



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.03.2022

CORAM

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

S.A.Nos.399 & 400 of 2013
and M.P.Nos.1 & 1 of 2013

S.A.No.399 of 2013:

1.Kaliannan
2.Sakthivel @ Raja
3.Tamilarasi @ Peria Kannal
4.Kaliammal @ Chinna Kannal
5.Vijaya
6.Santhi
7.Vimala

...Appellants

Vs.

1.Savithiri
2.Boomathi

...Respondents

PRAYER: Second Appeal is filed under Section 100 of C.P.C., against the Judgment and Decree dated 04.09.2012 made in A.S.No.99 of 2011 on the file of the Principal District and Sessions Judge, Erode confirming the Judgment and Decree dated 16.09.2011 made in O.S.No.178 of 2001 on the file of the Subordinate Court, Gobichettipalayam.

S.A.No.400 of 2013:

1.Kaliannan
2.Sakthivel @ Raja
3.Tamilarasi @ Peria Kannal
4.Kaliammal @ Chinna Kannal
5.Vijaya
6.Santhi
7.Vimala

...Appellants

Vs.

1.Boomathi
2.Savithiri

...Respondents



PRAYER: Second Appeal is filed under Section 100 of C.P.C., against the Judgment and Decree dated 04.09.2012 made in Cross Appeal No.99 of 2011 on the file of the Principal District and Sessions Judge, Erode reversing the Judgment and Decree dated 16.09.2011 made in O.S.No.178 of 2001 on the file of the Subordinate Court, Gobichettipalayam.

For Appellants : Mr. Tranquebar Doraivasu
(in both the Second Appeals) for R.T. Duraisamy

For R1 in S.A.No.399 of 2013 &
R2 in S.A.No.400 of 2013 : Ms. P.T. Ramadevi

For R1 in S.A.No.400 of 2013 : Mr. P. Valliappan
& R2 in S.A. No. 399/2013

C O M M O N J U D G M E N T

The issue involved in both the second appeals are common and hence they are heard and decided through this common judgment.

2. The 1st defendant and the legal representatives of the 5th defendant are the appellants in both the second appeals.

3. The 1st respondent/ plaintiff filed a suit seeking for the relief of partition and allotment of 33 contiguous shares out of 96 equal shares.

4. The case of the plaintiff is that the plaintiff, 1st defendant, 5th defendant and one Rangasamy are the sons and daughter of one Madhappa Chettiyar. The said Rangasamy died in the year 2004 leaving behind the 2nd and 3rd defendants. The 3rd defendant also died un-married. The further case of the plaintiff is that the suit properties were originally the ancestral properties that belonged to the father of the plaintiff. It is stated that the said Madhappa Chettiyar had 1/3rd share, the 1st defendant had 1/3rd share and the other son Rangasamy had 1/3rd share in the property. After the demise of Rangasamy, the defendants 2 to 4 filed a suit in O.S.No.22 of 1982 and obtained a preliminary decree. Similarly the mother of Rangasamy viz., Ponnammal filed another suit in O.S.No.24 of 1986. In the said suit also a preliminary decree was passed. While so, the father of the plaintiff executed a registered Will dated 18.03.1987, marked as Ex.A4 in favour of the plaintiff



with life estate in favour of his wife Ponnammal and vested remained in favour of the plaintiff. During the pendency of O.S.No.24 of 1986, the said Madhappa Chettiyar died and the defendants 2 to 4 filed an application to implead themselves as legal heirs.

5. At this point of time, the 5th defendant came up with a Will dated 10.07.1987, marked as Ex.B5. The mother Ponnammal who was the life estate holder also died in the year 1999. Thereby the plaintiff claimed that the property had devolved upon her and she was in possession and enjoyment of the suit property. Therefore, according to the plaintiff, the defendants did not have any right insofar as the 1/3rd share of Madhappa Chettiar is concerned. Insofar as the preliminary decree passed in O.S.No.24 of 1986 is concerned, Ponnammal was held to be entitled to 1/24th share and the defendants 1 to 5 are each entitled for 1/96th share. In view of the same, the plaintiff had sought for 33/96th share in the suit properties and according to the plaintiff, the defendants 2 to 4 are entitled for 29/96th share and the 5th defendant is entitled for 1/96th share. It is under these circumstances, the suit came to be filed seeking for partition and allotment of the share of the plaintiff.

6. The contesting defendant viz., the 5th defendant filed a written statement. There was no dispute with regard to the fact that the father was entitled for 1/3rd share and the 1st defendant and yet another son Rangasamy were entitled for 1/3rd share each. It is claimed by the 5th defendant that insofar as the 1/3rd share of the father is concerned, he had executed a Will dated 18.03.1987 in favour of the plaintiff. Subsequently the father executed yet another Will dated 10.07.1987, marked as Ex.B5 and thereby the earlier Will was cancelled. Therefore, the 5th defendant has taken a stand that the plaintiff cannot claim any share on the basis of the Will dated 18.03.1987. In view of the same, the 5th defendant denied the share claimed by the plaintiff.

7. The 7th defendant filed a written statement and took a stand that Ponnammal viz., the mother had executed a Will dated 27.04.1999, marked as Ex.B6 and had bequeathed 1/24th share in favour of the 7th defendant. After the death of Ponnammal, the 7th defendant became entitled to the share of Ponnammal. This defendant has therefore sought for allotment of share in accordance with the Will executed by Ponnammal in her favour.

8. The trial Court on appreciation of the oral and documentary evidence and after considering the facts and



circumstances of the case, through the judgment and decree dated 16.09.2011 declared the Will marked as Ex.A4 as valid and accordingly a preliminary decree was passed by declaring that the plaintiff is entitled for 32/96th share. The trial Court held that Ex.B5 Will that was relied upon by the 5th defendant was surrounded by suspicious circumstances and consequently it was held to be invalid. Similarly the Will executed by Ponnammal in favour of the 7th defendant was upheld and the 7th defendant was held to be entitled for 1/24th share of Ponnammal.

9. Aggrieved by the judgment and decree of the trial Court, the 1st defendant and the legal representatives of the 5th defendant filed an appeal in A.S.No.99 of 2011. Similarly the 2nd defendant filed a cross appeal. Both the appeals were taken up together and the lower appellate Court on re-appreciation of oral and documentary evidence and on considering the findings rendered by the trial Court, dismissed the appeal filed by the 1st defendant and the legal representatives of the 5th defendant and allowed the cross appeal filed by the 2nd defendant and thereby Ex.B6 Will was also set aside. To that extent the judgment and decree passed by the trial Court was set aside/modified through judgment and decree dated 04.09.2012.

10. Aggrieved by the judgment and decree passed by the lower appellate Court, two second appeals have been filed by the 1st defendant and the legal representatives of the 5th defendant.

11. Heard Mr.Tranqubar Doraivasu, learned counsel for the appellant in both the second appeals, Ms.P.T.Ramadevi, learned counsel for the 1st respondent in S.A.No.399 of 2013 and 2nd respondent in S.A.No.400 of 2013 and Mr.P.Valliappan, learned counsel for the 1st respondent in S.A.No.400 of 2013. This Court carefully perused the materials available on record and the findings of both the Courts below.

12. The main issue that arises for consideration in this second appeal is with regard to the appreciation of evidence pertaining to the Will that was marked as Ex.A4, Ex.B5 and Ex.B6. The execution of Ex.A4 Will in favour of the plaintiff has not been disputed. By virtue of this Will, the life interest was given in favour of the mother Ponnammal and the vested remained was given to the plaintiff. By virtue of demise of the father and the mother who had a life interest, the plaintiff is claiming for absolute right over the 1/3rd share of her father in the properties. The plaintiff in order to prove the Will in accordance with Section 68 of the Indian Evidence Act, had examined PW2 who was one of the attesting witnesses.



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On appreciation of his evidence, both the Courts below categorically found that the Will dated 18.03.1987 has been proved in accordance with law. It was also found that there were no suspicious circumstances that surrounded this registered Will that was marked as Ex.A4.

13. While appreciating Ex.B5 Will which was relied upon by the 5th defendant, both the Courts found that attesting witnesses were not examined on the ground that both of them are not alive. The Courts below held that there was no evidence to show that the attesting witnesses were not available as on the date when the will was sought to be proved. In the absence of the attesting witness, the 5th defendant had examined one Xavier as DW3 to speak about the signature of one of the attesting witness Selvaraj. This mode of proof was adopted in line with Section 69 of the Indian Evidence Act. While appreciating his evidence, it was found by both the Courts below that there was no material to show that Xavier was the son of Selvaraj. That apart, the said witness also clearly admitted that there is a substantial difference in the signature found in Ex.B5 Will when compared to the signature of his father. The Courts below also found that there were absolutely no recitals found in this Will as to why the earlier Will dated 18.03.1987 was cancelled. That apart, both the Courts also took into consideration the fact that the earlier Will was a registered Will and the subsequent Will was an un-registered Will and there was no reason as to why the subsequent Will was not registered, if really the earlier registered Will was sought to be cancelled. The Courts below also took into consideration the evidence of DW2 who is the brother of the 5th defendant, who also spoke about the execution of the Will. The Courts below found that he had actively participated in the execution of Ex.B5 Will in favour of his sister viz., 5th defendant. That apart, it was also found that he is none other than the husband of the 7th defendant who is the daughter of the 5th defendant. Hence, his evidence was considered with a lot of caution and rejected. It is therefore seen that both the Courts below had given sufficient reasons as to why Ex.B5 Will has not been proved and cannot be acted upon.

14. Insofar as the appreciation of evidence with respect to the Will relied upon by the 7th defendant and marked as Ex.B6 is concerned, the lower appellate Court found that even though DW5 and DW6 who were the attesting witnesses were examined to prove the Will, the recitals in the Will did not satisfy the conscience of the Court and accordingly the lower appellate Court found that Ex.B6 Will is also not valid and it cannot be acted upon. The lower appellate Court has assigned sufficient



reasons while interfering with the findings of the trial Court with respect to the Will marked as Ex.B6.

15. In the considered view of this Court, the findings rendered by both the Courts below are based on appreciation of oral and documentary evidence and this Court does not find any perversity in those findings. In any event, this Court does not find any substantial question of law involved in these second appeals.

16. In the result, both the second appeals are dismissed. Considering the facts and circumstances of the case, there shall be no order as to costs. Consequently, the connected miscellaneous petitions are closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1.The Principal District and Sessions Judge,
Erode.

2.The Subordinate Judge,
Subordinate Court,
Gobichettipalayam.

3. The Section Officer
VR Section
High Court, Madras 104.

+2 Ccs to Mr.P.Valliappan, Advocate sr 19253.
+1 CC to M/s.P.T. Ramadevi, Advocate sr 19050
+1 Cc to Mr.R.T. Doraisamy, Advocate sr 19090.

S.A.Nos.399 & 400 of 2013

SVI (CO)
SP(04/04/2022)