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SA.Nos.694 & 695 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **12.09.2022**

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THE HONOURABLE MS. JUSTICE P.T.ASHA

SA.Nos.694 & 695 of 2022

[SA.No.694 of 2022]

Santhana Krishnan

... Appellant / Appellant/ 5th Defendant

Vs.

1.Rajendira Kumar

... 1st Respondent/1st Respondent/Plaintiff

2.Mohana

3.Shoba Rani

4.Nagaraj

...Respondents 2-5/Respondents 2-4/Defendants

[SA.No.695 of 2022]

Santhana Krishnan

... Appellant / 3rd Respondent/ 5th Defendant

Vs.



SA.Nos.694 & 695 of 2022

1.Rajendira Kumar

... 1st Respondent/Appellant/Plaintiff

2.Mohana

3.Shoba Rani

4.Nagaraj

...Respondents 2-4/Respondents 4,5,7/ LR's of Defendants

PRAYER in SA.No.694 of 2022 : Appeal filed under Section 100 of CPC, against the Judgement and Decree dated 18.11.2019 passed in Cross A.S.No.20 of 2010 passed by the Hon'ble Court of the Subordinate Judge, Tiruvallur confirming the Judgement and Decree dated 28.04.2010 passed in O.S.No.94 of 2004 (O.S.No.10 of 1983).

For Petitioner : Mr.S.S.Rejesh

For Respondent : Mr.M.L.Joseph for M/s Chennai Law
Associates Caveator counsel for [R.4]

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COMMON JUDGEMENT

The unsuccessful 5th defendant is the appellant before this Court. The brief facts which are necessary for disposing of the above Second Appeal is herein below narrated and parties are referred to in the same litigative status as before the Trial Court.

2.The plaintiff had filed O.S.No.94 of 2004 on the file of the learned District Munsif, Tiruvallur, seeking a preliminary decree for partition of the suit property into 4 equal shares and put him in separate possession of one such share. The basis on which the above suit was filed was that the suit properties were joint family undivided ancestral properties of the plaintiff and belonged to Velu Mudali, the father of the 1st defendant and his brother Duraisami Mudali. The three of them had lived together and enjoyed the suit property as co-parceners. Duraisami Mudali is the paternal grandfather of the plaintiff and he died intestate. The 2nd defendant is his son and the father of the plaintiff. The family properties were enjoyed in common and the 1st defendant being the senior member was in the management and thereafter, the 2nd defendant came into the management of the properties. The plaintiff would submit that he is entitled to 1/4 th share in the suit items



and the 2nd defendant and the 1st defendant are entitled to $\frac{1}{4}$ and $\frac{2}{4}$ share in the suit items, respectively. Defendants 3 and 4 are the legal heirs of the deceased Rangasamy, who were impleaded as parties. They are in possession and enjoyment of the assets of the deceased.

3.The plaintiff would contend that for the past five years, prior to the filing of the suit, the defendants amongst themselves were not in good terms and the properties were not being managed properly. On the wrong advice of the daughters of the 1st defendant, he attempted to create encumbrance over the said lands. The 2nd defendant did not question this act of the 1st defendant. Therefore, the plaintiff orally demanded division of the properties in June 1982. The 1st defendant was adamant and evasive and was not inclined to partition the properties. The plaintiff would further submit that he is entitled to some items in the suit property pursuant to a registered Will dated 11.02.1976 executed by Rangasami Mudaliar in favour of the plaintiff and the defendants 2 to 4. Therefore, the plaintiff is the absolute owner of these items which has been allotted under the Will and in the remaining lands, he is entitled to a $\frac{1}{4}$ th share. Therefore, the suit.



4.The 1st defendant had filed Written Statement inter alia contending that the properties were not the Hindu Undivided ancestral properties and that the 1st defendant and Duraisamy Mudaliar, the grandfather of the plaintiff never lived together and enjoyed the suit items as undivided coparceners.

5.The 1st defendant had contended that the plaintiff and the 2nd defendant are not in possession of any of the suit properties. The plaintiff's allegation that the properties are the joint family properties is totally misconceived. The properties are the self acquired properties of the 1st defendant and he is the sole owner of the same. The revenue records also stand in his name and neither the plaintiff nor the defendants have any semblance of a right on the properties. The 1 st defendant would submit that the 2nd defendant is working in the Railways and posted in North India from his younger days. He has settled in the suit Village only few years back. As he is the brother's son of the 1st defendant who did not have a son, he helped the 2nd defendant by giving him some propertie. However, the 2nd defendant taking advantage of the old age of the 1st defendant put pressure on the 1st defendant to help him by hypothecating his properties to



the Government for purchasing a Tractor. The 1st defendant rejected the request and since then there was misunderstanding between the 1st and 2nd defendants.

6.The 2nd defendant has earlier filed a suit in O.S.No.780 of 1979 on the file of the learned District Munsif, Thiruvallur, for permanent injunction restraining the 1st defendant from interfering with the alleged possession and enjoyment of the suit Items 5, 6, 9 and 20 and he had obtained an ex parte order and continued to be in possession of the same till December 1982. When the suit was dismissed with costs and injunction order vacated the 1st defendant took possession of these properties, the 2nd defendant had filed A.S.No.32 of 1983 and obtained an ex parte order of injunction in I.A.No.96 of 1983. Thus, the 2nd defendant has set up the plaintiff to file this frivolous suit for partition. The suit is filed only to coerce the 1st defendant and harass him in his old age.

7.The 3rd defendant had filed an Additional Written Statement stating that on 19.09.1979, Rangasami Mudali out of free volition and in a sound disposing state of mind had bequeathed the properties upon the 3rd



defendant under the registered Will. Therefore, they prayed the plaintiff's case be dismissed.

8. Pending the suit, on 25.11.2002, the 3rd defendant had passed away and the 5th defendant had impleaded himself as a party to the proceedings claiming a share in the suit property by virtue of a Will dated 12.12.1986 said to have been executed by the said Sarojammal, the 3rd defendant.

9. In the written statement filed by the 5th defendant, he would submit that the plaintiff was not entitled to any share in the suit schedule property. The 5th defendant is the brother's son of the 3rd defendant. The 5th defendant would submit that he was taking care of Sarojammal as she was unmarried and had no one to take care of her. Out of her love and affection she had executed a registered Will dated 12.12.1986 bequeathing the properties mentioned thereon in favour of the 5th defendant. Apart from immovable property she had also bequeathed movable assets including money and other claims.



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10. The 5th defendant would submit that the plaintiff had no right, title or interest in the suit property and that the 5th defendant was in possession and enjoyment of the property bequeathed to him under the registered Will dated 12.12.1986. The 5th defendant had also raised a plea that the suit was hit by the principle of res-judicata in the light of the judgement made in OS.No.780 of 1979.

11. The Trial Court had framed the following issues -

ISSUES: -

“(1)Whether the suit properties are not the Hindu joint family undivided ancestral properties of the plaintiff?”

(2)Whether the defendants 1 and 2 managed the suit properties at different times?

(3)Whether the plaintiff and the 2nd defendant are not entitled to any right or share in the suit properties?



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(4)Whether the suit properties are self acquired properties of the 1 st defendant?

(5)To what relief, if any, is the plaintiff entitled?“

ADDITIONAL ISSUES:-

“(1)Whether the Will dated 11.02.1976 is true and valid?

(2)Whether the Will dated 17.09.1979 is true and valid?“

12. Subsequently on 27.04.2010, the Trial Court namely the District Munsif, Tiruvallur had recast the issues with the consent of the counsels of both parties as follows:-

"1. Whether the suit properties are undivided joint family properties of the plaintiff's father and the first defendant?

2. Whether the will dated 11.2.1976 is true, valid and binding on the defendants?

3. Whether the will dated 19.9.1979 is true, valid and binding on the plaintiff?



4. *Whether the will dated 12.12.86 is binding on the plaintiff and the 4th defendant?* 5. *Whether the plaintiff is entitled to the relief of partition as prayed for?*

6. *To what other relief the plaintiff is entitled to?"*

13. The learned District Munsif, Thiruvallur, by her order dated 28.04.2010 dismissed the suit stating that Ex.B.14 - Will dated 19.09.1979 had cancelled the earlier Will Ex.A.1. The learned Judge had also held that the defendants had proved the genuineness of Ex.B.14 by examining the attesor of Ex.B.14. The learned District Munsif had further observed that some of the suit properties are the absolute properties of Manonmani Ammal, the deceased 1st defendant's wife which is gifted to Nalla Nainiyappa Mudali.

14. Further the learned District Munsif returned a finding with reference to the recasted issue no.4 namely "*whether the will dated 12.12.1986 is binding on the plaintiff and the 4th defendant*" that the Will dated 12.12.1986 which is marked as Ex.B.15 had been disputed by the plaintiff as well as the defendants 2 and 4. The learned Judge further went



on to observe that though the plaintiff had examined D.W.4, one of the attestors of the Will, however, the said witness was unable to speak about the execution of Ex.B.15 as contemplated under Section 63 (c) of the Indian Succession Act and Section 68 of the Indian Evidence Act. Ultimately the suit was dismissed.

15. Challenging the said judgement and decree, the plaintiff had filed A.S.No.20 of 2010 on the file of the learned Sub Judge, Tiruvallur and the 5th defendant had filed a Cross Appeal in Cross Appeal No.20 of 2010. By a common judgment dated 18.11.2019. The learned Sub Judge, Tiruvallur had dismissed both the appeal as well as the Cross Appeal and it is challenging the said common Judgement that the appellant is before this Court.

16. Mr.S.S.Rejesh, learned counsel appearing on behalf of the 5th defendant would submit that D.W.4 who is the attesting witness has adduced oral evidence regarding the execution of the same. He would submit that the examination of the attesting witness is sufficient proof about the execution of Ex.B.15 Will and therefore, the Second Appeal should be allowed. The contesting respondent had entered caveat in the matter.



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WEB COPY 17. Heard the counsels.

18. The plaintiff has come forward with a suit for partition and separate possession of his 1/5th share in respect of items not covered under the Will, Ex.A.1 and the entire items covered under the Will. The plaintiff had contended that the suit properties are the ancestral property belonging to his grandfather, Velu Mudali. His two sons were the 1st defendant and his brother Duraisamy Mudali. The 1st defendant had been enjoying the said property after the death of Velu Mudali. The properties devolved on the 1st defendant and his sons. The plaintiff had also contended that the property was being enjoyed by the 1st defendant and his son the 2nd defendant who is the father of the plaintiff. The plaintiff being the son of the 2nd defendant was entitled to a 1/4th share. It is also his contention that on 11.02.1976 Rangasamy Mudali, the 1st defendant had bequeathed some portion of his share in favour of the plaintiff. The defendants on the other hand had contended that it was a self-acquired property of the 1st defendant and that



the plaintiff and the 2nd defendant had no right to the same and further the plaintiff was never in possession and enjoyment of the same.

19. The Trial Court has held that the earlier Will dated 11.02.1976 has been cancelled upon the said Rangasamy Mudali executing the subsequent Will dated 19.09.1979 in favour of Sarojammal and Sakkubai.

20. The plaintiff has based his case primarily on the ground that the properties are ancestral and the 1st defendant has executed a Will in his favour. The plaintiff has not proved the ancestral character of the properties though the defendants have claimed it is the self-acquired property of the 1st defendant. Ex.A.1 Will has been cancelled by virtue of Ex.B.14 Will. Therefore, the Courts below have rightly dismissed the plaintiff's suit. With reference to the Will Ex.B.15 alleged to have been executed by the 3rd defendant in favour of the 5th defendant, the Courts below have held that the 5th defendant has not proved the same as per the provisions of Section 63(c) of the Indian Succession Act and Section 68 of the Evidence Act. The Attesting witness who was examined as Ex.D.W.4 has not adduced evidence



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regarding his having witnessed the Testator and the other attesting witnesses executing the Will. On the contrary, he has deposed that he is not aware about the contents of the document that he was asked to sign.

21. Therefore, the Lower Appellate Court has rightly dismissed the appeal and the Cross Appeal. I see no reason to set aside the concurrent judgment and decree of the Courts below. Further no substantial question of law have been made out in the above appeals, accordingly, the Second Appeals stand dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

12.09.2022

Index : Yes/No
Internet: Yes/No
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To

1. The Principal District Munsif Court at Attur.
2. The learned Principal Subordinate Court at Attur



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3.The Section Officer,
V.R.Section,
High Court, Madras.

P.T. ASHA, J,

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