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S.A.No.11 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.11.2022

CORAM

**THE HONOURABLE Ms. JUSTICE P.T. ASHA**

**S.A.No.11 of 2017**

Kanniyappan

...Appellant/1<sup>st</sup> Respondent/1<sup>st</sup> defendant

Vs.

1.Panchalai

2.Chinnaponnu

...Respondents 1&2/Appellants 1&2  
Plaintiffs 1&2

3.Muniyammal

4.The Sub Registrar,  
Pernamallur.

...Respondents 3 and 4/Defendants 2&3  
/Respondents 2&3

**PRAYER:** Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 29.03.2016 in A.S.No.43 of 2014 on the file of the learned Subordinate Judge, Cheyyar, reversing the Judgment and Decree dated 22.07.2014 in O.S.No.26 of 2013 on the file of the learned Principal District Munsif, Cheyyar.



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For Appellants : Mr.V.Baskaran

For Respondents : Mr.B.Jawahar for R1 and R2

Mr.B.Tamil Nidhi  
Additional Government Pleader (CS)  
for R4

R3 – Served – No appearance

### **JUDGMENT**

The 1<sup>st</sup> defendant before the trial court is the appellant before this court challenging the Judgment and Decree passed by the learned Subordinate Judge, Cheyyar, in A.S.No.43 of 2014 in and by which the learned Judge has reversed the Judgment and Decree passed by the learned Principal District Munsif, Cheyyar, in O.S.No.26 of 2013. The parties are referred to in the same rank and array as before the trial Court.



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2.The brief resume of the facts that has been culminated in filing of the present appeal is narrated herein below:

The plaintiff had filed a suit for partition seeking a direction to the defendants to divide the suit property into four equal shares and to allot two shares to the plaintiff and for injunction against the defendants 1 to 3 from alienating the suit property and the 3<sup>rd</sup> respondent / Sub Registrar, Pernamallur, from registering the same.

3.It is the case of the plaintiffs that the property belonged to the mother of the plaintiffs and defendants 1 and 2 named Ellammal. On 12.01,2013, she had died intestate leaving behind her surviving the plaintiffs and the defendants 1 and 2 as her legal representatives. The plaintiffs were not able to bear the adamant attitude of the defendants 1 and 2 and they had demanded the partition of their half share. However, the defendants 1 and 3 refused to partition the same and stated that they would be alienating the property. Therefore, the plaintiffs have come forward with the above suit.



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4.The first and second defendants had filed a Written Statement *in te alia* denying the allegations contained in the Plaint except the relationship between the parties. They had admitted that the properties originally belonged to Pachaiyappa Naicker, Melnagarampedu Village, Cheyyar Taluk. It is the further case that the said Pachaiyappa Naicker had executed a Will dated 24.08.1959 which was his last Will and the properties under the Will was to be enjoyed by Muniyammal, his wife and on her demise, it was devolve on his daughter Ellammal for her lifetime and thereafter, on her male issue. Muniyammal, the wife of Pachaiyappa Naicker predeceased him and on her demise, his daughter Ellammal took a life estate to the property. Therefore, it is the contention of the 1<sup>st</sup> defendant that on the demise of their mother, he alone became entitled to the suit property and neither the plaintiffs nor the defendants could claim a right to the same. He would further state that the plaintiffs were fully aware about the Will.



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5.The trial Court had framed the following issues for consideration:

“(1)Whether the plaintiffs are entitled to the reliefs of partition and injunctions?

(2)What relief the plaintiffs are entitled to?”

6.On the side of the plaintiffs, the 2<sup>nd</sup> plaintiff had examined herself as PW1 and the 1<sup>st</sup> plaintiff as PW2 and one witness as PW3. Ex.A.1 to Ex.A.4 were marked on their side. The 1<sup>st</sup> defendant was examined as DW1 and two other witnesses as DW2 and DW3 and marked Ex.B.1 to Ex.B.3. Ex.B.1 is the Will dated 24.08.1959 executed by Pachaiyappa Naicker in favour of Ellammal. Ex.B.2 is the certified copy of the Will dated 24.08.1959 executed by Pachaiyappa Naicker in favour of the Ellammal and Ex.B.3 is the Sale Deed dated 05.06.1981 executed by Kalyaniammal in favour of the 1<sup>st</sup> defendant.



7.The learned Judge on perusing the records and considering the evidence has held that the Will is to be a valid one. The learned Judge held that the defendants had proved the Will in the manner known to law and therefore, the plaintiffs were not entitled to the relief of partition and dismissed the suit. Challenging the same, the plaintiff has filed A.S.No.43 of 2014 on the file of the learned Subordinate Judge, Cheyyar. The learned Judge after hearing the arguments held that the Will had not been proved in the manner known to law and therefore, once the Will is disbelieved the properties have to be inherited equally and therefore, set aside the Judgment and Decree of the trial Court. Aggrieved by the same, the 1<sup>st</sup> defendant has filed the above Second Appeal.

8.This Second Appeal was admitted on the following Substantial Questions of Law:

*(1)Has not the First Appellate Court erred in disbelieving the original Will under Ex.B.1 on the*



*ground when some of the words in the Will was torn when the certified copy of the Will has been marked as Ex.B2?*

*(2)Has not the First Appellate Court erred in disbelieving the execution of Will under Ex.B.1 when the plaintiffs have clearly deposed by admitting the execution of Will?”*

9.Heard the learned counsels appearing on either side and perused the papers.

10.The admitted case of both the parties is that the property belonged to Pachaiyappa Naicker who had executed a registered Will in favour of his wife Muniyammal and daughter Ellammal, that Ellammal is the only daughter of Pachaiyappa and Muniyammal is also admitted. Ex.B.1 is the original Will and Ex.B2 is the certified copy of the same. Ex.B.1 is the original Will which has been laminated. A perusal of the same would show that most of the sentences have been



torn and further, the very left thumb impression of the testator is not visible in the Will. To prove the said Will, the 1<sup>st</sup> defendant has examined one Gurusamy one of the attesting witnesses as DW2. He would submit that he was present when the Will was executed by Pachaiyappa Naicker. It is his contention that Govindaraj an Accountant who had written the Will, Annasi Gounder, Varadachari along with the testator Pachaiyappa Naicker had gone to the Sub Registrar Office, Pernamallur. The Will was prepared at the Sub Registrar's office in the office of one Govindaraj (Accountant) and that Pachaiyappa Naicker had signed in each page of the Will and that Annachi Gounder and Varadachari had signed the Will as attesting witnesses. In the Chief examination, he does not state that after Pachaiyappa Naicker, the testator had signed, the attesting witnesses affixed their signature in the Will and likewise, there is nothing in the Chief examination to show that the attesting witnesses have witnessed Pachaiyappa Naicker signing the Will. Be that as it may, there is no explanation as to why DW2 had not signed the Will either as the attesting witness or as an identifying witness although in his cross



examination, he would submit that he had also signed the Will as an attesting witness along with others. He would also in his cross examination admitted that the scribe Govindaraj (Accountant) was very much alive, there is no explanation on the side of the defendants as to why the said Govindaraj was also not examined. He would submit that the Will was written on a Rs.10/- stamp paper. This witness has been examined to prove the execution of the Will. However, the evidence does not satisfy the provisions of either Section 63 of the Indian Succession Act or 68 of the Indian Evidence Act as he is not the attesting witness.

11.DW3 has been examined to prove the factum of the mediation that had taken between the parties and to prove that the Will had been read out to the sisters, namely, the plaintiffs and the 3<sup>rd</sup> respondent. The witness in his Chief examination would state that he had heard that the Will had been executed. He would further in his Chief examination state that the plaintiffs have requested for division and they were informed that they were not entitled to any share as per the Will and the



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Will was read out by the Panchayatars during the mediation talks. The chief examination would indicate that the witness was present during the mediation talks, however, in his cross examination he would state that he was not present when the mediation talks were held. He would submit that the Will was written on a Rs.100/- stamp paper which runs contrary to the statement of PW2. Therefore, from the evidence of DW2 and DW3, it is clearly evident that the Will has not been proved, more particularly, when the original Will which has been produced and marked as Ex.B.1 is neither written in a stamp paper nor is the LTI or signature of the testator affixed on the first page of the Will. Many of the paragraphs are missing and they have appeared to have been stuck using a cello tape. Therefore, one cannot come to the conclusion that Ex.B.1 relates to the Will of the said Pachaiyappa Naicker. In the Will, most of the sentences are missing as it is torn and there is a contradiction in the evidence of DW2 and DW3. DW2 has been examined on the basis that he was present during the execution of the Will and DW3 as the panchayatar. As narrated supra, DW2 would state that the Willis prepared on a Rs.10/- stamp papers and that he had



affixed his signature as the attesting witness which is not found in the Will. Further, DW3 in his cross examination would admit that he was not present during the mediation talks and he would state that the Will was prepared on a Rs.100/- stamp paper. Therefore, the contradictions in the evidence clearly show that the Will has not been proved in the manner known to law. The plaintiffs have not admitted the execution of the Will.

12.The 1<sup>st</sup> defendant has not been able to establish the Will as per the provisions of Section 68 and Section 69 of the Indian Evidence Act read with Section 63(c) of the Indian Succession Act. In fact, DW2 would submit that the scribe is alive and it was the attesting witness who are no more. The 1<sup>st</sup> defendant was not attempted to examine the said scribe. Therefore, in the absence of the proof of the execution of the Will, the Appellate Court was right in not accepting the Ex.B.2 Will. Once the Will is not proved then it is to be taken that the said Pachaiyappa Naicker had died intestate and therefore, the property would devolve upon the plaintiffs and the defendants equally as the



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legal representatives of Ellammal who was the only the heir of the said Pachaiyappa Naicker on whom the property devolved on the death of Pachaiyappa Naicker. Pachaiyappa Naicker's wife is also no more and therefore, the property would devolve on the plaintiffs and the defendant equally. Therefore, the substantial questions of law are answered against the 1<sup>st</sup> defendant/appellant.

Accordingly, this Second Appeal is dismissed. There shall be no order as to costs.

**17.11.2022**

Index : Yes/No  
Internet : Yes/No  
Speaking order / Non speaking order  
mps

To

1.The Subordinate Judge,  
Cheyyar.

2.The Principal District Munsif,  
Cheyyar.



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**P.T. ASHA, J,**

mps

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