



A.S.(MD) No.174 of 2007

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 29.07.2022

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S.(MD) No.174 of 2007

and

C.M.P.(MD).Nos.5959 of 2016, 4416 of 2020 and 3502 of 2021

S.Samu Devarajan

.... Appellant

-Vs-

- 1.S.Albert Selvaraj
- 2.S.Rathinavathy
- 3.M.Thilakavathy
- 4.D.Rubavathy
- 5.E.Malikavathy
- 6.A.Chandramohan
- 7.A.Chandrasekaran
- 8.S.Gomathi
- 9.S.Premaachi
- 10.P.Chandra
- 11.P.Anand Amirtharaj
- 12.Mirasu Thangavel
- 13.Mirasu Anand Kumar

R12 and R13 impleaded as party respondents
vide order dated 11.06.2012 made in



A.S.(MD) No.174 of 2007

M.P.(MD).No.2 of 2012 in A.S.(MD).No.174 of 2007.

14.Larin Regna Mary

15.Xaviour

RR14 and 15 are impleaded vide Court order dated
05.03.2021 made in C.M.P.(MD).No.449 of 2021 in
A.S.(MD).No.174 of 2007.

... Respondents

PRAYER: Appeal Suit filed under Section 96 of the Civil Procedure Code,
against the judgment and decree passed in O.S.No.1 of 2002 on the file of
the Additional District Court (Fast Track Court No.II), Patukottai, dated
13.01.2007.

For Appellant : Mr.K.P.Narayana Kumar
For R1 : Mr.D.R.Murugesan
For R4 : Mr.VR.Shanmuganathan

For R12 and R13 : M/s.C.Bharathi
For R14 and R15 : M/s.V.Muthukamatchi



A.S.(MD) No.174 of 2007

WEB COPY

J U D G M E N T

The first respondent is the plaintiff. He filed a suit in O.S.No.1 of 2002 before the Additional District Court (Fast Track Court No.II), Patukottai, against the appellant and the defendants 2 to 15, for partition claiming 1/7th share in the suit property by metes and bounds.

2. The trial Court after trial, decreed the suit holding that the first respondent/plaintiff is entitled to 1/6th share in respect of 1st Item of the suit schedule property and dismissed the suit in respect of other items of property. Challenging the said judgment and decree, the first defendant filed the present appeal.

3. The brief facts of the case are as follows:

The plaintiff and the defendants 1 to 6 are the brothers. Their father Samuvel Pillai died intestate on 11.12.1993. Therefore, his wife and children are entitled for the share, as per the Indian Succession Act. The



A.S.(MD) No.174 of 2007

WEB COPY

wife of Samuvel Pillai died on 12.09.2001. The second defendant through their mother sold the properties, which are not shown in the schedule, and got separated from the family. Since their mother Kamala was not able to administer the properties, she executed a power of attorney in favour of the first defendant. However, their mother Kamala is not entitled to the entire properties, but she is entitled to a share along with her sons. The first respondent by using the power of attorney sold some properties in favour of defendants 7 to 10. In the power of attorney, it is wrongly mentioned as if there was a partition between the family members and those properties were allotted to her share. However, no partition has been entertained into between the family members. Further, the first respondent by cheating the other shareholders, said to have obtained a Will in his favour. Before the death of Kamala, she was not in a fit state of mind to execute the Will. Even assuming that it is true, the same cannot be acted upon unless it got probated as per the Christian Law. Hence, the sale deed executed in favour of the defendants 7 to 10 is not valid. Since the first defendant has constructed a house in the second item of suit schedule property from out of the sale



A.S.(MD) No.174 of 2007

proceeds of the family properties and hence, the plaintiff is entitled to a share in the said house also. Since the plaintiff is not willing to enjoy the family properties along with the defendants 1 to 6, he issue an advocate notice for partition of the suit properties. Since the defendants have not replied for the same, the plaintiff has filed the suit for partition and separate possession.

4. The defendants 1, 2 and 5 resisted the suit by filing their written statements, which reads as follows:

The plaint scheduled properties belonged to Kamala Samuvel Pillai, who is the mother of the plaintiff and the defendants 1 to 6 and she was in possession and enjoyment of the same. The second defendant sole the share allotted to him in the oral partition and got the sale proceeds. The mother of the plaintiff and the defendants 1 to 6 has executed a power of attorney in favour of the first defendant only in respect of the share allotted to her in the oral partition. Based on the power of attorney, the first defendant sold a portion of the property mentioned therein in favour of the



A.S.(MD) No.174 of 2007

defendants 7 to 10 and gave the sale proceeds to his mother. Their mother Kamala was in a fit state of mind, while executing the Will in favour of the first defendant and it came into effect after her death. The first defendant was also filed a petition for probating the Will and the same is pending. However, as per the amendment made in the Indian Succession Act, probating the Will is not necessary. The first defendant has constructed a house in the second item of suit property out of his earning, selling his wife's jewels and obtaining loan from his friends. Hence, the plaintiff is not entitled to share in the suit properties.

5. The defendants 3, 4 and 6 filed the written statements supporting the contention made by the defendants and also made claim for partition and separate possession.

6. On the basis of the above pleadings, the learned trial Judge framed the following issues for consideration:



A.S.(MD) No.174 of 2007

(i) Whether the plaintiff is legally entitled to 1/7th share in the suit property as per the provisions of Indian Succession Act, 1925?

(ii) Whether there is any oral partition between the family members as claimed by the first defendant?

(iii) Whether the plaintiff is legally entitled to a share in the house property which was constructed by the first defendant at the cost of Rs.15,00,000/- ?

(iv) Whether the plaintiff is legally entitled to a share in the building constructed by the 10th defendant on the land purchased under Ex.B3?.

(v) Whether the first defendant has legal right as power of attorney holder, as per the registered general power of attorney, executed by the plaintiff's mother Tmt. Kamala on 06.02.1996?



A.S.(MD) No.174 of 2007

(vi) *Whether the plaintiff's mother Tmt. Kamala has legal right to give the property to the first defendant as per her Will dated 03.06.1996?*

(vii) *Whether the first defendant's mother Kamala was in a sound state of mind, while executing the Will dated 03.06.1996, in favour of the first defendant?*

(viii) *Whether the plaintiff is legally estopped as per the attestation made in Ex.B1, general power of attorney dated 06.02.1996 from making a claim that the suit property does not belong to the plaintiff's mother Tmt. Kamala?*

(ix) *Whether the defendants 3 to 6 are having legal right to have 1/7th share in the suit schedule properties?*

(x) *Whether the sale deeds executed by the first defendant as the power of attorney of his mother*



A.S.(MD) No.174 of 2007

Tmt. Kamala in favour of defendants 7 to 9 are valid in law?

(xi) Whether the Court fee paid by the plaintiff is correct or not?

(xii) Whether the suit is bad for non-mentioning of the property given to the share of second defendant Backiyaraj?

(xiii) Whether the suit is bad for non-inclusion of certain properties which were given in sale by Tmt.Kamala Ammal?

(xiv) To what other relief the plaintiff is entitled to?

7. In order to substantiate the case, on the side of the plaintiff, one witness was examined as P.W.1 and 25 documents were marked as Exs.A1 and Ex.A25. On the side of the defendants, four witnesses were examined as D.Ws.1 to 4 and 44 documents were marked as Ex.B1 to



A.S.(MD) No.174 of 2007

Ex.B44.

8. After completing the trial and on hearing of arguments advanced on either side, the learned trial Judge, considered the evidence available on record, decreed the suit that the first respondent/plaintiff is entitled to 1/6th share in respect of 1st Item of the suit schedule property and dismissed the claim in respect of other items of property. Against which, the first defendant filed the appeal suit.

9. The learned counsel appearing for the appellant/1st defendant would submit that the suit property originally belonged to his father Samuvel Pillai. He died intestate on 11.12.1993, leaving behind the plaintiff and the defendants 1 to 6 in the suit and his wife Kamala Ammal as legal heirs. Since the daughters were provided adequate facilities at the time of marriage, the wife and the sons of the Samuvel Pillai entered into an oral partition. The mother executed a power of attorney in favour of the appellant/1st defendant on 06.02.1996, in respect of her property. Based on



A.S.(MD) No.174 of 2007

the power of attorney, the appellant/1st defendant sold the properties and also the mother had executed a Will dated 03.06.1996 and bequeathed her share to the appellant/1st defendant. The mother executed the power of attorney for selling the property only in favour of her, who got the property by way of oral partition and also initially executed a Will in favour of the appellant/1st defendant and the first respondent/plaintiff under Ex.B2. Subsequently, Ex.B2 was cancelled by her mother Kamala Samuvel Pillai during her life time. Subsequently executed Ex.A7 / Will and bequeathed her right to the appellant/1st defendant. Therefore, the first respondent/plaintiff has no right to get any share in the suit property. He would further submit that the first respondent/plaintiff, who has filed the suit, has suppressed the fact that he got the share over oral partition and the suit property was sold to a third party. The first respondent/plaintiff mainly objected that the oral partition under the provision of Indian Succession Act is unknown. Therefore, the oral partition is not valid. But however, he admitted that the first son Backiyaraj is the brother of the appellant and the first respondent and he got share from the mother and left the place.



A.S.(MD) No.174 of 2007

WEB COPY

Therefore, he has no share in the suit properties. But, he has failed to include the property, which was sold by him. He would also submit that in the power of attorney, the first respondent/plaintiff signed as witness and even in the Will / Ex.B2, the daughters / the defendants 3 to 6 attested. The wife of the appellant/10th defendant has purchased one of the portions of the property out of her own income and constructed a building. All the respondents have also admitted in the house warming ceremony that they have not raised any objection and they estopped from seeking any share. The conduct of the respondents would clearly show that all the family properties are the properties of Samuvel Pillai. After the death of Samuvel Pillai, the properties divided orally between the mother and male members as the female members were satisfactorily given the gift and other things even during the marriage. Therefore, they have relinquished their right and they have not claimed any right and they also signed in all the documents. Hence, they clearly raised the plea of partition against Section 115 of the Indian Evidence Act. Further, he would submit that though some of the documents given to the counsel before the trial Court, they were not marked



A.S.(MD) No.174 of 2007

stating that they were not necessary. But however, after seeing the judgment and conduct of the parties, the documents mentioned in C.M.P.(MD).No. 5959 of 2016 has to be received. The documents clearly show that the wife and all the sons of Samuvel Pillai sold the property in the year 1999 and also the mother of the appellant/1st defendant has given a consent deed for constructing the house and the brothers and sisters also given the consent. Now, they have estopped and they said that the first respondent sold the property to the third party and that property has not included in the partition deed. The trial Court failed to appreciate the oral and documentary evidence and decreed the suit that the first respondent/plaintiff is entitled for 1/6th share in the suit property, except the building constructed in item No.2 of the suit property covered under Ex.B38. The conduct of the parties and the consent given by the parties clearly show that the legal heirs of Samuvel Pillai divided the property, after his life time and everyone has sufficiently provided and they also dealt with the properties separately as their own. Now, the questioning is only regarding the property given to her mother. Since the mother has executed the power of attorney and the Will in favour



A.S.(MD) No.174 of 2007

of the appellant/1st defendant and they have not turned down to say that there is no oral partition, even assuming that oral partition is barred under law and they cannot claim right under oral partition. Therefore, all the respondents are estopped from raising such a stand by their own conduct. Therefore, the appeal has to be allowed and the judgment and decree passed by the trial Court is liable to be set aside.

10. In support of his submissions, the learned counsel for the appellant relied on the decision of this Court in the case of ***Gopi v. H.David*** reported in **2011 (1) SCC 694**;

11. Learned counsel appearing for the respondents would submit that admittedly Samuvel Pillai died intestate on 11.12.1993. Therefore, his wife and children are entitled for the share, as per the Indian Succession Act. As per Section 33 of the Indian Succession Act, when the male died intestate, 1/3rd share go to the widow and all the other legal heirs are entitled to divide remaining 2/4th share equally. He would further submit that there is



A.S.(MD) No.174 of 2007

no oral partition and even assuming that there is a oral partition, that will not bind the respondents. Though Ex.A7 / Will said to have executed by the mother, the same is not valid under law. The mother is not entitled to execute or encumber the property more than her 1/3rd share. Even otherwise, the Will has not been proved in the manner known to law. The attestors to the document also have not been examined and mere attestation is not sufficient. Further, it has got to be proved in the manner known to law. A bare reading of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, the appellant has not proved the Will in the manner known to law. Further, he would submit that even he is a Christian, Will has got to be probated before the Amendment Act come into force. This Will is executed prior to the amendment and the document also marked and since the Will is not probated, the same is not valid under law. At any angle, the appellant has not proved the Will in the manner know to law. Therefore, the Will is not binding on the respondents.



A.S.(MD) No.174 of 2007

WEB COPY

12. Though the appellant now to fill up the lacuna filed the petition under Order 41 Rule 27 of C.P.C. in C.M.P.(MD).No.5959 of 2016, he himself stated in his affidavit that very much the documents were available and also handed over to the counsel, which clearly prove that the documents will not helpful to him at any way. Therefore, they have not produced the same before the trial Court and not marked. In order to fill up the lacuna, the party cannot invoke the provisions under Order 41 Rule 27 of C.P.C. Therefore, the application filed by the appellant in C.M.P.(MD).No 5959 of 2016 is liable to be rejected. Even otherwise, the documents will not improve the case of the appellant. Therefore, now the question is whether the mother of the appellant is entitled to encumber or bequeath her property more than she is entitled to. As per law, she is entitled only 1/3rd share and more than that she cannot alienate or bequeath. He would further submit that even in the Will, the appellant/1st defendant, who is the beneficiary actually participated and that is one of the sound suspicious circumstances to disbelieve the Will. Further, he would submit that even the



A.S.(MD) No.174 of 2007

other suspicious circumstances also not been proved by the appellant.

Though he has stated that D3 and D6 put their signatures as attestors, they have not been examined by the appellant and the Will has not been proved by examining the attestors. The appellant is not entitled to any property for the two reasons. One is the mother is not entitled to bequeath more than her 1/3rd share actually she is entitled to and the other is the Will has not been proved in the manner known to law. Therefore, it can be taken as mother died intestate. Therefore, the Will executed by the mother is not valid and not proved in the manner known to law. Therefore, the first respondent / plaintiff is entitled for partition. The trial Court has rightly appreciated the oral and documentary evidence, both factual position as well as the legal position, granted a decree for partition of 1/6th share property. Therefore, the appeal is liable to be dismissed.

13. In support of their submissions, the learned counsel for the respondents relied on the following decisions:



A.S.(MD) No.174 of 2007

- (i) in the case of ***Jagdish Chand Sharma v. Narain Singh Saini*** reported in **2015 (8) SCC 615**;
- (ii) in the case of ***Ramesh Verma v. Lajesh Saxena*** reported in **2017 (1) SCC 257**;
- (iii) in the case of ***K.A.Selvanachi and another v. Dr.S.R.Sekar and another*** reported in **2003 (1) LW 818**;
- (iv) in the case of ***Krishna Mohan Kul v. Pratima Maity*** reported in **2004 (9) SCC 468**;
- (v) in the case of ***G.Ganesan v. P.Sundari*** reported in **2011 (2) CTC 435**;
- (vi) in the case of ***S.Swaminathan v. S.Dhanushkodi and another*** reported in **2016 (3) LW 43**;

14. Heard the learned counsel for the appellants and the learned counsel for the respondents and perused the records.



A.S.(MD) No.174 of 2007

WEB COPY

15. Admittedly, the suit property originally belonged to one Samuvel Pillai, who is a Christian and he died intestate on 11.12.1993. As per the Christian Law, the widow is entitled to 1/3rd share and the remaining 2/3rd share has to go to the other legal heirs of Samuvel Pillai. The mother Kamala Samuvel also died on 12.09.2001. After the death of Samuvel Pillai, during her life time, his wife and all the sons entered into an oral partition.

16. According to the appellant, though there was an oral partition, the mother has executed a power of attorney in respect of her property in favour of the appellant, who sold the properties and the mother has also executed a Will in favour of the appellant originally under Ex.B2, but subsequently, the same was cancelled under Ex.B7. The mother and the sons divided the property by way of oral partition and the female members were adequately provided sufficient jewels and other ornaments during their marriage and they have also accepted the same and not claimed any right in the suit properties. According to the appellant, the first respondent/plaintiff



A.S.(MD) No.174 of 2007

is not entitled for any partition and the main contention is that the first respondent/plaintiff not included the property, which he got by way of oral partition and he sold it and that the properties allotted to the second defendant also have not been included. Since the first respondent/plaintiff has got animosity with the appellant, he filed the suit stating that there was no oral partition and the mother has no right to execute the power of attorney and also she has no right to execute any Will for more than 1/3rd share.

17. According to the first respondent/plaintiff, there was no oral partition and even assuming so, it is not valid under the Indian Succession Act, 1925. The oral partition is unknown to the Christian Law. The mother has no right to execute the power of attorney for the entire properties. Further, the Will under Ex.A7 has not been proved in the manner known to law. Since the mother was not well to execute the Will and that there is no sufficient reason given to cancel the earlier Will / Ex.B2. Out of the money received from selling of the common properties, the first respondent



A.S.(MD) No.174 of 2007

constructed the building in item No.2. Therefore, he is entitled for partition in item No.2 also. The appellant has stated that the property was purchased from his own income and he constructed the building, out of the sale proceeds of his property. However, in this case, the oral partition has not been proved. It is stated that the properties came to the mother under the family settlement that means, oral partition. Since the first respondent/plaintiff is a party to it, he is estopped from taking such a defence. In the Will and the consent deed, the 3rd and 6th defendants stood as attestors. Therefore, in the Will and the other documents, it has been stated that the mother got the property by way of oral partition. However, though the appellant has stated that it is an oral partition, the same is not valid under the Indian Succession Act, 1925 and there is no estoppel against law. Without knowing the consequences, the person signed and it is not valid under law and he cannot claim the estoppel by conduct against law. Further, the Will has not been proved by the appellant in the manner known to law.



A.S.(MD) No.174 of 2007

WEB COPY

18. A combined reading of Section 63 of the Indian Succession Act and also Section 68 of the Indian Evidence Act, the purpose of the attestation has to be met out the requirements in Section 68, while examining the attestators, whereas, a reading of the entire materials enclosed shows that the appellant has not proved the Will in the manner known to law. Further, the appellant, beneficiary to the Will has actively participated in the execution of the Will. Though the active participation in the execution of the Will may not be a sole ground, but, it is also one of the circumstances, which creates suspicion as to the genuiness of the Will. A combined reading of the evidence of D.W.1 and also Exs.B2 and B7 clearly shows that the Will has not been proved and the power of attorney will not bind the first respondent for more than 1/3rd share. Under these circumstances, a reading of the entire materials go to show that the first respondent / plaintiff has proved his case that the properties originally belonged to his father Samuvel Pillai and he died intestate. However, subsequent division of oral partition among the legal heirs of Samuvel Pillai has not been established in the manner known to law. Therefore, they are



A.S.(MD) No.174 of 2007

entitled for partition, except the second item of the property. The property sold based on the power of attorney will not bind the first respondent / plaintiff. Once the mother is entitled for 1/6th share, regarding the 1/6th share, at the time of final decree, the third party purchaser can work out his remedy and whatever the encumbrance made and sold beyond 1/6th share will not bind the first respondent / plaintiff. Though the appellant has filed a petition to receive additional evidence, it is not acceptable. The appellant has not given valid reason for non-production of those documents before the trial Court and it is also a settled law that to fill up a lacuna, no additional evidence can be let in. In such circumstances, the first respondent/plaintiff is entitled to get 1/6th share in the suit property as held by the trial Court. As the first appellate Court is a fact finding Court, this Court has to re-appreciate the entire evidence and has to give an independent finding, whereas, in this case, while re-appreciating the evidence, this Court finds that there is no perversity in the judgment passed by the trial Court.

19. In a recent judgment of the Hon'ble Supreme Court reported in



A.S.(MD) No.174 of 2007

2022 Live Law (SC) 549, Kattukandi Edathil Krishnan and another vs.

Kattukandi Edathil Valsan and others, it has been held as follows:-

"33. We are of the view that once a preliminary decree is passed by the Trial Court, the court should proceed with the case for drawing up the final decree suo motu. After passing of the preliminary decree, the Trial Court has to list the matter for taking steps under Order XX Rule 18 of the CPC. The courts should not adjourn the matter sine die, as has been done in the instant case. There is also no need to file a separate final decree proceedings. In the same suit, the court should allow the concerned party to file an appropriate application for drawing up the final decree. Needless to state that the suit comes to an end only when a final decree is drawn. Therefore, we direct the Trial Courts to list the matter for taking steps under Order XX Rule 18 of the CPC soon after passing of the preliminary decree for partition and separate possession of the property, suo motu and without requiring initiation of any separate proceedings.

34. We direct the Registry of this Court to forward a copy of this judgment to the Registrar Generals of all the High Courts who in turn are directed to circulate the directions contained in paragraph '33' of this judgment to the concerned



A.S.(MD) No.174 of 2007

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Trial Courts in their respective States."

20. As per the above latest decision of the Hon'ble Supreme Court, a party need not file a final decree application separately. The Court itself can *suo motu* initiate final decree proceedings after passing the preliminary decree. Therefore, the trial Court is directed to initiate *suo motu* final decree proceedings and pass a final decree. Since already the suit is pending from 2002, all the final decree proceedings shall be completed within a period of six months from the date of its initiation. Registry is directed to send the original records to the trial Court concerned along with the judgment and decree made in this appeal within a period of fifteen days from the date of this judgment.

21. In the result, the Appeal Suit is dismissed and the judgment and decree passed by the Additional District Court (Fast Track Court No.II), Patukottai in O.S.No.1 of 2002, dated 13.01.2007 is confirmed. No costs.



A.S.(MD) No.174 of 2007

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22. The reasons stated in the accompanying affidavit have not made out the ingredients of Order 41 Rule 27. Therefore, in order to fill up the lacuna, he cannot adduce any additional evidence. Hence, the C.M.P. (MD).No.5959 of 2016 is dismissed. Consequently, other connected Miscellaneous Petitions are closed.

29.07.2022

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To

1. The Additional District Court
(Fast Track Court No.II),
Pattukottai.
2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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A.S.(MD) No.174 of 2007

P.VELMURUGAN,J.

akv

A.S.(MD) No.174 of 2007

29.07.2022