



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:07.04.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S (MD)No.65 of 2011

and

M.P (MD)No.2 of 2011

Shanmugam @ Samiyappan

... Appellant/2nd defendant

Vs.

1.Saraswathi

... Respondent/Plaintiff

2.Subbarayan (DIED)

... Respondent/1st defendant

(R2 DIED AND

THE APPELLANT IS EXEMPTED FROM SUBSTITUTING
THE L.RS OF THE DECEASED R2 AS HE REMAINED
EX-PARTE, VIDE ORDER DT 07.04.2022 MADE IN
CMP 2914/2022 IN AS (MD) 65/2011)

PRAYER: Appeal filed under Section 96 of C.P.C., against the judgment and decree dated 18.09.2010 made in O.S.No.9 of 2006 passed by the learned District Judge, Karur.

For Appellant

: Mr.N.Shanmugaselvam

For R-1

: No Appearance

(R-2 died)

JUDGMENT

R.SUBRAMANIAN, J.

AND

N.SATHISH KUMAR, J.

The second defendant in O.S.No.9 of 2006 on the file of the District Court, Karur, a suit for partition, has come up with this appeal, challenging the decree granted declaring that the plaintiff is entitled to 1/3rd share in respect of the suit schedule properties.

2. The plaintiff filed the suit for partition contending that the suit properties belonging to one Ramasamy Gounder, who died leaving behind three sons and a daughter namely the plaintiff. The first son Nachimuthu died leaving behind two sons namely Suriyamoorthy and Shanmugam(the appellant herein). Suriyamoorthy died without issues. The other son of Ramasamy Gounder namely



Palanisamy died issueless. Therefore, according to the plaintiff, as the daughter of Ramasamy Gounder, she would be entitled to 1/3rd share in all the suit properties.

3. The first defendant Subbarayan, who is one of the sons of Ramasamy Gounder remained ex-parte. The second defendant / appellant herein contested the suit claiming that there was a oral partition in respect of Item Nos.1 and 2 of the suit schedule properties in 1981 between the heirs of Ramasamy Gounder and the plaintiff was paid a sum of Rs.25,000/- in lieu of her share. Therefore, she is not entitled to a share in those two items of properties.

4. As regards, 3rd item of suit schedule properties, it was the contention of the second defendant that the same belonged to one Chinnasamy Gounder, the brother of Ramasamy Gounder, who died in the year 1986. Upon his death, it devolved on his wife Palaniammal and Palaniammal executed a Will dated 06.07.1992, which was marked as Ex.B2, under which, she had bequeathed the said item of property to the second defendant / appellant herein.

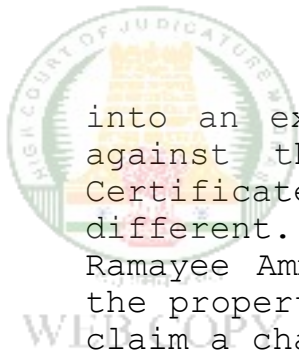
5. As regards 4th item of suit schedule properties, it was the contention of the second defendant that the property was mortgaged by Ramasamy Gounder and his sons in favour of one Kaliappa Gounder and the said Kaliappa Gounder has assigned the mortgage to Ramayee Ammal, who is the wife of Ramasamy Gounder and the second defendant has inherited the same after her death. Therefore, the plaintiff cannot claim any right over the said item of property.

6. As regards Item Nos.5 and 8 of the suit schedule properties, the second defendant, would claim that the same belonged to his father having purchased the same under Ex.B9, dated 17.09.1980 and Ex.B10 dated 11.08.1981.

7. As regards 6th item of properties, it was the contention of the second defendant that the said property was sold in Court auction in O.S.No.248 of 1958 and the sale certificate was marked as Ex.B7. Insofar as 7th item of suit schedule properties, the second defendant did not raise any specific defence.

8. Before the trial Court, the plaintiff was examined as P.W.1 and Exs.A1 to A10 were marked. The second defendant was examined as D.W.1 and one Sundaram, attester to Ex.B2-Will was examined as D.W.2. Exs.B1 to B12 were marked.

9. The trial Court framed necessary issues. It disbelieved the Will dated 06.07.1992. In respect of properties covered by Exs.B9 and B10, the learned trial Judge concluded that the properties were common properties, though they stood in the name of Natchimuthu Gounder. The act of Natchimuthu Gounder in entering



into an exchange deed dated 27.04.1983 under Ex.B11, was held as against the defendants. The trial Court rejected Ex.B7-Sale Certificate on the ground that the survey numbers found therein were different. As regards mortgage, the trial Court rightly held that Ramayee Ammal being a mortgagee would not become absolute owner of the property. Therefore, after her death, the second defendant can claim a charge over the property.

10. On the above conclusions, the trial Judge granted a decree as prayed for. Hence, this appeal.

11. We have heard Mr.N.Shanmugaselvam, learned counsel for the appellant. The first respondent though served, is not appearing either in person or through counsel duly instructed.

12. Mr.N.Shanmugaselvam, learned counsel for the appellant, would vehemently contend that the trial Court grievously erred in disbelieving the Will dated 06.07.1992. He would fault the learned trial Judge for disbelieving the Will on the ground that Will of Chinnasamy Gounder was disbelieved by the Court in the other proceedings. He would also point out that the evidence of D.W2 has not been shaken in any manner and therefore, the reason assigned for not believing the Will was flimsy.

13. As far as Item Nos.5 and 8 of the suit schedule properties are concerned, regarding the validity of the sale deeds, the learned counsel would contend that both the sale deeds stand in the name of Natchimuthu Gounder. It is not the case of the plaintiff that those properties were acquired by Natchimuthu Gounder from and out of the income from the ancestral properties. The plaintiff had come to the Court pointing out that the properties belonged to Ramasamy Gounder and it was not the case of the plaintiff that the properties are ancestral properties and there were coparceners including Ramasamy Gounder. The learned counsel for the appellant would also point out that the Court misunderstood the very Exchange deed. The property that was purchased by Natchimuthu Gounder under Ex.B10 measures about 23 cents that was adjacent to the property belonged to Ramasamy Gounder. Therefore, according to the learned counsel, the trial Court erred in non-suiting the defendant on the ground that Natchimuthu Gounder has entered into an Exchange Deed in respect of 23 cents, which belonged to Ramasamy Gounder.

14. On the above contentions of the learned counsel for the appellant, the following points arise for determination in this appeal:

(i) Whether the trial Court was right in disbelieving the oral partition?

(ii) Whether the trial Court was right in disbelieving the Will Ex.B2?



(iii) Whether the trial Court was right in concluding that Item Nos.5 and 8 were common properties in the absence of any pleadings to the that effect?

(iv) Whether the trial Court was right in concluding that the mortgage deed would not confer title?; and

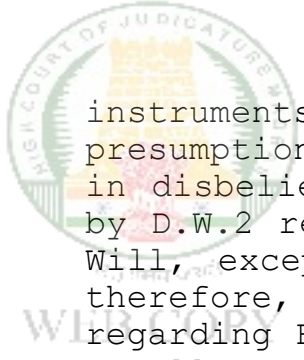
(v) Whether the trial Court was right in concluding that Ex.B7 does not cover Item No.6 of the suit schedule properties?

Point No.1:

15. Insofar as oral partition is concerned, once the second defendant accepts the title of Ramasamy Gounder and pleads oral partition, it is for him to establish the same before the Court. The pleading is to the effect that there was a oral partition in the year 1981 and the plaintiff was paid with a sum of Rs.25,000/- in the presence of panchayatars. No panchayatar has been examined. There is no other evidence in support of the case of the second defendant regarding oral partition except his oral testimony, which is interested testimony. Therefore, we are not able to find fault with the learned trial Judge for having come to the conclusion that the oral partition was not established.

Point No.2:

16. Adverting to the validity of the Will dated 06.07.1992 executed by Palaniammal, we find that the learned trial Judge had gone astray. He had concluded that because the Will of Chinnasamy Gounder was disbelieved by the Court in other proceedings, Palaniammal has no right to execute the Will. The learned trial Judge has also stated that Palaniammal has derived title on the demise of Chinnasamy Gounder under the Will which was disbelieved. A perusal of Ex.B2-Will would show that on the Will executed by Chinnasamy Gounder being disbelieved by the Court, Palaniammal had inherited the properties of Chinnasamy Gounder as his sole heir. Therefore, the premise on which the trial Judge has disbelieved Ex.B2 is incorrect. D.W.2 has been examined to prove the execution of the Will. In his chief examination, D.W.2 has stated that he saw Palaniammal signing the document and he went to the Registrar's office with her. She presented the document for registration and the document was read over to her and she admitted the execution before the Registrar and he has also stated that he signed the document in the presence of Palaniammal. The learned trial Judge has pointed out that the witness has stated that Will was written in two blue colour papers, but the Will was written in two conqueror papers. This cannot be considered as a contradiction in order to disbelieve the Will. There is nothing in the cross-examination of D.W.2 to discord his testimony. The essential ingredients relating to execution of the Will has been spoken to by D.W.2. There is no cross-examination on those essential aspects about the execution of the Will. Apart from that, the above document is a registered instrument and under Section 60(2) of the Registration Act, there is a certain presumption attached to execution of registered



instruments. No evidence has been placed so as to dislodge such presumption. We therefore find that the trial Judge was not right in disbelieving the Will. There is no evidence either by D.W.1 or by D.W.2 regarding any extraneous circumstances in execution of the Will, except a mere claim that there was impersonation. We are, therefore, unable to sustain the conclusion of the trial Court regarding Ex.B2-Will. The second point is answered in favour of the appellant and against the respondents.

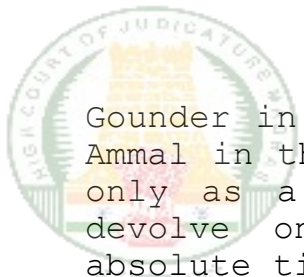
Point No.3:

17. With regard to the claim of the plaintiff in respect of Item Nos.5 and 8, the second defendant would contend that Item Nos.5 and 8 of the suit scheduled properties were purchased by his father Natchimuthu Gounder under Exs.B9 and B10, dated 17.09.1980 and 11.08.1981 respectively. The trial Court has disbelieved Ex.B9 on the ground that D2 has not sent a reply notice to the suit notice sent by the plaintiff. The learned trial Judge had faulted the second defendant for not raising the claim that Item Nos.5 and 8 did not belong to Ramasamy Gounder in the the reply notice. A registered sale deed cannot be disbelieved on the ground that claim has not been made in the reply notice. Admittedly, Ex.B9 stands in the name of Natchimuthu Gounder, father of the appellant and it is a sale deed dated 17.09.1980. No document is placed by the plaintiff to show the title of Ramasamy Gounder to the said property. It is not the case of the plaintiff that they are joint family properties acquired from and out of the income of the joint family in the name of Natchimuthu Gounder. We are, therefore, unable to sustain the conclusion regarding Ex.B9.

18. Similarly, insofar as Ex.B10 is concerned, the trial Court has not suited the defendant on the ground that Natchimuthu Gounder has entered into an exchange deed. This finding is a factual mistake. The exchange deed would go to show that the property that was allotted to the family under the exchange deed is situate on the eastern side and the property belonged to Natchimuthu Gounder is situate on the western side. A bare perusal of the description in the exchange deed would itself clarify the said fact. The total extent of the property in Item No.8 which relates to exchange deed-Ex.B10 is 46 cents. Out of which, 23 cents has been purchased by Natchimuthu Gounder under Ex.B10. Remaining 23 cents has been exchanged with LGB Company by the family. Therefore, it is crystal clear that the family is entitled to only 23 cents in Survey No.447 in item No.8 of the suit properties. Hence, the decree granted will have to be confined only to eastern 23 cents in Survey No.447, which was allotted to the family under exchange deed Ex.B.11.

Point No.4:

19. Insofar as Item No.4 is concerned, it is the defence of the second defendant that the same was mortgaged to one Kaliappa



Gounder in the year 1963. He had assigned the mortgage to Ramayee Ammal in the year 1978. Ramayee Ammal had charge over the property only as a mortgagee. On the death of Ramayee Ammal, it would devolve on the second defendant. Therefore, hee cannot claim absolute title. He may claim charge over the property. Therefore, the decree of the trial Court in respect of the said item, cannot be said to be wrong.

Point No.5:

20. In respect of item No.6, the second defendant had claimed that the property was sold in Court auction and he has produced Ex.B7 sale certificate issued by the Court in favour of one Narayana Chettiar. The trial Court has found that the survey numbers in Ex.B7 do not tally with the survey number of the suit property namely item No.6. We are therefore unable to disturb the said findings of the trial Court which are factual in nature in the absence of any other material evidence to show that both the properties are one and the same.

21. Insofar as Item No.7 is concerned, the second defendant has not raised any specific defence and the title of Ramasamy Gounder to the said property is admitted. Therefore, the trial Judge cannot be faulted for granting a decree in respect of the same.

22. In view of the answers to the points above, this appeal is partly allowed and the suit will stand dismissed in respect of Item Nos.3, 5 and in respect of western 23 cents in Item No.8. In respect of other properties, the decree of the trial Court, is sustained. There will be a preliminary decree with regard to the 1/3rd share to the plaintiff in Item Nos.1, 2, 4, 6, 7 and eastern 23 cents in item No.8. No Costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

pm

NOTE: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

<https://hcservices.ecourts.gov.in/hcservices/>



To:

1.The District Judge,
Karur.

2.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court. (2 COPIES)

+1 CC to M/s.N. SHANMUGASELVAM, Advocate (SR-17436[F] dated
08/04/2022)

A.S(MD)No.65 of 2011 and

M.P(MD)No.2 of 2011

07.04.2022

RD(11.05.2022) 7P 5C