



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 06.04.2022

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.215 of 2010

WEB COPY

1.Nagammal

2.Mariappan (died)

(Death of the 2nd Appellant is Recorded vide court order dated 21.02.2022)

3.Arumugam

4.Krishnan

5.Lakshmi

6.Pushpa Ammal

7.Padmavathi

8.Parameswari (died) ... Appellants / Respondents / Plaintiffs
(8th Appellant died and there is no need to take steps to bring the Legal heirs as she has not left any legal heir, vide court order dated 21.02.2022)

9.Bhanumathy

10.Pappathy

11.Kamatchi

... Appellants

(Appellants 9 to 11 are suo motu impleaded as Lrs of the deceased 2nd Appellant vide order dated 11.03.2022)

-Vs-

1.S.Rajarethinam (died) ... 1st Defendant / Appellant /
1st Respondent

2.Dhanapackiam

3.Saraswathy

4.Muthu Lakshmi

... Defendants 2, 3 & 5 / 9 to 11
Respondents / 2 to 4 Respondents

5.R.Thilagavathy

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



6.R.Neelavathi

7.R.Sakthivel

8.R.Senthilkumar

(Respondents 5 to 8 are suo motu impleaded as Lrs of the deceased 1st respondent vide order dated 21.02.2022)

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree rendered by the learned Principal District Judge, Tiruchirappalli in A.S.No.301 of 2007, dated 09.09.2009 modifying the judgment and decree of the learned First Additional District Munsif, Tiruchirappalli in O.S.No.2417 of 1996, dated 22.01.2007.

For Appellants : Mr.V.G.Kamalesh
For R2 to R8 : no appearance
R1 - Died

JUDGMENT

The plaintiffs in O.S.No.2417 of 1996 on the file of the 1st Additional District Munsif Court, Trichy are the appellants in this second appeal.

2. The suit was for partition and allotment of 2/3rd share in favour of the plaintiffs. The first defendant was the contesting defendant. Based on the divergent pleadings, the trial court framed the necessary issues. The first plaintiff Nagammal examined herself as P.W.1. She examined one Palaniyandi and Arumugham as P.W.2 and P.W.3. Ex.A1 to Ex.A9 were marked. The first defendant Rajarathinam examined himself as D.W.1. He did not adduce any documentary evidence. After considering the evidence on record, the trial court passed preliminary decree on 22.01.2007 allotting 2/3rd share in favour of the plaintiffs. Questioning the same, the first defendant filed A.S.No.301 of 2007 before the Principal District Judge, Tiruchirappalli. By the impugned judgment and decree dated 09.09.2009, the first appellate court modified the preliminary decree passed by the trial court and granted only ½ share in favour of the plaintiffs. Aggrieved by the same, this second appeal came to be filed. The second appeal was admitted on 12.03.2010 on the following substantial questions of law:-

"1.Whether the first appellate court is right in holding that the Will Ex.A9 is not proved as per Section 68 of the Evidence Act?

2. In the absence of any pleadings regarding ouster whether the first appellate court is right in holding that the 6th plaintiff is ousted and she has no right over the property?"



During the pendency of the appeal, two of the appellants passed away and their legal heirs have been brought on record. Likewise, the contesting respondent Rajarethinam also passed away and his legal heirs were impleaded. Even though notices were taken to the legal heirs and paper publication was also made, they have not chosen to enter appearance.

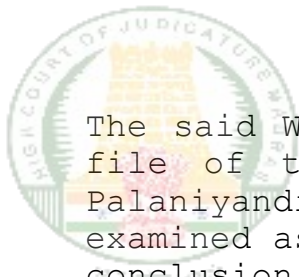
3. The learned counsel appearing for the appellants reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellants and modify the impugned judgment and decree and restore the decision of the trial court.

4. Since there is no appearance on the side of the respondents, I undertook an independent scrutiny of the pleadings and the evidence on record.

5. The suit is one for partition. The suit property belonged to one Chinnammal. She was blessed with two sons namely Subramanian and Palaniyandi and one daughter by name Lakshmi Ammal. Subramanian got married to one Ramayee ammal and through her, the first defendant Rajarethinam was born. After the demise of Ramayee Ammal, the said Subramanian married the first plaintiff Nagammal and through her, the plaintiffs 2 to 5 & 7 to 9 were born. Subramanian before his demise executed a Will dated 05.01.1990 in favour of the first plaintiff Nagammal. This Will was marked as Ex.A2 and there is no dispute that 1/3rd share of Subramanian in the suit property devolved on the first plaintiff. Likewise, there is again no dispute that the second son of Chinnammal namely Palaniyandi executed a gift deed in favour of Rajarethinam / first defendant.

6. The only issue is on the devolution of 1/3rd share of Lakshmi Ammal. Lakshmi Ammal joined with the plaintiffs and that is why, the partition was sought for 2/3rd share in the suit property. During the pendency of the suit proceedings, Lakshmi Ammal passed away. Even during her life time, she had executed a Will-Ex.A9 dated 27.01.1992 in favour of Nagammal. The trial court came to the conclusion that the plaintiffs have proved the due execution of Ex.A9 by Lakshmi Ammal and granted preliminary decree for 2/3rd share in favour of the plaintiffs. The first appellate court modified the said preliminary decree and granted ½ share only for the plaintiffs by coming to the conclusion that Ex.A9 was not proved. The first appellate court erroneously thought that in the plaint, there is no reference to Ex.A9-Will.

7. The learned counsel appearing for the appellants drew my attention to the amendment made to the plaint by adding Paragraph No.16A. Thus, in the amended plaint, there is a categorical pleading about the Will dated 27.01.1992 executed by Lakshmi Ammal.



The said Will is a registered document (Document No.3/2002, on the file of the Joint SRO No.3, Trichy). It was attested by one Palaniyandi and Arumugham. Both these attesting witnesses were examined as P.W.2 & P.W.3. That is why, the trial court came to the conclusion that Lakshmi Ammal's Will had been duly proved. The first appellate court even without taking note of the amendment made to the plaint and deposition of P.W.2 & P.W.3 erroneously held that Will dated 27.01.1992 was not proved. I therefore answer the first substantial question of law in favour of the appellants.

8. The question of ouster also will not arise. Admittedly, the property belonged to Chinnammal and it devolved on her three children. Therefore, the possession of the brothers can never be construed to the exclusion of the daughter. There are also no sufficient pleadings or proof to establish ouster. In any event, Rajarathinam alone entered the witness box and the second son of Chinnammal, Palaniyandi did not enter the witness box. Therefore, the second substantial question of law is also answered in favour of the appellants. The judgment and decree passed by the first appellate court is modified. The decision of the trial court is restored. The second appeal is allowed. No cost.

Sd/-

Assistant Registrar(CS-III)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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To

- 1.The Principal District Judge, Tiruchirappalli.
- 2.The First Additional District Munsif, Tiruchirappalli.

Copy To

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

+1 CC to M/s.V.G. KAMALESH, Advocate (SR-16933[F] dated 06/04/2022)

Judgment made in
S.A.(MD)No.215 of 2010
06.04.2022

ss (CO)

TR(28.04.2022) 4P 6C