

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.08.2022

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S. (MD) No.132 of 2015

and

M.P.(MD) No.1 of 2015

1.Veeramani (Died) ...1st appellant/3rd defendant
2.V.Shanthi
3.V.Krubhakaran
(Appellants 2 & 3 are impleaded as
legal heirs of deceased 1st appellant
as per order, dated 27.06.2022) ... 2 & 3 appellants

vs

1.S.Nagarathinam ... 1st Respondent/Plaintiff
2.Gandhi
3.Thavasu ... Respondents 2 & 3/Defendants 1 & 2
4.R.Lakshmi
5.R.Udhayakumar ... Respondents 4 & 5/Defendants 4 & 5

PRAYER: Appeal Suit filed under Section 96 of the Civil Procedure Code,
against the judgment and decree passed in O.S.No.42 of 2012, on the file of
the III Additional District Judge, Trichy, dated 31.10.2014.

For Appellants : Mr.H.Lakshmi Shankar

For R1 : Mr.R.Sundar Srinivasan
For R2 & R3 : Mr.P.Vinoth
For R4 & R5 : Mr.V.Illanchezian

J U D G M E N T

The first respondent has filed a suit for partition in O.S.No.42 of 2012, on the file of the III Additional District Court, Tiruchirappalli against the first appellant and the respondents 2 to 5 seeking the relief of 1/4th share from the suit schedule properties. The said suit was decreed. Challenging the same, the third defendant in the suit has filed the present appeal before this Court.

2. Brief plaint averments are as follows:-

The plaintiff and defendants 1 to 3 are sister and brothers. Their parents are one Sangapillai and Rajammal. The said Sangapillai had one brother, namely, Thangaiyan. Their father's name is Akilandam and mother's name is Nagammal. Akilandam had four brothers, by name, 1) Sadayan, 2) Annavi, 3) Veeramalai and 4) Ponnusami. Their father's name

is Sangili Poosari. The suit A and B Schedule properties are ancestral properties of the plaintiff and the defendants 1 to 3. The A Schedule property lies on the north and the B schedule property lies on the south. The suit A Schedule property consists of old terraced and tiled buildings. The B Schedule property is a tiled building. A Schedule property is the ancestral property. The plaintiff has produced a registered document, dated 15.09.1923 described as Agreement of right to wall, which was executed in favour of plaintiff's ancestors, namely, sons of Sangili Poosari, by one Govindan Chettiar. 'B' Schedule property is in the name of the plaintiff's paternal grand-mother Nagammal, under a registered sale deed, dated 14.03.1935. The plaintiff and the defendants 1 to 3 are only available lineal descendants in respect of the entire Sangili Poosari family. One Thangaiyan, brother of plaintiff's father had two wives, 1) Dhanam and 2) Kamatchi. As there was no issues to them, the plaintiff and the defendants 1 to 3 alone inherited the entire suit A and B schedule properties as legal heirs. Plaintiff got married on 07.03.1990. After the demise of Sangapillai and Thangaiyan, the plaintiff and the defendants 1 to 3 are in possession and

enjoyment of the suit A and B schedule properties. So, the plaintiff is entitled to 1/4th share in the suit schedule properties. In the southern portion of the properties, the defendants constructed new building in both A and B Schedule properties. When the plaintiff questioned the same, the defendants 1 to 3 represented that it would be adjusted in their share. But quite contrary to their promise, the 2nd defendant made arrangements for construction in the suit B Schedule property on its western side. The same was questioned by the plaintiff, which the defendants 1 to 3 jointly informed that the plaintiff has no share in the suit properties. As the 4th and 5th defendants have purchased the suit properties from the defendants 1 to 3, the same will not be binding on the plaintiff. Hence, this suit for partition of 1/4th share has been filed.

3. Brief averments stated in the written statement filed by the 3rd defendant are as follows:-

The suit is false, frivolous and vexatious. It is admitted that the plaintiff and the defendants 1 to 3 are the daughter and sons of

Late.Sangapillai and Rajammal. Sangapillai predeceased his brother Thangaiyan died on 29.07.1988. Plaintiff got married on 07.03.1990. After printing of the marriage invitation and before marriage of the plaintiff, paternal uncle Thangaiyan died on 27.02.1990 leaving a testamentary disposition of his properties on 19.02.1990 in favour of defendants 1 to 3. The last will of Thangaiyan, dated 19.02.1990 was duly executed, attested and registered. The will became operative from 27.02.1990 i.e., the date of death of Late.Thangaiyan. Thereby, one half share in the proper vest with defendants 1 to 3. Sangapillai, who is the father of the plaintiff died on 29.07.1988. After the death of Sangapillai, his $\frac{1}{2}$ share property with defendants 1 to 3 and the plaintiff. Defendants 1 to 3 are entitled to half share of the paternal uncle Thangaiyan under the Will and as such, the plaintiff is entitled to $\frac{3}{24}$ and defendants 1 to 3 are each entitled to $\frac{7}{24}$ share. Plaintiff's marriage was celebrated in the year 1990 with borrowed funds from the Bank. The same was discharged by defendants 1 to 3. In the year 2005, at the request of the plaintiff's husband, plaintiff demanded the 3rd defendant to purchase property in her husband's village and the 3rd

defendant also on 21.09.2005 purchased the property in the name of the plaintiff's minor daughter and son and the plaintiff is in possession of the same. After settling the share of the plaintiff by purchase of property in her minor children, the defendants 1 to 3 effected a partition of the suit properties among themselves on 21.12.2010. The plaintiff has full knowledge about the division and she has not raised any protest. Plaintiff got married in the year 1990 and she is living with her husband leaving the suit property. There was no common enjoyment or joint possession for the plaintiff's share to an extent of 3924 sq.ft (0.09 cents) of land in her husband's native place, viz., Thirumangalam Village, Lalgudi Taluk in the names of her children represented by guardian 3rd defendant.

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

- (i) Whether the plaintiff is entitled to $\frac{1}{4}$ share and for delivery of separate possession of suit property?*
- (ii) Whether the will dated 19.02.1990 executed by one Thangaiyan is true and valid and whether it is binding on the plaintiff or not?*

(iii) Whether the plaintiff has relinquished her share orally after obtaining benefit by way of another property and whether a partition effected on 21.12.2010 among the defendants 1 to 3 is valid and whether it is binding on the plaintiff?

(iv) To what other reliefs the plaintiff is entitled?

5. In order to substantiate the case, on the side of the plaintiff, two witnesses were examined as PW1 and PW2 and 6 documents were marked as Ex.A1 to Ex.A6. On the side of the defendants, three witnesses were examined as D.W.1 to D.W.3 and 4 documents were marked as Ex.B1 to Ex.B4.

6. After completing the trial and hearing of arguments advanced on either side, the learned trial Judge, considered the evidence available on record, decreed the suit as prayed for with costs by passing preliminary decree for partition of the suit properties into four equal shares and allotment of one such share to the plaintiff in accordance with good and bad quality of the soil and according to metes and bounds.

7. The learned counsel appearing for the appellant would submit that though the properties belong to one Sangapillai and his brother Thangaiyan, the said Sangapillai died intestate, whereas, Thangaiyan died with testamentary succession by way of Will. Thangaiyan executed a registered Will dated 19.02.1990. The said Will is a last Will. He died on 27.02.1990. Therefore, the first respondent is not entitled to half share. She is entitled to 1/4th share from Sangapillai share and she is not entitled to any share from the Thangaiyan share. The Will has to be proved in the manner known to law. Though the first respondent has not pleaded anything about the Will executed by the Thangaiyan, subsequently, the appellant and other respondents filed the written statement, in which, they have clearly pleaded about the Will. The first respondent has not filed any reply statement disputing the Will. Though the law does not require to be given any reply for the written statement filed by the defendants, however, they are not disputing the Will, since the attestors to the Will, who said to have attested the will was no more. Therefore, they have not examined the attestors, however examined one witness namely Veeramani, who is the legal heir of

the one of the attestors and the Will was marked as Ex.B3. He has spoken about the signature of the attestors and the Will has been proved under Section 69 of the Indian Evidence Act. The appellant has not disputed the signatures and also execution of the Will and in the suggestion during the examination of witnesses, he had not denied the execution. They put the suggestion that they forcibly obtained the signature and therefore, execution of the Will need not be proved. It is for the respondents to prove that the Will has not been executed under Section 63 of the Indian Succession Act. The other surrounding circumstances pointed out by the trial Court in this case are perverse. Even during the life time of Thangaiyan, he executed the mortgage deed along with the appellant and the respondents 1 to 3 and they are also party to the document and in case, any doubt arising out the signature found in Ex.B3, the admitted signature can be sent for comparing with the disputed signature. Signature of the attestor of the Will is to be proved, whereas, in this case, the first respondent knowing fully well the facts had kept quite for a long time and only after filing the suit and when the appellant filed the written statement, in which, they have stated about

the Will, she has not seriously disputed that since the first respondent knows about the execution of the Will. Since the first respondent has not seriously disputed the Will, the appellant has proved the Will in the manner known to law and the trial Judge had failed to appreciate the evidence and held that the will was not proved in the manner known to law, which is perverse and therefore, the appeal has to be allowed and the judgment and decree passed by the trial Court granted 1/4th share is liable to be set aside. At the best, the first respondent is entitled to only ½ share in Sangapillai properties and not to Thangaiyan property. Therefore, the appeal is liable to be allowed and the judgment and decree are liable to be set aside.

8. The learned counsel appearing for the first respondent/plaintiff would submit that the properties belong to one Sangapillai and his brother Thangaiyan. Both died intestate. The appellant and the respondents 1 to 3 are the only legal heirs of the Sangapillai since Thangaiyan died issueless. Therefore, in the properties of the Sangapillai and Thangaiyan, the appellant

and the respondents 1 to 3 each are entitled to 1/4th share. However, after filing of the suit, the respondents 1 to 3 filed a written statement, in which, they have introduced a Will Ex.B3 and stated that Thangaiyan executed the Will on 19.02.1990, thereafter, he died on 27.02.1990. Though, they need not file the reply statement, law does not require the reply statement to the written statement, however, in the proof affidavit and in the chief examination, he has denied the execution of the Will. Further, he would submit that a reading of the deposition of D.W.2, who is the legal heir of one of the attestors of Ex.B3, has not spoken anything about the execution of the Will by the testator and he only identified the signature of one of the attestors. He had not spoken anything as contemplated under Section 69 of the Indian Evidence Act. Even though, the appellant has not seriously disputed the Will, it is the duty of the propounder to prove the same in the manner known to law. He cannot take advantage of the weakness of the person who denied the Will, but it is the duty of the propounder to clear the suspicious circumstances surrounded and Will has to be proved in the manner known to law. He also relied on the judgment of this Court in

S.A.No.241 of 2015, dated 23.03.2022 (Malliga vs. P.Kumaran) and Testamentary Original Suit No.22 of 2010, dated 27.02.2017 (N.Durga Bai and 2 others vs. Mrs.C.S.Pandari Bai and another).

9. Further he would submit that the first respondent has not proved the death of the attestors Ex.B3 Will. Therefore, the Will has not been proved. However, the trial Court has rightly appreciated the fact that the will has not been proved, therefore, disallowed the claim of the appellant and rightly passed the preliminary decree for 1/4th share and there is no reason to interfere with the same.

10. Heard the learned counsel appearing for the appellant, the learned counsel appearing for the respondents, perused the pleadings, issues framed by the trial Court, oral and documentary evidence adduced and produced by both parties.

11. Admittedly, both parties are claiming title from their

predecessors Sangapillai and Thangaiyan. Admittedly, the appellant and the respondents 1 to 3 are the children of the Sangapillai. The said Thangaiyan is none other than the brother of the Sangapillai. Admittedly, Thangaiyan has no issues. Therefore, the appellant and the respondents 1 to 3 are the legal heirs of the Thangaiyan also. So, according to the first respondent/plaintiff, both the Sangapillai and Thangaiyan died intestate, therefore, the appellant and the respondents 1 to 3 are equally entitled to $\frac{1}{4}^{\text{th}}$ share. According to the appellant, though Sangapillai died intestate and the appellant and the respondents 1 to 3 are equally entitled to $\frac{1}{4}^{\text{th}}$ share from the share of the Sangapillai, however, Thangapillai executed a will bequeathing his share to the appellant and the respondents 2 and 3 and the first respondent is not entitled to any share from the share of the Thangaiyan. Therefore, now the question that arises for consideration is whether the Thangaiyan died intestate or testamentary succession. If the Thangaiyan died intestate, the appellant and the respondents 1 to 3 are each entitled to $\frac{1}{4}^{\text{th}}$ share. If the Thangaiyan died with the testamentary succession, the first respondent is not entitled to any share from the

Thangaiyan, for which, the Court has to see whether the alleged Will executed by the Thangaiyan has been proved by the appellant. Now it is not out of place to say that under Section 68 of the Indian Evidence Act, the Will has to be proved by the propounder by examining at least one attester to the Will, however, the same has not been proved in the manner known to law. Now, in this case, since the appellant has stated that the attestors to Ex.B3 Will are no more. Therefore, they invoked Section 69 of the Indian Evidence Act and called one of the person namely Veeramani, who is the son of Velayutham, who is one of the attesting witnesses to Ex.B3 and he was examined as P.W.1 and he has spoken about the signature of the one of the attestors to the Will, namely, Velayutham and therefore, the Will has been proved. A careful reading of the deposition of D.W.2, it is seen that though he has filed the proof affidavit for the chief-examination, he has not spoken anything about the testator and other attester to the Will. He has only spoken about the signature of one of the attestors. The learned counsel for the appellant would submit that the appellant has not proved the death of the attestors.

12. A reading of the entire materials would show that the first respondent has not disputed anything about the death of the attestors, even they have not put any suggestion either before D.W.1 or D.W.2 and therefore, the said fact has not been disputed. If at all, the attestors of the Will alive or able to trace out the first respondent, who is none other than the sister of the defendants 1 to 3 and all are their close relatives and they should have stated about the whereabouts of the attestors. Therefore, now the proof of Will under Section 68 of the Indian Evidence Act has not been complied with. However, the propounder is not able to trace out the attestors and he tried to prove the Will by way of other mode i.e., under Section 69 of the Indian Evidence Act. Though the appellant examined one of the legal heirs of one of the attestors, but he has only spoken about the signature of the one of the attestors in Ex.B3 and he has not spoken anything about the signature of the testator and other attestor to the Will. Therefore, this Court finds that on a combined reading of Section 63 of the Indian Succession Act and Sections 68 & 69 of the Indian Evidence Act, it

cannot be taken in the lighter way and interpreting Section 69 of the Indian Evidence Act that simply calling one of the persons, who knows only the signature of the attestors.

13. A combined reading of Section 63 of the Indian Succession Act and Sections 68 and 69 of the Indian Evidence Act and the intention of the legislators that the Will has to be proved in the manner known to law in the light of Section 63 of the Indian Succession Act and Sections 68 and if not possible at least under Section 69 of the Indian Evidence Act.

14. A careful reading of the entire evidence of D.W.2, this Court finds that the Will has not been proved in the manner known to law, for the reasons that the witness D.W.2 has not complied with the ingredients of Sections 68 and 69 of the Indian Evidence Act. Therefore, this Court finds that the Will has not been proved. Though the trial Court has found the other reason for invoking the suspicious circumstances surrounding and disbelieved the Will. Since this Court, as the first appellate Court, is a fact

finding Court, it has to re-appreciate the entire evidence and has to give an independent finding.

15. A reading of the entire evidence, pleadings as well as the oral and documentary evidence, since the relationship of the parties are not in dispute and also the entitlement of the party is also not disputed. Now the only question that arises for consideration is whether the Thangaiyan died intestate or testamentary. Though the appellant stated that Thangaiyan died testamentary, therefore, the first respondent is not entitled to get any share from the Thangaiyan share. This Court finds that the appellant has not proved the Will in the manner known to law. Therefore, this Court finds that as if the Thangaiyan died intestate, therefore, the deceased first appellant and the respondents 1 to 3 are entitled to 1/4th share each from the property of the Sangapillai as well as Thangaiyan. Therefore, there is no merit in the appeal.

16. In the result, the Appeal Suit fails and the same is dismissed

and the judgment and decree, dated 31.10.2014 passed in O.S.No.42 of 2012 by the III Additional District Judge, Tiruchirappalli are confirmed. In a recent judgment of the Hon'ble Supreme Court reported in **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 Trial Courts in their respective States."

17.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 appellant is directed to divide the property by metes and bounds and hand over the possession to the respondents as per the preliminary decree passed by the trial Court, within a period of two months

from the date of receipt of a copy of this judgment, otherwise, the trial Court is directed to initiate *suo motu* final decree proceedings and appoint an advocate commissioner and proceed with the same and pass a final decree. Since already the suit is pending from 1995, 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. No costs. Consequently, connected miscellaneous petition is closed.

03.08.2022

Index : Yes / No

Speaking Order : Yes / No

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To

1.The III Additional District Judge,

Trichy.

2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

A.S. (MD) No.132 of 2015

P.VELMURUGAN, J.

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A.S. (MD) No.132 of 2015

03.08.2022