

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

DATED: 15.07.2022

CORAM : **JUSTICE N.SESHASAYEE****S.A(MD).No.696 of 2015****and****M.P(MD).No.1 of 2015****C.M.P(MD).No.10971 of 2021**

Murugan

... Appellant/Appellant/Plaintiff

Vs

1.Gurusamy
2.Annalakshmi
3.Mangaleswari
4.Savithri
5.Kala
6.Nilavazhagan
7.Selvi
8.Janaki
9.Velmurugan
10.Renuga Devi
11.Pramiladevi

....Respondents/Respondents/Defendants

Prayer : Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree passed in A.S.No.14 of 2012 dated 04.03.2015 on the file of the Subordinate Court, Ramanathapuram by confirming the judgment and decree passed in O.S.No.126 of 2008 dated 12.12.2011 on the file of the District Munsif Court, Ramanathapuram.

For Appellant : Mr.K.Sathiya Singh

For Respondents : Mr.B.Senthilkumar (for R1)
Mr.J.Barathan (for R2 to R4)
No appearance (for R5 to R11)

JUDGMENT

The plaintiff in O.S. 126 of 2008 on the file of District Munsif Court, Ramanathapuram, is the appellant herein. He laid the suit for partition of as many as nine items in seven schedules of properties, of which some of the schedules have more than an item of immovable property. They belonged to his parents, not



jointly but independently, and included ancestral property in the hands of the father of the plaintiff.

1.2 The plaintiff relied on Ext.A-1 Will of his father, which the trial court rejected and decreed the suit in terms of the law as it stood at the time when the suit was decided on 12.12.2011. Aggrieved by the finding of rejection of Ext.A-1 Will, the plaintiff preferred A.S.14 of 2012 before Sub Court, Ramanathapuram. The first appellate court confirmed the decree and this decree is now under challenge in this appeal. Parties would be referred to by their rank as in the trial court.

2. Certain Sundaram Servai and his wife Parvatham Ammal died leaving behind them surviving nine children as their heirs and also certain items of properties for their heirs to litigate.

3. An opening sentence may now be made as to how the dispute arose:

There are seven schedules of properties. Of them the properties described in schedules 1 and 2 deal with two items of properties each. They either belonged to Sundaram Servai or Parvatham Ammal. Some of these properties at the hands of Sundaram Servai were also ancestral properties, while others are his self acquired properties. The details are as below:

Property (schedule)	Item Nos.	Person in whose name it stands	Character of the property
I	1 2	Parvatham Ammal Parvatham Ammal	Personal property of Parvathamammal.
II	1 2	Parvatham Ammal Sundaram Servai	Personal property of Parvathamammal Ancestral
III	1	Parvatham Ammal	Personal property of Parvathamammal
IV	1	Sundaram Servai	Ancestral
V	1	Sundaram Servai	Self acquired
VI	1	Sundaram Servai	Ancestral
VII	1	Sundaram Servai	Ancestral



4. Sundaram Servai and Parvatham Ammal had nine children. They included their three sons, namely Murugan, the plaintiff, Gurusamy, the first defendant and Nilavalagan, the sixth defendant. The remaining six children are their daughters. Of them, two of their daughters Vasantha had died on 09.08.2005 and Rakkammal had died on 22.06.2008. The other four daughters are defendants 2 to 5. Turning to Rakkammal and Vasantha, defendants 7 to 9 are the heirs of Rakkammal, whereas defendants 10 and 11 are the children of Vasantha.

5. According to the plaintiff, on 26.11.1997 Vide Ext.A.1, Will, Sundaram Servai had bequeathed all the items of suit properties, which included the properties held by his wife Parvatham Ammal to his three sons namely, plaintiff and defendants 1 and 6. In other words, he had excluded his six daughters including the children of the deceased daughter from the bequeath. The plaintiff would now file a suit for partition on the strength of Ext.A.1, Will.

6. The suit was contested by defendants 2 to 4, who are the daughters of Sundaram Servai and Parvatham Ammal. Their defence was two fold:

- a) Ext.A-1 Will dated 26.11.1997 alleged to have been executed by Sundaram Servai and propounded by the plaintiff was not executed by him;
- b) That on 24.11.1997, Parvatham Ammal had executed Ext.B.6, Settlement deed, in favour of the fourth defendant, one of her daughters, as concerning Schedule I item 2 property, and that it is not available for partition; and
- c) That Parvatham Ammal had sold a portion of Schedule III property under Ext.B.4, dated 27.09.1983 to one Manickam, and that he is a necessary party. The property covered under Ext.B.4 was not available for partition.

7. The dispute went to trial, and before the trial Court both sides adduced oral and documentary evidence. For the plaintiff, he examined himself as P.W.1, besides examining certain Balakrishnan as P.W.2 for proving Ext.A.1, Will. For the contesting defendants, fourth defendant examined herself as D.W.2, through whom the defendants produced Ext.B.1 to Ext.B.10.

8.1 On appreciating the evidence, the trial Court accepted the alienation made by the Parvatham Ammal vide Ext.B.4 and Ext.B.6 and excluded them for its consideration for partition. Turning to the all critical Ext.A.1 Will, the trial Court disbelieved the Will for the following reasons:

- a) that the original Will was not produced;



b) that the scribe/attestor was examined as P.W.2. His statement does not deserve to be accepted as it does not satisfy the requirements of Sec. 68 of the Indian Evidence Act.

c) The legatees under the Will were stated to be present at the time when the Will was executed, and hence their influence affecting the free will of the testator could not be ruled out.

8.2 The trial court would then proceed to hold that inasmuch as all the daughters were married prior to 1989, in terms of Sec.29-A of the Hindu Succession Act as was then in force, they were not entitled to any share in the ancestral properties, namely the properties described in Schedule-II (Item No.2), Schedule IV, Schedule VI, Schedule VII in the suit. Consequently, it invoked Sec. 6 of the Hindu Succession Act as it stood prior to its amendment Vide Act 39 of 2005, and allotted $\frac{1}{4}$ th share notionally to the share of Sundaram Servai, and distributed it evenly to all his nine children, with each of them taking $\frac{1}{36}$ share in the share notionally allotted to Sundaram Servai. Accordingly, in the ancestral properties, the trial court passed a preliminary decree declaring plaintiff's $\frac{10}{36}$ shares ($\frac{1}{4} + \frac{1}{36}$). So far as the other properties, namely, the properties of Parvatham Ammal (Schedule-I Item No. 1, Schedule -II Item No1., Schedule -III), and the self-acquired property of Sundaram Servai in Schedule V, the trial court granted $\frac{1}{9}$ th share to the plaintiff.

9. Aggrieved by the finding of the trial court rejecting Ext.A-1 Will, the plaintiff had preferred A.S.No.14 of 2012 before the Sub Court, but without any tangible benefit as the first appellate court dismissed the appeal Vide its judgment and decree dated 04.03.2015. Hence, this second appeal at the instance of the plaintiff.

10. The appeal was admitted for considering the following substantial questions of law:

"i) Whether the courts below are legally right in non-suiting the appellant suit in this partition suit basing his title on Ex.A.1 Will dated 26.01.1999 executed by his father Sundaram Servai without setting aside the Will which stands in the way of the defendants/respondents 2 to 6 and their daughters/the respondents 7 to 11 of getting any share under Section 31 of the Specific Relief Act r/w Section 41 of TN Court Fees and Suit Valuation Act.?"

ii) Whether the courts below are legally right in non-suiting the appellant/plainiff in this partition suit in spite of this appellant is one of the admitted sons



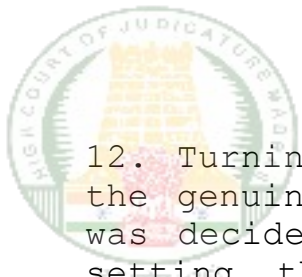
of Sundaram Servai along with respondents 1 and 6 other son of Sundaram Servai the original owner of the property even assuming without admitting that the Will executed by Sundaram Servai by virtue of the appellants birth when admittedly no earlier partition and allotment of properties was neither pleaded nor proved particularly when the respondents have specifically admitted that the second item property in S.No.214/2 and Item 4, 6 and 7 belonged to the father of the appellant and the respondents 1 to 6 Sundaram Servai ancestrally?

iii) Whether the non-suiting of the appellant suit by both Courts are right in spite of no objection having been expressed for partition by the respondent/defendant with regard to all the properties except in S.No.215/2 in the first item and with regard to 21 cents in third item property as agreed and admitted by the 1st respondent/1st defendant's written statement?

iv) Whether the both Courts below are legally right in not considering the vital aspects that Paruvatham Ammal wife of Sundaram Servai having pre-deceased her husband Sundaram Servai and thus Sundaram Servai having become exclusive legal heir of Paruvatham Ammal, Sundaram Servai having legal right to execute the Will?

v) Whether the courts below are legally right in dismissing the suit of the appellant on the ground that Sundaram Servai had no testamentary capacity to execute the Will with regard to the properties standing in the name of his wife Paruvatham Ammal. When Paruvatham Ammal had no income of her own to purchase the property?"

11. Of the substantial questions of law framed, question No.2 may not be relevant since the Courts below have given a decree vis-a-vis all the properties involved in the suit except Schedule I item 2 and for part of Schedule III as regards the property covered under Ext.B4 and Ext.B.6. So far as substantial question No.4 is concerned, it is shocking to state the least. When a Hindu female predeceases her husband leaving behind her children, then under Sec.15 of the Hindu succession Act, each of her heirs would be entitled to a share equal to the other. Hence the very supposition that Sundaram Servai, the husband of Parvathammal, alone would succeed to the properties owned by the latter is a terrible misconception in law. This necessarily has to be decided against the appellant.



12. Turning to the proof of the Ext.A-1 Will, the finding as to the genuineness of the said Will is a question of fact and this was decided concurrently against the plaintiff. It is in this setting, the learned counsel for the appellant argued:

- that Ext.A1, a Will dated 26.11.1997 was executed by Sundaram Servai, father of the plaintiff, when he was in a conscious state of mental disposition, and that it was adequately proved by the attesting witness.
- the trial Court had gone wrong in rejecting the certified copy of the Will, marked Ext.A1, and in demanding the production of the original Will, which the plaintiff contends has been lost. Indeed, when Sundaram Servai died, the plaintiff was not in the family house, and taking advantage of the situation, the defendants 2 to 4 had removed the same.
- if only the contesting defendant were aggrieved by the Will, they should have filed a suit for cancellation of Ext.A.1, Will, in terms of Section 31 of the Specific Relief Act, or at least should have preferred a counter claim to that effect. They did not do it.

13. Per contra, the learned counsel for the respondents argued:

- To prove the Will, the plaintiff had examined one Balakrishnan as P.W.2. He claims that he had prepared the Will and also attested the Will. In other words, he is both the scribe of the Will besides being an attestor thereof. But, the certified copy of the Will produced by the appellant/plaintiff shows that the Will was prepared by a certain S.B.S.Pandian, which instantly implies that the Will now in question cannot be the Will which the plaintiff claims. If it is not, then it is apparent that P.W.2 was plainly lying before the Court. Even if this is kept aside the testimony of P.W.2 do not indicate that his evidence satisfies the criteria mandated for proving the ingredients of Sec. 63 of the Indian Succession.
- This apart, P.W.1 has admitted that not only he, but the two other legatees under the Will have also actively participated in the preparation, execution and registration of the Will. He has testified that all the three sons of Sundaram Servai were present at the time when the Will was executed and also were present when the Will was registered.
- Under the alleged Will, Sundaram Servai had dealt with more than his share, and it is difficult to believe that if only Sundaram Servai, had been in a sound state of mental disposition he might not have ever executed a Will including



the properties belonging to his wife entirely or any excess of his share in the ancestral properties.

- This apart, exclusion of all the daughters, who are his natural heirs entirely from inheriting a legacy under the Will is not adequately explained.

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14. Relying on the ratio in **Vineeta Sharma Vs Rakesh Sharma** [(2020) 9 SCC 1], the learned counsel argued that inasmuch as the preliminary decree passed was subsequent to the amendment of Sec.6 of the Hindu Succession Act vide Act 39 of 2005, this Court has to revisit the preliminary decree, and should make it in conformity with Sec.6 as amended, as well as the ratio in **Vineeta Sharma case**

15.1 This Court carefully weighed the rival submissions. The real bone of contention between the parties is Ext.A.1 Will. In this Will, Sundaram Servai had dealt with all the properties which includes not only the property of his wife Parvathammal but also the portion of the property in Schedule III which Parvathammal herself had alienated vide Ext.B.4 and Ext.B.6, and also whole of the ancestral properties well beyond his shares in them. This per se does not imply that the Will ought to be held bad, but it does provide a circumstance to suspect the mental state of Sundaram Servai. Would he have included all the properties of whatever kind in his Will if only he had the free will to execute it, or was in a sound state of mental disposition?

16. Turning to the defence of the contesting defendants against Ext.A.1 is concerned, they denied very execution of Ext.A.1. In this context, the non- production of original Will becomes significant. A certified copy of the Will may not be ideal to prove the signature of the testator. The plaintiff at least should have summoned the registering authority to produce the register containing the Will, and should have opted for comparison of the signature of the testator with any of his admitted signatures. But that was not done. This is his first fault. Then comes the second fault line in his case. He had examined a certain Balakrishnan as P.W.2. As was pointed out by the counsel for the defendants, P.W.2 in his testimony would depose that he had played twin roles vis-a-vis the Will - of preparing or drafting the Will, and also attesting it along with another. On perusing Ext.A.1, it is evident that the Will was prepared by a certain S.B.S.Pandian and not by P.W.2. The third fault line in the plaintiff's case is that in proving the attestation, P.W.2 does not speak to the requirements of Section 63 of the Indian Succession Act. Fourthly, there is no explanation whatever for Sundaram Servai to exclude his daughters, who are few of his natural heirs. Fifthly, all the three beneficiaries under the Will have actively participated in the preparation, execution and registration of the Will, and P.W.1 admits to the same.



17. Inasmuch as, the finding as to the genuineness of the Will is a question of fact and inasmuch as this Court is satisfied that the approach of the Courts below in appreciating the evidence for arriving on a fact finding as to the genuineness of Ext.A.1, Will is not faulty, this Court does not choose to interfere with the same under Section 100 of Code of Civil Procedure.

18. This now takes to the next stage in ascertaining the share to which the plaintiff would be entitled to in terms of Section 6 of the Hindu Succession Act, as amended by Act 39/2005 and the implication of the ratio in **Vineetha Sharma's case**, since its amendment vide Act 39/2005 removed the embargo of marital status of the daughters for creating an eligibility which was one of the criterion under Sec.29-A of the Hindu Succession Act as was in force till Act 39/2005 eclipsed it, and elevated the daughters to be same status of male coparceners, and accordingly the daughters would be entitled to the same share as that of the sons in the ancestral properties.

19. However, two of the daughters of Sundaram Servai, , namely Vasantha and Rakkammal had passed away, of whom Vasantha had died about a month prior to the coming into force of the amended Section 6 of the Hindu Succession Act.

Section 6 : Devolution of interest in coparcenary property.

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), in a Joint Hindu family

governed by the Mitakshara law, the daughter of a coparcener shall,

(a) by birth become a coparcener in her own right the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.



(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.--For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

.....

If the above provision is carefully scanned, it could be seen that Sec.6(1) makes a declaratory statement that daughters would be treated as coparceners at par with the sons, but does not specify anything as to whether such daughters must be alive on the date of coming into force of Act 39 of 2005 to enable the children of daughters to claim a share in the ancestral property. Here Sec. 6 (3) provides a clue. Its opening statement is '**Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005)...**', and this indicates that the Parliamentary



intent to pass on the benefits that a daughter-coparcener had obtained under the amended Sec.6 to her heirs is allowed only to that class of daughters who die after the commencement of Act 39 of 2005 and not the one died before it. This would imply that only children of Rakkammal would be entitled to succeed to the share of Rakkammal as a coparcener, but not the children of Vasantha. And, on the daughters of Sundaram Servai becoming coparceners, the share of the plaintiff in the ancestral properties would be reduced from $\frac{1}{4}$ th share to $\frac{1}{8}$ share. The share as declared by the trial court therefore would undergo a change and it is provided in the table below:

Properties	Shares
Ancestral Properties : Item No.2 in Schedule No.II Schedule IV Schedule VI Schedule VII	Barring Vasantha, Sundaram Servai and each of his remaining eight children will be entitled to $\frac{1}{9}$ share. On the death of Sundaram Servai, his $\frac{1}{9}$ share devolved on his wife and nine children. In other words, each of them will be entitled to $\frac{1}{90}$ share in the shares of Sundaram Servai. Out of this, $\frac{1}{90}$ share of Sundaram Servai that devolved on Parvatham Ammal further devolved on all her nine heirs equally and accordingly, each would be entitled to $\frac{1}{810}$ share. In all, barring the heirs of Vasantha (defendants 10 & 11), all the other sharers will be entitled to $\frac{1}{9} + \frac{1}{90} + \frac{1}{810} = \frac{10}{81}$ share each. So far as Vasantha's children are concerned, they are entitled to $\frac{1}{81}$ shares.
Personal Properties of Sundaram Servai or Parvatham Ammal (as the case may be) : Item 1 in Schedule I Item 2 in Schedule II Schedule III Schedule V	Each of the heirs of Sundaram Servai or their legal representatives will be entitled to $\frac{1}{9}$ share.

20. In fine, the appeal is dismissed, but with a modification of the decree in accordance of the law that is now prevailing, and the plaintiff's $\frac{10}{81}$ share in Item No.2 in Schedule II, Schedule IV, Schedule VI and Schedule VII and $\frac{1}{9}$ share in Item No.1 in Schedule I, Item No.2 in Schedule II, Schedule III and Schedule V



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are now hereby declared. No costs. Consequently, () ed
miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS I)

// True Copy //

/07/2023

Sub Assistant Registrar(CS)

To

1.The Subordinate Judge, Ramanathapuram.

2.The District Munsif, Ramanathapuram.

COPY TO:

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

+1 CC to M/s.T.R.JEYAPALAM, Advocate (SR-32559[F] dated
19/07/2022)

+1 CC to M/s.K.SATHIYA SINGH, Advocate (SR-32311[F] dated
18/07/2022)

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