



S.A.No.209 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.11.2023

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THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.209 of 2021

&

C.M.P. No. 4175 of 2021

S.Athilakshmi

... Appellant

Vs

1.Ramakrishnan

2.S.Munusamy

... Respondents

Prayer : The appeal is filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree dated 30.07.2020 made in A.S.No. 21 of 2014 on the file of the Principal District Judge, Kancheepuram at Chengalpattu and modifying the Judgement and Decree dated 21.12.2011 passed in O.S.No. 7 of 2009 by the Principal Subordinate Judge, Chengalpattu.



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For Appellant : Mr. K.C. Karl Marx

For Respondents : Mr. J.Manoharan

JUDGEMENT

The plaintiff in a suit for partition is the appellant before this Court challenging the Judgement and Decree in A.S.No.21 of 2014 of the Principal District Judge, Kancheepuram at Chengalpattu, in and by which the learned Judge had modified the Judgement and Decree of the learned Principal Subordinate Judge, Chengalpattu in O.S.No.7 of 2009. The facts necessary for disposing of the Second Appeal is herein below set out and the parties are referred to in the same litigative status as before the Court.

2. The plaintiff had filed the above suit seeking partition of her 1/3rd share in the suit schedule property, which are agricultural lands

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measuring an extent of 7.35 acres and for a permanent injunction restraining the defendants or any other persons claiming under them from alienating the same.

3. It is the case of the plaintiff that she and the defendants are the children of Seetharam Naidu who had died on 07.01.2000. The said Seetharam Naidu died leaving behind him surviving his wife, Radhammal his sons the defendants and daughter, the plaintiff to succeed to his estate. The wife of the said Seetharam Naidu also died on 19.02.2007 leaving behind her surviving the plaintiff and the defendants as her legal heirs to succeed to her estate.

4. The plaintiff would submit that the property in question is an ancestral property, since her grand father Raghavalu Naidu had owned the extent of 6.50 acres of agricultural lands in Konadhi Village and 0.85 cents in Kattankulathur Village of Chengalpattu District. On the



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death of the said Raghavalu Naidu, the plaintiff's father became the absolute owner and after him the property devolved on his wife and children, the plaintiff and the defendants herein. On the death of the mother, it was only the plaintiff and the defendants who were entitled to the suit properties. The plaintiff would submit that despite her several requests asking her brothers to effect partition, they had not come forward to effect the same. Therefore, the plaintiff has come forward with the suit for partition.

5. The 1st defendant alone had filed a written statement and the 2nd defendant remained an ex parte.

6. It is the case of the 1st defendant that their father was the absolute and exclusive owner of the properties at Konadhi village and Kattankulathur village and not his grand father Raghavalu Naidu. His grand father has not purchased any of the property and therefore the



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contention of the plaintiff that these properties are ancestral properties were denied. The 1st defendant would further submit that his father Seetharam Naidu during his life time had executed a Will bequeathing the property to his grand sons, Dhanasekaran and Dhinakaran, sons of the 1st defendant and Saravanan, son of the 2nd defendant under a registered document dated 07.07.1997 on the file of the Sub Registrar, Chengalpattu. On the death of the said Seetharam Naidu, the Will came into effect and therefore the suit for partition filed by the plaintiff is not maintainable, particularly when the properties are the self acquired properties of the said Seetharam Naidu and he had deemed it fit to bequeath the properties on his grand sons.

7. The 1st defendant would submit that during his life time, the said Seetharam Naidu had celebrated the marriage of the plaintiff with great pomp and show, gifting her Gold ornaments, silver, vessels and other articles incurring expenses of a sum of Rs.1,00,000/- in the year



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1976. The 1st defendant would submit that the plaintiff's husband in a Conductor in the State Transport Corporation and she is leading a very comfortable life. Therefore, he had sought for the dismissal of the suit.

8. The Trial Court had framed the following issues:

“(1)Whether the suit properties are belongs to Raghavalu Naidu?

(2)Whether the suit properties are individual properties of Seetha Rama Naidu?

(3)Whether Seetharama Naidu executed a Will dated 7.7.1997?

(4)Whether the plaintiff is entitled for 1/3rd share in the suit properties?

(5)For what relief the plaintiff is entitled?



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9. The plaintiff had examined her self as P.W.1 and one Subbaralu as P.W.2 and marked Ex.A.1 to Ex.A.18 in support of her case. On the side of the defendants, the 1st defendant examined himself as D.W.1 and one Anandan, Perumal Naidu and Harikrishnan as D.W.2 to D.W.4, respectively. The 1st defendant had also marked Ex.B.1 to Ex.B.10.

10. The learned Judge on considering the evidence on record come to the conclusion that most of the suit properties were purchased by Seetharam Naidu as evidenced by Ex.B.1 to Ex.B.9. The learned Judge took note of the fact that Ex.A.2 and Ex.A.4, patta stood in the joint name of the plaintiff and the defendants. The learned Judge observed that the property comprised in S.No.1/2 A measuring an extent of 44.0 acres, 2B – 1.5 ares, 3A 28.0 ares, 3B – 1.15 ares, Survey No.18/4 7.5 ares, Survey No.51.6 to an extent of 4.0 ares,



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Survey No.53/1 to an extent of 8.5 ares belonged to Raghavalu Naidu and the other properties belonged to Seetharam Naidu.

11. The learned Judge further held that the Will, Ex.B.10 had been proved by the defendants by providing both oral as well as documentary evidence and therefore the plaintiff was bound by the same and the self acquired properties of Seetharam Naidu would devolve upon the legatees. The learned Judge ultimately held that the plaintiff was entitled to partition in respect of the lands covered under S.No.1/2A, 1/2B, 1/3A, 1/3B, 18/4, 51/6 and 53/1, with reference to the other properties the suit came to be dismissed.

12. Aggrieved by the said Judgement and Decree, the plaintiff had filed A.S.No.21 of 2014 on the file of the Principal District Judge, Kancheepuram. The learned Judge by her Judgement and Decree dated 30.07.2020 was pleased to modify the decree by reducing the share of



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the plaintiff to a 1/4th share since the share of Seetharam Naidu in the properties of Raghavalu Naidu would be covered by the Will Ex.B.10 though the defendants had not challenged the Judgement and Decree of the Trial Court. Challenging this Judgement and Decree, the plaintiff is before this Court.

13. Mr. K.C.Karl Marx, learned counsel appearing on behalf of the plaintiff had incisively argued the appeal by attacking the Judgement and Decree of the Courts below on the following grounds.

(a) That the Court has overlooked the suspicious circumstances surrounding the execution of the Will, since the Will does not give any reasons for excluding the wife and daughter from a share in the Will.

(b) The execution of the Will had been disputed and the defendant had not taken any steps to send the signature for verification.

(c) D.W.3 who is one of the attesting witness had not submitted



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himself for cross examination, as a result of which his evidence stood eschewed.

(d)The Will has not been proved in the manner contemplated under Section 63 (c) of the Indian Succession Act since there is no evidence to show that the attesting witnesses have witnessed the testator affixing the signature as also the signature of either of them, which according to him is sine qua non under the provisions of Section 63 (c) of the Indian Succession Act.

14. The learned counsel would draw the attention of this Court to the deposition of D.W.1, wherein he has submitted that the mutation of the records had not taken place though his father had passed away in the year 2000, which according to the counsel only give rise to a doubt that the Will has not been executed with the full knowledge of the said Seetharam Naidu.



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15. The learned counsel would also draw the attention of the Court to the cross examination of D.W.4, one of the attesting witness to contend that the witness has not spoken to his having seen the other witness signing the Will.

16. He would rely upon the following Judgement in support of his contention that the Will has been executed under suspicious circumstances in **2009 (3) SCC 687 – Bharpur Singh and other Vs. Shamsheer Singh**, with particular reference to paragraph no.23, where the Hon'ble Supreme Court has set out certain circumstances where suspicious circumstances could be inferred in the execution of the Will.

17. He had also relied upon the Judgement reported in **2008 (5) CTC 294 – Sivasamy and others Vs. Poomalai and others**, where the learned Judge had observed that the examination of one witness alone



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is not sufficient since the existence of the second attesting witness is itself in doubt.

18. He would also rely upon the unreported Judgement of this Court in *S.A.No.371 of 2007*, with particular reference to paragraph no.16, where the failure to provide for the wife has been considered as one of the reasons for holding that the Will was executed under suspicious circumstance. Therefore, the learned counsel would submit that the Judgement and Decree requires re-consideration and the plaintiff may be allotted a 1/3rd share in the suit schedule property.

19. The learned counsel for the 1st defendant would submit that a perusal of the patta would clearly show that the properties are the self acquired properties of Seetharam Naidu. The said Seetharam Naidu in a sound and disposing state of mind has executed Ex.B.10 Will bequeathing properties upon the defendants and upon their children.

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Both the parents were taken care of by the defendants and therefore the allegation that the father had not made provisions for the mother and therefore the Will is shrouded with suspicion is not true. Further, the father during his lifetime has married off the plaintiff providing her with the required jewellery and customary articles.

20. The learned counsel would submit that the father had died in the year 2000 and the plaintiff had not taken any steps to demand the partition till 2009 when the suit was filed. The plaintiff has not chosen to institute the suit even during the life time of the mother i.e., till the year 2007 and the suit has been filed two years thereafter. There is no pleading to the effect that the mother was not taken care of by the brothers. Infact, the plaintiff has not made any mention about the Will or the reasons as to why she had not sought for partition during the life time of her mother. The plaintiff has not denied the contents of the written statement by filing a reply statement. Therefore, he would



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submit that the Judgement and Decree of the Court below does not require re-consideration.

21. Heard the learned counsels and perused the records.

22. The Second Appeal has been admitted on the following substantial questions of law:

“(a)Whether the Trial Court and the Appellate Court has erred in law in not holding that the entire suit schedule property are ancestral property when the properties alleged to have been purchased by Seetharama Naidu are also properties purchased from the income accrued from the properties of the Ragavalu Naidu?

(b)Whether the Trial Court and the Appellate Court has erred in law in holding that the Will, Ex.B-10 was genuine when there is a deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act as DW4 one of the attesting witness of Ex.B-10 in his



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evidence has not satisfied the requirements of attestation of the Will by other witness also?"

23. The plaintiff's case revolves around two factors set out herein below:

(a) That the properties are ancestral properties, which the said Seetharam Naidu had succeeded to and the existence of the ancestral properties leads to the presumption that the other properties have been purchased from and out of the ancestral nucleus.

(b) The Will which has been executed is shrouded with suspicion since there is no explanation as to why no provision has been made for the wife and the Will has not been proved as per the provisions of Section 68 of the Indian Evidence Act and Section 63 (c) of the Indian Succession Act.



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24. The plaintiff has come to the Court stating that their grand father Raghavalu Naidu owned properties in Konadhi Village (6.50 acres in Patta No.27) and another extent of 0.85 cents in Kattankulathur Village. Patta no.27 has been marked as Ex.A.1, however, the owner is shown as Seetharam Naidu son of Raghavalu Naidu and the same covers the other survey numbers totally measuring an extent of 63.5 ares. Ex.A.2 also covers patta No.27. However, it appears to be a joint patta in the name of the plaintiff, defendants and their mother. This patta has been issued in the year 2007, two years prior to the filing of the suit.

25. Ex.A.3 is with reference to patta No.268, which once again shows the owner as Seetharam Naidu son of Raghavalu Naidu and not in the name of Raghavalu Naidu alone. Ex.A.4 relates to the very same patta in which names of the plaintiff, defendants and their mother has been included. There is no explanation as to how the names of the



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plaintiff, defendants and their mother had been included in the year 2007 when Seetharam Naidu had executed Ex.B.10 Will in the year 1997 and passed away in the year 2000. The date on which the original patta has been mutated in the names of the plaintiff, defendants and their mother, the Will had already come into effect.

26. The properties in respect of which the Trial Court had granted a preliminary decree stand in the name of Seetharam Naidu. However, the Trial Court has granted partition in respect of these properties on the ground that as per Ex.A.13, encumbrance certificate, it is seen that Raghavalu Naidu had purchased lands in S.No.1/2, 1/3 and 51/6 of Konadhi Village and S.Nos.51/3, 53/2, 54/2, 54/3 and sold the same to one Rangasamy under a registered sale deed dated 18.06.1931. The Trial Court has come to the conclusion that these properties comprised in S.No.1/2A, 1/2B, 1/3A, 1/3B, 18/4, 51/6 and 53/1 have been purchased by Raghavalu Naidu and therefore these



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properties are available for partition. The defendants have not challenged the said finding. The plaintiff has pleaded that the properties belonged to Raghavalu Naidu on the basis of Ex.A.1 and Ex.A.3 patta. Except for patta and encumbrance certificate, no other documents have been filed by the plaintiff to prove the same. However, the defendants have not challenged the findings of the Trial Court. Therefore, this Court does not wish to re-appreciate the evidence once again.

27. The defendants would submit that the properties now belonged to their sons as Seetharam Naidu executed Ex.B.10, Will in favour of their sons. The plaintiff has not filed any reply statement challenging the said Will by questioning the non inclusion of herself and her mother, the wife of Raghavalu Naidu as beneficiary in the Will. That apart, as on date of the filing of the suit, the wife of the testator is no more. The plaintiff has also not filed a suit immediately on the

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death of her father Seetharam Naidu nor has she filed a suit before the death of her mother. She has waited till her mother's demise to file a suit. She has not pleaded that her mother was not taken care of by her brothers.

28. The defendants have examined the scribe as well as the attesting witness. One of the witnesses, D.W.3 had been examined in chief, however, since he did not submit himself for cross examination his evidence has been eschewed. However, the other attesting witness has been examined as D.W.4.

29. The learned counsel for the plaintiff would rely upon the Judgement reported in **2003 (2) SCC 91 – Janki Narayan Bhoir Vs. Narayan Nameo Kadam**, to buttress his arguments that to prove attestation, the attesting witnesses have to satisfy to the fact that he has seen the other witness attesting the Will, which is absent in the instant



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case. He would rely upon the evidence of D.W.4. He would place reliance on the fact that nowhere has the attesting witness spoken about his seeing the other attesting witness affixing signature.

30. In order to appreciate this legal submission, it is necessary to extract the provisions of Section 68 of the Evidence Act and Section 63 (c) of the Indian Succession Act, which reads as follows respectively:

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any



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document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]”

“63. [\(c\)](#) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of



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attestation shall be necessary .”

31. In the Judgement reported in **2003 (2) SCC 91 – Janki Narayan Bhoir Vs. Narayan Namdeo Kadam**, the Hon'ble Supreme Court was considering a case where one of the attesting witness had been examined had adduced evidence to the effect that he did not know whether the other attesting witness was present at the time of the execution of the Will and that he did not remember as to whether both he and the other witness as well as the scribe were present at the same time. Since he had not seen the other attesting witness scribing his mark, he was not in a position to identify the thumb impression on the Will. The scribe had adduced evidence to the execution of the Will by the testator as well as the attesting witness.

32. The Hon'ble Supreme Court observed that though Section 68 of the Evidence Act provides that it would suffice if one of the



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attesting witness is examined, however, considering the language of Section 63 (c) it has to still be proved that the attesting witness had not only see the testator affixing his signature but should also be in a position to prove the attestation of the Will by the other attesting witness as well.

33. This Judgement has been followed in another Judgement of the Hon'ble Supreme Court reported in **2015 (8) SCC 615 – Jagdish Chand Sharma Vs. Narain Singh Saini**. The learned Judges had relied upon the Judgement in **2003 (2) SCC 91 – Janki Narayan Bhoir Vs. Narayan Namdeo Kadam** and had stated as follows:

*“It was expounded that on a combined reading of **Section 63** of the Act and **Section 68** of the 1872 Act, it was apparent that mere proof of signature of the testator on the Will was not sufficient and that attestation thereof was also to be proved as required by **Section 63** (c) of the*



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Act. It was, however, emphasised that though [Section 68](#) of the 1872 Act permits proof of a document compulsorily required to be attested by one attesting witness, he/she should be in a position to prove the execution thereof and if it is a Will, in terms of [Section 63](#) (c) of the Act, viz, attestation by two attesting witnesses in the manner as contemplated therein. It was exposted that if the attesting witness examined besides his attestation does not prove the requirement of the attestation of the Will by the other witness, his testimony would fall short of attestation of the Will by at least two witnesses for the simple reason that the execution of the Will does not merely mean signing of it by the testator but connotes fulfilling the proof of all formalities required under [Section 63](#) of the Act. It was held that where the attesting witness examined to prove the Will



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under Section 68 of 1872 Act fails to prove the due execution of the Will, then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects.”

34. Therefore, although Section 68 of the Evidence Act states that examining one witness would suffice but the language of Section 63 (c) of the Indian Succession Act would make it mandatory that the one attesting witness who is so examined should depose to the fact that he had seen the other attesting witness affix his signature / mark to the Will and vice versa.

35. In the light of the above, if the instant case is analysed it is seen that one attesting witness had been examined as D.W.3, however, he had not submitted himself for cross examination and therefore his evidence came to be eschewed. The second attesting witness has been



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examined as D.W.4 and has deposed to the effect that he has seen the testator and the other attesting witness set their signature / mark to the Will.

36. The plaintiff has however not chosen to cross examine him. In fact, the plaintiff's counsel has stated that they are not cross examining D.W.4. Therefore, the contention of the plaintiff that the provisions of Section 63 (c) of the Indian Succession Act read with Section 68 of the Evidence Act has not been complied with does not hold water and the Judgement referred to would not be applicable to the case on hand.

37. As already stated, except for patta and encumbrance certificate, the plaintiff has not produced any documents to show that it is the income from the ancestral properties that has contributed for the purchase of the other properties. In fact, the plaint is absolutely



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silent about these facts. The plaintiff who has come forward with the specific case that it was the income from the ancestral properties which has contributed for the purchase of the other properties has not pleaded or proved the same. Therefore, the Substantial question of law No.1 is answered against the plaintiff.

38. This Court has already observed that the Will Ex.B.10 has been proved as per the mandatory requirement of Section 68 of the Indian Evidence Act and Section 63 (c) of the Indian Succession Act. That apart, the Will is a registered Will. The very same attesting witness of the Will are the identifying witnesses before the Sub Registrar, Chengalpattu.

39. The Lower Appellate Court has proceeded to reverse the Judgement of the Trial Court with reference to the share without there being any cross appeal on the side of the defendants and the defendants



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have not questioned the share. Therefore, to that extent, the Lower Appellate Court has erred in modifying the Judgement of the Trial Court.

40. In the result, the Second Appeal is partly allowed. The Judgement and Decree of the Lower Appellate Court in so far as it reduces the share of the plaintiff is set aside and the Judgement and Decree of the Trial Court is restored. Consequently, the connected civil miscellaneous petition is closed. No costs.

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Index: Yes/No
Speaking order/non-speaking order



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To,

1.The Principal District Judge,
Kancheepuram at Chengalpattu.

2.The Principal Subordinate Judge,
Chengalpattu.



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