



A.S.No.380 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2023

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE C. KUMARAPPAN

A.S.No.380 of 2014

and

M.P.No.1 of 2014

K.Marudhachalam

... Appellant

Vs.

1.K.Rajeswari (died)

2.K.Balasundaram (died)

3.Prabala

4.Ramaswamy

5.Radhakrishnan

6.Balamurugan

7.Balan

8.Parvathy

9.M/s.Orange Opticals, represented by its

Proprietor,

D.No.1194, Rangae Gowder Street,

Coimbatore.

10.M/s.Rajah Trading Corporation,

Represented by its Proprietor Rajagopal

No.545, Vysial Street, Coimbatore – 641 001.



A.S.No.380 of 2014

WEB COURT

11.Sangeetha Ramaswamy

12.Nirmala Balasundaram

13.Premalatha

... Respondents

[R1 died, R11 is brought on record as LR of deceased R1 viz., K.Rajeswari, vide order of Court dated 08.03.2023 made in C.M.P.Nos.19141, 19144 & 19145 of 2022 in A.S.No.380 of 2014]

[R2 died, R12 and R13 are brought on record as LRs of deceased R12 viz., K.Balasundaram, vide order of Court dated 08.03.2023 made in C.M.P.Nos.19140, 19142 & 19146 of 2022 in A.S.No.380 of 2014]

Prayer : Appeal Suit filed under Order 41 of Code of Civil Procedure against the judgment and decree dated 20.02.2014 in O.S.No.111 of 2012 on the file of the IV Additional District and Sessions Court, Coimbatore.

For Appellant	:	Mr.L.Rajasekar
R1 and R2	:	Died (Steps taken)
For R3 to R10	:	No appearance
For R11 to R13	:	Mr.N.Ishtiaq Ahmed



A.S.No.380 of 2014

WEB COPY

J U D G M E N T

(Judgment was delivered by **S.S. SUNDAR, J.**)

The Appeal is directed against the judgment and decree dated 20.02.2014 in O.S.No.111 of 2012 on the file of the IV Additional District and Sessions Court, Coimbatore. The 1st defendant in the suit in O.S.No.111 of 2012 is the appellant in the above appeal.

2.Respondents 1 and 2 in this appeal, who are the sister and brother of the appellant/1st defendant, filed the suit in O.S.No.111 of 2012 on the file of the IV Additional District and Sessions Court, Coimbatore, for partition and separate possession of their 2/3 share in all the suit properties and for consequential reliefs.

3.The suit properties are described in Item Nos.1 to 4. The suit in respect of Items Nos.2, 3 and 4 was dismissed by the trial Court and the plaintiffs, who are respondents 1 and 2 in this appeal, have not challenged the judgment and decree. The trial Court decreed the suit only in respect of



A.S.No.380 of 2014

suit 1st item, and therefore, the appeal is confined only in respect of Item No.1 of the suit Schedule.

4.As regards Item No.1, it is the case of the respondents 1 and 2 as plaintiffs that the suit property originally belonged to the grandmother of plaintiffs and 1st defendant, by name Smt.Kullammal. It is the further case of plaintiffs that, after the death of Smt.Kullammal, their father Sri Kasi Viswanathan Chettiar got the property as the only legal heir of Smt.Kullammal. Stating that their father Sri Kasi Viswanathan Chettiar died on 14.06.1985, the plaintiffs contended that they are entitled to 1/3 share each in suit 1st item.

5.Though the plaintiffs claimed right in respect of other items, we are not concerned with the same in the present appeal, as the findings of the trial Court have become final in respect of Item Nos.2 to 4 as the dismissal of the suit in respect of Item Nos.2 to 4 is not challenged by the plaintiffs.



A.S.No.380 of 2014

WEB COPY

6.As regards suit 1st item, the appellant/1st defendant came forward with a specific case that his father Sri Kasi Viswanathan Chettiar executed a Will on 10.04.1985 in favour of 1st defendant. It is contended that after the death of Sri Kasi Viswanathan Chettiar, the father, the Will came into force and that the 1st defendant became the absolute owner as per the Will marked as Ex.B11. It is also stated by the appellant that he constructed a RCC building in an extent of 800 sq. ft. and let out the suit 1st item in favour of defendants 4 to 9.

7.Before the trial Court, the wife of 2nd plaintiff examined herself as P.W.1 and one Sangeetha, wife of Sridhar, was examined as P.W.2. On the side of plaintiffs, Exs.A1 to A7 were marked. The 1st defendant examined himself as D.W.1 and one Thennarasu was examined as D.W.2. Exs.B1 to B19 were marked on the side of defendants.

8.The trial Court, having regard to the pleadings, framed the following issues :



- i. *Whether the Will dated 14.06.1985 is valid under the eye of law?*
- ii. *Whether the properties under item numbers, two, three and four were purchased from the rental income derived from the ancestral property and family business ?*
- iii. *Whether the plaintiff is entitled for 1/3 share each as prayed for?*
- iv. *Whether the plaintiffs are entitled for permanent injunction as prayed for ?*
- v. *To what other reliefs, the plaintiffs are entitled ?*

9.The trial Court, on the question of validity of the Will dated 14.06.1985, rendered a specific finding that the Will pleaded by the 1st defendant is not proved in the manner known to law. The trial Court found that the original Will is not produced. Only a photocopy of the Will is marked subject to the objection raised by the plaintiffs. Though it is stated that the original Will was produced by the 1st defendant in another suit filed by him as against plaintiffs in O.S.No.798 of 2002, it is admitted that the said suit was decreed *ex parte* and it was a suit for bare injunction. Though the 1st defendant had ample opportunity to produce the original Will, no



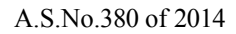
A.S.No.380 of 2014

valid explanation was given by the 1st defendant for non-production of original of Will dated 14.06.1985. The trial Court ultimately found that the document Ex.B11 cannot be accepted as a valid document in the absence of any explanation for the non-production of original Will. Therefore, the suit in respect of Item No.1 was decreed as prayed for, declaring 1/3 share of each of the plaintiffs. As regards Items 2, 3 and 4 of suit schedule, the trial Court dismissed the suit as they belonged to either the 1st defendant or his wife and that they are their separate properties.

10. Aggrieved by the judgment and decree of the trial Court decreeing the suit in respect of suit 1st item, the 1st defendant has preferred the above appeal.

11. During the pendency of the appeal, the plaintiffs/respondents 1 and 2 died and their legal heirs have been brought on record as respondents 11 to 13.

12. The appellant has raised several grounds in the memorandum of



11 to 13, have made their submissions.

valid and proved in the manner known to law.

appellant, this Court is unable to accept the reason given by the appellant for



A.S.No.380 of 2014

non-production of the original Will.

WEB COPY

15.From the pleadings, no explanation is offered by the appellant for not examining any one of the attestors of the Will. Section 68 of the Indian Evidence Act does not dispense with the examination of one of the attestors of the Will. When the genuineness of the Will is in issue before the trial Court, the appellant ought to have examined one of the attestors of the Will. The evidence of appellant before the trial Court that some of the witnesses are not known to him, is evasive. The appellant has also given evidence to the effect that none of the attestors of the Will is alive. The case of appellant before trial Court is therefore misleading. When he does not know the persons who attested the Will, he cannot assert about the death of attestors. Even if the attestors are not alive at the time of trial, Section 69 of the Indian Evidence Act requires proof of the handwriting of attesting witnesses in the document. Section 69 reads as follows :

“69. Proof where no attesting witness found :

If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one



A.S.No.380 of 2014

attesting witness at least is in his handwriting, and that the signature of the person executing the documents is in the handwriting of that person.”

16.It has been held in the case of **Ramesh Verma through LRs v.**

Rajesh Saxena reported in **2017 [1] SCC 257** as follows :

“13.A will like any other document is to be proved in terms of the provisions of Section 68 of the Evidence Act and the Succession Act, 1925. The propounder of the will is called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of Section 68 of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement.”



A.S.No.380 of 2014

WEB COPY

17. When the genuineness of the Will is mainly in dispute, in the absence of any evidence to prove the Will dated 10.04.1985 pleaded by the appellant/1st defendant as required under Sections 68 and 69 of Indian Evidence Act, the trial Court is right in holding that the Will is not proved in the manner known to law. Therefore, this Court has no reasons to interfere with the findings of the trial Court as regards suit 1st item. As held by the trial Court, plaintiffs, namely respondents 1 and 2 herein, are entitled to get a decree for partition in respect of their 1/3 share each in respect of Item No.1. Therefore, this Court finds it appropriate to confirm the judgment and decree of the trial Court as no illegality or irregularity in the judgment is pointed out by counsel for appellant.

18. The above appeal is therefore devoid of merits and therefore, dismissed. No costs. Consequently, connected miscellaneous petition is closed.

(S.S.S.R., J.) (C.K., J.)
07.06.2023

mkn



A.S.No.380 of 2014

Internet : Yes

Index : Yes / No

To

1.The IV Additional District and Sessions Judge,
Coimbatore.

2.The Section Officer,		<i>with a direction to return</i>
VR Section, High Court,		<i>the records to the Court below,</i>
Chennai.		<i>if any, forthwith</i>



WEB COPY



A.S.No.380 of 2014

S.S. SUNDAR, J.
and
C. KUMARAPPAN, J.

mkn

A.S.No.380 of 2014

07.06.2023