



AS.No.73/2014

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MR. JUSTICE P.B.BALAJI

AS.No.73/2014 & CMP.No.19182/2022

1.Sadayappan
2.Rukmani
3.Selvaraj

.. Appellants /
Defendants

Vs.

1.Palanisamy
2.Saraswathi @ Sarasathal

.. Respondents
/Plaintiffs

Prayer:- Appeal Suit filed under Section 96 of CPC to call for records and set aside the judgment and decree dated 08.12.2011 made in OS.No.676/2009 on the file of the I Additional District Court, Coimbatore, insofar as the 1st part of the suit properties namely the agricultural land in SF.No.303 with an extent of 3.16 acres of Nambiyampalayam Village, Avinashi Taluk, Tirupur District, is concerned.

For Appellants : Mr.P.M.Duraiswamy

For Respondents : No appearance



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JUDGMENT

[Judgment of the Court was delivered by S.S.SUNDAR, J.]

- (1) Learned counsel for the respondents/plaintiffs did not appear before this Court as the learned counsel reported no instructions from respondents earlier. Hence, this Court directed the Registry to send notice to the respondents. Notice sent to the 1st respondent is returned with an endorsement "left". Notice sent to the 2nd respondent is returned with an endorsement "no such addressee". However, having regard to the fact that the appeal is pending from the year 2014 and the learned counsel for respondents reported no instructions, this Court is inclined to dispose of the appeal on merits.
- (2) Defendants in the suit in OS.No.676/2009 on the file of the I Additional District Court, Coimbatore, are the appellants in the above Appeal Suit.
- (3) Respondents in the above Appeal are plaintiffs in OS.No.676/2009 and they filed the said suit for partition and separate possession of



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their 5/6th share in the suit properties. The suit properties consist of two items. The first item is an agricultural land measuring an extent of about 3.16 acres in S.No.303 in Nambiymapalayam Village, Avinashi Taluk, Tirupur District and the 2nd item is a house property which is described with reference to four boundaries.

- (4) The case of plaintiffs is that the suit properties originally belonged to the father of Thiru.Velappa Gounder by name Nanjappa Gounder. The genealogy is not in dispute. After the demise of Nanjappa Gounder, it appears that his two sons namely Sri.Velappa Gounder and Sri.Ramasamy Gounder entered into a registered Partition Deed dated 24.02.1976 which is marked as Ex.A1. As per the registered Partition Deed under Ex.A1, the brothers have divided the properties by describing properties of Velappa Gounder as the co-parcenary properties. Velappa Gounder died on 10.06.2000 and his wife Mayangathal died on 10.11.2005. Velappa Gounder had a son and two daughters. The 1st plaintiff is the son and 2nd plaintiff is one of the two daughters of Velappa



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Gounder. 2nd defendant by name Rukmani is the other daughter of Velappa Gounder. The 1st defendant is the husband of 2nd defendant and 3rd defendant is the son of defendants 1 and 2. It is the case of plaintiffs that Sri Velappa Gounder executed a Will in respect of his own half share in favour of his wife Mayangathal admitting the right of 1st plaintiff.

- (5) In the plaint itself, it is stated that defendants had created a fake Will dated 27.12.1999 as if Velappa Gounder executed the same in respect of the entire lands. Apart from questioning the genuineness of the Will dated 27.12.1999, plaintiffs have also stated that the Will is not binding on plaintiffs as the properties bequeathed under the Will are joint family properties in which Velappa Gounder had no exclusive title. It is seen that as per the alleged Will dated 27.12.1999, Smt.Mayangathal and 2nd defendant were given life interest and vested interest in favour of 3rd defendant namely the son of the 2nd defendant/grandson of Velappa Gounder. It is further stated that defendants 2 and 3 along with Smt.Mayangathal executed a Sale Deed dated 12.07.2004 [Ex.A4] in favour of 1st



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defendant in respect of agricultural properties allegedly bequeathed under the Will dated 27.12.1999. Plaintiffs questioned the Sale Deed admittedly executed by defendants 2 and 3 in favour of 1st defendant on 12.07.2004. The 1st plaintiff being the member of joint family and son of Velappa Gounder, claimed 4/6th share and the 2nd plaintiff as daughter of Velappa Gounder claimed 1/6th share. Therefore, the suit was filed for partition in respect of 5/6th share of plaintiffs.

- (6) The suit was resisted by the defendants/appellants. It is admitted that Velappa Gounder executed a Will dated 06.06.1990 in favour of his wife Tmt.Mayangathal. It is further stated that Velappa Gounder executed a subsequent Will in favour of his wife Tmt.Mayangathal, defendants 2 and 3, who are daughter and grandson of Velappa Gounder. Stating that the second Will was executed by Velappa Gounder in his sound disposing state of mind, defendants/appellants resisted the suit for partition and separate possession. As regards the character of properties, it is stated in the written statement that plaintiffs' father Velappa Gounder got the



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suit property under the partition and therefore, Velappa Gounder had absolute right to dispose of the property as per his own Will. The case of appellants is also to the effect that the Will was also acted upon as they are in possession of the property as legatees under the Will claiming exclusive ownership over to the properties pursuant to the Will executed by their father on 27.12.1999.

(7) The Trial Court on the basis of pleadings, framed the following issues:-

1. Whether the plaintiff is entitled for partition as prayed for?
2. Whether the suit property is not ancestral property?
3. Whether the Will dated 27.12.1999 is genuine?
4. Has the Will dated 06.06.1990 any effect?
5. Whether the suit is not barred by limitation?
6. Whether the Court fee paid is correct?
7. Whether the suit as framed is not maintainable?
8. To what relief, the plaintiff is entitled to?

(8) Before the Trial Court, the 1st respondent examined himself as PW1 and marked Exs.A1 to A11 on behalf of plaintiffs. The 1st defendant was examined as DW1 and one Palanisamy was examined as DW2. Exs.B1 to B6 were marked on the side of defendants.



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(9) The Trial Court held that properties covered under the document-Ex.A1 Partition Deed dated 24.02.1976 are ancestral properties. As regards proof of Will, it is admitted that defendants have not produced the original Will dated 27.12.1999. Though certified copy of the registered Will was produced by plaintiffs as Ex.A3, it is admitted that 1st defendant is also one of the attestors. DW2 is the other attestor. Since attestors were examined without producing the original Will, the Trial Court found that the Will is not proved. The Trial Court also held that Velappa Gounder had no right to execute the Will in respect of the entire the suit property as he has only 1/2 share in the suit properties. Since the Will propounded by defendants was held not proved, the Trial Court rejected the contentions of the defendants and granted a decree for partition in respect of 2/3rd shares in all the suit properties holding that the female heirs are also entitled to 1/3rd share. Though execution of first Will marked as Ex.A2 is admitted, the Trial Court held that the first Will was also not produced and the appellants did not claim any right under the first Will dated 06.06.1990.



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Aggrieved by the judgment and decree of the Trial Court, defendants have preferred the above appeal.

- (10) Learned counsel appearing for the appellants referring to the application filed in CMP.No.19182/2022 for reception of additional documents, submitted that the original Will has now been produced before this Court by way of additional documents and therefore, the appellants must be given an opportunity to prove the Will executed by their father. Learned counsel then submitted that the suit properties were purchased by Nanjappa Gounder, the father of Sri. Velappa Gounder in the year 1952. However, the Sale Deed was not marked before the Trial Court. He also submitted that respondents never took care of their parents and therefore, Velappa Gounder voluntarily executed a Will in favour of his grandson/3rd defendant giving life interest in favour of Mayangathal, wife of Velappa Gounder and in favour of 2nd defendant/2nd appellant, the other daughter of Velappa Gounder. Though the learned counsel for the appellants admitted 1/3rd share to each of the plaintiffs in respect of the suit second item property,



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he contended that the decree granting 1/3rd share in respect of both items is not sustainable.

(11) Having regard to the pleadings of the respective parties before the Trial Court and the arguments advanced by the learned counsel for the appellants, following issues arise for determination before this Court:-

A) Whether the suit properties are the joint properties or exclusive properties of Velappa Gounder?

B) Whether the original Will dated 27.12.1999 alleged to have been executed by Velappa Gounder can be accepted as additional document by allowing CMP.No.19182/2022?

C) Whether the Will dated 27.12.1999 is genuine and proved in the manner known to law?

D) Whether the plaintiffs are entitled to any share in their father's one-half share in view of admission regarding the genuineness of earlier Will marked as Ex.A2?



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WEB COPY **POINTS [A] & [B]:-**

- (12) As regards character of properties, evidence of PW1 and plaintiff averments are specific that suit properties are joint family properties. The two witnesses examined on behalf appellants/defendants are not competent to speak about the character. The Partition Deed dated 24.02.1976 marked as Ex.A1 shows that the parties have divided the properties as their ancestral coparcenary properties. The following recitals in the document-Ex.A1 is relevant:-

"....இதனடியில் கண்டதும், நமக்கு
பிதுரார்ஜித வகையில் பாத்தியப்பட்டு இதுவரை
நமக்குள் பாகமில்லாது பொதுவாக அனுபவித்து
வந்ததில் இனியும் அப்படியிருக்கச்
சரிப்படாததினால் இதனடியில் கண்டபடி பாகம்
பிரித்துக் கொண்டுள்ளோம்....."

- (13) From the document-Ex.A1, this Court infers that the properties were divided by the brothers, namely, Velappa Gounder and Ramasamy Gounder treating them as their ancestral joint family properties. The word " பிதுரார்ஜித " refers to ancestral character. Though the learned counsel for the appellants submitted that the



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properties which are the subject matter of partition were acquired by Nanjappa Gounder under a Sale Deed in the year 1952, no other document is produced to show that Nanjappa Gounder had any independent source or that Nanjappa Gounder purchased the suit properties without the aid of joint family nucleus. The Sale Deed is not marked before the Trial Court. Even in the Memorandum of Grounds, it is stated that Velappa Gounder and his son, the 1st plaintiff were entitled to equal share. Therefore, this Court is unable to accept that properties were acquired by Velappa Gounder as his exclusive properties under 1976 partition. Strangely, the document of Sale Deed relied upon by appellants before us was not produced before the Trial Court and hence, this Court cannot consider the said document which was sought to be produced before this Court in the form of a typed set. From the arguments advanced, this Court is unable to hold that the suit properties were the exclusive properties of Velappa Gounder by virtue of under Section 8 of the Hindu Succession Act.



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(14) In the affidavit filed in support of CMP.No.19182/2022, for reception of additional documents, it is seen that appellants have given a peculiar reason that the certified copy of the Wills which were marked as Exs.A2 and A3, were produced by plaintiffs/respondents and therefore, the appellants/defendants had not produced the originals of Exs.A2 and A3 before the Trial Court. However, it is admitted that the original Will, the certified copy of which is marked as Ex.A3 was in the possession of the appellants. It is further stated that no question was raised for non-production of the original Will before the Trial Court and therefore, the appellants did not produce the original Will. It is also stated that non production of the Will was neither willful nor wanton. None of the reasons stated in the affidavit filed in support of the petition can be accepted in view of the specific provision under Order 41 Rule 27 of CPC which reads as follows:-

"Order 41 – Appeals from original Decrees:-



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Rule 27:-Production of additional evidence in
Appellate Court:-

- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-*
- (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*
- [aa]the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]*
- (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.*
- (2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.*

(15) This Court finds no valid reason to admit additional evidence at



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this stage particularly when the appellants do not satisfy that situation herein fall within Order 41 Rule 27 of CPC. When the appellants themselves have admitted that original Will is in their custody and the genuineness of the Will is the subject matter of suit an issue is also specifically framed, this Court has no hesitation to hold that the application in CMP.No.19182/2022 is devoid of merits. Hence, **CMP.No.19182/2022 stands dismissed. Points [A] and [B] are answered in favour of respondents/plaintiffs.**

POINT [C]:-

- (16) When the execution and genuineness of the Will is specifically raised as an issue, the appellants ought to have filed the original Will before the Trial Court. The certified copy of the Will marked as Ex.A3 does not even contain the signature of Velappa Gounder or the attesting witnesses. In such circumstances, the Trial Court was not even in a position to consider the due attestation by DW1 and DW2. DW1 is an interested witness as the father of the 3rd defendant and as purchaser of property from defendants 2 and 3 in his favour. DW2 has not even spoken about the attestation by



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DW1. Mere registration of the Will is not sufficient to prove the due execution of the Will. The subsequent Will is an unnatural disposition as the two plaintiffs who are son and daughter of the testator have been excluded. DW1 has spoken about the recitals in the Will but he has not spoken to the fact regarding attestation as required under Section 63[c] of the Hindu Succession Act. In the said circumstances, this Court is unable to find any reason to interfere with the findings of the Trial Court as regards genuineness of the Will. **Hence, POINT [C] is also answered in favour of plaintiffs/respondents by holding that the subsequent Will dated 27.12.1999 is not proved in the manner required in law.**

POINT [D]:-

- (17) In the plaint in para 6, the plaintiffs have admitted the genuineness of the first Will in the following lines:-
- (18) Though the Will dated 06.06.1990 is stated to have been cancelled in the subsequent Will dated 27.12.1999, the Trial Court and this Court have found that the subsequent Will is not proved to be



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genuine. The admission regarding the 1st Will is significant. The Trial Court has given a finding that the first Will is not revived. There is no requirement for revival if the cancellation of 1st Will is held to be invalid. Under the 1st Will, the testator has bequeathed his undivided one half share in favour of his wife. Mother of plaintiffs executed a Sale Deed along with defendants 2 and 3 in respect of the entire suit 1st item. Though Velappa Gounder had no right to deal with the property under the Will exceeding his undivided half share, the disposition under Ex.A2 – Will which is admitted is valid in respect of his individual half share. Since Velappa Gounder died in 2000, prior to the commencement of Hindu Succession Amendment Act, 2005, this Court is inclined to hold that the Sale Deed dated 12.07.2004 marked as Ex.B3 [Ex.A4] is valid to the extent of one half share in suit first item. Hence, the plaintiffs are only entitled only to 1/6th share each.

- (19) Hence, the Appeal Suit **stands partly allowed** and the judgment and decree of the learned I Additional District Judge, Coimbatore, made in OS.No.676/2009 dated 08.12.2011 is



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modified by granting a preliminary decree for partition in respect of plaintiffs' 2/6th share in suit first item. Insofar as the suit 2nd item, the judgment and decree of Trial Court in OS.No.676/2009 is confirmed. No costs.

[SSSRJ] [PBBJ]

24.02.2023

AP

Internet : Yes

To

1.The I Additional District Judge
Coimbatore.

2.The Section Officer
VR Records, High Court
Chennai.



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S.S.SUNDAR, J.,

AND

P.B.BALAJI, J.

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