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A.S.No.528 of 2



THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.11.2023

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE N.SENTHILKUMAR

A.S.No.528 of 2019
and
C.M.P.Nos.15407 and 15410 of 2019

Komalavally

...Appellant

Vs.

1.Sathyanarayanan

2.Pushpalatha

3.Mohanarangam

4.Jegannathan

...Respondents

Prayer: Appeal Suit filed under Section 96 of the Code of Civil Procedure to set aside the judgment and decree and counter claim dated 06.03.2019 made in O.S.No.57 of 2011 on the file of the III Additional District Judge, Puducherry.

For Appellant : Mr.P.Dinesh Kumar

For Respondents : Mr.S.Savariram

for Mr.R.Thiagarajan for R3 and R4

R1 and R2 – Served – No appearance



J U D G M E N T

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(Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)

Challenge in this appeal is to the dismissal of the suit of the plaintiff for partition and separate possession of her 1/5th share in the suit properties in O.S.No.57 of 2011 on the file of the III Additional District Court at Puducherry.

2. The case of the plaintiff was that the suit properties belonged to one Sethurama Mudaliar, who died leaving behind three sons viz., Pandurangan, Balasundaram and Govindarasu @ Jegannathan. At a partition between the three sons of Sethurama Mudaliar that took place on 28.02.1946, the suit properties which form part of the 'A' schedule of the said document of partition were allotted to Govindarasu @ Jegannathan. The said Govindarasu @ Jegannathan died on 18.01.1970, leaving behind two sons and two daughters viz., Jayalakshmi, Kupppammal, Sethuraman and Subburayan @ Kannappan. The parties to the suit are the heirs of the last of the children of Govindarasu @ Jegannathan viz., Subburayan @ Kannappan, who died intestate on 27.06.1992. The others viz.,



Kuppammal, Sethuraman and Jayalakshmi died on 02.09.2005, 23.02.1993 and 11.03.1996 respectively. According to the plaintiff, the suit 'A' and 'B' schedule properties belonged to Subburayan @ Kannappan who died intestate and therefore she is entitled to 1/5th share in the suit properties.

3. The suit was resisted by the defendants 1, 3 and 4 contending that the grandfather of the parties viz., Govindarasu @ Jegannathan had executed a Will dated 07.12.1968 under which he had made certain bequest of the properties that were allotted to him in the partition of the year 1946 and as per the said Will, the 'A' schedule property in the suit was bequeathed to Subburayan for life and his male heirs are to take the property absolutely after the life time of Subburayan. One other property bearing No.55, Muthumariamman Koil Street, Puducherry was bequeathed to the other son Sethuraman giving him life estate and vested remainder was to be taken by his son. The third property viz., the property bearing No.53, Muthumariamman Koil Street, Puducherry, was bequeathed jointly to the two sons for life and the vested reminder was given to the grandsons after their lifetime. Therefore, according to the defendants, the plaintiff being a



female heir is not entitled to any share in the property, in view of the bequest made by the grandfather viz., Govindarasu @ Jegannathan under the Will dated 07.12.1968.

4. During the pendency of the suit, the 1st defendant obtained a document of release from the sisters which prompted the defendants 3 and 4 to file a counter claim seeking partition of their 2/3rd share based on the Will.

5. On the above pleadings the trial Court had framed the following issues on 05.06.2012:

- 1. Whether the suit is barred by limitation?*
- 2. Whether the plaintiff is estopped from claiming her share either by invoking Customary Coromandel Hindu Law adopted and practiced in Pondicherry or the Hindu Succession Act, 1956?*
- 3. Whether the plaintiff is entitled to partition by metes and bounds?*
- 4. To what relief?*



The following additional issues were framed on 19.03.2015

- 1. Whether it is possible to declare the release deed dated 15.07.2013 as null and void?*
- 2. Whether the Will dated 07.12.1968 is a genuine one?*
- 3. Whether D3 and D4 are entitled to 2/3rd share in “A” schedule property?*
- 4. Whether permanent injunction restraining plaintiff, D1 and D2 and their men from alienating the “A” schedule to 3rd parties is possible?*
- 5. Whether the counter claim is barred by limitation?*

6. At trial, the plaintiff was examined as PW1 and one Ravikumar was examined as PW2 and Exs.A1 to A9 were marked. During the cross-examination of PW1, Exs.B1 and B2 were marked. On the side of the defendants, the 3rd defendant was examined as DW1 and Exs.B3 to 28 were marked. The 4th defendant was examined as DW2 and Ex.B29 to 34 were marked. The sub-Registrar was examined as DW3 and Exs.X1 to X6 were marked. One Chandirasekarane was examined as DW4. One Sivasankar, Revenue Inspector was examined as DW5 and the revenue documents were marked as Exs.X7 to X11.



7. Upon consideration of documents and the evidence on record, the learned trial Judge concluded that the Will being more than 30 years old, the presumption under Section 90 of the Indian Evidence Act would apply to it. It further concluded that the Will being a document executed as per Article 973 and 974 of the French Code Civil in the presence of a notary, it being a notarial document, the presumption attached to it under the French Law would apply to dispense with the proof by examination of the attesting witness. Having upheld the Will, the learned trial Judge dismissed the suit and decreed the counter claim. Aggrieved the plaintiff is on appeal.

8. We have heard Mr.P.Dinesh Kumar, learned counsel appearing for the appellant and Mr.Savariram for Mr.R.Thiagarajan, learned counsel appearing for the respondents 3 and 4.

9. The learned counsel for the appellant would vehemently contend that the Will having been executed in the year 1968, after the extension of the Indian Evidence Act to Puducherry by the Puducherry Laws Regulation Act, 1963 with effect from 01.10.1963, the finding of the trial Court that



Section 68 need not be complied with as the presumption attached to a notarial document would continue to apply is not correct. The learned counsel would also rely upon the judgment of the Hon'ble Supreme Court in ***Bharpur Singh and others Vs. Shamsher Singh*** reported in **(2009) 3 SCC 687** to contend that the presumption available under Section 90 of the Evidence Act would not apply to a Will, since Section 68 enacts special Rule of evidence regarding proof of a will. Therefore, according to the learned counsel, since the attesting witness has not been examined, the Will has not been proved and therefore she as a daughter of Subburayan @ Kannappan would be entitled to 1/5th share in the properties. Though the property situate at Mariamman Koil Street, which was jointly bequeathed to the two sons by Govindarasu @ Jegannathan, under the Will dated 07.12.1986 was shown in the schedule of property, no relief of partition was sought with reference to the said property, since it was sold even prior to the institution of the suit.

10. Contending contra Mr.Savariram, learned counsel appearing for the respondents would submit that the Will being the notarial document



executed under the then prevailing French Law, examination of attesting witnesses need not be insisted upon and presumption relating to execution of documents by notary under Article 1317 of French Code Civil would apply and therefore non-examination of the attesting witness would not vitiate the Will.

11. He would also point out that if the Will is dis-believed, then succession to the estate of Govindarasu @ Jegannathan who died on 18.01.1970 will have to be under Section 8 of the Hindu Succession Act, thereby the daughters and sons of Govindarasu @ Jegannathan viz., Kupammal, Sethuraman, Jayalakshmi and Subburayan @ Kannappan would each get 1/4th share. The non-impleading of the heirs of the daughters and the other son Sethuraman is fatal to the suit. No doubt this plea has not been raised before the trial Court. In support of his submission the learned counsel would press into service the judgment of the II Additional District Judge Puducherry in O.S.No.20 of 2006, wherein, the Will has been upheld by the District Court.



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12. The learned counsel would further contend that notice to produce was issued to the plaintiff to produce the Will and since the plaintiff did not produce the Will, the certified copy of the Will was permitted to be marked by the order of this Court made in CRP.PD.No.1347 of 2016. Therefore, according to Mr.Savariram, once the certified copy is permitted to be marked after compliance of Sections 65A and 66 of the Evidence Act the presumption under Section 89 of the Evidence Act would stand attracted and therefore the Court has to presume that the Will has been proved.

13. We have considered the rival submissions.

14. We do not think that we will be justified in going into the merits of the contentions of the learned counsel on either side and pronounce upon the validity or otherwise of the Will, since we feel that we will be doing so in the absence of the necessary parties. As already pointed out even in the suit in O.S.No.20 of 2006 the finding regarding the Will has been rendered in the absence of the present plaintiff and the heirs of the daughters of Govindarasu @ Jegannathan. If we are to conclude that the Will is not



valid, as rightly pointed out by Mr.Savariram, the succession to the estate of Govindarasu @ Jegannathan would open on his death on 18.01.1970 and it would be under Section 8 of the Hindu Succession Act. If succession is under Section 8 of the Hindu Succession Act, the daughters and sons of Govindarasu @ Jegannathan would each be entitled to 1/4th share. So the decisions on the validity of this Will taken in the absence of those heirs would not be binding on them. When the plaintiff seeks to establish her right *de hors* the Will, she should have impleaded the other heirs who would inherit the property in the absence of the Will. By seeking a 1/5th share on the ground that the property belongs to her father Subburayan @ Kannappan under the Will, the plaintiff is trying to approbate and reprobate while accepting the Will in part and denying it when it suits her case. A party to proceedings before civil Court cannot be allowed to do that. We do not want to add to the confusion which has been created by the judgment in O.S.No.20 of 2006 which has been rendered in the absence of necessary parties upholding the Will.



15. We therefore do not pronounce upon any of the issues. Any finding rendered by the trial Court on the correctness or validity of the Will is also set aside. However, the suit is dismissed leaving it open to the parties to file appropriate suit and have the matter decided in the presence of all the necessary heirs who would be entitled to the property in the absence of the Will. Counter claim will also stand dismissed.

16. In view of the above we find that the suit and counter claim has to fail for non impleading of necessary parties. Hence, the appeal is dismissed confirming the judgment and decree of the trial Court dismissing the suit. However, the findings of the trial Court regarding the Will will stand set aside. Counter claim will also stand dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

(R.S.M.,J.) (N.S.,J.)
01.11.2023

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Neutral Citation :No
Speaking order



To

The III Additional District Judge,
Puducherry.

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