



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **18.04.2023**

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S(MD)NO.256 OF 2022

and

C.M.P(MD)Nos.11987 of 2022 and 3656 of 2023

- 1.Saminathan
- 2.Nagalakshmi
- 3.Kanagarethinam
- 4.Dharmasamvarthini :Appellants/Plaintiffs

.VS.

- Pattammal(died)
- Marimuthu(died)
- 1.Gopal Amma
 - Mathi Rajan(died)
 - 2.The Sub-Registrar,
Sub Registrar Office,
Manambuchavadi,
Thanjavur.
 - 3.The Tahsildar,
Tahsildar Office,
Papanasam Taluk,
Thanajvur District.
 - 4.Mohana
 - 5.Kavya



6.Rajagopal Raja

7.Subha

:Respondents/Defendants

PRAYER: First Appeal filed under Section 96 of the Civil Procedure Code against the judgment and decree made in O.S.No.27 of 2012, dated 22.08.2022, on the file of the I Additional District Judge(PCR), Thanjavur.

For Appellant	:Mr.S.Venkatesan
For Appellant-1	:Exparte
For Respondents 2 and 3	:Mr.D.Sasikumar Addl.Government Pleader
For Respondents 4 to 6	:Mr.K.R.Manimaran
For Respondent-7	:Mr.K.K.Senthil

JUDGMENT

The unsuccessful plaintiffs in a suit for partition are the appellants.

2.The parties are referred to as per their ranking before the Court below.

3.The brief facts leading to the filing of the appeal is as follows:



It is the case of the plaintiff that the suit properties originally belonged to one Venkatachala Nandiyar and his two brothers. The suit properties are allotted to Venkatachala Nandiyar in the partition between them. The said Venkatachala Nandiyar had executed a registered Will on 29.7.1995 bequeathing the suit properties to his two brothers Rajagopal Nandiyar and Rajappa Nandiyar. The wife of the said Venkatachala Nandiyar namely, Samiyammal died on 30.5.1999. Schedule 'A' and 'B' in the Will, dated 29.7.1995 bequeathed equally between his two brothers as above mentioned. Item Nos.15 to 23 of the suit properties belongs to the said Venkatachala Nandiyar. The plaintiffs are the legal heirs of Rajappa Nandiyar and the defendants are the legal heirs of the Rajagopal Nandiyar. Rajappa Nandiyar executed a Will in favour of the first plaintiff on 3.12.2007 bequeathing his half share to him .

4.It is the contention of the defendants 1 and 2 that the Will executed by Venkatachala Nandiyar dated 29.7.1995 has not come into force, since the said Venkatachala Nandiyar executed a subsequent Will in favour of his wife Samiyammal on 30.12.1997. As per the said Will, the entire properties bequeathed in favour of the said Samiyammal and the said Samiyammal died on 9.10.2010. The said Samiyammal executed a Will in favour of the first



defendant and daughter-in-law Mohana on 11.5.2010. The Will, dated 27.09.1995 has not come into force and no property was allotted to his wife Samiyammal. Therefore subsequently a Will was executed by Venkatachala Nandiyar validly. The property has not been mutated in the name of the first plaintiff and the Will executed by Rajappa Nandiyar is also denied. The entire properties of the Venkatachala Nandiyar as per Will dated 30.12.1997 came to Samiyammal and subsequently came to Pattammal and Mohana as per Will, dated 11.7.05. Hence opposed the suit.

5. On the basis of the above pleadings, the trial Court has framed the following issues:

1. Whether the Will, dated 29.7.1995 alleged to have been executed by Venkatachala Nandiyar is true, valid and came into force?

2. Whether the Venkatachala Nandiyar had cancelled the Will, dated 29.7.1995 and executed another Will, dated 30.12.1997 in favour of his wife Samiyammal?

3. Whether Samiyammal executed a Will, dated 11.5.2010 in favour of the first defendant and Mohana?



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4. Whether Rajappa Nandiyar executed a Will, dated 3.12.2007 in favour of the first plaintiff?

5. Whether the plaintiffs are entitled to the relief of partition of half share in the suit properties?

6. To what other relief, the plaintiffs are entitled to?

6. On the side of the plaintiffs, P.W.1 and P.W.2 were examined and Ex.A1 to Ex.A7 were marked. On the side of the defendants, D.W.1 and D.W.2 were marked and Ex.B1 to Ex.B9 were marked. The Trial Judge after analyzing both the oral and documentary evidence, had dismissed the suit on the ground that the earlier Will, dated 29.7.1995 has been superceded by the subsequent Will executed by Venkatachala Nandiyar on 30.12.1997. Therefore the Plaintiffs are not entitled to any share in the suit properties. Aggrieved over the same, the present appeal suit has been filed.

7. It is the contention of the appellants that the Will, dated 30.12.1997 is a registered one which has been proved in the manner known to law, whereas, the defendant has set up an unregistered Will said to have been executed by Venkatachala



Nandiyar. Signature of testator is different from the original Will of the Venkatachala Nandiyar. Therefore the Will, dated 30.12.1997 has not been established in the manner known to law and no attesting witness has been examined to prove the Will. Therefore the subsequent Will executed by one of the brother in favour of the defendant is also not valid in the eye of law., whereas, the learned counsel for the respondents would submit that the Will, dated 30.12.1997 contain certain conditions to maintain his wife Samiyammal. The plaintiff has not maintained Samiyammal during her lifetime. Therefore, a subsequent Will was executed by Venkatachala Nandiyar on 30.12.1997 in favour of his wife Samiyammal. Further, the planitffs have not taken any steps to file the suit immediately on the basis of the Will, dated 29.7.1995. The suit has been filed only in the year 2012.

8. In the light of the above submissions, now the points arise for consideration in this appeal are as follows:

1. Whether the Will, dated 29.07.1995 executed by Venkatachala Nandiyar is true, valid and proved in the manner known to law?

2. Whether the subsequent Will, dated 30.12.1997 executed



in favour of Samiyammal is valid and true?

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3. Whether the Will, dated 11.5.2010 executed in favour of the first defendant and Mohana is true and established before the Court?

9. It is admitted by both sides that the suit property originally belonged to Venkatachala Nandiyar and his two brothers and in a partition among the Venkatachala Nandiyar and his two brothers, the suit properties were allotted to the share of Venkatachala Nandiyar. Since he has no issues, he has bequeathed his share in favour of his two brothers Rajappa Nandiyar and Rajagopal Nandiyar. The Plaintiffs are the legal heirs of the Rajappa Nandiyar. The defendants are the legal heirs of the Rajagopal Nandiyar. The Will left by the Venkatachala Nandiyar is not disputed in the Written Statement. The contention in the written statement is to the effect that the same has not come into force. The other stand taken in the written statement is that during his lifetime, Venkatachala Nandiyar executed a subsequent Will, dated 30.12.2007 in favour of his wife Samiyammal.

10. In the above admitted facts, now it has to be seen whether the Will executed namely, Ex.A6, dated 29.7.1995 is true



and valid and executed by Venkatachala Nandiyar .Ex.A6 is the xerox copy of the certified copy of the Will where the signature of the attestors are found place.(No objection is taken to marking of secondary evidence) To prove the above Ex.A6, P.W.2 attesting witness was examined. In his evidence, he has clearly stated that the Will was executed by the testator namely, Venkatachala Nandiyar and he has seen the testator signing the Will. Similarly, the testator has also seen the attesting witness signing the documents The testator also seen P.W.2 signing the Will as a witness. Ex.A6 is a registered Will. When one of the attesting witness examines before the Court and has spoken about the execution and also the attestation of the Will, when the conditions required for the proof of the Will as required under Section 68 of the Indian Evidence Act and also Section 63(c) of the Indian Succession Act is complied with and the Will is said to be proved in the Court of Law. In the cross-examination of P.W.2, no circumstance whatsoever was brought on record to suspect the Will left by the testator bequeathing his share in the suit properties in favour of his two brothers. In the absence of any suspicious circumstances on record, this Court has no other option except to hold that the Will has been proved in the manner known to law. Merely because the attesting witness P.W.2 has stated in the cross examination that he has not gone to the Registration Office and



that will not affect the validity of the Will, when he himself present and seen the execution and attestation of the document, that is the proper compliance for proof of the Will.

11.The defendants projected an unregistered Will, dated 30.12.1997 said to have been executed by Venkatachala Nandiyar in favour of his wife Samiyammal. Though two witnesses have mentioned their address details, is not found in the said Will. Be that as it may, the defendants have not examined any of the attesting witness. It is stated by the learned counsel that the attesting witness are not available .Therefore they could not be examined. No materials whatsoever is placed to show that the defendants have taken steps to prove the alleged death of the attesting witness who has signed the Will as a witness in Ex.B7. Further, no attempt whatsoever was made to prove the Will as per Section 69 of the Indian Evidence Act. If no attesting witness is available, the defendants ought to have examined any of the witness who are acquainted with the signature of the attesting witness to prove the signature of the attesting witness. The said exercise has not been done by the defendants. Therefore, in the absene of twin conditions being complied with as per Section 69 of the Indian Evidence Act, to prove the Will of the Testator, it cannot be said that the Will has been proved in the manner known to law.



Therefore in the absence of proof of Ex.B5 as required under law, Ex.B5 cannot be admitted in the evidence. The trial Court has relied upon Ex.P5 and non-suited the plaintiff, which is totally improper. Therefore the Will-Ex.P8 said to have been executed by Samiyammal also will not convey any title to the defendants. When Samiyammal did not have any title as per Ex.B5 and when Ex.B5 was not proved in the manner known to law, the defendants will not derive any title based on the said Will, as Ex.B5 is not proved in the manner known to law and no attesting witness was examined to prove the same. Therefore Ex.B5 and Ex.B8 cannot be looked into for any other purpose when the same was not proved before the Court of Law.

12.The other contention of the learned counsel for the respondents is that the suit has been filed belatedly has no leg to stand. Merely because the suit has been filed after a period of 12 years, that will not take away the rights of the plaintiffs. The defendants have not set up a plea of adverse possession or ouster. In such view of the matter, mere delay in filing the suit for partition will not take away the rights of the plaintiffs.

13.Such being the position, the plaintiff is certainly entitled to partition of the suit properties in equal share.The defendant



No.2 , son of Rajagopal Nandiyar has also executed a sale deed in the year 2018 in favour of Mathi Rajan under Ex.A7 and he has clearly admitted the Will executed by the testator in the year 29.7.1995. All these admissions coupled with the admission in the written statement and the evidence of P.W.2 clinchingly establish the Will executed by Venkatachala Nandiyar marked under Ex.P6. As subsequent Wills marked under Ex.P5 and Ex.P8 are unregistered Will and the attesting witness were not examined. Those Wills cannot be looked into for any other purpose. Hence, the defendants cannot derive any title through the same.

14.It is also stated in the plaint that item No.15 to 22 and other properties left by Venkatachala Nandiyar though not covered under the Will, considering the above aspects and that the Venkatachala Nandiyar did not have any issues and the plaintiffs and the defendants being the class -II legal heirs of Venkatachala Nandiyar.

15.Insofar as the item Nos.1 to 14 are concerned, the plaintiffs and defendants are equally entitled to half share in the suit properties. Since the property has been bequeathed in favour of their father. As far as item Nos.15 to 23 is concerned, the plaintiffs 1,3 and 4 being the son and daughters are equally



entitled as class-II legal heirs and the defendant No.2 is entitled to the remaining half share in that items. Since the sister-in-law, widow of the brothers are in the VIth entry in the Class-II legal heirs, they are not entitled to any share. Since the plaintiffs 1,3,4 and defendant No.2 are brother's son, they are in IV entry in the Schedule under Section 8 of the Hindu Succession Act, they should be preferred to those in the next entry. However, since the first defendant died, a preliminary decree is passed dividing the suit properties in item Nos.1 to 14 equally, and one such equal share is allotted to the plaintiffs altogether and the remaining half share goes to the defendants altogether. In respect of item Nos.15 to 23, a preliminary decree is passed dividing the suit properties into two equal share and allotted one such equal share to the plaintiff No. 1,3 and 4 and defendant No.2, since defendant No.2 was also class-II legal heir, his share now goes to his legal heir, since he stated to be died.

16. Accordingly, the appeal suit is allowed and the judgment and decree of the trial Court is set aside. No costs. Consequently, connected Miscellaneous Petitions are closed.

18.04.2023

Index:Yes/No
Internet:Yes/No



NCC:Yes/No
vsn

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To

- 1.The Ist Additional District Judge(PCR),
Thanjavur.
- 2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

N.SATHISH KUMAR, J.



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vsn

JUDGMENT MADE IN
A.S(MD)NO.256 OF 2022
and
C.M.P(MD)Nos.11987 of 2022
and 3656 of 2023

18.04.2023

A.S.(MD)No.256 of 2022



and C.M.P.(MD)Nos.11987 of 2022 and 3656 of 2023

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N.SATHISH KUMAR, J

This Appeal Suit has been listed today under the caption 'For being mentioned' at the instance of the learned counsel appearing for the appellants.

2. The learned counsel appearing for the appellants submitted that while allowing the Appeal Suit by order dated 18.04.2023, inadvertently, the shares in respect of some of the property has not been mentioned and hence, he prays for appropriate orders.

3. In view of the above submissions, the following observations to be added in the last line, in paragraph 15 of the said order dated 18.04.2023:

“Other than item Nos.15 to 22 of the suit property, the plaintiff and the defendant No.3, being the Class-I legal heirs of Rajappa Nandiyar, are entitled to half share in rest of the suit properties. The remaining half share in other properties shall go to defendant Nos.7 to 9, who are



the only legal heirs of Rajagopal Nandiyar, on payment of necessary Court fee.”

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4. Registry is directed to carryout necessary corrections and issue fresh order copy to the parties.

27.06.2023

vsm



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N.SATHISH KUMAR, J

vsm

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27.06.2023