



AS.No.274 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.03.2024

PRONOUNCED ON : 07.06.2024

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

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1. N.Rathinasamy (deceased)
2. Ramathal
3. Saraswathi

Appellants

Vs

1. N.Ragamani
2. N.Kaliammal
3. R.Thangavel
4. R.Mylsamy

Respondents

Prayer:- This Appeal Suit has been filed, under Section 96 of CPC, against the judgement and decree, dated 21.09.2007, passed in OS.No.34 of 2003, by the Additional District Court, FTC No.IV, Coimbatore at Tiruppur.

For Appellants : Mr.V.P.Sengottuvel, SC

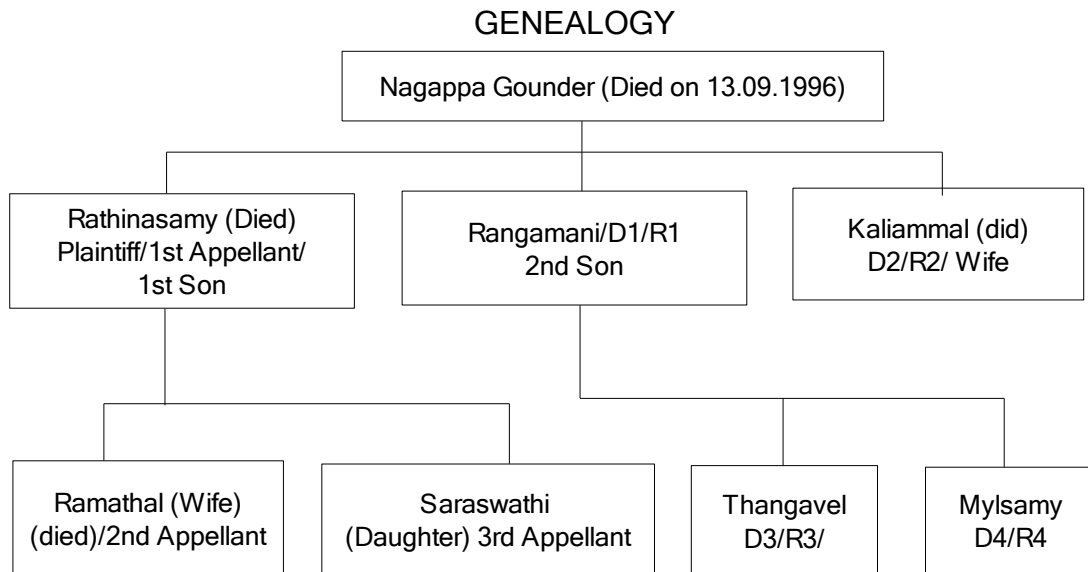
For Respondents : Mr.T.R.Rajagopalan, SC

JUDGEMENT

1. This Appeal Suit has been filed, by the Plaintiff in OS.No.34 of 2003, against the judgement and decree, dated 21.09.2007, passed in the said suit, by the Additional District Court, FTC No.IV, Coimbatore at Tiruppur.
2. For the sake of convenience, the parties hereinafter are referred to as per their litigation status before the Trial Court.
3. The said suit was filed by the 1st Appellant herein as the sole Plaintiff for



partition of 4/9th share in the suit schedule properties on the ground that the two items of properties mentioned in the suit schedule are all ancestral properties in nature and character. As per the plaint, the genealogy is given as follows:-



4. It is stated in the plaint that the 2nd Defendant is the mother of the Plaintiff and the 1st Defendant. The Defendants 3 and 4 are the grand sons of the 1st Defendant. As per the plaint averments, the suit schedule properties are ancestral properties, having been acquired by the father of the Plaintiff, Nagappa Gounder, from and out of the joint family income and hence, the nature and character of the suit schedule properties is ancestral property and the said Nagappa Gounder died on 13.09.1996, leaving behind the Plaintiff and the Defendants 1 and 2, as his legal heirs and hence, the said suit was filed for partition of the suit schedule properties into nine equal shares and allot 4/9th shares to the Plaintiff.



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5. In the written statement, the 1st Defendant disputed the nature and character of the suit schedule properties and it is specifically alleged that the suit schedule properties, consisting of two items of properties, are self-acquired properties of the said Nagappa Gounder. It is also stated that as per Ex.B1 Will dated 03.07.1996, the Testator Nagappa Gounder, while he was in a good, free, sound and disposing state of mind, had executed the said Will, dividing the item (1) of the suit schedule properties into three equal share and bequeathing 1/3rd share in item (1) to the 1st Defendant, another 1/3rd share in item (1) to the Plaintiff and another remaining 1/3rd share in item (1) to the Defendants 3 and 4, who are the sons of the 1st Defendant. In respect of the item (2) of the suit schedule properties, the Testator Nagappa Gounder had, by the said Will, bequeathed the said property to the grand sons, who are the Defendants 3 and 4. The Testator Nagappa Gounder died on 13.09.1996 and the death certificate was marked as Exs.A1 and B27. Hence, it is contended in the written statement that the Plaintiff is not entitled for the relief of partition.

6. On the pleadings of the parties, the Trial Court had formulated the following issues for trial:-

- (1) Whether the Plaintiff is entitled to partition of 4/9th share over the suit properties?
- (2) Whether the suit properties were already partitioned?
- (3) Whether the suit properties are self acquired properties of late Nagappa Gounder?
- (4) Whether the suit is maintainable?



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(5) To what reliefs and costs?

7. Before the Trial Court, on the side of the Plaintiff, the Plaintiff examined himself as PW.1 and also examined PW.2 and PW.3 and marked Exs.A1 to A11. On the side of the Defendants, DW.1 to DW.3 were examined and Exs.B1 to B30 were marked. By the impugned judgement, the Trial Court had dismissed the suit. Hence, this appeal has been filed by the Plaintiff. Since during the pendency of this appeal, the 1st Appellant/sole Plaintiff died, the Appellants 2 and 3 were brought on record as his legal representatives.
8. This Court heard the learned counsel on either side.
9. The learned senior counsel for the Appellants contended that when the Defendants have come forward with a specific case, claiming ownership to the suit schedule properties under Ex.B1 Will, they have to prove the Will in a manner known to law, namely, in compliance with the provisions as contemplated under Section 63 of the Indian Evidence Act and Section 68 of the Indian Succession Act, but, they miserably failed to do so and therefore, the Trial Court committed an error in holding the Will as a true and genuine document. The Trial Court has not properly appreciated the evidence of PW.3 Dr.Kavitha, who had deposed that on the alleged date of execution of Ex.B1 Will, Nagappa Gounder was in ailment and hence, the learned senior counsel would pray for allowing this appeal.
- 10.The learned senior counsel for the Respondents/ Defendants would make submissions in support of the impugned judgement of the Trial Court and also would contend that PW.3 Doctor, examined on the side of the Plaintiff



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supported the case of the Defendants, by deposing that on the date of execution of Ex.B1 Will, the Testator was in a sound and disposing state of mind and that examination of one of the attesting witnesses to the Will under Ex.B1 as DW.2 is sufficient enough to hold that Ex.B1 Will is true, valid and genuine. An internal arrangement between the parties, namely, the beneficiaries under Ex.B1 Will, after the death of the Testator, does not affect the intention of the deceased Testator, Nagappa Gounder and hence, he would pray for dismissal of this appeal.

11.This Court considered the submissions of the learned counsel on either side and also perused entire materials placed on record, including the relevant provisions of law. After considering the submissions of the learned counsel on either side and on perusal of both the oral and documentary evidence adduced on either side, the following points arise for consideration and determination in this appeal:-

- (1) Whether the Plaintiff is entitled to partition of 4/9th share in the suit schedule properties?
- (2) Whether the deceased Nagappa Gounder executed Ex.B1 Will in a free and sound state of mind as pleaded by the Defendants is true or the Will was not proved in a manner known to law, as contended by the Plaintiff?
- (3) Whether the suit schedule properties are ancestral properties as pleaded by the Plaintiff or self-acquired properties as pleaded by the Defendants?
- (4) Whether Ex.A11 partition deed executed by the contesting Defendants is against the intention of the deceased Testator Nagappa Gounder?

12.On a perusal of the suit schedule properties, I find that the suit schedule



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properties consists of two items, namely, Items (1) and (2) and that Item (1), which consists of three items, were purchased in the name of the deceased Testator, Nagappa Gounder through three sale deeds dated, 20.07.1951, 06.09.1951 and 16.05.1952, copies of which were marked as Ex.A1 to Ex.A3 and that the Item(2) of the suit schedule properties was purchased in the name of the deceased Testator Nagappa Gounder and the 1st Defendant, by a sale deed dated 01.07.1985, a copy of which was marked as Ex.A5. A superstructure with power looms and accessories now exists in a portion of Item (2) of the suit schedule properties.

13.The contention of the Plaintiff is that the suit schedule properties were purchased from and out of exertion of the Plaintiff, 1st Defendant and the deceased father Nagappa Gounder. In this connection, Ex.A10 was pressed into service to show the existence of an ancestral property. Ex.A10, dated 22.06.1995 relates to sale of a vacant site, measuring 3900 sq.ft.

14.Per contra, my attention is drawn by the Defendants/ Respondents to the pleadings in the written statement as well as the version of DW.1, namely, (a) suit schedule properties are self-acquired properties of late Nagappa Gounder and (b) Item (2) of the suit schedule properties is the self-acquired property of the 1st Defendant and Nagappa Gounder having acquired the same by their self earnings and the Plaintiff did not contribute anything.

15(a). Insofar as the issue relating to the nature and character of the suit schedule properties is concerned, on a perusal of Ex.A1 to A5, this Court finds that the Item (1) of the suit schedule properties appear to have been



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purchased during the year 1951 and 1952 exclusively in the name of Nagappa Gounder (now deceased).

15(b). Though the Plaintiff claimed that it is an ancestral property, no positive evidence has been let in by the Plaintiff to show the existence of any joint family property or availability of sufficient nucleus in the family during the relevant point of time. The Plaintiff, who was examined as PW.1, in his cross examination, admitted that at the relevant point of time, namely, during the execution of Ex.A2 to A5, he was only 9 years old and hence, it is hard to believe that he made contribution towards the purchase of the properties under Ex.A2 to A5.

16. My attention is also drawn by the learned counsel for the Appellants to Ex.A10, sale deed, dated 22.06.1995, which is in respect of a house site, measuring 3900 sq.ft. In the recitals of Ex.A10, there is a word called “ancestral”. On a perusal of the said document in its entirety, I find that it is a sale deed executed by the said Nagappa Gounder and he has stated in Ex.A10 that he had purchased the property and he is in enjoyment of the property. The property was purchased in the year 1981 and the Plaintiff has not let in any proof for availability of any other ancestral property and hence, the above specific stated facts and also the other recitals in the said document would go to show that it is a mere use of the word “ancestral” and hence, the Trial Court has rightly come to the conclusion that mere use of the word “ancestral” is not sufficient enough to hold that the family possessed of any ancestral property or will not clothe the nature and character of the land



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in the absence of any positive evidence.

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17. It is further clear from the recitals of Ex.A10, the sale deed dated 30.10.1981 that it is an exclusive property of the said Nagappa Gounder. The Plaintiff has not let in positive evidence for the alleged contribution towards the purchase of the item (2) of the suit schedule properties. In this regard, my attention is drawn to Ex.A7, sale deed, wherein the said Nagappa Gounder had sold two acres of land said to have been situated in Ganapathi Palayam, which he had purchased in 1971 and therefore, this Court is of the considered view that the property was purchased by the said Nagappa Gounder in the year 1971 and subsequently, he had sold it in the year 1985 and hence, that does not support the case of the Plaintiff. In fact, it supports the case of the Defendants that the properties that are dealt with by the said Nagappa Gounder are all self acquired properties.

18. In view of the above discussions, this Court is of the considered view that the three items in Item (1) of the suit schedule properties are all self-acquired property of Nagappa Gounder and the Item (2) of the suit schedule properties is the self-acquired property of the 1st Defendant and the deceased Testator, Nagappa Gounder and hence, the finding rendered by the Trial Court that the nature and character of the suit schedule properties is not ancestral property is well considered and well merited and consequently, does not require any interference in the appellate stage.



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19.The Plaintiff has filed the suit for partition, claiming 4/9th share. The Defendants resisted the claim of the Plaintiff on the ground that all the items of the suit schedule properties are self-acquired properties of Nagappa Gounder. He had executed Ex.B1 Will on 03.07.1996. Ex.A6 is the certified copy of the said Will. As per the terms of the Will, in item (1), 1/3rd share goes to the 1st Defendant and another 1/3rd share goes to the Plaintiff and another remaining 1/3rd share goes to the Defendants 3 and 4 and item (2) goes to the Defendants 3 and 4.

20.The Plaintiff challenged Ex.B1 Will on the ground that it is not proved in a manner known to law, namely, in compliance with the provisions as provided under Section 63(c) of the Indian Evidence Act and Section 68 of the Indian Succession Act. It is the specific case of the Plaintiff that the Testator, Nagappa Gounder was sick from the year 1986 and he was in a bad health condition during 1996 and hence, he was unable to apprehend the happenings around him and he was not in a sound state of mind at the time of execution of Ex.B1 Will and consequently, he contended that ExB1 is not a genuine Will.

21.In this regard, apart from the oral evidence of the Plaintiff, who was examined as PW.1, it is pertinent to refer to the evidence of PW.3 Dr.Kavitha attached to the K.G.Hospital, Coimbatore, who was examined on the side of the Plaintiff and the medical certificate marked as Ex.A9. As per Ex.B1 Will executed by Nagappa Gounder (Testator) dated 03.07.1996, it is a registered Will. As per Ex.B27, death certificate of



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Nagappa Gounder, he died on 13.09.1996. So to say, the said Nagappa Gounder was alive for about 70 days after the execution of the Will. A conjoint reading of the oral evidence of PW.3, who was said to have given treatment to Nagappa Gounder (Testator) in K.G.Hospital, Coimbatore along with Ex.A9 medical certificate issued by PW.3, would go to show that the Testator suffered carcinoma stomach, which is a type of stomach cancer and was under treatment between 01.06.1996 to 04.06.1996. In the cross examination, PW.3 had admitted that the deceased Testator was not mentally affected and further deposed that a person affected by such an ailment can do his normal activities during the rest of his life and that Ex.A8 is the bill for payment of hospital charges and that he had executed the Will after about a month from his discharge from the Hospital and that there is no evidence to show that his mental faculties were completely affected during the intervening period.

22. In view of the above said oral evidence of PW.3 and the medical evidence, namely Ex.A9, I find that neither the oral evidence of PW.3 nor Ex.A9 supports the case of the Plaintiff. However, the admission of PW.3 in the cross examination lends credence to the case of the Defendants that on the date of execution of the Will, the Testator Nagappa Gounder had no mental issues and consequently, considering the said aspects, the Trial Court has rightly come to the conclusion that there is no positive legal evidence to show that the Testator had affected with mental faculties.



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23. In order to prove the Will, the Defendants had examined DW.2, one of the attesting witnesses to Ex.B1 Will. On a perusal of the court records, it is seen that DW.2 has clearly deposed about the execution of the Will by the deceased Testator in a free, voluntary and sound state of mind in his presence and in the presence of another attesting witness by name Gopalsamy. DW.2 has also signed as an identifying witness at the time of registration in the Office of the Sub Registrar, Tiruppur. The other attesting witness Gopalsamy was not examined on the side of the Defendants.

24. It is the contention of the learned senior counsel for the Appellants that the Will has not been proved as per Section 63(c) of the Indian Evidence Act, by examining the other attesting and identifying witness. It is contemplated under Section 68 of the Indian Evidence Act that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

25(a). In this regard, in the case on hand, DW.2, who is one of the attesting witnesses to Ex.B1 Will had been examined in proof of the Will. The summons taken by the Defendants through the Court to the other attesting witness Gopalsamy to his residential address were returned with an endorsement of the Junior Bailiff that he was not residing in the address. Hence, the said other attesting witness could not be examined. The



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deceased Testator was alive for about 70 days from the date of execution of the Will and he died on 13.09.1996, as seen from the death certificate, Ex.A1/B27.

25(b). The evidence of DW.2 is crystal clear that the deceased Testator affixed his signature in Ex.B1 in the presence of DW.2. Though DW.2 has not specifically mentioned that the Testator had seen his attestation, it is inferred from the said evidence that the execution of the Will and its attestation have taken place simultaneously in the presence of the Testator and the attesting witnesses. Further, the Plaintiff did not dispute the signature of his father (Testator) contained in Ex.B1 Will. The only ground, on which, the Plaintiff denied Ex.B1 Will is that at the time of execution of the Will, the Testator was not in a sound, free and disposing state of mind.

26. It is true that the other attesting witness was not examined, since the summons sent to his address through the Court were returned unserved with an endorsement "not found and left the place". Further more, it is specifically deposed by DW.2 that the deceased Testator came to the Sub Registrar Office and signed in his presence and he was authorised to collect the Will and after registration, he collected the Will from the Sub Registrar Office and handed over the same to the Testator and the said evidence of DW.2 assumes significance.

27. Taking into consideration the evidence of DW.2, who is one of the attesting witnesses to Ex.B1 Will and also one of the identifying witnesses while presenting the document for registration before the



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concerned Sub Registrar and in the absence of any worthwhile being elicited in the cross examination of DW.2, I find that the evidence of DW.2 is clear and cogent with regard to the execution of Ex.B1 Will and its attestation and that the essential requirements as contemplated under Section 63(c) of the Indian Evidence Act and Section 68 of the Indian Succession Act are duly satisfied.

28. In this regard, it is worthwhile to refer to the **judgement dated 17.04.2024 rendered by me in CMA.No.4295 of 2019 (Chinnusamy and others Vs. R.Poovaragavan and others)**, wherein this Court has held that in cases where the evidence of one of the attesting witnesses to the Will is found to be satisfactory and in compliance with the essential requirements as contemplated under Section 63(c) of the Indian Evidence Act and Section 68 of the Indian Succession Act, is sufficient enough to hold that the subject Will is true and valid and that the non examination of the other attesting witness is of no avail.

29. In view of the above established circumstances in the case on hand, non examination of the other attesting witness is not fatal to the case of the Defendants. Though the deceased Testator had illness, his mental faculty is sufficient enough to execute Ex.B1 Will, as admitted by PW.3, in the cross examination and hence, the Defendants had successfully demonstrated before the Trial Court that Ex.B1 Will was executed by the Testator, while he was in a sound and disposing state of mind and that the same was presented for registration and after registration, it was



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collected by DW.2 and handed over the same to the Testator and that Ex.B1 Will is true and genuine and that the Testator died on 13.09.1996 and thereafter, Ex.B1 came into force and hence, this Court finds that similar findings rendered by the Trial Court are well considered and well merited and hence, they need not be interfered with in the appeal stage.

30. The next contention of the learned senior counsel for the Appellants is that ExA11, partition deed, dated 11.15.2006, which was executed amongst the contesting Defendants, is against the intention of the deceased Testator Nagappa Gounder. The terms of Ex.B1 Will are clear. A $\frac{1}{3}^{\text{rd}}$ share has also been given to the Plaintiff in Item (1) of the suit schedule properties and the other items are given to other persons. It is not the case of the total deviation of line of successors as contemplated under the Indian Succession Act. Under Ex.A11, who are all beneficiaries under Ex.B1 Will, have interchanged the properties. In other words, it is only a question of inter arrangement between the beneficiaries of Ex.B1 Will after the death of the Testator, whereby Ex.B1 Will came into force. Hence, this Court is of the considered view that Ex.B1 does not violate the intention of the Testator. A similar finding has also been rendered by the Trial Court and hence, it need not be interfered with.

31. On the above analysis, this Court finds that in the absence of anything on record to doubt about the version of DW.2 during the cross examination and the execution and registration of Ex.B1 Will, DW.2 is found to be a



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genuine witness and he had attested the Will Ex.B1 and also stood as an identifying witness for the Testator before the Sub Registrar concerned and also collected Ex.B1 Will after due registration and handed over it to the Testator. The evidence of DW.2 is sufficient enough to hold that there was satisfactory compliance of Section 63 of the Indian Evidence Act and Section 68 of Indian Succession Act and hence, Ex.B1 is hereby held to be true and genuine. Consequently, the Plaintiff is not entitled to the relief as prayed for in the suit. Hence, this Court is of the considered view that the findings of the Trial Court are in accordance with law and accordingly, all the points are answered in negation against the the Appellants and held in favour of the Defendants/Respondents.

32. In the result, this Appeal Suit is dismissed, confirming the impugned judgement and decree, dated 21.09.2007, passed in OS.No.34 of 2003, by the Additional District Court, FTC No.IV, Coimbatore at Tiruppur. No costs.

07.06.2024

Index:Yes/No
Web:Yes/No
Speaking/Non Speaking
Neutral Citation
Srcm

To

1. The Additional District Court, FTC No.IV, Coimbatore at Tiruppur
2. The Record Keeper, VR Section, Madras High Court



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Pre-Delivery Judgement in
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