



S.A.No.783 and 784 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED: 01.08.2024

THE HONOURABLE MRS.JUSTICE N.MALA

S.A.Nos.783 & 784 of 2021

and

CMP.Nos.15221 & 15227 of 2021

- 1.Yasodhammal
- 2.Raghu
- 3.Paranthaman
- 4.Jayanthi
- 5.Kannan

...Appellants in both S.A.Nos.

Vs

- 1.Rani
- 2.Vijaya
- 3.Thulasi
- 4.Elumalai
- 5.Govindaraj
- 6.Selvaraj
- 7.The Sub Registrar
Registration Department,
Avadi, Chennai.
- 8.Sampath
- 9.M.Gandhi
- 10.Krishnaveni
- 11.Balakrishnan
- 12.Usha
- 13.Manju
- 14.Mala

...Respondents in S.A.No.783 of 2021

and

- 1.M.Gandhi



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2.The Sub Registrar
Registration Department,
Avadi, Chennai.

3.Sampath
4.Krishnaveni
5.Balakrishnan
6.Usha
7.Manju
8.Mala
9.Rani
10.Vijaya
11.Thulasi
12.Elumalai
13.Govindaraj
14.Selvaraj

...Respondents in S.A.No.784 of 2021

Prayer in S.A.No.783 of 2021 : Second Appeal is filed under Section 100 of the Code of Civil Procedure Code, 1908 praying to set aside the Judgment and Decree dated 28.04.2021, passed in A.S.No.30 of 2016 on the file of the Subordinate Judge, Poonamallee, reversing the Judgment and Decree dated 11.03.2016 in O.S.No.168 of 2007 on the file of the Additional District Munsif Court, Poonamallee and allow the appeal with costs through out.

For Appellants : Mr.S.Mukunth, Senior counsel
for Mr.A.Tamilvanan

For Respondents : Mr.Na.Malaisaravanan
for RR1 to 6, R8 & R9

Mr.T.Arunkumar, Addl. Govt. Pleader
for R7

RR 10 to 14 – No appearance

Prayer in S.A.No.784 of 2021: Second Appeal is filed under Section 100 of the



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Code of Civil Procedure Code, 1908 praying to set aside the Judgment and Decree dated 28.04.2021, passed in A.S.No.32 of 2016 on the file of the Subordinate Judge, Poonamallee, reversing the Judgment and Decree dated 11.03.2016 in O.S.No.168 of 2007 on the file of the Additional District Munsif Court, Poonamallee and allow the appeal with costs through out.

For Appellants : Mr.S.Mukunth, Senior counsel
for Mr.A.Tamilvanan
For Respondents : Mr.Na.Malaisaravanan
for R1, R3, RR9 to 14

Mr.T.Arunkumar, Addl. Govt. Pleader
for R2
RR4 to 8 – No appearance

COMMON JUDGMENT

The Second Appeal arises out of the suit filed by the plaintiff for partition of the plaintiffs 1/3 share in the suit properties.

2. The facts of the case are as follows:

The plaintiff filed the suit for partition of her 1/2 share in the suit property on the premise that the suit properties were self-acquired property of her father Kishtappa Naicker who died, intestate on 22.05.1974. According to the plaintiff Kishtappa Naicker died leaving behind the plaintiff, plaintiff's mother and defendants 1 to 5 as legal heirs. The plaintiff stated that her brother Raji Naicker predeceased his parents leaving behind the defendants 1 to 5. The plaintiff's mother Parvathyammal also died 20 years back. The plaintiff stated that the plaintiff had cordial relation with



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the defendants 1 to 5, but subsequently differences arose because the defendants tried to sell the suit property to the third parties. The plaintiff further stated that defendants 1 to 5 stealthily changed the Patta in their name and as the defendants tried to deny the plaintiff her lawful share, the plaintiff was constrained to file the suit for partition of the suit properties for her 1/2 share.

3. The 2nd defendant filed written statement and the same was adopted by the defendants 1 and 3 to 5. The defendants denied the contentions raised in the plaint and also denied that the plaintiff and Raji Naicker were the only legal heirs of the deceased Kishtappa Naicker. According to the defendants, the deceased Kishtappa Naicker had two sons and two daughters i.e the plaintiff, their father Raji Naicker, Madhammal and Raman Naicker. According to the defendants, Raman Naicker died issueless and Madhammal died leaving behind the defendants 8 to 13 as legal heirs. According to the defendants as their father Raji Naicker predeceased Kishtappa Naicker, the said Kishtappa Naicker out of sympathy for his grand children executed a unregistered Will dated 18.03.1972 bequeathing his properties, viz., 5 acres 15 cents of land in S.Nos.422/1, 419/1, 419/2, 417/2, 421/2, 362/2, 361/1 and 362/1 in Paruthipattu village, Thiruvallur District. The defendants stated that ever since the Will, they were in enjoyment of the properties and they had also executed partition deed in 1992 partitioning the properties amongst themselves,

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leaving the 4th defendant who was married and was adequately provided with stridhana and jewels. The defendants stated that ever since the partition, the defendants were enjoying their respective shares without any hindrance from any quarter. The defendants also stated that the plaintiff was ousted long prior to Act 1 of 1990 and hence she was not entitled to any share in the suit properties. The defendants therefore stated that the suit was liable to be dismissed.

4. Before the trial court the 8th plaintiff examined himself as P.W1 and marked Ex.A1 to Ex.A3. On the side of the defendants, 2nd defendant examined himself as D.W1 and one Rangan, attesor of the Will as D.W2. The defendants marked Ex.B1 to Ex.B31.

5. The trial court framed appropriate issues and dismissed the suit holding that the Will was proved by the defendants and therefore the plaintiff could not seek partition. Aggrieved by the judgment and decree of the trial court, the plaintiff filed appeal in A.S.No.30 of 2016 and the 8th defendant in the suit filed the appeal in A.S.No.32/2016. The lower appellate court on consideration of the entire materials on record by a common judgment reversed the judgment and decree of the trial court holding that Ex.B3, Will and partition deed Ex.B4 were forged documents and therefore the defendants 1 to 5 had no exclusive right to the suit properties. The lower appellate court therefore decreed the suit for partition of the plaintiff's 3 to 8 and 7th



defendants 1/3 share in suit items 1 to 9 and other reliefs. Aggrieved by the common judgment and decree of the lower appellate court the defendants 1 to 5 have filed the above Second Appeal's.

6. This Court while admitting the Second Appeals framed the following substantial questions of law:

"(a) When the defendants 1 to 5 proved the WILL dated 18.03.1971, Ex.B-3 in accordance with Section 68 of Indian Evidence Act, by examining the D.W.3 attesting witness, is the learned Subordinate Judge right in holding the WILL as the one not proved and the judgment of the First Appellate Court suffers from non-consideration of material evidence in that behalf?

(b) Whether the Appellate Court is right in holding that WILL Ex.B-3 is forged one on the ground that the 3rd attesting witness has affixed his signature in a different ink?

(c) Whether the finding of the Appellate Court that the suit properties belonged to Parvathy Ammal and not that her husband Kishtappa Naicker, contrary to the pleadings and evidence of either parties was legally sustainable?

(d) Whether the exclusion of the other legal heirs under the Ex.B-3 WILL alone be found to be suspicious circumstances when the testator himself had explained the circumstance under which the properties are bequeathed to D2 to D5."



7. Mr.S.Mukunth, the learned Senior counsel appearing for the appellants submitted that the Will, Ex.B3 was executed several decades ago and therefore the lower appellate court erred in holding that the Will was a forged document. The learned counsel further submitted that the revenue records clearly proved that the plaintiffs were well aware of the Will and inspite of the same they did not question the Will at any point of time. The learned counsel submitted that the lower appellate court erred in thinking that the Will was shrouded by suspicious circumstances overlooking that the defendants 2 to 5 were minor's at the time of the death of their father and therefore out of sympathy, love and affection, their grand-father Kishtappa Naicker executed the Will in their favour. The learned senior counsel therefore prayed that the judgment and decree of the lower appellate court ought to be set aside.

8. The learned counsel for the respondents on the hand submitted that the lower appellate court in its reversing judgment had given cogent and justifiable reasons for over turning the judgment of the trial court and therefore this Court sitting in Second Appeal ought not to interfere with the factual findings of the lower appellate court.

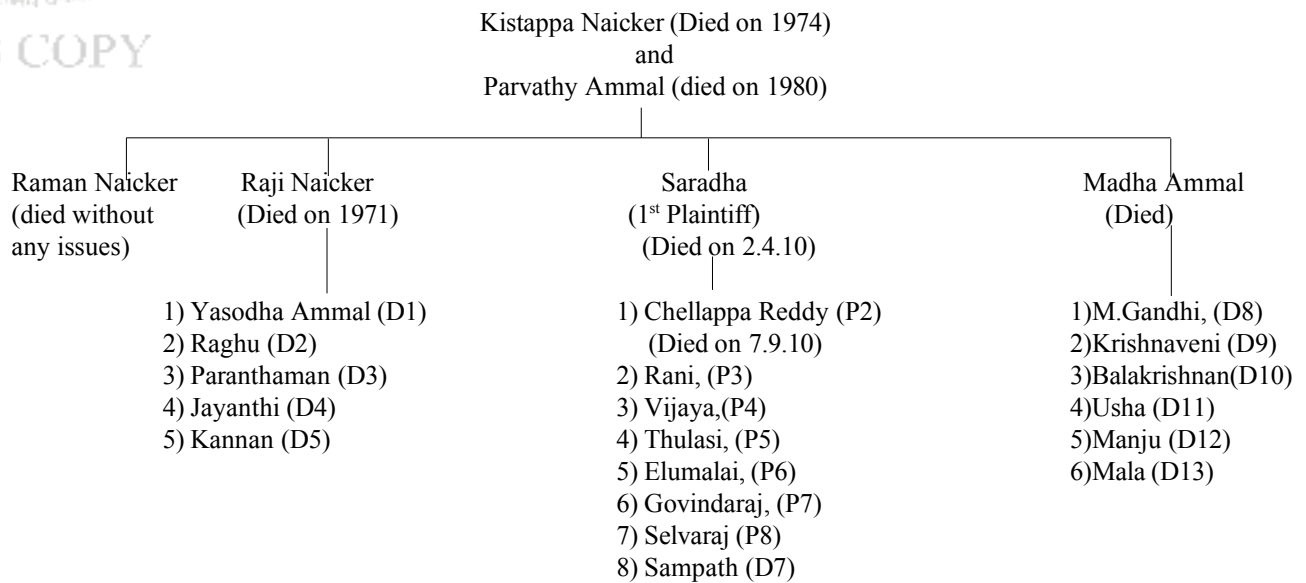
9. I have heard both the learned counsels and I have perused the materials placed on record.

10. The parties will be referred to as per their rank in the trial court.



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The geneology of the parties are as follows:



11. The substantial question of law 'c' was not argued by the learned senior counsel and therefore the same is not discussed. As the substantial questions of law a, b & d are inter related the same are taken up together. The only point that arises for consideration in the Second Appeal is whether Will Ex.B3 dated 18.03.1972 is valid and genuine document and whether it was proved by the defendants in a manner known to law.

12. The plaintiffs 2 to 8 and the 7th defendant are the children and husband of the deceased 1st plaintiff. The defendants 8 to 13 are the children of Madhammal the other deceased daughter of Kishtappa Naicker. The defendants 1 to 5 are the wife and children of Raji Naicker, one of the deceased son's of Kishtappa Naicker. Raman Naicker one other son of Kishtappa Naicker died issue less. The admitted



facts are that the suit properties and other properties were self-acquired properties of Kishtappa Naicker. Raji Naicker the husband and father of the defendants pre-deceased Kishtappa Naicker. That Kishtappa Naicker died in 1974 is also undisputed. Whereas the plaintiffs contend that Kishtappa Naicker died intestate, the defendants contend that Kishtappa Naicker executed a Will Ex.B3 on 18.03.1972 bequeathing his properties of an extent of 5 acres 15 cents infavour of the defendants 2 to 5. The defendants further contend that thereafter the defendants 2, 3 and 5 executed partition deed under Ex.B4 dated 07.07.1992 and they were in enjoyment of the respective shares allotted to them.

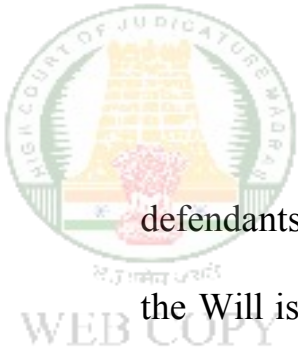
13. The defendants examined D.W2 one R.Rangan as an attesor of Ex.B3, the Will. The lower appellate court found that the Will was not valid on two grounds, one, that it was not at all referred in the partition deed executed by the defendants 2, 3 and 5 on 07.07.1992 and two that the 3rd attesting witness, D.W2 had signed in different ink in the Will. Taking into consideration of the aforesaid, the lower appellate court found that the Will was a fabricated one and the signature of D.W2 as a 3rd witness was taken only for the purpose of satisfying the requirement of law on attestation. In my view, the finding of the lower appellate court on the genuineness of the Will cannot be faulted for the reasons discussed hereunder, apart from ones cited by the lower appellate court.



14. It is seen that the defendants case in the written statement was that Kishtappa Naicker their grand-father executed the Will on 18.03.1972 out of sympathy for them because, their father, Raji Naicker pre-deceased him and they were minors at that time. In the written statement it was clearly stated that after the death of Kishtappa Naicker, the defendants as absolute owners of the entire bequeathed property partitioned the same and also got the revenue records transferred in their name. Contrary to the stand taken in the written statement, the recitals in the partition deed executed by the defendants on 07.07.1992 states that the properties after the demise of Kishtappa Naicker, their grand-father were enjoyed by their father Raji Naicker and after him they were in enjoyment of the defendants. The defendants specific case was that Kishtappa Naicker executed the Will out of sympathy for them as they were minors as their father pre-deceased him. While so, where was the question of Raji Naicker enjoying the property after the demise of Kishtappa Naicker. The said recital in the partition deed is fatal to the defendants case on the execution of the Will by Kishtappa Naicker in their favour.

15. It is pertinent to note here that the partition deed which was executed 20 years after the Will did not even whisper about the Will. The partition deed proceeds on the basis of intestacy and not on testacy. One of the properties covered under the Will is stated to have belonged to Parvathyammal, the grand-mother of the

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defendants, how and under what circumstances the same came to be dealt with under the Will is not explained. One more important aspect that is to be noted here is that the defendants have not whispered about the publication of the Will anywhere in the written statement. The Will is an unregistered Will and therefore the defendants ought to have at least attributed knowledge to the plaintiff about the Will, the said aspect also reflects on the genuineness of the Will. Even the revenue documents filed by the defendants relate to the periods 1994, 1999, 2001, 2004, 2006, 2007, 2013 and 2015. The documents Ex.B17, Ex.B18, Ex.B19, Ex.B20, Ex.B25 and Ex.B27 were all post suit documents. It is not the case of the defendants that the revenue records were mutated after notice to the plaintiffs. Therefore mutation of revenue records in favour of the defendants will not advance the defendants' case as the same were effected without notice to the plaintiffs. I am therefore of the view that the finding of the lower appellate court that the Will was not genuine cannot be faulted. As the Will is held to be invalid, the plaintiffs and the 7th defendant are entitled for a decree for partition of their 1/3 share in the suit properties.

In view of the above discussions, the substantial questions of law are answered against the appellants and both the Second Appeals are dismissed. No costs. Consequently connected CMP's are closed.



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01.08.2024.

Index: Yes/No
Speaking order: Yes/No
Neutral Citation: Yes/No
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To

1. The Subordinate Judge,

Poonamallee.

2. The Additional District Munsif Court,

Poonamallee.



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N.MALA,J.
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