



S.A.No.266 of 2020

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

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DATED: 04.07.2024

Coram

**THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN**

Second Appeal No.266 of 2020 &  
C.M.P.Nos.5434 of 2020 & 11944 of 2023

D.Arumugam (Died)

2.A.Rani

3.Dhanalakshmi

4.R.Revathi

5.A.Gunasekar

... Appellants

(Sole Appellant died, A2 to A5  
brought on records as legal heirs  
of the deceased sole appellant  
vide court order dated  
26.04.2023 made in  
CMP.No.20595 of 2021)

-Versus-

1.Srinivasan

2.Banu

3.Dandabani

4.Leelavathy

5.Navaneetham

6.Kanniammal

7.Tamilnadu Electricity Board,  
Rep. by its Superintending Engineer,  
SEDC, Anna Salai,  
Chennai – 600 002.

... Respondents

Appeal filed under Section 100 of C.P.C. against the judgement and



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decree of the lower appellate court viz., learned VI Additional Judge of City Civil Court, Chennai made in A.S.No.281 of 2017 dated 18.12.2018, confirming the judgment and decree of the learned XV Assistant Judge, City Civil Court, Chennai made in O.S.No.11681 of 2010 dated 20.02.2017.

*For Appellants : Mr.E.Anbu*

*For Respondents 1 : No appearance  
to 6*

*For Respondent 7 : Mrs.Hemalatha Gajapathy*

### **JUDGMENT**

The present second appeal arises out of the judgment and decree of the VI Additional City Civil Court at Chennai in A.S.No.281 of 2017 dated 18.12.2018 in confirming the judgment and decree of the court of learned XV Assistant City Civil Judge, Chennai in O.S.No.11681 of 2010 dated 20.02.2017.

2. For the sake of convenience, the parties will be referred to as per their ranks in the suit.

3. O.S.No.11681 of 2010 is a suit, which had been presented for a declaration that the alleged partition deed dated 05.04.1995 registered as document No.415 of 1995 on the file of the SRO Thiruvallikeni is void ab initio and for the relief of partition and separate possession of the plaintiff's 1/2 share in the suit schedule mentioned property.



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4. The plaintiff and the father of the defendants 1 to 5 and the husband of the sixth defendant are siblings. They are the children born to one Dhakshinamoorthy and Kannambal. Dhakshinamoorthy died intestate in the year 1959 leaving behind his two sons and Kannambal as his legal heirs. Kannambal died in the year 1996. According to the plaintiff, on the death of Dhakshinamoorthy, the plaintiff/Arumugam, Sivakannu and Kannambal got a share of  $\frac{1}{3}^{\text{rd}}$  each in the suit property, and on the death of Kannambal, the share bloomed to a proportion of  $\frac{1}{2}$  share each in the suit schedule mentioned property.

5. Finding that it is difficult to live in joint possession with the defendants 1 to 6 post the death of his brother Sivakannu on 15.05.2007, the plaintiff issued a notice seeking partition and separate possession of the property on 14.05.2010. He would state that on 10.06.2010, the first defendant issued a reply to which a rejoinder notice was issued on 19.06.2010.

6. The plaintiff would allege that his brother, Sivakannu was in management of the family assets from 1959 onwards till his death on 15.05.2007. Sivakannu had obtained signatures from the plaintiff and his



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mother on several blank papers and had taken them to the Sub Registrar Office allegedly for obtaining a power of attorney from both of them. Sivakannu, by fraudulent misrepresentation not only on the contents of the document but also on the character of the document, had registered a partition deed. The plaintiff would state that he came to know about the partition deed only when he received a reply notice from the first defendant and therefore, he filed a suit for the aforesaid reliefs.

7. On service of summons, the defendants entered appearance and would admit to the relationship between the parties. They would deny the allegation that the document executed was a power of attorney and not a partition deed. They would state that the plaintiff being a party to the document is estopped from challenging the same on baseless grounds. Further, the defendants would deny the averments of the plaintiff that his signatures had been taken on blank papers and utilising the same, a partition deed had been registered instead of obtaining power of attorney.

8. On the basis of these pleadings, the learned trial judge framed the following issues:

*“ 1. Whether the plaintiff is entitled for the declaration*



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*regarding Partition Deed dated 05.04.1995 as prayed for?*

*2. Whether the plaintiff is entitled for partition of ½ share in the suit property as prayed for?*

*3. Whether the suit is barred for non joinder of necessary facts?*

*4. Whether the plaintiff is estopped from challenging the Partition Deed dated 05.04.1995?*

*5. Whether the suit is barred by limitation?”*

9. Pending the trial, an Advocate Commissioner was appointed to note down the physical features of the property. The Advocate Commissioner also submitted his report under Ex.C1 and his sketch under Ex.C2 on 04.06.2013. The plaintiff examined himself as PW1 and marked Ex.A1 to Ex.A5. On the side of the defendants, the first defendant examined himself as DW1 and did not mark any document.

10. On analysis of the oral and documentary evidence let in before him, the learned XV Assistant City Civil Judge came to a conclusion that the plaintiff has not proved his case and therefore, he dismissed the suit.

11. Aggrieved by the same, the plaintiff preferred an appeal before the VI Additional City Civil Court, Chennai. The said appeal was received as



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A.S.No.281 of 2017. After hearing both sides, the learned Appellate Judge

concurred with the opinion of the learned trial court and dismissed the appeal.

12. Aggrieved by the same, the present second appeal has been presented before this Court.

13. This court admitted the second appeal on the following substantial question of law on 06.03.2020:

*“i) Whether the lower Appellate Court was right in dismissing the suit when Ex.A4, partition is, on the face of it, unequal and the same is also evidenced by the Commissioner's report?”*

14. Mr.E.Anbu learned counsel appearing for the Appellants at the time of argument would suggest an additional question of law namely:

*“If fraud, undue influence and flawed misrepresentation could not be established from trial due to lapse of time and death of related parties cannot circumstantial evidence by relying upon?”*



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15. Notice had been sent to the respondents on both the questions of law.

Notice was served on them. Apart from the seventh respondent represented by Mrs.Hemalatha Gajapathy, the contesting respondents namely the respondents 1 to 6 have not entered appearance nor are they present in the court at the time of final hearing.

16. I have heard Mr.E.Anbu for the Appellants and Mrs.Hemalatha Gajapathy for the seventh respondent.

17. Expanding on the questions of law, Mr.E.Anbu would submit that the property is a joint family property and therefore, the parties are entitled to equal shares in the same. Relying upon the Ex.C1 and Ex.C2, he would submit that on the face of it, the division that is borne out under the partition deed dated 05.04.1995 is unequal and therefore, the same deserves to be nullified by a decree of declaration. He would submit that circumstances exist in order to substantiate that the consent of the parties namely the original appellant/ Arumugam and that of Kannambal had been obtained in a surreptitious manner and therefore, it vitiates the entire document. On these grounds, he would plead that second appeal deserves to be allowed and decrees of the courts below have to be set aside.



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18. Mrs.Hemalatha Gajapathy would submit that the property has a single electricity meter and the plea of the appellants that the benefit of electricity was not afforded to his portion can be redressed, if he files an application seeking a fresh connection on the basis of any document including the partition deed which is the subject matter of the suit.

19. Taking cue from the first argument that the document is vitiated by undue influence and coercion, I am not in agreement with Mr.E.Anbu, for a simple reason that under Order VI Rule 4 of the Code of Civil Procedure, a party would specifically have to plead the circumstance under which his consent stood vitiated. The details of the circumstances leading to such vitiating factors upon persons would have to be pleaded. In absence of such a plea, the same cannot be urged for the first time in the Second Appeal.

20. Even if I were to agree with the scantily pleaded statement that the plaintiff was under the impression that he was executing a power of attorney in effect when he was signing a partition deed, it still falls short of requirements of the Code. The details as to how and when Sivakannu had obtained the consent of Arumugam and Kannambal for a power of attorney has not been explained.



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It is not as if members of a family execute a power of attorney in favour of another as a matter of ordinary course of conduct. The plaintiff having accepted that he had been in Registrar Office on the date of execution of the document, the burden falls on him heavily to show the reason why the document had been executed as it was.

21. The witness to the document had not been examined nor had any independent witness been produced before the court to substantiate the vitiating circumstances. Apart from that, even if I were to assume that Sivakannu was the karta of the family, the suit had not been presented soon thereafter but came to be filed 15 years after the date of execution and nearly 3 years after the death of Sivakannu.

22. According to the plaintiff, he came to know about the document only when a reply notice was issued by the first defendant to his notice demanding partition. It is on record that during the course of his cross examination, the plaintiff as PW1 had specifically pleaded that he is in possession of the property and is paying the tax for the portion in which he is in occupation. Therefore, this puts an end to the argument of E.Anbu that the document is vitiated by undue influence and coercion.



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23. Having failed on this second question of law, Mr.E.Anbu would very vehemently contend that, by virtue of Ex.C1 and Ex.C2, it becomes clear that the document under Ex.A1 is vitiated. The plaintiff cannot rely upon a document which came into existence 18 years after the disputed document had come into force.

24. The Advocate Commissioner had been appointed to this suit pursuant to the request that had been made by the plaintiff to the trial court. In fact, I wonder why the Advocate Commissioner had been appointed at all. In a suit for a declaration that the document is null and void, appointment of Advocate Commissioner is absolutely irrelevant. Nonetheless the report of the commissioner is on record but it is of no use to the plaintiff. The Advocate Commissioner cannot show as to who is in possession of the property. It is exactly for this point, Mr.E.Anbu relied upon Ex.C1 and Ex.C2.

25. The fact that the parties have divided the property is clear from Ex.A1. A schedule property was allowed to Kannambal, B schedule property was allotted to Sivakannu, and C schedule property was allotted to the Appellant/plaintiff. The reasons for such division giving larger share to the elder brother and the younger brother taking a lesser share are circumstances



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which only the members of the family can explain before the Court.

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26. I have already premised that the plaintiff has examined no one to show that there was no such understanding between the family at the time of entering into Ex.A1. Apart from that, the plaintiff was not even a babe in the woods when the document was written. He was aged about 37 years old. The mother was 85 years old.

27. In case the mother had come forward with the suit, then the burden would have been cast upon the two sons to explain the circumstances. As long as the mother was alive, she did not protest regarding the execution of the document. In fact, the very document itself reads that the plaintiff and the deceased Sivakannu will be entitled to equal share in the property allotted to her. Therefore, I am not willing to accept the argument of Mr.E.Anbu that by virtue of Ex.C1 and Ex.C2, the document under Ex.A1 stands vitiated.

28. At this stage, Mr.E.Anbu would point out that the plaintiff is suffering without any electricity connection to the portion under his occupation. Under the terms and conditions of supply governing the Electricity Board, it is always open to the appellants/legal heirs of the plaintiff to file an application and if



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they execute an indemnity in favour of the Electricity Board in terms of Rule

27, then the Electricity Board will certainly grant them the benefit of energy.

29. In fine, the judgment and decree of the VI Additional City Civil court, Chennai in A.S.No.281 of 2017 dated 18.12.2018 in confirming the judgment and decree of the court of XV Assistant City Civil Judge, Chennai in O.S.No.11681 of 2010 dated 20.02.2017 stands confirmed, with the observations above, regarding the grant of electricity. The second appeal is dismissed. As the respondents have not entered appearance, I am not inclined to impose cost in the appeal. Consequently, the connected miscellaneous petition is closed.

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Index : yes / no  
Neutral Citation : yes / no  
Speaking / Non Speaking Order



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To

- 1.The VI Additional City Civil Judge, Chennai
- 2.The XV Assistant City Civil Judge, Chennai



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V.LAKSHMINARAYANAN, J.

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