

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.10.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.NO.923 OF 1992

and

C.M.P.No.10100 of 2006

- 1.K.Athappan(died)
- 2.K.Kulandasamy
- 3.M.K.Ramasamy
- 4.A.Raju
- 5.R.Santhosh
- 6.T.Sakunthala
- 7.A.Krishnaveni

5 to 7 appellants brought on record
as L.Rs of the deceased 1st appellant
as per order of court dated 16.4.2004
made in C.M.Ps. 15364 to 15366/03
and 18788/2003

-vs-

1. Palaniammal
2. M.Thangavel
3. P.Chinnasamy
4. S.Kuppusamy
5. K.Sethupathy
6. M.Kannammal
7. M.Sakthivel
8. M.Mahalingam
9. M. Thirumoorthy
10. Nallammal

R2 to R9 are impleaded as
per order of the Court dated
30.12.2003 made in
C.M.P.No.13335 of 2003

10th respondent brought on record as
L.R. Of the deceased first respondent
made in C.M.P.No.18788/2003 as
per order of Court dated 16.4.2004

... Appellants

.. Respondents

This appeal was filed under Section 96 of C.P.C. against
the decree and Judgment dated 15.9.1992 and made in O.S.No.327 of
1986 on the file of I Additional Sub Judge, Erode.

For appellants : : Mr.R.Gandhi
(2 to 4) Senior Counsel
for Mr.R.G.Narendhiran
5th appellant : : Mr.S.Rajendrakumar
6th and 7th appellants : : Mr.G.Ethirajulu

For 1st respondent : : Mr.N.Manoharan
For 2nd to 9th
respondent : : Mr. S.Parthasarathy
Senior Counsel
for Mr.S.K.Nachimuthu

JUDGMENT

This appeal has been preferred against the decree and Judgment in O.S.No.327 of 1986 on the file of the I Additional Sub Court, Erode. The defendants in the suit are the appellants herein.

2. The averments in the amended plaint in brief are as follows:

The defendants 1 to 3 are brothers and they are the sons of 1st plaintiff. The 4th defendant is the son of defendant. The first plaintiff and defendants 1 to 4 constitute a Hindu Undivided Joint Family and the suit properties are the ancestral joint family properties of the said undivided joint family. The first defendant and his son 4th defendant have started "Shanthi Thirai Arangu", theatre and they had been running the Cinema in the said Thirai Arangu. But the defendants 1 to 4 did not give accounts for the profits realised. The first plaintiff called for the account from them and misunderstanding arose because of that. In view of the attitude of the defendants, it is no longer possible to have entire properties to be managed by the first plaintiff as Kartha of the family. The first plaintiff thought it fit to have a regular partition of the plaint schedule properties. For the purpose of registering the regular partition deed, the first plaintiff is not for it. The defendants 1 to 3 about 15 days prior to the filing of the suit. ie., on 21.9.1986 registered the deed but the defendants did not turn up. Hence the plaintiffs have filed the suit for partition of 1/4th share in the profits of the cinema theatre. An exparte preliminary decree was passed, which was set aside as per order in I.A.No.565 of 1988. The first plaintiff Kaliappa Gounder died intestate on 22.2.1989 leaving his three sons, viz., defendants 1 to 3 and his only daughter the second plaintiff as his legal representatives. After the death of Kaliappa Gounder, the second plaintiff became entitled to a share in the estate of the deceased father Kaliappa Gounder. Therefore, the second plaintiff has been impleaded as necessary party to the suit and to adjudicate the matter properly. The first plaintiff had also executed a Will bequeathing his share in the name of Palaniammal(Second plaintiff). Hence the suit.

3. The first defendant in his written statement would contend that the averments in the amended plaint that the first defendant and his son 4th defendant have started and running the cinema theatre

with funds belonging to the family of the plaintiff and his sons is totally false. The plaintiff and his sons who are the defendants became divided prior to 1981. There was no question of the defendants 1 and 4 starting and running any cinema with any family funds as alleged. There was no occasion or necessary for any demand for according and consequent misunderstanding. The whole story is fabricated for the purpose of the fraudulent suit. Ever since, the division prior to 1981, there was no joint family and consequently, the plaintiff was not and could not have been the Kartha of any such family. In the year 1976, the plaintiff and his sons the defendants had sold an extent of 1.50 acres of land belonging to the family for Rs.20,000/- and there was also some more family funds. The plaintiff as the Kartha of the family was lending the cash in his hands to third parties and was realising considerable income there from. Further by about January 1981, all the defendants got married, were divided and living separately. Hence, the defendants were in need of additional sources of income to meet their ever growing expenses. Therefore, the plaintiff retained the cash of about Rs.20,000/- belonging to the family, for his own share and released his interest in all the other items of family properties including the suit properties in favour of the defendants by a release deed dated 14.1.1981. After executing the document, the plaintiff turned round and refused to have the document registered. Hence the defendants got it registered under Section 74 of the Registration Act on 11.8.1981. Hence after the execution of the release, the plaintiff has now come forward with the suit totally suppressing the release. The suit is not maintainable without setting aside the release deed dated 14.1.1981. The defendants have one sister by name Palaniammal who is married to one S.Arunachalam. The defendants are given to understand and believe it to be true that it is the said Arunachalam who is the real plaintiff. The plaintiff is now only a puppet in the hands of the said Arunachalam. After the execution of the release, the plaintiff cannot be deemed to be in joint possession and hence he is not competent to file the suit. The Court fee paid is not correct. Hence the suit is liable to be dismissed with costs.

4. In the reply statement, the plaintiff would contend that the alleged release deed dated 14.1.1981 is not a genuine document and the said document was registered under Section 74 of the Registration Act on 11.6.1981. But no notice has been served to the plaintiff on the said proceedings from the Registrar. Fraud has been played in registering the alleged release deed dated 14.1.1981.

5. In the additional written statement filed by the first defendant, he would contend that Kaliappa Gounder, father of the plaintiffs 1 to 3 filed the suit in the first instance. The said Kaliappa Gounder died during the pendency of the suit and he was survived by his sons who are the defendants 1 to 3 herein and his daughter Palaniammal. After the death of Kaliappa Gounder, his only daughter Palaniammal got herself impleaded as second plaintiff in the suit. In as much Kaliappa Gounder himself had executed a deed on 14.1.1981 releasing his interest in the suit properties other than the cinema theatre styled as "Shanthi Thirai Arangu" in favour of his three sons viz., defendants 1 to 3, Kaliappa Gounder, the 1st

plaintiff himself ceased to have any right, title, or interest in any of the properties comprised in the release deed dated 14.1.1981. Consequently, the second plaintiff cannot and does not derive any right or share in the suit properties. Kaliappa Gounder was not competent to make any bequeath of any portion of the suit properties by any Will. There is no particulars regarding the Will has been furnished in the plaint. Assuming without admitting that Kaliappa Gounder did not execute the release deed dated 14.1.1981, and on the basis that there is no valid Will executed by him, the second plaintiff will be entitled only to 1/16th share in the suit properties other than the cinema theatre styled as "Shanthi Thirai Arangu" and not 1/4th share as claimed.

6. The second plaintiff in her additional reply statement would contend that the first plaintiff had executed a registered Will dated 3.2.1988 in a sound disposing state of mind. However, the first plaintiff had been examined in the suit, when it was posted in the list on 3.3.1988 and it was adjourned to 8.3.1988 and he had marked the Will as an exhibit and he had spoken to about the Will. The defendants were absent on that day and the counsel for defendants reported no instructions and the suit was decreed exparte. So the allegations in para 3 of the additional written statement cannot be true. The Will executed by Kaliappa Gounder cannot be forged and fabricated piece of paper. In the original written statement filed by the defendants dated 3.7.1987, it has been claimed that first plaintiff had executed a release deed dated 14.1.1981 releasing his right over entire suit properties. Now in the additional written statement it has been claimed that first plaintiff had released his interest in the suit properties other than the Cinema theatre styled as "Shanthi Thirai Arangam". The said Shanthi Thirai Arangam is situated in one of the suit survey field and first plaintiff had given a lease deed with regard to the said land. After the written statement had been filed on 13.7.1987, the first plaintiff came to know about the so called registered release deed dated 14.1.1981 and he applied for the copy of the said document on 22.9.1987 and an enquiry, he came to know about the fraud played by the defendants in creating the said document and proceedings of compulsory registration. The first plaintiff Kaliappa Gounder had been entitled to 1/4th share in the suit properties and he had not executed any release deed on 14.1.1981 and he executed a registered Will dated 3.2.1988 in sound disposing state of mind in the name of the second plaintiff and he had acknowledged the execution of the Will in his deposition previously in the suit and as such the second plaintiff is entitled to 1/4th share in the suit properties as per the registered will which had came into force after the death of Kaliappa Gounder.

7. In the additional reply statement filed by the plaintiff, it has been contended that if the document dated 14.1.1981 is produced in Court, the first plaintiff reserved his right to make further reply statement in the earlier proceedings. The said document was filed only on 2.3.1992. The signature in the said document dated 14.1.1981 is not the signature of the first plaintiff and the defendants are bound to prove that the said signature is true, genuine and that of the first plaintiff. The second plaintiff submits

that defendants ought to have forged the signature in the said document.

8. On the above pleadings, the trial Court has framed five issues and three additional issues and on the basis of oral and documentary evidence, has come to a conclusion that the second plaintiff is entitled to a preliminary decree for partition of 1/4th share but dismissed the relief in respect of rendition of accounts in respect of "Shanthi Thirai Arangam". Aggrieved by the findings of the learned trial Judge, the defendants have come forward with this appeal.

9. Now the point for determination in this appeal is whether the release deed Ex B1 dated 14.1.1981 in favour of the defendants said to have been executed by the first plaintiff Kaliappa Gounder is a genuine document or whether the second plaintiff is entitled to Kaliappa Gounder's 1/4th share under the Will Ex A3 dated 3.2.1988?

10. The point:

Ex B1 release deed cannot be held to be a valid document for the following reasons:

Ex B1 released deed is dated 14.1.1981 but it was given for registration only on 27.1.1981. Under the release deed, the first plaintiff Kaliappa Gounder is said to have released his share in respect of the plaint schedule properties in favour of defendants 1 to 3. D.W.1 is the first defendant. He would depose that Ex B1 contain the signature of his father. He would admit that his father, the executant under Ex B1 did not come to the Sub Registrar's Office for registration of Ex B1 document. He would further admit that he and his brothers have entered into an agreement in respect of house site under Ex B2. He would further admit that the signature contained in Ex B3 in Ex B2 belongs to his father. He would further admit that Ex B4 signature belongs to the husband of the second plaintiff. The learned trial Judge, after comparing the signature in Ex B1 with that of the admitted signature of the first plaintiff in Ex B3 has come to a conclusion that both the signatures do not belong to one and the same person. Further it has been admitted by D.W.6, the Sub Registrar in whose office Ex B1 was registered, that in case of compulsory registration of a document, notice will be issued to the executant of the document under registered post and in case, if the notice is not served by registered post, it should be sent by Special messenger in person. D.W.6 would admit in the cross examination that there is no acknowledgment for the notice being served for the compulsory registration of Ex B1 to the executant of the document of Ex B1 (first plaintiff). He would further admit that only once the notice is said to have been served on the executant by way of affixture but the notice effected through affixture on 26.2.1980 but the Sub Registrar has signed in the notice on 25.2.1981. He further stated that the person, who affixed the notice has not submitted a detailed report on that score. Further, D.W.6 would admit that the address furnished in the said notice is that Marappa Gounder, Erode, Moolapalayam. So it is clear from the evidence of D.W.6 that no notice as contemplated under law was served on Kaliappa Gounder, the executant of Ex B1. So it is not proved that only after giving the notice for compulsory registration to the executant Kaliappa Gounder,

Ex B1 was registered in his absence. On the other hand, second plaintiff claims her right over the suit property under Ex A3 Will dated 3.2.1988. Kaliappa Gounder was also examined before the trial Court when the matter was posted in the list in March 1988. His deposition has been marked as Ex C1. Under Section 33 of the Indian Evidence Act, Ex C1 is relevant for the purpose of proving the alleged Will. In Ex C1, Kaliappa Gounder, the first plaintiff has clearly stated that he has not received any notice for the registration of Ex B1 and that he would deny having executed any release deed under Ex B1 in favour of the defendants. On the other hand, he would admit that he had executed Ex A3 'Will'. No doubt Ex A3 Will come into effect only after the death of Kaliappa Gounder. During the pendency of the suit, Kaliappa Gounder died and second plaintiff has been recorded as legal representative of the first plaintiff, Kaliappa Gounder. Section 33 of the Indian Evidence Act runs as follows:

" Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceedings, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross examine; that the questions in issue were substantially the same in the first as in the second proceeding;

Explanation: A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused with the meaning of this section"

Even under Section 32 of the Indian Evidence Act, Ex C1 can also be taken as a dying declaration. Section 32 of the Indian Evidence Act reads as follows:

"Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

1) When it relates to cause of death:- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in

cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

2) or is made in the course of business:- When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities of property of any kind; or of a document used in commerce, written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

3) or against interest of maker:- when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

4) or given opinion as to public right or custom, or matters of general interest:- When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

5) or relates to existence of relationship:- When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

6) or is made in Will or deed relating to family affairs:- When the statement relates to the existence of any relationship by blood, marriage or adoption, between persons deceased, and is made in any Will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

7) or in document relating to transaction

mentioned in Section 13, clause(a) :- When the statement is contained in any deed, Will or other document which relates to any such transaction as is mentioned in Section 13 , clause (a)

8) Or is made by several persons, and expresses feelings relevant to matter in question:- When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question".

Ex C1 is the deposition of the first plaintiff Kaliappa Gounder before the trial Court in the suit, while he was alive. Under such circumstances, Ex C1 deposition is the relevant fact to prove Ex A3 Will in favour of the second plaintiff under Sections 32 and 33 of the Indian Evidence Act.

11. Apart from this, the second plaintiff has proved Ex A3 Will by examining one of the attestors to the Will. P.W.3 is one of the attestors to Ex A3 Will. From the evidence of P.W.3 , it is clear that P.W.4 had written the recitals in Ex A3 Will and the contents were read over to Kaliappa Gounder and Kaliappa Gounder has fixed his thumb impression in Ex A3 in his presence and that the witnesses have also signed in Ex A3 Will thereafter and before the Sub Registrar, Kaliappa Gounder had affixed the thumb impression and he has also signed before the Sub Registrar in Ex A3 Will as an identified witness. His evidence was corroborated by P.W.4 the scribe to Ex A3 Will. Under such circumstances, as per Section 68 of the Indian Evidence Act, Ex A3 Will has been proved.

12. The learned counsel appearing for the appellants relying on the decision reported in Cora Vedachalam Chetty, 17, Old NO.45, Strotten Muthiah Mudali Street, Madras 600 079 and another -vs- G.Janakiraman (2001(3) CTC 283 and contended that in a Court proceeding, the Court should start with presumption that the Will is not genuine and that the person who choose to probate the Will removing such suspicion even they are not in real. But the above said dictum will not be applicable to the present facts of the case because in this case, Ex A3 Will has been proved by examining P.Ws 3 and 4 viz., one of the attestors and the scribe respectively to Ex A3 Will.

13. On the other hand, the learned counsel appearing for the respondent/second plaintiff relying on the decision reported in Alamelu alias Chinnakannammal and others -vs- Manickammal (1979 (1) M.L.J.8) and contended that since it is the definite case of the plaintiff that Ex B1 is a forged document under law , he is not liable to set aside Ex B1 as contended by the learned Senior counsel appearing for the appellants. The exact observation in the said dictum is as follows:

" The question then really is, when a person alleges that a forged instrument has been brought into existence as if he were a party to it, does the law cast upon him a duty to have it cancelled or set aside by suit? There are two statutory

provisions which show that a suit for declaration lies(1) Section 39 of the Specific Relief Act, Illustration(b) to that section contains an express reference to forged instruments; and(2) Article 92 of the Limitation Act refers to suits," to declare the forgery of an instrument issued or registered". While the law thus entitled a person to sue to have the document adjudged a forgery does it compel him or make it obligatory upon him to get it cancelled or set aside"..... Having regard to the way in which the suit has come to be filed in the present case, it is clear that the plaintiff did not admit at any time that the document was executed by her or that she was a party to the document. Her case is that the document was a forged one. Forged documents would not confer title on any person and it would be unnecessary to get the document set aside in order to succeed in the prayer for declaration."

Under such circumstances, I do not find any reason to interfere with the findings of the learned I Additional Sub Judge, Erode which does not suffer from any illegality or infirmity.

14. In the result, this appeal is dismissed confirming the decree and Judgment in O.S.No.327 of 1986 on the file of I Additional Sub Court, Erode. Since the parties are close relatives, there is no order as to costs. Consequently connected C.M.P.No.10100 of 2006 is also dismissed.

sg
Sd/
Asst. Registrar

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Sub Asst.Registrar

To

1. The I Additional Sub Judge, Erode(with records)
2. The Record Keeper, VR SEction, High Court, Madras.

1 CC TO MR.R.G. NARENDHIRAN, ADVOCATE SR 50963
1 CC TO MR.N. MANOKARAN, ADVOCATE SR 51039
1 CC TO MR.S.K.NACHIMUTHU, ADVOCATE SR 51252

A.S.No.923 of 1992

MM (CO)