

Subbiah Vs. 1.Alagarsami (Died)

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Court : Chennai

Decided On : Sep-22-2014

Judge : K.K.Sasidharan

Appellant : Subbiah

Respondent : 1.Alagarsami (Died)

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED :

22. 09.2014 CORAM THE HONOURABLE MR.JUSTICE A.SELVAM AS.No.689 of 2003 & Cross Objection No.47 of 2012 AS.No.689 of 2003 Subbiah .. Appellant/Plaintiff Vs. 1.Alagarsami (died) 2.Santhakumari 3.Sankar Raj 4.Magesh Jayaraman 5.Bhama 6.Narayanaswami 7.Vanaja 8.Jaya 9.Rajagopal 10.Krishnamark 11.Venkataraman 12.Jayarani 13.R.Venkatanarayanan 14.Minor Ramarajan 15.Minor Jothi Ramasami (RR-14 & 15 rep.by R13) .. Respondents/Defendants 16.A.Muthusamy 17.A.Sankar raj 18.M.Kamala 19.A.Govindaraj 20.A.Krishnamoorthy 21.A.Subbarayalu 22.N.Rajalakshmi 23.S.Srirangan (RR ?. 16 to 23 brought on record vide order dated 03.04.2010 as LR.s. of R1) .. Respondents Appeal Suit filed under section 96 of CPC against the Judgment and decree dated 09.10.2001 passed in Original Suit No.390 of 1999 by the Principal Sub Court, Tenkasi. !For Appellant : Mr.A.Arumugam ^For RR ?. 2 to 15 : Mr.S.Ramesh @ Ramaiah For RR ?. 16 to 23 : Mr.P.Senthur Pandian Cross Objection No.47 of 2006 1.Santhakumari 2.Sankar Raj 3.Magesh Jayaraman

4.Bhama 5.Narayanaswami 6.Vanaja 7.Jaya 8.Rajagopal 9.Krishnamark
10.Venkataraman 11.Jayarani 12.R.Venkatanarayanan 13.Minor Ramarajan
14.Minor Jothi Ramasami (Minors rep.by R12) .. Respondents/Cross Objectors vs.
1.Subbiah .. Respondent/Appellant 2.Alagarsami (died) .. Respondent/1st
Respondent 3.A.Muthusamy 4.A.Sankar raj 5.M.Kamala 6.A.Govindaraj
7.A.Krishnamoorthy 8.A.Subbarayalu 9.N.Rajalakshmi 10.S.Srirangan ..
Respondents (RR ?. 3 to 10 are brought on record vide order dated 30.09.2011 as
LRs of deceased R2) Cross Objection filed under Order 41 Rule 22 of CPC
against the Judgment and decree dated 09.10.2001 passed in Original Suit
No.390 of 1999 by the Principal Sub Court, Tenkasi in respect of suit 5th item. For
Cross Objectors: Mr.S.Ramesh @ Ramiah For R ?. 1 : Mr.A.Arumugam For RR ?.
3 to 10 : Mr.P.Senthur Pandian :

JUDGMENT

This Appeal Suit as well as Cross Objection have been directed against the
Judgment and decree dated 09.10.2001 passed in Original Suit No.390 of 1999 by
the Principal Sub Court, Tenkasi.

2. The appellant herein as plaintiff has instituted Original Suit No.390 of 1999 on
the file of the trial Court for the reliefs of partition and separate possession of his
share in the suit properties, wherein the present respondents have been shown as
defendants.

3. The material averments made in the plaint are that the plaintiff, first defendant
and deceased Venkadasamy Naidu and Pachi Rajulu are brothers and their father
name is Muthusamy. The suit properties and some other properties have been
partitioned as per partition deed dated 26.07.1959, wherein the suit properties
have been allotted to the share of Pachi Rajulu and he has had enjoyed the same
as absolute owner and he passed away leaving behind him his wife by name
Muthu Pappammal. After his demise, the said Muthu Pappammal has succeeded
his estate including the suit properties and the said Muthu Pappammal has passed
away on 04.11.1999. Since the said Muthu Pappammal has succeeded the estate
of her deceased husband and since both of them have not been blessed with any
issue, the plaintiff and first defendant are having equal right. The defendants 2, 5,

8 and 12 are the daughters of one Ramalakshmi who is none other than sister of Muthu Pappammal and the remaining defendants are their husbands and children. The plaintiff has issued a legal notice dated 09.11.1999 to some of the defendants and a reply notice has been given, wherein it is stated that the deceased Muthu Pappammal has executed a will dated 05.10.1999 in respect of the suit properties 1 and 2. The said will is not genuine. Under the said circumstances, the present Suit has been instituted for the reliefs sought for in the plaint.

4. In the written statement filed on the side of the first defendant it is averred that the first defendant is having half share in the suit properties.

5. In the written statement filed on the side of the defendants 8 to 11 it is averred that Pachi Rajulu has executed a will dated 30.11.1981 in favour of his wife. Both the plaintiff and first defendant are not in talking terms with Pachi Rajulu. On 05.10.1999, the wife of Pachi Rajulu viz., Muthu Pappammal has executed a will in favour of some of the defendants in respect of suit items 1 and 2. Under the said circumstances, the plaintiff is not entitled to get the reliefs sought for in the plaint.

6. In the written statement filed on the side of the defendants 2 to 15 it is averred that the suit items 3 and 4 have already been sold by Pachi Rajulu in favour of second defendant. The said Muthu Pappammal has orally sold suit item 5. During life time of Pachi Rajulu, suit item 6 has been sold in favour of Athinarayanasamy prior to 21 years and the said Athinarayanasamy has constructed a house. After his demise, the defendants 2, 5, 8 and 12 have released their right in favour of the second defendant and therefore, the second defendant has perfected title to the suit 6th item by adverse possession. There is no merit in the suit and the same deserves to be dismissed.

7. On the basis of the divergent pleadings raised on either side, the trial Court has framed necessary issues and after analysing both the oral and documentary evidence has dismissed the suit in respect of suit items 1 to 4 and 6 and decreed the Suit in respect of suit item 5. Against the Judgment and decree passed by the trial Court, the plaintiff as appellant has preferred the present Appeal Suit and against suit item 5, Cross Objection No.47 of 2012 has been filed.

8. The learned counsel appearing for the appellant/plaintiff has contended that the suit properties and some other properties are originally belonged to erstwhile Hindu joint family consisted of Muthusamy and his four sons namely, the plaintiff, first defendant, Venkadasamy and Pachi Rajulu. After the demise of Muthusamy, all of them have partitioned their family properties, wherein the suit properties have been allotted to the share of Pachi Rajulu and he passed away leaving behind him his wife by name Muthu Pappammal and the said Muthu Pappammal has passed away on 04.11.1999. Since the said Muthu Pappammal has passed away and since she got the suit properties through her husband, both the plaintiff and first defendant are having equal shares in the suit properties. Under the said circumstances, the present suit has been instituted and on the side of the contesting defendants, it is urged that Muthu Pappammal, during her life time, has executed a will dated 05.10.1999 in respect of suit items 1 and 2 and the said will has been marked as Ex.B18 and the same has not been executed in a sound disposing state of mind and further the heirs of her husband have been disinherited by way of executing Ex.B18. Under the said circumstances, the Court can easily come to a conclusion that Ex.B18 has come into existence in a suspicious circumstance and the trial Court without considering the contention put forth on the side of the appellant/plaintiff has erroneously non-suited him in respect of suit items 1 to 4 and 6 and further the trial Court has erroneously come to the conclusion that with regard to item 6, adverse possession is available and therefore, the Judgment and decree passed by the trial Court are liable to be interfered with.

9. In order to resile the contention put forth on the side of the appellant/plaintiff, the learned counsel appearing for the respondents /cross objectors has also equally contended that the said Muthu Pappammal in a sound disposing state of mind has executed the will in question on 05.10.1999 in respect of suit items 1 and 2 and even during life time of Pachi Rajulu, suit items 3 and 4 have been sold and during life time of Muthu Pappammal she sold suit item 5 in favour of the second defendant and during life time of Pachi Rajulu he sold suit item 6. Under the said circumstances, the contentions put forth on the side of the appellant/plaintiff cannot be accepted and therefore, the Judgment and decree passed by the trial Court do not require any interference.

10. As adverted to earlier, the trial Court has dismissed the suit in respect of suit items 1 to 4 and 6 by way of holding that even life time of Pachi Rajulu suit items 3 and 4 have been sold and with regard to suit 6th item, the second defendant has perfected title by adverse possession and with regard to item Nos.1 and 2, Ex.B18 will has been duly proved. Under the said circumstances, the Court has to look into the following aspects: (a) Whether the said Muthu Pappammal has executed Ex.B18 in respect of suit items 1 and 2?. (b) Whether the second defendant has perfected title to the suit 6th item by adverse possession?.

11. The learned counsel appearing for the appellant/plaintiff has advanced his argument on many-fold.

12. The first contention put forth on the side of the appellant/plaintiff is that Ex.B18 is not genuine and the same has not been executed by Muthu Pappammal in a sound and disposing state of mind.

13. At this juncture, the Court has to look into the evidence given by the plaintiff during the course of cross examination and he has categorically admitted in his evidence that five days prior to death, the said Muthu Pappammal has possessed of good health. For the purpose of proving Ex.B18 one of the attestors by name Natarajan has been examined as DW2 and he has given clinching evidence to the effect that on 05.10.1999 the said Muthu Pappammal has executed Ex.B18 and the same has been drafted by an Advocate by name Subramanian and she put her signatures and after her signatures he and other attesting witnesses have put their signatures. In fact, no effective cross examination has been done to DW2. Since the plaintiff himself has clearly admitted about the mental condition of the executant viz., Muthu Pappammal and DW2 has given clear evidence with regard to due execution as well as attestation of Ex.B18 and since no effective cross examination has been done to DW2 with regard to mental condition of the executant viz., Muthu Pappammal, it is needless to say that Ex.B18 is nothing but a genuine will.

14. The learned counsel appearing for the appellant/plaintiff has repeatedly contended that in Ex.B18 it has been clearly stated that an Advocate by name Subramanian has drafted the same. But he has not been examined. Under the

said circumstances, Ex.B18 cannot be considered as a genuine will.

15. It is seen from Ex.B18 that the same has been drafted by the said Advocate, but he has not been examined on the side of the contesting defendants. But on the other hand, as per law, one of the witnesses by name Natarajan, as stated earlier, has been examined as DW2 and in fact, his evidence is in consonance with requisite law. Since his evidence is in consonance with requisite law, non examination of the said Advocate would not impinge the case of the contesting defendants.

16. The learned counsel appearing for the appellant/plaintiff has also strenuously contended that in Ex.B18, it has been clearly mentioned that the defendants 2, 5, 8 and 12 as daughters of the executant viz., Muthu Pappammal and admittedly both Pachi Rajulu and Muthu Pappammal have not been blessed with any issue. Under the said circumstances, the Court can easily come to a conclusion that Ex.B18 has come into existence in a suspicious circumstance.

17. The learned counsel appearing for the appellant/plaintiff has relied upon the following decisions: (a) In AIR2009 Supreme Court 1766 [Bharpur Singh & Ors. V.Shamsher Singh]. it is observed that ?propounder must offer reasonable explanation to remove such suspicious circumstances.?. (b) In 1996 (II) CTC466[T.Kanniah Roa V. Inder Rao]. this Court has held that ?propounder of will has to prove that testatrix is mentally and physically fit at the time of execution of will.?. (c) In 2011 (5) CTC262[G.Lalitha V. G.Ponnurangam and others]. this Court has held that ?a perusal of the will shows that a heir excluded from inheritance. No sufficient reason mentioned in the will for such exclusion and therefore, the Court can come to a conclusion that the will in question has become emerged in suspicious circumstances. (d) In 2010 (5) CTC364[S.R.Srinivasa and others V. S.Padmavathamma]. the Hon'ble Apex Court has held that ?object of Section 15(2) of Hindu Succession Act, 1956 (30 of 1956) is to revert to source, if any female inherited particular property dying intestate.?.

18. It is a settled principle of law that as per section 15(2) of Hindu Succession Act, 1956 (30 of 1956) if any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or

daughter of the deceased (including children of any pre-deceased son or daughter) not to upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

19. In the instant case, question of inheritance does not arise, since the said Pachi Rajulu has already executed a will dated 30.11.1981 in favour of his wife Muthu Pappammal. Since testamentary succession has opened as per the will dated 30.11.1981 which has been marked as Ex.B1, the contention put forth on the side of the appellant/plaintiff on the basis of Section 15(2)(b) is totally incorrect.

20. It is also a settled principle of law that in a case like this, the propounder of the will has to give necessary evidence for the purpose of proving that the same has not come into existence in a suspicious circumstance and the concerned executant has executed the same in a sound and disposing state of mind. Further it is also equally a settled principle of law that the Court can independently decide with regard to genuineness of the will even though other side has not raised any objection. In the instant case, as narrated earlier, PW1 has clearly admitted in his evidence that five days prior to demise of Muthu Pappammal she possessed sound and good health. It is not his evidence that on the date of execution of Ex.B18 that is, on 05.10.1999 she has not possessed sound and disposing state of mind. Further necessary cross examination has not been put to DW2. Therefore, it is quite clear that Ex.B18 has been executed by the said Muthu Pappammal in a sound and disposing state of mind and there is no incertitude in coming to a conclusion that the same is nothing but a genuine will.

21. The learned counsel appearing for the appellant/plaintiff has emphatically contended that in Ex.B18, legal heirs of husband of Muthu Pappammal have been disinherited. Under the said circumstances, Ex.B18 has come into existence in suspicious circumstances.

22. As pointed out earlier, in the decision reported in 2011(5) CTC262 this Court has held that no sufficient reason has been mentioned in the will in question for such exclusion of other legal heirs and that itself would be sufficient for coming to a conclusion that the will in question has come into existence in suspicious circumstances. It is a humdrum that a person can very well dispose of his or her

property as he or she likes. There is no impediment or inhibition in law in executing a will in favour of anybody. Further no law says that a will should be executed only in favour of nearest legal heirs.

23. In the instant case, Ex.B18 has been executed in favour of four daughters of the sister of Muthu Pappammal. In Ex.B18, it has been stated to the effect that the defendants 2, 5, 8 and 12 are the daughters of the executant. From the available circumstances, the Court can easily discern that after the demise of Pachi Rajulu, Muthu Pappammal must be under the care and custody of the defendants 2, 5, 8 and 12. Under the said circumstances, she would have stated in Ex.B18 as her daughters and that itself would not pave the way for coming to a conclusion that Ex.B18 has come into existence in suspicious circumstances.

24. At this juncture, it would be condign to look into the decision reported in AIR2002 Himachal Pradesh 7 [Leela alias Bali Devi V. Drumti Devi]., wherein it is held that ?merely because of other daughter has been disinherited, it is not itself creates suspicious circumstance to doubt genuineness of will.?

25. It has already been discussed in detail that execution of Ex.B18 by the deceased Muthu Pappammal has been clearly proved on the side of the contesting defendants and further the said Muthu Pappammal is having unfettered right of executing Ex.B18 as she likes and law does not warrant her to execute such kind of will only in favour of nearest legal heirs and further testamentary succession puts an end to line of succession, available under the Hindu Succession Act, 1956. Therefore, viewing from any angle, the first contention put forth on the side of the appellant/plaintiff is sans merit and the same cannot be accepted.

26. The trial Court has non-suited the plaintiff with regard to suit item 6 on the ground that during life time of Pachi Rajulu he orally sold the suit 6th item in favour of Athinarayanasamy prior to 21 years and he constructed a house and he passed away leaving behind him the defendants 2, 5, 8 and 12 as his legal heirs. The defendants 5, 8 and 12 have relinquished their shares in favour of the second defendant and therefore, the second defendant has perfected title to the suit 6th item by adverse possession.

27. As pointed out earlier, the present suit has been instituted in respect of six items of suit properties, wherein suit items 3 and 4 have been sold by Pachi Rajulu and with regard to suit items 1 and 2, Ex.B18 has been executed by Muthu Pappammal and therefore, in respect of items 1 to 4, the plaintiff as well as first defendant are not having any semblance of right.

28. The trial Court has granted a preliminary decree of partition with regard to suit item 5. But disallowed the claim of the plaintiff with regard to suit item 6 by way of holding that the second defendant has perfected title to the same by adverse possession.

29. As stated earlier, with regard to suit item 5, Cross Objection has been filed. The case put forth on the side of the defendants is that even during life time of Muthu Pappammal, she orally sold suit item 5 in favour of the second defendant. But to prove the same, convincing evidence is not at all available and the trial Court after considering the available evidence on record has rightly found that the plaintiff is entitled to get a preliminary decree of partition in respect of suit item 5.

30. Now the court has to look into suit item 6. In the written statement filed on the side of the defendants 2 to 15, it is stated that during life time of Pachi Rajulu he sold suit item 6 in favour of one Athinarayanasamy and the said Athinarayanasamy has constructed a house and after his demise, the defendants 2, 5, 8 and 12 have succeeded the same and defendants 5, 8 and 12 have relinquished their interest in favour of the second defendant and therefore, the second defendant has become absolute owner of the same. Under the said circumstances, the second defendant has perfected title to suit item 6 by adverse possession.

31. The trial Court has accepted the contentions put forth on the side of the defendants 2 to 15 and ultimately found that the second defendant has perfected title to suit 6th item by adverse possession.

32. It is an admitted fact that the suit 6th item is the absolute property of Pachi Rajulu. Even though it has been contended on the side of the defendants 2 to 15 to the effect that prior to 21 years, the said Pachi Rajulu has sold the suit 6th item

in favour of Athinarayanasamy, no acceptable evidence has been forthcoming and further, with regard to suit item 6, no document has been created by the wife of Pachi Rajulu. Under the said circumstances, with regard to suit items 5 and 6 both the plaintiff and first defendant are having partible interest. In the written statement filed on the side of the defendants 2 to 15 it has not been specifically stated as to how the said Athinarayanasamy and after his demise the second defendant have had enjoyed the suit 6th item. Therefore, it is quite clear that requisite animus is totally absent on the part of the second defendant. Since requisite animus is totally absent on the part of the second defendant, this Court is of the view that the finding given by the trial Court with regard to suit item 6 is erroneous and with regard to suit item 6, the present suit is liable to be decreed.

33. In fine, this Appeal Suit is allowed in part without cost. Connected Civil Miscellaneous Petition is closed. The Judgment and decree passed by the trial Court in Original Suit No.390 of 1999 are modified as follows: The appellant/plaintiff is also entitled to get a preliminary decree of partition as prayed for in respect of suit item 6. In other aspects, the Judgment and decree passed by the trial Court are confirmed. Cross Objection No.47 of 2012 is dismissed without cost. To The Principal Sub Court, Tenkasi

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