

Kannappan Vs. Arjunan (Deceased) and Others

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Court : Chennai

Decided On : Sep-02-2016

Judge : P. Kalaiyarasan

Appeal No. : S.A.No. 1562 of 2005 & C.M.P.No. 20189 of 2005

Appellant : Kannappan

Respondent : Arjunan (Deceased) and Others

Judgement :

(Prayer: Second Appeal is preferred under Section 100 of the Code of Civil Procedure against the Judgment and Decree, dated 21.04.2005 made in A.S.No.57 of 2004 on the file of the Subordinate Judge, Thiruvarur, whereby setting aside the Judgment and Decree, dated 27.01.2004 made in O.S.No.87 of 2002 on the file of the District Munsif-cum-Judicial Magistrate, Nannilam.)

1. This Second Appeal is directed against the Judgment and Decree, dated 21.04.2005 of the Sub-Court, Tiruvarur made in A.S.No.57 of 2004, by which the Judgment and Decree of the trial Court, namely, District Munsif-cum-Judicial Magistrate, Nannilam, dated 27.01.2004 made in O.S.No.87 of 2002 was set aside, so that the suit ended in dismissal.

2. The plaint averments are as follows :

(i) Natesa Vanniyar had two sons, namely Murugaiya and Dhakshinamurthy. Natesa Vanniyar had the suit properties through partition effected between him and his brothers. Natesa Vanniyar in his life time executed a Will on 30.07.1957 bequeathing the suit property in favour of his first son Murugaiya, as his second son Dhakshinamurthy was not affectionate and attached to his family.

(ii) After the demise of Natesa Vanniyar in 1960, his son Murugaiya got the suit properties under the Will. Murugaiya died intestate in 1993. The plaintiff and defendants 1 to 3 being son's of Murugaiya are each entitled to 1/4th of the suit property.

(iii) The fourth defendant is the son of first defendant. They claim title over the suit property under the alleged Will, said to have been executed by Dhakshinamurthy on 23.03.1994. Patta was also obtained in the name of D4. Having jointly in possession and enjoyment of the property, the plaintiff and defendants 1 to 3 jointly executed sale deed and disposed certain properties. The plaintiff demanded partition from June 2002 and the same was rejected. He also made attempt through panchayatdars but in vein. The first item of suit property is Nanja land and the second item is the house. As far as the first item of the suit property, defendants 1 and 4 had been in possession and earning Rs.3000/- per year and also the paddy. Therefore, the plaintiff has filed the suit for partition and mesne profits.

3. The averments in the written statement filed by the first defendant adopted by the fourth defendant are as follows :

(i) The suit property is ancestral property of Natesa Vanniyar and not his self acquired property. The suit properties were acquired by the father of Natesa Vanniyar from his earnings. Natesa Vanniyar and his brothers had not acquired any property. Therefore, Natesa Vanniyar had no authority to execute the Will, dated 30.07.1957, bequeathing the entire property and Will had not come into effect.

(ii) Murugaiya and Dhakshinamurthy being sons of Natesa Vanniyar were entitled to half of the suit property. The family arrangement was reduced into writing on

01.07.1961 and both of them enjoyed the properties as mentioned in the family arrangement. Dhakshinamurthy bequeathed his property by the Will, dated 23.05.1994 in favour of fourth defendant. He died in 1994 and after his demise, D4 had been in possession of the suit property. Therefore, the plaintiff has no right over the properties given by Dhakshinamurthy in favour of D4 under the Will. All the properties excepting the properties given to D4 under the Will executed by Dhakshinamurthy (Item No.5 to 9 in A Schedule) were already divided among the plaintiff and defendants 1 to 3, even during the life time of Murugaiya.

(iii) They have been in possession and enjoyment of the properties as already partitioned and the demand for partition and the alleged income from the properties are false. The suit is liable to be dismissed.

4. The learned District Munsif-cum-Judicial Magistrate, Nannilam, framed necessary issues and after analysing the oral and documentary evidence of both sides decreed the suit. Aggrieved against the Judgment and Decree, the defendants 1 and 4 preferred appeal before the Sub-Court, Tiruvarur and the learned First Appellate Judge, allowed the appeal and dismissed the suit. Against the Judgment and Decree of the Sub-Court, Tiruvarur, the plaintiff preferred the present Second Appeal.

5. At the time of admission, the following Substantial Questions of Law were framed :

"1. Whether the court below erred in holding that the unstamped, unregistered, Family agreement, Ex.B.1, dated 01.07.1961 conferred right, title and interest on Dhakshinamurthy over the properties alleged to have been allotted to him, as per Ex.B.1 and consequently, erred in holding that the unregistered Will, Ex.B.9, conferred title in respect of the said properties on the fourth respondent.

2. Whether the court below should have held that Ex.B.1 should not be looked into for any collateral purpose, as per the decision of the Hon'ble Court reported in 2001 (1) CTC 112 (DB)?

3. Whether the court below should have held that Natesa Vanniyar was competent to execute the Will, Ex.A.1, dated 30.07.1957, since the suit properties were his self acquired personal properties, as per the recitals in the said Will and that the appellant and the respondents 1 to 3 became the absolute owners of the suit property after the death of their father Murugaiyan, who dies intestate in the year 1994 ?

4. Whether the court below erred in holding that the appellant and respondents 1 to 3 were divided, even prior to the death of their father Murugaiyan in the year 1994, while the appellant and respondents 1 to 3 jointly executed a registered sale deed on 03.05.1996 in respect of a portion of the joint family properties.

5) Whether the court below should have held that Ex.B.1 was not enforceable and did not confer any right on Dhakshinamurthy to execute the unregistered Will, Ex.B.9 and hence, the suit properties were only undivided joint family properties of the appellant and respondents 1 to 3 and should not have reversed the judgment and decree of the trial Court."

6. The learned counsel appearing for the appellant / plaintiff contends that the suit properties acquired by Natesa Vanniyar through partition between brothers is his self-acquired property and as per the Will, dated 30.05.1957 executed by him, his son Murugaiya got the entire property and therefore, the plaintiff is entitled to 1/4th share in the property and D4 has got no right over the property under the Will executed by Dhakshinamurthy, as he had no title to pass on. It is further contended that the alleged family arrangement, dated 01.07.1961 between Murugaiya and Dhakshinamurthy cannot be looked into, as the same was not stamped and unregistered one.

7. The learned counsel appearing for the respondents 4 to 7 contends that the learned appellate Court has rightly held that the character of the property is ancestral and therefore, Natesa Vanniyar had no right to bequeath the entire property in favour of Murugaiya; that D4 got item No. 5 to 9 of the 'A' schedule suit property belonging to Dhakshinamurthy under the Will, dated 23.05.1994 executed by him; that the remaining property were already partitioned and the plaintiff and defendants 1 to 3 had been in possession of the same and therefore, there is no

need to interfere with the Judgment and Decree of the first appellate court.

8. There is no dispute with respect to the Genealogy and relationship between the parties. The Genealogy is as follows :

(Chart)

9. According to the appellant / plaintiff, the nature and character of the suit properties is self-acquired properties. The appellant contends that Natesa Vanniyar acquired the property through partition between him and his brothers and the entire properties were purchased from their earnings. The respondents / defendants 1 and 4 contends that the suit properties are ancestral properties acquired by father of Natesa Vanniyar and not either by Natesa Vanniyar or his brothers. The partition deed, dated 02.11.1938 executed between Natesa Vanniyar and his brothers is marked as Ex.B.8. In this document, the recital is as follows: (Language)

10. From the recitals, it is clear that there were family properties and joint nucleus and property was also purchased in the name of Narayana Vanniyar, i.e., brother of Natesa Vanniyar and they were all blended and partitioned among brothers. Therefore, the properties have got the character and nature of ancestral properties. Since the properties are ancestral in character, Natesa Vanniyar is not entitled to bequeath the entire property under the Will in favour of the plaintiff. Further, the Will, dated 30.07.1957, Ex.A.1 has not been proved, as per Section 68 of the Indian Evidence Act in this case. An attempt was made on the side of the plaintiff by examining the son of the attesor, Ramaiyah as P.W.3. The Will has been summoned from the Sub-Registrar and the same was brought to the Court by P.W.2, the staff of the Sub-Registrar office. But P.W.3 has neither identified nor spoken about the signature of his father in the Will. Therefore, Ex.A.1 shall not be used as evidence as the execution has not even proved in this case.

11. The family arrangement said to have been made between Murugaiya and his brother Dhakshinamurthy on 01.07.1961 also cannot be looked into for any purpose including collateral purpose, for want of stamp duty.

12. The learned counsel appearing for the appellant has rightly contended that unstamped documents should not be looked into for any purpose and cited the Division Bench Judgment of this Court, Lakshmipathy, A.C v. A.M.Chakrapani Reddiar, reported in 2001 (1) CTC 112. In this Judgment, it has been held as follows :

"41. We hold that the document in question is being an unstamped and unregistered, the same cannot be looked into for any purpose. Similarly, oral evidence cannot be let in about the contents of the said document.

42. To sum up the legal position

(I) A family arrangement can be made orally.

(II) If made orally, there being no document, no question of registration arises.

(III) If the family arrangement is reduced to writing and it purports to create, declare, assign, limit or extinguish any right, title or interest of any immovable property, it must be properly stamped and duly registered as per the Indian Stamp Act and Indian Registration Act.

(IV) Whether the terms have been reduced to the form of a document is a question of fact in each case to be determined upon a consideration of the nature of phraseology of the writing and the circumstances in which and the purpose with which it was written.

(V) However, a document in the nature of a Memorandum, evidencing a family arrangement already entered into and had been prepared as a record of what had been agreed upon, in order that there are no hazy notions in future, it need not be stamped or registered.

(VI) Only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what right in what properties the parties possess.

(VII) If the family arrangement is stamped but not registered, it can be looked into for collateral purposes.

(VIII) Whether the purpose is a collateral purpose, is a question of fact depends upon facts and circumstances of each case. A person can not claim a right or title to a property under the said document, which is being looked into only for collateral purposes.

(IX) A family arrangement which is not stamped and not registered cannot be looked into for any purpose in view of the specific bar in section-35 of the Indian Stamp Act."

13. The family arrangement between Murugaiya Vanniyar and Dhakshinamurthy Vanniyar, dated 01.07.1961 is marked as Ex.B.1, subject to objection on the side of the plaintiff. This is unstamped and unregistered document. As per Section 35 of Indian Stamp Act, no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence.

14. Following the above provisions of law and the decision of the Division Bench, the above document cannot be looked into as evidence for any purpose.

15. However, P.W.3, the witness examined on the side of the plaintiff, who is aged 73 years has deposed during cross-examination that Natesa Vanniyar died 40 years back; that they were relatives to him; that he knew about the partition made among Dhakshinamoorhty and Murugaiya Vanniyar. Thus partition effected between Murugaiya and Dhakshinamurthy has been spoken to by P.W.3. This shows that the Will, dated 30.05.1957 executed by Natesa Vanniyar was not given effect to.

16. The learned counsel appearing for the respondents 4 to 7 contends that Dhakshinamurthy during his life time executed the Will, dated 23.05.1994 bequeathing his properties to D4. The said Will has been marked as Ex.B.9. It is a registered document. One of the attesor, by name Govindasamy was examined as D.W.3. He says in his evidence about attestation. Thus the execution of the

above Will has been legally proved. Dhakshinamurthy as a coparcener having right over the ancestral property got partition from his brother Murugaiya, as deposed by P.W.3 and executed the Will, Ex.B.9 bequeathing his share in favour of D4.

17. There is no doubt that Murugaiya died in 1994. No doubt P.W.3 has said during cross-examination that even during the life time of Murugaiya, his children partitioned the properties among themselves. The plaintiff and the defendants 1 to 3 being sons of Murugaiya jointly executed the sale deed in favour of one Paneerselvam on 23.05.1996, i.e., after the demise of their father Murugaiya. As the plaintiff and defendants 1 to 3 jointly sold the property after the demise of their father, P.W.3's evidence as to the oral partition among plaintiff and defendants 1 to 3 cannot be given much weight. Further, no other document has been brought to the notice of this Court about partition, demarcation or possession by the plaintiff and defendant 1 to 3 of their respective share. Therefore, except Item No.5 to 9 of suit 'A' schedule property, other properties devolved upon Murugaiya were not partitioned among his legal heirs. Thus, the plaintiff is entitled to 1/4th share in the suit property, except Item No.5 to 9 of 'A' schedule property.

18. For the aforesaid reasons, the substantial questions of law are answered accordingly and therefore, the Judgment and Decree of the first appellate Court is modified to the effect as stated supra.

In fine, this Second Appeal is partly allowed and the appellant / plaintiff is entitled to 1/4th share in the suit properties, excepting Item Nos.5 to 9 of 'A' schedule. Consequently, connected miscellaneous petition is closed. The parties are directed to bear their own costs.

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