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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :08.02.2022

Pronounced on:18.02.2022

Coram::

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Appeal Suit No.1022 of 1993

1.Palaniammal
2.Marimuthu ... Appellants/Plaintiffs

/versus/

1.Jambulingam Servai (deceased)
2.Meenakshi
3.Marimuthu

(RR2 & 3 brought on record as LR
of the deceased sole respondent vide
order of Court dt.18.10.2016 made in
C.M.P.Nos.924 to 926/2008 in
A.S.No.1022/1993)

4.Saroja

(R4 brought on record as LR of the
deceased sole respondent vide Court
order dated 04.01.2021 made in
C.M.P.No.16297/2018 in
C.M.P.No.924 to 926 of 2008 in
A.S.No.1022 of 1993) ...Respondents

Prayer: Appeal Suit has been filed under Section 96 of C.P.C., against the judgment and decree of Subordinate Judge's Court, Ariyalur made in O.S.No.111 of 1986 dated 07.10.1991 in so far as it deems as suit in respect of item Nos.1 to 5, 16,17,18,20,21,22 and 24.

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For Appellants :Mr.C.Vediappan for
Mr.S.Mani

For Respondents:Mr.S.Sarath Chandran for
Mr.S.Giritharan for R3

R2, R4- No appearance

R1 died.

J U D G M E N T

Suit in O.S.No.111 of 1986 filed for partition was partly allowed. Hence, in respect of the disallowed portion, the plaintiffs have preferred the present Appeal Suit.

2.For clarity sake, the parties are referred to their status and ranking found in the trial Court decree.

3.The factual background of the case:
O.S.No.111 of 1986:-
The suit property belongs to one Chinnammal. The first plaintiff Palaniammal is her daughter. The second plaintiff Natesan Servai is the husband of Chinnammal. Chinnammal's elder son Jambulingam is the defendant in the suit. On the demise of Chinnammal intestate, claiming 2/3rd share in the suit property of Chinnammal, the suit has been filed alleging that the defendant having developed animosity with the co-sharers, causing act of waste of the joint family property and also declining to divide the property among the sharers. Instead of allowing them to enjoy the suit property, the defendant filed a suit against the plaintiffs seeking permanent injunction restraining the plaintiffs from interfering the possession. Hence, there is no purpose in continuing the joint enjoyment.

4.Pending suit, the second plaintiff (Natesan Servai), who is the husband of Chinnammal died on 19.12.1987. During his lifetime, he had executed a registered Will dated 01.10.1986 in favour of the third plaintiff (Marimuthu) and therefore, the third plaintiff is impleaded being a necessary party. In the plaint, 23 items of immovable properties were enlisted in the schedule and 2/3rd share claimed in each of the properties.

5.The sole defendant filed his written statement denying the claim of the plaintiffs stating that his mother Chinnammal is the daughter of one Karuppanna Servai. The said Karuppanna Servai had no male issues. Hence, he and his wife Nallammal

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brought up the defendant from his young age and he improved the estate of Karuppanna Servai by his hard work. The properties were handed over by Karuppanna Servai and Nallammal to Chinnammal for the benefit of the defendant since the defendant was a minor. The entire suit properties are in possession and enjoyment of the defendant for more than 12 years by paying tax. The defendant have no right over the property. The plaintiffs never in joint possession or enjoyed the property jointly at any point of time. The defendant directly inherited the property from his grand father. Only till he attains majority, during the interregnum period, his mother Chinnammal was administering the property on his behalf. Chinnammal had no exclusive right in the suit property. Hence, the plea of the plaintiffs that the suit property belongs to Chinnammal, is factually incorrect. There is no custom to give share in the family property to female members. As per custom, the defendant had provided enough streedhanam during the first plaintiff Palaniammal's marriage. He performed the marriage of the first plaintiff, as per the family custom. He provided 32 sovereign of jewels, a cow, 6 goats, two set of silver anklets, 51 items of brass and bronze articles, a sheep and periodical Pongal and Deepavali steer. Besides that for the past 24 years he has been providing groceries to the first plaintiff as seer as per the custom. Therefore, the plaintiffs have no right to seek partition in the property, which is being enjoyed by him exclusively for more than 12 years. Since the plaintiffs are trying to interfere with the peaceful possession in the suit property, he has already approached the Civil Court in O.S.No.349 of 1986 on the file of the Ariyalur District Munsif Court seeking permanent injunction against the first plaintiff (Palaniammal) and the said suit is pending.

6.For recovery of money, he has also initiated another suit O.S.No.345 of 1986 against Palaniammal and others. His father, who is the second plaintiff, is 80 years old. Certain properties were purchased in his name being the eldest male member of the family. Taking advantage of his old age, the first plaintiff in connivance with son are trying to manipulate documents to snatch away the properties which he has purchased in the name of his father the second plaintiff. The properties were purchased by the defendant in the name of his father and he is only a name lender. In fact, the defendant is entitled for share in the property, which the second plaintiff got through partition among his brothers. The suit properties exclusively belongs to the defendant. Neither his sister (first plaintiff) nor his son (third plaintiff) and his father (second plaintiff) have any right over the property. Even if so, they have lost

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their right being ousted from the property for more than 12 years. The alleged Will executed by the second plaintiff (Natesan Servai) in favour of the third plaintiff (Marimuthu) is not a valid and genuine document. The third plaintiff cannot be a legal heir of the second plaintiff (Natesan Servai). On 20.06.1984 Natesan Servai was not in good state of mind to execute the Will with free mind and there was no necessity for him to execute the Will. The alleged Will dated 01.10.1986 in favour of the third plaintiff executed by plaintiffs 1 and 2 is also not a genuine Will.,

7.Based on the pleadings, the trial Court has framed the following issues:-

(1)Whether the plaintiffs are entitled for the relief as prayed?

(2)Whether the suit property belongs to the deceased Chinnammal?

(3)Whether the plaintiffs are entitled for the share in the suit property?

(4)Whether the Will dated 01.10.1986 and 20.06.1984 prepounded by the plaintiffs are true and valid?

(5)Whether the properties in the name of Natesan Servai (2nd plaintiff) were purchased out of income derived through the properties allotted under the deed dated 12.08.1936?

(6)Whether Natesan Servai had any ancestral property at the time of purchasing the property in his name?

(7)Whether the defendant is entitled for the counter claim?

(8)Whether the property claimed by the defendant in his counter claim can be subjected to partition?

(9)What other relief the plaintiffs are entitled to?

O.S.No.349 of 1986:

8.The suit in O.S.No.349 of 1986 filed by Jambulingam seeking permanent injunction against Palaniammal was renumbered as O.S.No.86 of 1987. In this suit, Jambulingam claiming right and title over the suit property pleaded, he is enjoying the property by cultivating and harping the yield. Palaniammal have no right in the property. However, she with the help of her henchmen is trying to interfere with his peaceful possession. Hence, prays for permanent injunction.

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9.The first plaintiff (Palaniammal) as defendant in the suit in O.S.No.86 of 1987 filed a written statement denying the allegations. According to her pleadings, the suit property is not in exclusive possession of the defendant (Jambulingam). In the residence, the plaintiff (Jambulingam) is not in exclusive occupation. It is in correct to plea that the suit property belongs to the parents of Chinnammal and they allotted the suit property to Jambulingam as per the family arrangements. In fact, the property belongs to Chinnammal and she died intestate 10 years prior to institution of the suit and after her death, her husband Natesan Servai and children (Palaniammal) and (Jambulingam) were jointly enjoying the property. Therefore, the plaintiff (Jambulingam) cannot seek injunction against co-sharer. Further, the defendant (Palaniammal) and her father (Natesan Servai) had jointly executed a Will in favour of Marimuthu on 01.10.1986 in respect of their share in the suit property. Therefore, the suit for permanent injunction filed by the plaintiff (Jambulingam) against co-sharer is not maintainable.

10.Based on the pleadings, the trial Court has framed the following issues in O.S.No.86 of 1987:-

(1)Whether the suit property being in enjoyment of the plaintiff for more than 12 years?

(2)Whether the suit property belongs to the plaintiff?

(3)Whether the plaintiff is entitled for the relief as prayed?

11.Before commencement of examination of witnesses, a joint memo was filed by parties to take evidence recorded in O.S.No.111 of 1986 filed by Palaniammal and others as evidence for O.S.No.86 of 1987 filed by Jambulingam also. Accordingly, common evidence recorded in O.S.No.111 of 1986 filed by Palaiammal and others against Jambulingam.

12.On behalf of the plaintiffs, Palaniammal (first plaintiff) and Rajangam (attestor to the Will Ex.A-2) were examined as witnesses and four exhibits were marked. On behalf of defendant, the defendant (Jambulingam) and five others were examined as witnesses and 31 exhibits were marked.

13.Ex.A1 is the gift deed executed by Karuppanna Servai in favour of Chinnammal. The deed is accepted by both the parties. While the plaintiffs claimed right over the property on the premises that in the suit properties belongs to

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Chinnammal, the defendant (Jambulingam) claims that his grand father Karuppanna Servai executed gift deed Ex.A1 in the name of his mother Chinnammal because he was minor at that point of time and in fact, Karuppanna Servai gifted the property only to the defendant and not to the mother of the defendant. Some of the suit properties in fact were purchased by him in the name of his father Natesan Servai and few other properties were purchased in the name of his mother Chinnammal. However, all the properties were purchased from out of the income derived from his exertion.

14.The trial Court, after appreciating the documentary evidence and the witnesses spoken about the documents namely, Ex.A1 and Ex.B15 to Ex.B19 has held, that Ex.A1 is the gift deed dated 12.08.1936. As per the recitals, Karuppanna Servai has settled absolutely the suit schedule mentioned property as Items No.6,7,8,9,10,12 to 15,19 and 23 in favour of his sole daughter Chinnammal. The gift is in praesenti. The said document Ex.A1 is of the year 1936, which is nearly 55 years old document. The suit property is described in the deed as absolutely self-acquired property of Karuppanna Servai. Any oral statement contrary to the written document is subject to Section 92 of the Indian Evidence Act, 1872. Therefore, the plea of the defendant (Jambulingam) that the real intention of Karuppanna Servai was to gift the property to him and not to his mother, however, at the time of the gift deed Ex.A1, he was minor and therefore, Karuppanna Servai gifted the property in the name of his mother Chinnammal to administer it, till the defendant (Jambulingam) attains majority, is contrary to the written document and therefore, the plea is not sustainable. As a result, the trial Court has allowed the suit in respect of the suit schedule property items No.6 to 15, 19 and 23, which are covered under Ex.A1.

15.In respect of Ex.A2-Will dated 01.10.1986 executed by Palaniammal (first plaintiff) and Natesan Servai (second plaintiff) in favour of Marimuthu (impleaded third plaintiff), the trial Court held that the Will has been duly proved by the plaintiffs through one of the attesting witnesses (PW-2 (Rajangam)) and hence, it is valid. In the said Will, both Palaniammal and Natesan Servai had affixed their thumb impression and the attesting witnesses had seen the executors affixing thumb impression. Being satisfied by the evidence, the trial Court has held that the Will Ex.A2 duly proved as per Section 68 of the Indian Evidence Act, 1872.

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16.In respect of Ex.A4 Will dated 20.06.1984 executed by Natesan Servai in favour of Marimuthu, the trial Court after comparing Ex.A4-Will with Ex.A2-Will, had observed that in the later Will marked as Ex.A2, Natesan Servai had affixed his thumb impression along with the first plaintiff Palaniammal. Whereas in the previous Will Ex.A4 dated 20.06.1984, Natesan Servai had affixed his signature and there is no explanation on the part of the plaintiffs, why Natesan Servai chose to affix his signature in Ex.A4, while he chose to affix his thumb impression in Ex.A2. Further, in Ex.A4, none of the attesting witnesses namely Ramasamy and Maruthamuthu were examined and there is no justifiable reason placed by the plaintiff before the Court for not examining the attesting witnesses. Therefore, for non-compliance of the requirement under Section 68 of the Indian Evidence Act, 1872, the trial Court has disbelieved the genuineness of Ex.A4-Will(20.06.1984). As a result, the trial Court held that the properties which stood in the name of Chinnammal are the properties for which the plaintiffs are entitled for share.

17.In respect of the counter claim made by the defendant over the property which stood in the name of Natesan Servai on the ground that from out of the income derived from the property stood in the name of his grand father Karuppanna Servai, he purchased the property in the name of his father Natesan Servai was declined by the trial Court stating that the defendant to seek right in the property stood in the name of Natesan Servai, has to initiate separate suit and the relief cannot be granted as a counter claim.

18.The trial Court had observed that since the suit is filed for partition in respect of the property stood in the name of Chinnammal, the counter claim of the defendant in respect of the property which stands in the name of Natesan Servai not sustainable. The defendant has to be worked out his remedy in a separate suit.

19.In the result, the trial Court has partly allowed the suit for partition in respect of the suit schedule items No.6 to 15, 19 and 23 and declared that plaintiffs 1 and 2 namely, Palaniammal and Natesan Servai (deceased) are entitled for 2/3rd share and the defendant Jambulingam is entitled for 1/3rd share in the above mentioned properties.

20.In respect of the injunction suit filed by Jambulingam, which was taken on file as O.S.No.349 of 1986 and

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renumbered as O.S.No.86 of 1987 and tried along with this suit in O.S.No.111 of 1986, the trial Court declined to grant the relief of injunction against the co-owner in respect of the properties, which were held to be the joint family property to be inherited by the legal heirs of Chinnammal and no injunction can be granted in favour of one sharer against other sharers.

21.The plaintiffs for the disallowed portion have preferred this appeal on the ground that the entire suit properties were in possession and enjoyment of Chinnammal. Apart from the property, which Chinnammal got through gift deed Ex.A1, the rest of the properties were purchased in the name of the family members from out of the income derived from the property gifted to Chinnammal. Therefore, the entire suit property should have been subjected to partition. When there is no evidence to show that Jambulingam Servai had any separate source of income, the other properties also ought to have been considered as the joint family property and right of 2/3rd share in favour of the plaintiffs ought to have been granted in respect of those properties also.

22.Point for determination in the first appeal is:

> Whether the plaintiffs are entitled for any share in the properties described in schedule items No.1 to 5 16,17,18,20,21,22 and 24?

23.The learned counsel appearing for the appellants submitted that under Ex.A1, Karuppanna Servai had gifted certain properties in favour of Chinnammal. The other suit properties were purchased from and out of the income derived from the property settled in favour of Chinnammal. Therefore, those properties also to be considered as properties of Chinnammal, when it is proved that Jambulingam had no independent source of income.

24.Contrarily, learned counsel appearing for the respondent would submit that there is no denial of the averment that Karuppanna Servai, who owned the property, had no male issue and the respondent, who is the grand son of Karuppanna Servai, was brought up by Karuppanna Servai since his childhood. He had been toiling and out of his exertion, the other properties were purchased. Though it was a settlement in favour of his daughter Chinnammal in the year 1936, in fact the property was in exclusive possession and enjoyment of Jambulingam. The true intention of Karuppanna Servai, was to

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settle the property to Jambulinga. Since Jambulingam was minor during the year 1936 and the right of women estate not blossomed to the full extent, considering the prevailing law, Karuppanna Servai thought fit that the property settled in favour of his daughter will naturally devolve upon the male heir i.e. the respondent. Though the trial Court had partly allowed partition suit in respect of certain properties, which were in the name of Karuppanna Servai later gifted to Chinnammal in the year 1936, in respect of the other properties which are the subject matter of the appeal, the trial Court has rightly held that these properties, which stand in the name of Natesan Servai and others, cannot be subjected to partition in a suit filed in respect of deceased Chinnammal, who died intestate and also given liberty to the respondent to initiate a separate suit for partition in respect those properties which stands in the name of Natesan Servai and not subjected to the Will Ex.A4 which is held to be not proved.

25.Heard both sides and perused the materials available on record.

26.Before the trial Court, the plaintiffs have relied upon four documents. The first document Ex.A1 is the gift deed executed by Karuppanna Servai in favour of Chinnammal on 12.03.1936. The suit schedule items No.6 to 15, 19 and 23 are covered under this gift deed. The recital of this document, without any ambiguity reveals that Karuppanna Servai had out of love and affection absolutely gifted the property to his daughter. Therefore, no oral evidence is admissible in evidence contrary to the written document Ex.A1,which does not suffer any ambiguity.

27.The examination of the provisions of evidence Act on admissibility of oral evidence contrary to the terms of written document, Section 91 of the Indian Evidence Act, 1872 provides that when the terms of contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself.

Sub Section (1) of Section 92 declares that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last Section, ((i.e) Section 91) no evidence of any oral agreement or

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statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms And the first proviso to Section 92 says that any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contradicting party, want or failure of consideration, or mistake in fact or law.

Thus it is clear that the bar imposed by Sub-Section (1) of Section 92 applies when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms.

28.In the instant case, the defendant wants to substitute the terms of the document which is reduced into writing. None of the exception provided in Section 92 of the Evidence Act entitles the defendant to adduce oral evidence contrary to the terms of the written document. More particularly when the terms of the document is clear and un ambiguous. The gift in favour of Chinnammal cannot be termed as a gift to her minor son when the documents is conspicuously silent about even the existence of a minor son to Chinnammal. Therefore, the trial Court has rightly rejected the plea of the defendant, who claims exclusive right over the entire suit properties on the ground of continuous enjoyment and vested of the property in his favour.

29.The bar imposed by Sub-Section (1) of Section 92 applies, when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. Thus the law in this regard is well settled, in view of Section 92 of the Indian Evidence Act, 1872; where any contract is required by law to be reduced in writing, then no oral evidence or understanding to the contrary or what is apart from the said contract would be admissible in law.

30. As a result, in respect of properties which was settled in favour of Chinnammal by her father under Ex.A-1, on the demise of Chinnammal dying intestate, it gets devolved on

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her husband, daughter and son. The trial court has rightly restricted the relief of partition in respect of properties which was settled in favour of Chinnammal under Ex.A-1. Whereas in respect of other properties which are not in the name of Chinnammal, but in the name of Natesan Servai, who is the father of the first plaintiff and the sole defendant. On the death of Natesan Servai pending suit, the wills propounded by the plaintiffs were put to test as per Section 68 of the Indian Evidence Act, 1872.

31.Section 68 of Indian Evidence Act, 1872 requires three things to be proved for considering a Will as properly attested and executed. He would further submit that firstly the testator has to sign or affix his mark to the Will or it has got to be signed by some other persons in his presence and by his directions. The second point was that the sign or mark of the testator or sign of the person signing for him to appear at a place from which it would appear that by the mark or signature, the document was intended to have the effect as a Will. Third point was that the Will has to be attested by two or more witness and each of the witnesses must have seen the testator's signature or affixing his mark to the Will or must have seen other person signing the Will, in the presence and by the direction of testator or must have received from the testator, present acknowledgement of his signature or mark or of the signature of such other person and each of the witnesses has to sign the Will in the presence of testator.

32.In so far as Ex.A2, which is Will executed by Palaniammal and Natesan Servai in favour of Marimuthu Servai, the execution of the Will has been spoken by PW-2, who is one of the attesting witnesses. His evidence found to be unimpeached. The existence of the Will has been spoken by the preponderance of the Will in the plaint and being duly registered Will and proved in the manner known to law by examining one of the attesting witnesses. The finding of the trial Court regarding Ex.A2 cannot be faulted.

33.The case of the plaintiffs that the properties, which were declined by the trial Court, are the properties earned from the income of the properties though purchased in the name of her husband Natesan Servai. Therefore, the same to be held as the property of Chinnammal. The four documents relied on by the plaintiffs, we find no evidence to show that the rest of the properties were purchased from and out of the income derived from the property which stood in the name by Chinnammal. Contrarily, the house tax receipts and the land tax receipts,

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which are relied on by the defendant marked as Ex.B1 to Ex.B13 would indicate that apart from the properties which were gifted to Chinnammal by her father Karuppanna Servai, the other properties were purchased from different source of income. Therefore, this Court finds that the trial Court has rightly rejected the claim of the plaintiffs in respect of Items No.1 to 5, 16 to 18, 20, 21, 22 and 24 for want of evidence that they are the properties of Chinnammal who died intestate. This Court, on perusing of the evidence, finds that there is no error in the judgement of the trial Court either on law or on facts. Hence, it has to be confirmed.

34.In the result, this Appeal Suit is dismissed. The judgment and decree of the trial Court is hereby confirmed. Considering the relationship between the parties, there is no order as to costs.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

ari
To:

1.The Subordinate Judge,
Ariyalur.

2.The Section Officer,
VR Section, High Court of Madras.

+1cc to M/s.C.S.Associates, Advocate Sr.11037

A.S.No.1022 of 1993

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