



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 26.07.2021

CORAM

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

SA(MD)No.1189 of 2009

and

MP(MD)No.2 of 2009

1.Francis Robert

2.Mary Kamalam

3.C.Willington

4.C.Manimaran

5.C.Ellamchezian

...Plaintiffs / Appellants / Appellants

Vs.

Savariammal (died)

A.Devasahayam Nadar (died)

1.G.Isabella

2.A.D.Maria Dean Rusk

3.Y.Vasuki

4.D.Parthiban

5.D.Brown Kala

6.D.Washington

... Defendants / Respondents /
Respondents

(cause title was amended vide
order dated 12.07.2013 made in
MP(MD)Nos. 1 and 2 of 2013 in
SA(MD)No.1189 of 2019)

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree made in A.S No.139 of 2003 dated 04.11.2006 on the file of the Principal District Judge, Tuticorin confirming the judgment and decree passed in O.S No.64 of



2001 dated 01.10.2002 on the file of the Principal District Munsif, Tuticorin.

For Appellants : Mr.T.Lajapathi Roy

For Respondents : Mrs.P.Jessi Jeeva Priya
for Mr.G.Aravindhan for R1 to R6

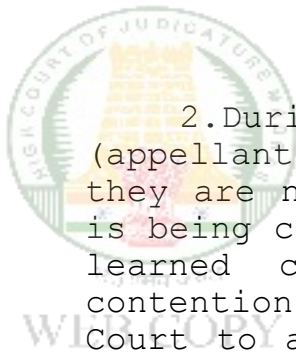
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JUDGEMENT

The defendants in O.S No.64 of 2001 on the file of the Principal District Munsif, Tuticorin are the appellants in this second appeal. The suit was one for partition. It was filed by one Savariammal. The case of the plaintiff was that the suit properties belonged to one Dharmar Gnanaprakasam. Dharmar Gnanaprakasam had a wife by name, Gnanaprakasi Ammal. The plaintiff Savariammal, the first defendant Francis Robert and T.M.Chandran were born to them. Dharmar Gnanaprakasam Nadar passed away in the year 1985. The mother Gnanaprakasi Ammal also passed away on 14.02.2000. Chandran had passed away on 09.01.1993 leaving behind the defendants 2 to 5 as his surviving legal heirs. According to the plaintiff, she is entitled to 1/3rd share in the suit properties. The first defendant Francis Robert opposed the suit claim by contending that the II Schedule property stood in the name of Gnanaprakasi Ammal and that she had settled the same in his favour vide Ex.B3 dated 12.10.1999. Based on the divergent pleadings, the trial court framed the necessary issues. The plaintiff Savariammal examined herself as PW.1 and the attestors to the document Ex.B3 as PW.2 and PW.3. Exs.B1 to 10 were marked. After consideration of the evidence on record, the trial court decreed the suit and passed preliminary decree on 01.10.2002 granting 1/3rd share in favour of the plaintiff in both the suit schedules. Aggrieved by the same, the defendants filed A.S No.139 of 2003 before the Principal District Court, Tuticorin. Vide judgment and decree dated 04.11.2006 the first appellate court dismissed the appeal. Challenging the same, this second appeal came to be filed. The second appeal was admitted on the following substantial questions of law :

"1.Whether the courts below are right in granting the relief of partition to the respondent/plaintiff without seeking the relief of setting aside the settlement deed and gift deed executed in favour of the appellant/defendants in respect of the suit properties?

2.Whether the courts below are right in holding that the validity of the Will executed in favour of the appellants/defendants cannot be accepted since it has not got probate under Indian Succession Act ?"

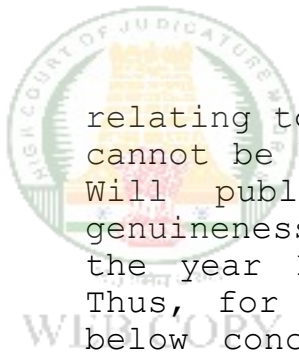


2. During the pendency of the appeal, defendants 2 to 6 (appellants 2 to 5 herein) settled the matter with the plaintiff and they are no longer interested in pursuing this appeal. The appeal is being conducted by the first appellant Francis Robert alone. The learned counsel for the first appellant reiterated all the contentions set out in the memorandum of grounds and wanted this Court to answer the substantial questions of law in favour of the appellants and set aside the judgment and decree.

3. Per contra, the learned counsel appearing for the respondents submitted that the impugned judgment and decree do not call for any interference. She would submit that the "A" Schedule property admittedly belonged to Dharmar Gnanaprakasa Nadar. However, "B" schedule property is a Natham. According to her, the trial court rightly held that even though Gnanaprakasi Ammal settled "B" Schedule property in favour of the first defendant Francis Robert, still, she could not have done so because she was not the owner of the property. Following the demise of Dharmar Gnanaprakasa Nadar, "B" Schedule property which is a Natham property devolved on Gnanaprakasi Ammal and on all the three children. She submitted that no substantial question of law arises for consideration.

4. I carefully considered the rival contentions and went through the evidence on record. The second schedule property is a dwelling house. It is located in a site that was originally classified as Natham. There is no doubt that Gnanaprakasi Ammal had executed Ex.B3 dated 12.10.1999 in favour of the first defendant. The courts below have held that Gnanaprakasi Ammal could not have claimed absolute title over the entire property. In my view, this conclusion is well founded. It is nobody's case that Gnanaprakasi Ammal acquired the suit properties in her independent capacity. Gnanaprakasi Ammal could not have bequeathed the entire property in favour of the first defendant. But then, Gnanaprakasi Ammal being a Christian widow would have got 1/3rd share in the second suit schedule property while other legal heirs would have each got 2/9th share. Vide Ex.B3 Gnanaprakasi Ammal had settled her interest in favour of the first defendant. Thus, her 1/3rd share also would get added to the share of the first appellant/first defendant. Thus, the first appellant would have 5/9th share in the "B" Schedule property. The courts below failed to take note of the fact that Gnanaprakasi Ammal would get 1/3rd share following her husband's demise and in view of the execution of Ex.B3, the said 1/3rd share would get added to the pre-existing share of the first defendant. To this extent, the judgments and decrees passed by the courts below warrant interference and modification.

5. The defendants had filed written statement claiming that Dharma Nadar executed a Will dated 03.04.1983 and the same was marked as Ex.B1. It is true that Section 213 of Indian Succession Act, 1925 was amended and as per Amendment Act 26 of 2002 with effect from 01.05.2002, it applies to all pending proceedings



relating to Wills executed by Christians. Failure to probate Ex.B1 cannot be held against the defendants. But the delay in making the Will public can be taken into account while examining the genuineness of the Will. Admittedly, Dharma Nadar passed away in the year 1985. The amendment was brought in in the year 2002. Thus, for 17 long years, the Will was not probated. The courts below concurrently disbelieved Ex.B1. Even though I answer the second substantial question of law in favour of the appellants, the other reasons given by the courts below for disbelieving Ex.B1 find favour with me. It was certainly open to the plaintiff to maintain a partition suit by proceeding on the premise that Ex.B3 dated 12.10.1999 does not bind her. The first substantial question of law is answered against the appellants. Since Ex.B3 is to be held as valid to the extent of her 1/3rd share in the second item in the "B" schedule property, the judgments and decrees passed by the courts below are modified as follows :

(i)the first appellant, the LRs of Chandran and the LRs of the Savariammal will each be entitled to 1/3rd share in the first item.

(ii)the first appellant will be entitled to 5/9th share in the "B" Schedule property. The LRs of Savariammal and LRS of Chandran will be entitled to 2/9th share each in the "B" Schedule property which is a dwelling house.

(iiiI)the LRs of the plaintiff will also be entitled to benefit under any amicable arrangement that may have been arrived at during the pendency of the appeal.

6.The second appeal is partly allowed. No costs. Connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

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/ /2022

Sub Assistant Registrar(CS)

skm

Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.



To:

1. The Principal District Judge, Tuticorin.
2. The Principal District Munsif, Tuticorin.

Copy to :

The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.P.JESSI JEEVA PRIYA, Advocate (SR-23991[F] dated
27/07/2021)

+1 CC to M/s.T.LAJAPATHY ROY, Advocate (SR-24067[F] dated
27/07/2021)

SA (MD) No.1189 of 2009
and
MP (MD) No.2 of 2009
26.07.2021

RK(07/06/2022) 5P 7C