



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 30.06.2022

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD) No.71 of 2005

Kondappan

... Appellant

Vs.

- 1.Shankar (died)
- 2.Krishnan
- 3.Sundaribai
- 4.Radhabai
- 5.Lalibai alias Kalavathi
- 6.Kesaribai
- 7.Chakrapani
- 8.Saraswathi
- 9.Ratnabai
- 10.Lakshminarayanan
- 11.Saraswathi
- 12.S.Gowribai
- 13.S.Prakash
- 14.S.Mohanram



15.S.Dharmendar

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(Respondents 12 to 15 are brought on record as LR's of the deceased first respondent vide Court order dated 08.06.2018 made in CMP(MD) Nos.4727 of 2018) ... Respondents

PRAYER: Appeal Suit filed under Section 96 of Civil Procedure Code, to call for the records of the II Additional Sub Judge, Tirunelveli, in his judgment and decree dated 07.02.2003 in O.S.No.63 of 1996 and set aside the judgment and decree and dismiss the suit of the plaintiff.

For Appellant : Mr.P.Thiyagarajan

For Respondents : No appearance

JUDGMENT

For the sake of convenience, the parties are referred to as per their ranking before the trial Court.

2.The appellant is the third defendant. The first and second respondents are the plaintiffs. They have filed the suit in O.S.No.63 of



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1996 on the file of the II Additional Sub Judge, Tirunelveli, for partition and separate possession. After trial, the trial Court decreed the suit and passed the preliminary decree. Challenging the said judgment and decree, the third defendant in the suit has filed the present appeal.

3.The averments made in the plaint, in brief, are as follows:-

(i) The plaintiffs and the defendants 1 and 2 and deceased Saraswathy Bai are the children of Late Kesavaram Bansilal and Late Lakshmi Bai. The said Saraswathy Bai was working as Staff Nurse in the Government Hospital and retired on 30.06.1987 as Nursing Superintendent at Government Hospital, Nagercoil. After retirement, she was living in her own house mentioned as item No.1 in the Ist schedule. Within a short period thereafter, she died on 19.02.1990. During her life time, she did not marry. She died intestate. She left behind the immovable properties mentioned in schedule I and movable and cash amounts mentioned in Schedule II. The plaintiffs and the defendants 1 and 2, who are the legal heirs, equally entitled to the schedule properties. The plaintiffs are entitled to 3/5th share in all the schedule properties. Besides the plaintiffs and the defendants 1 and 2, the deceased Saraswathy Bai had three sisters, who are the defendants



4 to 6 herein and their whereabouts were not known and unheard off till date to any of the plaintiffs or their relatives.

(ii) The first defendant and her family members went to the house of the deceased Saraswathy Bai immediately after her death and they took custody of all the second schedule movable properties and the documents of title deeds relating to the first schedule immovable properties. The plaintiffs are in joint possession with the defendants 1 and 2 over the plaint schedule properties. The plaintiffs demanded the defendants to have an amicable partition of their shares by metes and bounds for which the first defendant and her family members are evading under some pretext or other. Hence, the suit for partition and separate possession of the plaintiffs 2/5th share in the schedule mentioned properties by metes and bounds.

(iii) The third defendant has been claiming share in the estate of deceased Saraswathi Bai alleging that he had contact with the deceased till her death and that he had also parted with money for purchase of the 1st schedule properties by the said Saraswathy Bai. His claim for a share in any portion of the schedule properties is totally unfounded and illegal.



Hence, he has been added as a party in this suit. During the pendency of the suit, the third plaintiff and second defendant passed away and their respective heirs have been impleaded as defendants 7 and 8 and 9 to 11.

4.The averments made in the written statement filed by the third defendant, in brief, are as follows:-

(i) The suit for partition though not sustainable, without bringing all the sisters before the Court, is not maintainable and it is bad for non-joinder of necessary parties. It is false to state that Saraswathi Bai did not marry. She married one N.M.Menon, a clerk in the Special Investigation Branch in the Office of the Commissioner of Income Tax Department at Madras and she lived with him. The misunderstanding between them caused entrancement of the spouses and Saraswathi Bai got separated from her husband in the year 1965. Saraswathi Bai purchased a vacant site measuring 9.02 cents in NGO A colony from the Cooperative Building Society 0.1847, Jawahar Nagar, Tirunelveli-7. The plaintiffs and the defendants 1 and 2 did not know anything about her and they never joined her at any time. The relationship between this defendant matured into a bondage of inseparable, mutual love and this



defendant moved to the house of Saraswathi Bai on her request in 1973.

Saraswathi Bai and this defendant had joint accounts in their names.

A fixed deposit certificate was also taken in their names in the Indian Overseas Bank, Palayamkottai. They purchased the properties jointly and in individual names in Kottapatti village in Pallapathi Panchayat, Dindigul Taluk. The said properties are also in the actual possession and enjoyment of this defendant. Neither the plaintiff nor the defendants 1 and 2 bothered about Saraswathi Bai till the demise of Saraswathi Bai, excepting the first defendant who very rarely came to her and they had no access to her on any occasion.

(ii) Saraswathi Bai was frequently affected with fever and strong head-ache along with giddiness and she used to take pills and medicines of her choice, but later complained of abdominal pain. On 30.01.1990, she executed a Will, when the relatives of this defendant came home expressing to them of her decision. She handed over the said Will to this defendant, to the knowledge of the first defendant. On 03.02.1990, Saraswathi Bai complained of acute pain in her abdomen and this defendant got her admitted into Tirunelveli Medical College Hospital. She was given the best and required treatment, but she died in the



hospital on 19.02.1990. This defendant arranged cremation of her body.

Soon after the cremation was over, on 21.02.1990, the husband of the first defendant and her sons came to the house of this defendant and forced this defendant by stealth with a view to drive him away. Since the defendant had no other alternative, he went police station and gave a complaint to Perumalpuram police to protect him.

(iii) The fact that the plaintiffs and the defendants 1 and 2 are in joint possession of the schedule of properties, is absolutely false. This defendant alone is in possession and enjoyment of the properties. They have no right to claim partition in the properties scheduled to the plaint and there is no cause of action for the suit. They are not entitled to any share muchless $3/5^{\text{th}}$ shares. The plaintiffs are not in possession of any of the item of immovable property and the plea of joint possession is absolutely false. The suit is not maintainable either in law or on facts. Hence, the suit is liable to be dismissed with costs.

5.The averments made in the additional written statement filed by the third defendant, in brief, are as follows:-

Vasantha Bai had no right in the properties. Chakrapani's first wife



is alive and through her, he has two children. They are necessary parties and the defendant No.11 is not a major and he is only a minor. None of the defendants succeeded to the estate of the third plaintiff and she had no properties in Tirunelveli to claim legal heirship to it. Neither the plaintiffs 1 and 2 nor other defendants are entitled to any share in the properties muchless at the ratio of 2/5 and the entire calculation is wrong and misconceived.

6.On the basis of the above pleadings, the learned trial Judge framed the following issues:

- (i) Whether the plaintiffs are entitled to get 2/5 share in the plaint schedule property?*
- (ii) Whether the necessary parties were impleaded in the suit?*
- (iii) To what relief, the plaintiffs are entitled?*

7.In order to substantiate the case, on the side of the plaintiffs one witness was examined as PW1 and one document was marked as Ex.A1. On the side of the defendants, three witnesses were examined as DW1 to DW3 and 21 documents were marked as Ex.B1 to B21.



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8. On completion of trial and on hearing of arguments advanced on either side, the learned trial Judge considered the evidence available on record, decreed the suit and passed the preliminary decree for partition and separate possession of plaintiffs' 2/5th share in the suit properties. Aggrieved over that, the third defendant filed the present appeal.

9. The learned counsel for the appellant would submit that the properties in items No.3 and 4 of 1st schedule, were jointly purchased in the name of Saraswathi Bai and the appellant. She died without any issue and the husband also deserted. The appellant is the friend of the said Late Saraswathi Bai. The said Saraswathi Bai was living along with the appellant and she executed the Will in favour of the appellant. As per the Will Ex.B7, the appellant is the owner of the property and he is entitled to the property mentioned in the Will. The trial Court failed to consider the documents Ex.B4, Ex.B6 and Ex.B7. The documents in Ex.B4, Ex.B6 and Ex.B7 clearly stated that the appellant is the joint purchaser with the Saraswathi Bai. The recitals in the sale deed Ex.B4 and Ex.B6 are not stated anything about the special contribution or regarding the shares in the property. Therefore, in the absence of the same, as per Section 45 of the Transfer of the Property Act, the joint



purchaser is entitled to equal share in the property mentioned in the document and no contra evidence has been established contrary to the recital of the said document. Further, under Ex.B7, the said Saraswathi Bai executed the Will in favour of the appellant.

10.The learned counsel for the appellant further submitted that one of the attesor of the Will was examined as D.W.2 and the son of the another attesor to the Will was examined as D.W.3-Jawarangir, since the another attesor to the Will was no more during the trial. The son of the attesor also identify the signature of his father. Therefore, the Will was executed in the manner known to law under Section 63 of the Indian Succession Act and the Will was also proved in the manner known to law as per Section 68 of the Indian Evidence Act. Once the Will is proved, then the plaintiffs are out of the suit and they are not entitled to any share as Saraswathi Bai executed the Will and bequeathed the properties mentioned in the Will and therefore, the plaintiffs are not entitled to get any share in the property. The trial Court failed to appreciate the same and decreed the suit. In support of his contention, the learned counsel also placed reliance on the Judgment of this Court reported in **1973-86 LW462** in the case of **Guruswami Asari vs Raju Asari**, reported in **1976**



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0 AIR(Mad) 222 in the case of ***Tehmina Dinshaw Tehrani vs Official Assignee***, reported in **1978 91 LW 246** in the case of ***C.V.Ramaswami Naidu and others Vs C.S.Shyamala Devi*** and others.

11.The learned counsel for the respondents 2 and 12 to 15 has filed written arguments stating that the appellant has been claiming share in the estate of the deceased Saraswathi Bai alleging that the appellant had contacted with deceased Saraswathi Bai till her death and that he had also parted with money for purchase of the first scheduled properties. The appellant claims for the share in any portion of the scheduled property, which is totally unfounded and illegal. The appellant claims to have paid to buy the property of the deceased Saraswathi Bai, but no records of the payment have been submitted to this Court or the trial Court. Moreover, the Will written by Saraswathi Bai was not signed by any of the outside individuals except the appellant relations. The appellant was just in helping the deceased Saraswathi Bai due to her ill health. The relationship between the deceased Saraswathi Bai and the appellant was null. There is no documentary evidence that the deceased Saraswathi Bai was accepted the appellant as husband. The appellant cannot claim share over the suit properties. Further, DW2 is the brother



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of the appellant's wife and now he is claiming the lease holder of the first scheduled properties of the deceased Saraswathi Bai. The appellant and DW2 jointly colluding and created fake and forged documents with the help of others to claim share over the suit properties. Hence, he prayed to dismiss the appeal.

12. Heard the learned counsel appearing for the appellant, perused the pleadings, issues framed by the trial Court and oral and documentary evidence adduced and produced by both parties.

13. Admittedly, Saraswathi Bai died intestate and without any first class legal heirs. Therefore, the brother and sister of Saraswathi Bai as second class legal heirs has filed the suit for partition. The appellant has filed the written statement stating that Saraswathi Bai jointly purchased the item Nos.3 and 4 in the name of both the appellant and her name and they are each entitled to half share in the item Nos.3 and 4 as per the sale deed Ex.B4 and Ex.B6. The Saraswathi Bai also executed the Will Ex.B7 bequeathing her half share in the said properties and the other movable properties in favour of the appellant. The said Will has also been proved in the manner known to law. The trial Court has stated that Saraswathi



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Bai was working as nurse and having the means and source to purchase the property and at the time of purchasing the property, the appellant was jobless and he has no means to contribute the fund to the same and therefore, only Saraswathi Bai alone included the name of the appellant and the entire property belongs to the Saraswathibai. Since the Saraswathi Bai died issueless and there is no first class heirs to the Saraswathibai, the plaintiffs are entitled to share, whereas the documents Ex.B4 and Ex.B6 clearly show that Saraswathi Bai and appellant jointly purchased the property. The recitals do not show that Saraswathi Bai alone contributed the fund and she alone paid the sale consideration and the appellant is only the name lender and the appellant has no right or share or lessor share in the property. Therefore, in the absence of the same, as per Section 45 of the Transfer of Property Act, if any property jointly purchased in the names of two or more persons, they are entitled to equal share in the said property. In this case, the respondents have not proved that the appellant has not contributed the fund and even otherwise, the Saraswathibai alone contributed the fund to purchase the property.



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14.The appellant was shown as joint purchaser and during the lifetime of the Saraswathibai, she has not disowned the rights of the appellant and also she has not parted with the properties and further during the lifetime of the Saraswathibai, she executed the Will Ex.B7 in favour of the appellant which clearly shows the intention of the Saraswathi Bai and on a reading of the entire evidence, the Will has been proved in the manner known to law, but the trial Court has given the finding that the appellant has no means and he has not contributed, the Will has not been proved in the manner known to law and disbelieved the evidence of the attestors.

15.The trial Court failed to consider the legal proposition that once the property purchased in joint name, all the joint owners are equally entitled to the property. When the recital is absent regarding consideration and proposition of share and two persons jointly purchased the property, both are entitled to equal share. Therefore, a reading of Ex.B4 and Ex.B6, would prove that Item Nos.3 and 4 jointly purchased in the names of Saraswathi Bai and the appellant. Further Ex.B7-Will also confirmed the same that Saraswathi Bai bequeathed her share to the appellant and not only that property and the movable properties.



Therefore, the appellant is entitled to get the benefit of the Will. The trial Court failed to consider the same since the appellant is not a relative to the Saraswathi Bai and disbelieved the case of the appellant and decreed the suit. However, this Court as first appellate Court can re-appreciate the entire evidence and give independent findings.

16.A reading of the pleadings and evidence, clearly shows that both the appellant and the Saraswathi Bai were living together for some time and he was only taking care of the Saraswathi Bai and at that time, the Saraswathi Bai jointly purchased the property both in the name of the Saraswathi Bai and the appellant. She also executed the Will in favour of the appellant and the Will has also been proved in the manner known to law.

17.Considering the facts and circumstances of case, the appellant jointly purchased the item Nos.3 and 4 with the Saraswathi Bai. Therefore, in the absence of the any specific recitals regarding the quantum of the shares, as per Section 45 of Transfer of Property Act, the appellant is the joint purchaser and they are entitled to equal share. Though the respondents have not proved their case, the appellant has



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proved his defence and in a suit for partition is concerned, both the plaintiffs are defendants and the defendants are plaintiffs and they have to establish their respective case. In this case, the appellant is not a relative to the Saraswathi Bai and the respondents are the sisters of the Saraswathi Bai, but the recitals of the documents clearly show that the appellant jointly purchased the properties with the Saraswathi Bai. Therefore, as per Ex.B4 and ExB6, the appellant is entitled to half share in item Nos.3 and 4 of the suit properties and as per the Will Ex.B7 the appellant is entitled to entire share in item Nos.3 and 4. Therefore, as far as the Will mentioned property is concerned, the appellant proved the Will in the manner known to law. The reason stated by the trial Court for disbelieving the Will, is not sustainable either under law or on facts.

18. Therefore, under the said circumstances, the Appeal Suit is allowed and the judgment and decree dated 07.02.2003 passed by the trial Court in O.S.No.63 of 1996 with reference to the Will mentioned properties under Ex.B7 is set aside. No costs.

30.06.2022

Index: Yes
Internet: Yes



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To

- 1.The II Additional Sub Judge,
Tirunelveli.
- 2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN,J.

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