



A.S. (MD) No.41 of 2010

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :11.07.2022

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

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1.Samshad Begum (died)
2.Byroja Begum (Died) ... Plaintiffs/Appellants
3.M.S.Khader Mydeen
4.K.Mohammed Mustafa
5.K.Mohammed Iqbal Musthaq
6.K.Mohammed Hasan Shafi

(Appellants 3 to 6 are brought on record
as Lrs of the deceased 1st appellant
vide Court Order dated 15.06.2022)

7.Mohamed Kader Mustaffa
8.Femina Mubeen Syed Hasan Kuthoose
9.Mohammed Yaseen Rowther ... Appellants 3 to 9

(Appellants 7 to 9 are brought on record
as Lrs of the deceased 2nd appellant
vide Court Order, dated 15.06.2022)

-Vs-



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- 1.Jannathul Firthouse
2.K.Niaz Mohamed
3.Mohamed Ali
4.M.Raja Mohamed
5.Rahamath
6.M.Asha Banu
7.Sahira Banu
8.Praveen Roja
9.Roja Mohamed (Mentally retarded)
10.Subaiya Begum
11.P.Mani

... Defendants/Respondents

PRAYER: Appeal Suit filed under Section 96 of the Civil Procedure Code, against against the judgment and decree, dated 18.08.2009 made in O.S.No. 93 of 2007, on the file of the Principal District Court, Dindigul District, Dindigul.

For Appellants : Mrs.AL.Ganthimathi
For Respondents :

J U D G M E N T

The appellants herein are the plaintiffs. They filed a suit in O.S.No.93 of 2007, before the District Court, Madurai against the respondents 1 to 11, for partition.



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2. The trial Court after trial, dismissed the suit. Challenging the said dismissal of the suit, the plaintiffs have filed this appeal.

3. Brief facts to the case of the plaintiff, as per the plaint, the suit properties belonged to one Kadhar Ibrahim. The said Kadhar Ibrahim got three wives. The first wife is Safia Begam. She begotten the children, namely, the plaintiffs 1 & 2 and the second defendant in the suit. The second wife by name Subaitha Begam died in the year 1979 without any issues. The third wife Jannathul Firthouse got one son, who is the third defendant Mohammed Ali in the suit. The appellants and the respondents 1 to 3 are the legal heirs of the said Kathar Ibrahim and therefore, the appellants are entitled to 2/7th share in suit property. The said Kadhar Ibrahim died on 28.07.2007. During his life time, the marriage of the appellants took place in the year of 1978. The father of the appellants Kadhar Ibrahim promised to give the property in future and their marriage was performed in a simple way. Since the father promised to provide property, they kept quite and he died intestate. In this situation, the



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plaintiffs and defendants are entitled to the properties of Kadhar Ibrahim.

The defendants fraudulently created a document as if the said Kathar Ibrahim settled the property in their name. The said document is fraudulently created in order to defeat the rights of the appellants. The defendants cannot have any right in the said properties. The 7th item of the 'A' schedule property was purchased in the name of the third wife of Kathar Ibrahim and the 1st defendant has no means to pay the sale consideration. That amount was paid by the Kathar Ibrahim and therefore, said property is under the possession and enjoyment of the said Kathar Ibrahim. The plaintiffs are entitled in the plaint 'B' schedule property of the Partnership firm of Trade mark. Therefore, the plaintiffs are entitled to 2/7th share.

4. The third defendant resisted the suit by filing a written statement the same was adopted by the first defendant also, stating that the plaintiffs are not entitled to get any relief as sought for in the plaint. The schedule mentioned properties exclusively belonged to Kathar Ibrahim. The said Kathar Ibrahim was having 3 wives, namely, Sabiya Begam, Subaitha



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Begum and Jannathul Firthouse. The said Sabiya Begum died after divorce. Subaitha Begum died 30 years back without any issues. The plaintiffs and the 2nd defendant are the children of the Sabiya Begam. The third defendant is the son of the first defendant. The plaintiffs are having no right to have the share in the suit schedule properties. The said Kathar Ibrahim never assured any point of time he would give the shares in the properties. The schedule properties are not the common property of the family and hence, claiming 2/7th share by the plaintiffs having no right. At the time of marriage of the plaintiffs, 100 sovereigns of jewels and also so many lakhs cash were given to the plaintiffs. So the plaintiffs having no right to claim individual property of the defendants 1 & 3. The said Kathar Ibrahim has 1/4th share in the A schedule first item of the property, which is a self acquired property, in that, on 25.11.2003, 50% of the share he had executed a settlement in favour of the defendants 1 & 3 and they are enjoying the same. The 4th item of the property belonged to Kathar Ibrahim and three others and that he had 1/4th share. In that 1/4th share of the Kathar Ibrahim's property, for 50% of the share he had executed a settlement deed on



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25.11.2003 to the defendants 1 & 3. The 5th item of the property, 50% of the Kathar Ibrahim share and also 6th and 8th item of the property were enjoyed by the third defendant through settlement deed and in the 8th item of the property, the third defendant had sold the same to the 11th defendant on 01.11.2007 and handed over possession. In A schedule 7th item of the property, third defendant's mother, who is the first defendant in the suit, purchased the same. On 25.11.2003, through settlement the first defendant had given 50% to the third defendant and 50% to the second defendant. So the plaintiffs are not entitled to get any share in the schedule properties. The trade mark right in the 'B' schedule property already possessed by defendants 2 & 3 and hence, the plaintiffs have no right. The said Kathar Ibrahim had given one house situated at Dindigul Solaihal Theater Road, Dindigul to the second defendant through settlement deed. The Court fee paid by the plaintiffs are not acceptable one. The necessary parties are not impleaded, therefore, the suit is bad for non-joinder of necessary parties. The suit properties are absolutely belonged to the defendants 1 & 3 and therefore, the plaintiffs have no right. All the legal heirs of the Kathar



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Ibrahim have to be impleaded as necessary parties, but no steps has been taken to implead them. Hence, the suit is liable to be dismissed.

5. The second defendant resisted the suit by filing a written statement and stated that the relationships are admitted. It is denied that the suit schedule properties are enjoyed by Kathar Ibrahim and he died on 28.07.2007 leaving behind the plaintiffs and defendants as his legal representatives and the plaintiffs are having right in the suit schedule properties. The said Kathar Ibrahim died on 28.07.2007 with testamentary succession. At the instigation of the enemies of the second defendant, the suit has been filed. At the time of marriage of the plaintiffs, 100 sovereigns jewels, Rs.1,00,000/- cash and vessels worth about Rs.50,000/- were also given to the plaintiffs and cash also given for purchasing Scooter for the husband of the plaintiffs. The said Kathar Ibrahim has spent many lakhs to the three sons of the first plaintiff and has given one house to the first plaintiff. The second plaintiff's husband having no job and he having only the rented money of his father and hence, his sons higher education



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expenses also spent by the Kathar Ibrahim and also purchased some lands and given to the second plaintiff. Kathar Ibrahim never gave any assurance to give share in the property at the time of marriage, he executed the settlement deed in favour of the second and third defendants. 7th item of the property stands in the name of the first defendant. The 7th item of the property belonged to the first defendant and the first defendant executed the settlement deed in favour to the second and third defendant on 23.11.2003. So the plaintiffs have no right to have any share. The suit is bad for non-joinder of necessary parties.

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

- (I) Whether the plaintiffs are entitled to have the share in the suit schedule property?*
- (ii) Whether it is true that item No.7 of “A” schedule property has been given enjoyment of defendants 2 & 3 by way of separate settlement deeds dated 23.11.2003?*
- (iii) Whether the defendants 2 & 3 are entitled for item-B of suit schedule property by way of settlement deed dated*



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31.01.2005?

(iv) *Whether it is true that the 11th defendant is not a necessary party to the suit?*

(v) *Whether the plaintiffs statement that item 7 of suit schedule property has been purchased in the name of the 1st defendant?*

(vi) *Whether the plaintiffs are entitled for 2/7th share in the suit schedule property?*

(vii) *To what relief the plaintiffs are entitled to?*

7. In order to substantiate the case, on the side of the plaintiff, two witnesses were examined as PW1 and PW2 and 1 document was marked as Ex.A1. On the side of the defendants, five witnesses were examined as D.W.1 to D.W.5 and 23 documents were marked as Ex.B1 to Ex.B23.

8. On completion of trial and on hearing of arguments advanced on either side, the learned trial Judge, considered the oral and documentary evidence produced before the Court, dismissed the suit.



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9. The learned Senior counsel appearing for the appellant would submit that the suit 'A' schedule properties originally belonged to one Kadhar Ibrahim. The said Kadhar Ibrahim got three wives. The first wife is Sabia Begam. She begotten the children, who are plaintiffs 1 & 2 and the second defendant in the suit. The second wife by name Subaitha Begam. She died in the year 1979 without any issues. The first defendant is third wife, by name Jannathul Firthouse. She got one son, who is the third defendant Mohammed Ali in the suit. The appellants are entitled to 2/7th share. The Kadhar Ibrahim died on 28.07.2007. During his life time, the marriage of the appellants were performed in the year of 1979. On the same day, the father of the appellant, namely, Kadhar Ibrahim promised to give the property in future and their marriage were performed in a simple way and since the father promised to provide property, they kept quite and their father died intestate. Therefore, they are entitled to get the share in the 'A' schedule properties and also 'B' schedule Trade mark. After the death of the father, the appellants came to understand that the respondents 1 to 3 fraudulently created documents as if the Kadhar Ibrahim had settled the



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properties in their name. The said documents are fraudulently created in order to defeat the rights of the appellants. During his life time, their father never revealed about any document that has been executed in favour of the respondents 1 to 3 and item No.7 of the property purchased by the father of the appellants in the name of the first respondent. The first respondent, is the third wife of their father Kadhar Ibrahim. Out of the fund of the father, he purchased the property in the name of the first respondent, the first respondent is only a name lender of the 7th item of the property and she had no separate funds to purchase the said property and therefore, the 7th item of the property is also liable for partition and they are entitled to 2/7th share of the 'A' schedule properties.

10. The learned Senior counsel for the appellants would further submit that the respondents 1 & 2 were in joint possession and enjoyment of the suit properties including un-divided 2/7th share, as appellants were residing away from Dindigul and as such, the appellants are entitled for partition. The respondents 2 & 3 with dishonest intention to defeat the 2/7th



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share of the appellants in the suit properties claiming the suit properties under settlement deeds and fabricated the documents purporting to be the settlement deeds said to have been executed by the father of the appellants. The settlement deeds said to have been executed in favour of the respondents 2 & 3 in respect of the suit properties marked as Ex.B1 to B4, said to have been executed by the father of the appellants and respondents respectively, were obtained by fraud and under undue influence and the same are not acted upon. Hence, they are sham and nominal and not binding the appellants. Item Nos.1 & 2 of the properties jointly owned by the appellants and respondents 4 to 10 and as such, the father of the appellants did not have absolute right to settle his undivided share. The settlement deeds were not voluntarily executed by the deceased Kadhar Ibrahim in favour of the respondents 2 & 3. The elements of the declaration, acceptance, delivery and possession of the properties have not taken place in the disputed settlement deeds and hence, the same are not acted upon and under the Islamic law, the undivided share in the property would not be transferred and such transfer are bad in law and not binding on



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the appellants.

11. Item-7 of the 'A' schedule property is not absolute property of the first respondent. Even though the sale deed in respect of the 7th item is in the name of the first respondent but it cannot be stated that it is an absolutely property. The first respondent has no independent source of income to purchase any property and it was the property of Kadhar Ibrahim, who had purchased the same in favour of the first respondent and the said property was held by the first respondent only as benamy. Appellants have every right to get share in the said property.

12. Further, he would submit that non-examination of the attesting witnesses to the settlement deeds is a fatal to the case of the respondents. The settlement deeds are disputed by the appellants, as the same were executed by fraud and undue influence and not acted upon. Non-examination of attesting witness is fatal and hence, non-examination would only support the case of the appellant and that the execution of the



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settlement deeds would not bind the appellants and not acted upon. The settlement deeds executed in favour of the un-divided share is hit by doctrine of Mushai, thereby void and hence, the appellants are entitled to get share in the suit properties.

13.The appellants are not claiming partition in the joint family business and they are claiming the partition only from the share of the trade mark, namely, Kadhar Ibrahim. The appellants never admitted the settlement deeds, on contrary, the trial Court held that P.W.1 had clearly admitted the execution of the settlement deeds and therefore, the findings of the trial Court is erroneous.

14. The learned counsel appearing for the respondents 1 to 3 would submit that admittedly the suit schedule properties belonged to Kadhar Ibrahim. He got three wives and the relationship of the appellants and the respondents 1 to 3 are not in dispute. During the life time of the Kathar Ibrahim, he performed the marriage to his daughters in a grand



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manner and also provided 100 sovereign of jewels and also had given a sum of Rs.1,00,000/- cash, other house-hold articles and also provided money for purchasing the Scooter for her husband. In addition to that they were provided with house and all the educational expenses of their children were meted out by the Kadhar Ibrahim. The marriage of the appellants took place in the year 1978, even on that day, they performed the marriage in a grand manner in the famous Kalyana Mandabam in Dindigul and providing all the jewels and also other articles. Even during the life time of the Kathar Ibrahim, he executed a settlement deeds in favour of the respondents 1 to 3 and also as far as the 7th item of 'A' schedule property is concerned, it was purchased only by the first respondent out of her own income. Once the property stands in the name of the female member, unless it is proved that the properties not purchased by the named person out of her own fund it has to be treated as individual property of female. Though during the life time of Kadhar Ibrahim, he said to have executed settlement deeds in respect of item Nos.1 to 5 in 'A' schedule properties. Settlement deed, dated 31.01.2005 in favour of the second respondent, even the right in the 'B'



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schedule property settled in favour of the second defendant and also executed a settlement deed in favour of the respondents 2 & 3 on 31.01.2005 and also the settlement deed regarding the 'B' schedule property was duly intimated to the other members in the partnership firm on 29.06.2006 itself. Kathar Ibrahim died only in the year of 2007, more than two years after the execution of both settlement deeds, he was surviving for two years. He died after two years. Even during the proceedings in RCOP, Kathar Ibrahim admitted that he settled the properties in favour of the respondents 1 to 3. Further, he would submit that the appellants never denied the execution of the settlement deeds, dated 31.01.2005 in favour of the second defendant and third respondent. He executed a settlement deed on 25.11.2003 in favour of the third defendant. Therefore, he died after two years from the date of settlement deed, dated 25.11.2003, during the life time even in the other proceedings in RCOP, Kathar Ibrahim himself had admitted the above execution of the settlement deeds.



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15. Further, he would submit that the appellants never denied the execution of settlement deeds, they have stated that they were fraudulently created and also they have executed the same by coercion and undue influence and that has not been pleaded in the plaint as under Order 7 Rule 4 of C.P.C., Therefore, they cannot give evidence against their own pleadings. The appellants never specifically denied the execution of settlement deeds and once they have not specifically denied, there is no need to examine any one of the attestors. Further, he would submit that P.W. 1 during the cross-examination had clearly admitted that while the father is in the hospital, he also told about the execution of the settlement deeds. Therefore, once during the life time of the Kathar Ibrahim he executed the settlement deed, he also admitted the same in the other proceedings in RCOP and also revealed to one of the appellants. He himself admitted that the father informed him about the settlement deeds. They further stated that the father had made some arrangements but during the life time, father never had cancelled the settlement deeds and therefore, under these circumstances, there is no need for the respondents to examine the attesting witnesses and



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prove the settlement deeds. When the testator himself admitted that he settled the properties and also the appellants were aware of the same and further the appellants have not challenged the settlement deeds. Propounder need not prove the settlement deeds by examining the attestors. In support of their case, learned counsel for the respondents relied on the following judgment in ***K.Laxmanan vs. Thekkayil Padmini and others reported in (2009) 1 Supreme Court Cases 354.***

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

17. Admittedly, the suit properties belonged to the father of the appellants one Kadhar Ibrahim. According to the appellants Kathar Ibrahim died intestate and therefore, as daughters of the Kathar Ibrahim, they are entitled to 2/7th share in 'A' schedule suit properties. 'B' schedule



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trade mark is a partnership firm in the name of Kathar Ibrahim and from the share of the Kathar Ibrahim, they are entitled to get share. According to the respondents 1 to 3, 7th item of the suit property is not the property of Kathar Ibrahim, it is the property of the first respondent. The appellants have not proved that the 7th item was purchased out of funds of the Kathar Ibrahim. During his life time, they have not stated that it is the property of Kathar Ibrahim and therefore, after the death of Kathar Ibrahim now they cannot claim that it is the property of Kathar Ibrahim. It is settled proposition of law that if the properties stands in the name of female members, unless a person, who claim as a joint family property and proved that it is joint family property, it is only the property of female on whose name it stands. Therefore, it is not the property of the Kathar Ibrahim. Therefore, a reading of the entire materials, the appellants have not proved their case, further from the evidence of P.W.1 and also D.W.1 and even in the earlier proceedings in RCOP, the Kathar Ibrahim himself admitted that he has executed settlement deed in favour of his sons. During the evidence, in that proceedings, Kathar Ibrahim has clearly admitted about the execution of the



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settlement deeds. Kathar Ibrahim died after the execution of the alleged settlement deeds. The appellants had admitted that their father while admitting in the hospital, had told about the execution of settlement deeds in favour of the respondents 2 & 3, but they have not taken any steps during the life time of their father, since it is an absolute property of their father. Though they have stated that the father had promised to make some arrangements, but during the life time, he never cancelled the settlement deed and therefore, the appellants have not pleaded that the settlement deeds purported to have been executed by fraud and undue influence. Once the execution is not denied, if the document requires to be attested by the attestors as per law it need not be proved by examining any of the attestors. If the execution is denied, the settlee or the beneficiaries has to examine at least one of the attestor and prove about the execution. All the three ingredients of settlement has been proved and though the physical delivery is not mandatory, so constructive delivery is enough. So one of the stands taken by the appellant is that though the Kathar Ibrahim said to have executed the settlement deeds in the year 2003 and 2005 till his death in the



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year 2007, Kathar Ibrahim enjoying the property, therefore, settlement deeds were not acted upon and delivery of possession was not handed over. But in this case, as already stated, Kathar Ibrahim during his life time itself admitted in more than one place that he executed settlement deeds and also acted upon. So till the life time of Kathar Ibrahim, he has not cancelled the settlement deed and all the mutation taken place in the names of settlees. Therefore, once the execution of the settlement deeds not specifically denied and the same need not be proved by examining the attestors.

18. Therefore, in this case, from the pleadings, oral and documentary evidence it is found that the properties belonged to the Kathar Ibrahim, appellants and respondents 1 to 3 are his legal heirs and during the life time of the Kathar Ibrahim, he has executed the settlement deeds in favour of his sons. Even in the recital in the settlement deeds, he has clearly stated the reason for disinheriting the other legal heirs namely daughters and the written statement filed by the respondent and also the evidence of respondents clearly shows that the appellants were provided with properties



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and their marriage were performed in a grand manner and therefore, they were also well settled in their life and they were away from the suit property. The second and third respondents are the sons of the Kathar Ibrahim, therefore, he settled the property in favour of them.

19. Therefore, under these circumstances, a perusal of the oral and documentary evidence, this Court finds that the suit properties are absolute properties of the Kathar Ibrahim and except the 7th item of the schedule property, during his life time he settled the other properties in favour of the respondents 2 & 3 and therefore, the appellants are not entitled to any share. Since the appellants have not specifically denied regarding the execution of the settlement deeds and not specifically challenged the settlement deeds, though they have stated that they were not acted upon and when once it is proved as genuine, it is for the person who claims that the settlement deed executed by fraud and undue influence have to plead and prove the same in the manner known to law. Whereas, in this case a perusal of the entire materials, the appellants have not specifically pleaded and proved regarding



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fraud and undue influence and also the documents are not acted upon, sham and nominal. The appellants are not entitled to get any share in the suit property. Since the first appellate Court is a fact finding Court it can re-appreciate the entire materials and give independence conclusion.

20. A reading of the entire materials and also the judgment of the trial Court, the trial Court has given cogent and sufficient reason while dismissing the suit. Hence, the appeal fails and the same is dismissed. The judgment and decree passed by the trial Court are confirmed. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes / No

Speaking Order : Yes / No

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To

1. The Principal District Court,
Dindigul District, Dindigul.
2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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