



S.A.(MD) No.959 of 2011 and C.OBJ(MD)No.18 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.07.2022

Pronounced on : 04.08.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) No.959 of 2011
and Cross Objection (MD) No.18 of 2012

In SA(MD)No.959 of 2011:

1.Karuppayee @ Glory (Died)
2.Rajendra Prasad ... Appellants/Respondents 1 & 2/Plaintiffs

Vs

1.Ponnuthaiammal (Died)
2.Samarasam
3.Manikandan
4.Prasanna
5.Praveen
6.Pradeep
7.Saravanan
8.Umamaheswari
9.Amudha @ Helen Amudharani ... Respondents 1 to 9/Appellants/
Defendants 1 to 9
10. The Registrar, Registrar's Office,
Thevaram Town, Uthamapalayam Taluk,
Theni District ..10th Respondent/3rd Respondent/
10th defendant

(Memo dated 10.04.2017 in USR 1972 is recorded as first appellant died and the second appellant who is already on record is recorded as LR of the deceased first appellant Vide court order dated 4.7.2022)



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(Memo dated 15.04.2015 in USR 1783 is recorded as first respondent died and R2 to R9 and the appellants who are already on record recorded as the LR's of the deceased R1 Vide order dated 4.7.2022)

Prayer:- Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 29.09.2010 passed by the learned Subordinate Judge, Uthamapalayam in A.S.No.32 of 2010 reversing the judgment and decree of the District Munsif, Uthamapalayam dated 03.09.2009 in O.S.No.150 of 2008.

For Appellants	:	Mr.V.Raghavachari
For Respondents	:	Mr.S.Chandrasekaran for R2 to R9
	:	Mr.K.S.Selvaganesan
		Additional Govt. Pleader for R10

In Cross Objection (MD) No.18 of 2008:

1.Ponnuthaiammal (Died)	
2.Samarasam	
3.Manikandan	
4.Prasanna	
5.Praveen	
6.Pradeep	
7.Saravanan	
8.Umamaheswari	
9.Amudha @ Helen Amudharani	... Respondents 1 to 9/Appellants/ Defendants 1 to 9
10. The Registrar, Registrar's Office, Thevaram Town, Uthamapalayam Taluk, Theni District	..10 th Respondent/3 rd Respondent/ 10 th defendant
	Vs.



S.A.(MD) No.959 of 2011 and C.OBJ(MD)No.18 of 2012

1.Karuppayee @ Glory (Died)

2.Rajendra Prasad

... Appellants/Respondents 1 & 2/
Plaintiffs

Memo dated 10.04.2013 in Usr No.1972 is recorded as R1 died and R2 who is already on record is recorded as LR of the deceased R1 in view of the order of this Court dated 04.07.2022

Prayer:- Cross Objection is filed under Order 41 Rule 22 C.P.C against the judgment and decree dated 29.09.2010 passed by the learned Subordinate Judge, Uthamapalayam in A.S.No.32 of 2010 reversing the judgment and decree of the District Munsif, Uthamapalayam dated 03.09.2009 in O.S.No. 150 of 2008.

For Cross objector : Mr.S.Chandrasekar

For Respondents : Mr.S.Ramesh for R8

JUDGMENT

The plaintiffs in O.S.No.150 of 2008 on the file of the District Munsif Court, Uthamapalayam are the appellants herein. The suit is laid for partition. It was decreed in *toto* by the trial Court, and the defendants 1 to 9 joined to prefer A.S.No.32 of 2010, in which they had obtained partial success, and to the extent the plaintiffs have lost before the first appellate Court, they are now before this Court with this second appeal. The defendants have preferred their cross objection too.



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2.1 The dispute is over the estate of one Thangamani. He died leaving behind his wife, the first defendant, and also five children or their heirs as the case may be, and also left two items of properties for them to litigate.

The facts are:

- The first item of property is stated to be an agricultural land measuring 99 cents out of a larger extent of 1.58 acres, and the item 2 is a house property.
- Of the five children of Thangamani, his son Rajendran had died a bachelor in 1977. His second son is Rathinam Nadar, and he died in 1983, and his widow and son are the plaintiffs herein. Thangamani's daughter was Juliet, and she had since died and her husband and children are defendants 2 to 6. Amutha is another daughter and she is the 9th defendant. The last of the children of Thangamani is one Parimala Kantharuby, and she too had passed away and her heirs are defendants 7 and 8.
- On the demise of Thangamani Nadar, his properties devolved equally



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on his heirs. With his son Rajendran dying issueless, ultimately, his properties devolved on his widow and four children. In other words, each of the heirs of Thangamani became entitled to 1/5th share in both the items of properties.

- While so, on 09.07.1983, Vide Ext.A-1, the three daughters of the first defendant had jointly executed a release deed, relinquishing their respective 1/5th share in the suit property in favour of the second plaintiff and the first defendant. This would imply that both the plaintiffs would be jointly entitled to 1/5 share, and in addition, the second plaintiff became entitled to another one half of 3/5 share of his aunts, the executants of Ext.A1. The first defendant had also become entitled to an identical share in the properties.
- On the same date i.e., 09.07.1983, the first defendant had executed Ext.A.2, settlement deed in favour of the plaintiffs settling her entire share in the property that she obtained in the manner detailed above.



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- There is nothing remaining to be parted with, but on 17-06-2008, the first defendant had executed Ext.A.3 settlement deed, settling yet again her entire share in the properties (her own 1/5 share + $\frac{1}{2}$ of 3/5 shares of her daughters that she had obtained under Ext.A1) in favour of all her grand-children, namely the 2nd plaintiff and defendants 3 to 8 equally.

Alleging that the defendants are attempting to encumber the properties and that they have forcibly removed them of their one half share in the properties, the plaintiffs have laid a suit seeking (a) for partition of their one half right against defendants 1 to 9, (b) declare their right in terms of Ext.A. 2 settlement deed; and (c) for a declaration that Ext.A3 settlement deed dated 17.06.2008 will not bind the plaintiffs, besides certain ancillary relief of injunction.

3. The defendants 1 to 7 and 9 have filed a written statement, wherein, they alleged that Ext.A.2 settlement deed dated 09.07.1983 is not a valid document, that each of the defendants 1 to 9 have partible share in the property, and that the first defendant has no right to settle common property



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in favour of the second plaintiff. This apart, a gift deed would normally be executed only out of love towards the donee, and if the love is not reciprocated, then the executant of the document has every right to revoke the gift deed. Ext.A.3 is validly executed by the first defendant and she has every right to execute it, and that the plaintiffs have not been forcibly removed from any of the properties.

4.1. The suit went to trial. For the plaintiffs, the first plaintiff deposed as P.W.1. Besides, they also examined a certain Ramaraj as P.W.2, who is stated to be a lessee of the plaintiffs. They produced Ext.A.1 to Ext.A.6. For the defendants, the first defendant has examined herself as D.W.1 and the 9th defendant was examined as D.W.3. They also examined one Karuppaiah as D.W.2. They did not produce any documentary evidence.

4.2 On appreciating the evidence, the trial Court decreed the entire suit as prayed for. In other words, it treated Ext.A.2 as a valid settlement deed. As already outlined, the defendants preferred a first appeal and the first



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appellate Court treated Ext.A.2 as a Will, and consequently gave effect to Ext.A.3 settlement deed, and granted a decree for $\frac{1}{2}$ share to the plaintiff in both the items of suit properties, and for $\frac{1}{4}$ share for the second plaintiff in the remaining $\frac{1}{2}$ share in item 1 property. Its line of reasoning however indicates that the first appellate court tried to apply the rules of succession in terms of the Hindu succession Act, 1956, rather wrongly as the parties are Christians.

5. Aggrieved by the decree of the first appellate court, the plaintiffs have preferred this appeal and having felt aggrieved by the application of the Hindu Succession Act to the Christians, the defendants had filed their cross objection. The appeal was admitted for considering the following substantial questions of law:

“1. Whether there has been a prayer construction by the lower Appellate Court on Ex.A2 on the question as to whether it is a will subject to revocation when there is no pleadings or evidence by settlor 1st defendant herself? and



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2. Whether there is an omission to construe and misconstruction of the pleadings and material evidence on record by the lower Appellate Court when it chose to reverse the judgment and decree of the trial Court? ”

6.1 The learned counsel for the appellants took this Court through Ext.A2 and submitted that in the first part of Ext.A2, the settlor/the first defendant made at least two categorical statements which are integral to the terms of the settlement, and which will aid in a proper construction of the document. They are: (a) that the property will vest with the second plaintiff under the document; and (b) that the settlor will not have the right of alienation. In the latter part of the document, and more towards its end, the settlor had reserved her right to enjoy her properties till her death. There is one last term which is seen inserted in ink in what essentially a typed document, and it mentions that no application has been preferred for mutation of records.

6.2 Continuing his arguments, the learned counsel for the appellants submitted that nowhere the first defendant has denied the execution of Ext.A2, be it the written statement, or in her oral evidence as D.W.1. Indeed,



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her oral evidence exemplifies how well she chose to admit the execution of Ext.A-2 settlement deed. A plain reading of Ext.A2 indicates that while the right over the properties dealt with thereunder vested in the settlee *in presenti*, the right to possess and enjoy them alone was deferred till after the demise of the first defendant. The first defendant had at no time reserved any right to revoke Ext.A-2, nor has she revoked it even dehors it, as Ext.A-3, the subsequently executed settlement deed did not spell a word on it. And, contrary to the case created by the the first appellate Court there never was a dispute raised in the written statement as to the character of Ext.A-2, for the defendant neither pleaded that Ext.A-2 was a Will, nor did they attempt to build one at any time during trial.

6.3 When the facts and evidence remain thus, the first appellate Court misconceived an issue that was not there, and proceed to hold that Ext.A-2 was a Will, and hence Ext.A-3 was a competently made document.

7.1 Joining hands with the appellant's counsel on the solitary point on which the decree granted by the First Appellate Court, the learned counsel for the respondents/Cross Objectors/defendants argued that the first



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appellate Court had ventured to apply the Hindu law of Succession to Christians and granted a decree which will not represent the share to which the parties might be entitled to. The decree must have to be confined by 1/5 share which both the plaintiffs originally had, plus an additional $\frac{1}{4}$ share of the second plaintiff based on Ext.A.3. Hence, the decree of the first appellate court granting $\frac{1}{2}$ share for the plaintiffs in the first part of the decree is contrary to the law applicable to the parties.

7.2 Shifting his focus to the arguments of the appellant's counsel, he argued:

a) The 9th defendant as D.W.3 has deposed that Ext.A1 was not executed by her. Instantly, it shifts the burden of proving Ext.A-1 on the plaintiff, but precious little was done by the plaintiff to prove it. When Ext.A.1 remains on record as an unproved document, it may not be appropriate for the first appellate Court to grant a decree based on Ext.A3.

b) The entire pleadings of the plaintiffs repeatedly make a statement that Ext.A.2 is a gift deed. Even the first defendant as D.W.1 also



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speaks only a gift deed, whereas Ext.A.2 postponed the actual possession of the property to the settlees.

c) Turning to the construction *per se* of Ext.A.2, it requires to be emphasized that not only the first defendant had postponed the vesting of right till after her death, but also had made a statement that no application for mutation of revenue records was made. This would imply that the intent of the executant of Ext.A.2 was not to create an *in presenti* right over the property.

d) The cause of action of the plaintiffs is rooted on an allegation that the plaintiffs have been forcibly removed from the suit property but there is no prayer for recovery of possession. And, the court fee should have been paid under Section 37(1) of the Tamilnadu Court Fees and Suits Valuation Act,1965.

e) The suit is premature since it was filed even during the life time of the first defendant.

8.1 Let the rival arguments be filtered to arrive at the core issue to be resolved. Both the sides were correct, more particularly the counsel for the



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respondents/cross-objectors/defendants, in their submissions contended that the first appellate court had applied the wrong personal law for the Christians. But this will become relevant only in determining the shares of the parties.

8.2 The second aspect is on the nature of the prayers sought in the suit. When on the demise of Thangamani, succession opened, the plaintiffs became entitled to undivided 1/5 share in the property. When the three daughters of Thangamani executed Ext.A-1 release document jointly in favour of their mother (the first defendant), and their nephew, the second plaintiff, the plaintiffs have already become entitled to a combined half the share in the properties. With the first defendant executing Ext.A-2 settlement deed, the plaintiffs have become the absolute owners of the suit properties, with the first plaintiff taking a minor share in it i.e., $\frac{1}{2}$ of $\frac{1}{5}$ share equaling $\frac{1}{10}$ share. Therefore, what is there to be partitioned is a bit intriguing. And, when the plaintiff have also sought both positive and negative declaration respectively regarding Ext.A-2 and Ext.A-3 settlement deeds, it made the relief of partition all the more intriguing.



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8.3 Is the suit premature? This is a baffling argument as it presupposes for its sustenance that Ext.A-2 is a Will. That will be an issue which this Court would be resolving in a short while.

9.1 The core issue relates to the character of Ext.A-2: whether it is a Will or a settlement? Another related aspect is the extent of right which the first defendant had when she executed Ext.A-2? This brings Ext.A-1 release deed executed by the three daughters of the first defendant in her favour. Ext.A-1 is now questioned, Indeed the 9th defendant in her testimony even denies her purported signature in Ext.A-1. Let this issue pertaining to Ext.A-1 be first resolved.

9.2 Nowhere in the written statement, any of the executants of Ext.A-1 had pointedly denied its execution. The executants or their heirs, as the case may be, of Ext.A-1 choosing not to deny its execution, it will be too late in the day for the defendants to build an argument challenging Ext.A-1.



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10. This leaves the character of Ext.A-2 as the principal issue in this case.

Here this Court finds the first defendant, the executant of the document, had never questioned the character of Ext. A-2 in her written statement, more significantly she never called it a Will. The written statement lays stress on an allegation that the first defendant was not competent to execute the settlement deed pertaining to family properties, a principle more associated with right of a coparcener to gift the coparcenary property, and it has no relevance where the parties are Christians. Turning to the character of Ext.A-2, nowhere it gives an indication that it was intended to be treated as a Will. In the entire length of the oral testimony of the first defendant as D.W.1, she did not whisper anything such as that. In other words, the character of Ext.A-2 was a non issue before the first appellate court, and this Court is firm in its understanding that the first appellate court has created a dispute regarding the character of Ext.A-2 when there is none available based on the pleadings.

11. Whether Ext.A-2 creates a right *in presenti* in favour of the 2nd plaintiff?

The answer is an emphatic 'yes'. It unequivocally creates a right in the



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present, and the first defendant has merely postponed the enjoyment of the property by the second plaintiff till after the former's death, as in any classic deed of settlement. The statement that no application has been given for mutating the revenue record is of no consequence, as it is not couched in any restrictive language forbidding mutation. At any rate, today it pales into insignificance, for the first defendant has already passed away. This Court has no hesitation in holding that Ext A.2 is a settlement deed. Consequently, Ext.A-3 fails.

12. Turning to the reliefs, there is no need for any partition as the second plaintiff is the absolute owner of the both items of suit properties since even the first plaintiff, his mother, has passed away now. There is however, one hiccup. The second plaintiff obtained $\frac{1}{2}$ share in the suit property only based on Ext.A2. But as has been mentioned earlier, the first defendant, the executant of Ext.A-2 had reserved her right to be in possession of this $\frac{1}{2}$ share till her demise. Therefore, the second plaintiff could not claim any right to be in immediate possession of the property during the life time of the first defendant. And before the demise of the first defendant, the suit



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has been laid. And, the plaintiff's right to take possession of the share of the first defendant has accrued to him only when the first defendant died *pendente lite*. This apart there is an allegation that the plaintiff has been forcibly dispossessed by the defendants.

13. This now necessitates moulding the relief. Reliefs 'B' and 'C' are granted and to this extent, the decree of the first appellate court is set aside and the decree of the trial court is restored. So far as Relief A pertaining to partition is concerned, there is nothing to be partitioned. Hence, this relief has become unnecessary. The plaintiff is now required to institute a fresh suit for obtaining recovery of possession of the property from those who are in possession, if he is so desirous.

14. Turning to Cross Objection (MD) No.18 of 2012, the primary objection relates to the application of Hindu succession Act to Christians for determining the shares of the parties. Since this Court has upheld the validity of Ext.A-2, this has no relevance any longer. Still, this point is well founded and hence the Cross Objection on its merit is allowed, but it is



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added that it will not impact the nature of decree that is now passed.

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15. In fine, this Second Appeal is partially allowed to the extent as indicated in paragraph No.13. No costs.

04.08.2022

Index : Yes/No

Internet: Yes/No

Abr/Rmk/Cm

To,

1. The Subordinate Judge, Uthamapalayam.
2. The District Munsif, Uthamapalayam



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N.SESHASAYEE, J.

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