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AS.No.132 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.07.2023

CORAM:

THE HONOURABLE Mr. JUSTICE **R.SUBRAMANIAN**
AND

THE HONOURABLE Mrs.JUSTICE **R.KALAIMATHI**

A.S.No.132 of 2013

and

MP.No.1 of 2013

1. Mrs.Chandra (died)
2. Dillibabu
3. Murugan
4. Muthu Mari

(Appellants 2 to 4 are LR's of A1 as per the
Memo dated 14.11.2022 & vide Court order
dated 24.11.2022 made in AS.No.132/2013)

... Appellants/Defendants

-Vs-

Komala

... Respondent/Plaintiff

PRAYER: First Appeal filed under Section 96 of the Code of Civil Procedure praying to set aside the judgment and decree in O.S.No.160 of 2009 on the file of the II Additional District Court, Thiruvallore at Poonamallee dated 19.12.2012 and pass such further or other orders as this Hon'ble Court may deem fit and proper on the facts and circumstances of the case.



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For Appellants : Mr.J.Prakasam
for Mr.G.Ezhilarasan

For Respondent : Mr.G.Dilipkumar

J U D G M E N T

[Judgment of the Court was delivered by **R.SUBRAMANIAN, J**]

Challenge in this appeal is to the preliminary decree for partition granted by the Trial Court namely the II Additional District Court, Tiruvallur made in O.S.No.160 of 2009 granting a 5th share to the plaintiff in the suit properties. The suit properties consisted of two schedules viz., 'A' and 'B'.

2. According to the plaintiff, the suit properties belonged to one Munusamy, who died on 20.11.2008 leaving behind his wife Chandra-the 1st defendant, sons Dillibabu and Murugan-defendants 2 and 3, 2 daughters namely the plaintiff and one Muthumari, the 4th defendant. The plaintiff would claim that the suit A and B schedule properties belong to the said Munusamy and on his death devolved on his heirs and as a daughter, the plaintiff is entitled to 1/5th share in the suit schedule properties.



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3. The suit was resisted by the defendants contending that the suit A schedule property was purchased in the name of Munusamy out of the monies contributed by the 2nd and 3rd defendants. The said Munusamy was only a name lender and while the defendants 2 and 3 are the actual owners. It was also contended that the B Schedule property belongs to the 3rd defendant absolutely. Insofar as the B Schedule properties are concerned, it was also pleaded that 800 sq.ft of the said property was purchased by the mother of Munusamy, while another 800 sq.ft was purchased by the 1st defendant under Ex.B1 dated 28.01.1981. It was the further case of the defendants that the 1st defendant had settled the said 800 sq.ft purchased by her under Ex.B1 in favour of the 3rd defendant. The said settlement deed is dated 22.12.2008. It was further contention of the defendants that Munusamy had executed an unregistered Will on 16.11.2008 bequeathing the suit A schedule property to the defendants 2 & 3 and the suit B schedule property measuring about 760 sq.ft to the 2nd defendant only. Therefore, the defendants 2 & 3 would contend that they became the absolute owners of the property under the settlement deed executed by the mother Ex.B2 and the Will-Ex.B3.



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4. On the above pleadings, the Trial Court framed the following issues and additional issues also:-

“1) Whether the plaintiff is entitled to partition and separate possession as prayed for?

2) Whether the suit is maintainable?

3) Whether the court fee paid is correct?

4) To what relief the plaintiff is entitled to?

Additional issues:

(1) Whether the 'A' schedule property is the property purchased from and out of the income of D2 and D3 in the name of the deceased father Munusamy?

(2) Whether the 'B' schedule property is the self acquired property of the 3rd defendant?

(3) Whether the deceased Munusamy has bequeathed unregistered will dated 16.11.2008?(sic)

(4) Whether the plaintiff is entitled to 1/5th share in the suit properties?

(5) Whether the plaintiff is entitled to past and future mesne properties?

(6) To what relief the plaintiff is entitled to?”

5. At Trial, the plaintiff was examined as PW1 and Exs.A1 to A5 were marked. On the side of the defendants, defendants 1 to 3 were examined as



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DW1, DW2 & DW3 and 2 independent witnesses were examined as DW 4 & DW5. DW4 is the attesor to the Will. Exs.B1 to B3 were marked. On a consideration of the evidence on record, the learned Trial Judge found that the defendants 2 & 3 have not proved the principal plea that they had purchased the A schedule property out of their own money in the name of their father. The Trial Court found that there was no evidence in support of such claim. As regards the Will-Ex.B3 is concerned, the Trial Court found that the same was not reliable. As far as the B schedule property is concerned, the Trial Court did not take into account Ex.B1 Sale deed and concluded that the entire suit B schedule property also belongs to the father Munusamy. On the said conclusion, the learned Trial Judge granted a preliminary decree for 1/5th share as prayed for. Hence, this appeal.

6. We have heard Mr.J.Prakasam, learned counsel appearing for the appellants and Mr.G.Dilipkumar, learned counsel appearing for the respondent/plaintiff.

7. Mr.J.Prakasam, learned counsel appearing for the appellants would vehemently contend that the Trial Court erred in overlooking the evidence of



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the attesting witness and come to the conclusion that the Will has not been proved in the manner known to law. He would also point out that the Trial Court has overlooked Exs.B1 & B2, the Sale deed in favour of the 1st defendant and the settlement deed executed by the 1st defendant in favour of the 3rd defendant with reference to 800 sq.ft in the B schedule property out of 1600 sq.ft to come to the conclusion that the entire B schedule property was inherited by Munusamy from his mother Annammal. Mr.J.Prakasam, learned counsel would also further point out that even assuming that the defendants 2 & 3 have not proved their case that they had paid the consideration for the property, the Will having been proved in accordance with law, the Trial Court was not right in granting the decree for partition.

8. Contending contra, Mr.G.Dilipkumar, learned counsel appearing for the respondent/plaintiff would contend that the Will cannot be relied upon to prove title in a Court of justice, since it has not been probated in accordance with law as per Section 213 of the Indian Succession Act, 1925. Pointing out the fact that both DW4 and DW5 have admitted that the Will was executed within the premises of High Court of Judicature at Madras, the learned counsel would submit that a combined reading of Section 57 and 213 of the Indian



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Succession Act would make probate compulsory. In the absence of Probate, there is a prohibition under Section 213 restraining the legatee from establishing his/her right in a Court of justice. The learned counsel would however concede that as regards the 800 sq.ft of property belonged to the 1st defendant, the Trial Court had committed an error. In countering the case of the defendants that it is the 2nd and 3rd defendants, who had contributed money for purchase of A schedule property by Munusamy, the learned counsel for the respondent would rely upon the recitals in Exs.A2 & A3, release deeds dated 22.12.2008. Ex.A2 is a release deed executed by the defendants 1, 2 & 4 in favour of the 3rd defendant in respect of their share in the A schedule property. Ex.A3 is the release deed executed by the defendants 1, 2 and 4 in favour of the 3rd defendant releasing their share in a portion of the A schedule property. In both these documents, there is a recital to the effect that the properties were purchased by Munusamy out of his own funds. The learned counsel would point out that all the defendants being parties to these documents, which are registered instruments, are prohibited from letting in the evidence contrary to the recitals contained therein in view of Section 92 of The Indian Evidence Act. Therefore, according to the learned counsel, the plea that the A schedule properties were purchased from and out of the income of the defendants 2 & 3



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in the name of Munusamy has to be outright rejected.

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9. We have considered the rival submissions. The following points emerge for consideration in this appeal:-

1. Whether the defendants 2 & 3 are estopped from pleading that A schedule property was purchased by them out of income in the name of Munusamy?
2. Whether the Will dated 16.11.2008 marked as Ex.B3 cannot be projected as a document of title for want of Probate?
3. Whether the Trial Court was right in granting a decree in respect of entirety in the B schedule property?

10. **Point No.1:-** The sale deed for suit A schedule property dated 28.06.1996 stands in the name of Munusamy. It is the plea of the defendants 2 and 3 that they purchased the property in the name of their father. As rightly pointed out by the Trial Court, there is no evidence except the oral evidence of those defendants 2 & 3 and the supporting evidence of the 1st defendant in proof of the said plea. As rightly pointed out by the learned counsel for the respondent/plaintiff, Exs.A2 & A3 release deeds executed by the defendants *inter se* amongst themselves contains specific recitals to the effect that the suit A schedule properties were purchased by Munusamy out of his own savings. The recitals, which are similar read as follows:-



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“பின் மேற்படி மனையை மேற்கூறப்பட்ட திரு.வேலு மற்றும் அவர் வகையறாக்களிடமிருந்து மேற்படி பிளாட் நெ.1-க்கு மொத்த பரப்பு 4752 சதுரடி மனையில் பொது ரோடுக்காக விடப்பட்ட இடம் போக மீதியுள்ள 4346 சதுரடிகள் கொண்ட வீடுகட்டும் காலிமனையை மட்டும், எங்களில் 1-வது நபருக்கு கணவரும், 2, 3, லக்கமிட்ட நபர்களுக்கும் தங்களுக்கும் சேர்த்து தகப்பனாருமான திரு.M.முனுசாமி அவர்கள் அவர் சுய சேமிப்பு பணத்தைக்கொண்டு சுத்த கிரையம் பெற்று மேற்படி கிரையப் பத்திரத்தை முறையாக திரு.வேலு மற்றும் அவர் வகையறாக்களிடமிருந்து கடந்த 28.06.1996 ம் தேதியில் வில்லிவாக்கம் சார்-பதிவு அலுவலகத்தில் 1-வது பத்தகம் 165-வது வால்டும், 87 முதல் 90 வரை பக்கங்களில் 1996-ம் வருடத்திய 1909-ம் நெ.கிரையப்பத்திரமாக பதிவு செய்து அதுமுதல் அவர் சுவாதினத்தில் சர்வ சுதந்திரங்களுடன் ஆண்டு வந்த மனையாகும்.”

11. Exs.A2 & A3 are release deeds, are required to be in writing and they are registered instruments. Section 92 of The Indian Evidence Act prohibits oral evidence contrary to the recitals in documents, which are required to be in writing. It reads as follows:-

"92. When the terms of any such 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, no evidence of any oral agreement or 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:



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Proviso (1).- 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 contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2).- The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).- The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).- The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).- Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved.

PROVIDED that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).- Any fact may be proved which shows in what manner the language of a document is related to existing facts."



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12. In view of the above said provision, we do not think that we could allow the defendants 2 and 3 to contend that the properties were purchased by the defendants 2 & 3 out of their income in the name of their father Munusamy. We therefore uphold the finding of the Trial Court that the defendants 2 & 3 have not established the plea that the suit properties were purchased out of their income in the name of their father Munusamy.

13. **Point No.2:-** The second limb of defence of the defendants, in an effort to establish their title, is the plea based on the Will dated 16.11.2008 marked as Ex.B3. As rightly pointed out by the learned counsel, the Will complies with the provisions of Section 63 of The Indian Succession Act, it has been attested by two witnesses. One of the witnesses have also spoken to the execution. Therefore, the counsel is justified in contending that the provisions of Section 68 are complied with. However, the Trial Court has recorded a finding that the Will has not been proved. *De hors* the same, we find another obstacle in the form of Section 213 of The Indian Succession Act, which prohibits the defendants from establishing their title before a Court of justice in the absence of Probate. Though the Will is silent about the place of



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execution, the attesting witness, who has been examined as DW4, has clearly deposed that the Will was executed within the precincts of the High Court of Madras. DW5 has also deposed to that effect. Once it is found that the Will was executed within the precincts of this Court, then it is within the original jurisdiction of this Court. Section 57 of The Indian Succession Act reads as follows:-

“57. Application of certain provisions of Part to a class of Wills made by Hindus, etc. - The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply-

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; and

(c) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b);

Provided that marriage shall not revoke any such Will or codicil.”

14. Section 213 of The Indian Succession Act reads as follows:-

“213. Right as executor or legatee when established. -(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.



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(2) This section shall not apply in the case of Wills made by Muhammadans or Indian Christians and shall only apply -

(i) in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in clauses (a) and (b) of section 57; and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962 (16 of 1962), where such Wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immovable property situated within those limits."

15. A combined reading of the provisions of Sections 57(a) and 213 (2)

(i) would make it crystal clear that a Will executed within the original jurisdiction of the High Court of Madras in respect of all the properties mentioned therein situate anywhere requires Probate. A Will executed outside those territories would require Probate in respect of properties, which are situate within those territories. In an attempt to tide over the difficulties faced, the learned counsel appearing for the appellants would invite our attention to the judgment of the Hon'ble Supreme Court in ***Clarence Pais and others Vs. Union of India*** reported in **(2001) 4 SCC 325**. He would invite our attention to the following observations of the Hon'ble Supreme Court made at paragraph 6 of the judgment, which reads as follows:-



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“6. A combined reading of Sections 213 and 57 of the Act would show that where the parties to the will are Hindus or the properties in dispute are not in territories falling under Sections 57(a) and (b), sub-section (2) of Section 213 of the Act applies and sub-section (1) has no application. As a consequence, a probate will not be required to be obtained by a Hindu in respect of a will made outside those territories or regarding the immovable properties situate outside those territories. The result is that the contention put forth on behalf of the petitioners that Section 213(1) of the Act is applicable only to Christians and not to any other religion is not correct.”

16. The learned counsel laying emphasis on the words “as a consequence, a probate will not be required to be obtained by a Hindu in respect of a Will made outside those territories or regarding the immovable properties situate outside those territories”, would submit that if a Will made within the territories relates to immovable property situate outside the territories, probate is not required. We are unable to persuade ourselves to agree with the contention of the learned counsel. A proper reading of the pronouncement of the Hon'ble Supreme Court is to the effect that probate is not required for a Will, which is made outside the territories with reference to



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properties situate outside the original jurisdiction of High Court of judicature at Madras. If a Will is made/executed within the original jurisdiction of High Court of Judicature at Madras, in view of the clear language of Section 57(a), the same will have to be probated *de hors* the fact that the properties are situate outside the jurisdiction. We are unable to read the judgment of the Hon'ble Supreme Court in the way the counsel suggests or wants us to read. In view of the above, in the absence of a probate, the Will cannot be relied upon. Therefore, point no.2 is answered against them.

17. **Point No.3:-** This relates towards the portion of the property, which was purchased by the 1st defendant under Ex.B1, the same is dated 1981. The 1st defendant had executed the settlement deed in favour of the 3rd defendant in respect of the suit properties. The learned counsel for the respondent would fairly concede that the Trial Court has erred in concluding that the plaintiff is entitled to 1/5th share in the said portion also. Therefore, this point has to be answered in favour of the appellants.

18. In the light of the foregoing discussions, we will have to confirm the decree in respect of the A schedule property and modify the preliminary



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decree in respect of B schedule property. The Appeal is partly allowed. The decree in respect of A schedule property is confirmed. The decree in respect of B schedule property is modified to the effect that it will relate only to the property that was inherited by Munusamy from his mother Annammal and the property purchased by the 1st defendant under Ex.B1 Sale deed stands excluded. In other respects, the judgment of the Trial Court are confirmed. Since the appellant has partially succeeded in the appeal, we make no order as to costs. Consequently, connected MP is also closed.

[R.S.M., J] [R.K.M., J]
20.07.2023

Index : No

Internet : Yes

Speaking Order

Neutral Citation Case: No

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To
The II Additional District Court,
Tiruvallur at Poonamallee.



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