



A.S.No.790 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.06.2023

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE C. KUMARAPPAN

A.S.No.790 of 2012

and

M.P.No.1 of 2012

G.Parameswari

... Appellant

Vs.

1.Seethalakshmi

2.S.Gowthaman

... Respondents

*[R2 was exonerated in the lower Court and
hence given up]*

Prayer : Appeal Suit filed under Section 96 r/w. Order 41 Rule 1 of Code of Civil Procedure against the judgment and decree dated 23.04.2012 in O.S.No.28 of 2010 on the file of the District Court, Nagapattinam.

For Appellant : Mr.A.Prabhakaran

For R1 : No appearance

R2 : Given up



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J U D G M E N T

(Judgment was delivered by **S.S. SUNDAR, J.**)

The appeal is directed against the judgment and decree, dated 23.04.2012, in O.S.No.28 of 2010 on the file of the District Court, Nagapattinam. The 1st defendant in the suit is the appellant in the above appeal.

2.The 1st respondent as plaintiff filed the suit in O.S.No.28 of 2010 on the file of the District Court, Nagapattinam, for partition of her one half share in all the suit properties and for consequential reliefs. The suit is also for accounting and for future mesne profits. The suit properties are described as Item Nos.1 to 35 comprised in various Survey Numbers in North Poigainallur and South Poigainallur Villages, Nagapattinam Taluk, Nagapattinam District.

3.The case of the plaintiff is that, all the suit properties are the ancestral properties of father of plaintiff and 1st defendant, namely,



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Arunachala Gounder, and the properties purchased by him out of the income from joint family properties. It is admitted that Arunachala Gounder died on 10.11.1994. The mother of plaintiff/wife of Arunachala Gounder, namely Vedavalli Ammal, died on 21.07.2004. It is the specific case of the 1st respondent/plaintiff that Arunachala Gounder had two other sons, by name Kumarasamy and Chelladurai, and that both of them died unmarried. It is also contended by the plaintiff that both Arunachala Gounder and Vedavalli Ammal died intestate and therefore, the plaintiff is entitled to one half share in all the properties left by father Arunachala Gounder. The plaintiff has also stated about the sharing of income and alleged that 1st defendant did not share the entire income. Stating that joint possession is not feasible, the plaintiff came forward with the suit for partition.

4.The suit was contested by the appellant/1st defendant by a detailed written statement. It is the specific case of appellant that father Arunachala Gounder executed a registered Will dated 07.07.1993 and that on the same day, the appellant's mother Vedavalli Ammal also executed another registered Will dated 07.07.1993 in favour of their son Selva Kumarasamy.



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It is the further case of appellant that Selva Kumarasamy executed an unregistered Will dated 15.03.2005 in favour of the appellant. Therefore, the suit was contested by the appellant solely on the ground that, by virtue of the registered Wills dated 07.07.1993 (marked as Exs.B2 and B3) in favour of Selva Kumarasamy and the unregistered Will executed by Selva Kumarasamy dated 15.03.2005 (marked as Ex.B4) in favour of appellant, the appellant got absolute right over the suit properties.

5.The 2nd defendant is only a tenant and no written statement was filed by the 2nd defendant. Since no relief was claimed against the 2nd defendant, the trial Court exonerated him, as seen from the judgment.

6.The trial Court framed the following issues :

- i. *Whether the plaintiff is entitled for partition as prayed for ?*
- ii. *Whether the suit is bad for non-joinder of necessary parties ?*
- iii. *Whether the Arunachala Gounder left any Will dated 07.07.1993 ?*
- iv. *Whether the Vedhavalli left any Will, dated 07.07.1993 ?*
- v. *Whether the Selva Kumarasamy has left any Will, dated*



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15.03.2005 ?

vi. *Whether the plaintiff is entitled for accounts and mesne profits*
?

vii. *To what relief ?*

7.The plaintiff examined herself as P.W.1 and examined P.W.2 and P.W.3. On the side of plaintiffs, Exs.A1 to A12 were marked. The defendant examined herself as D.W.1 and also examined D.W.2 to D.W.7. Exs.B1 to B7 were marked on the side of defendants.

8.The appellant (D.W.1), in the course of evidence, admitted that one of the sons by name Selva Kumarasamy was married, however, it is stated that the marriage was dissolved and his wife got separated. It is also in evidence that the wife of Selva Kumarasamy contracted second marriage. D.W.2 and D.W.5 were examined to prove the execution of Will under Ex.B2. Finding that there are vital discrepancies in the evidence of D.W.2 and D.W.5, the trial Court specifically found that the Will under Ex.B2 is not proved. Similarly, the Will under Ex.B3, which is also attested by D.W.2 and D.W.5, was considered by the trial Court and the trial Court found that



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the appellant has not satisfied the requirements of Section 63(c) of Indian Succession Act, 1925, as well. The trial Court also held that the attestation was not proved in the manner required under Section 63 of the Indian Succession Act and that the suspicious circumstances surrounding the Will were also not dispelled by the appellant. As regards the Will alleged to have been executed by Selva Kumarasamy, one of the brothers of plaintiff and 1st defendant, in favour of 1st defendant's son under Ex.B4, the trial Court held that the unregistered Will stated to have been attested by D.W.3 and D.W.4, is not proved. The glaring discrepancies between the evidence of D.W.3 and D.W.4 were highlighted by the trial Court. One of the witnesses D.W.3 has stated that Selva Kumarasamy signed the Will in Tamil, whereas, the document Ex.B4 shows that the Will was signed by Selva Kumarasamy in English. The presence of the other witness was also held doubtful by the trial Court having regard to the evidence of D.W.3. The evidence of D.W.4 was also considered by the trial Court to hold that his evidence is not believable for reasons. The trial Court held that the Wills propounded by the 1st defendant/appellant were not proved. A specific finding is rendered that Ex.B4-Will was created. In the absence of Wills, the trial Court held that



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plaintiff is entitled to one half share in all the properties and that the consequential reliefs are also to be granted in favour of plaintiff, the sister of appellant and daughter of Arunachala Gounder, and ultimately, decreed the suit.

9. Aggrieved by the judgment and decree of the trial Court, the 1st defendant has preferred the above appeal.

10. Learned counsel appearing for the appellant/1st defendant, who vehemently argued that the trial Court has not considered the evidence in entirety in a proper perspective, is unable to demonstrate how the findings of the trial Court are perverse or not supported by evidence. This Court carefully considered the evidence of D.W.2 to D.W.5 and convinced that the discrepancies are glaring and the counsel for appellant himself accepts that he has no explanation to be offered. All the Wills show unnatural disposition. The appellant has miserably failed to dispel the suspicious circumstances.



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11.This Court, having gone through the findings of the trial Court, finds that the trial Court has applied its mind on all the issues by considering the evidence in a proper manner. This Court is unable to find any perversity or non-application of mind. In the absence of compelling reasons for this Court to interfere with the findings of the trial Court, this Court is unable to interfere with the judgment and decree of the trial Court.

12.It is admitted that the appellant has no other defence except the Wills under Exs.B2 to B4. It is seen that Exs.B2 and B3 are only photocopies of registered Wills. There is no explanation to the satisfaction of the Court why the appellant has not produced the originals of Exs.B2 and B3. Though certified photocopy of original Wills are produced under Exs.B5 and B6, the reason for non-production of original is nowhere explained in the evidence. The evidence of attesting witnesses are not reliable in view of the glaring contradictions and discrepancies pointed out by the trial Court. It cannot be disputed that the Will under Exs.B2 to B4



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are unnatural. Absolutely, there is no reason why father and mother should exclude the two daughters. The appellant has not even dispelled the surrounding suspicious circumstances.

13.The other point that was urged by the appellant before the trial Court is that the suit has been filed long after the death of father and therefore, the plaintiff has admitted the title of appellant on the basis of Wills under Exs.B2 to B4. This Court finds a specific pleading in the plaint that the father and mother died intestate. The plaintiff has also stated about sharing of income in respect of some of the immovable properties. The plaintiff examined herself as P.W.1. P.W.2 and P.W.3 were also examined to show that plaintiff was also in joint possession. Appellant is the elder sister of plaintiff. Merely because she has produced some Wills, it cannot be presumed that she is in exclusive possession of all the properties in hostility. This Court is unable to find a specific pleading of ouster in the entire written statement. In such circumstances, merely because the suit is filed with a delay, this Court is unable to find any merit in the contention of the appellant that she has prescribed title by ouster. For want of pleading and



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proof, this Court is unable to countenance the arguments of learned counsel for the appellant on the issue of ouster.

14.As a result, this Court finds no merit in this appeal. Accordingly, **this appeal is dismissed.** No costs. Consequently, connected miscellaneous petition is closed.

(S.S.S.R., J.) (C.K., J.)
09.06.2023

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Internet : Yes

Index : Yes / No

To

1.The District Judge,
Nagapattinam.

2.The Section Officer,
VR Section, High Court,
Chennai.

| *with a direction to return*
| *the records to the Court below,*
| *if any, forthwith*



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S.S. SUNDAR, J.
and
C.KUMARAPPAN, J.

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