



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.01.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.443 of 2007

- 1.S.Duraisamy
- 2.Annammal
- 3.Thangamuthu Gounder (died)
- 4.Kolandasamy
- 5.Subramani
- 6.Loganathan
- 7.Ramasamy
- 8.Smt.Poongodi

... Appellants

Vs.

Rukmani

... Respondent

[4th appellant recorded as LR and 8th appellant brought on record as LRs of the deceased 3rd appellant vide order of Court dated 24.06.2014 made in M.P.No.1 of 2014 in S.A.No.443 of 2007.]

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree of the learned Principal District Judge of Erode District at Erode in A.S.No.40/2006 dated 07.11.2006 confirming the Judgement and Decree of the learned I Additional Subordinate Judge, Erode in O.S.No.64/2004 dated 07.10.2005.



For Appellants : M/s.Prithvi
for M/s. S.Kaithamalai Kumaran
For Respondent : M/s.P.T.Ramadevi

JUDGMENT

The defendants in a suit for partition are the appellants before this Court. The facts are briefly set out herein below and the parties are referred to in the same ranking as before the Trial Court.

2. The plaintiff had filed the suit OS.No.64 of 2004 on the file of the I Additional Sub Judge, Erode for a partition and separate possession of her 1/12th share in the suit schedule property. The schedule of property consisted of several pieces of land comprised in various sub-divisions in Veppampalayam, Village Perundurai, Erode. It is the case of the plaintiff that the properties are ancestral in nature and belonged to one Nallappa Gounder. Nallappa Gounder had three sons, Chinnimalai Gounder, Kumarasami Gounder and Sellappa Gounder. Chinnimalai had two children Duraisamy, the 1st defendant and Annammal, the 2nd defendant. One Deivanai Ammal was Kumarasami's wife and his two children are Thangamuthu, the deceased 3rd defendant and the plaintiff, Rukmani. The



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3rd son of Nallappa namely, Sellappa had a son, Subramanian, the 5th defendant herein and a deceased son Krishnasamy whose sons are the defendants 6 and 7 respectively. The 4th defendant is the son of the 3rd defendant. On the death of Nallappa Gounder the property devolved on his three sons. They had enjoyed specific portions of the properties without a permanent partition. The 2nd son of Nallappa Gounder, namely, Kumarasamy died leaving behind him surviving the plaintiff and the 3rd defendant as his legal heirs. The 1st son, Chinnimalai had died leaving behind him surviving defendants 1 and 2. Likewise, the 3rd son, Sellappa Gounder had died leaving behind him surviving the 5th defendant and defendants 6 and 7 who are the legal heirs of his pre-deceased son Krishnasamy.

3. The plaintiff would submit that each person has been enjoying their respective shares according to convenience without their being a formal partition. Since the plaintiff wanted to improve her property, she had sought for a partition. Further, misunderstanding had cropped up between the defendants 3 and 4 and the plaintiff with reference to the enjoyment of the



properties. The plaintiff had called upon the defendants 3 and 4 to partition the property which was declined by them. The plaintiff therefore issued a legal notice dated 06.12.2003 calling upon the defendants to partition the suit property. However, since there was no response the plaintiff came forward with this suit in question.

4. The 3rd defendant, the plaintiff's brother had alone filed a written statement inter alia contending that on 24.04.1977, Kumarasamy Gounder had executed a Will bequeathing his properties in favour of the 3rd and the 4th defendant. Thereafter, he would submit, that there was a partition between the defendants 3 and 4 on one side and defendants 1, 2, 4 and 7 on the other side. He would also submit that the plaintiff had been given in marriage in a grand manner and she had been given over and above what she was entitled to as a dowry. Therefore, in the light of the Will the 3rd defendant would seek to have the suit dismissed.

5. The I Additional Subordinate Judge, Erode had framed the following issues which is translated from the vernacular reads as follows:-

"i. Whether the plaintiff is entitled to a preliminary



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decree for partition as prayed for?

ii. Whether Kumarasamy Gounder, father of the 3rd defendant and plaintiff dated 24.04.1977 executed a Will bequeathing his properties in favour of the defendants 3 and 4?

iii. Whether there was a partition dated 11.04.1984 between the defendants and 'B' schedule of the partition deed was allotted to defendants 3 and 4 as alleged in their written statement ?

iv. To what relief ? "

Additional issue:-

" Whether it is true to say that the Will dated 24.04.1977 is not a true one and it is forged ?"

6. The plaintiff had examined 2 witnesses on her side and marked Ex.A.1 to A.5. On the side of the defendants, three witnesses were examined and Ex. B.1 to B2 were marked.



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7. The learned I Additional Sub Judge, Erode by judgment and decree dated 07.10.2005 was pleased to decree the suit as prayed for and challenging the same the defendants had filed A.S.No.40 of 2006 on the file of the Principal District Judge, Erode. The Principal District Judge has also concurred with the judgment and decree of the Trial Court and dismissed the appeal. Challenging the same the defendant has filed the above Second Appeal.

8. The above Second Appeal in question has been admitted on the following Substantial Questions of law:-

i) Are the Courts below justified in not accepting the Will Ex.B.2 when there is no suspicious circumstances surrounding the execution of the Will and especially when it is proved by the attestators D.W.2 and D.W.3 ?

ii) Are not the judgments of Court below vitiated as admittedly there was love lost between the plaintiff and her father, the testator that they were not on visiting



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terms, that plaintiff did not attend her father's death the Will Ex.B.2 is natural and there is no suspicious circumstances in the due execution of the same?

9. The learned counsel appearing on behalf of the appellants/ defendants would submit her argument on three major grounds:-

a) Under a Will dated 24.04.1977, Ex.B.2, the property had been bequeathed by Krishnasamy in favour of the 3rd defendant.

b) The defendants have examined D.W.2 and D.W.3 to prove the same.

c) Further there was already a partition on 11.04.1984 and therefore the property had lost its ancestral character.

10. She would further submit that the notice issued by the plaintiff was only with reference to the B schedule property in the partition deed. Though the defendant has pleaded ouster the learned counsel has just made her submissions of the point as the strict ingredients of ouster has not been set out in the pleadings. She would place her reliance on the Will, Ex.B.2 by reason of which the plaintiff has lost her right to the property of her father.



11. Per contra, M/s.P.T.Ramadevi, learned counsel appearing on behalf of the respondent/plaintiff would submit that both the Courts below have come to the conclusion that the Will, Ex.B.2 has not been legally proved since there was a lot of discrepancies and contradictions in the evidence of the attesting witnesses. The defendants have not been able to rebut the suspicious circumstances surrounding the execution of Ex.B.2, Will. Further, the Will is said to be of the year 1977, whereas there is no mention about the said Will in the subsequent partition deed. Once, the defendants have failed to prove the Will then the plaintiff is entitled to the decree as prayed for.

12. Heard the learned counsels on either side.

13. That Krishnasami has 1/3rd share in the property is not denied by the defendants. The defendants would try to obstruct the intestate succession by pleading a Will, Ex.B.2. The witnesses who have been examined to prove the Will have contradicted each other and have not been able to prove that they had witnessed the execution of the Will. The other point which gives



rise to suspicion about the Will is the fact that in the subsequent partition deed which was entered into on 11.04.1984 between all the branches of the three sons of Nallapa Gounder there is no reference to the Will. Therefore, once the Will stands disproved the share of Kumarsamy has to necessarily be partitioned between the 3rd defendant and the plaintiff and therefore the plaintiff is entitled to a 1/12th share in the suit properties as decreed by the Courts below.

14. Both the Courts below have given cogent reasons for not considering the Will, Ex.B.2. Therefore, the Substantial Question of law No.1 is answered against the plaintiff. Likewise, there is no proof to show any kind of a bad blood between the plaintiff and her father and therefore the Substantial question of law No.2 is also answered against the plaintiff. Consequently, the Second Appeal stands dismissed confirming the judgment and decree of the Courts below. No costs.

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Index : Yes/No
Internet : Yes/No
Neutral Citation : Yes/No
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To

- 1.The Principal District Judge of Erode District.
- 2.The First Additional Subordinate Judge, Erode.

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