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S.A. No. 938 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.12.2023

CORAM

THE HONOURABLE MRS. JUSTICE T.V.THAMILSELVI

S.A. No.938 of 2015

and

M.P.No.1 of 2015

Selvambal (died)

Ramachandran,
S/o. Maruthamuthu

(A2 brought on record as LR of
deceased sole appellant vide
order of court dated 0119.12.2023
made in C.M.P.No.21890, 21894
and 21895 of 2022)

... Appellant

Versus

Rasammal
W/o. Vadivel

... Respondent

Prayer:- Second Appeal filed under Section 100 C.P.C., against the judgment and decree in A.S.No.7 of 2014 on the file of Addl. Subordinate Court, Perambalur dated 23.12.2014 in reversing the judgment and decree in O.S.No.535 of 2007 on the file of District Munsif Court, Perambalur dated 17.07.2013.



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For Appellant : No appearance

For Respondents : Mr.G.Ilamurugu

JUDGEMENT

The appellant herein is the defendant in the suit in O.S.No.537 of 2007 on the file of Addl. Sub-Court, Perambalur, which was filed by the respondent herein.

2. For the sake of convenience, the parties are referred as per the ranking in the suit.

3. Before the trial court, the respondent/plaintiff filed a suit for partition claiming half share in the suit property. Both the plaintiff and original defendant are daughters of deceased Thaiyamuthu Padaiyachi. The suit properties are ancestral joint family properties and she along with her father and sister, each entitled 1/3rd share and as their father died intestate, both plaintiff and defendant are entitled half share in the entire property. Furthermore, some of the items were purchased by their father out of income derived from joint family property. However, the defendant refused for



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amicable partition and also contended that her father executed a Will in her favour on 01.03.1994 and thereafter, their father died on 23.09.2007. After the demise of their father, the Will came into force, thereby the defendant denied the plaintiff's claim. Hence, the suit.

4. Before the trial court, the defendant filed a written statement stating that the item Nos.1 to 4 and 6 to 8 are not joint family properties and those items were purchased by her father and the same belong to him by way of self-acquisition, besides her father executed a Will in her favour in respect of his self-acquired properties i.e. item Nos.1 to 4 and 6 to 8 on 01.03.1994, thereby, she prayed to dismiss the suit in respect of those items covered in the Will.

5. Before the trial court, both parties adduced evidence and the trial judge framed issues and on considering evidence on record, the trial judge held that item Nos.1 to 4 and 6 to 8 are self-acquired properties of plaintiff's father as he purchased out of his personal business of selling goat and cow, thereby those properties are declared as self-acquired properties of her father



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Thaiyamuthu Padaiyachi, thereby he is entitled to execute a Will Ex.B1/A1 dated 01.03.1994 and the Will is also proved by one of witness by the defendant as well as attesor of the Will D.W.2 has confirmed the presence of testator along with other witnesses at the time of execution and registration of Will, thereby Will was proved. Accordingly, the Suit was partly decreed granting half share in item Nos.5,9, 10 and 11 and in respect of Nos.1 to 4 and 6 to 8, the suit was dismissed by confirming the Will dated 01.03.1994.

6. Challenging the said findings, the plaintiff preferred first appeal in A.S.No. 7 of 2014, wherein the first appellate judge independently analysed evidence on record and concludes that evidence of D.W.2, who is attesor of Will not sufficient to conclude that the Will was executed by Testator with full sound and state of mind nor other witnesses of the Will not examined by the defendant, thereby, the execution of Will was not proved as required under Sec.68 of Indian Evidence Act. Furthermore, the first appellate judge also held that the defendant has not established the fact that there was a separate source of income for her father, from which he purchased those



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properties, on the other hand, the first appellate judge also held that there was ancestral property and out of which, those properties were purchased, thereby all the properties are ancestral joint family properties. Accordingly, the Suit was decreed by setting aside the findings of trial judge. Challenging the said findings, now the defendant preferred this Second Appeal.

7. The learned counsel for appellant argued that the first appellate court failed to take note of the fact that there was no proof on the side of plaintiff to establish that there was a source of income from the ancestral properties, inspite of that, allotting share in entire items, as such is erroneous one and the same is liable to be set aside. Moreover, the plaintiff admits that his father had purchased some items of property during his life time and ignoring the said admission, declaration of all the properties are joint family property as such is erroneous one and the same is liable to be set aside. The learned counsel would further submit that before the trial court, the defendant proved the Will by examining one of the attestor, but the first appellate judge erroneously held that the Will is not proved as such is unjust and liable to be set aside. Accordingly, this Second Appeal is admitted on



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the following questions of law :-

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- a) Is the lower appellate court justified in arriving at a conclusion that the suit properties are joint family property and that too in the absence of any proof or evidence?
- b) Whether the lower appellate court is justified in decreeing the suit merely on the basis of the version of the plaintiff, which is unsupported by any documentary or oral evidence?
- c) Whether the lower appellate court is right in concluding that suit items 1,2,3,4,6,7,8 are ancestral property, when the plaintiff herself had admitted that it was purchased by her father and he executed a Will in favour of the defendant?
- d) Is not the lower appellate court wrong in decreeing the suit merely on surmises that too which is against the admission of the plaintiff?
- e) In the absence of Will under Ex.A1 being unchallenged is the lower appellate court justified in decreeing the suit?

When both the parties plead that they have purchased



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undivided share and were enjoying specific portions for convenient enjoyment, is the lower appellate court justified in holding that there should have been an oral partition among them without any basis and whether the said findings is legally sustainable?

f) Whether the findings of the lower appellate court are justified in law when the same are not based on evidence on record?

8. By way of reply, the learned counsel for plaintiff would submit that her family owned some of items of ancestral property and out of income derived from that ancestral property, the other items were purchased by father of plaintiff. When the plaintiff able to establish that family owned ancestral property and when there is no proof for separate income, the other properties purchased by father of plaintiff, Patta also issued in his name, it seems to be joint family property and the same was rightly held by the first appellate judge. Hence, she prayed to dismiss this Second Appeal as no merit.

9. Considering the evidence on record, it would clearly reveals that



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item nos. 5, 9, 10 and 11 are the ancestral property of the family and the same was admitted by both parties. Therefore, during the life time of plaintiff's father, there was ancestral property owned by him. According to the defendant, his father by selling cow, he earned separate income, thereby he purchased other items of property. But, there is no independent evidence that his father had an independent income to purchase those properties. When there is no conflict evidence with regard to self-acquisition, then the other properties also deemed to be joint family property, though it was purchased by father of plaintiff. Admittedly, there is no division of property taken place during the life time of their father Thaiyamuthu Padaiyachi. Therefore, the first appellate judge rightly concludes that entire properties are ancestral joint family property. Accordingly, the question of law (a), (b) and (c) are answered.

10. The appellant/defendant claiming right over item Nos.1 to 4 and 6 to 8 based on the Will said to be executed by her father Thaiyamuthu Padaiyachi, which was marked as Ex.B1/A1. To prove the Will as required under Sec. 68 of Indian Evidence Act, the defendant examined attesor of the Will as D.W.2. But the evidence of D.W.2 not established that the testator



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intended to execute the said Will in favour of defendant, who is one of his daughter. Further, his evidence reveals that he went to Registrar Office, there was a Will, wherein he signed as witness. Therefore, it would clearly implied that he is not known whether the testator dictated the Will or whether the testator is intended to execute a Will in favour of one of his daughter. Therefore, the evidence of D.W.2 not sufficient to conclude that Will was executed by the testator with full knowledge and consent. Moreover, D.W.2 evidence also disclosed that another witness was not signed in the Will in his presence. Sec. 68 of Evidence Act prescribes that the execution of Will is to be proved beyond reasonable doubt and not to be used as evidence until one of attesting witness proved its execution. But as per the evidence of D.W.2, beneficiary of the Will was present at the time of alleged execution. The defendant also not taken steps to examine other witnesses, when the evidence of D.W.2 itself is not sufficient to prove the execution of Will, the other available witness has to be called for to supplement his evidence by making submission with those lacuna made by D.W.2, but the defendant failed to take steps to examine another witness, thereby, he failed to prove the execution of Will and the same was rightly appreciated by the first



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appellate judge, which needs no interference. But the trial judge without proper appreciation of evidence, erroneously concludes that the Will was proved by the defendant. But, the first appellate judge has rightly concludes that when the Will is not proved, all the properties are the ancestral joint family properties, in which the plaintiff is entitled half share, which needs no interference, thereby the question of law (d) and (e) is answered.

11. Accordingly, this Second Appeal is dismissed as no merit. The findings of appellate judge is confirmed and the suit is decreed granting half share in the entire suit property by way of preliminary decree. No costs. Consequently, the connected Miscellaneous Petition is closed.

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Index : Yes/No
Speaking Order : Yes/No
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To

Sub-Judge, Perambalur.

T.V.THAMILSELVI, J.

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Pre-delivery judgment in
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