



A.S.(MD)No.53 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 23.01.2023

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THE HONOURABLE MRS.JUSTICE N.MALA

A.S.(MD)No.53 of 2012

and

C.M.P(MD)No.7968 of 2022

and

M.P(MD)No.1 of 2012

A.Gopala Krishnan

... Appellant/1st Defendant

Vs

1.A.Krishnaveni

...1st Respondent/1st Plaintiff

2.A.Tharangini

...2nd Respondent/2nd Plaintiff

3.T.Maheswari (Died)

...3rd Respondent/2nd defendant

*(Memo presented before the Court
on 07.11.2022 is recorded as third
respondent died vide Court order
dated 7.11.2022 in A.S.(MD)No.53
of 2012)*

PRAYER: Appeal Suit filed under Section 96 of Code of Civil Procedure r/w order 41 Rule 1 of C.P.C., to set aside the judgment and decree passed in O.S.No.136 of 2007 dated 06.02.2012 on the file of the learned Additional District and Sessions Court Cum Fast Track No.2, Trichi.

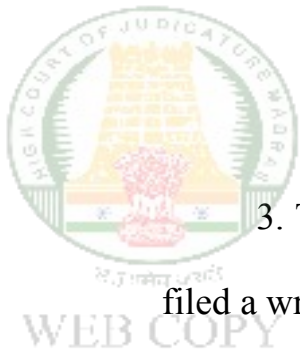
For Appellant	: Mr.S.Meenakshi Sundaram Senior Counsel For Mr.M.Sengu Vijay
For R1	: Mr.G.Sridharan
For R2	: Mr.R.Aravindraj



JUDGMENT

The appeal suit arises out of a judgment and decree, dated 06.02.2012 passed by the trial Court declaring the plaintiff's $\frac{1}{4}$ share in the suit A and B scheduled properties. The unsuccessful 1st defendant is the appellant in the appeal.

2. The facts in brief of the case are that the plaintiffs are the sisters of the first defendant and the second defendant's deceased husband. The suit A and B scheduled property originally belonged to one late V.Muthuachari who had two sons Angamuthu Achari and Raju Achari. The late Muthuachari executed a will dated 24.06.1961 bequeathing the A schedule property to Angamuthu Achari and the B Schedule Property to Raju Achari. The said Raju Achari died issueless and so he sold the B Schedule property before his death to his brother Angamuthu Achari vide sale deed dated 22.08.1977. According to the plaintiffs, after the death of Angamuthu Achari intestate the plaintiffs, the first defendant and the husband of the second defendant each were entitled to $\frac{1}{4}$ th share in the same. The C Schedule properties were gold jewel and silver items worth Rs.1,00,000/- and so the plaintiffs claimed $\frac{1}{4}$ th share in the same also. The plaintiffs therefore prayed for partition of their $\frac{1}{4}$ th share in the suit properties among other reliefs.



3. The second defendant, the widow of the predeceased brother though filed a written statement remained, *ex parte*.

4. The first defendant filed a written statement generally denying all the plaintiff averments. The first defendant further stated that though the plaintiff referred to the Will of Muthuachari, they did not divulge the vital recitals of the Will, dated 24.06.1961, wherein, it was clearly stated that only the male members of Angamuthu Achari would succeed to the said scheduled properties. As far as the C schedule property was concerned, it was the defendant's case that it was the plaintiffs, who took away the same after their mother's demise. The first defendant further submitted that though the plaintiffs had no right in the suit properties, the first defendant out of good will tried to negotiate through Panchayathars for an amicable settlement, but the plaintiffs failed to co-operate. The defendant's specific case was that only A and B schedule properties were available for partition and that C schedule movables were not available. The first defendant on these and other grounds prayed for the dismissal of the suit.

5. In the trial Court, the plaintiffs examined themselves as P.W.1 and P.W.2 and marked Exhibit A1 to A4 and the first defendant examined himself and did not mark any documents.



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6. The trial Court framed the following issues:

1. வாதிகள் தாவாவில் கோரியவண்ணம் பரிகாரம் பெற அருகதையுடையவரா?
2. வாதிகளுக்கு உள்ள இதர பரிகாரங்கள் என்ன?

7. The trial Court on an appreciation of the evidence both oral and documentary on record decreed the suit as regards A and B schedule properties alone.

8. Aggrieved by the judgment and decree of the trial Court, the first defendant has filed the above appeal.

9. The parties will be referred to as per their rank in the suit for the sake of convenience.

10. During the pendency of the appeal, the third defendant died, a memo was presented to record her death as she died issueless and her husband predeceased her.

11. The first defendant filed an application in C.M.P(MD)No.7968 of 2022 for receipt of additional evidence at the time of final hearing of the



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appeal. The defendant in the said application prayed to receive the original Will, dated 24.06.1961 executed by his grand father in favour of his father the copy of which was marked as Exhibit A2 by the plaintiffs in the suit.

12. The learned counsel for the first defendant submitted that the additional evidence was absolutely necessary to decide the controversy in the appeal. According to the learned counsel, he was not able to get the original Will earlier as it was in the possession of his deceased brother. The second defendant, the wife of his deceased brother did not co-operate with him and chose to remain exparte in the trial Court and further refused to search for the Will inspite of his requests. Only recently that is in the month of June, she searched and found the Will and handed it over to him. Soon thereafter, she passed away on 24.10.2022. The learned counsel further submitted that the plaintiffs would not be prejudiced in any way because they had already filed a copy of the same as Exhibit A2. The learned counsel for the plaintiffs did not dispute the above facts by filing a counter and further did not object to the receipt of additional evidence.

13. The short point to be considered in the appeal is whether the plaintiffs are entitled to 1/4th share in A and B Schedule properties.



14. At the time of hearing both the learned counsels agreed that the Will was a vital document as it would have a bearing on the ratio of shares of the respective parties . The learned counsels further submitted that this Court may itself decide on the validity of the Will by taking evidence in appeal or remand the matter to the trial Court restricting the enquiry to the validity and genuineness of the Will.

15. I have gone through the pleadings of the parties and the entire materials on record. In my view, the finding of the trial Court that the Suit A Schedule properties are joint family properties and as such the plaintiffs are entitled to 1/4th share by virtue of 2005 Amendment to Section 6 of the Hindu Succession Act, 1956 is erroneous in the light of the recitals in the Will, dated 24.06.1961. The trial Court failed to note that it was admitted by the plaintiff in their pleadings that A Schedule property was bequeathed by the plaintiffs' grandfather Muthuachari to their father Angamuthu Achari under Exhibit A2, Will dated 24.06.1961. This will also recites that the properties covered under the Will are the self acquired properties of the testator and the same would go to the male members. Therefore, the Will is a vital document which would throw light on the entitlement of the plaintiff to the suit 'A' Schedule property.



16. As far as the B schedule properties are concerned, it is the admitted case of both parties that it was purchased by Angamuthu Achari from his brother, who was allotted the B Schedule property under the Will, dated 24.06.1961. Therefore, there can be no quarrel on the entitlement of the plaintiffs to 1/4th share in B schedule property. The evidence of D.W.1, the first defendant in this regard is note worthy.

“இந்த எ2 ஆவணத்தின்படி வாதிகளுக்கும், எனக்கும் ஏ, பி அட்டவணை சொத்தில் சரிசம பங்கு உண்டு என்று சொன்னால் சரியல்ல. பி செட்டியூல் மட்டும் தான் சரிசம பங்கு உண்டு.”

17. In the light of the admission of D.W.1 as regards B schedule property there is no impediment to declare the plaintiffs' 1/4th share in B schedule property. Further, the finding of the trial Court that C schedule properties are not available for partition and as such no decree can be passed as regards C schedule properties is not challenged by the plaintiffs.

18. Therefore, the only issue is as regards the plaintiffs' right to A schedule properties. The Will is not disputed by the plaintiffs as they trace the title of Angamuthu Achari to the Will and have also produced a copy of the same and marked it as Exhibit A2. It is the defendant's case that as per the recitals of the Will, the plaintiffs would not be entitled to a share in the suit A



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schedule property. In my view, the Additional evidence filed now which is the original Will is necessary to decide the real controversy surrounding the A schedule property. The Additional evidence is therefore admitted and taken on record. C.M.P(MD)No.7968 of 2022 is allowed.

19. I am of the further view that the first defendant should be given an opportunity to prove the Will in a manner known to law. I am therefore of the opinion that the matter needs to be remanded to the trial Court for giving an opportunity to the first defendant to mark the original Will and lead evidence on the same. Needless to say that the plaintiffs will be given an opportunity to contest the same by leading contra evidence.

20. In fine, the judgment and decree of the trial Court is confirmed as far as B and C Schedule properties are concerned. The judgment and decree of the trial Court as regards A scheduled property is set aside for the reasons stated supra. The suit is remanded to the trial Court in so far as A schedule property is concerned with a direction to the trial Court to reconsider the same in the light of the additional evidence admitted by this Court by affording opportunity to both the parties to lead evidence on the same. Considering the limited purpose for which the remand is ordered, the trial Court is further directed to dispose of the suit within a period of six months from the date of



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receipt of copy of the judgment and decree. The appeal is allowed. There shall be no order as to costs. Consequently, connected M.P(MD)No.1 of 2012 is closed.

23.01.2023

Index : Yes / No

Internet : Yes / No

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Note: Registry is directed to mark additional document, namely, Will, dated 24.06.1961 as Exhibit B1.

To

- 1.The Additional District and Sessions
Court Cum Fast Track No.2, Trichy.
- 2.The Section Officer, Vernacular Records,
Madurai Bench of Madras High Court, Madurai.



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N.MALA, J

sn

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