



S.A.No.1400 of 2000

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 03.04.2023

PRONOUNCED ON:05.06.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

S.A.No.1400 of 2000

1.A.Shahul Hameed (Died)
2.A.M.Sharfuddin ...Appellants/Appellants/Plaintiffs
3.Mehar Banu
4.Aburoja
5.Raja Mohammed
6.Fir Thouse
7.Fairose
8.Mohammed Iqbal
9.Mohammed Riyaz ...LRs of the deceased 1st appellant

(Appellants 3 to 9 are brought on record as LR's of the deceased first appellant vide order dated 01.04.2009 made in M.P(MD).Nos.1 to 3 of 2009 in S.A.No.1400 of 2000)

-Vs-

R.Shahul ...Respondent/Respondent/Defendant

PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 21.08.2000 made in A.S.No.133 of 1999 on the file of the Additional District cum Chief Judicial Magistrate, Karur, confirming the judgment and decree dated 12.09.1997 made in



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WEB COPY O.S.No.752 of 1995 on the file of the Sub Court, Kulithalai.

For Appellants : Mr.P.Thiyagarajan

For Respondent : No appearance

JUDGMENT

The appellants 1 and 2 are the plaintiffs in O.S.No.752 of 1995 on the file of the Subordinate Court, Kuzhithalai. The plaintiffs filed the suit for partition and separate possession against the respondent/defendant. The said suit was dismissed by the trial Court. Challenging the said judgment and decree passed by the trial Court, the plaintiffs have filed an appeal before the District Court, Tiruchirappalli in A.S.No.269 of 1993 and the same was made over to the Additional District Court, Karur and taken on file in A.S.No.133 of 1999. The learned Additional District Judge has dismissed the appeal. Aggrieved over the same, the appellants/plaintiffs have filed the present second appeal before this Court.

2. It is a specific case of the appellants/plaintiffs that the suit schedule property measuring 76 cents of land in Survey Field No.299/8, Puthanatham Village, Manapparai Taluk, Tiruchirappalli District, was jointly purchased by one



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E.Jamaluddin and S.K.Jainudeen by a registered sale deed, dated 16.06.1975 under Ex.A1 and they were in joint possession and enjoyment of the said property. Subsequently, on 16.08.1979, the said S.K.Jainudeen alienated his undivided half share to one Aburoja by a registered sale deed under Ex.A.2. The remaining half share was held by E.Jamaluddin and he died in the year 1988 leaving behind his wife, namely, Fathamuthu Jagara, his sister, Badurunnissa and his paternal uncle, Abdul Azeez. After the death of the said Jamaluddin, his legal heirs and Aburoja have been in joint possession and enjoyment of the suit property. As per Hanafi Law of inheritance, the widow of the deceased Jamaluddin is entitled to $\frac{1}{4}$ share and his sister and his paternal uncle are entitled to inherit the remaining shares. As such, Aburoja was entitled to 38 cents and the wife of Jamaluddin, namely, Fathamuthu Jagara is entitled to 9 cents and his sister and paternal uncle are entitled to the remaining 29 cents. Therefore, the plaintiffs purchased the undivided share of Badurunnissa and Abdul Azeez under a registered sale deed dated 04.05.1992 under Ex.A3 for valuable consideration. Likewise, the defendant/respondent purchased the undivided share of Fathamuthu Jagara under registered sale deed dated 14.11.1990 and the undivided share of Aburoja by a registered sale deed, dated 03.03.1994. Hence, the plaintiffs are



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entitled to 3/8 share and the defendant is entitled to 5/8 share. Therefore, the plaintiffs have filed the suit for partition to divide the suit property with metes and bounds.

3. The case of the respondent/defendant is that Badurunnessa is not the sister of Jamaluddin and Abdul Azeez is not the paternal uncle of Jamaluddin. They are not entitled to inherit any share from the deceased Jamaluddin. Fathamuthu Jagara, who is the wife of Jamaluddin, is the sole successor of Jamaluddin. Therefore, Fathamuthu Jahra is the only legal heir of Jamaluddin and is entitled to $\frac{1}{2}$ share of the suit property out of 76 cents.

4. Based on the pleadings, the trial Court framed the following issues:

(i) Whether the plaintiffs are entitled to 3/8 share in the suit schedule property?

(ii) Whether the plaintiffs' vendor is having no right and title on the suit schedule property?

(iii) Whether the widow, Fathamuthu Jagara is the only successor of the deceased E.Jamal?

(iv) Whether Badurunisa and Abdul Azeez are entitled to inherit the properties of the deceased E.Jamal as sister and paternal uncle?



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5. Before the trial Court, on the side of the plaintiffs, P.W.1 to P.W.5 were examined and Ex.A1 to Ex.A10 were marked and on the side of the defendant, D.W.1 and D.W.2 were examined and Ex.B.1 and Ex.B.2 were marked. The Advocate Commissioner's report and the plan were marked as Ex.C1 and Ex.C2. Considering the above pleadings, oral and documentary evidence, the trial Court found that the plaintiffs have not proved that Badurunnissa and Abdul Azees are the legal heirs of Jamaluddin and as such, they are not entitled to the share belonging to Jamaluddin. Aggrieved by the said judgment and decree, the plaintiffs filed an appeal before the Additional District Court, Karur and the First Appellate Court dismissed the appeal.

6. While admitting the second appeal, this Court has formulated the following substantial questions of law:

(i) Is not the judgment of the learned District Judge is vitiated for the reason that he has not formulated issues relevant for consideration as per the Order 41 Rule 31 CPC especially relating to the issue whether Abdul Azeez is the uncle of Jamaluddin?

(ii) Is the learned Additional District Judge right in rejecting the petitions filed under Order 41 Rule 27 CPC to amend the plaint and to examine Badurunnissa respectively?



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7. The learned counsel appearing for the appellants would submit that it is not in dispute that the suit properties measuring an extent of 76 cents in Survey Field No.299/8 were originally purchased by one Jamaluddin and S.K.Jainudeen under Ex.A1 and subsequently, S.K.Jainudeen alienated his $\frac{1}{2}$ share to Aburoja under Ex.A2. Aburoja is in enjoyment and possession of the property from 16.08.1979. The said Jamaluddin died in the year 1988, without any issues, leaving behind his wife, Fathamuthu Jagara. The dispute is as to whether Jamaluddin died leaving behind his only wife Fathamuthu Jagara or whether he died leaving behind his wife, Fathamuthu Jagara, sister Badurunnissa and his paternal uncle, Abdul Azeez. According to the plaintiffs, Jamaluddin died intestate leaving behind his wife, Fathamuthu Jagara, sister Badurunissa and his paternal uncle, Abdul Azeez. The plaintiffs purchased the property from Badurunnissa and Abdul Azees. Hence, they are entitled to $\frac{3}{8}$ share from Jamaluddin's property.

8. According to the defendants, Badurunissa is not the sister of Jamaluddin and Abdul Azeez is not the paternal uncle of Jamaluddin. Fathamuthu Jagara, who is the wife of Jamaluddin, is alone entitled to get the



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share of Jamaluddin. The defendant purchased the property from Fathamuthu Jagara. Therefore, he is entitled to get the share of Jamaluddin.

9. Once it is admitted that Jamaluddin has $\frac{1}{2}$ share out of 76 cents in the suit property, the facts as to whether Jamaluddin died only leaving behind his wife, namely, Fathamuthu Jagara? or he died leaving behind his wife along with his sister and paternal uncle? whether Fathamuthu Jagara is alone entitled to get the entire share of Jamaluddin? whether all the three are entitled to get the share of the Jamaluddin? are to be ascertained.

10. The learned counsel appearing for the appellants would submit that the evidence of P.W.1 shows that Badurunissa's mother was one Amida Beevi and her first husband was one Ismail and the son born to them is E.Jamaluddin. After the death of Ismail, Amida Beevi married one Ibrahim and the daughter born to them is Badurunnissa and as such, Badurunnissa is the uterine sister of E.Jamaluddin. However, the learned Judge held that no evidence was produced to prove the fact that the said Badurunnissa and Jamaluddin were born to same mother and that the averment made in paragraph No.5 of the plaint that



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Badurunnissa is the full sister of Jamaluddin, is also not correct. At the time of filing the suit, the plaintiffs did not know the fact that the mother of Badurunnissa and Jamaluddin was one and the same and the fathers are different. Though the trial Court considered the evidence of P.W.2, P.W.4 and P.W.5, who were examined to prove the relationship of the parties, it refused to accept the case of the plaintiffs to grant the relief of partition on the grounds that the plaintiffs failed to prove that Jamaluddin and Badurunnissa were born to same mother and to different father by producing their Birth Certificate or family card and voters identity card and no marriage register was produced from Pallivasal to prove the two marriages. P.W.1 in his evidence deposed that one Allah Pitchai and Kadar Shah were brothers. Allah Pitchai's son was Ismail and Kadar Shah's son was Abdul Azeez. As such, Abdul Azeez is the paternal uncle of Jamal.

11. Though the evidences were adduced by P.W.1 with respect to the relationship of Abdul Azeez as the paternal uncle of the deceased E.Jamaluddin, the trial Court refused to accept the relationship. Abdul Azeez was examined as P.W.5 and has also given evidence with regard to the earlier suit in O.S.No.22 of 1993 on the file of the District Munsif Court, Manapparai filed by Jamaluddin's



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wife Fathamuthu Jagara and Badurunnissa against him and the same was dismissed. Aggrieved by the same, the plaintiffs preferred an appeal in A.S.No.269 of 1993 on the file of the District Court, Tiruchirappalli and in that appeal, four interlocutory applications were filed (i) to receive the additional documents, namely, the certified copy of Nikkah Register of Mohammed Ibrahim and Amida Beevi and the Nikkah register of Badurunnissa and Mohammed Hussain and (ii) to amend Badurunnissa as uterine sister in the plaint and (iii) to examine Badrunnisa as witness and (iv) to send for Nikkah Register containing the Nikkah dated 28.12.1939 between Mohammed Ibrahim and Hameeda Beevi and the Nikka Register containing the nikkah entry dated 04.11.1960 between Badrunnissa and Mohammed Hussain. Later, the appeal and interlocutory applications were transferred to the file of the Additional District Court, Karur and renumbered as A.S.No.133 of 2009 and I.A.Nos.61 to 64 of 1999. By a common order, dated 20.07.2000, I.A.No.61 of 1999 was allowed and the application filed for the amendment of plaint was dismissed. The application to examine Badurunnisa was also dismissed. The other application to send for Nikkah Register was allowed. Pursuant to that, P.W.6 was examined to prove the additional evidence and the certified copies were made ready on 10.08.2000 and



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the revisions were filed before the Principal Bench of this Court on 17.08.2000.

In spite of representation seeking time, the learned Appellate Judge has reserved the orders and delivered judgment on 21.08.2000. While considering the appeal, the learned Appellate Court has framed only one issue as point for determination that whether Badurunnissa is entitled for any share as uterine sister? and held that it has not been proved by the plaintiffs. Thereby, the judgment and decree of the trial Court was confirmed without going into the other issues. Hence, the present second appeal has been filed.

12. In support of his contention, he relied upon the judgment in the case of *B.V Nagesh & another. vs. H.V. Sreenivasa Murthy*, reported in *2010(13) SCC 530* for the legal proposition that under Order XLI Rule 31 C.P.C, the Appellate Court is duty bound to reflect its conscious application of mind and record findings supported by reasons on all the issues arising along with the contentions put forth and pressed by the parties and the first appeal is a valuable right. The parties have a right to be heard both on questions of law and on facts. He further relied upon the judgment in the case of *Santosh Hazari Vs. Purushottam Tiwari* reported in *2001(3) SCC 179*. Though the Trial Court has



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framed the issue No.4, the same was negatived against the plaintiffs and answered in favour of the respondent/defendant. The First Appellate Court should have framed proper points for determination that whether Badurnissa is the uterine sister or the full sister of Jamaluddin and Abdul Azeez is the paternal uncle or not? and those who are entitled to get the share along with his wife, Fathamuthu Jagara? But, a point for determination framed by the First Appellate Court is not proper.

13. The learned counsel for the respondent submitted that though the specific plea in the plaint was that Badurunnissa is the sister of Jamaluddin and Abdul Azeez is the paternal uncle of Jamaluddin, however, in the course of cross-examination of P.W.2, P.W.2 has stated that Badurunissa is the uterine sister of Jamal. A new case is introduced in evidence in the cross-examination by saying that one Amita Biwi is the mother of Jamaluddin. Ismail is the first husband of Amita Biwi and father of Jamaluddin. After the death of Ismail, Amita Biwi married Mohamed Ibrahim as the second husband and Badurunissa is born to the said wedlock of Amita Biwi and Mohamed Ibrahim. As such, she is a uterine sister. So far as Abdul Azeez is concerned, different version was given in cross-



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examination that Allah Pitchai and Khadersha are brothers, Alla Pitchai's son is Ismail and Ismail's son is Jamal and that Abdul Azeez is the son of Khadersha. In other words, the claim made by the plaintiffs that Abdul Azeez is the paternal uncle of Jamaluddin, is false. No record was produced to show that Badurunnissa is the sister of Jamaluddin. In the earlier suit in O.S.No.22 of 1993, they obtained a decree on 26.02.1993 and the said suit is a collusive suit in which the defendants submitted to a decree within one month from the date of service of summons and admittedly, the suit property was not included as one of the items in the schedule of property. Further, neither Badurunnissa has been examined nor any other relative of Abdul Azeez has been examined to establish the alleged relationships between the parties. Hence, the respondent/defendant has purchased the property from the original owners, namely, Aburoja and Fathamuthu Jagara, widow of Jamaluddin under Ex.B1 and Aburoja was the purchaser from Jainudeen, under Ex.B2. Therefore, the respondent/defendant is the absolute owner of the entire property. The appellants/plaintiffs have not proved that they have purchased the property from the original owner and have not established that their vendors were the legal heirs of the said Jamaluddin. Therefore, the trial Court and the First Appellate Court has rightly dismissed the suit. There is no



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14. Heard the learned counsel appearing for the appellants and perused the materials available on record.

15. Admittedly, the suit property in Survey Field No.299/8, Puthanatham Village, Manapparai Taluk, Tiruchirapalli District, was purchased by one E.Jamaluddin and S.K.Jainudeen by a registered sale deed dated 16.06.1975 and the same was marked as Ex.A1. From 16.06.1975, both Jamaluddin and Jainudeen were in joint possession and enjoyment of the said property. Subsequently, on 16.08.1979, one of the joint owners, namely, Jainudeen sold his undivided $\frac{1}{2}$ share to one Aburoja by a registered sale deed dated 16.08.1979. The same was marked as Ex.A2. Therefore, Aburoja had jointly enjoyed the said property with Jamaluddin and Jamaluddin died in the year 1988. Subsequently, the respondent purchased the property of Aburoja under a registered sale deed dated 03.03.1994, which is marked as Ex.B.2. Therefore, the respondent is entitled to get $\frac{1}{2}$ share in S.F.No.299/8. The said fact was not in dispute on either side. The only dispute is with regard to undivided $\frac{1}{2}$ share of Jamaluddin.



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According to the appellants, Jamaluddin died leaving behind his wife, his sister and his paternal uncle and hence, the wife is entitled to $\frac{1}{4}$ share and his sister and paternal uncle are entitled to the remaining shares. Fathamuthu Jagara, the wife of Jamaluddin, could sell only her share to the respondent under a registered sale deed dated 14.11.1990 under Ex.B1 and therefore, the appellants are entitled to $\frac{3}{8}$ share and the respondent is entitled to $\frac{5}{8}$ share.

16. However, the respondent stated that Badurunissa is not the sister of Jamaluddin and Abdul Azeez is not the paternal uncle of Jamaluddin. Hence, Fathamuthu Jagara alone is entitled to get the entire share of Jamaluddin (i.e.,) $\frac{1}{2}$ share in S.F.No.299/8 and the respondent is entitled to get the entire share. The appellants are not entitled to any share in Jamaluddin's property and not entitled to file the suit for partition which is liable to be dismissed. Therefore, both the Courts below have rightly dismissed the appeal filed by the plaintiffs. Further, they have not proved the relationship of Badurunissa and Abdul Azeez with Jamaluddin.



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17. The core questions are that whether the wife of Jamaluddin is entitled to get the entire $\frac{1}{2}$ share of her husband in S.F.No.299/8?, whether Badurunissa is the sister of Jamaluddin and Abdul Azeez is the paternal uncle of Jamaluddin? and if the relationships are proved, whether Fattamuthu Jagara is alone entitled to get the entire $\frac{1}{2}$ share in the suit property?

18. A careful reading of the entire materials would show that both the parties have not filed any genealogy tree/table and who are the legal heirs of Jamaluddin. Unless the legal heir Certificate of Jamaluddin has been produced, the present case cannot be correctly decided. Though the trial Court and the First Appellate Court has framed the issues, it has not been properly dealt with and given correct finding regarding the relationship of Badurunissa and Abdul Azeez with Jamaluddin. In the suit for partition, Mohammed Law is not like of Hindu Law. Some time first class legal heir is entitled to get the limited share and the residuary share will go to second class heir. Therefore, genealogy table of Jamaluddin is also required and the relationship of Badurunissa and Abdul Azeez with Jamaluddin has to be decided. Admittedly, Fattamuthu Jagara is the wife of Jamaluddin and they have no issue. The Court has to find out the fact as to



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whether Jamaluddin is having any other legal heir apart from Fattamuthu Jagara.

Unfortunately, both the Courts below have not properly dealt with this issue. No doubt, the plaintiffs, who have filed the suit, have to prove their case. Since the suit is for partition, both the parties are liable to prove their respective cases. Therefore, the judgment and decree passed by the First Appellate Court is set aside and the matter is remitted back to the First Appellate Court for fresh consideration. Both the parties are directed to file the genealogy table of the deceased Jamaluddin and the First Appellate Court is directed to receive the additional evidence regarding the relationship of Jamaluddin with Fattamuttu Jagara, Badurunissa and Abdul Azeez, if any.

19. Further, during the pendency of the first appeal, the appellants have filed an application under Order VI Rule 17 C.P.C to amend the plaint that Badurunissa is the uterine sister of Jamaluddin. However, the said application was dismissed on the ground that a new case was introduced. In order to resolve the dispute, it is necessary to decide the relationship of the three persons, namely, Jamaluddin, Badurunissa and Abdul Azeez. Hence, the order passed in the interlocutory application filed under Order VI Rule 17 C.P.C to amend the plaint



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is also set aside. After amending the plaint, the First Appellate Court is directed to take additional evidence regarding the relationship and after adducing additional evidence, the First Appellate Court is directed to decide the matter on merits and in accordance with law.

20. In view of the same, this Second Appeal is allowed for the limited purpose. There shall be no order as to costs.

05.06.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes / No
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To

1. Additional District cum Chief Judicial Magistrate, Karur
2. Sub Court, Kulithalai
3. The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN, J.

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