



S.A.No.110 of 2002

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 11.04.2023

PRONOUNCED ON : 19.06.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

S.A.No.110 of 2002

Nesamony Nadar (died)
S/o.Samuel

Sundara Jeyapal
S/o.Nesamani Nadar

... Appellant

(Appellant and R5 to R7 are brought on record as
LRs of the deceased sole appellant vide order
dated 13.09.2006 made in M.P.(MD) No.2 of 2006)

-Vs-

- 1.Yesudhas
- 2.Jebamani
- 3.Jhonrose
- 4.Thangabai
- 5.Sarqued
- 6.Renjitham



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7.Bella Marcy

8.S.Jayakumar

9.D.Sundar Singh

(Respondents 8 and 9 are impleaded vide Court order dated 15.02.2022 made in M.P(MD) No.1 of 2007)

... Respondents

PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree of the Sub Court, Kuzhithurai, dated 26.07.2001 in A.S.No.25 of 1998 confirming the judgment and decree dated 03.01.1998 in O.S.No.428 of 1995, on the file of the Additional District Munsif, Kuzhithurai.

For Appellant : M/s.Priyanka Jothi
for M/s.J.Anandhavalli

For R3 : Mr.H.Thayumanaswamy

For R8 & R9 : Mr.S.Ramakrishnan

For R1, R2
and R4 to R7 : No appearance

JUDGMENT

The deceased appellant is the plaintiff in O.S.No.428 of 1995. The respondents 1 to 4 are the defendants. The plaintiff filed a suit for partition and



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separate possession. After trial, the said suit was dismissed. Challenging the judgment and decree, the plaintiff filed an appeal in A.S.No.25 of 1998 on the file of the Sub Court, Kuzhithurai. After hearing the parties, the learned Subordinate Judge, Kuzhithurai, dismissed the appeal. Aggrieved by the said judgment and decree passed by the lower Appellate Court, the plaintiff had filed the present second appeal before this Court. While admitting the appeal, this Court has formulated the following substantial questions of law:-

“1. Assuming the case of the defendants is true, yet would not the Courts below mould the relief and grant a declaratory relief in favour of the plaintiff in respect of 7 ½ cents shown to be available without in any way being dealt with by anybody?

2. Whether the mere signature of the plaintiff in Ex.B8 assuming it contains his signature, in the absence of proof, when especially the plaintiff disputes the signature, can it be said legally that the plaintiff is bound by the terms of it?”

2. The case of the deceased appellant/plaintiff as per the plaint is that the suit property was originally belonged to one Narayanan and Chinnapoothathan.



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After the settlement enquiry, patta for 1/3rd was granted to Narayanan and 2/3rd was granted to Chinnapoothathan. After the death of said Narayanan, the property of the Narayanan went to his daughter by name Rahal, who is the mother of the plaintiff. After death of the said Rahal, the plaintiff is entitled to 1/3rd share in the said property. Further, the plaintiff purchased the share of the Chinnapoothathan under a registered sale deed dated 18.07.1957 from the son of the Chinnapoothathan, namely, Ramaswamy. Therefore, the appellant became the owner of the entire property to an extent of 22 ½ cents. Out of 22 ½ cent lands, the appellant sold to an extent of 4 cents to the first respondent and the first respondent was in possession and enjoyment of the same. Though the respondents 2 and 3 have no manner of right and possession, they attempted to interfere with the possession of the plaintiff on 05.09.1995. One residential building also stands in the suit property. After purchase of four cents, there was no partition between the plaintiff and the first defendant. The plaintiff made a request with the first respondent on 10.09.1995 to partition the property. The first respondent was not willing to settle the dispute out of Court. Hence, the plaintiff was constrained to file a suit for partition and separate possession of 18 ½ cents from the defendants.



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3. The case of the first respondent/first defendant as per the written statement filed by him is that he was not aware of the sale deed dated 18.07.1956 purchased by the plaintiff from the son of Chinnapoothathan to an extent of 15 cents and possession of the property. There was an Oodukoor award with respect to old Survey No.2569 of Killiyoor Village. As per the award, the said Survey Number was divided into 8 plots. Plot No.1 was allotted in the name of Chinnapoothathan and Ramaswamy to an extent of 15 cents. Plot No.2 measuring an extent of 10 cents was allotted in the name of Vedamoni Nadar, the father of first defendant. Out of 15 cents, the first defendant has purchased four cents from plot No.1. The plaintiff has no residential building in the said property. The plaintiff executed a registered gift deed dated 24.11.1971 in favour of his wife Thanka Bai to an extent of 11 cents from plot No.1 allotted to Chinnapoothathan. Based on the said gift deed, the wife of the plaintiff filed a suit in O.S.No.69 of 1976 for declaration and demarcation. The said suit was dismissed after trial. Therefore, the judgement and decree passed in O.S.No.69 of 1976 would operate as res judicata to the present suit. The plaintiff also suppressed the gift deed executed in favour of his wife and also the suit filed by his wife and result of the said suit. The suit was already partitioned as per the



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award in case No.1016 of Killiyoor Village. The wife of the plaintiff filed another suit in O.S.No.492 of 1980 for partition of the suit property and the same was also dismissed for default. The first defendant is in possession of the plot Nos.2 and 4 cents purchased by him under a registered sale deed dated 06.11.1971. There was a partition arrangement between the wife of the plaintiff and first defendant as per document dated 13.12.1985 with respect to Plot No.1 in the Oodukoor award in which the plot No.1 was allotted to Chinnapothan. As per the plan, Plot No.2 was allotted in favour of the first defendant into his share as per purchase made by the first defendant from the plaintiff. The plaintiff has no cause of action to file this suit and the suit for partition is not maintainable and also the suit is hit for non-joinder of necessary party.

4. The case of the second respondent/second defendant as per the written statement is that the plaintiff has no subsisting right in the plaint survey number of property. The plaintiff has already sold his entire right in favour of one Thanka Bai, who is the wife of the plaintiff. Therefore, the plaintiff is not entitled to any share and the claim made by the plaintiff is not sustainable. The plaintiff has no right or possession whatsoever in the suit property. Even if he



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had any right, the same is lost to him in view of the execution of the gift deed in favour of his wife. The suit property is an ancestral property of the defendants 2 and 3 and they have got right and possession in respect of four cents in the suit properties. The entire suit property was partitioned by metes and bounds as per the partition deed dated 13.05.1985. The plaintiff's wife was party No.1 in that partition deed. The first defendant has got Plot No.2 measuring 2.600 cents and the defendants 2 and 3 got Plot No.3 measuring 2.600 cents as per the partition deed. The respective parties are in possession and enjoyment of the specific portions of the property. The said partition deed dated 13.12.1985 was executed at the instance of the plaintiff. The first party was the wife of the plaintiff. The plaintiff is also attestor to the said partition deed. Therefore, the plaintiff is also bound by the partition deed. The third respondent was working in a Gulf country at the time of one year prior to filing of the suit and he has never been residing in the suit locality at the time of filing of the suit. The summons was also taken in a wrong address with some ulterior motive suppressing the fact that the third respondent was in a Gulf country. Since the appellant conveyed his property in favour of his wife at the time of filing the suit, the appellant is not having any right and title and enjoyment in the suit property and the suit is bad for non



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joinder of necessary parties and the wife of the plaintiff is necessary party to the suit.

5. Subsequently, the wife of the plaintiff was impleaded as fourth defendant in the suit and she has also filed the written statement by stating that the suit property lies as a single plot and the plaintiff's house is situated in the said property. The plaintiff and the fourth defendant are residing in the said house. The fourth defendant has no right over the suit property. Other defendants are not in a possession of any of the portions of the suit property as absolute owner of the suit property. Even though the gift deed was executed in favour of the fourth defendant, she never got any title or possession over the properties described in the gift deed. The gift deed is invalid and it confers no right to the fourth defendant. She has no knowledge about the partition deed of the year 1985 and she is not bound by the partition deed and there is no scope for partition deed including the fourth defendant as party. There is no partition effected with respect to the suit property. The fourth defendant is not a necessary party to the suit. The fourth respondent was dragged the suit unnecessarily.



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6. After filing the written statement by the defendants including the fourth defendant, the plaintiff filed reply statement stating that the first defendant purposefully pleads ignorance of the sale deed dated 18.07.1957. The plaintiff is the absolute owner of the suit property as per the sale deed dated 18.07.1957 and also as per inheritance. The defendants 2 and 3 have no right and possession. The residential building of the plaintiff stands in the suit property. The gift deed said to have been executed by the plaintiff as mentioned in the written statement of the respondent has not taken effect and the fourth defendant has no manner of right and possession of the suit property. The plaintiff is not a party in O.S.No.69 of 1976 and he is not aware of the details of the case and there is no question of *res judicata* and there was no partition between the plaintiff and the first defendant, though the sale deed was executed in favour of the first respondent. The appellant has also not aware of the partition deed said to have been executed between the wife of the plaintiff and other defendants. The wife of the plaintiff has no right and possession and the gift deed has not taken effect and the wife is not a necessary party to the suit and the suit property is not bad for non-joinder of necessary party.



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

1. Whether the suit filed for partition is maintainable?
2. Whether the partition deed between the appellant and the respondents are valid and bind the appellant?
3. Whether the suit is bad for non joinder of necessary parties?
4. what is the quantum of share, the parties are entitled?
5. Whether the parties are entitle to the cost?

8. Based on the pleadings and the issues, during the trial, on the side of the plaintiff, the plaintiff was examined as P.W.1 and seven documents were marked as Ex.A1 to Ex.A7. On the side of the defendants, one witness was examined as D.W.1 and nine documents were marked as Ex.B1 to B9.

9. After trial, considering the pleadings and the oral documentary evidence, the trial Court dismissed the suit. Challenging the said judgment and decree passed by the trial Court, the plaintiff filed an appeal in A.S.No.25 of 1998 on the



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file of the Sub Court, Kuzhithurai and the Lower appellate Court after hearing the arguments and reappreciating the entire evidence, dismissed the appeal. Challenging the dismissal of the appeal, the plaintiff has filed the present second appeal. While admitting the second appeal this Court formulated the substantial questions of law as stated supra. During the pendency of the second appeal, the appellant died and his legal heirs were brought on record as appellant and respondents 5 to 7.

10. The learned counsel appearing for the appellant would submit that the suit property is originally belonged to the grandfather of the deceased appellant Narayanan and one Chinnapoothathan. The grandfather has got 1/3rd share and Chinnapoothathan has got 2/3rd share in the said property. After the death of his grandfather, namely, Narayanan, his mother inherited 1/3rd share. After death of his mother, the appellant has got 1/3 share and Chinnapoothathan has got 2/3rd share in the suit property. After the death of Chinnapoothathan, the appellant purchased the said property from his son one Ramaswamy under a registered sale deed dated 18.07.1957. Therefore, the appellant is entitled to entire 22 ½ cents, out of which he sold 4 cents to the first respondent and the other respondents are



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not having any right and interest in the suit property. The deceased appellant is entitled for partition of 18½ cents, out of 22½ cents. Since the first respondent purchased four cents, the suit property is to be divided by metes and boundaries. Further, the learned counsel for the appellant would submit that after giving four cents in favour of the first respondent, even assuming that the deceased appellant settled 11 cents to his wife by way of gift settlement deed, the deceased appellant has got remaining 7 ½ cents. Therefore, the trial Court would have mould the relief even though the appellant is not entitled for 15 cents, atleast the suit should have been decreed partially for the extent of 7½ cents. Further, she would submit that the deceased appellant is not a party to the proceeding in the so-called partition deed, Ex.B8, dated 13.12.1985 and he also denied the signature in the partition deed as attesor. Even assuming that he is an attesor, in the absence of proof and the appellant disputes the signature and it will not bind the appellant and at any angle, the suit is maintainable, the partition deed between the respondents would not bind the appellant. Both the trial Court as well as the Lower Appellate Court failed to appreciate and consider the materials and erroneously dismissed the suit in toto, which warrants interference of this Court. Since the deceased appellant is not a party to the earlier suit filed by his wife and



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also he is not a party to the said partition deed Ex.B8, the earlier suit would not operate as *res judicata*.

11. The learned counsel for the third respondent would submit that first of all the deceased appellant has not proved the title to the extent of the suit property. The respondents are having the ancestral interest in the suit property and the deceased appellant has suppressed the material facts and he also suppressed Oodukoor award in favour of the ancestor's of the appellant and the respondents. Further, the deceased appellant suppressed the fact that he executed the gift deed in favour of his wife in respect of 11 cents and already four cents was sold to the first respondent. Therefore, even assuming that he got 15 cents under a registered sale deed from one Ramasamy S/o. Chinnapoothathan, out of 15 cents, he sold four cents to the first respondent and 11 cents was gifted to his wife, fourth respondent. Therefore, the deceased appellant is not entitled to any share in 15 cents. Further, the learned counsel would submit that even for the remaining 7½ cents, the appellant himself admitted that there are other legal heirs and they are entitled for share in the said 7 ½ cents and they were not added as parties in the suit. Therefore, the suit is hit by non joinder of necessary parties.



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Though the respondents pleaded non-joinder of necessary party, the deceased appellant impleaded his wife as fourth respondent in the suit. Further, he has not impleaded the other legal heirs, who are having interest in $7\frac{1}{2}$ cents. Therefore, admission is a best piece of evidence. The deceased appellant admitted that he sold four cents in the suit property to the first respondent and though he has not admitted regarding execution of gift deed in favour of his wife, the deceased appellant denied that the said gift deed was not acted upon. However, the fourth respondent, the wife of the deceased appellant, also filed a suit in O.S.No.69 of 1979 against the first respondent based on the gift deed, for declaration and demarcation. The said suit was dismissed. Therefore, the wife of the deceased appellant filed a suit for partition in O.S.No.492 of 1980 and the said suit was also dismissed for default. Since the said suit was dismissed, the fourth respondent entered into a partition with the respondents 1 to 3 under Ex.B8 partition deed and therefore, as per the deed, the fourth respondent has got $7\frac{1}{2}$ cents and the first respondent got $2\frac{1}{2}$ of cents and the second and third respondents got $2\frac{1}{2}$ cents and therefore, the deceased appellant is not entitled to any share in the suit property. Both the Courts below rightly appreciated the oral and documentary evidences and found that the deceased appellant has not come



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to the Court with clean hands and he has suppressed the material facts and he has not impleaded the necessary parties. Therefore, the second appeal is devoid of merits and the same is liable to be dismissed.

12. Heard the learned counsel appearing on either side and perused the records.

13. The facts of the case is that there was two brothers by names Narayanan and Chinnapoothathan. The said Narayanan had 1/3rd share and Chinnapoothathan had 2/3rd share in the suit survey number. Narayanan's daughter is Rahal, who is none other than the mother of the deceased appellant. Chinnapoothathan's son is Ramaswamy. The case of the deceased appellant/plaintiff is that after the death of Narayanan, his mother got 1/3rd share of the Narayanan and after the death of his mother, he is entitled to the above said 1/3rd share in the suit property and he purchased the other share from Ramasamy, who is the son of Chinnapoothathan under the registered sale deed dated 18.07.1957. Thus, the deceased appellant is entitled to the entire suit property



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measuring 22½ cents. The deceased appellant also admitted that he sold four cents out of 22½ cents under a registered sale deed, Ex.B3 to the first respondent and the first respondent has also admitted that he purchased four cents from the deceased appellant. The case of the respondents is that the deceased appellant settled the suit property in favour of his wife. On that basis, his wife filed two suits one is O.S.No.69 of 1976 for declaration of title and other reliefs and other suit is O.S.No.492 of 1980 for partition and both the suits were dismissed. Further, the case of the respondents is that under the registered partition deed, Ex.B.8 dated 13.12.1985, there was a partition between the wife of the appellant and the respondents 1 to 3 and therefore, the deceased appellant is not entitled to the relief as prayed for in the suit. Subsequently, the wife of the deceased appellant was also impleaded as fourth respondent.

14. The contention of the learned counsel for the appellant is that after giving credit to the sale of four cents in favour of the first respondent and the settlement of 11 cents in favour of his wife, fourth respondent, the deceased appellant has got 7½ cents in the suit property, for which, there cannot be any dispute at all. Therefore, the trial Court would have atleast granted the relief in



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respect of said 7½ cents. Further contention is that the appellant denied the attestation in Ex.B8. Since the appellant denied the signature found in Ex.B8 is not that of him, the respondents have proved the same. The contention of the learned counsel for the third respondent is that no doubt the appellant purchased 2/3rd share from one Ramasamy, who is the son of Chinapoothan under a registered sale deed dated 18.07.1957 to an extent of 15 cents and out of 15 cents, the appellant sold four cents to the first respondent and executed a settlement deed in favour of his wife, fourth respondent to the extent of 11 cents. Therefore, the appellant is not entitled to any right or share in the 15 cents of the suit property. The extent of the suit property is shown as 22½ cents. Out of 22½ cents, as per the above sale deed and gift deed, the deceased appellant lost his right and title in respect of 15 cents. If at all, the appellant has got the remaining 7½ cents, even in that also, the deceased appellant has admitted during the cross examination that there are other sharers also available and those have not been impleaded as parties. The appellant except admitting that he sold four cents out of 22½ cents to the first respondent suppressed the facts regarding the execution of gift deed in favour of his wife and his wife filed the suit against the respondents 1 to 3 and also his wife entered into a partition deed with the



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respondents. Therefore, the suit is not maintainable and the deceased appellant is not entitled to any relief as sought for.

15. The deceased appellant himself admitted that in the suit property, shown as 22½ cents, out of 22½ cents 1/3rd share belongs to the grandfather Narayanan and 2/3rd belongs to the Chinapoothan. The deceased appellant got 7½ cents through his mother by inheritance and 2/3rd share of 15 cents, he got by way of sale deed purchased from the son of Chinnapooththan, one Ramasamy, under a registered sale deed dated 18.07.1957. He admitted that out of 15 cents, he sold four cents to the first respondent and he also admitted that he executed the gift deed in favour of his wife to an extent 11 cents and the said gift deed was not acted upon. The wife of the deceased appellant, the fourth respondent herein, filed a suit in O.S.No.69 of 1976 against the first respondent for declaration and demarcation stating that the husband executed the settlement deed in favour of the fourth respondent herein, the plaintiff in the said suit and the said gift deed was also marked in that suit. Even in that suit, both the deceased appellant and his wife, the fourth respondent herein, admitted that they were residing under the same roof. In the present suit also, the deceased appellant, while examined as



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P.W.1, admitted that he and his wife, the fourth respondent, are residing in the same roof. In the written statement filed by the fourth respondent, she also stated that both the fourth respondent and the deceased appellant are residing under the same roof, but the deceased appellant is not aware of the suits filed by his wife against the respondents 1 to 3 and also he is not aware of the partition deed between the fourth respondent and the respondents 1 to 3. It is not the case of the deceased appellant and the fourth respondent that they were not in cordial relationship or there are strained relationship between them. Therefore, all along the way back, she filed the suit in the year 1976 in which itself she has clearly stated about the execution of gift deed and also both are residing in the same roof. In that suit, she has clearly admitted that the gift deed was acted upon and she was in possession of the suit property. Therefore, now neither the appellant nor the fourth respondent could state that the gift deed was not acted upon. The learned counsel for the appellant also admitted that the gift deed was acted upon and as per the gift deed, the fourth respondent is entitled to 11 cents and the first respondent is entitled to four cents. Therefore, out of 22 ½ cents, 15 cents the appellant is not entitled. He is entitled only 7 ½ cents which he got inherited from his grandfather Narayanan through his mother Rahal. It is admitted that the



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deceased appellant has not cancelled the gift deed executed in favour of his wife.

16. The deceased appellant admitted that his wife filed the suit based on the settlement deed and both the husband and wife are residing in the same house. He has also admitted that he does not know the patta for the Resurvey No.22/6 stands in whose name and also he denied the suggestion that the third respondent is residing in abroad from 1994. The deceased appellant has clearly stated that he is not aware as to whose name stands in the patta for the suit property. Further, the appellant has not stated as to why he impleaded the second and third respondents in the suit and only he has stated one word that the respondents 1 to 3 are trying to interfere with his possession, but he has not sought for the relief of injunction restraining from interfering their peaceful possession. Though he admitted that the first respondent has got four cents by way of purchase from him, the second and third respondents have stated that they have got ancestral interest in the suit property. Though the wife of the deceased appellant filed the suit and she entered into a partition with the respondents 1 to 3 and as per the partition deed, the respondents 1 to 3 are having interest in the suit property, the deceased appellant has not sought any relief against the respondents 2 and 3. Though the



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deceased appellant has also stated that he is not aware of the partition deed and the partition deed could not bind them, however, the fourth respondent has not come to the witness box and denied the signature found in Ex.B8 partition deed and he is not an attester to the said partition deed and the signature is not that of him and the plaintiff he has not taken any steps to prove that the signature found in the partition deed is not that of him as he has got the admitted document of gift deed in favour of his wife. The deceased appellant denied that the gift deed is acted upon, but the execution of the gift deed was admitted.

17. Therefore, the trial Court, considering all the facts, found that the deceased appellant has suppressed the material facts and further the third respondent admittedly is in aboard at the time of filing the suit and also raising denial of cause of action, but the deceased appellant has stated that they tried to interfere on the specific date and he has not proved the same and also no relief sought for against them. Since both the deceased appellant and his wife fourth respondent together all along maintaining with the good relationship, the earlier suit filed by the wife is not binding and he is not aware of the same, is not acceptable. Hence, the appellant has not come to the Court with clean hands. If



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at all as stated by the learned counsel for the appellant that the Court ought to have granted 7½ cents to the deceased appellant, he proved only the title for 15 cents as he has purchased the same under a registered sale deed dated 18.07.1957 Ex.A1 from Ramasamy Nadar and out of 15 cents, he has sold four cents to the first respondent and gift deed to the extent of 11 cents to his wife, fourth respondent. Therefore, he is not entitled to get any share in 15 cents and as far as 7½ cents is concerned, he has not produced any document to show that only the mother of the appellant was alone the legal heir of the said Narayanan and the mother inherited 7½ cents and he is the only son to his mother Rahal. He has also not proved that how he derived the title 7½ cents. Therefore, it is for the plaintiff to prove his case and he cannot take advantage of the weakness of defence. It is the case of the deceased appellant that only the first respondent alone has got four cents and he claims for partition to an extent of 18½ cents, for which, the deceased appellant has not proved and also he has not proved that gift deed was not acted upon. In the earlier suit, the fourth respondent clearly stated that the gift deed was acted upon and she was in possession of the property. Therefore, under these circumstances, there is no merit in the second appeal and there is no perversity in the findings of both the Courts below. Therefore, the first



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substantial question of law is answered against the appellant.

18. As far as the second substantial question of law is concerned, though the deceased appellant and the fourth respondent denied Ex.B8 partition deed, but however they admitted that both are living under the same house and the fourth respondent has not come to the witness box and denied Ex.B8 and the signature. Further, the respondents 1 to 3 had clearly stated that the deceased appellant also stood as attester to the said partition deed and the plaintiff has not taken any steps to prove that the signature is not that of him. Though the appellant and the fourth respondent are residing in the same roof, the fourth respondent has not come to the Court and denied the partition deed and also denied the signature of the deceased appellant. The trial Court and the Lower Appellate Court also referred the decisions of this Court and held that once the appellant stood as attester, the same would bind on him. The respondents 1 to 3 have clearly stated that in the partition deed between the wife of the deceased appellant and the respondents 1 to 3, the fourth respondent and the deceased appellant also put their signatures and the deceased appellant did not prove that he is not the attester to the partition deed. Therefore, this Court finds that the deceased appellant suppressed



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several material facts and he has not come to the Court with clean hands. Hence, he is not entitled for the relief sought for in the suit. Both the Courts below rightly appreciated the oral and documentary evidence and dismissed the suit. This Court does not find any perversity in appreciation of evidence in the judgment of the Courts below. The substantial question of law No.2 is also answered against the appellant and in favour of the respondents.

19. In the result, the Second Appeal is dismissed by confirming the judgment and decree of the Sub Court, Kuzhithurai, dated 26.07.2001 in A.S.No. 25 of 1998 and the judgment and decree dated 03.01.1998 passed in O.S.No.428 of 1995, on the file of the Additional District Munsif, Kuzhithurai. No costs.

19.06.2023

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

1. The Subordinate Judge, Kuzhithurai.
2. The Additional District Munsif,
Kuzhithurai.
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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