



S.A. No. 122 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.12.2024

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

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1. S.Krishnaveni
2. Tamilarasi

... Appellants

Vs.

Narasimman (died)

2. Munirathinam
3. Shanmugam,
4. Govindan

Kullammal (died)

6. Kantha
7. Maragadammal
8. Kanniappan
9. Settu
10. Sundarraaj

(Respondents 8 to 10 are brought on record as legal representatives of deceased 5th respondent vide court order dated 07.02.2023 in C.M.P. No. 12231 of 2021)

.. Respondents



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PRAYER : Second Appeal filed under Section 100 of Code of Civil Procedure, praying to set aside the judgment and decree dated 16.12.2004 passed in A.S.No.63 of 2004 on the file of Principal District Judge, Vellore, reversing the judgment and decree dated 24.06.2004 passed in O.S.No.176 of 2000 on the file of Subordinate Judge, Gudiyatham.

For Appellants : Mr.S.Baskaran

For Respondents : Mrs.R.T.Sundari
for R6 & R8 to R10

R1 to R5 – died
R7 – died

JUDGMENT

The appellants herein are the original plaintiff's wife and daughter in the suit in O.S.No.176 of 2000 on the file of Subordinate Judge, Gudiyatham, Vellore District filed against the defendants seeking for the relief of partition. On hearing both sides, the trial judge dismissed the suit. Against which, the defendants preferred an appeal in A.S.No. 63 of 2004 on the file of Principal District Judge, Vellore, wherein the first appellate judge independently analysed the facts and evidence on record, allowed the



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appeal by setting aside the findings of trial judge. Challenging the said reversal findings of first appellate court, the plaintiff preferred this Second Appeal.

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

3. According to original plaintiff Subramani, he along with defendants 2 to 5 are the five sons of one Appadurai/1st defendant and Kullammal (6th defendant), defendants 7 and 8 are his daughters. Before the trial court, defendants 6 to 8 remain exparte. Brothers of plaintiff contested the case. Pending suit, father/1st defendant Appadurai died. Pending appeal, mother Kullammal died. In respect of 11 items of suit properties, plaintiff claiming 1/6th share stating that all the properties are joint family properties headed by his father/1st defendant. He also contributed to the family and with the help of joint family nucleus, other properties are purchased along with his father and other brothers. The defendants 1 to 5 contested the case. They have disputed the plaintiff's claim stating that he was given adoption to one Muthusamy gounder. Thereafter, he received with his adopted portion. Hence, he has no right to claim the suit property of his natural



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father. All the defendants contended that properties are self acquired properties. So also, the 6th defendant also purchased one of the items and in respect of properties belong to father, he executed a Will and mother also executed a Settlement deed. To that effect, they have produced the sale deed before the trial court and to prove the Will and the settlement deed, they have examined the witnesses, thereby totally denied the plaintiff's claim.

4. Before the trial court, both parties adduced evidence. On the side of plaintiff, P.W.1 and P.W.2 were examined and documents Ex.A1 to Ex.A7 were marked. On the side of defendants, D.W.1 to D.W.6 were examined and documents Ex.B1 to Ex.B44 were marked. Considering the evidence on record, the trial judge has framed issues and finally held that Will as well as Settlement deed have not been proved beyond reasonable doubt and defendants 2 to 5 have also not been proved how they have purchased certain suit properties by self-acquisition. Some of the properties stand in the name of father and mother. Therefore, all the properties are deemed as joint family properties except item No.10. Accordingly, the plaintiff was granted 1/6th share. Challenging the said findings, the



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defendants 2 to 5 preferred an appeal in A.S.No.63 of 2004. Since Appadurai gounder died, the 2nd defendant contested the case. The learned first appellate judge also framed separate points for consideration and on considering entire evidence on record and independently analysed the facts and finally held that Will as well as settlement deed executed by father (D1) and by mother (D6) is proved, thereby the plaintiff was not given any share in the property, besides item Nos.3,8 and 9 are self-acquired properties of contesting defendants 2 to 5, thereby in entirety, suit was dismissed by setting aside the findings of trial court. Aggrieved over that, this Second Appeal was preferred.

5. The learned counsel for plaintiff would argue that before the trial court, the contesting defendants filed an application in I.A. No. 165 of 2004 to receive additional documents and the same was permitted by the first appellate judge erroneously, since the defendants attempted to fill up the lacuna and also not given sufficient reasons to receive those documents. In spite of that, the said application was allowed by the first appellate judge as such is erroneous one. Furthermore, already the adoption pleaded by the contesting defendants not been proved and the same was rightly



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appreciated by the trial court. But, without taking note of the fact that the plaintiff was always retained as son of natural father Appadurai. To that effect, records were also proved. In spite of that, the first appellate judge dismissed the entire suit without giving any share in the property to the original plaintiff, who is legal heir of 1st defendant as such is totally erroneous one and liable to be set aside. Furthermore, the contesting defendants not proved that they are having sufficient money to purchase the property, without which, the court has granted the decree in favour of them as such is erroneous. Furthermore, the Will said to be executed by father as well as settlement deed executed by mother has also not been proved beyond reasonable doubt. But the first appellate court erroneously held that those documents were proved without properly appreciating the evidence on record as such is perverse and the same is liable to be set aside.

6. Considering the facts and circumstances as well as considering the rival submissions of both learned counsel for appellants and respondents, this Second Appeal was admitted on the following substantial question of law:-



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“(1) Whether the admission of the documents Ex.B45 and B46 by the appellate court is against the provisions of Order 41 Rule 27(aa) of the Code of Civil Procedure?

(2) Whether the appellant court is right in holding the Ex.B5 settlement deed executed by the 6th defendant pending the suit is valid without examining the settlor and without any proof of independent income to purchase the properties?

(3) Whether the appellate court should have drawn an adverse inference, as the female heirs of the deceased remained exparte in the suit and did not join the appellants in challenging the decree granting partition?

7. During the pendency of first appeal, the contesting defendants filed separate application to receive the documents and the same was allowed by the first appellate court. So certified copy of proceedings of Tahsildar was marked as Ex.B45 and the certified copy of the proceedings of Deputy Tahsildar was marked as Ex.B46, wherein the assignment orders given by the Government in the year 1961 related to item No.1 of the suit property were found. Hence, the first appellate court had received those



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documents. Admittedly, it is a Government proceedings and it is a public document of the year 1961. Therefore, by receiving those documents, the trial judge has held that it was oral testimony, thereby, the findings rendered based on the recitals of those documents is sustainable. Accordingly, the question of law (1) is answered.

8. Furthermore, the first appellate judge held that the plaintiff claiming share in the suit property belong to his father and mother Kullammal, but the contesting defendants stated that already the plaintiff was given adoption to Muthusamy family, but after the alleged adoption, as per Ex.A3, A4 and A5, particularly school certificate Ex.A5 reveals that the natural father Appadurai was shown as a father for the plaintiff Subramani and not shown the adopted father Muthusamy. Therefore, the first appellate court has rightly concluded that adoption has not been proved, which needs no interference. Now, the plaintiff was declared as son of Appadurai and Kullammal . The point is to be decided as to “whether the plaintiff is entitled to get share in the suit properties item 1 to 11?”. The trial court has granted the relief except 10th item in the remaining items, 1/6th share in the



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suit property. But the first appellate judge has totally dismissed the suit holding that there is no joint family property and Will as well as settlement deed executed by the parents of plaintiff is true and valid one, besides some of the items are purchased by defendants 2 to 5. Therefore, there is no joint family property to get a share. Moreover, the initial burden is casted upon to prove that there is joint family property, but admittedly the item No. 1 is anadheenam property. So, it is not exclusive property of assignment. In respect of item No.1 stands in the name of plaintiff's mother Kullammal of the year 1964 and 1973 through three sale deeds marked as Ex.B2 to Ex.B4, Kullammal remained exparte. Hence, she has not entered into witness box to depose that she had separate income to purchase the property. When she failed to prove the same, the fact reveals that it is not self-acquired property. Therefore, the contention of plaintiff that his father purchased the property in the name of mother is sustainable one. In respect of item No.3 stands in the name of defendants 2 to 5 to that effect, the sale deed has also been produced. The plaintiff proved that these properties were purchased by Defendants 2 to 4 through sale deed Ex.B13. So, it is self acquired property of defendants, in which the plaintiff is not entitled



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for any share. In respect of item No.4 claimed to be purchased by father of plaintiff, in which portion of property was stands in the name of Kullammal. In respect of item No.5 was claimed as self-acquired property of father of plaintiff. Though the contesting defendants stated that it does not belong to the family, but no proof attached to that effect. In respect of Item No.6 was purchased by plaintiff's father in the year 1968. The item No.7 was also assigned to plaintiff's father as per Ex.B46. Item No.8 was said to be purchased by defendants 2 to 5 through sale deeds Ex.B15 and Ex.B16, in which plaintiff has no share, since it is a self-acquired property. In respect of item No.9 it was assigned in favour of defendants 2 to 5, in which the plaintiff has no right. In respect of item Nos.10 and 11 said to be jewels, no proof that family owned jewels. So, no share was given to any of the parties. The first appellate court relied on the Will Ex.B8 said to be executed by 1st defendant Appadurai pending suit. But, admittedly, within four hours from the date of alleged execution of Will he was died, so the duty is casted upon the profounder to prove the Will beyond reasonable doubt. The Will dated 16.03.1990 is marked as Ex.B8. Admittedly, the original suit was filed in the year 1990 in O.S.No.91 of 1990, at that time,

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the 1st defendant was alive and he died pending suit. He had also filed written statement before the trial court but in the written statement, he has not disclosed that he executed a Will in favour of sons except plaintiff. Though there is a defence that the plaintiff was given adoption to one Muthusamy, but it has not been proved. So, with the intention not to give any property to the plaintiff, the alleged Will came into force that too within four hours from the execution of said document, the testator died. So, the evidence of witnesses also not inspired in the mind of the court that the testator executed a Will with sound state of mind. Therefore, the Will Ex.B8 is deemed to be not proved. Therefore, the findings rendered by the first appellate judge to that effect is liable to be set aside.

9. The contesting defendants claimed mother's property based on the settlement deed executed by Kullammal, however she remained exparte. There is no proof that the alleged settlement deed was came into force. But the trial judge has contended that though one of witness of Will was examined, there is no proof that properties contained in Ex.B8 Will exclusively belongs to father of plaintiff. Therefore, the trial court has not accepted the Will nor there is proof that the Will came into force after



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demise of 1st defendant. In respect of settlement deed, the evidence of D.W.3 reveals that he has not seen thumb impression made by Kullammal and he went there after the thumb impression affixed by Kullammal. Therefore, his evidence reveals that he has not seen the alleged thumb impression made by Kullammal, which itself cause suspicious over the said document nor there is no proof that Kullammal has sufficient source of income to purchase the property. Hence, through the evidence the contesting defendants not proved the settlement deed. Indeed, the trial court has rightly concluded that the settlement deed was not proved, but the first appellate judge erroneously held that the evidence of D.W.4 is sufficient to hold that the settlement deed is valid as such is illegal, perverse and liable to be set aside. Therefore, the Will and Settlement deed relied on by the contesting defendants have not been proved beyond reasonable doubt. So, the findings rendered by the first appellate judge is liable to set aside. Accordingly, the question of law (3) is answered. However, when the facts are not properly appreciated, this court is inclined to cause interference. Moreover, the defendants 7 and 8 are daughters of Appadurai not inclined to contest the suit from the beginning, which shows that the first appellate



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court has failed to appreciate the said fact. When they are entitled to have share in the suit properties, mere absence would not take away their right. Therefore, as on date, plaintiff, defendants 2 to 5, sons and two daughters, defendants 7 and 8 are surviving as legal heirs of Appadurai and Kullammal (D1) and (D6). Under Order 7 Rule 1 of C.P.C., legal heirs are entitled for 1/7th share in the suit properties in respect of item Nos.1,2,4,5,6 and 7. Suit decreed partly. The remaining items 3, 8 and 9 are self-acquired properties of defendants 2 to 5, in which the plaintiff and other daughters are not having any claim. Since D3 and D5 died, subsequently memo filed, hence, LR's of deceased D3 and D5 are entitled their lawful share in final decree proceedings. Accordingly, this Second Appeal is partly allowed and the findings of first appellate court in A.S.No. 63 of 2004 is set aside. Against item Nos.10 and 11, suit is dismissed. No costs.

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Index : Yes / No
Internet : Yes / No
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To

1. Principal District Judge, Vellore.
2. Subordinate Judge, Gudiyattam, Vellore Dt.
3. Section Officer, VR Section, Madras High Court.



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T.V.THAMILSELVI, J.

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