



S.A. No.1655 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.09.2024

CORAM:

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

S.A. No.1655 of 2008

and

M.P.No. 1 of 2008

S.Rathnasabapathy (died)

2. S.Mohandoss
3. S.Thangavel
4. S.Chinnasamy @ Tikkan
5. Saraswathi
6. Amuthavalli
7. Sakthivel
8. Shanmughasundaram
9. Shanthi
10. Rajasekar
11. Loganayagi

(A1 died. A5 to A11 are brought on record
as legal representatives of deceased 1st
appellant vide court order dated 27.07.2021
made in C.M.P.Nos.18, 21 and 24 of 2021)

... Appellants

Vs.



S.A. No.1655 of 2008

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1. R.Sakthivel
2. Raju
3. Babu
4. S.Dhandapani

.. Respondents

PRAYER : Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the judgment and decree dated 25.03.2008 made in A.S.No.124 of 2005 on the file of Principal District Court, Coimbatore, reversing the judgment and decree dated 11.12.2003 passed in O.S.No.138 of 1997 on the file of Subordinate Court, Tiruppur.

For Appellants : Mr.T.Murugamanikkam
Senior Advocate for
Ms.Zeenath Begam

For Respondents : Mrs.D.Chitra Maragatham
for R1

R2 to R4 – Given up

JUDGMENT

The appellants, who are the defendants 1 and 3 to 5 in the suit in O.S.No. 138 of 1997 on the file of Subordinate Court, Tiruppur, which was filed by the 1st respondent/plaintiff seeking for the relief of partition claiming half share in the suit property and on considering the evidence



S.A. No.1655 of 2008

on record, the trial court decreed the suit granting 1/6 the share in favour of plaintiff. Against which, he preferred an appeal in A.S.No. 124 of 2005 and the same was allowed in favour of plaintiff by setting aside the findings of trial court. Now, challenging the reversal findings of the first appellate judge, the defendants 1 and 3 to 5 have preferred this Second Appeal.

2. For the sake of convenience, the parties are denoted as per the ranking in the suit before the trial court.

3. The 1st respondent herein is the plaintiff, who filed a suit against the appellants/defendants for the relief of partition claiming half share in the suit property. The suit was contested by the defendants 1 to 5 stating that as per the Will dated 12.11.1952, the plaintiff and the defendants 1 to 5 are equally entitled to 1/6th share in the suit property and he is not entitled to claim half share in the suit property.



S.A. No.1655 of 2008

WEB COPY

4. Before the trial court, both parties have adduced evidence and based on that, the trial court finally held that as per the Will executed by the original owner, Marakkal, dated 12.11.1952, each defendants 1 to 5 entitled to 1/6th share. Accordingly, the suit was partly allowed by granting 1/6th share. Challenging the said findings, the plaintiff preferred appeal suit in A.S.No. 124 of 2005, wherein the first appellate judge independently analysed the facts and evidence and finally held that the plaintiff, being son of Ramasamy entitled half share and remaining half share goes to another branch of Subramaniam. Accordingly, the plaintiff is entitled for half share and remaining half share goes to the legal heirs of Subramaniam, thereby the trial court findings was set aside and the appeal was allowed by granting the relief as prayed for in favour of plaintiff. Challenging the said findings of the first appellate court, the defendants preferred this Second Appeal on submitting the following grounds :-

(i) The lower appellate court ought to have dismissed the appeal on the sole ground that the Will Ex.A1 is very clear and unambiguous, since



S.A. No.1655 of 2008

the testator has clearly bequeathed the suit property to all the male heirs of Subramaniam and Ramasamy.

(ii) The lower appellate court ought to have seen that the recitals in the Will, Ex.A1 do not imply that the male heirs should take *per capita* and not *per stirpes*.

(iii) The lower appellate court ought to have seen that the plaintiff is estopped from making any claim contrary to his acceptance in the action in the sale deed Ex.B2, wherein a portion of the property covered under the Will was sold to one Devi. At that point of time, the sale consideration was taken equally by all the 6 male heirs, with the plaintiff containing his 1/6th share of the sale consideration by a banker's cheque.

(iv) The lower appellate court ought to have seen that the plaintiff cannot be heard to let in evidence contrary to the recitals in the registered document, Ex.B2 Sale deed.

(v) The other reasons given by the lower appellate court for reversing the well considered judgment and decree of trial court are untenable in law.



S.A. No.1655 of 2008

WEB COPY

5. Considering his submissions, this Second Appeal is admitted on the following question of law :-

(1) Whether the judgment of lower appellate court is vitiated in that it has misinterpreted the Will, Ex.A1 by holding that the plaintiff would be entitled to a share *per stirpes* and not *per capita* in the property covered under Will, whereas the Will is to the effect that “all the male heirs should succeed the property?

(2) When the plaintiff has admitted his right to only 1/6th share in the properties covered in the Will Ex.A1, by receiving one-sixth of the sale proceeds in Ex.B2 Sale deed, whether he is estopped from setting up a new claim for half-share in the suit property?

6. Brief facts of the case is as follows :-

One Marakkal is the original owner of the suit property consisting of two items as described in plaint schedule with constructed house and another item of 3 sq.ft. two tiled house. As the said Marakkal, wife of Kuppan had no issues, she executed a Will on 12.11.1952 in favour of



S.A. No.1655 of 2008

her husband's brothers Subramaniam and Ramasamy by giving life interest and after her demise, their male heirs absolutely entitled two items of properties as prescribed in the schedule of Will. Thereafter, she died and as per the terms of Will, the said Subramaniam and Ramasamy enjoyed two items of property as a life interest holder and till their demise, the plaintiff is the son of the said Ramasamy, the defendants 1 to 5 are sons of Subramaniam, according to plaintiff, his father entitled for half share in the property. While so, on 14.06.1993 both plaintiff and defendants 1 to 5 sold the property to one Devi for a valid consideration and each of them have received a sum of Rs.15,000/- and remaining extent was available as prescribed in the plaint schedule, in which as a legal heir of the said Ramasamy is entitled half share and the remaining half share goes to the branch of Subramaniam, i.e. defendants 1 to 5, who refused for the amicable partition. Hence, he filed a suit claiming half share in the suit property.

7. Admittedly, the defendants 1 to 5 are the legal heirs born through Subramaniam. The contention of defendants is that after the



S.A. No.1655 of 2008

death of Marakkal, their father Subramaniam and his brother Ramasamy enjoyed the property till their life time. After their demise, their male legal heirs, plaintiff and defendants 1 to 5 have enjoyed the property. Accordingly, each of them having 1/6th share in the property, however, for their necessity, they sold a portion of property to one Devi for a sale consideration of Rs.90,000/-, for each share, they received a sum of Rs.15,000/- through banker's cheque on 14.06.1993. Thereafter, the remaining property is available, in which the plaintiff is entitled only 1/6th share and not half share as he claimed. The trial court accepted their contentions and granted only 1/6th share, on the other hand, the first appellate judge reversed the findings and not granted half share.

8. The arguments advanced on the side of appellants is that as per the recitals of Will executed by the said original owner of the property Marakkal, all the male heirs born through the said Ramasamy and Subramaniam, who succeeds the property and there is no mentioning that both Subramaniam and Ramasamy were entitled half share in the property, besides, the property was sold in the year 1993 through Ex.B2.



S.A. No.1655 of 2008

All the sharers, plaintiff and the defendants 1 to 5 have sold the property and divided the sale consideration as per $1/6^{\text{th}}$ share. Now suppressing all the facts, the plaintiff approached the court claiming half share as such is erroneous one as well as contrary to the recitals of Will.

9. By way of reply, the learned counsel for 1st respondent/plaintiff would submit that the intention of testator is that after her demise, her husband's brother's son viz., Subramnaim and Ramasamy have to divide the property equally. Accordingly, son born through Ramasamy, he is entitled for half share and the defendants 1 to 5 born through another son Subramaniam are entitled for half share and the same was rightly appreciated by the first appellate judge.

10. Considering both submissions, the point is to be decided is whether the plaintiff is entitled for half share or $1/6^{\text{th}}$ share in the suit property. On perusal of recitals of the Will, it clearly indicates that all the male heirs born through Subramaniam are entitled to succeed the property mentioned in the schedule absolutely. So, the intention of



S.A. No.1655 of 2008

Testator is that all the male heirs born through Subramaniam and Ramasamy are bound to enjoy the property equally. There is no mentioning that Ramasamy and Subramaniam are entitled equal share nor there is no mentioning that male heirs born to Ramasamy entitled for half share and remaining share goes to male heirs of Subramaniam. So, as a whole, the intention of Testator, after the demise of Ramasamy and Subramaniam, male heirs born to them are entitled to succeed the properties as described in the schedule of the Will. Therefore, the plaintiff is not entitled to claim half share as a legal heir of Ramsamy. Moreover, as per the sale deed executed by the plaintiff and defendants 1 to 5 in favour of one Devi marked as Ex.B2 clearly reveals that each of them are entitled 1/6th share in the property. Accordingly, they have received Rs.15,000/- each of their share through banker's cheque. Will as well as Sale deed is admitted by both parties. It is an undisputed fact that the plaintiff had received 1/6th share out of sale consideration when the portion of property was sold to third party Devi. If really, he is having half share in the property, he ought to have raised objection at the time of receiving 1/6th share. Thereafter, nearly about 3 years later, he filed a suit



S.A. No.1655 of 2008

suppressing the fact as if he is having half share in the suit property. He has also received a sum of Rs.15,000/- towards his share out of sale consideration. Therefore, by this conduct, he is estopped from claiming half share in the suit property. Accordingly, question of law (2) is answered.

11. As discussed above, as per the recitals of Will, male heirs born to Subramaniam and Ramasamy are given absolute right in the property described in the schedule of Will. Therefore, when there is no specific mentioning Ramasamy and Subramaniam have to enjoy the property equally. That being so, the interpretation made by the first appellate judge that the branch of Ramasamy is entitled to half share and another branch of Subramaniam is entitled for half share as such is totally erroneous one and it is contrary to the recitals of Will. As discussed above, the intention of Testator is that after her demise, her interest as well as life interest of Subramaniam and Ramasamy, the male heirs born to them are entitled to succeed equally, thereby, the plaintiff and defendants 1 to 5, who are male heirs of her are entitled to have 1/6th share in the suit property. Therefore,



S.A. No.1655 of 2008

the findings given by the first appellate judge is contrary to the recitals of Will and the same is liable to be set aside. Accordingly, the question of law (1) is answered.

12. By relying the ratio laid down in the authority reported in *AIR 1968 SC 751*, in the case of **iBoddy Venkatakrishna Rao and others vs. Smt. Boddy Satyavathi and others**, the learned counsel for 1st respondent argues that the plaintiff is entitled to have half share in the suit property by dividing *per stirpes* and not by *per capita*. But, as discussed above, the portion of property was already sold and the plaintiff had received 1/6th share and the remaining share was received by the other defendants. Thus, already all the male heirs born to Ramasamy and Subramaniam divided the property by allotting 1/6th share. So also, the plaintiff received a sum of Rs.15,000/- as per his share. By this conduct, he is estopped from claiming half share subsequently in the suit property, thereby the question of law (1) and (2) are answered. Hence, the findings of first appellate judge is liable to be set aside. Accordingly, this Second Appeal is allowed by setting aside the findings of first appellate judge



S.A. No.1655 of 2008

held in A.S.No. 124 of 2005 and the suit is decreed by allotting 1/6th share in the suit property to the plaintiff and the remaining 1/6th share goes to the defendants 1 to 5. No costs. Consequently, the connected Miscellaneous Petition is closed.

26.09.2024

Index : Yes / No
Internet : Yes / No
Speaking/Non-speaking order
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To

The Principal District Judge,
Coimbatore.



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S.A. No.1655 of 2008

T.V.THAMILSELVI, J.

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Pre-delivery judgment in
S.A. No.1655 of 2008

26.09.2024