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S.A.No.1257 of 2009

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED : 30.09.2024

CORAM :

**THE HONOURABLE MRS. JUSTICE T.V. THAMILSELVI**

Second Appeal No.1257 of 2009

S. Mani

.. Appellant

Versus

- 1.Sivaraman
- 2.Sadananth (died)
- 3.Bhuvaneswari
- 4.Elango
- 5.Shanmugasundaram Pillai
- 6.Sangeetha
7. Sivasakthi
8. S.Pavithra

... Respondents

[R6 to R8 brought on record as Lrs of the deceased R2, viz., Sadananth vide Court order dated 28.06.2024 in C.M.P.Nos.974, 978 & 980 of 2023.]

Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 27.04.2009 made in A.S.No.18 of 2008 on the file of the Principle District Court, Villupuram confirming the Judgment and Decree dated 16.02.2008 made in O.S.No.53 of 2005 on the file of the Principal Subordinate Court, Tindivanam.

|               |                                          |
|---------------|------------------------------------------|
| For Appellant | : Mr. S. Mani (Party – in – Person)      |
| For R1 to R5  | : Non contested party                    |
| R3 & R4       | : Dismissed vide order dated 14.12.2022. |
| R6 to R8      | : R.Karunakaran :                        |



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## **JUDGMENT**

**WEB COPY** Challenging the concurrent findings of the Courts below, the first defendant in O.S. No. 53 of 2005 has preferred this Second Appeal.

2. The suit in O.S.No.53 of 2005 was filed by the respondents herein against the appellant and two others, for partition of the plaint described property, to allot 2/3 shares thereof to them, to award *mesne* profits towards the rental income derived by the defendants and for costs.

3. For the sake of convenience, the parties to this appeal shall be referred to as per their ranks in the suit as Plaintiffs and Defendants.

4. As per the plaint averments, the fifth plaintiff namely Shanmugam Pillai had two wives and they are (i) Viruthambal and (ii) Balambal. Out of the wedlock between the fifth plaintiff and Viruthambal, two children have born and they are (i) Mani, first defendant herein and (ii) Geetha, who is the wife of the first plaintiff/first respondent and mother of the plaintiffs 2 to 4/ respondents 2 to 4. The first wife of the fifth plaintiff, namely, Viruthambal died and therefore, the fifth plaintiff contracted a second marriage with one Balambal. Out of such wedlock, also, children were born. According to the



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plaintiffs, Viruthambal is one of the daughters born to her parents, Sankaran Pillai and Kanagavalli Ammal. In other words, Sankaran Pillai and Kanagavalli Ammal were blessed with four daughters and they are (i) Saraswathi (ii) Parimalanayagi (iii) Viruthambal and (iv) Manickammal. The father of Viruthambal and others, namely Sankaran Pillai, had properties of his own. During his lifetime, Sankaran Pillai executed a registered Will dated 10.10.1945, bequeathing his properties to his four daughters. The property set out in 'C' Schedule of the Will, which was allotted to Virthambal, is the subject matter of this suit. As per the Will, Kanagavalli Ammal, wife of Sankaran Pillai was given life interest in the property bequeathed in favour of Viruthambal.

5. According to the plaintiffs, the plaint described property was let out for rent to one Swaminatha Iyer and Srinivasan from whom the fifth plaintiff collected 1/3<sup>rd</sup> rent while the plaintiffs 1 to 4 collected the other 1/3<sup>rd</sup> portion of the rent. It is stated that the tenants failed to pay the rent properly and therefore, O.S. No.4 of 1976 was filed before the District Munsif Court, Tindivanam, as against the first defendant. In the suit, the first defendant remained *ex-parte* and an *ex-parte* decree was passed. Similarly, as against the other tenant Swaminathan Iyer, a suit in O.S. No.16 of 1976 was filed and it



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ended in a compromise. It is further stated in the plaint that the suit schedule property was required for the own use and possession of the plaintiffs and therefore, R.C.O.P. No. 7 of 1980 was filed before the District Munsif Court, Tindivanam by the fifth plaintiff and his daughter Geetha Sivaraman. Even in R.C.O.P. No.7 of 1980 the first defendant was set *ex-parte*. However, R.C.O.P.No.7 of 1980 was dismissed on the ground that all the legal owners of the property did not file the suit and therefore, the suit was dismissed for non-joinder of necessary parties. An appeal was filed and it was also dismissed. Thereafter, a Second Appeal was filed before this Court and during the pendency of the appeal before the First Appellate Court, the tenants have vacated the property on their own on 14.02.1986. Later, the property was let out to rent to one Jayarama Reddiyar and others, but they have also failed to pay the rent. Therefore, S.C.No.66 of 1986 was filed against the tenant. During the pendency of the said case, Geetha Sivaraman, wife of the first plaintiff and mother of the plaintiffs 2 to 4 died on 31.03.1992. After the death of Geetha, her husband, the first plaintiff was in receipt of the rent, however, a portion of the rent was paid to the first defendant either through money order or demand draft. It is also stated that the first plaintiff had paid the municipal taxes in respect of the suit property and obtained receipts thereof. It is further stated that on 23.02.1990, 28.02.1990 and 08.10.1990, the



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first defendant had written letters to the first plaintiff, in which, he had admitted the joint possession of the suit property by the plaintiffs and first defendant. Further, it is stated that the first defendant had inducted the defendants 2 and 3 as tenants and the rent paid by them has been shared by the plaintiffs and first defendant. It is at this stage, the plaintiffs demanded their 2/3<sup>rd</sup> share in the suit property from the first defendant, amicably. However, the first defendant refused to give the due share to the plaintiffs and also did not pay the rent to them. Therefore, the suit was filed for partition, separate possession and for *mesne* profits.

6. The first defendant contested the suit by filing a written statement. In the written statement, the first defendant admitted that the fifth plaintiff had two wife and the first defendant and Geetha @ Pachaiyammal are the children born. The first defendant also admitted that the said Will was executed by Sankaran Pillai in respect of the suit property on 10.10.1945. The first defendant also admitted that Geetha died on 31.03.1992. It is also admitted that the first plaintiff is the husband of the deceased Geetha and the plaintiffs 2 and 4 were the children born to them. It is further admitted that civil proceedings and including the R.C.O.P. No. 7 of 1980 initiated by the fifth plaintiff and the deceased Geetha, against the tenant. Further, it is stated that



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on 22.09.1993, the plaintiffs 1 to 4 issued a legal notice calling upon the first defendant to come for an amicable partition of the suit property by metes and bounds. On receipt of the notice, a reply notice was sent by the first defendant specifically stating that the plaintiffs have no right, title or interest in the suit property and they are not in possession of the plaint described property. It is further stated in the reply notice that the principle of *ouster* will be applicable to the plea of the plaintiffs and that the first defendant is the exclusive owner of the plaint described property. The first defendant further stated that already a suit in O.S.No.643 of 1995 was filed before the Principal District Munsif, Tindivanam, for the relief of permanent injunction against the plaintiffs. It is further stated that as per Section 15 (1) of the Indian Succession Act, the first plaintiff cannot be construed to be the legal heir of the deceased Geetha and the fifth plaintiff has no right over the plaint described property. During the lifetime of Geetha, she had no intention to seek for partition of the property from her brother/the first defendant. The rent received from the tenants have been enjoyed by the first defendant and it was not apportioned and paid to the plaintiffs at any point of time. The suit was instituted only at the instigation of the second wife of the fifth plaintiff, for partition, accordingly, the first defendant prayed for dismissal of the suit.



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7. Before the Trial Court, on behalf of the plaintiffs, the fifth plaintiff was examined as P.W.1 and the second plaintiff was examined P.W.2. The plaintiffs have marked 24 documents as Ex.P1 to P24. On the side of the defendants, the first defendant was examined as D.W.1 besides one Krishnamoorthy and one Vaithiyanathan were examined as D.W.2 & D.W.3 and Exs.B1 to B28 were marked.

8. After appreciating the oral and documentary evidence on record, the Trial Court framed the following issues :-

*“ i) Whether the plaintiffs are entitled to 2/3<sup>rd</sup> share in the suit schedule property?*

*ii) To what other reliefs the plaintiffs are entitled to? ”*

9. The Trial Court concluded that as per Will dated 10.10.1945, the testator/Sankaran Pillai gave the properties to her four daughters, including Viruthammal, who is the mother of the appellant, therefore, being children of the said Viruthammal, the appellant/first defendant and the deceased Geetha and being husband/Shanmughasundram Pillai/fifth plaintiff/fifth respondent have their rights and interest in the property. The first defendant has also



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admitted that the said Will dated 10.10.1945 was executed by Sivasankaran Pillai to his four daughters, including the said Viruthammal, and therefore, the plaintiffs are entitled to their share in the plaint described property. Accordingly, the Trial Court passed a preliminary decree for partition as prayed for.

10. Aggrieved by the Judgment and Decree of the Trial Court, an appeal in A.S.No.18 of 2008 was filed before the Principal District Court, Villupuram. The First Appellate Court also confirmed the Judgment and Decree of the Lower Court, against which, the first defendant/appellant has preferred the above Second Appeal.

11. The main contention of the first defendant/appellant herein is that his sister, Geetha died long back by committing suicide by pouring kerosene and set fire on herself. It is also stated that during the life time of Geetha, the fifth plaintiff, being her husband, subjected her to matrimonial cruelty and harassed her. Unable to tolerate the harassment, the said Geetha died. In such circumstances, even though the plaintiffs are the legal heirs of Geetha, they are not entitled for any share in the suit property. The first defendant/appellant herein is the only male heir of their parents and therefore, he is entitled to the



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suit property entirely.

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12. Further, the appellant submits that Courts below erred in appreciating the facts and evidence, and erroneously granted the preliminary decree and judgment. In fact the appellant's sister, Geetha, died long ago by committing suicide. Subsequently, her husband, Sivaraman/ the first plaintiff, remarried. Hence, he has no right to claim any right in the suit property, as the legatee predeceased the testator/Sankaran Pillai. Therefore, the plaintiffs' claim is not maintainable and the findings of the Courts below is *non-est* in the eye of law. In view of the above, the appellant prayed to allow the Second Appeal.

13. At the time of admitting the second appeal, on 10.12.2009, this Court formulated the following substantial question of law for consideration:-

*“ a) Effect of words showing testator's intention to give distinct shares of it then if any legatee dies before the testator. Whether vested rights, comes upon the died legatee's heirs?*

*b) The trial Court judgment in this suit is according to the conclusion of this suit property “C” Schedule legatee who died before the testator's was daughter of the testator so the “C” Schedule legatee's legal heirs are right in the property is correct?*



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*c) The First Appellate Court delivered the judgment with imaginative conclusion of the thoughts of the deceased testator's is correct? ”*

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

15. On appreciation of the above facts, it reveals that the mother of the appellant namely Viruthammal died long back before the testator. The legal heirs of the deceased Geetha /plaintiffs have no right over the suit schedule property. As per the Will, which was executed in the year 1945, the testator died in the year 1975 and the father of the appellant died in the year 1958. Admittedly, the Will executed by the said Kanagavalli, the mother of Viruthammal, is her last Will and till her lifetime it was not cancelled. Therefore, though the said Kangavalli died, the Will has not been cancelled before her death, hence, the legal heirs of the deceased Viruthammal are entitled to claim their respective shares in the suit property since the property is absolutely derived from the plaintiff's mother to the said Viruthammal and she died, leaving behind her legal heirs namely her husband and children. Therefore, parties in the suit are entitled to their shares in the suit property.



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16. During the pendency of the present case, father of the appellant/ Shanmughasundaram Pillai also died, therefore, the Geetha's legal heirs/plaintiffs 2 to 4 and the first defendant/appellant/Mani are entitled to half share of the suit schedule property in respect of his deceased father's share. Therefore, the plaintiffs 1 to 4 are entitled to  $\frac{1}{2}$  share and the appellant/Mani is also entitled to  $\frac{1}{2}$  share in the suit property.

17. Admittedly, there is a house in the suit schedule property. Considering the age of appellant, who is aged about 73 years old, he is entitled to equitable consideration, hence, the plaintiffs are directed to be allotted share to the appellant in the house in the final decree proceedings. The husband of Geetha/the first plaintiff /Sivaraman is directed to allot share of the appellant. Since the another legal heir of the said Viruthammbal's daughter Geetha died leaving behind the plaintiffs 1 to 4 and moreover, after the death of the said Geetha, her husband/Sivaraman got married another woman, therefore, at the time of final decree proceedings, the  $\frac{1}{2}$  share shall be allotted to the appellant in the final decree and the remaining extent of  $\frac{1}{2}$  share shall also be allotted to the appellant out of 12 cents, the plaintiffs 1 to 4 is directed to work out  $\frac{1}{2}$  of the share in the suit schedule property.



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18. At this juncture, the learned counsel for the respondents submitted that the fifth respondent/Shanmughasundarampillai, the husband of the said Viruthammal, also got four daughters through his second wife/Balammal and he seeks share to them.

19. This Court is of the view that the fifth respondent's second wife is not a Class I legal heir, hence, she and their children are not entitled to claim share in the property, since the property is originally belongs to maternal grandmother/Kanagavalli of the first defendant/appellant and the deceased Geetha. The fifth respondent/Shanmughasundaram Pillai, being the father of the appellant and the deceased Geetha, has no right in the said property. If the fifth respondent/Shanmughasundaram Pillai has no right in the property, similarly, his second wife and his legal heirs have no right in the suit property. Therefore, the final decree proceedings before the Lower Court shall proceed as follows:

(i) After getting report form the Advocate Commissioner and allocate shares as indicated above.

(ii) As the suit was filed in the year 2005, the entire final decree proceedings shall be completed within a period of four months from the date of receipt of this judgment.



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20. Accordingly, the Second Appeal is disposed with the above modifications. No costs.

**30.09.2024**

Index : Yes/No  
Speaking/Non Speaking order  
Neutral Case Citation:Yes/No

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To

- 1.The Principle District Court, Villupuram.
- 2.The Principal Subordinate Court, Tindivanam.
- 3.The Section Officer,  
VR-Section, High Court of Madras.



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**T.V.THAMILSELVI, J**

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