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S.A.No.32 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on 20.03.2024	Judgment Pronounced on 05.04.2024
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THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.32 of 2017
& Cross Objection No.98 of 2022
and C.M.P.No.436 of 2017

S.A.No.32 of 2017:

Selvaraj

..Appellant

Vs.

1.Loganayagi
2.Parvatham (Died)
3.Gandhimathi
4.Dr.Senthamizselvi
5.Sakthivel
6.Lalitha
7.C.Sibiarasu

..Respondents

[R2 died, RR6 & 7 are bring on record as LR's of the deceased R2 vide order dated 10.01.2024 in C.M.P.Nos.29328, 29330, 29332 of 2023 in S.A.No.32 of 2017 & Cross Objection No.98 of 2022]

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 06.10.2016 made in



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A.S.No.40 of 2015 on the file of the Additional District Court No.3, Dharapuram, reversing the judgment and decree dated 01.09.2015 passed in in O.S.No.238 of 2010 on the file of the Subordinate Court, Dharapuram.

For Appellant : Mr.T.R.Rajaraman
for Mrs.Chitra Maragatham

For Respondents
For R1 : Mr.N.Manokaran

For R2 : Died (steps taken)

For RR3 & 5 : No appearance

For RR4, 6 & 7 : Not ready in notice

Cross Objection No.98 of 2022:

Selvaraj ..Appellant

Vs.

1.Loganayagi
2.Parvatham (Died)
3.Gandhimathi
4.Dr.Senthamizselvi
5.Sakthivel
6.Lalitha
7.C.Sibiarasu

..Respondents

[R2 died, RR6 & 7 are bring on record as LR's of the deceased R2 vide order dated 16.11.2023 in C.M.P.Nos.26023, 26025 & 26026 of 2023 in Cross Objection No.98 of 2022 & S.A.No.32 of 2017]



S.A.No.32 of 2017

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 06.10.2016 made in A.S.No.40 of 2015 on the file of the Additional District Court No.3, Dharapuram, reversing the judgment and decree dated 01.09.2015 passed in in O.S.No.238 of 2010 on the file of the Subordinate Court, Dharapuram by modifying the share as 1/4th instead of 1/2th share by allowing the Cross Objection.

For Appellant : Mr.T.R.Rajaraman
for Mrs.Chitra Maragatham

For Respondents

For R1 : Mr.N.Manokaran

For R2 : Died (steps taken)

For RR3 & 5 : No appearance

For RR4, 6 & 7 : Not ready in notice

JUDGMENT

The 2nd defendant in a suit for partition is the appellant herein. The Trial Court had initially dismissed the suit for partition. However, the First Appellate Court reversed the findings of the Trial Court and granted a decree, aggrieved over which, the present Second Appeal has been preferred.



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2.The 1st respondent has filed Cross Objection against the disallowed portion of the judgment and decree dated 06.10.2016 in A.S.No.40 of 2015.

The grievance of the 1st respondent is that the First Appellate Court ought to have granted 1/4th share to the plaintiff instead of 1/2th share.

3.The parties are described as per their litigating status before the Trial Court.

4.The above Second Appeal was admitted on 23.01.2017, on the following substantial question of law:

“When the plaintiff was aware of the Will executed by the deceased father in favour of the third defendant sister and having not taken steps to question the same either in the prior proceedings O.S.No.38 of 1995, wherein final decree was also passed in favour of the third defendant, accepting the Will executed by the deceased father or any pleading in the present suit, still the learned District Judge right in reversing the judgment and decree of the trial Court?”

5.The suit property originally belonging to one Rangasamy Gounder. The 1st defendant is the daughter of the said Rangasamy Gounder. Apart from the 1st defendant, the Rangasamy Gounder was blessed with a son, by name,



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Duraisamy Gounder, who died leaving behind his two wives, by name, Sellathal and Karunathal. Through the said Sellathal, Duraisamy Gounder was blessed with a daughter, Loganayagi, who is the plaintiff in the partition suit and he was also blessed with a son, by name, Selvaraj, who is the 2nd defendant in the suit. Through the second wife, Karunathal, Duraisamy Gounder was blessed with a daughter, Gandhimathi, the 3rd defendant in the suit. Admittedly, there were two earlier proceedings in O.S.No.36 of 1995 and O.S.No.38 of 1995. O.S.No.36 of 1995 was filed by the 1st defendant in the present suit, namely, the daughter of the Rangasamy Gounder seeking partition. Similarly, the father of the plaintiff, Duraisamy Gounder had also filed a suit in O.S.No.38 of 1995. A preliminary decree came to be passed in the said suits and appeals were preferred in A.S.Nos.217 of 1997 and A.S.No.218 of 1997 and the same were dismissed, confirming the judgment and decree of the Trial Court.

6.It is further contended that in and by a Will dated 13.12.1996, Duraisamy Gounder had executed a Will in favour of the 3rd defendant, who is the daughter to the 2nd wife, Karunathal and therefore, in the earlier proceedings, the Will was upheld and not even objected to. In such



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circumstances, the defendants attacked the entitlement of the plaintiff who seek partition. However, the arguments of the learned counsel for the respondents is that the Will was not proved in the presence of the plaintiff, who was the daughter of the testator, Duraisamy Gounder and admittedly, the earlier suits for partition were behind the back of the plaintiff herein and in such circumstances, the preliminary decree passed in the said proceedings would not bind the plaintiff.

7.The learned counsel would also place reliance on the decision of the Hon'ble Supreme Court in *Vineeta Sharma vs. Rakesh Sharma and Ors*, reported in **(2020) 9 SCC 1**, where, the Hon'ble Supreme Court has held that even if a daughter had been married prior to the Amendment Act of 1939 coming into force, would still be a coparcerner, as long as the property has not been already partitioned by a registered instrument or dealt with during the lifetime of the father, prior to 20.12.2004.

8.According to the cross objector, the preliminary decree will have to be modified and 1/4th share will have to be allotted, in view of the dictum of the Hon'ble Supreme Court in *Vineeta Sharma's* case, referred herein supra.



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The learned counsel for the appellant however on the other hand would submit that there is no necessity to mention about the Will to the plaintiff and P.W.1, who was examined on the side of the plaintiff did not deny the Will though he claimed to know everything.

9.The learned counsel for the appellant would place reliance on the decree in O.S.No.36 of 1995 and O.S.No.38 of 1995 and contend that the Will has been exhibited in the said proceedings and there is no requirement to prove the Will in the presence of the plaintiff herein.

10.I have carefully considered the rival submissions advanced by the learned counsel on either side.

11.A learned Single Judge of this Court in *Leelavathi Vs. Chellaswami* reported in **2023 1 L.W.804**, referring to Section 6(1) of the Hindu Succession Act, 1956, held that nothing contained in the Sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004. The counsel for the appellant would therefore, place



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reliance on the said decision and contend that the Will being executed before the cut of date, namely 20th December, 2004, the plaintiff would not get any right to seek partition of the suit property.

12.Per contra, the learned counsel for the respondent would place reliance on the decision of this Court in *Mallika Vs. P.Kumaran* reported in **(2022) 3 CTC 88**, where this Court held that the Will has to be proved as prescribed under the Evidence Act and unless it is proved, it cannot be used as evidence. The learned counsel would therefore pray for the Second Appeal being dismissed and the Cross Objection being allowed.

13.The law with regard to devolution of property of Hindu Succession has now taken new turn with the decision of the Hon'ble Supreme Court in *Vineeta Sharma's* case, referred herein supra. Admittedly, the Will executed by the Duraisamy Gounder, who is the father of the plaintiff, has been projected by the 3rd defendant even in the earlier proceedings arising out of O.S.No.36 of 1995 and O.S.No.38 of 1995. At the same time, the said Will has not been exhibited or proved in the present suit proceedings. Considering the fact that the Will has been produced earlier and was not objected by other



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members of the family in the earlier proceedings and finality has also been reached in the said partition proceedings, and keeping in mind the fact that the plaintiff was not made a party to the said suit and the entire proceedings took place behind her back, an opportunity should be given to the appellant to prove the Will in the presence of the plaintiff herein, especially, in view of the fact that the right of the plaintiff which was not available in view of Tamil Nadu Amendment Act I of 1990 has subsequently alone become available in view of Act 39 of 2005 which also came to be clarified very recently by the Hon'ble Supreme Court in *Vineeta Sharma's* case, referred herein supra.

14. Thus, in order to afford a fair opportunity to the appellant to prove the Will dated 13.12.1996 in the presence of the respondent/plaintiff, I am allowing the Second Appeal and remitting the matter back to the First Appellate Court, giving an opportunity to the 3rd defendant to produce the Will of late; Duraisamy Gounder and prove the same in accordance with law and equally, it would be open to the plaintiff to attack the truth and genuineness of the said Will, consequent upon which the First Appellate Court shall render a finding regarding the said Will and accordingly decide respective shares of the parties.



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15. In fine, the Second Appeal is allowed and the matter is remitted to the Additional District Court No.3, Dharapuram, for the limited purpose of enquiring into the truth and genuineness of the Will dated 13.12.1996 said to have been executed by Duraisamy Gounder. The Cross Objection is consequently dismissed. However, it is made clear that the First Appellate Court, subject to the decision regarding the proof of Will in accordance with law, shall workout the respective rights of the parties. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

05.04.2024

Index : Yes/No
Speaking Order/Non-Speaking Order
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To

1. The Additional District Court No.3, Dharapuram.
2. The Subordinate Court, Dharapuram.
3. The Section Officer, V.R.Section, High Court, Madras.



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P.B.BALAJI., J.

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Pre-delivery judgment made in
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05.04.2024