



A.S.No.837 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

**Reserved on:
28.03.2024**

**Pronounced on:
12.06.2024**

Coram

THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN

**A.S.No.837 of 2018
and
C.M.P.No.3918 of 2022**

M.Saravanan

...Appellant

VS

1. Saraswathi
2. M.Gopalakrishnan
3. M.Mahadevan
4. Deepak Chedda
5. M.Mathiazhagan
6. P.Balu
7. K.Babu
8. Shankar

...Respondents

First Appeal filed under Section 96 C.P.C r/w. Section 41 Rule 1 C.P.C, against the judgment and decree dated 29.06.2018 made in O.S.No.3380 of 2013 on the file of the learned XVIII Additional Judge, City Civil Court, Chennai.



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For Appellant : Mr.K.V.Sundararajan
For R1 to R3 : Mr.A.M.Packianathan Easter

JUDGMENT

The plaintiff is the appellant herein and has filed this first appeal challenging the judgment and decree dated 29.06.2018 passed in O.S.No.3380 of 2013 by the learned XVIII Additional Judge, City Civil Court, Chennai.

2. For the sake of convenience and clarity, the parties are referred to as per their litigative status before the trial Court.

3. The plaintiff filed a suit in O.S.No.3380 of 2013 for partition claiming 1/4 share in the suit property. There are two schedules in the suit property. Murugesan @ Alex Annasamy and Saraswathi are husband and wife. The plaintiff, second defendant and third defendant are the sons of Murugesan @ Alex Annasamy. Murugesan @ Alex Annasamy is said to



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have executed a Will dated 10.11.2018, whereby, he had bequeathed the suit property giving life estate to his wife/first defendant and his sons/second and third defendants and the plaintiff. The plaint further proceeds that when the father of the plaintiff was in weak condition and not of sound mind, the defendants 2 and 3, who are the brothers of the plaintiff, have obtained Ex.A1/Will from their father, whereby, the unencumbered property, which is in possession of the second and third defendants, was allotted to them, whereas, the litigative property, encumbered property and the property in hands of the defendants 2 and 3 were carved out, projecting as if they were bequeathed to the plaintiff after two generations. Hence, he filed a suit for partition.

4. The written statement was filed by the first defendant/mother and it was adopted by the defendants 2 and 3 in the suit.

5. The trial Court appears to have framed the following issues:-

"1. Whether the plaintiff is entitled to get 1/4 th share in the suit property?"



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2. If so whether the plaintiff is entitled to get 1/4 th share in the suit property?

3. Whether the plaintiff is entitled for the relief of declaration that Will dated 10.11.2018 as sham and nominate, void abinitio.

4. Whether the plaintiff is entitled for permanent injunction against the defendants 1 to 3?

5. Whether the plaintiff is entitled for mandatory injunction against the defendants 4 to 8?

6. Whether the Will dated 10.11.2018 executed by Late Murugesan is true and valid and enforceable?

7. To what other relief is plaintiff entitled to?"

6. On the side of the plaintiff, the plaintiff was examined himself as P.W.1 and Ex.A1 to Ex.A8 were marked. On the side of the defendants, the first defendant was examined herself as D.W.1 and Ex.B1 was marked.

7. On consideration of both oral and documentary evidence, the trial Court has held that the suit property is a separate property of S.Murugesan @ Alex Annasamy and Ex.A1/Will was not sham and nominal one, since the testator was Christian and as per the Indian Succession Act, the Will



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executed by the Christian need not be probated and therefore, even in the absence of any witness being examined by the defendants, Ex.A1 is held to be true and genuine, and accordingly, held that Ex.A1/Will is valid since the testator held the property as separate property and bequeathed under Will and the Will was proved by legal presumption and the plaintiff is not entitled to the relief of partition, and the suit was dismissed. Hence, this appeal.

8. Heard Mr.K.V.Sundararajan, learned counsel appearing for the appellant/plaintiff and Mr.A.M.Packianathan Easter, learned counsel appearing for the respondents 1 to 3/defendants 1 to 3.

9. The learned counsel appearing for the appellant would contend that Murugesan is a Hindu and hence, the law of succession as applicable to the Hindu is to be adopted. Therefore, Sections 8 and 10 of the Hindu Succession Act will come into operation. However, the learned trial Judge jumped to a conclusion *suo motu* that the plaintiff's father is a Christian, without any pleadings or evidence adduced by the parties and consequently,



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held that the Will need not be proved and the defendants are not required to probate the Will by invoking Section 57 of the Hindu Succession Act and dismissed the suit. He would further contend that the finding of the trial Court that the Executor of the Will cannot challenge the same, is against the basic principles of the Will. The finding of the trial Court that since the plaintiff marked Ex.A1/Will, the burden was cast upon him to prove the Will as not genuine, is unsustainable, whereby, the trial Court wrongly cast the burden of proof on the person who challenged the Will, however, the burden of proof is to be cast on the beneficiary under the Will to prove the same. The learned counsel appearing for the Appellant would rely upon the following judgments of the Hon'ble Apex Court in support of his contentions:

1. ***Clarence Pais and others Vs. Union of India*** reported in ***(2001) 4 Supreme Court Cases 325.***
2. ***Babu Singh and Others Vs. Ram Sahai alias Ram Singh*** reported in ***(2008) 14 Supreme Court Cases 754.***
3. ***Bhagwan Kaur Vs. Kartar Kaur*** reported in ***(1994) 5 Supreme Court Cases 135.***
4. ***Benga Behera and Another Vs. Braja Kishore Nanda and others*** reported in ***(2007) 9 Supreme Court Cases 728.***



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WEB COPY 10. The learned counsel appearing for the defendants made his submissions in support of the judgment of the trial Court.

11. Heard Mr.K.V.Sundararajan, learned counsel appearing for the appellant and Mr.A.M.Packianathan Easter, learned counsel appearing for the respondents.

12(a). The plaintiff has prayed for the interim relief for Permanent Injunction and Mandatory Injunction, pending suit. Since the suit is disposed of, those reliefs have now become infructuous.

12(b). According to the plaintiff, the schedule of the suit property consists of two properties namely Item No.I is Old No.2, New No.5, Muthunaickern Street, Purasaiwakkam and Item No.II is Old No.14, New No.27, Kutty Chetty Street, Purasaiwakkam.



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WEB COPY 12(c). The plaint proceeds on the basis that both items of the suit properties are ancestral properties and reliance has been placed upon the decree passed in O.S.No.1696 of 1979. The defendants have also relied upon the very same decree in the said O.S.No.1696 of 1979, however would contend that it is a separate property of the father Late.Murugesan.

12(d). Copy of the said decree was not filed by either on the parties. But both the parties have admitted passing of such decree and also admitted that the suit properties are originally ancestral properties of the father of the Murugesan and in the said partition suit, a compromise decree was filed and these two items of properties were allotted to the share of the Murugesan (Father).

12(e). P.W.1 in the cross-examination has admitted that as per the partition decree in O.S.No.1696 of 1979 for the share of plaintiff's father, these properties have been allotted. So also, D.W.1 has admitted about the passing of the decree.



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12(f). In the decision of the Hon'ble Supreme court in Commissioner. of Wealth Tax, Kanpur and others Vs. Chandersen and others (1986) 3 SCC 567. it has been held that Class I heirs listed in the schedule under Section 8 of the Hindu Succession Act 1956 makes the son of an intestate to become an absolute owner of the property which he derives from his father and constitutes the property as absolute one and his son has no right by birth over such properties.

12(g). In the decision of this Court in CDJ 2010 MHC 5157 [M.Kumaran and another Vs. J.Rajesh (Minor) and another. it has been held that under Schedule I of the Hindu Succession Act 1956, "Schedule I in the Hindu Succession Act 1956, does not include a son's son" and thus the preposition of law at this point is set to the extent that once the ancestral property has been divided and the divided property reached the hands of late Murugesan who is the son, he becomes the absolute owner of the property and the plaintiff who is a son of the said late Murugesan cannot have any interest nor the plaintiff shall acquire any right by birth in the suit property.



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12(h). It remains to be stated that in view of the admitted decree namely compromise decree in partition suit property in O.S.No.1696 of 1979, the divided property falls into the share of late Murugesan as the separate property of late Murugesan and hence on the division in the partition suit, the ancestral nature of the property has been extinguished and on partition it falls in the hands of the person namely late Murugesan as a separate property and hence the plea raised by the plaintiff that the suit property is ancestral property is rightly negated by the Trial Court and the property in the hands of late Murugesan is a separate property. In view of the finding of fact, the scope of this appeal is narrow down to the following point for consideration.

13. After perusing the pleadings and the submissions made by the rival parties, the following point arises for consideration;

(i) Whether the trial Court is right in construing the plaintiff's father as Christian, when no such pleading was taken by either of the parties?



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(ii) on admitted factual matrix, whether the finding of

the trial Court that when the parties to the Will are Christians, they are not required to probate the Will is sustainable in law?

(iii) Whether the plaintiff is entitled for the relief of partition as prayed for?

Religious Status of Murugesan:

14(a). At the outset, I find that the learned trial Judge has misdirected herself in assuming the parties as Christians, in the absence of any pleading and the evidence adduced by both parties to the lis. From the plaint, written statement and the evidence of P.W.1 and D.W.1, I find that the parties have projected them as Hindus.

14(b). The father of the plaintiff and the defendants 2 and 3 is Murugesan @ Alex Annasamy. The learned trial Judge appeared to have misguided herself on the nickname of the plaintiff's father which is used for identifying the person and construed that the plaintiff's father is a Christian and also developed that since Murugesan @ Alex Annasamy is a Christian,



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Section 57 of the Indian Succession Act will come into play and held that a testator being an Christian is not required to probate the Will and that Ex.A1 is proved in the manner known to law and dismissed the suit. The approach adopted by the trial Court is result of misconception and misdirected itself. Accordingly, the finding of the trial Court on the religious status of the parties is hereby vacated.

Can the Executor of the Will Challenge the Will: Maintainability and burden of proof thereto.

15. With regard to the relief of partition sought for by the plaintiff, the trial Court has come to a conclusion that the property is not ancestral property and a separate property of the father of the plaintiff, and to reject the case of the plaintiff also, it has been observed that as per Ex.A1/Will, the plaintiff/appellant was appointed as Executor of the Will and as Executor, he cannot challenge the Will. However, it is a well settled law that the Executor of the Will can either seek to probate the Will as per the terms of the Will or can challenge the Will, if he is beneficiary under the Will. However, in pleading, he has to renounce the role of Executor and can



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challenge the Will in any of legal grounds. Here, in the instant case, the plaintiff was appointed as Executor of the Will by the father and the life estate was given to the first defendant (wife of testator) during the lifetime of the first defendant and thereafter, it goes to the grandsons of the testator. He has renounced the role of Executor and challenged the Will on the ground of lack of free Will and good and sound state of mind. Hence, it is maintainable. So, both on pleading and evidence, such finding rendered by the trial Court is totally unwarranted and unsustainable in law and the same is hereby vacated.

16. Another finding of the trial Court that since the plaintiff marked Ex.A1/Will, it is for the person, who marked the Will, to prove the same either in terms of the Will or the contention against the Will, is also unsustainable. The plaintiff in both the pleadings as well as the evidence has categorically stated that he has challenged Ex.A1/Will on the ground that it was obtained by his brothers/the defendants 2 and 3, while his father was in weak state of mind and the beneficiaries of the Will are the defendants 1 to 3 and therefore, it is for them to prove Ex.A1/Will in the



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manner known to law as contemplated under the Hindu Succession Act and the Indian Succession Act. Therefore, the finding of trial Court/learned District Judge in casting the burden of proof on the shoulder of the plaintiff to prove the Will is erroneous and the same is hereby vacated.

17. Yet another finding of the trial Court which is glaring on the face of the record that some of the properties under the Will have been sold by the testator during his lifetime, hence, the plaintiff is not entitled to challenge the Will, is unsustainable in law. Merely because of one of the beneficiaries under the Will, who has challenged the Will, has not challenged the alienation made by the testator during his lifetime, it cannot disqualify him from challenging the Will. It is a settled law that merely because the Will was executed by the owner of the property, the testator is not precluded or prevented from alienating the property which he owns. Hence, the finding rendered by the trial Court in this regard is hereby vacated.



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18(a). Whether the Will is true, valid and genuine, it is specific case of the Plaintiff that he challenged the Will of his Father on the ground that during the time of the execution of the alleged Will, the testator of the Will is not in good health and a sound state of mind. However, the Defendant has filed written statement relying upon the Will as could state that since the suit properties are self acquired properties of the Father and the Will is valid, true and genuine and hence, prayed for the dismissal of the Suit. When the Defendant pleads that the subject Will of the testator is true and genuine, it is the burden caused upon the Defendant to let in evidence in support of Ex.A1/Will and hence at this point the trial Court appears to be misdirected itself.

18(b). Yet another point which this Court has noticed is that the trial Court has *suo motu* assured, without any pleading or evidence by either of parties that the testator is a Christian and proceeded further to decide the case as stated supra. I find that on behalf of the Defendant, the widow of the testator was entered into witness box as DW1 and identified the photo and the signature in the Will as that of his husband (Testator of the Will)



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and the trial Court has presumed that, that is sufficient. Admittedly, the parties to the Will are Hindu and the testator is a Hindu, he had a nick name, which resembles that he is a Christian and the trial Court without going into the pleadings and the evidence presumes that the testator is a Christian and accordingly accepted the case of the Defendant and dismissed the Suit. The said approach given by the trial Court is erroneous in law and liable to be set aside.

18(c). In respect of the Will executed by the Hindu, once the Will has been challenged by one of the beneficiaries to the Will on any of the grounds based on sound legal principles, then it is the bounden duty caused upon the parties, who is claiming under the Will viz., beneficiary under the Will who has to prove the Will as required under Section 63 of the Indian Evidence Act and Section 68 of the Indian Succession Act.

18(d). On pleading and evidence, I find that the evidence of DW1, widow of the deceased cannot found to satisfy nor be treated as substitute for the mandatory and statutory requirement as stated in Section 63 of the



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Indian Evidence Act and Section 68 of the Indian Succession Act. In the instant case, the evidence of D.W.1 is only to an extent of that the photo affixed in the Will has been identified and signature has also been identified by the wife/DW1, that is not sufficient to come within the purview of Section 63 of the Indian Evidence Act and Section 68 of the Indian Succession Act. This vital aspect appears to be lose sight of by the trial Court.

18(e). In the evidence available on record, viz., evidence of DW1 and in the absence of any attestor who has attested the document or the scribe to talk about the evidence regarding the mental status of the testator at the time of execution of the the Will and the evidence of DW1 has to confirm the genuinity of Ex.A1/Will and accordingly, I have no hesitation to set aside the contra finding rendered by the trial Court and consequently hold that Ex.A1 is not proved in the manner known to law.

19. Now that in view of the discussion in the the preceding paragraphs regarding the nature and character of the suit property, being a



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separate acquired property of the deceased, on his death, the Plaintiff is entitled to 1/4th share along with his two brothers and widow Mother and there shall be a preliminary decree of partition declaring 1/4th share in favour of the Plaintiff.

20. In view of the discussion in the presiding paragraphs, this Court comes to the conclusion that the suit properties are not ancestral properties of late Murugesan and it is a separate property of late Murugesan. Murugesan died on 31.01.2013 leaving behind the plaintiff and the defendants 4 members in the family. Ex.A1 - Will was not proved in the manner known to law and hence as per the Hindu Law, if a Hindu Male dies, all the legal heirs shall take one share each and consequently, both the plaintiffs as well as the defendants D1 and D3 are entitled to take 1/4th share each and hence there shall be a preliminary decree of partition in favour of the plaintiff and 1/4th share is hereby granted.



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21. In the result, the First Appeal is allowed and the judgment and decree passed by the learned XVIII Additional Judge, City Civil Court, Chennai, in O.S.No.3380 of 2013 dated 29.06.2018 is set aside and consequently in O.S.No.3380 of 2013, there shall be a preliminary decree of partition declaring 1/4th share in favour of the Plaintiff. No costs. Connected miscellaneous petition is closed.

12.06.2024

Index:yes/no
Speaking Judgment/Non-Speaking Judgment
Neutral Citation:Yes/No

ssb/nvi



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To
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1. The learned XVIII Additional Judge,
City Civil Court, Chennai.
2. The Section Officer,
V.R. Section,
High Court, Chennai.



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RMT.TEEKAA RAMAN, J.

ssb/nvi

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