



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **07.06.2024**

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)NO.19 OF 2006

1.A.Maria Navis(died)

2.Mari Malliga

3.Antony Kishore

4.Arokiya Viji

5.Antony Reegan :Plaintiff/Appellants/Appellants

(Appellants 2 to 5 are brought on record as legal representatives of the deceased sole appellant as per order of this Court made in M.P(MD)No.1 of 2011 in S.A(MD)No.19 of 2006, dated 12.08.2011)

.vs.

1.A.Johnson(died)

2.A.Francis Christudoss(died)

3.Mary Sornam

4.J.Antony Xavier

5.J.Mary Pravina

6.J.Priya Johnson

7.J.Sahaya Mary

8.K.Saroja Kumari

9.J.Alphonse Ammal

10.J.Arockia Ramani



11.Efrance Vimala

12.Resheeba Rose

13.Anto Fready

(Respondents 3 to 10 are brought on record as legal representatives of the deceased first respondent as per order of this court made in M.P(MD)Nos.2 and 3 of 2009 in S.A(MD)No.19 of 2006, dated 27.2.2013)

(Respondents 11 to 13 are brought on record as legal representatives of the deceased second respondent as per order of this Court made in C.M.P(MD)Nos.835,836 and 838 of 2023 in S.A(MD)No.19 of 2006, dated 10.02.2023)

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree made in A.S.No.114 of 2004, dated 29.3.2005, on the file of Principal Subordinate Judge, Nagercoil confirming the judgment and decree made in O.S.No.629 of 1998, dated 4.3.2004, on the file of Second Additional District Munsif, Nagercoil.

For Appellants :Mrs.Jessi Jeeva Priya

Respondents :Died
1 and 2

Respondents :Mr.P.Thiagarajan
3 to 13

JUDGMENT

This Second Appeal is directed against the judgment and decree made in A.S.No.114 of 2004, dated 29.03.2005, on the file of Principal Subordinate Judge, Nagercoil confirming the judgment



and decree made in O.S.No.629 of 1998, dated 4.3.2004, on the file of Second Additional District Munsif, Nagercoil.

2.The Plaintiff in a suit for partition is the appellant. He filed a suit for partition of 1/3rd share in the suit property. The suit as well as the First Appeal filed by the plaintiff were dismissed by the Courts below. Aggrieved by the concurrent findings of the Courts below, the appellants are before this Court by way of this Second Appeal.

3.According to the plaintiff/Appellant, the suit property measuring an extent of 64 ¼ cents belonged to the mother of the plaintiff and defendants. She died intestate on 30.04.1990 and hence, he was entitled to 1/3rd share in the suit property. When the Plaintiff demanded partition, the first defendant refused the same by contending that the father of the parties had executed a 'Will' in respect of his property and also the property of the mother and divided the same into three unequal shares and allotted 1/3rd share to each of the parties. It is claimed by the plaintiff that the father of the plaintiff has no right to execute a 'Will' in respect of the mother's property and hence, laid a suit for partition claiming one third share in the suit property.



4.The suit was resisted by the defendants on the ground that the total extent of property available on record was 80.725 cents. The mother of the parties purchased 64 ¼ cents and 10 ½ cents was purchased by the father of the parties. However, the total extent available in the locality is 80.725 cents. It was contented by the defendants that after the death of the mother, there was a family arrangement and father of the parties executed a "Will", dated 1.7.1991 in favour of the plaintiff and defendants dividing the total extent available on ground into three plots, allotting one share each to each of his children. The plot measuring an extent of 24 cents lying on the east of pathway was allotted to the share of the plaintiff, the plot on the west of pathway measuring an extent of 24.75 cents was allotted to the share of the first defendant. The parties have been in possession and enjoyment of their respective shares. When the father of plaintiff and defendants made allotment of properties as per family arrangement by executing a 'Will', the suit filed by the plaintiff was not maintainable. The defendants also raised a plea of partial partition on the ground that the property of the father was not included in the plaint schedule.

5.Before the trial Court, the plaintiff was examined as P.W.1 and the 'Will' executed by the father was marked as Ex.A1 and the Sreedhana Pathiram in the name of mother was marked as Ex.A2.



The first defendant was examined as D.W.1 and four documents were marked as Ex.B1 to Ex.B4 on behalf of defendants. The Advocate Commissioner's Report and Plan were marked as Ex.C1 and Ex.C2.

6. The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the plaintiff who elected to accept the disposition made under the 'Will' in respect of father's property is not entitled to turn around and seek for partition of mother's property and dismissed the suit. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No. 114 of 2004, on the file of Principal Sub-Court, Nagercoil. The First Appellate Court affirmed the findings of the trial Court. Hence the plaintiff has come by way of this Second Appeal.

7. At the time of admission, this Court formulated the following substantial questions of law by order, dated 20.01.2006:

1. Whether the law relating to the family arrangement could be applied to the personal law of Christians, found by the Succession Act?

2. When the suit was filed for the partition of



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the properties belonging to the mother, whether, the non-inclusion of the properties belonging to the father can be said to be hit under the principle of the suit for partition not being maintainable for partial partition?

8.The learned counsel for the appellants submitted that the Courts below have committed an error in relying on Ex.A1-Will treating it as a family settlement and therefore,the judgment and decree passed by the Courts below dismissing the suit is liable to be set aside. The learned counsel further submitted that the concept of family arrangement is not applicable to the Indian Christians. Hence, the 'Will' executed by the father of the parties should not have been treated as a family arrangement.

9.The learned counsel for the respondents by drawing the attention of this Court to Section 185 of the Indian Succession Act, submitted that the plaintiff, who is deriving benefit under the 'Will' in respect of father's property, is not entitled to ignore the disposition made by him regarding the mother's property. The learned counsel further submitted that in case, the plaintiff chose to ignore the "Will" executed by the father in totality, he ought to have laid a suit for partition in respect of all the properties including



the father's property and however, the present suit has been laid only in respect of mother's property. Therefore, the suit for partition filed by the plaintiff is bad for partial partition.

10.Ex.A1 is the Will executed by the father whereunder the properties purchased by him and also the properties of his wife Maria Nesam were dealt with. After the death of Maria Nesam, the father of the parties, as a widower, was entitled to 1/3rd share in her property. However, the entire properties of Maria Nesam has been dealt with by the father of the parties, as if it was his own property. The defendants raised a plea that the document executed by the father shall be treated only as a family arrangement but not as a 'Will' and hence, the family arrangement which has been acted upon, cannot be questioned at a later point of time. A perusal of Ex.A1 would suggest that the plaintiff and defendants have not subscribed their signature in the document. It was executed by the father of the parties alone. Therefore by no stretch of imagination, it can be treated as a family arrangement between the parties. The father's power to divide family property equally among sons recognized in Hindu Law, by virtue of his "*Patria Potestas*" power cannot be extended to Christian Law, that too, for properties inherited from mother. Therefore the first substantial question of law framed at the time of admission is answered



against the appellants.

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11.By virtue of Section 33 r/w Section 35 of Indian Succession Act, after the death of mother of the parties, 1/3rd of her estate goes to the father of the parties, namely Antony. The plaintiff and defendants are each entitled to 1/3rd share in the remaining 2/3 share of the mother's property. Likewise, after the death of the father, the plaintiff and defendants are each entitled to 1/3rd share of his estate. In view of the fact that the mother of the parties pre-deceased the father, the estates of mother and father are inseparably mixed up and hence, after the death of father, the plaintiff is not entitled to file a suit for partition only in respect of mother's estate when the estate of father is also available for partition in equal share. Therefore, the suit for partition filed by the plaintiff in respect of mother's estate is hit by principle of partial partition and hence, the prayer for partition made by the plaintiff cannot be entertained only in respect of mother's estate. The second substantial question of law framed at the time of admission is answered accordingly against the appellants and in favour of the respondents and as a necessary consequence, the Second Appeal stands dismissed.

12.In view of dismissal of Second Appeal on technical ground



of partial partition, while dismissing the Second Appeal, liberty is given to the appellant/plaintiff to file a fresh suit for partition in respect of properties of both the father and mother. With this liberty, the Second Appeal stands dismissed. No costs.

07.06.2024

Index:Yes/No

Internet:Yes/No

NCC:Yes/No

vsn

To

- 1.The Principal Subordinate Judge,
Nagercoil.
- 2.The Second Additional District Munsif,
Nagercoil.
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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10

S.SOUNTHAR, J.

vsn

JUDGMENT MADE IN
S.A(MD)NO.19 OF 2006

07.06.2024