



A.S(MD).No.163 of 2015

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 12.08.2024

CORAM:

THE HONOURABLE **MR.JUSTICE P.VELMURUGAN**
AND
THE HON'BLE **MR.JUSTICE K.K.RAMAKRISHNAN**

A.S.(MD).No.163 of 2015
and
M.P(MD).Nos.2 and 3 of 2015

Kumarasamy

... Appellant/2nd Defendant

.Vs.

1.Parasuraman

2.Ananthakrishnan

... Respondents 1&2/Plaintiffs

3.Rajagopal

... 3rd Respondent/1st Defendant

4.Mohan

5.Ramasamy

6.Mariappan

7.Jeyakumar

... Respondents 4 to 7/Defendants 3 to 6

PRAYER: Appeal Suit has been filed under Section 96 of the Code of Civil Procedure to set aside the judgment and decree dated 27.02.2015 passed in O.S.No.104 of 2012 on the file of the I Additional District and Sessions Court, Madurai.



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For Appellant : Mr.D.Srinivasaragavan
For Respondents : Mr.S.Natesh Raja (For R1 & R2)
R3-Died
R4 to R7- Exparte

JUDGMENT

(Judgment of the Court was delivered by **P.VELMURUGAN,J.**)

For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

2. The brief facts of the plaint are as follows:

The plaintiffs and the defendants are none other than they are brothers. The defendants 3 to 6 are the tenants of the suit properties. Originally, the suit property belongs to their paternal grandparents, namely, Parasuram Naidu and Andal Ammal. They executed a registered Will dated 19.02.1986 to the plaintiffs and the defendants 1 and 2 and they have given only enjoyment right till the life time of one Ramakrishnan, who is the son of said Parasuram Naidu and Andal Ammal and father of the plaintiffs and the defendants 1 and 2. After the demise of said Ramakrishnan, the plaintiffs and the defendants 1 and 2 became the absolute owner and got 1/4th share each in the suit property. As such, the



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plaintiffs are entitled to half share in the suit property as well as the rent payable by the defendants 3 to 6. Since the attitude of the defendants 1 and 2 has changed and they refused to partition of the suit property as well as the rent, the plaintiffs filed the suit.

3. The brief facts of the written statement filed by the defendants 1 and 2 are as follows:

The suit is not sustainable in the manner known to law. The suit property has already been partitioned. Hence, the plaintiffs' statement that the suit property has not been partitioned, is not true. The father of the plaintiffs and the defendants 1 and 2, namely, Ramakrishnan, has executed a Will dated 01.06.2012 and based on the said Will, the second defendant is in possession and enjoyment of the property in Door Nos.45 and 46 of the suit property, the first defendant is in possession and enjoyment of the suit property in Door No.47 and the plaintiffs are possession and enjoyment of the suit property in Door Nos.47A and 48. Since the plaintiffs suppressing the said partition, filed the suit, the same is liable to be dismissed.



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4. Based on the above said pleadings, the trial Court framed the following issues:

- (i) Whether the plaintiffs are entitled to half share as prayed for?*
- (ii) Whether the plaintiffs are entitled to mandatory injunction as prayed for?*
- (iii) Whether the Will dated 19.02.1986 is true?*
- (iv) Whether the suit properties are already partitioned on 01.06.2012?*
- (v) Whether the Court fee paid by the plaintiffs are correct?*
- (vi) To what other relief?*

5. After framing the issues, in order to substantiate the case of the parties, on the side of the plaintiffs, four witnesses were examined as P.W.1 to P.W.4 and twenty documents were marked as Ex.A1 to Ex.A20. On the side of the defendants, one witness was examined as D.W.1 and ten documents were marked as Ex.B1 to Ex.B10.

6. On conclusion of the trial, after hearing the arguments advanced on either side, the trial Court, by judgment and decree dated 27.02.2015, held that the plaintiffs are entitled to 2/4th share in the suit properties and passed the



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preliminary decree for the same. The defendants 1 and 2 are entitled to 1/4th share each in the suit properties.

7. Challenging the said judgment and decree, the second defendant in the suit has filed the present Appeal Suit before this Court.

8. The learned counsel for the appellant/second defendant would submit that the father of the plaintiffs and the defendants 1 and 2, namely, Ramakrishnan, executed a Will in respect of the suit properties and the trial Court failed to consider the fact that the defendants 1 and 2 accepted the Will executed by the said Ramakrishnan. The parties to the suit, namely, the plaintiffs and the defendants 1 and 2, partitioned the suit properties on the basis of the Will executed by Ramakrishnan on 29.05.2009. As per the oral partition between the parties, the appellant is in possession and enjoyment of the house in Door Nos.45 and 46. The plaintiffs are in possession and enjoyment of the house No.47A and 48. The plaintiffs suppressed the oral partition effected between the plaintiffs and the defendants 1 and 2, on 01.06.2012. The plaintiffs are not in joint possession and enjoyment of the suit properties. The plaintiffs and the defendants are separately enjoying the properties on the basis of the Will executed by



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Ramakrishnan. The plaintiffs and the defendants are paying electricity bill, drainage tax and house tax etc., separately to their respective house and collecting rent from the tenants on separately. Suppressing these facts, the plaintiffs filed a suit with an intention to get the property allotted to the defendants 1 and 2. The defendants 3 to 6 are unnecessary parties to the suit and the fifth defendant is not residing in the suit properties and hence, the suit is liable to be dismissed for misjoinder of parties.

9. The trial Court failed to consider all these aspects and also failed to frame the specific issues with regard to the Will said to have been executed by Ramakrishnan, dated 29.05.2009 and also regarding the non-joinder of the necessary parties. Therefore, the judgment and decree passed by the trial Court is liable to be set aside. The plaintiffs failed to prove their case in accordance with Sections 101 and 103 of the Indian Evidence Act. Ex.A1-registration copy of the Will, dated 19.02.1986, was not proved by examining the attesting witnesses in the said Will. Therefore, suppressing the material facts regarding the earlier oral partition and the Will executed by Ramakrishnan and also non-framing of the issues and answering parties, the trial Court came to the conclusion in favour of the case of the plaintiffs. Therefore, since already there was an oral partition



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between the plaintiffs and the defendants 1 and 2 as per the Will executed by Ramakrishnan, the suit for partition is not maintainable.

10. The learned counsel for the respondents/Plaintiffs 1 and 2 would submit that the defendants 1 and 2 are the brothers of the plaintiffs. The defendants 3 to 6 are the tenants in the suit properties. Originally, the suit property belongs to Parasuram Naidu and Andal ammal, who are the paternal grandparents of the plaintiffs and the defendants 1 and 2. Out of the joint funds of them, building was constructed and there are eight portions in the suit properties. The second plaintiff and the defendants 1 and 2 are residing in three portions and four portions were let out to the defendants 3 to 6 by Ramakrishnan and 1/4th portion remains vacant. During the lifetime of said Parasuram Naidu and Andal Ammal jointly executed a registered Will dated 19.02.1986 bequeathing the suit properties to the plaintiffs and the defendants 1 and 2. Under the Will, the testators have only given life interest to the father of the plaintiffs and the defendants 1 and 2, namely, Ramakrishnan and the absolute right in the property was given to their grandchildren, namely, the plaintiffs and the defendants 1 and 2. The testators to the Will, dated 19.02.1986, died on 28.08.1986 and 28.09.1998 respectively. After their demise, the Will came into force and the life estate holder of



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Ramakrishnan was in possession of the suit properties. The life estate holder Ramakrishnan died intestate on 14.05.2012. After his demise, the plaintiffs and the defendants 1 and 2 became the absolute owners and they got 1/4th share each. Since the defendants have prevented the possession of the properties of the plaintiffs, the plaintiffs have filed a suit.

11. He would further submit that since both the attestors to the Will dated 19.02.1986 expired prior to recording the evidence, the legal heir of one of the attestors to the Will was examined as P.W.2 and he has also identified the signature of one of the attestors. Since both the attestors to the Will dated 19.02.1986 were no more, the Will was proved in the manner known to law under Section 69 of the Indian Evidence Act. Further, he would submit that since the father of the plaintiffs and the defendants 1 and 2 had only life interest in the property as per the Will dated 19.02.1986 executed by the grandparents of the plaintiffs and the defendants 1 and 3, the father of the plaintiffs and the defendants 1 and 2 had no alienable right and interest over the suit property. Therefore, he has no right and interest to execute the Will dated 29.05.2009. Therefore, under these circumstances, the defendants have not proved the oral partition, even otherwise, they claimed the oral partition only based on the Will



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dated 29.05.2009. Since the father of the plaintiffs and the defendants 1 and 2, namely, Ramakrishnan had no absolute right in the suit property and he had no right to execute the Will dated 29.05.2009, based on the Will, the partition cannot be effected. Therefore, the defendants have failed to prove their case.

12. Though the issues regarding the Will dated 29.05.2009 was not framed, since the father of the plaintiffs and the defendants 1 and 2 had only a life interest and there was no absolute right and interest over the property, further a suitable issue was framed by the trial Court based on the pleadings and documents that whether the suit properties are already partitioned on 01.06.2012. In the said issue, the alleged Will dated 29.05.2009 will cover. Though the defendants have not claimed any right under the Will dated 29.05.2009, they have claimed the right under oral partition based on the Will dated 29.05.2009, which was said to have been executed by Ramakrishnan. Since the said Ramakrishnan had only life interest, he could not execute a Will and therefore, the trial Court rightly granted the decree and therefore, there is no merit in the appeal.

13. Heard both sides and perused the materials available on record.



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14. Based on the pleadings, evidence let in before the trial Court, grounds of appeal raised by the appellant and also the submission made by the learned counsel for the defendants 1 and 2, the following points arise for determination:

(i) Whether the plaintiffs have proved the Will dated 19.02.1986?

(ii) Whether the father of the plaintiffs and the defendants 1 and 2 had right to execute the Will in respect of the suit property? and

(iii) Whether the preliminary decree passed by the trial Court is sustainable?

15. It is the specific case of the plaintiffs that the suit properties originally belonged to Parasuram Naidu and Andal Ammal. They are none other than their paternal grandparents. They executed a Will dated 19.02.1986 in favour of the plaintiffs and the defendants 1 and 2 and gave life interest to the father of the plaintiffs and the defendants 1 and 2. The said Parasuram Naidu died on 28.08.1986 and Andal Ammal died on 28.09.1998. After the demise of both the testators, the Will came into force and the father of the beneficiaries, the plaintiffs and the defendants 1 and 2, namely, Ramakrishnan was having only life estate and all are enjoying the property jointly. Thereafter, the said Ramakrishnan died intestate on 14.05.2012. After his demise, the plaintiffs and the defendants 1 and 2 became the absolute owners and they are each entitled to 1/4th share. Since the



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defendants have not come forward to amicable settlement for dividing the property, the plaintiffs were constrained to file a suit for partition and separate possession.

16. The case of the defendants 1 and 2 is that the plaintiffs have not proved the Will dated 19.02.1986 and the father of the plaintiffs and the defendants 1 and 2, namely, Ramakrishnan, as the legal heir of Parasuram Naidu and Andal Ammal, after the death of Parasuram Naidu and Andal Ammal, the said Ramakrishnan alone was the absolute owner of the property. Therefore, Ramakrishnan executed a Will dated 29.05.2009 and based on the said Will, the plaintiffs and the defendants 1 and 2 have entered into an oral partition. Under the oral partition, the properties have been separately allotted to the legal heirs of the Ramakrishnan. Therefore, as per the oral partition, they are enjoying the property in their respective shares of the property individually. The plaintiffs are not absolute owners or they are not jointly enjoying the entire suit properties with the defendants. Therefore, since already oral partition is effected, the suit for partition is not maintainable and the plaintiffs are out of possession in the suit properties. Therefore, the Court fees paid by the plaintiffs are not in accordance with law. Hence, the suit is liable to be dismissed.



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17. As far as the Point No.1 is concerned, it is not in dispute that the properties originally belonged to the paternal grandparents of the plaintiffs and the defendants 1 and 2, namely, Parasuram Naidu and Andal Ammal. According to the plaintiffs, they executed a registered Will dated 19.02.1986 in favour of the plaintiffs and the defendants 1 and 2 and gave life estate to their son Ramakrishnan. The testators died on 28.08.1986 and on 28.09.1998 respectively and thereafter, the father of the plaintiffs and the defendants 1 and 2 became the life estate owner of the suit property, who enjoyed the property and thereafter, he died on 14.05.2012, from which date, the plaintiffs and the defendants 1 and 2 have become the absolute owners of the property. Since the defendants have not come forward to give their share in the suit property as per Will dated 19.02.1986, the plaintiffs filed the suit.

18. According to the defendants 1 and 2, they denied the Will dated 19.02.1986 and therefore, the legal heir of Parasuram Naidu and Andal Ammal, the father of the plaintiffs and the defendants 1 and 2, namely, Ramakrishnan, was the absolute owner of the property and he executed a Will dated 29.05.2009 and after his death on 14.05.2012, the plaintiffs and the defendants 1 and 2 have entered into an oral partition and divided the property. Accordingly, they are



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enjoying the property separately. According to them, the Will dated 19.02.1986 was not proved by the plaintiffs.

19. Since the plaintiffs claimed the title under the Will dated 19.02.1986, in order to substantiate their claims, the registration copy of the Will dated 19.02.1986 was marked as Ex.A1. When the plaintiffs have stated that the Will was in possession of the defendants 1 and 2 and despite gave notice to produce document, they have not produced the same and therefore, summoned the Officer of the Registration Department and also, examined as witness. Since the attestors to the Will dated 19.02.1986, Ex.A1, were no more, P.W.2 was examined to prove Ex.A1-registration copy of the Will. P.W.2 is the son of one of the attestors Venkatasamy Naidu. The death certificate of the Venkatasamy Naidu was also produced and the legal heir certificate of the Venkatasamy Naidu was also marked as Ex.A16. Venkatasamy Naidu died on 29.06.2004. P.W.2 is the one of the legal heirs of the said Venkatasamy Naidu. The sale agreement entered into between Venkatasamy Naidu and Alagarsamy Chettiar was marked as Ex.A.17, in which, the said Venkatasamy Naidu affixed his signature. In Ex.A19, the signature of the Venkatasamy Naidu was found. Since the attestors to the Will were no more, they could not be examined, but however, in the manner known to law, the person,



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who knows the signatures of the attestors, was examined as witness as P.W.2.

Therefore, the Will dated 19.02.1986, Ex.A1, was proved in the manner known to law under Section 69 of the Indian Evidence Act.

20. The plaintiffs have stated that since the original Will could not be produced by them for the reasons that they are not in possession of the original Will, the Junior Assistant of the Sub Registrar Office was summoned and examined as P.W.4 and he has also identified the registration copy of the Will and stated that the original Will, Ex.A1, was registered in their office. Therefore, in the absence of the attestors to the Will, the plaintiffs examined the available and possible witnesses and proved the Will in the manner known to law. Therefore, this point is determined accordingly.

21. Now, according to the defendants 1 and 2, they denied the Will dated 19.02.1986, which is said to have been executed by Parasuraman Naidu and Andal Ammal, but however the defendantants 1 and 2 admitted that they are the owners of the property. According to them, after the death of said Parasuraman Naidu and Andal Ammal, their son, namely, Ramakrishnan is entitled to the suit property and subsequently, during his life time, he executed a Will on 29.05.2009.



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Thereafter, after the demise of Ramakrishnan, they entered into a partition and they have devided the suit property and enjoyed the same.

22. Even though the trial Court has not framed the issues regarding the Will dated 29.05.2009, since the defendants have stated that based on the said Will dated 29.05.2009, the plaintiffs and the defendants 1 and 2 entered into an oral partition and they claimed right under the oral partition, the defendants have not produced the said Will dated 29.05.2009 and they have not proved the same. Except saying that they entered into oral partition, they have not proved by oral and documentary evidence and also produced the sufficient materials. But, the plaintiffs have produced a registered Will marked as Ex.A.20 and registration copy of the Will marked as Ex.A1.

23. At the outset, the plaintiffs and the defendants admitted that the suit property originally belonged to Parasuraman Naidu and Andal Ammal and also stated that in the earlier points, the plaintiffs have proved their Will said to have been executed by Andal Ammal and Parasuraman Naidu dated 19.02.1986 and the father of the plaintiffs and the defendants 1 and 2 had only life interest over the property as per Exhibits A.1 and A.20. The father of the plaintiffs and the



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defendants 1 and 2, Ramakrishnan, was having only life interest and he was not having absolute interest over the suit property and he had no right to execute any Will.

24. The second defendant was examined as D.W.1 and he has not produced the Will dated 29.05.2009, though he has claimed the right under the Will dated 29.05.2009, based on the Will, entered into a partition and they divided the property and enjoyed the same separately. Except the second defendant, no other witnesses were examined either to prove the Will dated 29.05.2009 or the oral partition and in the absence of proof of Will dated 29.05.2009, they cannot claim right over the suit property through Will. The said Will was not proved and produced by the defendants and the same was not proved in the manner known to law and the oral partition was also not proved. Therefore, the second point for consideration is determined accordingly.

25. Though the defendants have marked certain documents as Ex.B1 to Ex.B7, the tax receipts, in the absence of proof of the rights of the father of the plaintiffs and the defendants 1 and 2, namely, Ramakrishnan and in the absence of proof of Will dated 29.05.2009 and also in the absence of proof of the oral



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partition, mere revenue records standing in the name of the one of the joint owners or co-parceners, will not give absolute right to that co-parcener, on whose name, the revenue records stand. Since the plaintiffs proved the Will dated 19.02.1986 and though the defendants claimed right under Will dated 29.05.2009, the same is not proved in the manner known to law.

26. Since this Court is first appellate Court as a fact finding Court, it has to re-appreciate the entire evidence independently and arrive at an independent conclusion. Therefore, this Court has carefully gone through the pleadings, oral and documentary evidence adduced on either side. As far as the third point is concerned, the trial Court after considering the entire oral and documentary evidence, held that the plaintiffs have proved the Will dated 19.02.1986 and the defendants have not proved their case as pleaded in the written statement and the plaintiffs and the defendants 1 and 2 are the brothers. As per the Will dated 19.02.1986, the plaintiffs and the defendants 1 and 2 are each entitled to 1/4th share. Since they are the absolute owners of the suit property, they are all beneficiaries to the Will. Though the father was given the life estate, the life estate owner has no right to alienation or transfer of absolute right. Therefore, under these circumstances, this Court finds that the plaintiffs have proved their



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claim by producing oral and documentary evidence. Therefore, the trial Court has rightly appreciated the oral and documentary evidence and accepted the case of the plaintiffs and rejected the case of the defendants 1 and 2 and other defendants are only the tenants.

27. Accordingly, the preliminary decree passed by the trial Court declaring the plaintiffs and defendants 1 and 2 each are entitled to 1/4th share is in accordance with law and there is no reason to interfere with the judgment and decree passed by the trial Court in O.S.No.104 of 2012 and there is no merit in this appeal and it is liable to be dismissed.

28. Hence, this Appeal Suit is dismissed. However, considering the facts and circumstances of the case and relationship of the parties, there shall be no order as to costs.

(P.V.,J.) (K.K.R.K.,J.)
12.08.2024

NCC : Yes/No
Index : Yes / No
Rmk



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To

1. I Additional District and Sessions Judge, Madurai.
2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN,J.
AND
K.K.RAMAKRISHNAN,J.

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