



S.A.(MD)No.185 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 23.07.2024

Pronounced on : 13.11.2024

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

S.A.(MD)No.185 of 2018

and

C.M.P.(MD)No.4860 of 2018

Palraj Nadar (died)

1.A.Kohila

2.M.Appadurai

3.A.Dinesh Kumar

4.R.Nisha

5.P.Pasupathi Raghavan

6.S.Sharmila

7.P.Vignesh

... Appellants/
Respondents/
LRs of plaintiff

Vs.

K.Thavamalar

... Respondent/
Appellant/
Defendant



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Prayer : This Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree made in A.S.No.5 of 2013 on the file of the I Additional District Court, Tuticorin dated 24.04.2017 modifying the judgment and decree made in O.S.No.129 of 2006 on the file of Sub Court, Tuticorin dated 27.06.2012.

For Appellants : Mr.G.Rajaraman

For Respondent : Mr.D.Senthil

JUDGMENT

The Second Appeal is directed against the judgment and decree passed in A.S.No.5 of 2013 dated 24.04.2017 on the file of the I Additional District Court, Thoothukudi, modifying the judgment and decree made in O.S.No.129 of 2006 dated 27.06.2012 on the file of the Subordinate Court, Thoothukudi.

2. The suit is for partition.

3. For the sake of convenience and brevity, the parties herein will be referred to as per their status/ranking in the trial Court.



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4. The case of the plaintiff is that the suit properties belonged to one Kasi Nadar, that the said Kasi Nadar executed a Will dated 15.12.2003 of his own free will and whereunder, he bequeathed the first schedule of properties to his daughter/defendant and second schedule of properties (suit properties) to the defendant and the plaintiff's son Gangadharan jointly, that since the said Gangadharan had lost his mother in his childhood days, he was with his maternal grandfather Gurusamy Nadar and after his death, in the family of the said Kasi Nadar, that since the said Kasi Nadar died on 26.12.2003, Will came into force and the plaintiff's son Gangadharan has become entitled to half share in the suit properties, that since the said Gangadharan died on 04.06.2006, the plaintiff being the father has become entitled to get his son's share in the suit properties, that though the plaintiff had demanded the defendant to effect partition and allot half share in the suit properties, she refused to effect the partition and that therefore, the plaintiff was constrained to file the above suit for partition.

5. The defence of the defendant is that the suit properties and other properties were originally belonging to the defendant's paternal



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grandfather Gurusamy Nadar, that the said Gurusamy Nadar had died 35 years back by leaving his four sons, namely, Kasi Nadar, Sivasubramaniya Nadar, Maharajan Nadar and Panneer Selvam, that the said Gurusamy Nadar in the presence of Panchayatdars have entered into a partition on 17.09.1977 in respect of the properties owned by the Gurusamy Nadar Hindu Joint Family and the same was recorded in an unregistered partition deed, that the suit properties and some other properties were allotted to the share of the said Kasi Nadar and his brother Sivasubramaniya Nadar, that since the said Sivasubramaniya Nadar had been doing business in Sri Lanka, the said Kasi Nadar, without any partition, had been in possession and enjoyment of the entire properties, that the said Sivasubramaniya Nadar had died intestate without marriage and as such, his properties came to be owned by the said Kasi Nadar and his legal heirs, that the said Kasi Nadar died on 26.12.2003 leaving behind his wife Marikani and the defendant as only legal heirs and hence, the defendant and her mother have become entitled to the suit properties and other properties left by the said Kasi Nadar, that the plaintiff's son Gangadharan was never with the said Gurusamy Nadar or with the said Kasi Nadar and was with his father/plaintiff, that the said Gangadharan being the sister's son used to



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visit the said Kasi Nadar's house often and used to take the said Kasi Nadar to hospital as the said Kasi Nadar was suffering from cancer from June 2003 and that the said Kasi Nadar remained unconscious two months prior to his death and at that time, the said Gangadharan had taken the said Kasi Nadar to hospital in a car.

6. It is the further defence of the defendant that the contention of the plaintiff that the said Kasi Nadar had executed a Will in favour of the defendant and the said Gangadharan, is not true, that the Will alleged by the plaintiff is a fraudulent document, that the plaintiff's son Gangadharan had taken the said Will fraudulently when the said Kasi Nadar was in unconscious condition, that the said Kasi Nadar had absolutely no right to execute a Will in respect of the entire properties as the properties are ancestral in character, that the defendant is entitled to get the benefits under the Hindu Succession (Tamil Nadu Amendment) Act, 1989, that the Will never came into force, that after the death of the said Kasi Nadar, the defendant and her mother had been in possession and enjoyment of the same, that since the defendant's mother is a necessary party, the suit is bad for non-joinder of necessary party, that the cause of action alleged by the



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plaintiff is false and that therefore, the suit is liable to be dismissed.

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7. The learned trial Judge, upon perusing the pleadings of both the parties, has framed the following issues;

- 1. Whether the plaintiff is entitled to get the preliminary decree in respect of the half share in the suit properties?*
- 2. What is the order with regard to the suit cost?*
- 3. To what other relief the plaintiff is entitled to?*

8. During trial, the plaintiff has examined himself as P.W.1 and examined one Abusubhiyan as P.W.2 and exhibited 4 documents as Ex.A1 to Ex.A4. The defendant has examined herself as D.W.1 and exhibited 8 documents as Ex.B1 to Ex.B8.

9. The learned trial Judge, upon considering the pleadings and the evidence both oral and documentary and on hearing the arguments of both the sides, has passed a judgment and decree dated 27.06.2012 granting the preliminary decree as prayed for by declaring that the plaintiff is entitled to half share in the suit properties. Aggrieved by the judgment and decree passed by the trial Court, the defendant has preferred an appeal in A.S.No.



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5 of 2013 and the learned I Additional District Judge, Thoothukudi, upon considering the materials available on record and on hearing the arguments of both the sides, has passed the impugned judgment and decree dated 24.04.2017 partly allowing the appeal and granting the preliminary decree in respect of 1/4th share in the suit properties to the plaintiff. Challenging the impugned judgment and decree, the present second appeal came to be filed.

10. At the time of admission, the following substantial question of law came to be formulated:-

When it was not established that the properties are not ancestral properties in the hands of Gurusamy, is not the appellate Court wrong in holding that the suit properties are joint family properties?

11. It is not in dispute that the suit properties and other properties came to be owned by one Gurusamy Nadar and after the death of the said Gurusamy Nadar, his four sons including Kasi Nadar had entered into a partition, wherein, the suit properties and other properties were allotted to the share of the said Kasi Nadar and his brother Sivasubramaniya Nadar. It



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is also not in dispute that the plaintiff is the husband of Kasi Nadar's sister.

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12. The case of the plaintiff is that the plaintiff's son Gangadharan, who had lost his mother in his childhood days, was with the Gurusamy Nadar's family and after his death, with Kasi Nadar's family and that the said Kasi Nadar had executed a Will in respect of four items of properties in first schedule to his daughter/defendant and two items of properties in second schedule to the defendant and the plaintiff's son Gangadharan jointly. But according to the defendant, the suit properties and other properties were ancestral properties of Kasi Nadar and as such, the said Kasi Nadar has no right to execute a Will in respect of the entire properties as the defendant has become the coparcener in view of the provisions of Hindu Succession (Tamil Nadu Amendment) Act, 1989 and that the said Gangadharan had taken the Will fraudulently while the said Kasi Nadar was in unconscious stage.

13. It is pertinent to note that the trial Court as well as the first appellate Court have given specific findings that Ex.A.1-Will was proved in accordance with law, that the Will is a genuine one and that the Will



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was acted upon as the defendant had sold a property obtained through Ex.A.1-Will by accepting the Will. No doubt, the defendant has preferred the appeal challenging the finding given by the trial Court with regard to the Will, but the first appellate Court has also confirmed the finding of the trial Court that the execution of Will came to be proved and that the Will is a genuine document. But the first appellate Court, by holding that the properties are ancestral properties, has given finding that the said Kasi Nadar had no right to execute a Will in favour of the entire properties. Admittedly, the defendant has not preferred any second appeal challenging the finding given by the first appellate Court with regard to the Will and as such, the above findings of the trial Court as well as the first appellate Court with regard to the Will had attained finality.

14. As already pointed out, the trial Court, by accepting the case of the plaintiff, has declared that the plaintiff is entitled to half share in the suit properties as per the terms of Ex.A.1-Will but the first appellate Court, by mainly relying on the admission of the plaintiff in his evidence that the suit properties and other properties are ancestral properties of the said Kasi Nadar, has come to a decision that the defendant being the



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coparcener is entitled to get half share and also entitled to get half share in the properties bequeathed under Ex.A.1-Will and that therefore, the defendant is entitled to 3/4th share and the plaintiff's son is entitled to 1/4th share. Considering the above, the main and only point to be decided is about the nature of the properties.

15. It is pertinent to note that the defendant, in her written statement, has specifically stated that the suit properties and other properties were belonging to her paternal grandfather Gurusamy Nadar. The defendant, in her written statement, has nowhere whispered that those properties came to be owned by him ancestrally. No doubt, the defendant has also averred that after the death of the said Gurusamy Nadar, his four sons had entered into partition in respect of the properties owned by the Gurusamy Nadar Hindu Joint Family, but the first appellate Court as well as the defendant have given much importance to the one line deposition of the plaintiff that all the properties owned by the said Kasi Nadar were his ancestral properties. As rightly contended by the learned counsel appearing for the plaintiff, the plaintiff has nowhere stated that the properties are ancestral properties of the said Gurusamy Nadar. In the absence of any specific defence taken by the defendant, just because the



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plaintiff has given evidence that the properties were owned by the said Kasi Nadar ancestrally, the same cannot be construed as the properties were owned by the said Gurusamy Nadar ancestrally. More importantly, as rightly pointed out by the learned counsel appearing for the plaintiff, in the partition deed under Ex.B.1, the said Kasi Nadar and his brothers entered into a partition in respect of the properties owned by them as legal heirs of their father Gurusamy Nadar and the properties purchased by them and they have nowhere referred that the properties were owned by their father Gurusamy Nadar ancestrally. As rightly contended by the learned counsel appearing for the plaintiff, the defendant has not produced any other material or evidence to show that the properties were ancestral properties of the said Gurusamy Nadar.

16. P.W.1 in his evidence and cross-examination would also say that the properties shown in the Will were owned by one Duraipandi Nadar/brother of the said Gurusamy Nadar, that the said Duraipandi Nadar has not executed any documents in respect of the said properties and that he was not in a position to produce the document to show that the properties are owned by the said Duraipandi Nadar. Considering the above evidence, it is pertinent to note that the plaintiff was very much clear that



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the properties were not ancestral properties of the said Gurusamy Nadar.

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17. Moreover, it is pertinent to note that the defendant sold some properties obtained through the Ex.A.1-Will to one Rajagopal Nadar vide sale deed dated 22.06.2006 under Ex.A.4 and in the sale deed, as rightly contended by the learned counsel appearing for the plaintiff, the defendant has referred only about the Will executed by her father and the relevant portion is extracted hereunder:-

“.... எழுதிக் கொடுத்த கிரய பத்திரம் என்னவென்றால் லேட் என் பிதா அவர்கள் 15.12.03ல் எனக்கு எழுதி வைத்திருக்கிற உடன்குடி சப்ரி ஆபிஸ் 3.40.9.35/03 நம்பர் உயில் சாசனபடி அவர்கள் காலத்துக்குப்பின் எனக்கு தனித்து கிடைத்து என் தனி அனுபோகத்திலிருக்கிற இதன் தபசில்.... ”

and she has nowhere whispered that the property sold under Ex.A.4 came to be owned by her ancestrally. Moreover, the defendant's father Kasi Nadar in his Will under Ex.A.1 has referred that he obtained the properties in a family partition and nowhere he has whispered that the properties were belonging to him ancestrally. Considering the above, the learned trial Judge has rightly come to a decision that the properties obtained by the said Kasi Nadar in the partition under Ex.B.1 are his separate properties.



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18. The learned counsel appearing for the plaintiff would contend that since the sons of the said Gurusamy Nadar have partitioned the properties owned by the said Gurusamy Nadar, they have taken the properties as their separate properties and not as ancestral properties, that therefore the said Kasi Nadar being his separate properties has every right to execute a Will in respect of the properties and that the defendant cannot question the right of the said Kasi Nadar in bequeathing his properties through Will as the properties were not ancestral in character.

19. The learned counsel appearing for the plaintiff would rely on the following decisions;

(i) (2007) 4 MLJ 993

(N.Ramachandran Vs. E.Varadarajan and another):

“(A) Hindu law – Property – Joint family property or self acquired property – No nucleus found – Release deed – Validity upheld – No question of avoiding as void – Relief to set aside – Plea, evidence and grounds.

(B) Hindu Succession Act (30 of 1956), Section 8 – Self acquired property – Inheritance by sons – No right to the grandson in property.



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On the death of the father leaving the suit property being his self acquired property, his two sons inherited the same and the grandson of a son did not have any interest in the said property under Section 8 of the Hindu Succession Act.”

(ii) (2012) 7 MLJ 414

(S.Dakshina Vs. Chinnaponnu and others)

“Hindu Succession Act (30 of 1956), Section 8 Clause(1) – Self acquired property – Suit for declaration and vacant possession – Trial Court and First Appellate Court on consideration of fact that minor interest to be protected dismissed suit – Question as to Whether Courts below are right in holding that minor grand son has got right in property admittedly property as self acquired property of deceased grandfather of Minor purchased out of self earnings – Held, if a male Hindu owning immovable properties dies leaving behind his wife and children, then his wife and children would be Class I heirs, to inherit his property which cannot be described as ancestral property – They would be inheriting property of deceased male Hindu as their absolute property – Grandchildren of deceased original owner would have directly no right over it – Because person happens to be paternal grand son of an individual, he would not be



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entitled to lay claim over property of his grand father, unless property happens to be ancestral property – Without understanding real purport of concept 'ancestral property', both Courts below accepted wrong plea of defendant and dismissed suit – warrant no interference – Judgment and decree of both Courts below set aside – Suit decreed as prayed for.”

(iii) (2015) 5 MLJ 257

(Purasawakum Permanent Fund Ltd., rep. by its Managing Director Vs. R.Kalaiselvi and others)

“13. It is an admitted fact that the property purchased under the original of Ex.A4 was the self-acquisition and absolute property of Kanakasabhai Naicker. We have held that Kanakasabhai Naicker should have died only after the advent of Hindu Succession Act, 1956. On 05.06.1974 his wife and sons have partitioned the property left by Kanakasabhai Naicker and in that partition, the suit property came to be allotted to the share of the first defendant Rangaramanujam. The first defendant Rangaramanujam, having got the suit property as a legal heir of Kanakasabhai Naicker under the rule of succession provided in the Hindu Succession Act, 1956 and not as a coparcener, the same shall be his separate property in which, his son would not have got a right to



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share by birth under the provisions of Hindu Succession Act, 1956 that stood before the amendment made by Tamil Nadu Act 1 of 1990. The daughters of the first defendant Rangaramanujam, who remained unmarried on 23.12.1989 also would not have become coparcener having a right to share by birth in the said property by virtue of the amendment introducing Section 29-A to the Hindu Succession Act, 1956. Even after the amendment of Section 6 of the Hindu Succession Act by Act 39 of 2005 (Central Act) the character of the property remained the same and the plaintiffs have not become coparceners with their father, namely the first defendant. Therefore, the claim of the plaintiffs that the suit property is the coparcenary property in which each one of the plaintiffs, second and third defendants got a share equal to that of their father, namely the first defendant Rangaramanujam, cannot be countenanced and the same deserves to be rejected as untenable...”

20. Considering the above, this Court has no hesitation to hold that the said Kasi Nadar has got the properties as legal heir of the said Gurusamy Nadar and by entering into partition with his brothers and not as a coparcener and the said properties shall be considered as his separate properties and as such, his daughter/defendant would not have got a right



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to share by birth as per the Hindu Succession (Tamil Nadu Amendment) Act, 1989 and consequently, the findings of the first appellate Court that the said Kasi Nadar has no right to execute Will in respect of the entire properties cannot be sustained. Hence, the judgment of the first appellate Court modifying the share allotted to the plaintiff by the trial Court is liable to be set aside and the judgment and decree of the trial Court are to be restored.

21. Considering the other facts and circumstances of the case, this Court further decides that the parties are to be directed to bear their own costs.

22. In the result, the Second Appeal is allowed and the impugned judgment and decree passed in A.S.No.5 of 2013 dated 24.04.2017, on the file of the I Additional District Court, Thoothukudi is set aside and the judgment and decree made in O.S.No.129 of 2006, dated 27.06.2012, on the file of the Subordinate Court, Thoothukudi is restored. Preliminary decree is passed declaring that the plaintiff is entitled to get half share in the suit properties. Consequently, connected Miscellaneous Petition is



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closed. The parties are directed to bear their own costs.

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13.11.2024

NCC :yes/No

Index :yes/No

Internet:yes/No

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To

1. The I Additional District Judge,
Thoothukudi.
2. The Subordinate Judge,
Thoothukudi.
3. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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Pre-Delivery Judgment made in
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and
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Dated : 13.11.2024