



A.S(MD)No.8 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated: 31.01.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD)No.8 of 2023

and

C.M.P(MD)Nos.16340, 16341 & 237 of 2023

Arul Kavimani

... Appellant/2nd Defendant

Vs.

1.Amalirani

2.Idhayarani

... Respondents 1 & 2/Plaintiffs

3.K.P.Selvam

... 3rd Respondent/1st Defendant

Prayer : This Appeal Suit filed under Section 96 r/w Order XLI, Rule 1 of CPC., against the decree and judgment, dated 05.07.2022 in O.S.No.1 of 2016 on the file of the Additional District Judge, Ramanathapuram.

For Appellant : Mr.Arul Kavimani
(Party in Person)

For R-1 & R-2 : Mr.K.Mahendran

For R-3 : Mr.V.Vinayagamoorthy



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JUDGMENT

This Appeal Suit has been preferred as against the preliminary decree passed in O.S.No.1 of 2016 on the file of the Additional District Judge, Ramanathapuram, wherein the respondents 1 and 2 herein have filed a suit for partition as against the third respondent herein and the appellant herein and the suit was decreed in favour of the plaintiffs (i.e.,) respondents 1 and 2 herein. As against the decree and judgment, the present Appeal Suit has been filed by the second defendant.

2. For the sake of convenience and brevity, the parties herein after will be referred as per their status / ranking in the Tribunal.

3. The brief averments of the plaint are as follows:

The suit property was originally belonged to one Viagulam, who is the mother of the plaintiffs and the defendants. The said Viagulam had purchased the suit property through sale deed, dated 06.08.1973 and thereafter, she constructed the building and leased out the buildings to the tenants. The said Viagulam lastly executed a registered Will, dated



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16.04.2013 in favour of both the plaintiffs and the defendants bequeathing equal shares to the plaintiffs and the defendants. The said Viagulam died on 27.08.2014 and after her demise, the Will came into effect. Therefore, the plaintiffs each are entitled to 1/4 share and the defendants each are entitled to 1/4 share over the properties. Now, the father of the plaintiffs and the defendant, namely, Kulandaisamy was residing in the house and receiving the rent amounts from the tenants. The plaintiffs demanded the defendants for amicable partition, but they have not amenable for amicable partition during the 1st week of August 2015. The first defendant had in collusion with the second defendant filed a suit before the District Munsif cum Judicial Magistrate Court, Tiruvaduani in O.S.No.54 of 2013 against the plaintiffs and the father and mother. Since the defendants refused for partition of 1/4th share of the plaintiffs, the present suit is filed for 1/2 share of the plaintiffs over the suit property.

4. The averments of the written statement filed by the first defendant are as follows:

The suit properties were purchased by the first defendant through registered document, dated 06.08.1973 for sale consideration of



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Rs.1,000/-. But the sale deed was executed in the name of his mother for namesake. The said document is shame and nominal document. The first defendant also purchased his property in the name of his father Kulandaisamy through sale deed, dated 30.10.1980 for a sum of Rs.1,500/-. Both the above said sale deeds are shame and nominal. Therefore, the first defendant alone is having right over the suit property and the property purchased in the name of his father through sale deed, dated 30.10.1980. The first defendant purchased those properties through his own earnings. The plaintiffs have no right over the suit properties. Already a civil suit in O.S.No.54 of 2013 on the file of the District Munsif Court, Thiruvadunai has been filed and the same is still pending. The first defendant had celebrated the sister's marriage, who are the plaintiffs in the suit in a grand manner. The first defendant had given entire support and development and developed the plaintiffs. The first defendant is maintaining his family interest without any encumbrance or debt or charge over the properties. The first defendant had permitted the plaintiffs to visit his parents and to assist them in hospital necessities. Since 2005, the plaintiffs gaining the active confidence of the parents had dominated the Will of parents and also they coerced for gift deed, dated 18.01.2006. The



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plaintiff never enjoying the suit property jointly as co-sharer. Hence, the Court fee paid is not proper. Hence, the suit is liable to be dismissed.

5. The brief averments of the written statement filed by the second defendant are as follows:

The suit property was not the individual property of the mother Viagula Mary. The father and mother of the defendant were living together with love and care to the family and never they considered any of the earnings or assets to them being belonged to anyone individual alone. With the savings of father and the mother, the suit property was purchased by father Kulandaisamy on 04.08.1973. But it was agreed that the property would be registered in the name of mother Viagula Mary. The residential house and other constructions in the suit property were starting from the year 1980 by the father, mother, the second defendant and the younger sister (i.e.,) second plaintiff. The first defendant and the first plaintiff were not at all involved in any of the construction either physically or cash contribution. The plaintiffs have kidnapped their mother from the hospital and made their mother to register the Will, dated 16.04.2013. The mother of the plaintiff had admitted for throat cancer from 20.03.2013 in Saint



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Mary of Leuca Hospital. At that time, the plaintiffs 1 and 2 and their family members kidnapped the father and mother of the plaintiffs to Othakadai Sub-Registrar Office and executed the Will with coercion. Already the plaintiffs got married. The ancestral property from the mother side was transferred to the daughters alone. The property of the father in S.No.189/2 was handed over to the daughters. The plaintiffs were excluded from the possession of the property. The suit property was allotted to the shares of the defendants 1 and 2 and the plaintiffs were excluded from the possession of the property as declared by the parents in the family arrangements in first week of August 1994. The Court fee paid by the plaintiffs are not correct. Therefore, the suit is liable to be dismissed.

6. Based on the above said pleadings, the Trial Court has framed the following issues and additional issue:

- "1) Whether the plaintiff is entitled to get a relief of partition?
- 2) Whether a preliminary decree to be passed for 1/2 share to the plaintiff?
- 3) Whether the sale deeds in favour of parents of D1 is sham and



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nominal?

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4) Whether the properties purchased by D1 in his parents name as benami transaction?

5) To what other relief?

Additional Issue:

1) Whether the suit is valued property and Court-fee paid is correct?"

7. Before the Trial Court, on the side of the plaintiffs, they examined P.W.1 and P.W.2 and marked Exhibits A.1 to A.3. On the side of the defendants, D.W.1 was examined and marked Exhibits B.1 to B.9.

8. The Trial Court after considering the evidences adduced on both sides, decreed the suit in favour of the plaintiffs and preliminary decree is passed to divide the properties into two equal shares and to allot 1/2 share in favour of the plaintiffs by metes and bounds.

9. Aggrieved by the above said judgment, the second defendant has filed this appeal on the following grounds:



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Grounds of Appeal:

i) The preliminary decree and judgment of the Trial Court, dated 05.07.2022 upon the suit property are against law, weight of evidence and probabilities of the case.

ii) The Trial Court erred in decreeing the suit and the preliminary decree is based on the non probated testamentary Will.

iii) The Trial Court has not followed the procedure for the joint trial and as per the order of the District Court, suits in O.S.No.1 of 2016 and O.S.No.43 of 2016 were tried together, but in the judgment there is no whisper about the joint trial.

iv) The Trial Court has not discussed the issue separately and answer jointly by wrongly holding that 1 to 4 issues are inter connected and inter linked with each other. The appellants are adduced evidence in respect of the non payment of Court Fee under Section 37 (1) of Court Fee and Suit Valuation Act. The Trial Court failed to consider the evidences of the defendant side.

v) The Trial Court failed to consider that the mother of the plaintiff was under the custody of the plaintiffs and they kidnapped the parents and obtained the Will. Therefore, the decree and judgment of the Trial Court,



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dated 05.07.2022 are against law.

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10. The learned Counsel appearing for the appellant / second defendant would contend that the plaintiffs have filed for suit for partition based on the Will and the Will has not been proved in accordance with law and the plaintiffs are not joint possession with the defendants and thereby, they have to pay Court Fee under Section 37 (1) of the Court Fee and Suit Valuation Act. The suit properties are not exclusively belonged to the mother of the plaintiffs and the defendants. In fact the properties were purchased by the father and mother of the plaintiff and defendants. Therefore, the mother of the plaintiffs and defendants alone has no right over the properties. The Trial Court has not considered the above said aspects and erroneously decreed the suit. Therefore, the decree and judgment passed by the Trial Court are liable to be set aside.

11. The learned Counsel appearing for the respondents would contend that the appellant / defendant has examined the attesting witnesses of the Will and they proved the execution and attestation of the Will. Per contra, the appellant / second defendant only examined as P.W.1 and no



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other witnesses were examined. As per the Will, the plaintiffs and defendants are equally entitled to the suit properties. The plaintiffs and the defendants are all equally entitled to the properties of the brother. The first defendant has taken a plea that the suit properties are belongs to him and he not even examined any witness and the second defendant taken a plea that the properties belonged to the mother and father of the plaintiffs and the defendants, but the father of the plaintiff and the defendant was examined as P.W.2 and he has not claimed anything about the above said purchase of the properties in the name of mother and father of the plaintiffs as stated by the appellant / second defendant. Therefore, the defendants failed to prove their contention. Per contra, the appellant / second defendant examined the witnesses and produced the documents. Thereby, the defendants failed to prove their contention and the Trial Court correctly decreed the suit. Hence, the present Appeal Suit is liable to be dismissed.

12. This Court after hearing both sides and upon perusing the documents, including the order of the Trial Court, the points for determination in this appeal are:



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"1) Whether the suit property was purchased by the mother and the same is her self-acquired property?

2) Whether the mother of the plaintiff and defendant, namely, Viagula Mary executed a Will, dated 16.04.2013?

3) Whether the plaintiffs are entitled to share over the suit property?

4) Whether the plaintiffs are entitled to decree for partition?

5) Whether the judgment and decree passed by the Trial Court are sustainable?

6) Whether the appeal has to be allowed or not?

7) To what relief the plaintiffs are entitled to?

Point No.1:

13. The plaintiffs have filed the suit for partition stating that the properties belonged to her mother and he purchased the property on 06.08.1973. According to the first defendant, he only purchased the property through his earnings but the sale deed was executed in the name of his mother and his mother is only a name lender. That apart, another property was also purchased in his father's name. Thereby, both the properties are belonged to him. According to the second defendant, the



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suit property was not purchased by the mother of the plaintiffs and defendants. The father and mother have purchased the property in the name of his mother. Thereafter, the construction was made by contributing the second plaintiff, second defendant and their parents. Therefore, the plaintiffs and the defendants 1 and 2 have taken different plea in respect of the purchase of the property. Therefore, the plaintiffs, who filed the suit for partition have to prove that the suit property belonged to her mother and the same was purchased through sale deed, dated 06.08.1973.

14. In this context, the second plaintiff was examined as P.W.1 and marked Exhibits A.1 to A.3. Exhibit A.1 is the original sale deed, dated 06.08.1973 in the name of mother of the plaintiffs. Both the defendants have also admitted the sale deed in the name of mother of the plaintiffs. But they only stated that the first defendant only purchased the property in the name of his mother. The second defendant's contention is that the father and mother have purchase the property. In order to prove the same, the first defendant has not even entered into box and no witnesses were examined on the side of the first defendant. The second defendant was examined as D.W.1 and also marked Exhibits B.1 to B.9. Those documents



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are not sufficient to prove that the properties were purchased in the name of mother through the funds provided by his father and the property was jointly purchased by his father and the mother. According to the second defendant, the property was purchased by father and mother of the plaintiffs. But the said father was examined as P.W.2. He himself has not stated anything about the purchase of the property in the name of the mother of the plaintiffs and he did not claim any right over the suit property. Therefore, the plaintiffs have proved that the property belongs to their mother through sufficient evidence. Thus the point is answered.

Point No:2:

15. According to the plaintiffs, their mother while she was in sound mind executed a Will, dated 16.04.2013 and thereafter, she died on 27.08.2014. After the demise of her mother, the Will came into force. The defendants denied the said execution of Will. However, the plaintiff examined the attesting witnesses of the Will, who is none other than the father of the plaintiffs and the defendants and also husband of testator. He categorically deposed about the execution of Will and thereby, the plaintiffs proved that the Will was duly executed. The second defendant



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also admitted the execution of Will. But his plea is the Will was executed through coercion and undue influence. When the mother was in the hospital, they were in a dominant position and thereby, they kidnapped the parents and executed the Will. To that effect, there is no sufficient evidence adduced by the defendants. Per contra, the evidence of plaintiffs' side shows the execution of Will by the mother of the plaintiff. Therefore, the plaintiff has proved the execution of Will by her mother.

16. Though the defendants have produced Exhibits B.7 to B.9, they reveal that the deceased was admitted in the hospital for the treatment. However, the defendants have not taken any steps to examine any other witnesses to establish that the deceased was not in a position to execute a Will and she was kidnapped. Per contra, the said Will was registered Will and registered before the Sub Registrar Office and once the document is registered, it is the presumption that all the formalities have followed unless the contrary is proved. The defendants have not proved any contrary and the defendants failed to rebut the evidence of the plaintiffs' side in respect of execution of Will. Thus the point is answered.



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Point Nos.3 and 4:

17. This Court in the previous points decided that the property belongs to the mother of the plaintiff and defendants and she executed a Will, dated 16.04.2013. According to the said Will, the properties were bequeathed in favour of all the children of the deceased Viagulam (i.e.,) plaintiffs and defendants. The another legal heir of the deceased Viagula Mary is her husband, namely, the father of the plaintiffs and defendants. But he himself examined as P.W.2 and he has not claimed any right over the property and thereby, as per the Will, all the plaintiffs and the defendants are equally entitled to 1/4 share. The suit is filed by the plaintiffs for 1/2 share over the properties. Therefore, the plaintiffs are entitled to partition of 1/2 share over the property and they are entitled for preliminary decree for their 1/2 share. Thus the points are answered.

Point Nos.5 and 6:

18. The Trial Court in the judgment, framed proper issues and answered all the issues after analyzing the evidences adduced on both the sides. The Trial Court also examined the evidence of P.W.2, who is the



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father of the plaintiff and the attesting witness of the Will and thereafter, came to a conclusion that the Will has been proved in accordance with law and as per the Will, the plaintiffs are entitled to 1/2 share over the property and thereby, granted preliminary decree for partition of 1/2 share of the plaintiffs. Therefore, there is no any infirmity or perversity found in the judgment and decree of the Trial Court and the same warrants no interference. Thus the points are answered.

Point No.7:

19. This Court has discussed in the previous points and decided that the plaintiffs are entitled to 1/2 share over the properties and preliminary decree also passed. There is no infirmity found on the judgment and decree of the Trial Court. Thereby, this Court decided the appeal has no merits and deserves to be dismissed and thereby, the appellants are not entitled to any relief. In view of the above said discussions, this Court is of the opinion that the present appeal has no merits and deserves to be dismissed.



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20. In the result, this Appeal Suit stands dismissed and the Trial Court decree and judgment are confirmed. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions stand closed.

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NCC : Yes / No
Index : Yes / No
Internet : Yes
BTR

To

- 1.The Additional District Judge,
Ramanathapuram.
- 2.The Section Officer,
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.



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P. DHANABAL, J.

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