



S.A.No.1900 of 2002

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **12.07.2024**

CORAM

THE HON'BLE MR.JUSTICE S.SOUNTHAR

S.A.No.1900 of 2002

1.Kaliaperumal @ Kaliaraj (Died) ... Appellant/3rd Respondent
3rd Defendant

2.Malarvizhi

3.Shanmugaveni

4.Killivalavan

5.Lakshmi

6.Minor Kavitha ... Appellants 2 to 6
Represented by Mother & Guardian
/ 2nd Petitioner.

*(Appellants 2 to 6 brought on record as
legal heirs of deceased sole appellant vide
Court order, dated 17.03.2016 made in
M.P(MD)No.1 of 2015 in S.A.No.1900 of
2002)*

Vs.

1.Thamaraiselvi ... 1st Respondent/Appellant
Plaintiff

2.Dhanakodi Ammal (Died) ... 2nd Respondent/2nd Respondent
2nd Defendant

3.Valarmathi



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4.Karunanithi

5.Annadurai

6.Indiraganthi

... Respondents 3 to 6

*(Respondents 3 to 6 are brought on record as
LRs of the deceased second respondent vide
Court order, dated 15.02.2022 made in
C.M.P.Nos.2998 to 3000 of 2019 in S.A.No.
1900 of 2002)*

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 29.10.2001 made in A.S.No.77 of 2001 on the file of the Principal District Judge at Thanjavur reversing the judgment and decree, dated 28.01.1998 made in O.S.No.489 of 1996 on the file of the District Munsif Court at Thanjavur.

For Appellants : Mr.V.K.Vijayaraghavan

For R-1 : Mr.C.Sundaravadivel

For R-2 to R-6 : No appearance

JUDGMENT

The third defendant in the suit is the appellant herein.

2. The first respondent herein filed a suit for declaration of title and injunction in respect of suit 'B' and 'D' Schedule properties with alternative prayer for partition of 1/3rd share in respect of all the suit



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properties, namely, suit 'A' to 'D' Schedules. The suit was dismissed by the Trial Court and on appeal filed by the first respondent / plaintiff, the First Appellate Court allowed the appeal and decreed the suit and granted declaration and injunction as prayed for. Aggrieved by the same, the third defendant has come before this Court.

3. According to the first respondent / plaintiff, the suit properties originally belonged to one Natesa Merkondar, husband of first defendant and father of plaintiff and second defendant. He died in the year 1957 leaving the plaintiff and defendants 1 and 2 as heirs to succeed to his estate. After marriage of the plaintiff and second defendant, the suit properties and other properties which were not subject of the suit were divided in an oral partition in the presence of Villagers. The suit 'A' Schedule properties were allotted to the share of second defendant. The suit 'B' Schedule properties were allotted to the share of plaintiff. The suit 'C' Schedule property, dwelling family house was kept as a common property. It was also agreed that the plaintiff and second defendant shall pay five bags of paddy each to the first defendant annually and Rs.100/- per year towards her maintenance. The said arrangement was accepted and acted upon by the parties. Some of the properties allotted to the



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plaintiff and defendant were sold to third parties by plaintiff, first defendant and second defendant jointly as per the wish of the purchasers.

Recently, there was mis-understanding between the first defendant and her daughters, namely, plaintiff and second defendant. She made attempts to act against the interest of the plaintiff and second defendant. Therefore, a legal notice was issued on 14.05.1985. It appears first defendant sold some of the suit properties to third defendant through a registered sale deed, dated 29.05.1985 and the same was not binding on the plaintiff and second defendant as first defendant had no right or title to sell the entire property to third defendant. The first defendant in collusion with third defendant made attempts to trespass in to the suit property and hence, plaintiff was constrained to file a suit for above said relief.

4. The second defendant, sister of plaintiff filed a written statement supporting the plaint averments.

5. The first defendant remained *ex parte* and the third defendant, purchaser of the portion of the suit properties from first defendant filed a written statement and denied the oral partition pleaded by the plaintiff.



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He also claimed that Natesa Merkondar died on 28.03.1956 prior to coming into force of Hindu Succession Act. Therefore, it was the claim of the third defendant that first defendant, wife of Natesa Merkondar, got the properties as a limited owner and the same got enlarged into absolute estate after coming into force of the Act. It was also pleaded that first defendant executed a Will in favour of third defendant on 28.05.1992 bequeathing 2 cents of land in R.S.No.89B/60 and 8 cents of plot in R.S.No.89B/8E in favour of the third defendant. After death of first defendant, the third defendant has been enjoying the property purchased by him and also the properties he got under the Will as an absolute owner. Therefore, he sought for dismissal of the suit.

6. Before the Trial Court, the plaintiff was examined as P.W.1 and yet another witness was examined as P.W.2. 12 documents were marked on the side of the plaintiff as Exhibits A.1 to A.12. The third defendant was examined as D.W.1. The attesor to the sale deed in favour of third defendant was examined as D.W.2. The attesor to the Will in favour of third defendant was examined as D.W.3. On behalf of the defendants, 18 documents were marked as Exhibits B.1 to B.18.



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7. The Trial Court on appreciation of oral and documentary evidence available on record came to the conclusion that, Natesa Merkondar died on 28.03.1956 prior to coming into force of Hindu Succession Act and hence, his entire estate would go to his wife first defendant on the date of his death and after enlargement of the limited estate, first defendant sold portions of the suit properties, namely, items 1, 2 and 3 in 'B' Schedule, items 2, 3 and 4 in 'A' Schedule and properties in 'D' Schedule to the third defendant. The properties described in 'C' Schedule was bequeathed in favour of third defendant. Therefore, the Trial Court dismissed the suit filed by the plaintiff by holding that plaintiff was not entitled to any of the reliefs prayed for. Aggrieved by the same, plaintiff preferred an appeal before the First Appellate Court in A.S.No.77 of 2001. The First Appellate Court reversed the findings of the Trial Court on the ground that, death of Natesa Merkondar prior to coming into force of Hindu Succession Act was not proved. The First Appellate Court also found that, Will executed in favour of third defendant under Exhibit B.12 was not proved in accordance with law. As a necessary consequence, the First Appellate Court decreed the suit by granting declaration and injunction as prayed for. Aggrieved by the



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same, the third defendant has come by way of this Second Appeal.

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8. At the time of admission, this Court formulated the following substantial question of law by an order, dated 29.11.2002:

"a) Whether the reversing judgment of the Lower Appellate Court is sustainable in law as it has not considered the entire evidence available on record and the relevant provision of law applicable to the facts of the case?"

9. The learned Counsel appearing for the appellant submitted that death extract marked as Exhibit B.1 would clinchingly prove that, first defendant's husband and plaintiff's father Natesa Merkondar died on 28.03.1956 prior to coming into force of Hindu Succession Act and therefore, daughters cannot claim any right in the property of male Hindu, who died prior to coming into force of 1956 Act. The learned Counsel for the appellant submitted that the reasoning given by the First Appellate Court for ignoring Exhibit B.1 death extract is not sustainable in law. The learned Counsel for the appellant also submitted that even assuming Natesa Merkondar died after coming into force of 1956 Act as a clause 1 heir, first defendant is entitled to 1/3rd share in the suit property. The defendants being purchaser of property from the first



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defendant is entitled to claim equity in respect of 1/3rd share of the first defendant.

10. In the light of the arguments made by the learned Counsel for the appellant, the following additional substantial question of law is taken up for consideration in this second appeal:

"b) Whether the finding of the First Appellate Court that Exhibit B.1 death extract is not a conclusive proof to prove that Natesa Merkondar died prior to coming into force of Hindu Succession Act is legally sustainable?"

11. The learned Counsel appearing for the respondents was heard on both the substantial questions of law. He submitted that D.W.1 in his evidence clearly admitted there was a partition between Natesa Merkondar and his father in the year 1962. Therefore, the death of Natesa Merkondar should have taken place only after 1962. In the light of the admission of D.W.1, Exhibit B.1 death extract produced by the third defendant cannot be treated as conclusive proof and in the absence of corroborating evidence, the same cannot be accepted. In support of his contention, the learned Counsel for the respondents relied on the judgment in *Satpal Singh Vs. State of Haryana reported in 2010 (8)*



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SCC 714. The learned Counsel for the respondents further submitted that, the third defendant had taken a lead role in execution of Exhibit B.12 Will, dated 28.05.1992 in his favour. When the said suspicious circumstance is not dispelled by the propounder, the Will relied on by the third defendant will not advance his case. In support of the said contention, the learned Counsel for the respondents relied on **AIR 1959 SCC 443 [H.Venkatachala Iyengar Vs. B.N.Thimmajamma and Others]**.

12. The plaintiff in the plaint averment pleaded oral partition. However, there is no enough material evidence available on record to prove the oral partition pleaded by the plaintiff. In such circumstances, we have to consider the alternative case set up by the plaintiff. Alternatively plaintiff contended Natesa Merkondar died subsequent to 1956. Therefore, on his death, the plaintiff was entitled to 1/3rd share in the suit property along with her mother and sister, who were arrayed as D.1 and D.2. The said claim of plaintiff was mainly resisted by the third defendant, purchaser of the property from mother on the ground that Natesa Merkondar died on 28.03.1956 as per death register extract marked as Exhibit B.1. The learned Counsel for the appellant vehemently



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contended that the death extract produced as Exhibit B.1 conclusively proves Natesa Merkondar died prior to coming into force of 1956 Act and in the absence of any contra evidence, the Trial Court rightly relied on the same to come to the conclusion that Natesa Merkondar died prior to coming into force of Hindu Succession Act and the said finding was erroneously reversed by the First Appellate Court. In the normal circumstances, based on death extract certificate issued by the competent authority, we can come to the conclusion that death had occurred on the date mentioned in the said certificate. In the peculiar circumstances of the case, when appellant / third defendant was examined as D.W.1, he admitted there was a partition between Natesa Merkondar and his father in the year 1962. Therefore, even as per the admission of D.W.1, Natesa Merkondar was alive in the year 1962. In such circumstances, the entry in Exhibit B.1 with regard to date of death of Natesa Merkondar pales into insignificance and the presumption created by death extract is rebutted by the fatal admission made by D.W.1. Therefore, the findings reached by the First Appellate Court that Exhibit B.1 is not conclusive is sustainable in law and the question of law b) is accordingly answered against the appellant.



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13. Once we come to the conclusion that, Natesa Merkondar died subsequent to coming into force of Hindu Succession Act, plaintiff, first and second defendants are entitled to 1/3rd share each in the suit property. The third defendant purchased the portion of the suit property from the first defendant. The other portion was bequeathed to third defendant under Exhibit B.12 Will. Therefore, it is the contention of the third defendant that under Exhibit B.2 sale deed and Exhibit B.12 Will, third defendant is entitled to 1/3rd of property covered by the document, namely, interest of the first defendant in the said property. Therefore, the 1/3rd property available to first defendant may be allotted to the share of third defendant. In order to prove Exhibit B.12 Will, the attesor to said document was examined as D.W.3. A perusal of the evidence of D.W.3 would suggest that he had clearly deposed about the execution of the Will and signing of the Will by the testatrix. Therefore, based on evidence of D.W.3 attesor, we can safely come to the conclusion that due execution of Will was proved by the third defendant. However, the First Appellate Court dis-believed the Will by pointing out suspicious circumstances. The First Appellate Court pointed out two suspicious circumstances. Firstly, absence of any reasoning for excluding the



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daughters, namely, plaintiff and second defendant in the Will executed by first defendant. Secondly, it was pointed out that the Will was not pleaded by third defendant in his original written statement and the same was pleaded only in the additional written statement filed by him.

14. As far as the exclusion of daughters is concerned, the very purpose of executing the Will is to tinker with a normal rule of succession. Therefore, failure to give any reason to exclude the daughters *per se* may not be treated as a serious suspicious circumstance surrounding the Will. On the other hand, it is seen from the records, suit was filed by the plaintiff claiming partition on 17.07.1986 against mother and her sister. The Will came to be executed by first defendant mother on 28.05.1992 nearly six years after filing of the suit. Therefore, very filing of suit for partition by daughter proves mis-understanding between daughter and mother. Therefore, at the time of execution of Will, there was no good relationship between testatrix and plaintiff. In such circumstances, exclusion of daughters in the Will cannot be treated as un-natural. The same has been over-looked by the First Appellate Court. As far as additional written statement is concerned, the same was filed with a leave of the Court and it has become part and parcel of the



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pleadings. Therefore, non-mentioning of the Will in the original written statement cannot be put against third defendant. Therefore, the finding of the First Appellate Court with regard to the proof of Will is liable to be set aside and I hold, Will relied on by the third defendant, dated 28.05.1992 stood proved.

15. In view of the discussion made earlier, I hold that after death of Natesa Merkondar, plaintiff, 1st defendant and 2nd defendant each were entitled to 1/3rd share in the suit property and the third defendant being a purchaser / legatee of property from the first defendant is entitled to work out his equity in respect of 1/3rd share of the first defendant. The sale and Will executed by first defendant in favour of third defendant is valid to the extent of her 1/3rd share alone. The third defendant is entitled to work out equity in final decree proceedings.

16. In fine,

a) The Second Appeal stands partly allowed by setting aside the judgment and decree passed by the First Appellate Court.

b) The suit is dismissed regarding prayer for declaration and injunction.



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c) The plaintiff is entitled to alternative prayer of partition and a preliminary decree for partition of 1/3rd share in the suit property.

d) The sale and Will executed by the first defendant in favour of third defendant is valid to the extent of 1/3rd share of first defendant and third defendant is entitled to work out his equity in the final decree proceedings. There shall be no order as to costs.

12.07.2024

NCC : Yes
Index : Yes
Internet : Yes
BTR

To

- 1.The Principal District Judge,
Thanjavur.
- 2.The District Munsif Court,
Thanjavur.
- 3.The Section Officer,
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

BTR

Judgment made in
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Dated:
12.07.2024