



S.A.No.469 of 2002

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **18.06.2024**

CORAM

THE HON'BLE MR.JUSTICE S.SOUNTHAR

S.A.No.469 of 2002

Narasimha Bhattar

... Appellant/Appellant/
1st Defendant

Vs.

1.Venkatesan

2.S.Madhavan

3.S.Govindarajan

4.K.Rukmani

5.J.Janaki @ Saroja

6.S.Rengasami

7.S.Muralidharan

8.Vaideki

9.Janaki

10.Vijaya

11.Kamala

... Respondents/Respondents/
Plaintiffs & Defendants 2-7



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PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree of the learned II Additional District Judge, Trichy, dated 19.07.2001 in A.S.No.334 of 1999 confirming the judgment and decree of the learned I Additional Subordinate Judge, Trichy, dated 09.07.1999.

For Appellant : Mr.P.Thiyagarajan

For R1-R3, R4-R7
R9-R11 : Mr.T.Antony Arulraj

For R8 : No Appearance

JUDGMENT

The 1st defendant in the suit for partition is the appellant.

2. The suit filed by the respondents 1 to 5 was decreed by the trial Court and the findings of the trial Court were affirmed by the first appellate Court. Aggrieved by the concurrent findings, the 1st defendant is before the Court.

3. According to the respondents 1 to 5 / plaintiffs, the suit property originally belongs to one Lakshmi Ammal. She executed a settlement deed, dated 20.05.1936 marked as Exhibit A.1 giving life estate in favour



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of her daughter Seshammal with vested remainder to Seshammal's grant children Srinivasa Bhattar and Jeyalakshmi @ Pitchammal. The respondents 1 to 5 are the children of the said Jeyalakshmi @ the Pitchammal. The appellant and other respondents are children of above said Srinivasa Bhattar. Thus, claiming half share in the suit properties, the suit for partition was made.

4. The appellant / 1st defendant filed a written statement and resisted the suit on the ground that Lakshmi Ammal executed a Will on 17.06.1935 marked as Exhibit B.1 giving the suit properties to Srinivasa Bhattar, who is the father of the defendants. He specifically denied the execution of settlement deed, dated 20.05.1936 pleaded by the plaintiff. Thus, by relying on the Will allegedly executed by Lakshmi Ammal, dated 17.06.1935, the appellant and other defendants sought for dismissal of the suit.

5. Before the trial court, the 1st plaintiff was examined as P.W.1 and 3 other witnesses were examined as P.W.2 to P.W.4. The appellant / 1st defendant was examined as D.W.1 and the 2nd defendant was examined as D.W.2. On behalf of the plaintiffs, 11 documents were



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marked as Exhibits A.1 to A.11. On behalf of the defendants, 21 documents were marked as Exhibits B.1 to B.21. Exhibits X.1 to X.3 documents relating to registration of settlement deed pleaded by the plaintiff which were marked through the official respondents.

6. The trial Court after appreciating the oral and documentary evidence, arrived at a conclusion that Exhibit A.1 settlement deed relied on by the plaintiff was proved. As a necessary consequence, the Will relied on by the defendants was rejected. In view of the said findings, the trial Court granted a decree for partition of half share in favour of the plaintiffs. Aggrieved by the same, the 1st defendant preferred an appeal in A.S.No.334 of 1999 on the file of II Additional District Court, Tiruchirappalli. The first appellate Court affirmed the findings of the trial Court. Aggrieved by the same, the 1st defendant is before this Court.

7. At the time of admission, this Court formulated the following substantial question of law, dated 17.04.2002:

“1. Whether the Courts below are right in holding that the original of Exhibit A.1 is proved when the same is very seriously disputed and whether in any event, the provisions



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of Section 69 of the Evidence Act are not attracted?

2. When admittedly the attestor and scribe of the original of Exhibit B.1 are dead and when Exhibit B.1 is not seriously challenged, the Courts below are right in rejecting Exhibit B.1 as 'not proved'?"

8. The learned counsel appearing for the appellant submitted that the Courts below have committed a serious error of law in holding that Exhibit A.1 settlement deed relied upon by the plaintiffs was proved, when the attestor to the said document has not been examined. He further submitted that original of Exhibit A.1 settlement deed was not produced by the plaintiffs and hence, the Courts below ought not to have pressed into service presumption available to the old documents without production of the original documents. Therefore, it is the submission on the learned counsel for the appellant that the Will relied on by the plaintiffs was not at all proved. The learned counsel appearing for the appellant further submitted that execution of Exhibit B.1 Will relied on by the defendants was not at all seriously disputed by the plaintiffs and hence, the Courts below ought not to have rejected Exhibit B.1 when subsequent settlement deed relied on by the plaintiff is not proved. The learned counsel for the appellant further submitted that the suit for partition filed by the plaintiffs is bad for partial partition as the plaintiffs



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failed to include the property situated at Uthamaseri. It is the submission of the learned counsel for the appellant that the properties situated in Uthamaseri village were settled by Lakshmi Ammal's husband Narasimha Bhattar in favour of Seshammal with life estate and vested remainder to Srinivasa Bhattar and Jeyalakshmi @ Pitchammal. If the Will executed by Seshammal, dated 26.11.1969 marked as Exhibit A.2 fails, automatically the defendants are entitled to half share in the lands in Uthamaseri village. Therefore, the Courts below ought to have dismissed the suit on the ground of partial partition.

9. The plaintiffs claimed half share over the suit properties under Exhibit A.1 settlement deed, dated 20.05.1936 executed by Lakshmi Ammal in favour of Seshammal for life with vested remainder in favour of Srinivasa Bhattar and Jeyalakshmi @ Pitchammal. It is seen from the evidence let in by both the parties, the attestors to the settlement deed Exhibit A.1 were not alive at the time of trial. Taking into consideration Exhibit A.1 is more than 30 years old document, the Courts below invoked presumption available to the old document and came to the conclusion that the said settlement deed was proved. However, as rightly contended by the learned counsel for the appellant, the presumption



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available to the old document can be pressed into service only if the original of the document is produced. In the case on hand, admittedly the plaintiffs failed to produce the original and only certified copy was marked as Exhibit A.1. In such circumstances, the Courts below are not justified in relying on presumption available to the old document while upholding the validity of Exhibit A.1. The plaintiffs have not taken any steps to prove Exhibit A.1 by other means as per rule of evidence under Section 69 of Evidence Act. Therefore, the conclusion of the Courts below that Exhibit A.1 settlement deed relied on by the plaintiffs was proved is not correct and the said finding is to be set aside.

10. The learned counsel appearing for the appellant vehemently contended that the execution of Exhibit B.1 Will relied upon by the defendants was not seriously disputed by the plaintiff and hence, the same shall be up-held in case the Court comes to the conclusion that the settlement, Exhibit A.1 was not proved by the plaintiffs in the manner known to law. This Court already came to the conclusion that Exhibit A.1 has not been proved by the plaintiffs. The propounder of the Will is bound to prove the execution of Will whether it is denied or not as per Section 68 of Evidence Act. It is settled law whether execution of Will is



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seriously disputed or not, the same has to be proved in terms of Section 63(a) of Indian Succession Act read with Section 68 of Evidence Act. If both the attestors are dead, the propounder of the Will can lead other evidence as contemplated under Section 69 of Evidence Act and proceed to prove the Will. In the case on hand, the appellant / 1st defendant has not taken any steps to prove Exhibit B.1 Will relied upon by him by taking recourse to Section 68 and 69 of Evidence Act. In such circumstances, the submission made by the learned counsel for the appellant that Exhibit B.1 Will shall be upheld in the absence of serious dispute by the plaintiffs is not acceptable by this Court. The second question of law is accordingly answered against the appellant and in favour of the respondents. In view of the answer to 1 and 2, this Court comes to the conclusion that both Exhibit A.1 relied upon by the plaintiffs and B.1 relied upon by the defendants were not proved. It is not in dispute that Lakshmi Ammal and Narashimma Bhattar had a daughter by name Seshammal. The said Seshammal had only daughter Ranganayaki, who pre-deceased her. plaintiffs' Predecessor in interest Jayalakshmi @ Pitchammal and defendants' predecessor Srinivasa Bhattar are children of said Ranganayaki. Therefore, even if Exhibit A.1 and B.1 relied on by respective parties are not proved, by operation of



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law of succession, Jeyalakshmi @ Pitchammal and Srinivasa Bhattar are entitled to half share in the suit property. Therefore, the decree passed by the Courts below granting half share in favour of the respondents 1 to 5 / plaintiffs need not be disturbed in view of the answer given to the substantial questions of law in this second appeal. Therefore, this Court concurs with the final conclusions of the Courts below granting decree for half share in favour of the plaintiffs.

11. The learned counsel also made submission regarding partial partition, namely non inclusion of properties situated in Uthamaseri village covered by settlement deed of Narasimha Bhattar and Will of Seshammal. The plea of partial partition was not specifically raised by the 1st defendant in his written statement. Therefore, no issue was framed with regard to the partial partition. It is the case of the plaintiffs that the properties situated in Uthamaseri village was covered by Will executed by Seshammal marked as Exhibit A.2, but the Courts below has not considered the validity of the said Will in view of the fact that the properties covered by the Will were not included in the plaint schedule. Since the question of partial partition was not specifically raised before the Courts below, there was no occasion for the Courts below to decide



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the validity of the Exhibit A.2 Will relied on by the plaintiffs and decide the said issue. The 1st defendant is not entitled to raise the plea of partial partition in the second appeal without canvassing the same before the Courts below. Further, it is made clear that the appellant / 1st defendant is entitled to work out his remedy in respect of the properties in Uthamaseri village in the manner known to law. If any proceeding is initiated by the appellant in this regard, it is always open to the respondents 1 to 5 to raise all the defence available to him under law including the defence based on Exhibit A.2 Will.

12. In view of the above, this Second Appeal stands dismissed. No costs.

18.06.2024

Index : Yes / No
Internet : Yes / No

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- To
- 1.The II Additional District Judge,
Trichy.
 - 2.The I Additional Subordinate Judge,
Trichy.
 - 3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR,J.

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Judgment made in
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Dated:
18.06.2024