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A.S.No.531 of 2025

**THE HIGH COURT OF JUDICATURE AT MADRAS**

**Date : 03.04.2025**

**CORAM:**

**THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR**

**A.S.No.531 of 2025 & CMP.No.8140 of 2025**

1. Md.Basheeruddin Ahamed
2. K.Shaneena Begum

... Appellants

Versus

1. Dr.Shenaz Akther  
Saleem Begum
2. Dr.Md.Riazuddin Ahamed
3. Md.Ziauddin Ahamed

... Respondents

**PRAYER :** Appeal Suit filed under section 96 of Code of Civil Procedure to set aside the decree and judgment dated 27.08.2024 passed in O.S.No.989 of 2013 on the file of the XXII Additional Judge, Allikulam, Chennai and allow this appeal.

For Appellants : Mr.E.Sivanandan



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## **JUDGMENT**

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Challenge has been made to the decree and judgment of the trial Court decreeing the suit for a preliminary decree declaring the rights of first and third plaintiffs to an extent of 1/7 and 2/7 shares respectively, in the present appeal by the second defendant.

2. The parties are arrayed as per their own ranking before the trial Court.

3. The suit has been filed by the plaintiffs for partition and separate possession. The suit property was originally owned by one Md Azizuddin, the father of the plaintiffs 1 and 3 and husband of the second plaintiff. The first and second defendants are sons of the said Azizuddin. The said Azizuddin died on 02.08.2006 leaving behind the plaintiffs and the first and second defendants as his legal heirs. After his demise, the plaintiffs and the defendants are in joint enjoyment of the property as co-owners. Due to difference of opinion between the plaintiffs and the defendants, they are not able to enjoy the property jointly. The plaintiffs suggested to sell the property and to share the sale proceeds



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amongst themselves. However, the defendants refused to co-operate with the plaintiffs. Hence, the suit. After filing of the suit, the second plaintiff died and hence, the first plaintiff is entitled to 8/56 share and the third plaintiff is entitled 16/56 share.

4. The case of the first defendant is that he never objected to sell the plaint schedule property. The suit property is not properly calculated and wrongly mentioned. After deducting her 1/8<sup>th</sup> share, the remaining 49 shares have to be divided among the children of the second plaintiff as per law. The first plaintiff is entitled to 7/49 share and not 7/56 share. It is his further case that his father has not executed any Will as stated by the second defendant. Hence, according to the first defendant he is having 14/49 share in the plaint schedule property.

5. The second defendant filed a written statement stating that the suit property has been developed by his parents and the second defendant has given financial support to his father. The first defendant and the first plaintiff were students and the third plaintiff was out of station and he has not turned up for a



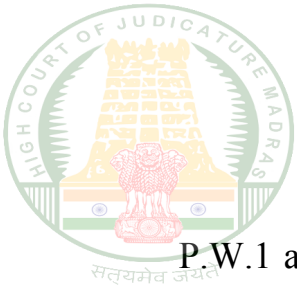
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long time either to assist his father nor help him by way of monetary means and not provided even square meals to the second plaintiff. The first defendant with illegal custody of his mother had obtained the settlement in his favour. It is his further case that the second defendant's father had written a Will called as Hiba in his favour and his minor children on 27.06.2006. Hence, opposed the suit.

6. On the basis of the above pleadings, the following issues have been framed by the trial Court :

1. Whether the plaintiffs are entitled for any share over the suit property and if are, what is their share?
2. Whether the alleged Will dated 27.06.2006 is valid?
3. Whether the plaintiffs are entitled to a preliminary decree for partition?
4. To what other reliefs the plaintiffs are entitled to?

7. On the side of the plaintiffs, the first plaintiff examined herself as



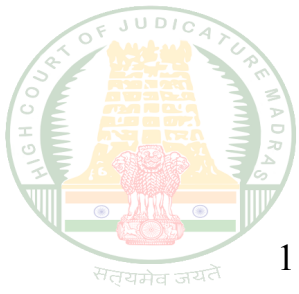
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P.W.1 and Ex.A.1 to Ex.A.5 have been marked. On the side of the defendants, second defendant examined himself as D.W.1 and Ex.B.1 to E.B.8 have been marked.

8. The trial Court, considering the entire evidence, both oral and documentary, has come to the conclusion that the Will and the Hiba have not been established and granted preliminary decree to the plaintiffs. Challenging the same, the present appeal came to be filed.

9. The learned counsel appearing for the appellant would submit that Ex.B.1 dated 27.06.2006 is a Hiba wherein the property has been given to the second defendant and pursuant to the same, the properties have been settled in favour of the third defendant on 04.12.2009. Therefore, it is his contention that the trial Court has not considered the documents property.

10. This Court is inclined to dispose of the appeal by invoking Order 41 Rule 11 Code of Civil Procedure and hence, no notice is sent to the respondents.



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11. In the light of the above submissions, now the point that arise for consideration in this appeal are :

1. Whether the second defendant has proved the Will dated 27.06.2006?

2. Whether the Will can be construed as Hiba?

12. Points 1 and 2 :

The relationship between the parties are not in dispute. The first and third plaintiffs and the defendants 1 and 2 are children of one Md.Azizuddin. The property originally owned by Md.Azizuddin, which is not in dispute. The only defense raised by the second defendant is that his father has executed a Will, which is otherwise known as Hiba on 27.06.2006 in his favour Therefore, he is entitled to the property. The very pleading of the second defendant clearly indicate that he was not in a position to come up with a stand whether Ex.B.1 is a Will or Hiba. Even the contention of the appellant is assumed to be true that Ex.B.1 is a Will, it is relevant to note that the Will in the eye of law, cannot be given any validity. As far as disposition of the Will in Mohamaddian law, the bequeath shall not exceed 1/3. Further consent of other legal heirs has also not



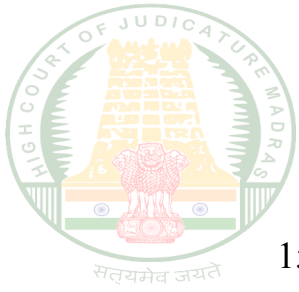
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been obtained. Therefore, Ex.B.1 cannot be given any importance.

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13. Further to construe that Ex.B.1 is a Will, the mandatory requirement under the law to prove the Will has not been done. None of the attesting witnesses were examined as mandated under section 68 of the Indian Evidence Act and Section 67 Bharathiya Sakshya Adhinayam. In such view of the matter, E.B.1 cannot be construed as a valid Will.

14. With regard to the other contention of the appellant that Ex.B.1 should be construed as a Hiba is concerned, to constitute valid Hiba, there must be acceptance by the donee and possession has also to be handed over. When Ex.B.1 carefully perused, no such recitals are found in Ex.B.1. Whereas, it is written as a Will and there is no recitals to the effect that the said document has been accepted by the donee and possession has been handed over on the same day. In such view of the matter, the alternative contention of the appellant that the document is Hiba also has no legs to stand. Hence, I do not find any merits in this appeal. The points are answered accordingly.



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15. In the result, this Appeal Suit is dismissed and the decree and judgment of the trial Court in O.S.No.989 of 2013 dated 27.08.2024 is confirmed. No costs. No costs. Consequently, connected miscellaneous petition is closed.

**03.04.2025**

Index : Yes / No

Internet: Yes

Speaking/non speaking order

vrc

To,

1. The XXII Additional Judge, City Civil Court, Chennai.
2. V.R.Section, High Court, Madras.



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**N. SATHISH KUMAR, J.**

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