



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.01.2025

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

S.A.No.1563 of 2011 and
M.P.No.1 of 2011

1.Pakkiri Mohamed
2.Alauddin

... Appellants / Plaintiffs

Vs.

1.Allapichai
2.Abdul Rahman
3.Basha
4.Bahadursha
5.Mohammed Ali Noor,

... Respondents / Defendants

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree made in A.S.No.25 of 2008 dated 10.08.2011 on the file of the Principal District Judge, Cuddalore, reversing the judgment and decree made in O.S.No.39 of 1997 dated 28.02.2003 on the file of the Subordinate Judge, Panruti.

For Appellants : Mr.P.Dinesh Kumar

For Respondents : Mr.R.Gururaj



JUDGMENT

This Second Appeal has been filed to set aside the judgment and decree made in A.S.No.25 of 2008 dated 10.08.2011 on the file of the Principal District Judge, Cuddalore, reversing the judgment and decree made in O.S.No.39 of 1997 dated 28.02.2003 on the file of the Subordinate Judge, Panruti.

2. Heard Mr.P.Dinesh Kumar, learned counsel for the appellants, Mr.R.Gururaj, learned counsel for the respondents and perused the materials available on record.

3. The plaintiffs are the appellants. The plaintiffs have filed a suit against the defendants for the relief of partition in respect of 2/7 share in the suit property. The Trial Court has passed a preliminary decree by fixing the share of the plaintiffs as 2/7 in the suit property. On the First Appeal preferred by the first defendant, the First Appellate Court has allowed the First Appeal and set aside the preliminary decree passed by the Trial Court. Now the plaintiffs have filed this Second Appeal.



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4. The short facts pleaded in the plaint are as follows:

The suit properties originally belonged to Gudumian Sahib. He has three sons by names Mohamed Ali Sahib, Khan Sahib and Muthalif Sahib. Muthalif Sahib had executed a registered release deed dated 15.02.1971 releasing his rights in the suit properties. The plaintiffs and the defendants 1 to 5 are entitled to the suit properties and they have got equal share in the suit properties. Gudumian Sahib executed a registered Will dated 23.02.1971 and bequeathed the suit properties in favour of his elder son Mohamed Ali Sahib and younger son Khan Sahib. As per the terms of the Will, the defendants 1 to 4 became entitled to the suit items after the fourth defendant attained majority. Each of the plaintiffs is entitled to 1/7 share in the suit property. As the defendants did not come forward to effect partition, the plaintiffs have filed the suit seeking a preliminary decree for partition in respect of 2/7 share.

5. The averments made in the written statement filed by the defendants are as follows:

Gudumian Sahib was the owner of the suit properties. Muthalif Sahib executed a release deed on 15.02.1971. However, it does not have any



legal effect. Muthalif Sahib had no title in respect of the subject properties of the release deed, because on the date of executing the release deed, Muthalif Sahib had only an expectancy right and he did not have any absolute right. So there cannot be any conveyance in respect of expectancy right. Muthalif Sahib was entitled to 1/3 share in the suit properties. The first defendant is in possession of Muthalif Sahib's 1/3 share. It is true that Gudumian Sahib has executed a Will on 23.02.1971 and the said Will is invalid because three sons of Gudumian Sahib are entitled to the properties and the Will has been executed without the consent of the other sharers. Hence, the Will is invalid and unenforceable. The first defendant has prescribed title by adverse possession over the suit properties. The plaintiffs are not entitled to the relief of partition as prayed.

6. On the basis of the above pleadings, the Trial Court has framed the following issues:

"1. Whether this suit for partition is not maintainable?

2. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction?



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3. Whether the release deed dated 15.02.1971 is true and valid?

4. Whether the 'Will' dated 23.02.1971 is true and valid?

5. Whether the plaintiffs are entitled to 2/7 the share in the suit properties?

6. Whether the plaintiffs are entitled to preliminary decree for partition as prayed for?

7. To what reliefs the plaintiffs are entitled?"

7. During the course of the trial, on the side of the plaintiffs, P.W.1 was examined and Exs.A1 to A28 were marked. On the side of the defendants, D.W.1 was examined and Ex.B1 was marked.

8. At the conclusion of the trial and on considering the evidence on record, the Trial Court has passed a preliminary decree for partition of the plaintiffs' 2/7 share in the suit properties. The First Appeal preferred by the first defendant challenging the preliminary decree was allowed and the preliminary decree passed by the Trial Court was set aside. Aggrieved over that, this Second Appeal has been filed by the plaintiffs by raising the following substantial question of law:



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"Is the learned District Judge is right in allowing the appeal on the ground that the suit does not have any cause of action, as the 4th defendant was a minor at the time of suit, whereas Exs.A4 to A6 would amply establish the fact that the 4th defendant had attained majority even before the disposal of O.S.No.65 of 1996?"

9. The learned counsel for the appellants submitted that the First Appellate Court had misled itself that there is no cause of action despite the fact that the Will was marked as Ex.A3 which had settled the right in respect of the suit properties in favour of the plaintiffs and the defendants. So far as the other aspects of the cause of action of the Will in respect of more than 1/3 share, none of the children of Gudumian Sahib had raised any objection. Even though the Trial Court has rightly decreed the suit, the First Appellate Court has erratically allowed the Appeal by setting aside the preliminary decree passed by the Trial Court.

10. The learned counsel for the respondents submitted that the suit itself is a pre-matured one as the fourth defendant who is one of the grandsons and who is the beneficiary of the Will has not attained majority



on the date of the suit and the grand daughters of the original owner Gudumian Sahib were not impleaded as parties in the suit. The First Appellate Court has rightly allowed the appeal by setting aside the preliminary decree passed by the Trial Court. Even after that, the appellants / plaintiffs did not choose to file a fresh suit on getting cause of action after the fourth defendant attained majority.

11. The fact that Gudumian Sahib was the owner of the suit property was not in dispute and the fact that one of the sons of Gudumian Sahib *viz.*, Muthalif Sahib relinquished his right over the suit property and executed a release deed on 15.02.1971 in respect of his right over the property is also not denied. Further fact that Gudumian Sahib has executed a Will on 23.02.1971 and bequeathed the suit property in favour of his grandsons born to his two sons *viz.*, Mohamed Ali Sahib and Khan Sahib was also accepted.

12. Gudumian Sahib has three sons *viz.*, Mohamed Ali Sahib, Khan Sahib and Muthalif Sahib. Muthalif Sahib had relinquished his right as early as on 15.02.1971 and executed a release deed in this regard. The plaintiffs and the fifth defendant are the sons of Mohamed Ali Sahib and the



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defendants 1 to 4 are the sons of Khan Sahib. The plaintiffs and the defendants are the beneficiaries of the Will dated 23.02.1971 executed by their grandfather Gudumian Sahib. The genuineness of the Will is also not in dispute. As per the terms of the Will, the two sons *viz.*, Mohamed Ali Sahib and Khan Sahib have to maintain the suit properties until their sons who are the plaintiffs and the defendants herein attain majority. After the grandsons attained majority, they can have the absolute right and enjoyment of the suit properties.

13. At the time when the suit was filed, all the parties except the fourth defendant had attained majority. So it is claimed by the respondents that the suit is a pre-matured one as there is no cause of action for the plaintiffs until the fourth defendant attains majority. In support of the above contention, the learned counsel for the respondents cited the decision of the Hon'ble Supreme Court in the case of *Ramsaran Lall and Others Vs. Mst.Domini Kuer and Others, reported in 1961 0 AIR(SC) 1747*. In the above judgment, it is held that the right of pre-emption would arise only at the completion of valid and *bonafide* sale and before the completion of the



sale, there cannot be any cause of action for the suit seeking right of pre-emption.

14. In the instant case, the suit has been filed for the relief of partition of the plaintiffs' share as per the Will (Ex.A3). So far as the entitlement of the suit property of the plaintiffs and defendants is concerned, it is a settled right and that takes effect immediately after the death of the testator. So far as the right to enjoy the properties is concerned, that can take effect only after all the grandsons of the testator attain majority. The plaintiffs have filed the suit for partition for determining their share as per the Will and for which, cause of action is available even on the date when the suit was filed. So there cannot be any trouble for the Courts to consider the cause of action on the basis of the Will and determine the shares of the parties and pass a preliminary decree. However, to partition the suit property as per the shares determined in the preliminary decree and to hand over the possession, final decree process should take place. In the meanwhile, the fourth defendant had also attained majority and hence, there cannot be any hurdle to pass final decree subsequent to the preliminary decree passed.



15. Even though the learned counsel for the respondents contended that the grand daughters of Gudumian Sahib were also given with the right in the suit property, that was not the pleadings of the defendants made in their written statement. The recitals of the Will does not state about any entitlement given to the grand daughter. On the other hand, the recitals of the Will makes it clear that the grand daughters does not have any right and the suit properties are bequeathed only for the grandsons. Even for the sake of argument, it is admitted that the grand daughters also have right, it is for the grand daughters to establish the same extraneous to the Will dated 23.02.1971 which was marked as Ex.A3. None of the grand daughters have also filed a petition to implead themselves as parties to the suit. In the event of grand daughters establishing any right, it is needless to state that the preliminary decree that might be passed in the suit will not bind their interest as they are not parties.

16. Since the issue of entitlement of grand daughters is not figured before the Trial Court, the Trial Court did not have the compulsion to look into the above aspect. Even though the Trial Court has rightly appreciated the rights of the parties on the basis of the Will and other facts established



before it, the First Appellate Court has misled itself by arriving at a conclusion that on the date of filing of the suit, the plaintiffs did not have any cause of action on the wrong notion that the plaintiffs will have right to settle the shares of the Will only after the fourth defendant attains majority.

17. At the risk of repetition, it is reiterated that the attainment of majority of the fourth defendant or other grand sons of the testator is for the purpose of entrusting the possession and enjoyment of the properties and not for determining the shares on the date when the suit was filed. The cause of action very much available to the plaintiffs at the time of filing the suit has not been appreciated by the First Appellate Court. Hence, the substantial question of law is answered in favour of the appellants.

18. In the result, this Second Appeal is allowed and the judgment and decree of the First Appellate Court made in A.S.No.25 of 2008 dated 10.08.2011 is set aside. The preliminary decree passed by the Trial Court is restored. No costs. Consequently, connected miscellaneous petition is closed.

22.01.2025

Speaking order / Non Speaking Order



Index : Yes / No
Neutral Citation : Yes / No
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R.N.MANJULA, J.

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To

1.The Principal District Judge,
Cuddalore.

2.The Subordinate Judge,
Panruti.

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