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S.A.No.663 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.01.2025

CORAM

THE HONOURABLE MRS. JUSTICE **R.HEMALATHA**

S.A.No.663 of 2017 and
C.M.P.No.16985 of 2017

1. Latha

2. Anushka

... Appellants

(A2 is declared as major and A1 is discharged
from Guardianship vide order of this Court, dated
20.03.2024 made in C.M.P.No.6522 of 2024)

Vs.

Annakili

... Respondent

Prayer: Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 15.03.2017 passed in A.S.No.9/2016, on the file of the Principal District Judge, Tiruvarur upholding the decree and judgment dated 21.06.2016 passed in O.S.No.29/2012, on the file of the Subordinate Judge, Mannargudi.

For Appellants	:	Mr.S.Senthil (for A1)
		Mr.A.Manoj Kumar (for A2)
For Respondent	:	Mr.S.Kothandraman



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JUDGMENT

The appellants are the defendants in O.S.No.29 of 2012 on the file of the Subordinate Judge, Mannargudi. The Respondent / Plaintiff filed the suit for partition of the suit properties into two equal shares and to allot one such share to her.

2. For the sake of convenience, the parties are referred to as per their ranking in the Trial Court and at appropriate places, their rank in the present second appeal would also be indicated.

3. The case of the plaintiff in a nutshell is as follows :

The plaintiff and the first defendant's husband Chandrasekaran are the children of one late Balasundaram and late Amirdham. Amirdham predeceased Balasundaram. Balasundaram purchased the suit properties from out of his own income. The plaintiff's husband also contributed for the purchase of certain items of the suit properties. The plaintiff and her brother late Chandrasekaran were jointly enjoying the suit properties. On



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01.08.2011, the plaintiff's brother Chandrasekaran died and therefore, the plaintiff was unable to enjoy the suit properties jointly with the defendants. Therefore, the plaintiff issued a legal notice dated 28.12.2011 (Ex.A8) to the first defendant. The first defendant received the said notice and sent a reply dated 28.01.2012 (Ex.A10) with false allegations and according to the defendants, late Balasundaram had executed a Will in favour of late Chandrasekaran. However, the said Will is not true and valid. Hence the suit.

4. The suit was resisted by the defendants on the following grounds:

- i. Balasundaram during his life time executed a Will dated 30.07.1999 in favour of his son Chandrasekaran (since deceased).
- ii. After the death of Balasundaram, Chandrasekaran alone was in possession and enjoyment of the suit properties.
- iii. The contention of the plaintiff that 'A' Schedule properties are the self acquired properties of Balasundaram, is totally false.



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iv. In fact, the plaintiff was given Sridhana at the time of her marriage. Moreover, the plaintiff got married prior to 1989 and therefore, she cannot claim any right in the ancestral properties.

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

- i. *Whether the plaintiff is entitled to 1/2 share in the suit properties?*
- ii. *Whether Balasundaram executed a Will, dated 30.07.1999 in favour of late Chandrasekaran?*
- iii. *To what relief the plaintiff is entitled?*

6. In the Trial Court, the plaintiff examined herself and marked Ex.A1 to Ex.A15. The first defendant examined herself. However, no documentary evidence was adduced on her side.

7. The learned Subordinate Judge, Mannargudi on considering the evidence on record, decreed the suit in favour of the plaintiff vide his decree and judgment dated 21.06.2016 on the following grounds:



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- i. The defendants failed to cross examine P.W.1 though sufficient opportunity was granted to them. Therefore the evidence of P.W.1 remains unrebutted.
- ii. Though D.W.1 filed her proof affidavit, she did not appear before the Court for subjecting herself for cross examination.
- iii. The documentary evidence adduced on the side of the plaintiff clearly shows that all the suit properties except item 8 in 'A' Schedule property absolutely belonged to late Balasundaram.
- iv. Though the defendants have contended that late Balasundaram executed a Will dated 30.07.1999 during his life time, the said Will was not filed in the Court.
- v. In any event on 23.01.2003, the plaintiff and her brother late Chandrasekaran had jointly mortgaged item numbers 1 and 2 of 'A' Schedule properties with Muthupet Primary Agricultural Cooperative Bank. Therefore, it cannot be stated that the plaintiff has been ousted out of the suit properties.
- vi. Since item number 8 of 'A' Schedule properties stands in the name of one Deivanai, a third party the plaintiff is not entitled to 1/2



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share in respect of the said property. However, she is entitled to 1/2 share in all the other items of the suit properties.

8. Aggrieved over the decree and judgment passed by the Trial Court Judge, the defendants filed an appeal in A.S.No.9/2016 before the Principal District Judge, Tiruvarur. The learned Principal District Judge, Tiruvarur, on considering the oral and documentary evidence adduced on both sides, upheld the findings recorded by the Trial Court vide his decree and judgment dated 15.03.2017, as against which the present second appeal is filed.

9. The second appeal was admitted by this Court on 01.11.2019 on the following substantial questions of law by my learned predecessor:

- i. Whether the Trial Court was in error in reaching the conclusion that in terms of the Hindu Succession Act, 1956 (As amended by Act 39/2005) the plaintiff and the defendants were each entitled to a half share in the suit 'A'*



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schedule property in the teeth of the fact that the father of the plaintiff had died on 08.09.1999 anterior to the advent of the Hindu Succession Amendment Act (Act 39 of 2005) and hence the plaintiff could not be considered to be a coparcener for the purpose of succession to the estate of the plaintiff's father.

- ii. Whether the Courts below should have rendered a finding that since PW1 has not been cross examined on behalf of the defendants, the evidence tendered by PW1 was not tested by cross examination and hence is inchoate and as such no reliance could be placed on the testimony of PW1 to espouse the cause of the plaintiff.*
- iii. Whether the Trial Court should have held that as the first defendant had not presented herself for cross examination on the ordained day, as predicated by order XVII Rule 2 of the Code of Civil Procedure the defendants, they were to be set ex parte and further orders were to be passed under Order XVII Rule 2 of the Code of Civil Procedure and hence*



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the evidence of the defendants cannot be closed.

- iv. *Whether the Trial Court should have held that albeit the fact that DW1 did not appear on the appointed day for being cross examined by the plaintiff, it could not be presumed that she is guilty of default and hence the provisions of Order XVII Rule 3 of the Code of Civil Procedure cannot be invoked to non-suit the defendants*
- v. *Whether the Courts below should have countenanced the plea of the appellants that in terms of a Will dated 30.07.1999, the father of the respondent herein had bequeathed all his properties in favour of his son Chandrasekaran and as such the claim for partition made in the suit by the respondent herein cannot be sustained in law.*

10. Heard Mr.S.Senthil, learned counsel for the first appellant, Mr.A.Manoj Kumar, learned counsel appearing for the second appellant and Mr.S.Kothandraman, learned counsel for the Respondent.



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11. Mr.S.Senthil, learned counsel for the first appellant contended that even though there is no sufficient evidence on record, the trial Court had decreed the suit on merits instead of passing an exparte decree. In this regard, he relied on the decision of the Hon'ble Supreme Court in ***B.Janakiramaiah Chetty Vs. A.K.Parthasarathi and ors.*** reported in ***(2003) 5 Supreme Court Cases 641*** and contended that while the evidence or the substantial portion of the evidence of the parties is not on record, the Trial Court should not have decreed the suit on merits.

12. Mr.A.Manoj Kumar, learned counsel appearing for the second appellant contended that the second appellant was a minor throughout the proceedings and that her interest was not protected by the first appellant. He drew the attention of this Court to Order XXXII Rule 3A(2) which reads as under:

***3A.Decree against minor not to be set aside
unless prejudice has been caused to his interests:-***

(1) ...

***(2) Nothing in this rule shall preclude the minor
from obtaining any relief available under any law by***



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reason of the misconduct or gross negligence on the part of the next friend or guardian for the suit resulting in prejudice to the interest of the minor.

13. The appellants have filed an application in C.M.P.No.16985 of 2017 along with the present second appeal to receive the original Will, dated 30.07.1999 allegedly executed by late Balasundaram. The counsel for the second appellant would contend that since the first appellant did not file the original Will either before the trial Court or before the first appellate Court, the second appellant should be given an opportunity to prove the Will, dated 30.07.1999 in the manner known to law. He therefore, prayed for remanding the matter back to the trial Court for fresh disposal.

14. Per contra, Mr.S.Kothandraman, learned counsel for the respondent contended that both the Courts below after analysing the evidence on record, had concurrently held that the plaintiff is entitled to 1/2 share in the suit property except item number 8 of the 'A' schedule property. His specific contention is that during the year 2003, the



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plaintiff and her brother late Chandrasekaran had jointly mortgaged items 1 and 2 of 'A' Schedule properties with Muthupet Primary Agricultural Cooperative Bank and at that point of time, the Will dated 30.07.1999 was not produced by late Chandrasekaran. His further contention is that the first defendant did not cross examine P.W.1 and did not also subject herself to cross examination before the trial Court. The first defendant having failed to adduce the Will dated 30.07.1999 either before the trial Court or before the I appellate Court, cannot present it at this stage in the second appeal. He, therefore prayed for dismissal of the second appeal.

15. The plaintiff Annakili and late Chandrasekaran are brother and sister born to late Balasundaram. According to the plaintiff, the suit properties are self acquired properties of late Balasundaram and the plaintiff's husband also contributed for the purchase of certain items of the suit properties. On the other hand, the contention of the defendants is that the suit properties are ancestral properties of late Balasundaram and that Balasundaram also executed a Will dated 30.07.1999 in favour of



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Chandrasekaran (husband of the first defendant and father of the second defendant).

16. It is pertinent to point out that the defendants did not adduce the Will, dated 30.07.1999 allegedly executed by late Balasundaram either before the trial Court or before the first appellate Court. In the present second appeal, the Will dated 30.07.1999 has been filed along with a petition in C.M.P.No.16985 of 2017. A bare perusal of the Will, dated 30.07.1999 shows that there are several overwritings, corrections and interpolations. The first defendant (first appellant) had stated that she could not produce the Will dated 30.07.1999 before the first appellate Court due to her health condition. According to her, she had undergone a surgery for pericardial Patch closure of ASD with Mitral Valve prolapse in the year 2010. She had filed the 'Operation details' issued by Sri Ramachandra Medical Centre, Porur, Chennai which shows that an operation was performed on 18.01.2010. However, the discharge summary has not been produced by the first appellant.



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17. The decree and judgment of the trial Court was passed on 21.06.2016 and the decree and Judgment of the first appellate Court on 15.03.2017. A perusal of the trial Court Judgment shows that the plaintiff was not cross examined though the case was adjourned on several dates from 12.04.2016 to 07.06.2016. Thereafter, it was finally posted on 14.06.2016. Subsequently, the first defendant filed her proof affidavit and did not appear before the Court though she was given sufficient opportunities. Thus, it is seen that the first defendant deliberately did not appear before the first appellate Court. The heart operation was performed in the year 2010 and therefore it is difficult to accept that her absence was due to her ill health. When the defendants' main contention is that late Balasundaram executed the Will, dated 30.07.1999 in favour of Chandrasekaran (husband of the first defendant and father of the second defendant) during his life time, it is not known as to why the Will, dated 30.07.1999 was not filed either before the trial Court or before the first appellate Court. A copy of the Will was also not filed along with the written statement filed by the defendants.



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18. As already observed, there are several corrections, interpolations and overwritings in the Will, dated 30.07.1999. Though it is contended by the second appellant that he must be given an opportunity to prove the Will in the manner known to law, the same cannot be accepted for the simple reason that the Will itself appears to be highly suspicious. The signature of Balasundaram on both the pages of the Will has been overwritten. If really Balasundaram had executed the Will on 30.07.1999 in favour of Chandrasekaran, he would not have requested his sister Annakili (the plaintiff) to jointly execute the mortgage deed with Muthupet Primary Agricultural Cooperative Bank in respect of item numbers 1 and 2 of 'A' Schedule properties. The suit is also filed after the death of late Chandrasekaran. The defendants did not avail various opportunities granted by both the Courts below and the law will not help recalcitrant persons. Both the Courts below have analysed the evidence on record in the right perspective and I do not see any reason to interfere with the same. Accordingly, the substantial questions of law are answered against the appellants.



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19. In the result,

- i. The Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is dismissed.
- ii. The decree and judgment dated 15.03.2017 passed in A.S.No.9/2016, on the file of the Principal District Judge, Tiruvarur and the decree and judgment dated 21.06.2016 passed in O.S.No.29/2012, on the file of the Subordinate Judge, Mannargudi, are upheld.
- iii. The suit in O.S.No.29/2012, on the file of the Subordinate Judge, Mannargudi is decreed with costs.

20.01.2025

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
vum

To

1. The Principal District Judge, Tiruvarur.
2. The Subordinate Judge, Mannargudi.
3. The Section Officer, VR Section,
Madras High Court, Chennai.



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R. HEMALATHA, J.

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