



A.S.No.695 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Dated:18.03.2025

Coram:

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

A.S.No.695 of 2023

and

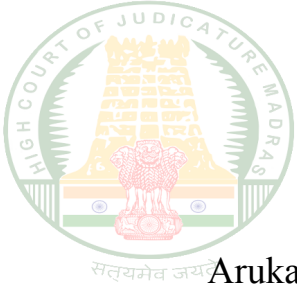
C.M.P.No.24529 of 2023

Govindammal,
D/o Late PalanisamyGounder,
No.631, A.Rajiv Nagar,
2nd Street, T.N.Road,
Cotton Mill Road,
TiruppurTaluk and District 641 602. .. Appellant/2nd plaintiff

/versus/

NachimuthuGounder (died)

1.A.R.Surendiran,
S/o N.Ramasamy,
No.5/1197, Poyampalayam West,
Pichampalayam,
TiruppurTaluk & District.



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Arukathal(died)

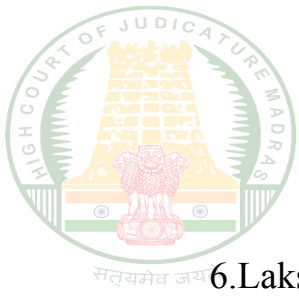
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2.Thangamuthusamy,
S/o late PalanisamyGounder,
No.104, TSR Lorry Service,
KomaliThottam, Mummoorthi Nagar,
Pooluvapatti Post,
Tiruppur 641 602.

3.Ramasamy,
S/o late PalanisamyGounder,
KomaliThottam, Mummoorthi Nagar,
Pooluvapatti Post,
Tiruppur 641 602.

4.Thangamani,
W/o Velusamy,
D/o NachimuthuGounder,
No.99, Anna Vedhi,
V elampalayam Village,
TiruppurTaluk and District.

5.Periyasamy,
S/o late NachimuthuGounder,
KomaliThottam, Mummoorthi Nagar,
Pooluvapatti Post,
Tiruppur 641 602.



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6.Lakshmi,
W/o Ramasamy,
D/o NachimuthuGounder,
No.5/483, Vengamedu,
Chettipalayam Village,
TiruppurTaluk and District.

.. Respondents 1 to 6/
Defendants 2 and 4 to 8

7.Deivathal,
D/o late PalanisamyGounder,
No.14, Cotton Mill Road,
2nd Street, TiruppurTaluk and District. .. Respondent 7/1st plaintiff

Appeal Suit has been filed under Section 96 CPC read with Order 41, Rule 1 CPC, praying to set aside the judgment and decree of the learned Principal District Judge of Tiruppur dated 20.06.2023 in O.S.No.250 of 2017 and allow the above first appeal.

For Appellant :Mr.B.Bharathkumar for
Mr.V.Nicholas

For Respondents :Mr.V.P.Sengottuvel, Senior counsel for
Mr.K.R.Nishanth for R2
Ms.A.Pramila for R7
Mr.G.Vigneshwar for R3
No appearance for R2,R4 and R6.



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JUDGMENT

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Aggrieved over the dismissal of the suit filed for partition, the present appeal came to be filed by the unsuccessful second plaintiff.

2.The parties are arrayed as one for ranking by the trial Court.

3.The brief facts of the plaintiffs' case is as follows:-

According to the plaintiffs, the plaintiffs are the daughters of one Palanisamy Gounder. The third defendant, one Arukathal, is the mother of the plaintiffs. The fourth and fifth defendants are the brothers of the plaintiffs. The first defendant is the brother of the plaintiff's father Palanisamy Gounder. The second defendant is the purchaser of the suit property. The defendants 6 to 8 are the legal heirs of the first defendant.

According to the plaintiffs, the suit property is an ancestral property belonging to their father Palanisamy Gounder and their uncle Nachimuthu



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gounder. The suit property remains as joint family property. The first defendant sold the undivided share to the second defendant through a sale deed dated 06.08.2003. According to the plaintiffs, it is not binding on the plaintiffs, as the property has not been partitioned. The plaintiffs, being the legal heirs of their father Palanisamy Gounder, sought a partition of 6/50 shares each in the suit property.

4. The first defendant and the fifth defendant filed a memo before the trial Court indicating that they have no objection for partition and also paid Court fee for allotting their shares.

5. However, the fourth defendant filed a written statement admitting that there was no partition in the properties. It is the contention that after the death of his father, the plaintiffs orally relinquished the right in S.Nos.311 and 312, after receiving consideration. That apart, sufficient seers were also

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given during their marriage.

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6. The 7th defendant filed a written statement to the effect that the first defendant has sold the property to the second defendant with a specific boundaries. According to him, there is oral partition between his father and Palanisamy Gounder. The first defendant has left the Will dated 05.12.2011 in favour of the 7th defendant. After his death on 27.06.202, the Will came into effect. Hence, he opposed the suit.

7. Based on the above pleadings, the trial Court framed the following

Issues:-

(i) Whether the plaintiffs are entitled for 12/50 shares in the suit property?

(ii) To what other relief, the plaintiffs are entitled to?



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8. On the side of the plaintiffs, PW-1 to PW-4 were examined and Exs.A1 to A9 were marked. On the side the defendants, DW-1 to DW-6 were examined and Ex.B1 to Ex.B6 were marked and on the side of the Court Ex.C1 was marked.

9. The trial Court dismissed the suit on the ground that the plaintiffs have not proved the identity of the property. However, the 7th defendant has proved the Will executed by his father and challenging the said dismissal of the suit, the second plaintiff has filed the present appeal and the first plaintiff, Deivathal is arrayed as the 7th respondent in the appeal.

10. The main contention of the appellant is that the trial Court misdirected itself and dismissed the suit without properly appreciating the

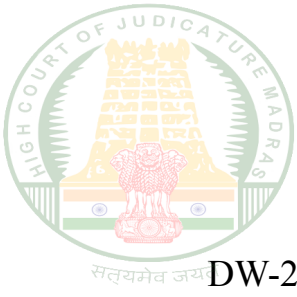


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evidence. Though the 7th defendant pleaded that the Will said to have been executed by his father Nachimuthu Gounder, the socalled Will not seen the light of day. Whereas, the fourth defendant has projected the Will said to have been executed by her mother, despite the fact that the Will has also not been established. The Trial Court recorded the finding, as if the Will projected by the 7th defendant has been proved, despite the fact that the said Will had not been filed before the Court. In any event the trial Court dismissed the suit without properly appreciating the evidence.

11. On the other hand, the learned Senior Counsel appearing for the defendants 4 and 7/respondents 2 and 5 herein in the appeal would vehemently contend that the wife of Palanisamygounder Arukathal had executed a Will in respect of the undivided share in favour of her son the fourth defendant. The said Will dated 07.01.2011 has been proved through



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DW-2 , who was examined in this regard. It is further contended that the plaintiffs had already relinquished their right in favour of the fourth defendant after receiving consideration. Further, it is contended that the plaintiffs themselves pleaded that one of the properties was sold to one Sareswathy and she was not made as a party to the suit. Therefore, according to them, the judgment of the trial Court does not require any interference.

12. In the light of the above submissions, the following Points arise for consideration in this appeal:-

(1)Whether the Will (Ex.B1) dated 07.01.2011 is proved in the manner known to law?

(2)Whether the oral release as pleaded by the fourth defendant is valid and can be given effect?

(3)Whether the plaintiffs are entitled for a partition, and if so, to what extent?

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13. As far as the relationship of the parties are concerned, there is no dispute. Originally, the property is owned by one Rayappa Gounder. This aspect is not disputed by the parties. The said Rayappa gounder had two sons namely, Palanisamy Gounder and Nachimuthu Gounder. The plaintiffs are the daughters of Palanisamy Gounder. The defendants 4 and 5 are the sons of the said Palanisamy Gounder. Natchimuthugounder, who is the brother of Palanisamy Gounder, died leaving behind the defendants 6 to 8 as his legal heirs. This fact is also not disputed by the parties. The character of the properties is also not disputed. Though it is pleaded in the plaint that certain property was sold to one Saraswathy. It is pointed out by the learned counsel appearing for the respondents that such sale is in no way connected to the suit property. In fact, it is related to S.No.306/1. In this regard, Ex.A6 dated 14.12.1998 was filed before the Court.



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14. On perusal of the same, in fact, the same is with regard to different survey number. Further, the suit property is not included in the suit schedule. Be that as it may, as far as the character of the property is concerned, there is no dispute. Though it is pointed out by the 7th defendant in the written statement that there was an oral partition between Palanisamy Gounder and Nachimuthu gounder, factum of oral partition has not been established. Some undivided share also appears to have been sold in favour of the second defendant under Ex.A5. It is also not disputed by the legal heirs of the first defendant, who arrayed as the defendants 6 to 8. Availability of properties in the two survey numbers is also not disputed. The contention of the fourth defendant is that there was a valid relinquishment in respect of the plaintiffs' shares by oral release. The very pleadings itself is vague and it is not indicated the nature of amount received by them. In any event, to create or extinguish any right in immovable property, same can be made

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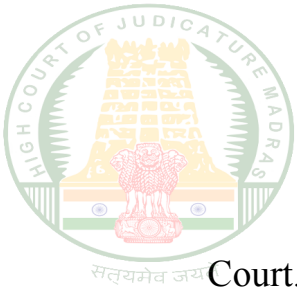


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only through registered instrument. Oral release is not permissible under
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law. Therefore, the contention of the defendants with regard to the alleged oral release has no legs to stand on. It is to be noted that the 7th defendant has propounded the Will, which was said to have been executed by his father Nachimuthu Gounder dated 05.12.2011. The said Will has not seen the light of day and not produced before the Court. Therefore, his contention that his father left the Will has no legs to stand on.

15. Having pleaded the existence of the Will, when the party himself has not produced the Will and proved the same before the Court, it has to be held that there is no such Will existed. Therefore, his contention cannot be countenanced. Whereas, the trial Court has recorded a perverse finding in this regard stating that the 7th defendant has proved the Will, particularly, when the Will dated 05.12.2011 has not even been produced before the



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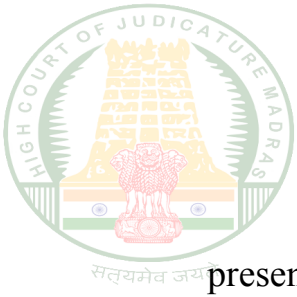
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Court. The trial Court, infact, has casually dealt the issue without going through the documents and evidence.

16. The fourth defendant has propounded the Will during the trial claiming that his mother namely, Arukathal executed the Will in respect of her undivided share in the property during the pendency of the suit. The said Will marked as Ex.B1. To prove Ex.B1, one of the attesting witness was examined as DW-2

17. On perusal of the evidence of DW-2, except stating that he signed as the first witness, he never spoke about the execution as well as attestation of the Will as required under the Law. The execution, in the sense, must be spoken of by the witness stating that the Will was signed by the executant after understanding its contents. Further, there must be evidence to the effect that both the attesting witnesses saw the executant sign the document in their

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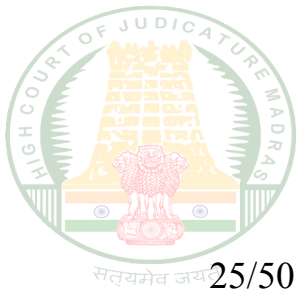
presence and the executant also seen the witnesses signed in his presence. In

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the absence of any evidence with regard to prove the attestation as well as the execution, it cannot be said that the Will has been proved as required under the law. Strict proof of the Will is mandated, since the Will normally deviate succession. Therefore, in the absence of proof with regard to execution and attestation, mere filing of the Will it cannot be said that the legal requirement has been complied with. This aspect has also not been seen by the learned District Judge.

18. In such view of the matter, as there was no partition established, the property being the ancestral property, the plaintiffs being the daughters of Palanisamy Gounder, are entitled their shares. During pendency of proceedings, their mother also died. Therefore, each plaintiffs are entitled to 6.25/50 shares in the suit property. Similarly, the fourth and fifth defendants are entitled to 6.25/50 shares each in the suit properties. The remaining

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25/50 shares will go to the defendants 6 to 8 equally at the ratio of 8.1/3/50

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each. As the defendants have also not disputed the sale of the property in favour of the second defendant with a specific boundaries, the second defendant can seek allotment of the same in a final decree proceedings. With the above observations, these points are answered accordingly.

19. In the result, **the Appeal Suit is allowed**. The judgment and decree of the Principal District Court, Tiruppur in O.S.No.250 of 2017 dated 20.06.2023 is hereby set aside. The said suit is decreed as follows:-

- (i) The first plaintiff is entitled to 6.25/50 share in the suit property.
- (ii) The second plaintiff is entitled to 6.25/50 share in the suit property.
- (iii) The fourth and fifth defendants are entitled to 6.25/50 shares each in the suit property.
- (iv) The defendants 6 to 8 are entitled to 8.1/3
----- shares each in the suit
property. 50

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WEB COPY (v) Consequently, connected Miscellaneous petition is closed. There shall

be no order as to costs.

18.03.2025

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Index:yes/no

Speaking order/non speaking order

Neutral citation:yes/no

To

The Principal District Court, Tiruppur.



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N.SATHISH KUMAR, J.

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