



A.S.(MD)No.82 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 18.03.2025

CORAM

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
and
THE HONOURABLE MR.JUSTICE M.JOTHIRAMAN**

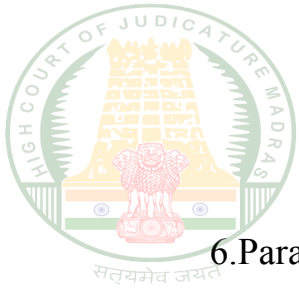
**A.S.(MD)No.82 of 2018
and
C.M.P.(MD)No.4458 and 10647 of 2018
and
C.M.P.(MD)No.SR22659 of 2025**

Thiyagaraj

... Appellant

Vs.

- 1.K.Duraisamy Nadar (Died)
- 2.D.Selvaraj
- 3.D.Ramraj
- 4.Wescare (India) Limited Company,
Wescare Towers, No.16 Cenotaph Road,
Teynampet, Chennai – 600 108,
Rep. by its Director.
- 5.Indowind Energy Limited,
No.15, 2nd Floor,
Kakkani Towers,
Kadhar Nawzkhan Road,
Chennai – 600 006.



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6.Paramasivan

7.S.Periyasamy

8.N.Kalimuthu

9.E.Ganesan

10.S.Lingaraja

11.G.Balasubramanian

12.M/s.Maris Hotels and Theaters,
D.No.9 Cathedral Road,
Chennai – 600 086,
Rep. by its Director.

13.Ms.Centurary Flour Mills Limited,
Post Box No.1674,
India Chambers Building,
Explande, 1st Floor,
Chennai – 600 018.

14.Srinivas Finance Arts Limited,
D.No.35-A, Velayutham Road,
Sivakasi, Virudhunagar District,
Rep. by its Director.

15.S.Subramanian

16.R.S.Windetech Engineers (Pvt) Limited Company,
No.8/126-E3 Aralvoimozli Main Road,
Aralvoimozhi Post, Thovalai Taluk,
Kanyakumari District,
Rep. by its Director.



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17.M/s.Kovilpatti Lakshmi Foller Flour Mills,
Gangaikondan Village,
Tirunelveli Taluk, Tirunelveli District,
Rep. by its Proprietor.

18.Balachandran (Died)

19.Selvakumari

20.Sobana Princes

21.Stepy

22.A.Alexander Mohan

23.Ethal Birnda Mohan

24.Balamani

25.Jeyanthi

26.Sheela

27.Monisha @ Kala

(R22 to R27 are brought on record as the legal heirs of the deceased 1st respondent vide order dated 10.11.2022 in C.M.P.(MD)No.9793 of 2021 and C.M.P.(MD)Nos.6502, 6462 & 6464 of 2022 in A.S.(MD)No.82 of 2018 by MSRJ & NAVJ)

28.Siva Anbu

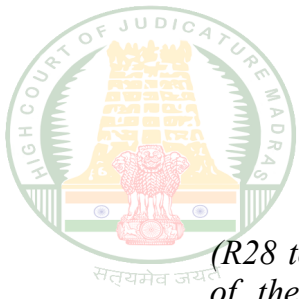
29.Deepika

30.Rasmi

31.Abisha

... Respondents

3/15



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(R28 to R31 are brought on record as the legal heirs of the deceased 18th respondent vide order dated 10.11.2022 in C.M.P.(MD)No.9793 of 2021 and C.M.P.(MD)Nos.6502, 6462 & 6464 of 2022 in A.S.(MD)No.82 of 2018 by MSRJ & NAVJ)

Prayer : Appeal Suit filed under Order 41, Rules 1 and 2 r/w. Section 96 of Civil Procedure Code, to set aside the judgment and decree of the learned Principal District Judge, Tirunelveli dated 12.04.2018 made in O.S.No.56 of 2011 and further order the reliefs as sought for in the original plaint in respect of the appellant / plaintiff forthwith.

For Appellant : Mr.S.Parthasarathy for Mr.S.Velusamy.

For Respondents : Mr.T.Lajapathy Roy, Senior Counsel,
For Mr.S.Rajasekar for R2, 3, 24 & 26.

Mr.S.R.Anbarasu for R5.

Mr.A.Sivaji for R14.

Mr.G.Karthik for R15.

Mr.S.P.Maharajan for R17.

Mr.Raja Karthikeyan for R27.

No appearance for R6, 9, 10, 13, 16, 22, 23 & 25



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JUDGMENT

This first appeal arises out of a partition suit. The appellant herein / Thiyyagaraj instituted O.S.No.56 of 2011 on the file of the Principal District Court, Tirunelveli seeking partition and separate possession of his 1/4th share in the plaint schedule properties by metes and bounds. The suit was dismissed vide judgment and decree dated 12.04.2018. Challenging the same, the plaintiff has filed this appeal.

2.The suit properties belonged to one Kailasa Nadar. He was blessed with two sons, namely, Duraisamy Nadar and Chidambaram Nadar. Duraisamy Nadar was blessed with three sons (Selvaraj, Thiyyagaraj and Ramraj) and five daughters (Bala Saraswathi, Balamani, Jeyanthi, Sheela and Monisha @ Kala). Bala Saraswathi, Balamani and Jeyanthi had been given in marriage prior to 1989. Duraisamy Nadar filed O.S.No.44 of 1994 on the file of the Principal Sub Court, Nagercoil against Chidambaram Nadar and his sons seeking partition. The suit was partly decreed on 17.04.1997. As against the disallowed portion, Duraisamy Nadar and his sons and two daughters namely, Sheela and



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Monisha @ Kala filed A.S.No.451 of 1998 before the High Court of Madras. The appeal was disposed of on the basis of the compromise entered into between the parties. The “A” schedule set out in the compromise decree was allotted to Duraisamy Nadar branch. Subsequently, quite a few transactions took place and it is not necessary to refer to them at this stage. Suffice to say that several alienations were made and the remaining properties formed the subject matter of partition on 09.05.2011 (Ex.B2). The plaintiff was not a party to Ex.B2. Duraisamy Nadar who was shown as first defendant along with his two sons namely, Selvaraj and Ramraj had executed the said document. The schedule to Ex.B2 contains 31 items. Out of them, 12 items were alienated prior to 09.05.2011. The remaining 19 items were divided into four schedules. “A” schedule was allotted to Duraisamy Nadar. “B” schedule was allotted to Selvaraj. “C” schedule was allotted to Thiagaraj/the appellant herein. “D” schedule was allotted to Ramraj. The case of the plaintiff is that Ex.B2 was not formally communicated to him and is therefore not binding on him. He, therefore, sought partition of his 1/4th share.



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3.The trial Judge framed the following issues:-

“1.Whether the alienations made in respect of items 20 to 31 are binding on the plaintiff?

2.Whether the plaintiff is entitled to the preliminary decree for partition of 1/4th share in the suit properties as claimed?

3.To what relief, the plaintiff is entitled to.?

4.Whether the suit is bad for non-joinder of necessary parties?

5.Whether the suit is hit by partial partition.?

6.Whether the suit is barred by the principle of res judicata of decision in O.S.No.465 of 2007 on the file of the II Additional District Munsif Court, Nagercoil?

7.Whether the court fee paid under Section 37(2) Tamil Nadu Court Fees and Suit Valuation Act is correct?

8.Whether the suit is barred by Order 2 Rule 2 CPC?”

4.The plaintiff examined himself as P.W.1 and marked Exs.A1 to A22. Selvaraj examined himself as D.W.1 and five other witnesses were also examined on the side of the defendants and Exs.B1 to B35 were also marked. As already mentioned, after considering the evidence on record, the learned trial Judge non-suited the plaintiff. Aggrieved by the same,



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this appeal has been filed.

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5.The point that arises for our determination is whether Ex.B2 binds the plaintiff and whether his prayer for partition is without any legal basis.

6.The stand of the learned Senior Counsel for the contesting defendants is that Duraisamy Nadar was declared as “karta” (family manager) in the compromise decree dated 13.02.2002 in A.S.No.451 of 1998 (Ex.A3) and that therefore, he was fully competent to effect partition of the joint family properties even without the consent or association of any member of the joint family. The learned Senior Counsel strongly contended that failure to associate the plaintiff / Thiagaraj in the said document cannot lead to invalidation of the document. He relied on the judgment reported in *AIR 1966 Mad 266 (P.N.Venkatasubramanian Iyer Vs. P.S.Easwara Iyer)*. Paragraph No. 124 of the said decision clearly states that the power of a father of a joint family to divide family property at any moment during his life is well established and the consent of the sons is not necessary for the exercise of that power. It is as follows:



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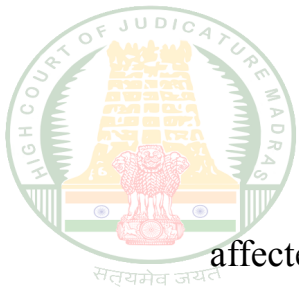


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124. The power of the father of a joint family to divide family property at any moment during his life, **provided he gives his sons equal share with himself**, is well established. The consent of the sons is not necessary for the exercise of that power, the right of the father to sever himself and the sons inter se being part of the partiae potestas that was recognised by the Hindu law. As noticed in *Principles of Hindu law* by Mullah, 12th Edn. at page 493:

“If the partition is unequal and unfair it is open to the sons if they are majors to repudiate the partition; but if they are minors, It is open to them to avoid it after I hex attain majority. The partition will be good until it is set aside.”

7.We endorse the above contention. But the power so exercisable by the Karta (family manager) is subject to a caveat. The partition effected by the father in his capacity as karta must be equitable and fair. The learned counsel for the appellant draws our attention to the decision of the Hon'ble Division Bench reported in **1995 2 MLJ 549 (Gurusamy Naicker Vs. G.Jayaraman)**. The Hon'ble Division Bench in the said decision held that if the said power is exercised in an unfair manner, the



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affected coparcener can very well challenge the same. Thus what is to be seen is whether the partition effected vide Ex.B2 is just and fair.

8.In the case on hand, K.Duraisamy Nadar who figured as the first defendant did not enter the witness box to convince the Court below to demonstrate that he exercised his power in an equitable manner. It is well settled that if the person who is most competent to give evidence keeps away from the witness box, then adverse inference has to be drawn against him. The Hon'ble Supreme Court in *Vidhyadhar v. Manikrao* (1999) 3 SCC 573 held thus:

“17. Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct”

Moreover, it is the specific case of the appellant that Ex.B2 was not communicated to him. K.Duraisamy Nadar would be the most competent to depose whether Ex.B2 was communicated to the plaintiff or not. The absence of any explanation or reason for his non-examination will give rise to an adverse presumption under Section 114(g) of the Indian Evidence Act, 1872.



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9. Even if Duraisamy Nadar had not entered the witness box, if it had been demonstrated by a valuation exercise that the plaintiff was given equal share vide Ex.B2, then we would not interfere with the impugned judgement and decree. In this case, such a valuation exercise was not undertaken. There is nothing on record to show that the value of the properties allotted to the plaintiff under Ex.B2 are more or less on par with what was allotted to the other members of the joint family, namely, Duraisamy Nadar (father), Selvaraj and Ramraj (brothers).

10. The learned counsel for the appellant on instructions from D.Thiyagaraj / plaintiff categorically stated that whatever alienation that has taken place prior 09.05.2011 can be accepted as such and that they need not be reopened. In other words, whatever third parties rights that have accrued shall be respected. The plaintiff informs this Court through his counsel that partition can be effected in respect of items 1 to 19 in the plaint schedule. This undertaking and submission made by the plaintiff is placed on record.



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11.During the pendency of this appeal, Duraisamy Nadar passed away. Duraisamy Nadar chose to consciously exclude all the daughters when the compromise decree was effected in the year 2002. One of the left out daughters namely, Kala @ Monisha has now taken the stand that the said compromise decree is fraudulent and that it would not bind her. So long as, Kala @ Monisha has not succeeded in setting aside the said compromise decree, we cannot take cognizance of her claims. It is for this reason, we do not entertain even the petition for stay filed by Kala @ Monisha under Section 10 of Civil Procedure Code.

12.During the pendency of this appeal, Duraisamy Nadar passed away. It is also agreed by the contesting parties that Duraisamy Nadar has not executed any Will. In other words, he died interstate. Therefore, preliminary is passed in the following terms:-

(1) The plaintiff / D.Thiyagaraj, D.Selvaraj and D.Ramraj, the sons of Duraisamy Nadar will be entitled to 9/32th share each in plaint item Nos.1 to 19.



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(2) Balamani, Jeyanthi, Sheela and Monisha @ Kala will be entitled to 1/32th share each in plaint item Nos.1 to 19.

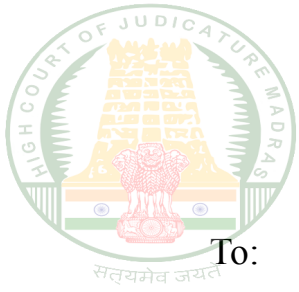
(3) Bala Saraswathi passed away leaving behind her husband Alexander Mohan and daughter Ethal Birnda Mohan. They will be entitled to 1/64th share each.

13.The judgment and decree passed by the trial Court is set aside and the appeal is allowed accordingly. No costs. C.M.P.(MD)No.SR22965 of 2025 is dismissed and C.M.P.(MD)No.4458 and 10647 of 2018 are closed.

(G.R.S. J.) & (M.J.R. J.)
18.03.2025

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
ias/SKM

Note : This order was dictated in the open court
in the presence of the counsel



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To:

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The Principal District Court, Tirunelveli.

Copy to:

The Section Officer,
ER/VR Section,
Madurai Bench of Madras High Court,
Madurai.



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G.R.SWAMINATHAN, J.
and
M.JOTHIRAMAN, J.

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