
(2016) 05 MAD CK 0010
In the Madras High Court
Case No : A.S. No. 469 of 1992

Karuppa Konar @ Porikarar Karuppa Konar (deceased) and
others

APPELLANT

Vs

Chinnathayee (deceased) and others

RESPONDENT

Date of Decision : 11-05-2016

Acts Referred:

Citation : (2016) 4 MLJ 628

Hon'ble Judges : P.R. Shivakumar, J.

Bench : Single Bench

Advocate : R. Saseetharan, Advocate, for the Appellant; N. Vijayaraja, Advocate, R. Ravikumar, Advocate and V. Raghavachari, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

P.R. Shivakumar, J.—This appeal has been filed against the judgment and preliminary decree of the trial court in O.S. No. 230/1987 on the file of the II Additional Subordinate Judge, Coimbatore granting the relief of partition directing division of the 1st and 3rd item of the suit properties into two equal shares and allotment of one such share to the plaintiff therein. The appeal came to be disposed of by a previous judgment dated 08.02.2007, by which this court had allowed the appeal, set aside the preliminary decree passed by the trial court and dismissed the suit. Contending that there was an error apparent on the face of the record in the said judgment, the respondents 4 to 8 herein filed a Review Application in Review Appln. No. 109 of 2007. The said Review Application was allowed by order dated 04.04.2016. Based on the order allowing the review application and thereby making it incumbent on this court to re-hear the appeal, the appeal was re-heard and this court pronounces the following fresh judgment.

2. As against the preliminary decree of the trial court dated 14.01.1992 passed in O.S. No. 230/1987, the second defendant has filed the appeal. During the pendency of the appeal, the appellant (second defendant) died and his legal

representatives got themselves impleaded as appellants 2 to 5. Similarly, the first respondent/plaintiff Chinnathayee died during the pendency of the appeal and her legal representatives have been impleaded as respondents 4 to 8.

3. For the sake of convenience, the parties are referred to in accordance with their ranks in the original suit and in appropriate places their ranks in the second appeal shall also be mentioned.

4. Chinnathayee, the deceased first respondent in the appeal, filed the above said suit O.S. No. 230/1987 on the file of the II Additional Subordinate Judge, Coimbatore for partition against Thulasi (the second respondent herein), Karuppa Konar (the deceased appellant) and Mounasamy (the third respondent herein) arraying them as defendants 1 to 3 respectively, claiming ? share in the suit properties. The claim was made based on the plaint averments that are, in brief, as follows:

The plaintiff (the deceased first respondent) and the first defendant (second respondent Thulasi) were sisters. Their maternal grandmother Palaniammal was the owner of the suit properties. She bequeathed her properties under her last Will dated 11.12.1967 in favour of her daughters Kaliammal and Rangammal. The said Rangammal died before marriage and without issues. Thus her share also went to her sister Kaliammal, the mother of the plaintiff and the first defendant. The suit properties had been in possession and enjoyment of the plaintiff and the first defendant till the date of filing of the suit and the second defendant Karuppa Konar had no interest in or title to the suit properties. However falsely claiming that he was the legal heir of Rangammal, he staked title to the suit properties. Colluding with the third defendant Mounasamy, who also did not have any right in the suit properties, the second defendant Karuppa Konar tried to trespass into the suit properties. In such an attempt of defendants 2 and 3, the first defendant was also supporting them. Hence the plaintiff was constrained to file the suit for partition and separate possession.

5. The first defendant Thulasi filed a written statement containing, in brief, the following averments:

The allegation made in the plaint as if Rangammal died as a spinster is false. Before her death she got married but died without issues. Her husband also passed away. The second item of the suit properties is not available for partition as it had already been alienated by Palaniammal herself during her lifetime. The Will of Palaniammal dated 11.12.1967 is genuine. On the other hand, it is false to state that Palaniammal executed a second Will on 03.12.1974 and the same was the last Will of Palaniammal. From 1973, she was bedridden and hence was not in a position to execute any Will in 1974. Palaniammal was also not having sound disposing state of mind. If at all there is a Will, it could have been a fabricated one. The first item of the suit properties is in the joint possession of the plaintiff and the first defendant, whereas the third item of the suit properties is in the possession of the first defendant. The plaintiff and the first defendant

alone were entitled to ? share each in the first and third items of the suit properties. A preliminary decree for partition to the said effect could be passed.

6. The contents of the written statement filed by the second defendant, which was adopted by the third defendant are, in brief, as follows:

There is no truth in the contention that Palaniammal bequeathed her properties to Kaliammal, the mother of the plaintiff and her sister Rangammal under a Will dated 11.12.1967 as her last Will; that on 03.12.1974 Palaniammal, by executing a registered Will bequeathing the suit properties to the second defendant, who is the son of the brother of the husband of Palaniammal. Rangammal got married and she died after marriage. With a view to get the property, the plaintiff chose to make a false claim that Rangammal died before marriage. It is also false to state that the plaintiff and the first defendant were in possession of the suit properties. By virtue of the registered Will dated 03.12.1974, which came into effect on the death of Palaniammal on 10.01.1975, the second defendant became the absolute owner of the suit properties. As absolute owner of the suit properties, the second defendant transferred the third item of the suit properties to the third defendant Mounasamy and the third defendant Mounasamy is in enjoyment of the house by paying house tax and kist. The second defendant also effected a partition of the first item of the suit properties within his son and they sold it to various other persons. Since the plaintiff is not in possession of the suit properties as on the date of filing of the suit, the relief should have been valued under Section 37(2)(ii) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955. The suit is also bad for non-joinder of necessary parties and the suit is liable to be set aside.

7. Based on the above said pleadings, the learned trial Judge framed three issues and one additional issue. They are as follows:

Issues:

- 1) Whether the plaintiff is entitled to a share in the suit properties as claimed by her in the suit?
- 2) Whether the suit properties absolutely belonged to the second defendant?
- 3) To what other reliefs?

Additional Issue:

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

8. In the trial, the plaintiff was examined as PW1 and one document was marked in Ex.A1 on the side of the plaintiff. Three witnesses were examined as DWs.1 to 3 and seven documents were marked as Exs.B1 to B7 on the side of the defendants. The learned trial Judge, on proper appreciation of evidence has decided all the issues and also the additional issue against the second defendant and in favour of the plaintiff, decreed the suit as prayed for and granted a preliminary decree for partition in respect of items 1 to 3 of the suit properties.

9. The points that arise for consideration in the appeal suit are as follows:

- i) Whether the trial court has committed an error in granting a preliminary decree for partition in respect of the suit second item also which is admittedly not available for partition?
- ii) Whether the Will dated 03.12.1974 propounded by the second defendant as the last will and testament of Palaniammal, a certified copy of which has been marked as Ex.B2 has been proved?
- iii) Whether Ex.B1-Will relied on by the plaintiff and the first defendant has been proved?
- iv) Whether the plaintiff is entitled to half share in the first and third item of the suit properties?
- v) Whether the suit is bad for non-joinder of necessary parties?
- vi) Whether the plaintiff is entitled to the relief of partition and a preliminary decree directing division of the first and third item of the suit properties into two equal shares and allotment of one such share to her?
- vii) To what other reliefs the parties are entitled?

10. The arguments advanced by Mr. R. Saseetharan, learned counsel for the appellants, by Mr. N. Vijayaraja, learned counsel for the first respondent and by Mr. V. Raghavachari learned counsel for the respondents 4 to 8 were heard. The materials available on record were also perused.

Points i to vii:

11. The admitted case of the plaintiff and the defendants is that the 10 cents of land shown as the second item of the suit properties had been sold by the testator Palaniammal herself to third parties during her life time and hence the same is not available for partition. However, the learned trial Judge, chose to make an observation, which is ex-facie erroneous, to the effect that the 10 cents of land shown as the second item of suit properties was sold by Kaliammal during her lifetime. When the admitted plea of the parties is that the said property was sold by the original owner Palaniammal in favour of third parties and hence the same is not available for her testamentary or non-testamentary legal heirs, the learned trial Judge chose to make such a wrong observation as if the said property was sold by Kaliammal, the mother of the plaintiffs. Even such a wrong recital shall have the very same effect of the correct recital, namely the second item of the suit properties is not available for partition. Since the said observation came to be made in the preliminary recitals in paragraph 5 of the judgment of the trial court and only thereafter specific issues were taken up for consideration, the learned trial Judge chose to hold in general that the plaintiff was entitled to a preliminary decree for partition as prayed for in the plaint. The same resulted in the drafting of the decree to the effect that a preliminary decree was granted directing division of the suit properties into two equal shares and

allotment of one such share to the plaintiff.

12. Despite such a clear plea made by the defendants and a categorical admission made by the plaintiffs that the second item of the suit properties was not available for partition as it had been sold away by Palaniammal herself, during her life time in favour of third parties, and that the plaintiff was not claiming any relief in respect of the second item of the suit properties, the learned trial Judge chose to grant the relief of partition in respect of the second item of the suit properties also. The said mistake crept-in spite of the recital in paragraph 5 of the judgment of the trial court that the second item of the suit property was admittedly sold by Kaliammal during her lifetime, to third parties. We have seen that the same is a mistake. Even such mistake would have made the trial court to hold that since the second item, had gone out of the family by the sale made by Kaliammal (the mother of the plaintiffs), the relief of partition of the same was not available to the plaintiff. The learned trial Judge committed a grave error in not properly appreciating the pleadings of the parties and the admission made by the plaintiff in respect of the second item of the suit properties. Hence, this court does have no hesitation in coming to the conclusion that the second item of the suit properties had been sold away by Palaniammal during her life time and that hence the prayer for partition in respect of the second item of the suit properties could not be sustained. The preliminary decree for partition granted by the trial court deserves to be interfered with and set aside insofar as it relates to the second item of the suit properties.

13. It is not in dispute that Palaniammal was the owner of the first and third items of the suit properties till her death. Though the parties have not stated the date or the year of the death of Palaniammal, the death certificate of Palaniammal has been produced by the second defendant and the same has been marked as Ex.B3. From Ex.B3, it is obvious that Palaniammal died on 10.01.1975 and the death was registered on 21.01.1975. The case of the plaintiffs and the first defendant in respect of items 1 and 3 of the suit properties is that Kaliammal and Rangammal, both daughters of Palaniammal became co-owners of the suit properties as testamentary legal heirs of Palaniammal by virtue of a Will dated 11.12.1967 left by Palaniammal as her last will. A certified copy of the registered Will dated 11.12.1967 relied on by the plaintiff has been produced as Ex.A1 and the original Will has been produced by the first defendant and marked as Ex.B1. The execution of the said Will by Palaniammal bequeathing her properties in favour of her two daughters Kaliammal and Rangammal has not been disputed by any of the defendants.

14. On the other hand, the defendants 2 and 3 contended that Ex.B1 was not the last will of Palaniammal; that on 03.12.1974 Palaniammal executed a second Will cancelling and superseding the Will dated 11.12.1967 and that by the second Will dated 03.12.1974, the second defendant was made the sole legatee. Since the execution of the first will dated 11.12.1967 produced as Ex.B1 has not been disputed by the second and third defendants and on the other hand, they

propounded a second Will dated 03.12.1974 as the last will of Palaniammal, the burden of proving the execution of the said Will dated 03.12.1974 and that the same was executed voluntarily by Palaniammal while possessing sound disposing state of mind stood cast on the defendants 2 and 3. The plaintiff and the first defendant have contended that Palaniammal could not have executed the Will dated 03.12.1974, as claimed by the defendants 2 and 3; that the same could have been fabricated and that the said will, in any event, could not have been executed by Palaniammal while possessing sound disposing state of mind, since she had been bedridden for about one year prior to her death. In the light of such a contention, the burden lies heavily on the propounder of the said Will dated 03.12.1974. Though the second defendant Karuppa Konar has propounded the said will dated 03.12.1974 as the last will of Palaniammal, he has not chosen to enter the witness box to depose regarding the health condition and sound disposing state of mind of Palaniammal, as on the date of alleged execution of the disputed Will dated 03.12.1974. On the other hand, his son Aruchamy, who was not a party in the suit alone figured as DW2 to depose regarding the execution and attestation of the Will dated 03.12.1974 and to speak about the physical and mental condition of Palaniammal as on the said date.

15. DW2-Aruchamy has been impleaded as the second appellant after the death of Karuppa Konar, the first appellant during the pendency of the appeal. A perusal of the evidence of DW2 will make it clear that he was neither a witness for the execution of the Will dated 03.12.1974 propounded by the second defendant; nor was he an attester of the Will. It is also obvious from his evidence that he was also not present at the time of registration of the Will. It is pertinent to note that the original Will dated 03.12.1974 propounded by the second defendant has not been produced. The reason assigned for non-production of the same is that the first item of the suit properties was sold to a number of third parties and the original Will was handed over to the purchasers. If at all the original Will had been handed over to the purchasers, the defendants 2 and 3 could have very well caused production of the same by taking summons to such purchasers. Surprisingly, the particulars of the purchaser have not been furnished and not even a copy of the single sale deed came to be produced. The said Will is said to be a registered one having Document No. 28/1974. A certified copy of the same has been produced by the contesting defendants and it has been marked as Ex.B2. A perusal of Ex.B2 will show that all the three items of the suit properties, which were dealt with in Ex.A1-Will dated 11.12.1967 were shown as the properties bequeathed under the will dated 03.12.1974. Though the will is said to have been executed on 03.12.1974, it was registered only on 05.12.1974. Within 38 days from the date of execution of the said Will and within 36 days from the date of registration of the said Will, Palaniammal died. Admittedly, the second item of the suit properties had been sold away to third parties by Palaniammal during her life time. There is no evidence either on the side of the plaintiffs or on the side of the defendants to show when such alienation of the second item was made by Palaniammal. If at all such alienation

was made by Palaniammal subsequent to the execution of the original of Ex.B2-will, the contesting defendants could have very well stated the date on which the second item was sold by Palaniammal to third parties. DW2, who deposed to the effect that the Will was executed on 03.12.1974 and it was registered on 05.12.1974, has not stated that within 36 days, that is during the period between 05.12.1974 and 10.01.1975, Palaniammal went to the office of the Registrar for executing a sale deed in respect of the second item of the suit properties. It is also not his evidence that such a sale deed was executed by her in between the above said dates. The evidence of DW2 shows that he was neither an attester of the Will, nor an identifying witness before the Registering Authority for the registration of the Will. It is also his clear admission that he was not present at the place of execution and in the office of the Registrar at the time of registration of the Will. On the other hand, one P. Krishnasamy son of Palani Konar and one Murugesan son of Ramasamy Gounder were shown as the attestors. One Selvaraj, document writer, has been shown as the scribe of the Will. The very same persons, who were the attesting witnesses also figured as the identifying witnesses before the Registering Authority, namely Sub Registrar, Singanallur. Out of the two alleged attestors, Murugesan has not been examined as a witness. P. Krishnasamy alone has been examined as DW3.

16. The evidence of DW3-P. Krishnasamy is to the effect that he was aware of the execution of the first Will and that the second will came to be executed on 03.12.1974 cancelling the earlier will. It is also his evidence that he started from his residence at 9.00 a.m and reached the place of execution of the Will at 10.00 or 10.30 a.m. It is his further testimony that they were there at the place of execution for about 3 to 3½ hours. He has not stated anything as to whether the testator Palaniammal affixed her signature or affixed only a thumb impression. It is quite obvious from Ex.B2 that Palaniammal did not sign the Will and only the left thumb impression was affixed. Ex.B1 also shows that Palaniammal was not a person who could sign her name and she used to affix only thumb impression. As Ex.B2 is disputed, the defendants 2 and 3 could have produced the original will dated 03.12.1974 to enable the comparison of the thumb impression found therein with the thumb impression found in Ex.B1. They could have at least called for a copy of the Thumb Impression Register kept in the office of the Sub Registrar, Singanallur for the purpose of comparison with the admitted thumb impression. But the defendants 2 and 3 have failed to do so apart from the fact that DW3 has not spoken about Palaniammal's signing or affixing her left thumb impression in the Will in their presence, there are other vital contradictions between the evidence of DW2 and DW3, which will show that the will propounded by the second and third defendants was surrounded with suspicious circumstances.

17. The first defendant was not a direct lineal descendant to Palaniammal. Admittedly the second defendant Karuppa Konar was the son of the brother of the husband of Palaniammal. In the presence of her own progenies, namely her daughters Kaliammal and Rangammal, there should have been a strong reason

to prefer the second defendant as the sole legatee, thereby totally excluding her own daughters. Ex.B2 does not contain any reason for Palaniammal disinheriting her own daughters and preferring her husband's brother's son. Though Ex.B2 contains a recital to the effect that earlier Will dated 11.12.1967 was cancelled, no reason for the same has been assigned. The same gives rise to a serious suspicion regarding the execution of the original of Ex.B2. The second defendant Karuppa Konar was the propounder of the said Will and he was shown as the sole legatee. But Karuppa Konar shied away from figuring as a witness on his side and he chose to send his son Aruchamy to depose as DW2. Inability due to old age was stated to be the reason for his failure to appear as a witness. DW2, in his evidence, would state that since his father aged about 95 years was bedridden, he was not able to come to the court. In the averments made in the plaint, the age of the second defendant Karuppa Konar was shown as 68 years. The plaint was filed in March 1987. Within 3? years thereafter, on 21.10.1991, his son Aruchamy was examined as DW2. He gave the age of the father as on the said date to be 95 years. If at all the age of the second defendant found in the plaint is taken to be his correct age, he would have completed the age of 71 or 72 years as on the date of examination of DW2. The age of the second defendant furnished in the plaint has not been denied in the written statement. Hence the statement made by DW2 that his father was aged about 95 years could not be accepted to be correct. The difference is huge, namely about 23 years. The necessary inference from the same will be that the second defendant, fearing meticulous cross examination that would bring truth from his mouth, chose to keep away from the court. The Will is said to have been executed on 03.12.1974, but it was registered only on 05.12.1974. According to the testimony of DW2, the second defendant Karuppa Konar, attesor Krishnasamy and the elder brother of DW2 started at 10.00 a.m from their house for the purpose of execution of the Will propounded by the second defendant. It is his further testimony that the testator Palaniammal was taken in an auto-rickshaw by the second defendant and the elder brother of DW2. On the other hand, the evidence of DW3 - Krishnasamy is to the effect that Palaniammal, her daughter Rangammal and servant-maid Karupakkal walked some distance and then took an auto-rickshaw to go to the place of execution of the Will, whereas he proceeded in a bicycle. The said evidence of DW3 is contrary to the evidence of DW2, which is to the effect that Palaniammal was taken by the second defendant and the elder brother of DW2 (elder son of the second defendant) in an auto-rickshaw.

18. DW3 has denied the suggestion that during the relevant period Palaniammal was not in a position to sit and she could not travel without the help of others. The same is quite contrary to the admission made by DW2. DW2 made a clear admission in his evidence that Palaniammal could not walk as on the date of the execution of the sale deed, because of her old age. It is also his clear admission that Palaniammal was not well; that Palaniammal died of ill-health and that she was in such a stage for one or two months prior to her death. The relevant

portion of his testimony in vernacular is as follows:

ghl;o clk;g[rhpapy;yhky; ,we;jhh;/ 1. 2 khjk; ,Ue;jhh;fs;/ mtUf;F elf;f KoahJ
vd;why; tajhdjhy; elf;f KoahJ/ ngr;R thh;j;ij ,y;iy/

The said admission of DW2 will make it clear that Palaniammal was not possessing good health and sound disposing state of mind on the alleged date of execution of the original of Ex.B2. The same shall be the reason why the original will was not produced. The learned trial Judge, on a proper appreciation of evidence, has arrived at a correct conclusion that, apart from the failure to prove execution of the Will dated 03.12.1974, the said will was surrounded with more suspicious circumstances.

19. The propounder of the will should lead evidence sufficient to dispel the suspicious circumstances surrounding the execution of the will. In view of the above mentioned facts, the learned trial Judge has arrived at a correct conclusion that the defendants 2 and 3 were not able to dispel the suspicious circumstances by adducing reliable and sufficient evidence and that hence, the will propounded by the second defendant could not be genuine. The learned trial Judge has also arrived at a correct conclusion that apart from the failure to prove the execution of the said will, the defendants 2 and 3 also failed to prove that the testator was maintaining good health and sound disposing state of mind as on the date of alleged execution of the will. The said findings of the trial court cannot be said to be either defective or infirm, warranting interference by this court. This court also, on re-appreciation of evidence, comes to the very same conclusion that the execution of the Will dated 03.12.1974, a certified copy of which has been produced as Ex.B2, has not been proved by the defendants 2 and 3; that there are many suspicious circumstances surrounding the alleged execution of the will, which remain unexplained that there is want of reliable evidence to dispel such suspicions and that hence the claim made by the defendants 1 and 2 on the basis of the will dated 03.12.1974 cannot be sustained.

20. We have seen that the will propounded by the second defendant, namely the will dated 03.12.1974, a certified copy of which has been produced as Ex.B2, has not been proved in the manner known to law. Next, we have to consider whether the will relied on by the plaintiff and the first defendant has been proved in the manner known to Law:

68. Proof of execution of document required by law to be attested. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is

specifically denied.]

It provides that a document required by law to be attested, shall not be used as evidence until at least one of the attesting witnesses has been called for the purpose of proving its execution, if there be an attesting witness alive and he is subject to the process of the court and is also capable of giving evidence. The proviso provides an exemption in respect of a document, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 unless its execution is specifically denied.

21. Of course, in this case, Ex.B1-Will has been registered under the provisions of the Indian Registration Act, 1908 and it has been registered as Document No. 271/1967 on the file of the Sub Registrar, Singanallur. But a proper consideration of the proviso to Section 68 of the Indian Evidence Act, 1872 will show that the exemption is not available for the proof of a Will. A Will is not required to be registered. Even if it is registered, its execution has got to be proved in accordance with the main part of Section 68 of the Evidence Act. The proviso makes it clear that the exemption from calling an attesting witness in proof of execution of a document shall be applicable if such document is not a Will. Unless the plaintiff and the first defendant prove the execution of Ex.B1 will in the manner known to law, they cannot succeed in claiming benefit under the said Will.

22. None of the attestors of Ex.B1-Will has been examined as a witness in proof of its execution. No doubt, the contesting defendants have not denied the execution of Ex.B1-Will and on the other hand, they contended that the same was revoked and superseded by a subsequent Will dated 03.12.1974. Such an admission, as pointed out supra, will not dispense with the requirement of examination of an attestor to prove the execution of the said will. It is not the case of either the plaintiff or the first defendant that both the attestors of Ex.B1-Will are not alive. Except the plaintiff as PW1 and the first defendant as DW2, who were not the attestors of Ex.B1-will, no other witness was examined on the side of either the plaintiff or the first defendant to prove the execution of Ex.B1-Will. Therefore, the testamentary succession of Kaliammal and Rangammal, daughters of Palaniammal to the suit properties owned by Palaniammal does not stand substantiated. Even in case of failure to prove Ex.B1-Will, the position will not change because Kaliammal and Rangammal were admittedly the daughters of Palaniammal and they alone were the non-testamentary class I legal heirs of Palaniammal. It is not the case of any one that either Kaliammal or Rangammal predeceased Palaniammal and it is an admitted fact that they survived Palaniammal. Hence, on the death of Palaniammal in the year 1975, both Kaliammal and Rangammal, as her class I legal heirs, became entitled to her properties in equal moieties.

23. It is the case of the plaintiff that Rangammal died without marriage and without any issues. The defendants 2 and 3 did admit that Rangammal died without issues. But they claim that Rangammal did not die as a spinster, but she

died only after marriage. Even in Ex.B1 relied on by the plaintiff and the first defendant, Rangammal has been shown to be the wife of one Nanjappa Konar. There is no evidence to show when did Nanjappa Konar die. On the other hand, the contesting defendants, namely defendants 2 and 3 have admitted that the husband of Rangammal and Rangammal died without issues. The said plea will give rise to an inference that the husband of Rangammal predeceased her and thereafter Rangammal died. It is also not the case of the contesting defendants, namely defendants 2 and 3, that Rangammal's husband survived her and the second defendant as his legal heir got the property by way of succession. The very fact that the second defendant chose to stake a claim to the suit properties based on an alleged will executed by Palaniammal will show that the second defendant could not have become a legal heir of Rangammal even through her husband. The claim that Kalaammal became the sole legal heir of her sister Rangammal has not been disputed. The claim of the plaintiff and the 1st defendant to have succeeded to the property of their mother Kaliammal has got to be sustained. Though the learned trial Judge has not adverted to the above said aspects, the finding of the trial court that the plaintiff and the first defendant, being the daughters of Kaliammal, are entitled to the first and third items of the suit properties in equal moieties is bound to be confirmed.

24. The claim of partition was resisted by the defendants 2 and 3 on two other grounds. They are: (1) The suit is bad for non-joinder of necessary parties; and (2) neither the plaintiff nor the first defendant was in possession of the first and third items of the suit properties and hence the relief ought to have been valued under Section 37(1) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955. It is the contention of the second defendant that the first item of the suit properties had been sold away by the second defendant and his sons to various persons and that the purchasers are in possession and enjoyment of the same. It is also their contention that the purchaser had put up residential building and they are residing there. But the contesting defendants were not able to state the names and addresses of such purchasers. Not even the dates of such sales came to be furnished. None of the sale deeds allegedly executed by them in favour of third parties has been produced. Not even certified copies of such sale deeds have been produced. The witnesses examined on the side of the contesting defendants were not able to give the particulars of the alleged sales. Hence the finding of the trial court that the sales allegedly made by the second defendant and his sons were not proved, cannot be said to be either defective or infirm.

25. It is not the case of the contesting defendants that the first item of the suit properties was in the possession of the second defendant as on the date of filing of the suit. It is also not their contention that the first item of the suit properties was in possession of the sons of the second defendant as on the date of filing of the suit. On the other hand, the contention raised in the written statement is to the effect that the second defendant effected a partition of the first item of the suit properties with his sons and they sold away the same to third parties and that the first item of the suit properties were in the hands of the third parties as

on the date of filing of the suit. As seen supra, the contesting defendants have not chosen to prove such alienation to third parties by reliable evidence. Not even a single sale deed or a certified copy of the same has been produced. It has also not been proved that pursuant to the alleged sales, the revenue records have been changed in the names of the third party purchasers. All the tax receipts found in Ex.B4 series are shown to be the receipts for payment of property tax in the name of Karuppa Konar, especially the receipt dated 16.07.1977 and 13.02.1982 specifically refer to the tax paid as house tax. The other receipts also suggest the tax to be house tax as they are said to have been collected half yearly. Though the said documents have been produced as Ex.B4 series, no evidence correlating the same to the first item of suit properties came to be adduced. Hence the said documents cannot be taken as the evidence proving the possession of the first item of the suit properties by the second defendant Karuppa Konar. In any event, it cannot be taken as establishing the exclusive possession of the second defendant Karuppa Konar in respect of the first item of the suit properties. The learned trial Judge has rightly chosen to rely on the evidence of PW1 and DW1 to arrive at a conclusion that the first item of the suit property was proved to be in the joint possession and enjoyment of the plaintiff and the first defendant. Even otherwise in the absence of any document regarding enjoyment, the principle "possession follows title" shall be applied. Hence this court comes to the conclusion that the trial court has not committed any error in arriving at the conclusion that the first item of the suit property is in the joint possession and enjoyment of the plaintiff and the first defendant as on the date of plaint and that the contention of the contesting defendants that the suit ought to have been valued under Section 37(2) is bound to be rejected.

26. The contention of the contesting defendants that the suit is bad for non-joinder of necessary parties stands unsubstantiated, as they have not chosen to give the particulars of persons who are necessary parties. Though the contesting defendants might have stated that the first item of the suit properties have been sold to third parties, the particulars of such third parties, who allegedly purchased the first item of the suit property have not been furnished. Not even sale deeds or copies of the sale deeds have been produced. In the absence of such evidence, based on the bald averment that the first item of the suit properties is in the possession of the third party purchasers alone, it cannot be said that the suit is bad for non-joinder of necessary parties. The finding arrived at by the court below regarding the said issue, which was framed as the additional issue by the trial court does not warrant any interference by this court.

27. Similar is the case regarding the third item of the suit properties. The third item of the suit properties is admittedly a residential house. Ex.B4 series came to be produced as house tax receipts and the receipts showing payment of tax to the local bodies in the name of the second defendant Karuppa Konar. According to the learned trial Judge, the said receipts alone shall not be enough to prove that the second defendant was in possession and enjoyment of the third item of the suit properties, especially in the light of Exs.B6 and B7 produced by the first

defendant to show that voter's identity card and family card were issued to her to the address of the third item of the suit properties. The difference in door number alone shall not be enough to show that the address found in Exs.B6 and B7 does not refer to the third item of the suit properties.

28. Even otherwise, admittedly, the third item of the suit properties belonged to Palaniammal. After her death, it became the property of her daughters Kaliammal and Rangamma. On the death of Rangamma, it became the absolute property of Kaliammal and on the death of Kaliammal, the plaintiff and the defendants became jointly entitled to the said property. The plaintiff and the first defendant have thus established their title to the first and third items of the suit properties. Though the second defendant claimed to be in possession of the third item of the suit properties, it is not his case that he perfected title by adverse possession defeating the title of the plaintiff and the first defendant. On the other hand, he claimed to be the testamentary legal heir of the original owner Palaniammal. The plaintiff and the first defendant also claimed title to the said properties as legal heirs of Palaniammal, through her daughters. Even if it is assumed that the third item of the suit properties was in actual possession of the second defendant, since he claimed it as a legal heir of Palaniammal, whereas the plaintiff and the first defendant also claimed those properties as legal heirs of Palaniammal through Rangamma and Kaliammal, the very plea made in the plaint that she is in joint possession, will be enough to sustain her plea for partition. Therefore, the objections raised by the defendants 2 and 3 for the grant of relief of partition in respect of third item of the suit properties on the ground that the possession of the suit property was with the second defendant, has no substance in it. As it has been held that the plaintiff and the first defendant are entitled to the third item of the suit properties also in equal moieties, the plaintiff is found to be entitled to the relief of partition in respect of the said property also. The plaintiff, first defendant and the second defendant claimed right by way succession and the suit is one for partition. Hence, there shall be no question of seeking a declaration of title for getting the relief of partition. A prayer for partition incorporates in itself a claim of title. As such the plaintiff cannot be non-suited merely on the ground that her title has been denied by the defendants 2 and 3 and she has not chosen to seek declaration of her title. The conclusion arrived at by the trial court to the effect that the plaintiff is entitled to half share in the third item of the suit properties also deserves to be confirmed. The further finding of the trial court that the plaintiff is entitled to the relief of partition in respect of items 1 and 2 of the suit properties is bound to be confirmed. However as indicated supra, the preliminary decree for partition granted in respect of the second item of the suit properties has got to be reversed and set aside, whereas the preliminary decree for partition granted in favour of the plaintiff in respect of the first and third items of the suit properties has got to be confirmed.

29. In the result, the appeal is partly allowed and the preliminary decree for partition granted by the trial court dated 14.01.1992 made in O.S. No. 230 of

1987 is set aside, so far as the second item of the suit properties is concerned and the suit shall stand dismissed in respect of the second item of the suit properties. So far as the items 1 and 3 of the suit properties are concerned, the preliminary decree of the trial court for partition directing division of the same into two equal shares and allotment of one such share to the plaintiff shall stand confirmed. In view of the peculiar facts and circumstances of the case, there shall be no order as to cost.