

**(2016) 04 MAD CK 0097**  
**In the Madras High Court**  
**Case No : Civil Suit No. 600 of 2014**

Renuka Manuel

APPELLANT

Vs

Mallika Surrender

RESPONDENT

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**Date of Decision :** 26-04-2016

**Acts Referred:**

**Citation :** (2016) 5 MLJ 747

**Hon'ble Judges :** Mr. M. Sathyanarayanan, J.

**Bench :** Single Bench

**Advocate :** Mr. S.R. Rajagopal, Advocate, for the Appellant; Mr. S.A. Rajan, Advocate, for the Respondent

**Final Decision :** Disposed Off

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## Judgement

Mr. M. Sathyanarayanan, J.—The plaint averments are as follows :-

(a) The plaintiff and the defendant are the daughters and legal representatives of Late Tmt. Helen Dasan and Dr. A.J. Dasan. Tmt. Helen Dasan, the mother of the plaintiff and the defendant, died on 24.12.2004, and she was a Professor and Head of Post Graduate English Department at Stella Maris College and she left a Will dated 31.7.1983, and the original of the same, is in the custody of the defendant. The defendant is the elder daughter of Late Tmt. Helen Dasan and Dr. A.J. Dasan, and the plaintiff is their younger daughter. As per the Will dated 31.7.1983, executed by Late Tmt. Helen Dasan, her husband ? father of plaintiff and defendant viz. Dr. A.J. Dasan, was appointed as the Sole Executor and the property bearing New Door No. 29 (Plot No. 47), 2nd Cross Street, Trustpuram, Kodambakkam, Chennai 600 024, was bequeathed in equal shares to the plaintiff and the defendant.

(b) The defendant made a representation to the plaintiff that the superstructure on the suit schedule property, may be demolished and a new construction can be put up and after construction, the plaintiff and the defendant are entitled to equal shares. The plaintiff in order to facilitate and enable the defendant ? her

elder sister, to get necessary approvals, had executed a General Power of Attorney bearing Document No. 669 of 2010 dated 16.8.2010, on the file of the Sub-Registrar of Assurances, Kodambakkam.

(c) After the execution of the said document, the plaintiff was kept in complete dark and apprehending that the defendant may resort to some action detrimental to her interest, had revoked the above said Power of Attorney under a registered Deed of Revocation of Power of Attorney dated 22.7.2013, (Document No. 2678 of 2013, on the file of the Sub-Registrar of Assurances, Kodambakkam).

(d) The plaintiff and the defendant are in constructive joint possession of the suit schedule property and the plaintiff was repeatedly calling the defendant to have an amicable partition of the same and she has not been favoured with any response and in this regard, one Mr. Raja Singh ? family friend, had also taken substantial steps to resolve the dispute ; but, it was also not favourably responded. Therefore, the plaintiff caused a lawyer's notice dated 19.2.2014, to the defendant calling upon her to divide the suit property in equal share and put her in possession, and though it was acknowledged, no reply has been sent and the request/demand made by the plaintiff for partition and separate possession, has also not been complied with. In the circumstances, the plaintiff came forward to file the present suit for partition and separate possession of half share and also for an enquiry for mesne profit and for costs of the suit.

2. The defendant filed a written statement denying the averments made in the plaint, and would contend that the suit property belonged to Late Tmt. Helen Dasan and after her demise, the plaintiff and the defendant are entitled to get equal shares. The defendant would further aver that there was an old dilapidated building, which could not be used for effective occupation, and the father of the plaintiff and the defendant came forward to help them by putting up a construction consisting of ground and first floors, and after construction, the plaintiff shall occupy the first floor and the defendant shall occupy the ground floor, sharing common amenities and the open terrace.

3. It is further averred by the defendant that the cost of construction was Rs. 85 lakhs and since neither of them had money, their father had sold the properties at Madurai as well as at Chennai and put up a construction out of the said sale consideration, with an understanding that he will have the life interest in the superstructure and will occupy one floor of the property and will receive the rental income from the other floor for his livelihood, until his life time and on account of the fact that the father of the defendant by spending his own money, had put up the superstructure, neither the plaintiff, nor the defendant is having any right over the same and their father is entitled to deal with the superstructure as he likes.

4. The defendant would further contend that the parties to the suit are entitled to get half share in respect of the land alone, and since their father had put up the superstructure, he is entitled to deal with the property as he likes and hence,

prayed for dismissal of the suit with costs.

5. The following issues were framed for consideration :-

(i) Whether the plaintiff is entitled to partition and allotment of half share of the plaint schedule mentioned property ?

(ii) Whether the defendant is liable to pay the mesne profits as prayed for ?

(iii) Whether the defendant is liable to pay the cost of the suit ?

(iv) Whether the superstructure was put up for the convenience of the plaintiff and the defendant ?

(v) Whether the superstructure is liable to be partitioned or not ?

(vi) To what other reliefs is the plaintiff entitled to ?

6. The plaintiff filed her proof affidavit in lieu of chief-examination, and marked Exs. P1 to P6. The defendant filed her proof affidavit in lieu of chief-examination, and marked Exs. D1 to D4.

7. The learned Counsel appearing for the plaintiff, would submit that the Will executed by Late Tmt. Helen Dasan, marked as Ex. P3, as well as the entitlement of the plaintiff and the defendant to get equal share in the suit schedule property, are not in serious dispute and the present lis revolves around the entitlement of the plaintiff to get half share in the newly put up superstructure.

8. The learned Counsel appearing for the plaintiff, has drawn the attention of this Court to the oral evidences of P.W. 1 and D.W. 1 and would submit that it is the stand of the defendant that the father of the plaintiff and the defendant Dr. A.J. Dasan by disposing of the properties at Madurai as well as at Chennai, incurred all expenses for putting up the superstructure with an understanding that he can live in the property till his life time and further, that he can lease out a portion of the property and appropriate the rental income and can deal with the superstructure as he likes and the said defence taken by the defendant, is not at all supported by any documentary evidence except the bank passbooks of Dr. A.J. Dasan, marked as Exs. D3 and D4, and the said documents came to be marked without examining him and therefore, it is of no help to probablise the case of the defendant.

9. It is the further submission of the learned Counsel appearing for the plaintiff, that though originally a Power of Attorney was executed by the plaintiff so as to enable the defendant to approach the authorities for getting necessary approvals for putting up the superstructure, later on, on coming to know about the evil design of the defendant, she has revoked the said Power of Attorney and the plaintiff is yet to be aware of the break-up of expenses incurred by engaging the services of Mr. Raja Singh of Kingsway Consultants and that apart, to sustain the case of the defendant that the father of both of them had incurred expenses in putting up the superstructure with an absolute right over it, he was not at all

examined as a witness and so far as the cost of construction is concerned, Mr. Raja Singh of Kingsway Consultants was also not examined and in the light of the fact that Ex. P3 Will covered the superstructure also, there cannot be any difficulty in sustaining the case of the plaintiff.

10. The learned Counsel appearing for the plaintiff, would further submit that the plaintiff has no objection for her father to reside in the superstructure till he is alive, and has also drawn the attention of this Court to the testimony of P.W. 1 and would submit that if he is willing, she is prepared to take him to United Kingdom also, where she lives at present, and it also shows her love and affection towards her father and only on account of the adamant attitude of her elder sister viz. the defendant, she is very much constrained to file the present suit and prays for decreeing of the suit with costs.

11. Per contra, the learned Counsel appearing for the defendant, made a submission that it is an admitted fact that the funds for putting up a new construction, have been provided by the father of the plaintiff and the defendant and Exs. D3 and D4 bank passbooks, would also reflect the fact that the cost of construction was borne out by Dr. A.J. Dasan ? father of the plaintiff and the defendant, and there was a specific understanding that he can reside in the superstructure till his life time and is entitled to deal with the superstructure according to his own will and pleasure, and however, the plaintiff had gone back on her promise and therefore, prays for dismissal of the suit.

12. This Court perused the pleadings as well as the oral and documentary evidences and also considered the submissions made by the learned Counsel appearing for the plaintiff, and the learned Counsel appearing for the defendant.

13. Issue Nos. (i) and (iv) :-

13(i) It is not in dispute that Ex. P3 Will, was executed by the mother of the plaintiff and the defendant appointing her husband Dr. A.J. Dasan ? father of the plaintiff and the defendant, as Executor of the Will and the schedule of property to the Will would also disclose that the property is consisting of land and superstructure and as per the terms of the Will, both plaintiff and defendant are entitled to equal share.

13(ii) It is the stand of the defendant that the father of the defendant had disposed of the properties at Madurai and Chennai and put up the superstructure and as such, neither the plaintiff, nor the defendant can claim any right over the same and their father is entitled to deal with the newly put up superstructure as he likes.

13(iii) P.W. 1 ? the plaintiff, in the proof affidavit filed in lieu of chief-examination, would state that her father offered to provide the construction cost and the excess cost for her portion was to be borne by her and on account of love towards their father, they were willing to permit their father to reside in the property during his life time and denied the stand taken by the defendant as to

the vesting of ownership of the superstructure with her father. P.W. 1 in her cross-examination, would depose that she has not been provided with any documents with regard to the cost of construction, either by her father or by Raja Singh of Kingsway Consultants and would further depose that her father voluntarily offered to bear the cost of putting up a new superstructure and at no point of time, she has given her consent to take ownership on account of putting up of new superstructure and the construction of superstructure by the father of the plaintiff and the defendant was a gift to his daughters and at any point of time, no consent was given to him to own the superstructure and also reiterated that she has no objection to her father to live in the superstructure till his life time and denied the suggestion that her father refused to give any portion of the construction to her.

13(iv) The defendant who examined herself as D.W. 1, in her cross-examination, would admit Ex. P3 Will as well as the entitlement of the plaintiff to the half share in the suit schedule property and however, reiterated her stand that the entire cost of construction was borne out by her father by disposing of two immovable properties situated at Madurai and Chennai respectively and would also depose, the suit property was actually purchased by her father and gifted to her mother and since the superstructure was built up by her father by putting in/ investing the savings, neither she, nor her younger sister ? the plaintiff has any right or claim to the said building.

13(v) It is to be pointed out at this juncture, that the father of the plaintiff and the defendant viz. Dr. A.J. Dasan, did not enter the witness box and was not examined as a witness. A perusal of Exs. D1, D3 and D4 would disclose, the sale proceeds were credited to the bank account of Dr. A.J. Dasan and from there, amounts have been spent for putting up the superstructure. Therefore, the superstructure was put up by Dr. A.J. Dasan. It is the stand of the defendant that since the superstructure was put up by Dr. A.J. Dasan ? father of the plaintiff and the defendant, he became the owner of the superstructure and entitled to deal with the same as his own property and neither she, nor her younger sister ? the plaintiff, has any right whatsoever. The said stand taken by the defendant, in the opinion of the Court, is wholly unsustainable for the reason that at the time of execution of the Will, the property consisted of land and superstructure and the defendant would also concede that her younger sister ? the plaintiff is entitled to equal share in the suit schedule property. As pointed out earlier, the defendant did not choose to examine her father Dr. A.J. Dasan, who is residing with her, to probablise/substantiate her stand that since the cost of construction was borne out by him, he is the owner of the superstructure and entitled to deal with the same as his own property. The best person to speak about the said fact is Dr. A.J. Dasan ; but, he did not enter the witness box. No doubt, Dr. A.J. Dasan had spent money out of the sale proceeds of Ex. D1, for putting up the superstructure and Exs. D3 and D4 would also reflect the same. Exs. D1, D3 and D4 are not public documents and therefore, the person connected with the said document ought to have been is to be examined to prove the contents of the

same ; but, it was not done so.

13(vi) So far as the disposal of Madurai property is concerned, it is the stand of the plaintiff that the said property was in the name of her mother and it was disposed of by her father and to probablise the same, no document has been marked. Therefore, issue No. (i) is answered in affirmative and in favour of the plaintiff.

13(vii) As regards issue No. (iv), the superstructure was put up for the convenience of the plaintiff and the defendant.

14. Issue No. (v) :- In the light of the finding given in respect of issue Nos. (i) and (iv), the newly put up superstructure is also liable to be partitioned equally between the plaintiff and the defendant.

15. Issue No. (ii) :- The plaintiff neither in the plaint, nor in her evidence, had stated anything about the lease of newly put up superstructure by the defendant and the earning of rental income. Admittedly, the father of the plaintiff is under the care and custody of the defendant. The plaintiff, during the course of her evidence, made a fair admission that her father is entitled to reside in the superstructure, till his life time and if her father is willing, she is also willing to take him to United Kingdom, where she resides for the present. In the absence of pleading and evidence as to the rental income earned by the defendant by leasing out the superstructure, this Court is of the view that the plaintiff is not entitled to mesne profits. Therefore, issue No. (ii) is answered in negative and against the plaintiff.

16. Issue Nos. (iii) and (vi) :- For the foregoing discussion, the plaintiff is entitled to succeed partially and considering the relationship, is not entitled to costs of the suit.

17. In the result, the civil suit is partly decreed in respect of partition and allotment of half share in the land and superstructure bearing New Door No. 29 (Plot No. 47), 2nd Cross Street, Trustpuram, Kodambakkam, Chennai 600 024, (more fully described in the plaint schedule), in favour of the plaintiff. The plaintiff is not entitled for mesne profits. This Court, taking into consideration the relationship between the parties, is not inclined to award any costs.