



Appeal Suit.No.535 of 2016

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	05.04.2023
Pronounced on	16.06.2023

CORAM

**THE HONOURABLE MRS.JUSTICE
K.GOVINDARAJANTHILAKAVADI**

Appeal Suit.No.535 of 2016

1.K.Chakarapani

....Appellant

Vs.

1.Sowrirajan
2.Alamelu

...Respondents

Prayer: First Appeal has been filed under section 96 of CPC, against the Judgement and Decree dated 31.07.2015 made in O.S.No.138 of 2011 on the file of the III Additional District and Sessions Judge, Virudhachalam.

For Appellant : M/s.R.Gururaj

For R1 : M/s.T.Dhanasekaran



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For R2 : M/s.P.V.Muralidhar

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J U D G M E N T

This appeal is directed against a judgment and decree dated 31.07.2015 passed by the learned III Additional District and Sessions Judge, Cuddalore at Virudhachalam in O.S.No.138 of 2011.

2.The appellant is the 1st defendant in O.S.No.138 of 2011 and brother of the plaintiff and the 2nd defendant in the above suit who are the respondents 1 and 2 herein.

For the sake of convenience, the parties herein are referred to as they are ranked before the trial Court as plaintiff and defendant.

3.The plaintiff in O.S.No.138 of 2011 instituted the above suit for partition and separate possession of 1/3rd share in the suit schedule properties. According to the plaintiff, the plaintiff and the defendants 1 & 2 are the sons and daughter of one Kothandapani who acquired the suit properties by



inheritance from his adopted father Sowrirajulu Chettiar and therefore the properties are his ancestral properties. Apart from the plaintiff and the defendant, the said Kothandapani had three other daughters namely Brindha, Parimala and Devagi. After the amendment of Central Act 39/2005 the daughters of Kothandapani are also entitled for equal shares in the suit properties. While so, the father Kothandapani died intestate on 03.10.2011 leaving behind his sons and daughters as his legal heirs. On 24.08.2011 the daughters of Kothandapani namely Brindha, Parimala and Devagi executed a release deed in favour of the 1st defendant in respect of their shares in the suit properties. However, such reliefs made in favour of one co-parcener is presumed to be released in respect of all co-parceners, since the suit properties are undivided joint family properties. While so, the 1st defendant is attempting to alienate the suit properties, as if he is entitled to 5/7 shares in the suit properties. Hence, the plaintiff was constrained to file the above suit for partition and separate possession of his 1/3 shares in the suit properties.

4.The 1st defendant contested the suit, filed written statement and denied the averments made in the plaint. According to the 1st defendant, the



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suit for partition is not maintainable in law and on facts. The plaintiff has suppressed the earlier partition deed executed on 05.03.1960 in respect of the suit properties and about the judgment and decree passed in O.S.No.72 of 69, a partition suit in respect of the properties alienated by the father of the parties. Hence, a second suit for partition is not maintainable. He would further submit that, after the said partition, the sisters of the 1st defendant had relinquished their rights in the suit properties in favour of the 1st defendant and therefore, such relinquishment cannot be presumed to be made in respect of all other co-parceners. Moreover, in order to avoid huge registration charges for registering the release deed executed by his sisters, the 1st defendant agreed to mention the properties as ancestral properties in the said release deed. The plaintiff taking advantage of the same filed the above vexatious suit for partition. It is further submitted that the plaintiff had also purchased properties in his name and the name of his wife and children utilizing funds from the suit properties. Hence, the 1st defendant prays for dismissal of the suit for compensated cost.

5.The 2nd defendant, in her written statement would submit that she is



the daughter of the said Kothandapani who inherited the suit properties from his adopted father. Since she has not relinquished her rights in the suit properties, she is equally entitled to 1/3rd shares in the suit property and also paid the necessary court fees in respect of her shares.

6.The trial Court, on basis of the pleadings of the parties, framed the following issues:

1.Whether the suit properties are joint family properties of deceased Kothandapani?

2. Whether the three daughters of Kothandapani were entitled to inherit to the estate of deceased Kothandapani?

3.Whether the release deeds executed by the daughters of Kothandapani are binding the other parties?

4.Whether the legal position canvassed in Para 6 of the plaint is correct and enforceable?

5.Whether the plaintiff is entitled to 1/3 share in the suit property?



6. Whether the partition deed dated 05.03.1960 referred to in Para 5 of the written statement filed by 1st defendant is binding on all the parties?

7. Whether the Will dated 23.12.2010 is true, valid and binding on the parties?

8. Whether the 2nd defendant is entitled to 1/3 share in the suit properties?

9. To what relief the plaintiff is entitled to?

7. The parties adduced oral and documentary evidence in support of their respective cases.

8. The plaintiff examined himself as P.W.1 and marked Exs.A.1 and A2, certified copy of registered release deed dated 24.08.2011 and certified copy of registered Will dated 01.04.2009. On the side of the 1st defendant was examined as D.W.1 and one G.Ezhumalai was examined as D.W.2 and marked Exs.B.1 to B.10 respectively.



WEB COPY 9.The trial Judge, after appreciating the evidence on record, decreed the suit in favour of the plaintiff and the 2nd defendant by allotting 1/3 shares each in the suit properties.

10.Aggrieved by the same, the 1st defendant has filed the present appeal stating that the trial Judge failed to take note of the fact that there was already a partition in the family which is evidenced by Exs.B1 & B.2 and the second suit for partition will not lie. The other grounds raised by the 1st defendant in this appeal is that Ex.B.3-release deed cannot enure for the benefit of any other person other than the 1st defendant, the releasee. The trial Court failed to take note of the fact that the plaintiff has played fraud upon the Court by suppressing Ex.B1 & B.10, the partition deed dated 05.03.60 and certified copy of the suit register pertaining to O.S.No.72 of 69. Hence, prayed for allowing the appeal by setting aside the decree and judgment dated 31.07.2015 in O.S.No.138 of 2011 on the file of the III Additional District and Sessions Judge, Virudhachalam.

11.The learned counsel appearing for the 1st defendant/appellant would



submit that the second suit for partition is barred by the principles of *res-judicata*. According to him, a judgment pronounced by Courts of competent jurisdiction is binding on the parties and therefore a second suit for partition is not maintainable. His further contention is that after passing of decree for partition in O.S.No.72 of 69 in respect of the suit properties, a second suit for partition is not maintainable. He would further submit that, once there is severance in status in the family after partition, re-union is not possible. He would further contend that the plaintiff has played fraud upon the Court by suppressing the earlier partition and therefore, the plaintiff is not entitled for any relief as claimed in the above suit. The trial Court without proper appreciation of the facts of the case erroneously decreed the suit for partition which is liable to be set aside. To support his contention he has relied upon the following decision cases reported in:

Res judicata

1. *AIR 1961 SC 1457*
2. *AIR 1977 SC 1268*
3. *AIR 1979 SC 551*
4. *2003 (10) SCC 578*



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5. 2008 (12) SCC 661

WEB COPY **Effect of Partition decree**

6. AIR 1970 SC 1536

7. 2003 (7) SCC 452

Co-parcenary- what is severance in status

whether re-union possible

8. AIR 1962 SC 287

9. AIR 1969 SC 1330

10. AIR 1968 SC 1018

11. AIR 1972 SC 1279

12. AIR 1980 SC 1173

13. AIR 1992 SC 1254

Fraud

14. AIR 1951 SC 16

15. 1994 (1) SL 21 (SC)

Equity

16. AIR 1951 SC 469



WEB COPY 12. On the other hand, the learned counsel appearing for the 1st respondent/plaintiff would submit that, the alleged partition deed dated 05.03.1960 was only a sham and nominal document and no final decree was passed in in-pursuant to the preliminary decree passed in O.S.No.72 of 69. There was no partition thereof by metes and bounds has been effected among the parties in respect of the suit properties in pursuant to the said partition deed and the decree passed in O.S.No.72 of 69. The 1st defendant himself admitted during his cross examination that even after the said partition deed, the family enjoyed the properties jointly and no final decree was passed in O.S.No.72 of 69 till date. The above admissions made by the 1st defendant can be used against him in terms of Section 58 of the Indian Evidence Act 1872. The trial Court considering the materials available on record and appreciating the evidence adduced by the parties, rightly decreed the suit and no interference calls for. To support his contention he has relied upon the following decision cases reported in :

1.CDJ 2007 SC 654

2.CDJ 2022 SC 675



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3.CDJ 2001 Bihar HC 123

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13.Heard on both sides, records perused.

14.Based on the grounds of memorandum of appeal, and the arguments advanced by the respective counsel for both parties, the following points have arisen for consideration:

1.Whether in pursuant to the partition deed dated 05.03.1960, partition was effected by metes and bounds between the parties?

2.Whether the decree passed in O.S.No.72/69 was given effect to?

3.Whether the present suit for partition is hit by the principles of res-judicata and barred by Order 2 Rule 2 CPC?

4. Whether the question of reunion arises in the facts and circumstances of the case?



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5. Whether the plaintiff has played fraud upon the Court by suppressing the material facts?

6. Whether the daughters of Kothandapani are entitled for their respective shares in the suit properties as per Central Act 39/2005?

7. Whether the release deed executed by the other daughters of Kothandapani in favour of the 1st defendant shall be presumed to be in favour of the other co-parceners?

8. Whether the appeal can be allowed or not?

15. Point Nos. 1 to 6

The facts not in dispute

I. The plaintiff and the defendants are the sons and daughter of one Kothandapani

II. The said Kothandapani died intestate on 03.10.2011.

III. The daughters of Kothandapani namely Brindha, Parimala and Devagi executed a release deed dated on 24.08.2011 in favour of the 1st



defendant.

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16. According to the plaintiff, the suit properties were acquired by his father Kothandapani by inheritance from his adopted father Sowrirajulu chettiar and therefore the properties are his ancestral properties. On the other hand, the 1st defendant would submit that, the suit properties are not ancestral in nature. In order to avoid huge registration charges at the time of registering the release deed executed by his sisters, the 1st defendant agreed to mention the suit properties as ancestral properties in the above document. The plaintiff taking advantage of this, has stated in the plaint that the suit properties are the ancestral properties of their father Kothandapani. However, the 1st defendant failed to establish that the suit properties are not the ancestral properties of their father Kothandapani. On perusal of Ex.A1 release deed, it is mentioned in the recitals that the suit properties are the ancestral properties of Kothandapani. Moreover, the 1st defendant examined himself as D.W.1 has categorically admitted in his evidence that the suit properties are ancestral properties of Kothandapani. The relevant portion of his evidence is extracted as here under:



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“தாவா சொத்து என் தகப்பனாரின் பூர்வீக சொத்து என்றால்

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சரிதான்.”

17. Therefore, the specific admission made by the 1st defendant during his cross examination goes to show that the suit properties are ancestral properties of their father Kothandapani and as per the Central Act 39/2005 the daughters of Kothandapani also have respective shares in the suit properties.

18. Now, it is necessary to determine whether the suit properties were partitioned by metes and bounds pursuant to execution of the partition deed and passing of a decree in O.S.No.72 of 69. The 1st defendant examined himself as D.W.1 has categorically admitted during his cross examination that since no final decree was passed in pursuant to the preliminary decree passed in O.S.No.72/69 the suit properties were enjoyed as joint family properties by the family members. The relevant portion of his evidence is extracted as here under:

“இறுதி நிலை தீர்ப்பாணை பிறப்பிக்காததால் பொது குடும்ப



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சொத்தாகத் தான் அனுபவித்து வந்தோம் என்றால் ஆமாம்.”

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“இவ்வளவும் நடந்த பின்னர் என்னுடைய தகப்பனார் பாக
வழக்கு தாக்கல் செய்யப்பட்டிருந்தும் இறுதி தீர்ப்பாணை
பிறப்பிக்கப்படாததால் பாகம் பொறுத்து ஒரு தீர்வு காண வேண்டும்
என எண்ணினார். ஆனால் வாதி அதற்கு ஒத்துவரவில்லை. வாதி
தூர்லாபம் அடைய வேண்டியே அவ்வாறாக செயல்பட்டு வந்தார்.
சகோதரிகளுக்கு முன்பே சொத்துக்கள் ஒதுக்கப்பட்டிருந்ததால்
அவர்களுக்கு எந்த பாகமும் இல்லாதபோதும் அவர்களிடமிருந்து
விடுதலை பத்திரம் எழுதி வாங்க முடிவு செய்யப்பட்டது.”

19.From the evidence of D.W.1, it is understood that, no final decree application was filed by the parties and since no final decree was passed in O.S.No.72/69, their father decided to find a solution in respect of the suit properties by executing Ex.B.3 release deed. D.W.1 also admitted that till his life time, his father enjoyed the suit properties. The father of the plaintiff admittedly died on 03.10.2011. Therefore, according to D.W.1 the suit properties were jointly enjoyed till the death of their father i.e., on 03.10.2011



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i.e., even after relinquishing his right in the suit properties on 24.08.2011 by executing Ex.B.3 release deed, the father Kothandapani continued to enjoy the suit properties along with other co-parceners. This would show that, even after execution of the alleged partition deed dated 05.03.60 and passing of preliminary decree in O.S.No.72/69 on 20.11.1972, the family members have enjoyed the suit properties as joint family properties. The categorical admission of D.W.1 is sufficient to establish that pursuant to the partition deed and passing of preliminary decree in O.S.No.72/69, there is unity of title and possession of the suit properties between the parties and no partition thereof by metes and bounds has been effected.

20.As rightly pointed out by the learned counsel for the plaintiff referring to the decision case reported in **CDJ 2007 SC 654** that 'an admission made by a party can be used against him,' squarely applicable to this case. Moreover, in terms of Section 58 of Indian Evidence Act 1872, a thing admitted need not be proved. Therefore, the documents marked by the 1st defendant as Exs.B.1, B .2 & B10 has no significance.



WEB COPY 21. Since there was no severance in status between the parties in pursuant to the partition deed and by virtue of decree passed in O.S.No.72/69, the question of reunion does not arise. From the evidence on record it could be inferred that the alleged partition deed and the decree passed in O.S.No.72/69 were not given effect. Till date no final decree was passed in O.S.No.72/69.

22. Coming to Section 11 of C.P.C, which embodies the Rule of conclusiveness as a evidence. This provision bars the plea of issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue and became finally. Section 11 of C.P.C operates as a bar to try the same issue once over, in order to prevent multiplicity of proceeding and accords finality to an issue. Though the learned counsel vehemently contend that the present suit is hit by the principles of res-judicata stating that, the matter in issue was already reached its finality and steps for filing an application for a final decree can be made at any point of time. It is not in dispute that there is no limitation for moving an application



for passing of final decree. But here the intention of the parties to be taken into consideration. Though the preliminary decree in O.S.No.72/69 was passed in the year 1972, till 2011 i.e., till the death of father Kothandapani the suit properties were enjoyed jointly. The plaintiff examined as P.W.1 also deposed that the above suit for partition in O.S.No.72/69 was filed in order to resolve the dispute between Kothandapani and his brother and that is why the suit properties were enjoyed jointly and even after passing of the decree in the above partition suit it was not acted upon and given effect. His further contention is that the alleged partition deed marked as Ex.B.1 dated 05.03.60 was also a sham and nominal document which was not given effect and acted upon. Even in Ex.A.1 release deed dated 24.08.2011 it is mentioned that the suit properties are Hindu undivided Joint family properties. The relevant portion of the recital found in Ex.A.1 is extracted as under:

"Whereas the joint Hindu undivided family consists of V.S.Kothandapani the first releaser herein and his two sons K.Sowrirajan and Sakkrapani the releaser herein and four daughters Viz. N.Brindha the second releaser herein, P.Alamelu second daughter of Kothandapani the second



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releaser herein and P.Devagi the fourth releaser herein, the wife of the 1st releaser K.Vimala expired on 12.02.2007".

It is also mentioned in the recital as

"The properties are the ancestral properties and he was managing (V.S.Kothandapani) the said properties as joint Hindu undivided family properties."

23.This recital itself clearly goes to show that no partition took place in the family even after Ex.B.1 partition deed. Therefore, the arguments put-forth by the learned counsel appearing for the appellant that the present suit for partition is barred by the principles of res-judicata and barred under Order 2 Rule 2 C.P.C has no force. While the factual position is so, the submission made by the 1st defendant counsel that the plaintiff has played fraud upon the Court and he is not entitled for equity cannot be accepted. Accordingly, these points are answered in favour of the plaintiff.

24.Point Nos.7 & 8:

The next point for consideration is that whether the daughters of Kodhandapani are entitled for their respective shares in their suit properties



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as per Central Act 39/2005. The Hindu Succession (Amendment) Act, 2005

(39 of 2005) was enacted to remove gender discriminatory provisions in the Hindu Succession Act, 1956. Under the amendment, the daughter of the co-parcener shall by birth become a co-parcener in her own right in the same manner as the son, provided that, nothing contained in the Sub Section of the above Act shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December 2004. In fact D.W.1 himself admitted in his cross examination that as per Act 39 of 2005 his sisters have equal shares in the suit properties. The relevant portion of his evidence is extracted as here under:

“தாவா சொத்து என் தகப்பனாரின் பூர்வீக சொத்து என்றால் சரிதான்.”, “மத்திய சட்டம் 39/2005 அமுலுக்கு வந்த பிறகு சகோதரிகளுக்கும் சம உரிமை உண்டு என்றால் சரிதான். எனது சகோதரிகளுக்கும் பாகம் உண்டு என்பதால் தான் என் தகப்பனார் வா.சா.ஆ.2 உயில் எழுதிக் கொடுத்துள்ளார் என்றால் சாட்சி ரத்து பத்திரம் எழுதிய பிறகு தான் வா.சா.ஆ.2



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பற்றி தெரிய வந்ததாக கூறுகிறார்.”

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The above evidence of D.W.1 goes to show that after the amendment of Central Act 39 of 2005, the daughters are also entitled to their respective shares in the suit properties. As discussed above, the suit properties are the ancestral properties of Kodhandapani and till date no partition has been effected by metes and bounds, the daughters of Kothandapani are also entitled for their respective shares in the suit properties. However, except the 2nd defendant, the other daughters of Kothandapani have relinquished their shares in the suit properties by executing Ex.B.3- release deed. Though the release deed executed in favour of the 1st defendant by his sisters shall be presumed to be in favour of the other co-parceners. The suit properties as discussed above still remains as joint Hindu undivided family properties. Therefore, the release made by the other daughters of Kothandapani in favour of the 1st defendant is presumed to be released in favour of other co-parceners, Since the 2nd defendant, the daughter of Kothandapani did not execute any release deed by relinquishing her right in their suit properties, the 2nd defendant is also entitled for 1/3 shares in the suit properties. In view of what has been stated and observed above, it is to be held that the plaintiff and



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the 2nd defendant are entitled to get 1/3 shares in the suit properties.

Accordingly, these points are answered.

25.In the result, there is no merit in the above appeal which must fail.

Accordingly, the appeal is dismissed. There will be no order as to cost.

16.06.2023

vsn

Internet:Yes/No

Index:Yes/No

Speaking/Non-speaking order



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K.GOVINDARAJAN THILAKAVADI, J.

vsn

PRE- DELIVERY JUDGEMENT MADE IN

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