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A.S.(MD).No.106

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 23.01.2023

CORAM

THE HONOURABLE MRS.JUSTICE N.MALA

A.S.(MD)No.106 of 2012

and

M.P(MD)Nos.3 of 2012 & 1 of 2015

1.V.Sundaram

2.V.Jeyaraman

3.V.Marimuthu

4.Muniammal

5.Chitra

6.Balamurali

... Appellants/Defendants

[5th and 6th appellants impleaded as
Legal Representatives of deceased
3rd Appellant as per order dated
16.08.2022 in CMP (MD).No.
7289/2022]

Vs

1.Lakshmiammal

2.M.Dhandapani

3.M.Shanmugavel

4.M.Mayilsamy

... Respondents/Plaintiffs



A.S.(MD).No.106

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PRAYER: Appeal Suit filed under Section 96 of Code of Civil Procedure r/w Order 41 Rule 1 of C.P.C., against the Judgment and Decree passed in O.S.No.50 of 2008 dated 31.10.2011 on the file of the Fast Track Court, Dindigul.

For Appellant Nos.1, 2 and 4 : Mr.C.Sundaravadivel

Appellant No.3 : Died

For Respondents : Mr.M.P.Senthil Change of Vakalat

Mr.A.Mohamed Haneef

* * * * *

J U D G M E N T

The appeal suit is filed against the Judgment and Decree passed in O.S.No.50 of 2008 dated 31.10.2011 on the file of the Fast Track Court, Dindigul.

2.The defendants are the appellants in the appeal. The suit was filed by the plaintiffs for partition of suit properties and preliminary decree for their 4/6th share in the suit properties among other reliefs.

3.For convenience sake the parties will be referred to as per the ranking in the trial Court.



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4.The case of the plaintiffs was that the properties originally belonged to one Vellayan chettiyar, as his self acquired properties and on his death the same devolved on his three sons viz., Velusamy chettiyar, Perumal chettiyar and Subburayalu chettiyar. After the death of Vellayan chettiyar, his three sons divided the properties by way of oral partition and the suit properties were allotted to the share of the said Velusamy chettiyar. Ever since the partition, the said Velusamy chettiyar was in absolute enjoyment of the same. The suit properties were purchased from out of the ancestral nucleus as, the said Velusamy chettiyar had no independent income and the same were jointly enjoyed by Velusamy chettiyar along with his heirs. The said Velusamy chettiyar during his lifetime had three wives viz., Alagar Ammal @ Thoppayee, Thirumalaiammal and Ramuthayee @ Mathakkal. The first wife of Velusamy chettiyar died in the year 1945 issueless. After the demise of the first wife, Velusamy chettiyar entered into a second marriage and through the second wife he begot one daughter viz., Muniammal, the 4th defendant herein and one son Muniappan, who passed away leaving behind the plaintiffs. The first plaintiff is the wife of the said Muniappan and other plaintiffs are the sons of the said Muniappan. Later the said Velusamy chettiyar contracted a third marriage with one Ramuthayee @ Mathakkal and through her he begot three sons, viz., defendants 1 to 3 herein.



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5. According to the plaintiffs the said Velusamy chettiyar and his sons were in joint possession and enjoyment of the suit ancestral properties with the sons contributing their labour in the suit properties. While so, the said Velusamy chettiyar died leaving his daughter, the 4th defendant herein, the plaintiffs (legal heirs of deceased Velusamy chettiyar's son Muniappan) and the defendants 1 to 3 herein as his legal heirs. The plaintiffs and the defendants 1 to 3 were in joint possession of the suit properties as the legal heirs of the deceased Velusamy chettiyar. The 4th defendant married in and about 1965 and after her marriage she lived separately with her husband. As the 4th defendant was given the usual and customary presentation (Seervarisai) at the time of her marriage, she relinquished her right in the family properties in favour of the plaintiffs in and about 1999 and was out of enjoyment of the suit properties. The first defendant was insisting the plaintiffs and her other brothers to divide his share in the family properties as he required money for investing the same in his money lending business. The plaintiffs and the defendants 2 and 3 agreed to the division and in and about 2005, the land in S.No.221/3 measuring an extent of 1.94 acres on the eastern side out of 5.42 acres along with 1/3rd right in the well in S.No.221/2 was divided and allotted to the first defendant towards his share in the suit properties. The plaintiffs and the defendants 2 and 3 agreed to enjoy their shares in the suit properties jointly and further decided to divide their shares at a later point of time. The first defendant in pursuance of the said oral partition was



enjoying his share of the properties exclusively. The first defendant on 22.04.2005 as the exclusive owner of the lands allotted to him in the oral partition executed a sale agreement on 22.04.2005 in favour of the plaintiffs 2 and 3 and the second defendant also attested the sale agreement. As the first defendant illegally joined hands with the defendants 2 and 3 and refused to execute the sale deed in terms of the sale agreement, the plaintiffs filed the suit in O.S.No.93 of 2007 on the file of the Sub Judge, Palani for the relief of Specific Performance of the sale agreement.

6. According to the plaintiffs the defendants 2 and 3 wanted the plaintiffs to settle for a lesser share than, they were entitled to and, as the plaintiffs refused the defendants 2 and 3 instigated the first defendant to abstain from executing the sale deed. The plaintiffs stated that in spite of repeated requests the defendants did not come forward for an amicable partition and therefore the 4th defendant issued the Advocate notice to the plaintiffs, claiming partition of the suit properties.

7. In substance the plaintiffs case was that as the 4th defendant had relinquished her right in the suit properties in their favour she was not entitled to any share, that as the defendants 1 to 3 were the illegitimate children of Velusamy chettiyar they were not entitled to any share in the ancestral properties, and as the 1st defendant already divided his share, he was also not entitled to any share in the suit properties. According to the plaintiffs, the defendants 1 to 3 were entitled only to a share in the



share of Velusamy chettiyar. The plaintiffs therefore claimed 4/6th share as according to the plaintiffs, the 1st and 4th defendants lost their right in the suit ancestral properties. The plaintiffs therefore filed the suit for partition for the plaintiffs 4/6th share in the suit properties among other reliefs.

8.The defendants filed the written statement denying all the contentions raised in the plaint.

9.The 2nd and 3rd defendants did not contest the suit. The defendants 1 and 4 filed the written statement and contested the suit. The defendants 1 and 4 stated that there was no partition between the sons of Vellayan Chettiyar, that Velusamy Chettiyar, the father of the defendants 1 to 3 and the father-in-law and grand father of the plaintiffs purchased the share of one of the brothers viz. Perumal Chettiyar and thus became entitled to 2/3rd shares. Subburayalu Chettiyar the other brother was entitled to 1/3rd share in the suit ancestral properties. That the two brothers were enjoying the properties in common without any division. According to the defendants the property in S.No.221/3 measuring an extent of 1.94 acres along with the undivided share in the well was sold by the defendants 1 to 4 and the daughter of the first defendant under, the sale deed dated 12.02.2007 in favour of one Sivagnanam. Later the said Sivagnanam under a sale deed dated 27.03.2007 purchased the 1/3rd share of Subburayalu Chettiyar through his grand son viz., Velusamy.



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10.The defendants specifically denied the contention of the plaintiffs that the defendants 1 to 3 were the illegitimate children of Vellusamy Chettiar and as such not entitled to a share in the suit properties. According to the defendants their mother married Vellusamy Chettiar before 1955 and therefore the marriage was valid and as such they were entitled to a share in the suit properties. The defendants denied the contention of the plaintiffs that the 4th defendant had relinquished her share in favour of the plaintiffs and that the first defendant in pursuance of the oral partition of his share had executed the sale agreement dated 22.04.2005 and hence they were not entitled to a share in the suit properties.

11.According to the defendants, the plaintiffs had misrepresented the document as "உள்வாடகை ஒப்பந்தம்" and got the same executed in their favour. Further the suit in O.S.No.93 of 2007 filed by the plaintiffs for specific performance of the aforesaid sale agreement was pending and the same was contested by the first defendant. The defendants raised the issue of partial partition and non-joinder of necessary parties as legal ground for non suiting the plaintiffs. On the basis of the aforesaid pleadings the defendants submitted that they were entitled to a share in the suit properties and therefore the claim of the plaintiff for 4/6 share in the suit properties was untenable and the same deserved to be rejected.



12.The trial Court framed the following issues:

- 1.கப்பராயலு செட்டியாரின் பேரன்
வேலுச்சாமி இவ்வழக்கிற்கு அவசியமான தரப்பினரா?
- 2.வழக்கு பகுதி பிரிவினை தோசத்தினால்
தடைப்பட்டுள்ளதா?
- 3.பொதுக்குடும்பச் சொத்துக்களில் 1, 4
எதிர்வாதிகளுக்கு பங்குபாத்தியம் உள்ளதாக கூறவது
சரியா?
- 4.வழக்குரைச் சொத்துக்களில், வழக்குரையில்
கோரியுள்ள வண்ணம் வாதிகளுக்கு 4/6 பங்கு
கிடைக்கத்தக்கதா?
- 5.வாதிகளுக்கு என்ன பரிகாரம் கிடைக்கத்தக்கது?

13.In the trial Court the 1st plaintiff examined herself as PW1 and marked Ex.A1 to Ex.A4. The 1st defendant examined himself as DW1 and the 4th defendant examined herself as DW2 and the defendants did not mark any documents on their side.

14.On the basis of the pleadings and the evidence on record the trial Court held that the 4th defendant had not relinquished her right in the suit properties, that the 1st defendant was not entitled to a share in the suit properties, in view of the oral



partition and the agreement of sale executed by him in favour of the plaintiffs of his share, and which was the subject matter of the suit in O.S.No.93 of 2007. The trial Court found that the third marriage of the Velusamy Chettiyar was contracted after 1955 and therefore the defendants 1 to 3 were not the legitimate children of the deceased Velusamy Chettiyar and hence not entitled to a share in the suit properties. The trial Court therefore decreed the suit for partition of the plaintiffs 4/6 share in the suit properties. Aggrieved by the said Judgment and Decree of the trial Court, the defendants have filed the above appeal.

15.The learned counsel for the appellants submitted that the findings on the legitimacy of the defendants 1 to 3, the relinquishment of the 4 defendant's rights in favour of the plaintiffs and on the oral partition of the 1st defendant's share in the suit properties were erroneous and the same deserved to be set aside. The learned counsel further submitted that in the absence of any evidence on the exact date of third marriage of the Velusamy Chettiyar, the lower Court erred in merely relying on Ex.A4 to conclude that the marriage took place in the year 1966. He further submitted that in the absence of any documentary evidence, evidencing the relinquishment of the 4th defendant of her share in the suit properties in favour of the plaintiffs, the trial Court ought to have held that she was entitled to a share in the suit properties.



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16.The learned counsel for the defendants on the other hand submitted that the findings of the trial Court were based on the oral and documentary evidence placed on record and therefore the same did not call for any interference in the appeal.

17.I have heard both the learned counsels and have perused the materials on record.

18.The points that arise for determination in the appeal are as follows:

1.Whether defendants 1 to 3 are the legitimate children of Velusamy Chettiyar through his third wife Ramuthayee @ Mathakkal and as such entitled to a share in the suit properties?

2.Whether the plaintiffs have established that the 4th defendant relinquished her right in the suit properties in favour of the plaintiffs?

3.Whether the finding of the trial Court that the 1st defendant was not entitled to a share in suit property is sustainable?

4.To what other reliefs, the plaintiffs are entitled?

**POINT NO.1:**

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19. Whereas it is the case of the defendants 1 to 3 that the marriage of their parents was valid and therefore they were entitled to a share in the suit properties, the plaintiffs dispute the same. It is seen that absolutely no documentary evidence is filed to establish the marriage of Velusamy Chettiyar with the mother of the defendants 1 to 3. In the absence of any documentary evidence, the Trial Court on the basis of the evidence of the first defendant, who was examined as DW1 relied on Ex.A4, to conclude that the marriage was invalid. The first defendant has challenged the said finding by stating that the trial Court erred in relying on Ex.A4. It is seen that the 1st defendant is admittedly the son-in-law of the 4th defendant. It is to be seen if the reliance placed by the trial Court on Ex.A4 is justified. The 1st defendant admitted in his evidence that his mother-in-law, who was 25 years older than him is the competent person to speak on the marriage of his parents. The 4th defendant who is examined as DW2, in her evidence speaks of the marriage of her father with the defendants mother, and says that she is not clear on the exact day of marriage. DW2 admits that Ex.A4 notice was sent by her along with D1 and D2 and even the details mentioned in the notice were given by her along with them. The trial Court therefore relied on Ex.A4 to conclude that the marriage of the parents of defendants 1 to 3 was solemnized in 1966. I find no infirmity in the finding of the Trial Court as it is based on a document, the particulars of which even according to the defendants were given



jointly by them. Apart from the said fact one more vital aspect which cannot be lost sight of is that, the defendants 1 and 4 clearly stated in their evidence that the defendants mother, if examined, would throw light on the year of marriage. The first defendant in spite of admitting that his mother was very much alive, for the reasons best known to him, did not examine her. Hence an adverse inference is drawn against the first defendant for withholding the best evidence.

20.I am therefore of the view that the marriage of the defendants' 1 to 3's parents was illegal and the finding of the trial Court that the defendants 1 to 3 were not the legitimate children of Velusamy chettiar is confirmed. I find no illegality in the finding of the trial Court and hence the same is confirmed. Point No.1 is answered against the defendants 1 to 3.

POINT No.2:

21.It is the case of the plaintiffs that at the time of the marriage of the 4th defendant she was given the usual and customary presentation (Seervarisai) and as the 4th defendant was happily married, she relinquished her share in the family properties in favour of the plaintiffs. It is seen from the documents filed on record that absolutely no materials were placed by the plaintiffs to establish the relinquishment by the 4th defendant. It is further pertinent to note that to the legal notice dated 06.09.2007 i.e. Ex.A4 demanding partition of the properties by the 4th



defendant, the plaintiffs did not reply.

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22.The evidence of the plaintiffs as regards the relinquishment by the 4th defendant is as follows:

"4ம் பிரதிவாதி என் கணவரின் அக்காள். அவருக்கு எப்போது திருமணம் நடந்தது என்று தெரியாது. 4ம் பிரதிவாதிக்கு தாவாச்சொத்தில் எவ்வித பாகமும் இல்லை. என் மாமனார் இருக்கும் காலத்திலேயே 4ம் பிரதிவாதிக்கு சீர் வரிசைகள் செய்து விட்டார். அதனால் அவருக்கு எவ்வித பாகமும் இல்லை. பாகம் கேட்டு 4ம் பிரதிவாதி எங்களுக்கு அறிவிப்பு அனுப்பினார். என் நாத்தனார் 4ம் பிரதிவாதியும் என் மாமனாருக்கு வாரிகதான். சீர் வரிசை பெற்றுக் கொண்டுவிட்டதால் 4ம் பிரதிவாதி பாகம் வேண்டாம் என்று சொல்லி விட்டார். தாவாச் சொத்துக்களில் 4ம் பிரதிவாதிக்கும் 1/5 பாகம் உள்ளது என்று சொன்னால் சரியல்ல,"

23.PW1 though admitted that the 4th defednant was entitled to a share, she set up oral relinquishment on the frivolous ground that the 4th defendant accepted "Seervarisai". It is true that this Hon'ble Court has held the oral relinquishment is valid in law. But in the present case, there is absolutely no evidence to prove the oral



relinquishment. In the absence of any evidence in support of the plea of oral relinquishment, I am not inclined to accept the plaintiffs ipsidixit. It is further pertinent to note that if really the 4th defendant relinquished her right in properties orally, then the plaintiff could have replied to Ex.A4 notice sent by the 4th defendant setting up oral relinquishment. In my view the plaintiff has set up this plea only to deprive the 4th defendant of her legitimate share. After the amendment to the Hindu Succession Act, 2003, the 4th defendant is entitled to equal share in the suit properties which are ancestral properties of Velusamy Chettyiar. In the light of the pleadings and in the absence of any oral or documentary evidence in support of the plea of relinquishment by the 4th defendant, I am of the view that the finding of the Court that, the 4th defendant is not entitled to any share in the property cannot be sustained. The 4th defendant would be entitled to 5/12th share. Point No.2 is answered in favour of the 4th defendant.

POINT NO.3:

24.The 1st defendant has denied the contention of the plaintiffs that he was not entitled to a share in the suit properties. It is seen that the 1st defendant who is the son-in-law of the 4th defendant in an oral partition between the plaintiffs and the defendants 2 to 4 was allotted the property in S.No.221/3, measuring an extent of 1.94 acres, on the eastern side, along with well in S.No.221/2. The 1st defendant in pursuance of the said partition executed an agreement of sale dated 22.04.2005 in



favour of the plaintiffs.

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25.In this regard the evidence of DW2 is note worthy. DW2 in her evidence states:

"1ம் பிரதிவாதி கந்தரம் தனக்கு உடனே பங்குபிரித்து தரவேண்டுமென்றதால் 221/3ல் உள்ள கீழ்புறம் 1 ஏக்கர் 81 செண்ட்டை அவருக்கு பங்காக பிரித்துக்கொடுத்தார்கள் என்றால் சரிதான். அந்த சொத்துக்களை பொருத்து தான் 1ம் பிரதிவாதி தண்டபானி, சண்முகவேல் 2, 3 வாதிகளுக்கு பத்திரம் எழுதிக்கொடுத்தார். அவ்வாறு பத்திரம் எழுதும்போது 2, 3 வாதிகள் 1ம் பிரதிவாதிக்க பணம் கொடுத்து தான் பத்திரம் எழுதி வாங்கினார்கள் என்றால் சரிதான்."

26.Therefore, it is admitted by DW2 that the 1st defendant was allotted his share in the suit properties and therefore. the finding of the trial Court that the 1st defendant was not entitled to a share in the suit properties is justified. I therefore answer point No.3 against the 1" defendant.

POINT NO.4:

27.In the light of the above discussions, I find that the plaintiffs are entitled to



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5/12 share in the suit properties and the defendants 2 and 3 are entitled to 1/12 share each and the 4th defendant is entitled to 5/12 share. As the 1st defendant was already allotted his share in the oral partition, he is not entitled to any share in the suit properties.

28. In view of the above, the appeal is partly allowed. However there shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

23.01.2023

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Index: Yes/No

Internet: Yes/No

To

1. The Fast Track Court, Dindigul.
2. The Section Officer, V.R. Section,
Madurai Bench of Madras High Court.



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