



A.S.(MD)No.177 of 2010

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 02.08.2023

PRONOUNCED ON:19.10.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

A.S.(MD)No.177 of 2010

and

M.P.(MD)Nos.1 of 2010 and 1 of 2012

and

C.M.P.(MD)No.1633 of 2023

1.R.Ramasamy(died)

2.R.Rajendran

3.R.Senthil

: Appellants/Defendants

4.R.Ramarathinam

: Appellant

(A.4 is brought on record

as LR of the deceased

1st appellant vide order

dated 29.03.2023 made in

C.M.P.(MD)No.3979 of 2023)

Vs.

1. R.Krishnasamy

: Respondent / Plaintiff

2.Gandhi Mathi

3.Umavathi

4.Thirumalaisamy

5.Saraswathi

: Respondents

(Respondents 2 to 5 are brought

on record as LR of the deceased

sole respondent vide order dated

13.06.2022 made in C.M.P.(MD)No.4764 of 2016)



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PRAYER:- Appeal Suit filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree, dated 17.03.2010 made in O.S.No.74 of 2008, on the file of the Additional District Judge, Fast Track Court, Dindigul.

For Appellants : Mr.T.R.Subramanian

For Respondents :Mr.M.R.Sreenivasan
for R.2 to R.5
:R.1-died

JUDGMENT

The Appeal Suit is directed against the judgment and decree passed in O.S.No.74 of 2008, dated 17.03.2010, on the file of the Additional District Court/Fast Track Court, Dindigul.

2. The suit is for partition.

3. Admittedly, one Rengasamy Reddiyar had three sons viz., Shesha Reddiyar, Ramasamy Reddiyar (first defendant) and Krishnasamy Reddiyar (plaintiff) and the defendants 2 and 3 are the sons of the first



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defendant. It is not in dispute that the suit “A” schedule properties and some other properties were ancestral and joint family properties of Rengasamy Reddiyar and after his demise, his three sons had entered into a partition on 11.07.1962 under Ex.A.1 whereunder “A” schedule properties therein were allotted to the share of Shesha Reddy and “B” schedule properties were allotted jointly to the plaintiff and the first defendant, the present “A” schedule properties. It is also not in dispute that the plaintiff and the first defendant have purchased the suit “B” schedule house property on 22.09.1964 under Ex.A.2.

4. The case of the plaintiff is that himself and his brother – first defendant were in joint possession and enjoyment of the suit properties, that since there arose difficulty in enjoying the properties jointly, the plaintiff made a request to his elder brother – first defendant for partitioning the suit properties and that since the same was not accepted by him, the plaintiff was constrained to file the above suit for partition and allotment of $\frac{1}{2}$ share in the suit properties.

5. The defence of the defendants is that there was a oral partition in the year 1987 in respect of some of “A” schedule properties and they



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have been in separate and exclusive possession and enjoyment of the properties allotted to them in the oral partition, that pattas were issued separately, that “B” schedule house property was allotted to the share of the first defendant in the said oral partition and since then, the first defendant along with his family has been in possession and enjoyment of the same, that the plaintiff and the first defendant have partitioned the other properties and enjoying separately by paying taxes and that therefore, the plaintiff has no cause of action to file the suit and as such, the suit is liable to be set aside.

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

- (1) Whether the cause of action is true?
- (2) Whether the partition and separate enjoyment alleged in the written statement is true?
- (3) Whether the plaintiff is entitled to get the relief of partition?
- (4) Whether the plaintiff is entitled to get the relief of permanent injunction?
- (5) To what other relief, the plaintiff is entitled to?



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7. During trial, the plaintiff has examined himself as P.W.1 and exhibited 5 documents as Exs.A.1 to A.5. The defendants have examined the second defendant as D.W.1 and one Ramasamy Reddiyar as D.W.2 and exhibited 10 documents as Exs.B.1 to B.10. The learned trial Judge, upon considering the evidence, both oral and documentary and on hearing both sides, has passed the impugned judgment dated 17.03.2010 by holding that the defendants have failed to prove the alleged oral partition, has granted preliminary decree declaring that the plaintiff is entitled to $\frac{1}{2}$ share in the suit properties. Aggrieved by the impugned judgment and decree, the defendants have preferred the present appeal.

8. Pending appeal, the first appellant/first defendant died and hence, his wife Tmt.R.Ramarathinam has been impleaded as fourth appellant. Pending appeal, the sole respondent has also died and hence, his wife, son and daughters have been impleaded as respondents 2 to 5.

9. The learned Counsel for the appellants would submit that items 5 to 10 in “A” schedule and the house property in “B” schedule have already been divided between the parties as early as in 1987, that the trial Court has failed to consider that there was a division in status in the year



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1987 itself with regard to the above properties and that therefore, the above items 5 to 10 in “A” schedule and house property in “B” schedule are no more common properties and as such, the plaintiff is not entitled for the relief of partition in respect of those properties.

10. The learned Counsel for the respondents would submit that the trial Court, considering the pleadings and evidence available on record, has come to a decision that there was no oral partition effected between the plaintiff and the first defendant, that “B” schedule house property was admittedly purchased by the plaintiff and the first defendant vide sale deed dated 22.09.1964 and that since the defendants have miserably failed to prove the alleged oral partition, the trial Court has rightly granted preliminary decree.

11. The points for consideration are

(1) Whether the learned trial Judge erred in deciding that the defendants have failed to prove the alleged oral partition, despite showing that items 5 to 10 in “A” schedule properties were partitioned between the plaintiff and the first defendant and since then, they have been in separate possession and enjoyment of the same by receiving



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separate patta and paying taxes therefor and that “B” schedule house property was allotted to the first defendant in the said partition and since then, they have been in separate possession and enjoyment of the same by paying taxes therefor?

(2) Whether the trial Court erred in granting preliminary decree in respect of the entire properties despite proving that there was an oral partition in the year 1987 and the same was followed by separate possession and enjoyment of the same?

(3) Whether the impugned judgment and decree dated 17.03.2010, passed in O.S.No.74 of 2008 is liable to be interfered with?

(4) To what other reliefs, the parties are entitled?

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12. The above petition is for reception of additional evidence filed under Order 41 Rule 27 C.P.C.

13. The appellants are the petitioners. The second appellant has filed an affidavit in support of the above petition stating that they contended that there was an oral partition and in order to prove the oral



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partiton, the documents sought to be received are absolutely necessary, that though the documents come into existence during the pendency of the appeal proceedings, the recitals therein would prove the oral partition between the parties and also the enjoyment as per the oral partition, which is the main issue involved in the above case and that the respondents are not having any valid objection for receiving the same.

14. The petitioners/appellants have produced the certified copy of the settlement deed executed by the respondents 2, 3 and 5 in favour of the fourth respondent and the information given by the Revenue Divisional Officer, Dindigul, in response to RTI application and the pattas standing in the name of the fourth respondent. Admittedly, the respondents have not filed any counter statement or objections to the above petition. It is not in dispute that the settlement deed came to be executed on 19.08.2016 during the pendency of the appeal. The respondents have specifically admitted the execution of settlement deed and according to them, the same will not help the appellants to prove the alleged oral partition. Moreover, the respondents have disputed neither the genuineness nor the contents of the document Nos.2 and 3 and that the reply received from the Revenue Divisional Officer and the pattas.



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15. As already pointed out, according to the appellants/defendants, the above documents are necessary to prove their main defence of oral partition that was occurred between the plaintiff and the first defendant. More importantly, the above documents came into existence subsequent to filing of the appeal. Considering the above and since there was no specific or serious objections from the respondents, this Court is inclined to receive the additional evidence. Accordingly, the documents produced along with the above petitions are ordered to be received and are exhibited as Exs.B.11 to B.13.

16. In the written statement, the defendants have taken a specific stand that there was a partition in the year 1987 wherein S.No.2051/2 and 2052/4 were partitioned and S.Nos.2051/2C1 and 2052/4B were allotted to the share of the first defendant with separate patta No.2996 and the lands in S.No.2051/2C2 and 2052/4B were allotted to the share of the plaintiffs with separate patta No.492, that the first defendant had dug a well in S.No.2051/2C1 in the year 1981 and obtained service connection and two bore wells and that the plaintiff and the first defendant have been in separate possession and enjoyment of the said properties allotted to



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them in the partition. It is their further defence that “B” schedule property was allotted to the first defendant in the partition and that the other properties were also partitioned for convenience sake and are in the separate possession and enjoyment of the same.

17. Admittedly, the defendants in their written statement have nowhere whispered that the partition alleged to have been effected in the year 1987 is a oral partition and the persons in whose presence, the same was effected. But in the chief examination affidavit, D.W.1 has stated that in the year 1984, in the presence of common people, the properties in S.No.2051/2 and 2052 were partitioned and sub-divided lands were allotted to them and that separate pattas came to be issued to them.

18. As already pointed out, in the written statement, they have alleged that the partition was effected in the year 1987, but in the chief examination affidavit, D.W.1 would state that the partition was effected in the year 1984. When the above contradiction was brought to his notice during his cross-examination, he would admit the same and the same is extracted hereunder:



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“**பி.செட்டியல் சொத்துக்களை 1987 - ல் பிரிவினை செய்து
கொண்டாம் என்று எதிர்வழக்குரையில் சொல்லியுள்ளன என்றால்
சரியல்ல. 1985 - ல் பிரித்துக்கொண்டாம். எதிர்வழக்குரையில்
1987ம் ஆதி பிரிவினை செய்து கொண்டதாக உள்ளது என்றால்
சரிதான்.**”

19. D.W.1 would further admit that his father and the plaintiff have entered into a partition in respect of S.No.2051/2 and 2052/4 and that both of them have been enjoying the properties separately, that the said properties were subsequently sub-divided and that the other properties were being enjoyed as per their convenience. D.W.1 would admit that the land in S.No.2054 was not partitioned and he does not know the reason for the same and the same is extracted hereunder:

“**சர்வ எண்.2052/4 நிலத்தை ஒட்டி மூலபுறம் சர்வ எண்.2054
நிலம் உள்ளது என்றால் சரிதான். சர்வ எண்.2054ல் உள்ள
நிலத்தை பிரிவினை செய்யாததற்கு காரணம் என்ன என்ற விவரம்
எனக்கு தெரியாது. பி.வா.சா.ஆ.1ல் பட்டாவில் கண்ட நிலத்தை விட
பி.வா.சா.ஆ.3ல் கண்ட பட்டாவின் நிலத்தின் விதிதீர்ணம் குறைவாக
உள்ளது என்றால் சரிதான்.**”

D.W.1 would further say



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“சர்வ எண்.2055/1ல் மல்புரம் 71 சென்டை அனுபவிக்கிறாம். ஆனால் எந்த பக்கம் அனுபவித்து வருகிறாம் என்று சொல்ல முடியாது. மற்ற சர்வ எண்களிலும் எந்த எந்த பகுதியில் எவ்வளவு வி?தீரணம் அனுபவித்து வருகிறாம் என்று குறியிடீடுச் சொல்ல முடியாது. முறைப்பாக பாகம் பிரித்துக்கொண்டால்தான் யார் யாருக்கு எவ்வளவு வி?தீரணம் உரிமை என்று சொல்ல முடியும் என்றால் சரிதான்.”

20. As rightly contended by the learned Counsel for the respondents, D.W.1 would specifically admit that there is no equality in the share as per Exs.B.1 and B.3 patta and that he was not aware about the extent and in which portion they were enjoying.

21. The defendants have examined D.W.2 to prove the alleged partition between the plaintiff and the first defendant. D.W.2 in his chief examination affidavit would say that the plaintiff and the defendants were enjoying the properties allotted to them jointly in the partition effected in 1962 and that both of them have partitioned two Survey Number lands in the presence of common people 25 years back. But in the cross-examination, he would specifically admit that himself and his brother have filed a civil suit in O.S.No.543 of 2001 against the plaintiff,



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that since the suit was decided against them, they have preferred an appeal in A.S.No.63 of 2004 and the same was decided against them and that subsequently they have sold that property to one Ramalakshmi under Ex.B.4, that he was not aware of the extent of lands in the concerned survey numbers and that he has filed the chief examination affidavit as directed by the first defendant.

22. Considering the above, the evidence of D.W.2 is of no use to the defendants and as such, the trial Court has rightly decided that his evidence is not sufficient to prove the alleged partition.

23. No doubt, as rightly pointed out by the learned Counsel for the appellants, the plaintiff in his cross-examination would say that himself and his brother – first defendant have been residing separately since 1994. As rightly contended by the learned Counsel for the respondents, the plaintiff has nowhere admitted that there was a partition with respect to some of the properties. But no doubt, he would admit the separate enjoyment of some of the properties and of getting of separate pattas and payment of taxes therefor.



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24. The learned Counsel for the appellants would submit that during the pendency of the appeal, the respondents have entered into a settlement on 19.08.2016 under Ex.B.11 in respect of the private properties of the first defendant and also the suit properties wherein the respondents 2, 3 and 5 have settled all the properties in favour of their brother - 4th respondent. He would further submit that the respondents 2 to 5 have admitted the partition allegedly effected between the plaintiff and the defendants in the settlement deed and that Ex.B.12 information received from the Revenue Divisional Officer in response to the R.T.I., application and Ex.B.13 patta would go to show that the parties have been in possession and enjoyment of the properties in pursuance of the partition and that therefore, the partition is to be upheld.

25. The learned Counsel for the respondents would submit that in Ex.B.11 settlement, the respondents 2, 3 and 5 have not executed settlement in respect of any specific property to the fourth respondent, but in the undivided $\frac{1}{2}$ share of the deceased plaintiff, they have settled their $\frac{3}{4}$ share in favour of the fourth respondent. It is necessary to refer the recitals found in Ex.B.11 settlement deed hereunder for better appreciation:



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“

1962 - ம் வருடத்திய 3751 நம்பராக பதிவு செய்யப்பட்ட
பாகப்பிரிவினை பத்திரத்தில் கண்டபடி B - டெயூல் சொத்தாக
கிரு:ணசாமி ரெட்டியாருக்கும் மற்படியார் அண்ணன் ராமசாமி
ரெட்டியாருக்கும் கிடைத்தும் அதில் கிரு:ணசாமி ரெட்டியாருக்கு
உரிய ஜாமிண்டு பாதிரி பாத்தியத்தையும் அவர் அனுபவித்து வந்தும்
மற்படி கிரு:ணசாமி ரெட்டியார் அவர்கள் சென்ற 26.1.2016 - ம்
ததியில் காலமானதன் மல் தட்களுக்கும் எட்களுக்கும் வாரிககிரமப்
படி கிடைத்தும் நாம் பொதுவில் வைத்து அனுபவித்து வரும்
தேனடியில் சொத்து விவரத்தில் கண்ட சொத்துக்களில் தட்களுக்குள்ள
பொது 4 - ல் 1 பக்கு மாக எட்களுக்குண்டான பொது 4 - ல் 3 -
பக்கு பாத்தியத்தை மட்டும்

26. As rightly contended by the learned Counsel for the respondents, in their father's undivided 1/2 share, they have settled their 3/4th share in favour of the fourth respondent and as such, the present contention of the appellants is liable for rejection.

27. In Ex.B.12 reply given by the Public Information Officer, the report of the Village Administrative Officer and the statement given by the plaintiff and the first defendant were enclosed. In the report of the Village Administrative Officer, he has observed that

“ ரெட்கசாமி ரெட்டியார் மகன் ராமசாமி-1இ ரெட்கசாமி
ரெட்டியார் மகன் கிரு:ணசாமி ஆகியவர்கள் அனுபவித்து வரும் பொது



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நிலைகளில் அவரவர் அனுபவத்திற்கு அருகில் நேவரும் செல்வ 12
அடி பாதை பாட்டுக்கொள்வதாகவும் “

28. At this juncture, it is necessary to refer the judgment of this Court in ***Guruvammal and another Vs. Subbiah Naicker and 5 others*** reported in ***2000-1-L.W.488***, wherein it has been held that mere convenience in enjoyment will not be sufficient and the relevant portion is extracted hereunder:

“26. Thus the position on this aspect is well settled, it has not been shown by the appellants that dehors Exs. A-64 and A- 65 there is any material available to substantiate their case of partition between Krishnaswamy Naicker and Subbiah Naicker.

27. Conceding that there was a separate enjoyment by the brothers, that will not by itself show that there was any completed partition between the brothers. The legal aspect is well settled. In Appavu @ Lakshmanan Pillai and another vs. Manikkam Pillai and four others ILR 1946 Mad 557 it has been held as follows:

"The fact that the members of a Hindu joint family divide among themselves some of the family assets, such as income from agricultural lands, outstandings and other movable property, does not in itself mean a division in status. In deciding whether a joint family has become divided the Court



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must have regard to the terms of any instrument bearing on the question and the subsequent conduct of the parties. Statements made by members of the family on certain occasions for certain purposes that they are joint or divided in status are not of much consequence. It is not their statements but their relations with the estate that must be taken into consideration in determining the issue."

28. In P. Kaliappa Gounder and others v. Muthuswami Mudaliar, it has been held by a Bench of this Court that, separate possession for the sake of convenience is no partition. The fact of separate enjoyment of specified portions for making improvements over such portions and of obtaining loans will not turn joint ownership into ownership is severally and in specie in the eye of law."

29. In the case on hand also, it is the specific case of the defendants that they were in separate possession and enjoyment, that pattas were separately issued and that they were paying the kist and other taxes separately. In the absence of any evidence to prove that there was a partition in the year 1984 or in 1987, the separate possession and enjoyment can only be considered for convenience sake and as such, the same cannot be termed as partition.



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30. At the time of hearing, the learned Counsel for the appellants would submit that items 1, 3, 4, 5, 10 and 11 have to be divided among the appellants and the third respondent in equal shares and as such preliminary decree for partition has to be passed in respect of these items alone. But as already pointed out, the defendants have not proved that there was a partition by metes and bounds in respect of other properties.

31. On considering the entire evidence available on record, the finding of the trial Judge that the defendants have miserably failed to prove the partition alleged by them and that therefore, the plaintiff is entitled to get $\frac{1}{2}$ share in the entire suit properties, cannot be found fault with and this Court is in entire agreement with the same. Consequently, this Court concludes that the appeal suit is devoid of merits and the same is liable to be dismissed. Considering the other facts and circumstances and also the relationship between the parties, this Court further decides that the parties are to be directed to bear their own costs.

32. In the result, the Appeal Suit is dismissed, confirming the judgment and decree, dated 17.03.2010 made in O.S.No.74 of 2008, on the file of the Additional District Judge, Fast Track Court, Dindigul.



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Miscellaneous Petitions are dismissed. The parties are directed to bear their own costs.

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NCC : Yes : No

Index : Yes : No

Internet : Yes : No

Additional documents marked before this Court:

1. Ex.B.11 – Copy of the settlement deed dated 19.08.2016 executed by the second respondent and others in favour of the fourth respondent;
2. Ex.B.12 - Information given by the RDO, Dindigul (under RTI) dated 18.04.2011;
3. Ex.B.13 – Pattas standing in the name of the fourth respondent; SSL

To

1. The Additional District Court, Fast Track Court, Dindigul.
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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SSL

PRE-DELIVERY JUDGMENT MADE IN

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19.10.2023