



SA.Nos.1378 & 1379 of 2004

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.07.2024

CORAM

THE HON'BLE Mr.JUSTICE C.KUMARAPPAN

S.A.Nos.1378 & 1379 of 2004

S.A.No.1378 of 2004

1. Arumugham
2. Vijaya

... Appellants

- Vs -

1. Vadivel Counder (Died)
2. Kandasamy
3. Sundaramoorthy
4. Ambika

(R2 to R4 brought on record as LR's of the deceased
sole respondent vide order dated 29.01.2019 made in
CMP.Nos.23226, 23228 to 23230, 23232 and 23233/2018)

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 15.03.2004 made in A.S.No.43 of 2003 on the file of the Court of the Principal District Judge at Pondicherry, reversing the setting aside the judgment and decree dated 27.06.2003 made in O.S.No.164/2001 on the file of the Court of the Principal District Munsif, Pondicherry.



SA.Nos.1378 & 1379 of 2004

For Appellants : Mr.T.P.Manoharan
Senior Counsel
for Mr.K.P.Jotheeswaran

For Respondents : Ms.Usha Raman
for R2 to R4
R1-Died

S.A.No.1379 of 2004

Vijaya

... Appellant

- Vs -

1. Vadivel Counder (Died)
2. Kandasamy
3. Sundaramoorthy
4. Ambika

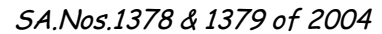
(R2 to R4 brought on record as LR's of the deceased
sole respondent vide order dated 29.01.2019 made in
CMP.Nos.23226, 23228 to 23230, 23232 and 23233/2018)

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 15.03.2004 made in A.S.No.42 of 2003 on the file of the Court of the Principal District Judge at Pondicherry, reversing the setting aside the judgment and decree dated 27.06.2003 made in O.S.No.153/2001 on the file of the Court of the Principal District Munsif, Pondicherry.

For Appellants : Mr.T.P.Manoharan
Senior Counsel
for Mr.K.P.Jotheeswaran

For Respondents : Ms.Usha Raman for R2 to R4
R1-Died



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2. Both the Second Appeals are arising against the common judgment and decree in A.S.Nos.42 & 43 of 2003. Among this, A.S.No.42 of 2003 has arisen against the judgment and decree in O.S.No.153 of 2001. Similarly, A.S.No.43 of 2003 has arisen against the judgment and decree in O.S.No.164 of 2001. The plaintiff in O.S.No.153 of 2001 and the 2nd defendant in O.S.No.164 of 2001 are the appellants herein. Likewise, the sole defendant in O.S.No.153 of 2001 and the plaintiff in O.S.No.164 of 2001 arrayed as the first respondent in both the Second Appeals. Likewise, the first defendant in O.S.No.164 of 2001 was arrayed as the 2nd appellant in S.A.No.1379 of 2004.

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SA.Nos.1378 & 1379 of 2004

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4. It is pertinent to mention here that before the Trial Court, both the suits have been tried together jointly and the evidence and documents have been recorded and marked in O.S.No.153 of 2001. Therefore, for the sake of convenience, the parties will be referred to according to their litigative status before the Trial Court in O.S.No.153 of 2001.

5. The brief facts which give rise to the instant Second Appeals are that, Vadivel Counder, who was the defendant in O.S.No.153 of 2001 has filed a separate suit in O.S.No.164 of 2001 seeking for the relief of declaration and injunction. According to his contention, the suit property was originally belongs to him by virtue of the Sale Deed dated 17.03.1941 and that ever since the date of purchase, he has been in actual, physical possession and enjoyment of the same. This defendant's father Subramania Counder has got two wives and this defendant Vadivel Counder born through his first wife. Similarly, Subramania Counder, through his second wife has got three children by name Masilamani, who is the eldest son, Kathirvelu and Arumugham. It is his further submission that he purchased the suit property when he was 25 years old. While so, he sold the portion of the property in favour of one Harikrishnan and at the time of execution of the Sale Deed, he



SA.Nos.1378 & 1379 of 2004

was accompanied by his step-brother Arumugham. However, while document was registered, on the request of Harikrishnan, his brother Arumugham has also signed the document as the executant. This defendant submits that without knowing the implications, the same was registered. It is the submission of this defendant that by taking advantage of his old age and illiteracy, Harikrishnan and the first defendant fabricated the documents. While so, taking advantage of such Sale Deed which stands in the name of Harikrishnan, this defendant and their henchmen attempted to interfere with the possession of the plaintiff. Hence, the plaintiff has come forward with the suit.

6. The said suit was resisted by Vijaya [Plaintiff in O.S.No.153 of 2001] and Vadivel Counder's brother Arumugham, as both were arrayed as the defendants in O.S.No.164 of 2001. It is their contention that the plaintiff Vadivel Counder [Plaintiff in O.S.No.164 of 2001] is not at all the owner of the suit property. According to these defendants, it has been divided into three parts and one such share was allotted to the first defendant Arumugham and another share was allotted to his another brother Masilamani. It is the submission of these defendants that they are the absolute owner of the portion of the suit property measuring to an extent of 6.45 acres or 12 kuzhis,



SA.Nos.1378 & 1379 of 2004

by virtue of the sale deed dated 24.04.2000 executed by the first defendant's another brother one Masilamani. Ever since the date of purchase, the 2nd defendant was in possession and enjoyment of the property. Though the suit properties were originally purchased in the name of the defendant Vadivel Counder, as he was the eldest member, through the joint family income. Though the property stands in the name of Vadivel Counder, it was treated as the joint family property between Vadivel Counder and his step brothers. These defendants submit that in spite of knowing the Sale Deed in respect of Vijaya/the plaintiff Vadivel Counder has not sought for any relief to cancel the said document. Therefore, Vijaya and Arumugham submitted that Vadivel Counder has no right to seek any relief as prayed for.

7. Similarly, Vijaya has also filed a suit for declaration in O.S.No.153 of 2001 based upon the Sale Deed dated 24.04.2000 in respect of the portion of the property viz., 12 kuzhis in R.S.No.33/6.

8. The said suit was resisted by Vadivel Counder by reiterating his contention made in the plaint in O.S.No.164 of 2001.

9. Before the Trial Court, the plaintiff was examined 5 witnesses as PW1 to PW5 and marked 10 documents as Exs.A1 to A10. On behalf of the defendants, one witness was examined as DW1 and 4 documents have been



SA.Nos.1378 & 1379 of 2004

marked as Exs.B1 to B4.

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10. The Trial Court, after having considered the oral and documentary evidence, has believed the case of the oral partition pleaded by Vadivel Counder's brother and decreed the suit in O.S.No.153 of 2001, and dismissed the suit filed in O.S.No.164 of 2001 filed by Vadivel Counder.

11. Not satisfying with the judgement of the Trial Court, when Vadivel Counder preferred the First Appeal, the First Appellate Court has found the case set up by the plaintiff in O.S.No.153 of 2001 [Vijaya] has not been substantiated. It was also held that the oral partition pleaded by the parties has not been established before the Court and ultimately reversed the judgment of the Trial Court and thereby, granted decree in favour of Vadivel Counder in O.S.No.164 of 2001 and reneged the decree in favour of Vijaya in her suit in O.S.No.153 of 2001.

12. Not satisfying with the judgment of the First Appellate Court, Vijaya/the plaintiff in O.S.No.153 of 2001, and the defendants in OS.No.164 of 2001 preferred the instant Second Appeals.

13. At the time of admitting the instant Second Appeals, this Court has formulated the following common substantial question of law:-

“Whether the judgments and decrees of the Courts



SA.Nos.1378 & 1379 of 2004

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below are sustainable in law, as the entire evidence which is relevant to decide the issue and the relevant question of fact applicable to the facts of the case were not taken into consideration?”

14. The learned counsel for the plaintiff/appellants would vehemently submit that though the property stands in the name of Vadivel Counder (the defendant) by virtue of Exs.A1 and A10, the division among Vadivel Counder and his step brothers could be established. Therefore, the learned counsel would submit that the case projected by the plaintiff could be very well vindicated through Ex.A10-Sale Deed and also through the Revenue records, such as Exs.A2 and A3. Whereas, the First Appellate Court erroneously took the weakness of the defendants' case and favoured the respondent/defendant. It is also the contention of the learned counsel for the appellants/plaintiff that when there is a specific recital as to the oral partition, the question of disbelieving such statement voluntarily made in Ex.A10 is unknown to law. Hence, the learned counsel would submit that by virtue of Ex.A1-Sale deed, she is the absolute owner of the suit property. Hence, prayed to decree the suit in OS.No.153 of 2001 by allowing both the Second Appeals. In order to buttress his submission, the learned Senior Counsel



SA.Nos.1378 & 1379 of 2004

relied upon the following precedents:-

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1. ***Ramti Devi (Smt) Vs. Union of India Vs. Union of India*** reported in (1995) 1 SCC 198;
2. ***Rangammal Vs. Kuppuswami and another*** reported in (2011) 12 SCC 220;
3. ***Kanagambaram Ammal Vs. Kakammal & 5 others*** reported in 2004-4-L.W.408;
4. ***S.P.Chengalvaraya Naidu (Dead) by LRs Vs. Jagannath (Dead) by LRs and others*** reported in (1994) 1 SCC 1.

15. Per contra, the learned counsel for the respondent/defendant would vehemently contend that the suit property was purchased during 1941 by virtue of Ex.B2 and that while entering Ex.A10-Sale Deed, his brother Arumugham and Harikrishnan has mislead the plaintiff and thereby, made Arumugham as the executant of the document. The mere making of Arumugham as the executant of Ex.A10 will in no way be the conclusive proof of oral partition among Vadivel Counder and his step brothers. The learned counsel would further contend that there are no semblance of document to establish the oral partition. It was also the further contention of the learned counsel for the defendant that the oral evidence of Masilamani



SA.Nos.1378 & 1379 of 2004

would dislodge the case of oral partition and their exclusive possession over the property. It was also contended by the learned counsel for the defendants that there are no records to show that the plaintiff's predecessor in title Masilamani was owner of the suit property so as to execute Ex.A1-Sale Deed in her favour. Hence, the learned counsel for the defendant would submit that the First Appellate Court has gone into all the factual aspects and has properly reappreciated the evidence and arrived at a right conclusion, which does not require any interference by this Court.

16. I have given my anxious consideration to either side submissions.

17. Before we delve into the disputed facts, it is appropriate to cull out the admitted facts of these cases.

(i) Admittedly, the suit property stands in the name of Vadivel Counder by virtue of Ex.B2;

(ii) Masilamani, Kathirvel and Arumugham are the step brothers of Vadivel Counder;

(iii) Arumugham was the party to Ex.A10-Sale Deed along with Vadivel Counder while dealing the portion of the suit property by way of a sale in favour of Harikrishnan;

(iv) In Ex.A10-Sale deed, there is a recital in respect of a oral partition among Vadivel Counder and his step brothers.

18. With the above admitted facts, now let us consider the fact in issue



SA.Nos.1378 & 1379 of 2004

one after another. Firstly, whether really there was a oral partition in respect of the property that had been purchased by Vadivel Counder under Ex.B2 is to be seen. It is pertinent to mention here that to substantiate such oral partition, the plaintiff is very much relying upon the recitals made in Ex.A10. As already stated, in Ex.A10, there is a recital in respect of oral partition. For ready reference, this Court deems it appropriate to extract the relevant recitals of Ex.A10 for easy analysis of this case.

“எங்களில் 1வது நபரான வடிவேலு அவர்களால் முருகேசுக்கவுண்டர் அவர்களிடம் இருந்து கிரயம் பெற்ற பத்திரத்தை புதுவை பதிவகத்தில் 19.3.1941ல் ஆர்.வீ.242, ஞா.43 ஆக பதியப்பட்ட கிரயப்பத்திரப்படி வடிவேலு அவர்களுக்குசொந்தமானதும் மேற்படி வடிவேலு அவர்களும் அவருடைய சகோதரர்கள் மாசிலாமணி, கதிர்வேலு, ஆறுமுகம் ஆகியோர்களும் வாய்மொழியே பாகம் பிரித்து அனுபவித்து வருவதும், 2வது நபரான ஆறுமுகம் அவர்களின் பாகத்திற்கு வந்ததும், எங்களுக்கு சொந்தமானதும், எங்களுடைய அனுபவத்தில் இருந்துவருவதுமான கீழ்க்கண்ட சொத்தை தங்களுக்கு கிரயம் செய்துக்கொடுக்க ஒப்புக்கொண்டு நமக்குள் விலையாக பேசி தீர்த்து கொண்டது ரூபாய்.10,000./ இந்த தொகை ரூபாய் பத்தாயிரத்தையும் நாங்கள் தங்களிடமிருந்து இன்றைய தேதியில் ரொக்கமாக பெற்றுக்கொண்டு எங்கள்பைத்தாகிவிட்டபடியால் கீழ்க்கண்ட சொத்தை இன்றே தங்கள் சுவாதினத்திற்கு ஒப்புக்கொடுத்துவிட்டேன்.”

19. Now, we must see whether such recital would steer the case in favour of the plaintiff Mrs.Vijaya. At this juncture, this Court would like to emphasis that the plaintiff purchased the property from one Masilamani, who



SA.Nos.1378 & 1379 of 2004

was examined as PW4. Whereas in Ex.A10, Masilamani was not party. While analysing the above recitals with forensic and etymological insight, even for argument sake, there was a oral partition, there is a reaffirmation of Vadivel Counder's absolute right over the property purchased under Ex.B2 dated 17.03.1941, and there is also a recital that the property dealt under Ex.A10 was allotted to Arumugham. However, the next sentence has states that the property belongs to both Vadivel Counder and Arumugham. Therefore, though there were some recitals in respect of a oral partition, on close and harmonious reading with Forensic insight, as rightly found by the First Appellate Court, Ex.A10 cannot be the basis to determine the title of Masilamani so as to execute Ex.A1-Sale Deed in favour of the plaintiff Vijaya. Even for argument sake, if we admits the recitals found in Ex.A10 is, still true, what is essential is, to see what was the extent allotted to Masilamani and where exactly such property lies.

20. It is well settled principle of law that there is no bar to enter into an oral partition. But, such oral partition should be embedded and proved through the Revenue records. Here, while considering the evidence of PW4-Masilamani, he would state that he was the eldest son of Subramania Counder through his second wife, and he admits that the suit properties were



SA.Nos.1378 & 1379 of 2004

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purchased even prior to his birth. The following admission would cause serious doubt in respect of the plaintiff Vijaya's case.

“எனக்கு 10 அல்லது 15 வயது இருக்கும்போது பிரித்து கொடுத்தார்கள் ஊர் பஞ்சாயத்தார் பிரித்து கொடுத்தனர். எங்களுக்கு பிரித்துக் கொடுத்த ஒரு பஞ்சாயத்தார் உயிருடன் இருக்கிறார். எனக்கு கூட பிறந்தவர்களுக்கும் 3 அல்லது 4 வயது வித்தியாசம் இருக்கும். என் தம்பிகளுக்கு நான் பிரித்துக்கொடுத்தேன். அவர்களுக்கு திருமணமான பிறகு பிரித்துக்கொடுத்தேன்.

..... பாகம் பிரிந்த சொத்துக்கு நான் என் பெயரில் வரி இதனால் வரை கட்டவில்லை. நான் வரியை என் அண்ணனிடம் கொடுப்பேன். அவர் கட்டுவார்.”

21. Though PW4, who was the predecessor in title of plaintiff states that there was a partition, when he was 10 or 15 years old, such partition probably could have been during 1947. Because, on the date of examination of witnesses, he states that he was aged about 70 years old on 14.11.2002 [date of examination of PW4]. Therefore, according to his evidence, the alleged oral partition could have been during 1947. It is pertinent to mention here that on the date of alleged oral partition, Masilamani was a minor. Therefore, he is not competent to speak what had happened at the relevant point of time. However, in spite of availability of one Panchayatar, he has not been brought before the Court. It is further stated that he only subsequently divided the property among his full brothers viz., Kathirvel and Arumugham



SA.Nos.1378 & 1379 of 2004

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after their marriage. Therefore, on the face of it, since 1947 according to the plaintiff's predecessor in title, the property was in his exclusive possession. But to substantiate such a specific stand, there are no scrap of paper filed before the Trial Court.

22. Yet another interesting aspect is that the plaintiff Vijaya purchased the property by virtue of Ex.A1-Sale Deed, which is dated 24.04.2000. Wherein the following recitals are there:-

“எனது சகோதரர்கள் வடிவேலு, கதிர்வேலு, ஆறுமுகம் ஆகியோர்களுக்கும் ஊர் பஞ்சாயத்தார் முன்னிலையில் வாய்மொழியே பாகம் பிரித்துகொண்டவகையில் என் பாகத்திற்கு வந்து எனக்கு சொந்தமானதும், என்னுடைய பெயரில் பட்டாவாக உள்ளதும், இதுநாள் வரை என்னுடைய அனுபவத்தில் இருந்துவருவதுமான கீழ்க்கண்ட சொத்தை.....”

23. As per the above recital, there is a reference that there was a patta in the name of Masilamani. Even then, no such patta has been filed before this Court and the Revenue records such as, Exs.A2 and A3 are subsequent to Ex.A1-Sale Deed. More curiously and surprisingly, PW4 has categorically stated that he has not given any title records so as to substantiate his title to sell the property to the plaintiff. Therefore, this Court is of the view that even if there was a oral partition as referred to in Ex.A10, it is mandatory on the part of the plaintiff to establish her predecessor in title's title over the



SA.Nos.1378 & 1379 of 2004

property. Here, admittedly, the defendant Vadivel Counder has established his right over the property by virtue of Ex.B2. Now there is a duty cast upon the plaintiff to establish not only the existence of oral partition, but also the proof as to which the property was allotted to the plaintiff's predecessor in title through such partition. But to prove such material factum, no evidence was let in and the plaintiff has miserably failed.

24. The learned counsel for the appellant/plaintiff relying upon **Ramti Devi's** case [cited supra], would contend that, since Vadivel Counder(defendant) did not seek for a relief of cancellation of sale deed stands in the name of Mrs.Vijaya, the suit is not maintainable. But this Court is not in a position to agree with the submissions made by the learned counsel for the plaintiff. Here, the plaintiff has come up with a specific prayer seeking for a relief of declaration. Therefore, the above judgment is not applicable to the facts of this case.

25. The learned counsel for the plaintiff has also relied upon the judgment in **Rangammal's** case [cited supra] and **S.P.Chengalvaraya Naidu's** case [cited supra] to buttress his submission that the weakness of the other side cannot be taken as advantage while decreeing the suit. Whereas, the First Appellate Court, on re-appreciation of the evidence has found that



SA.Nos.1378 & 1379 of 2004

the plaintiff Vijaya could not establish her predecessor in title's right over the suit property. Only in that context, the First Appellate Court reversed the finding. Therefore, there is no scope for the application of the above two precedents to the facts of the case.

26. The learned counsel has also relied upon the judgment in *Kanagambaram Ammal's* case (cited supra) to draw adverse inference for non examination of the material witnesses. But, this Court could not understand as to the relevancy of the above ruling in support of the plaintiff's case. However, the above precedent could only be used in favour of the defendant on the simple ground that the plaintiff has not examined the alleged panchayatar, who was alive at the relevant time so as to prove the oral partition.

27. It is also relevant to refer that the finding rendered by the First Appellate Court for not relying upon Exs.A2 and A3 is also based upon the sound reasoning. It is pertinent to mention here that Vadivel Counder has still got right over the some share in SF.No.33/6, according to the plaintiff. But while looking at Exs.A2 and A3, Vadivel Counder's name is not find a place. The First Appellate Court has also rightly found that when the



SA.Nos.1378 & 1379 of 2004

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plaintiff's case is based upon a oral partition, he ought to have pleaded the date on which the oral partition has taken place. Whereas neither the sale deed of the plaintiff nor the pleading contain such a material factum. Therefore, this Court is of the firm view that, even if there was any oral partition as stated in Ex.A10, still there are no proof as to the allotment of the share to the plaintiff's predecessor in title qua Masilamani. Therefore, this Court is of the firm view that the finding recorded by the First Appellate Court is based upon sound reasoning, and on the basis of the documents. Thus, there are no ground to interfere with such well merited finding of the First Appellate Court.

28. At this juncture, it is pertinent to mention here that the Trial Court has erroneously carried away with the recitals of Ex.A10 without seeking any proof about the allotment of specific share in the name of plaintiff's predecessor in title.

29. Thus, in view of the above detailed discussions, this Court could not find any perversity in the judgement of the First Appellate Court. Further, in view of the above discussion, the substantial question of law is answered in



SA.Nos.1378 & 1379 of 2004

favour of the respondents.

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SA.Nos.1378 & 1379 of 2004

WEB COPY

30. In the result, these Second Appeals are dismissed. There shall be no order as to costs.

09.07.2024

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Index : Yes/No

Speaking Order : Yes/No

NCC : Yes/ No

To

1. The Principal District Court,
Pondicherry.
2. The Principal District Munsif Court,
Pondicherry.



WEB COPY



SA.Nos.1378 & 1379 of 2004

C.KUMARAPPAN, J

kmi

S.A.Nos.1378 & 1379 of 2004

09.07.2024