



S.A.No.276 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.01.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.276 of 2021
and
C.M.P.No.5497 of 2021

Vijayalakshmi

... Appellant

Vs.

1. N.Kothandam
2. Rajaram Naicker
3. Sridhar
4. Arunkumar
5. NithyaKalyani
6. Varthini
7. Gnanavalli

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C. to set aside the judgment and decree dated 24.09.2019 in A.S.No.14 of 2017 passed by the learned Fast Track Mahila Judge, Tiruvannamalai reversing the judgment and decree of O.S.No.85 of 2005 dated 27.11.2013 passed by the learned Additional Sub Judge, Tiruvannamalai.

For appellant

: Mrs.P.Veena Suresh

For respondents

For R1

: Mr.A.G.Rajan

For R2 to R4 and R6 to R7

: No appearance

For R5

: Mr.P.K.Harinath Babu

JUDGMENT



The plaintiff in a suit for partition is the appellant before this Court.

2. The facts which have given rise to the above second appeal are briefly set out hereinbelow and the parties are referred to as the plaintiff and the defendants as before the Trial Court.

FACTS OF THE CASE:

2.1. The plaintiff and the defendants would trace their title to the suit property through one Rajaram Naicker. It is the case of the plaintiff that the first defendant is her father. He is one of the sons of Rajamanicka Naicker. Besides him, Rajamanicka Naicker has 2 other sons viz., Arjunan and Dakshinamoorthy. The first defendant was originally married to the plaintiff's mother viz., Kalaiselvi, through whom, the plaintiff and second defendant were born. After the death of Kalaiselvi in the year 1985, Rajaram Naicker had got married to the 7th defendant viz., Gnanavalli, through whom, the 3rd and 4th defendants were born. Kalaiselvi is the daughter of one Subramaniam Naicker,



who, in turn, is the son of Rangasami Naicker. Rangasami Naicker is the father of the plaintiff's paternal grandmother viz., Yasodhammal.

2.2. The plaintiff would submit that her father and his brothers had divided all the joint family ancestral properties under a registered partition deed dated 19.12.1994 and in this partition, the 'C' schedule property was allotted to the share of the first defendant. The plaintiff would submit that she and the defendants 1 to 4 constitute a joint Hindu family. The first defendant has been in management of the properties inherited under the said partition. From and out of the income from these properties, the first defendant had purchased the 24th item of the 'A' schedule properties for the benefit of the family. Except the income from the joint family properties, the first defendant had no other income to purchase the said property.

2.3. The plaintiff would submit that the 'A' schedule properties remained undivided. The plaintiff and the defendants 1 to 4 are each entitled to a 1/5th share. While so, the second defendant who is the



brother of the plaintiff, had brought into existence a registered settlement deed in respect of item nos.21 to 23 of the 'A' schedule properties, in and by which, he had settled the same in favour of the first defendant. This document is a fraudulent one meant to defeat the right of the plaintiff and other sharers.

2.4. The plaintiff would submit that all the properties in the 'A' schedule remained undivided and the second defendant had no right to settle certain items in the 'A' schedule property. Therefore, the settlement deed is *per se* illegal and invalid. That apart, it appears that the first defendant had created a fictitious sale deed dated 06.05.2004 in favour of the 5th defendant in respect of the 'B' schedule property. This sale deed would not bind the plaintiff and the sale deed is neither supported by consideration nor was there an actual transfer of possession. The plaintiff would submit that the first defendant is giving out that he will create more such deeds to defeat the plaintiff's right to a 1/5th share. In view of this, the plaintiff demanded partition of the suit joint family properties mentioned in the 'A' and 'B' schedules free from



all encumbrances since April 2004. However, attempts made for mediation to arrive at an amicable settlement have not fructified. The defendants are refusing to give the share of the plaintiff stating that she has been provided with enough sridhana.

2.5. The plaintiff had issued a legal notice dated 12.07.2004 to the defendants to partition the properties. However, the said request has not been complied with. The plaintiff would submit that even thereafter the first defendant had created a sale deed dated 12.04.2005 in respect of items 6 and 11 in favour of the 6th defendant and further, he has executed a settlement deed dated 17.03.2005 in favour of his second wife Gnanavalli. The plaintiff would submit that when there is no partition in the family, the first defendant has no right to execute a deed in favour of the 7th defendant. The 7th defendant, in turn, alienated a portion of the property settled on her in favour of the 8th defendant on 27.07.2007. The plaintiff, in order to avoid multiplicity of proceedings, impleaded the buyers also as defendants 6 to 8. The plaintiff, therefore, claims that she is entitled to 1/5th share in the suit property and hence,



the suit for partition.

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2.6. The defendants 1, 3, 4 and 5 have filed a written statement denying the plaintiff's claim to 1/5th share. The defendants would submit that the 4th defendant was born on 02.06.1985 and the 3rd defendant was born on 15.03.1988. The first defendant and his brothers, along with their father, had constituted a Hindu undivided joint family. In the year 1977, these persons had effected oral partition and all their ancestral properties were divided into 3 shares which are allotted only to the sons of Rajamanicka Naicker and Rajamanicka Naicker did not take any share for himself. The only condition made during the partition was that the 3 sons should take care of Rajamanicka Naicker on a rotation basis for every one month in their house. During the partition, items 1 to 23 of the 'A' schedule properties and 'B' schedule properties were allotted to the share of the first defendant and from the date of partition, the respective sharers have been enjoying their shares separately.

2.7. The defendant would admit that from and out of the joint



family income, the first defendant had purchased the land in Survey No.280/1C measuring 0.32 acres and Survey No.280/2A measuring 0.65 acres under a registered sale deed dated 26.05.1982. From and out of the surplus income derived from the patrimony, the first defendant had dug a well in the land in Survey No. 280/2A and installed a 5 HP electric pumpset and obtained electric service connection in his name. These two properties have also been impressed with the character of the joint family properties of the plaintiff and the defendants 1 to 4. They would further contend that the second defendant was a minor and his maternal grandfather Subramani had obtained a so-called registered settlement dated 03.12.1985 in respect of the properties comprised in Survey No.280/1C and Survey No.280/2A including well and pumpset from the first defendant in favour of the second defendant by coercion and undue influence.

2.8. The first defendant would contend that the settlement was made under coercion and therefore, it is invalid. The defendants would submit that the plaintiff had filed this vexatious suit on the instigation



of the second defendant. Therefore, they contended that the suit is bad for partial partition. They would further contend that Rangasamy Naicker, the maternal great grandfather of the plaintiff, had settled certain properties in favour of the first defendant under registered settlement deeds and he has also taken possession of the same as the absolute owner. The first defendant would submit that he had incurred the marriage expenses of the plaintiff and in the oral partition, item nos.21, 22 and 23 of the 'A' schedule properties were allotted to the share of the second defendant. The first defendant's mother Yasodhammal had settled 1.36 acres of land in favour of the plaintiff who was then a minor represented by her maternal grandfather Subramaniam Naicker under a settlement deed dated 03.12.1985. The plaintiff is in enjoyment of the same.

2.9. The defendant would submit that the plaintiff had informed them that she would not require any share in the joint family lands if the tiled house in the village natham situate in Aruanagirimangalam Village comprised in Survey No.150/B1 is settled in her favour. The



properties described as item nos.1 to 20 in the 'A' schedule and 'B' schedule have been jointly allotted to the shares of the defendants 1, 3 and 4 in the oral partition. The first defendant had thereafter purchased item no.24 of the 'A' schedule property by borrowing funds on 06.05.2004. Likewise on 22.03.2004, the first defendant had sold his self-acquired property measuring 6.15 acres along with 2 wells and 2 pumpsets in favour of the second defendant. In the written statement, the defendants have stated about various transactions that had taken place with reference to these properties and would submit that the suit is bad for non-joinder of necessary parties *viz.*, 7th defendant and other purchasers. They would submit that in the light of the oral partition that has taken place between the plaintiff and the defendants 1 to 4 and as the plaintiff was never in joint possession and enjoyment of any of the suit properties, she has no right to claim any share much less 1/5th share in the suit properties.

2.10. An additional written statement was also filed by the first defendant, wherein, it was stated that 7th defendant has sold item no.21



in favour of the 8th defendant under a registered sale deed dated 27.07.2007 and possession of the same were with the 8th defendant. The 7th defendant had filed a written statement stating that item nos.2, 3, 4, 21 and 24 of the 'A' schedule property was settled in her favour by the 7th defendant and the patta was also transferred in her name. The settlement deed is a perfectly valid document under which the 7th defendant had perfected title to the property. The 7th defendant has alienated the 21st item in favour of the 8th defendant who has taken possession of the same. The 8th defendant had filed a written statement stating that he is a *bona fide* purchaser and that, in the event of the partition being granted, item no.21 has to be allotted to his share under equity.

TRIAL COURT:

3. The Trial Court had framed the following issues:

“1. Whether the suit is bad for non including the properties bearing S.No.280/2000-0.32 and S.No.280/2A-0.65?

2. Whether there was an oral partition between



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the plaintiff and defendant in January 2004?

3. Whether the suit 24th item is a separate self acquired properties of D1 from borrowed funds?

4. Whether the suit items 21, 22 and 23 are the first defendant's absolute properties in pursuance of settlement deed dated 22.03.2004?

5. Whether the suit is bad for non-joinder of Gnanavalli and Vijayan?

6. Whether the suit has been properly valued for the purpose of Court fee and jurisdiction?

7. Whether the plaintiff is entitled to the relief and partition and accounts?

8. To what other reliefs?

Additional Issues:

1. Whether the settlement deed alleged to have been executed in favour of Gnanavalli by the first defendant dated 17.02.2005 with respect to item nos. 2, 3, 4, 21 and 24 of the A schedule property is valid and enforceable by law?

2. Whether the 8th defendant right and title has been perfected with respect to item no. 21 of the 'A' schedule on the foot of registered sale deed alleged to



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have been executed by the 7th defendant? ”

4. The plaintiff had examined herself as P.W.1 and marked Exs.A1 to A6. On the side of the defendants, 5 witnesses were examined and Exs.B1 to B19 were marked. Ultimately, on considering the evidences, the Trial Court had decreed the suit as prayed for granting 1/5th share in the 'A' schedule and 'B' schedule property to the plaintiff.

LOWER APPELLATE COURT:

5. Aggrieved by the same, the defendants 1, 3, 4, 5, and 7 had filed an appeal in A.S.No.15 of 2017 and the 8th defendant had filed an appeal in A.S.No.14 of 2017.

6. The Lower Appellate Court had allowed both the appeals. The Lower Appellate Court held that the first defendant had entered into all the transactions only as the Karta of the joint family and act of



the Karta was binding on the members of the family.

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7. The learned Judge observed that except the plaintiff, no other family member had objected to the alienations made by the Karta of the joint family. The plaintiff has approached this Court totally suppressing these transactions. The Lower Appellate Court had taken a view that this fact has been overlooked by the Trial Court. With regard to the settlement in favour of the first plaintiff, the Lower Appellate Court had taken a novel view not pleaded by the parties, that the settlement has been done by the first defendant in favour of the second defendant after he had executed the settlements to all the others, including the plaintiff and therefore, he had every right to settle the property in favour of the 7th defendant, who, in turn, being the absolute owner, was entitled to convey the property to the 3rd party. Therefore, the Lower Appellate Court has held that the plaintiff cannot question the alienation. With regard to the partitioning of the 24th item, the Lower Appellate Court has held that though the first defendant has contended that he had borrowed money from various persons and had



also used his own income to purchase the 24th item, no documents has been filed to prove the same. However, since the purchase has been made after the oral partition on 06.05.2004, the Lower Appellate Court held that it is the absolute property of the first defendant. Consequently, the lower appellate court has allowed both the appeals as the two appeals arise from and out of the single suit.

8. Challenging the same, the plaintiff has filed this second appeal.

9. Heard the learned counsel on either side and perused the materials available on record.

DISCUSSION:

10. The defendants have not denied the fact that the properties are the ancestral properties. The defendants had pleaded partial partition and an oral partition on 06.05.2004 and also an oral partition in the month of January 2004 between the plaintiff and the defendants 1



to 4 in respect of the item nos.1 to 23 of the 'A' schedule and the 'B' schedule properties. The defendants would contend that under this oral partition Item nos.21 to 23 were allotted to the share of the second defendant. The defendants have pleaded that the plaintiff had stated that she did not want any share in the joint family property if the first defendant settles the tiled house measuring 1,275 sq.ft. bearing village natham comprised in Survey No.150/B1 situated at Arunagirimangalam Village. The defendants have not stated if the above said property was ultimately, given to the plaintiff.

11. The defendants would contend that item nos.1 to 20 in the 'A' schedule and the 'B' schedule property were allotted to the defendants 1, 3, and 4 jointly and Item no.24 was purchased by the first defendant by borrowing funds from one Venkatesan and Sankar. Therefore, there was no property available for partition. The defendants have not proved the oral partition more particularly when the plaintiff has denied the said oral partition. The purchase of the 24th item of the 'A' schedule property of the first defendant through borrowings has also



not been proved by the defendants. That apart, on 22.03.2004, when the defendants had executed a sale and settlement deeds evidenced by Exs.A3, B5, B6, B7 and B8, there was no reference to this oral partition. All of this would clearly go to show that there was no oral partition amongst the parties.

12. D.W.1, in his chief examination, has himself admitted that the oral partition had been effected only amongst the defendants 1 to 4 and he has neither stated that the plaintiff was present or that he was a party to the partition deed. This factum which was taken note by the Trial Court has been ignored by the Lower Appellate Court. Therefore, the plea of oral partition has to fail and it is not binding on the plaintiff, as she is not a party to the same. The first defendant has admitted the ancestral nature of the properties in his cross-examination as D.W.1 where he has stated as follows:

“... தாவாவில் கண்டுள்ள சொத்துகள் என் அப்பாவின் பூர்வீக சொத்துகள் என்றால் சரிதான். என் அப்பாவிற்கு விவசாயம் தான் தொழில் என்றால் சரிதான்.....”



13. Further, with regard to the oral partition, D.W.1 would submit as follows:

“... 2004ல் ஏற்பட்ட வாய்மொழி பாகப்பிரிவினையை பத்திரமாக எழுத வேண்டாம் என்று சுப்பிரமணிய நாயக்கர் சொன்னதால் எழுதவில்லை. வாய்மொழி பாகப்பிரிவினையில் நானும், சுப்பிரமணிய நாயக்கரும் தவிர வேறு யாரும் கலந்துகொள்ளவில்லை. நாங்கள் இருவரும் சேர்ந்து தான் வாய்மொழி பாகப்பிரிவினை முடிவு செய்தோம். வாய்மொழி பாகப்பிரிவினைக்கு ஆதரமாக கூர் சீட்டு உட்பட எந்த ஒரு ஆவணமும் ஏற்படுத்தப்படவில்லை. வாய்மொழி பாகப்பிரிவினை ஏற்பட்டபோது 4ஆம் பிரதிவாதிக்கு 12 வயதிருக்கும், அப்போது 3ஆம் பிரதிவாதிக்கு 10 வயதிருக்கும்.....”

14. Therefore, in the light of the failure on the part of the defendants to prove the oral partition and taking note of their admission that the properties are ancestral properties, the plaintiff is entitled to 1/5th share in the same. Therefore, substantial question of law no.1 is answered in favour of the plaintiff. Once, this Court has come to the conclusion that the oral partition pleaded had not been proved, then, the settlement in favour of the 7th defendant is not a valid settlement. However, considering the fact that the 8th defendant is a purchaser for value at the time of the passing of the final decree, equities shall be



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worked out. Therefore, substantial question of law no.2 is answered as above.

In fine, this second appeal stands allowed with the above observation on equity. Consequently, the connected C.M.P. stands closed. However, there shall be no order as to costs.

31.01.2024

Index : Yes/No
Speaking order/non-speaking order
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To

1. The Sessions Judge Mahila Court, Thiruvannamalai.
2. The Additional Sub Judge,
Civil Judge (Senior Division), Tiruvannamalai.
3. The Section Officer, V.R. Section, High Court, Madras.

P.T.ASHA, J.,



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