



A.S(MD) No.59 of 2022

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Dated: 08.02.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD) No.59 of 2022
and
C.M.P(MD) No.2310 of 2022

Gomathi

... Appellant/Plaintiff

Vs.

1. Rajalakshmi
2. Gandhimathi
3. Vasanthi

Prayer : This Appeal Suit has been filed under Section 96 of C.P.C., to set aside the judgment and decree dated 20.01.2022 passed in O.S. No.108 of 2018 on the file of the Principal District Judge, Tirunelveli and set aside the same.

For Appellant : Mr.J.Maria Rubit

For Respondents :Mr.Ramesh Mahadev

JUDGMENT

This Appeal Suit has been filed as against the judgment and decree passed in O.S.No.108 of 2018 on the file of the District Court, Tirunelveli, wherein the appellant being plaintiff has filed suit as against the respondents for the relief of partition and separate possession and for declaration of gift deed dated 13.06.2014



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executed by the first defendant in favour of the second defendant as not valid and binding on the plaintiff's in respect of $\frac{1}{4}$ share of the suit property.

2. The trial Court has dismissed the suit, thereby the present appeal has been filed by the unsuccessful plaintiff.

3. For the sake of convenience and brevity, the parties herein after will be referred to as per their status/ranking in the Trial Court.

4. The averments of the plaint are as follows:

The first defendant is the mother of the plaintiff and the defendants 2 and 3 are the sisters of the plaintiff.. The suit property was allotted to the father of the plaintiff by Non Gazetted Officer's Co-operative Housing Society, Tirunelveli. The father of the plaintiff was the member of the above said Society and hence allotment was made by resolution dated 13.01.1985. After the said allotment of property, the father of the plaintiff namely, Kasi Arunachalam died on 27.07.1987 leaving the plaintiff and the defendants as legal heirs to succeed his estate. The plaintiff and the defendants jointly decided to have document in the name of the first defendant, namely, the mother of the plaintiff and conveyed the consent to the



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Society for allotment. Hence, in the name of the mother of the plaintiff i.e., the first defendant allotment was made in the name of the first defendant on 27.11.1993. To construct the property, the first defendant was appointed as power agent by registered deed dated 23.06.1992 to deal with the joint family property. To raise funds for the construction, the first defendant based on the power deed, sold the family properties on 11.01.1994 to an extent of 14.16 cents in various survey numbers. Based on the above said funds raised through the above sale proceeds, the house situated in the suit property was constructed with the consent of the plaintiff and other defendants. The property was meant common to the plaintiff and the defendants and the construction was also made with the common funds. Whiles, the first defendant colluded with the defendants 2 and 3 attempted to alienate the property in favour of the defendants 2 and 3. Thereby, the plaintiff has sent notice demanding partition dated 07.05.2018. The first defendant received notice on 23.05.2018 and all the defendants issued reply notice with false averments. In order to deceive the plaintiff right over the property the first and second defendants fraudulently created gift deed dated 13.06.2014 in respect of the joint family property in which, the plaintiff is also having 1/4th share over the property. Hence, the suit is filed for relief of partition and separate possession



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in respect of $\frac{1}{4}$ share of the property of the plaintiff and to declare that the gift deed executed by the first defendant in favour of the second defendant is not binding on the plaintiff in respect of her $\frac{1}{4}$ share over the property.

5. The brief averments of the written statement filed by the defendants are as follows:

The suit is not maintainable either in law or facts and the same is liable to be dismissed in *limini*. The averments made in the plaint after the allotment of the scheduled property, the husband of the first defendant Kasi Arunachalam died is not correct and also the averment that the plaintiff and the defendant jointly decided to have documents in the name of the eldest member of the family i.e., in the name of mother has also denied. Infact the NGO of the Society terminated the allotment in favour of Kasi Arunachalam as early as on 05.05.1992 vide its letter to the first defendant. The allotment of the scheduled plot was allotted on 27.11.1993 is not correct. The plot was allotted in favour of the first defendant by Co-operative society pursuant to the agreement entered between her and the Society and it was not allotted to her on the sole ground that she was the eldest member of the family. The plaintiff cannot claim any right over the house or plot. The building was constructed with the



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funds provided by her brother N.Venkatachalam. The first defendant was in absolute possession and enjoyment of the property as the absolute owner. The first defendant has not purchased the property from the alleged sale of the family property dated 11.01.1994. When the power of attorney was executed by the plaintiff and the defendants 2 and 3. The plaintiff has got married with the expenses of the first defendant and she was provided with 60 sovereigns of gold ornaments and her husband was provided with one gold chain and ring apart from the cash of Rs.1,50,000/-. The first defendant executed gift deed dated 13.06.2014 in favour of the second respondent being the youngest daughter and now the property is under the possession and enjoyment of the second defendant. Since the first defendant is the absolute owner of the property, she got every right to execute the gift deed and no one have right over the property. Therefore, the suit is liable to be dismissed.

6. Based on the above said pleadings and hearing both sides, the trial Court has framed the following issues:

- a) Whether the suit property was allotted in favour of Kasi Arunachalam father of plaintiff or not ?
- b) Whether the first defendant was having absolute irtght over the suit property?



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c) Whether the settlement deed executed by the first defendant on 13.06.2014 is valid and binding on the plaintiff?

d) Whether the house in suit property was constructed from the sale consideration of agricultural lands belongs to plaintiff and defendants

e) Whether the plaintiff is having $\frac{1}{4}$ share in the suit property

f) Whether the plaintiff is entitled for partition and declaration as prayed for?

7. In order to prove the case before the trial Court, on the side of the plaintiff they have examined P.W.1 and P.W.2 and marked Exs.A1 to A10 and on the side of the defendants the D.W. 1 to D.W3 were examined and documents Exs.B.1 to B.3 were marked.

8. After analysing the evidence adduced on both sides, the trial Court has dismissed the suit by holding that there is no evidence to prove that the plaintiff contributed money for purchase of property and for construction of the property. Aggrieved over the decree and judgment of the trial Court the present appeal has been filed by the plaintiff on various grounds.



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Grounds of appeal

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i) the judgment and decree passed by the trial Court is against law, weight of evidence and the probabilities of the case

ii) the trial Court ought to have held that the suit property belongs to the father of the appellant

iii) the trial Court ought to have held that the appellant is entitled for $\frac{1}{4}$ share in the suit scheduled property

iv) the trial Court ought to have held that the settlement deed executed by the first respondent in favour of the second respondent on 13.06.2014 is not valid as the suit scheduled property does not absolutely belong to the first respondent.

v) the trial Court ought to have held that house constructed in the suit scheduled property was constructed from the sale consideration of agricultural lands belonging to the appellant and respondent

vi) the trial Court ought to have held that the suit scheduled property was allotted to the first respondent on behalf of the appellant and other respondents being the legal heirs of deceased Kasi Arunachalam.

vii) the trial Court failed to consider that the Co-operative Society allots the property only to its members and the first respondent not being the member of the Co-operative Society has



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been allotted with the suit scheduled property only because it was allotted to the appellant's father prior to his death.

viii) the trial Court failed to consider that the first respondent did not prove that the house in the suit schedule property was constructed out of her own funds by adducing sufficient oral and documentary evidence

ix) the trial Court failed to consider that D.W.1 admitted in her cross examination that the housing society allots the plot only for the NGO's and that she is not an NGO which implies that the property was allotted to her being the legal heir of deceased Kasi Arunachalam

9. The learned counsel appearing for the appellant would contend that the appellant is the plaintiff before the trial Court and the first respondent herein is the mother of the plaintiff and the other defendants are the sisters of the plaintiff. The father of the plaintiff namely, Kasi Viswanathan was member in the Co-operative Housing Society, Tirunelveli and the suit schedule property was allotted to the father of the plaintiff on 13.01.1985. Thereafter, the father of the plaintiff died and then the property was allotted in the name of the first defendant. For allotment of the property, the plaintiff and other defendants have given consent to allot in the



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name of the first defendant and thereafter, the property was allotted in favour of the first defendant through order dated 27.11.1993.

Thereafter, the family properties of the plaintiff's and the defendants were sold by the first defendant based on power deed dated 23.06.1992 given by plaintiff and other defendants in favour of the first defendant. Out of the sale proceeds, the first defendant has constructed the building in the suit property and the plaintiff is also entitled to 1/4th share over the property. Whiles, the first defendant executed gift deed dated 23.06.1992 in order to defeat the right of the plaintiff over the property. The plaintiff is having 1/4th share over the property and each of the defendants are entitled to 1/4th share of the property since the property is a common property. The first defendant has no right to execute gift deed in its entirety in which, the plaintiff is also having 1/4 share. In order to prove the case of the plaintiff before the trial Court, she has examined P.W.1 and P.W. 2 and marked Exhibits A.1 to A.10. On the side of the defendants, they have examined D.W.1 to D.W.3 and marked documents Ex.B.1 to B.3. The trial Court, without considering the evidence adduced on both sides and without considering that the plot was allotted only because of the membership of the father of the plaintiff, erroneously dismissed the suit by holding that the plaintiff has not proved that she already have contributed for purchase of



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the property. Therefore, the decree and judgment passed by the trial Court is liable to be set aside. To support his contention the learned counsel appearing for the appellant relied on the judgment of the Hon'ble Apex Court in the case of ***K.Ambigapathy .vs. K.Subha and others*** reported in ***2019 SCC Online Mad 35536***.

10. The learned counsel appearing for the respondent would contend that the relationship of the parties are admitted. The first defendant being the mother of the plaintiff after demise of the her husband approached the society and obtained sale deed in her favour by utilizing her own funds and then constructed house with the help of the fund provided by her brother N.Venkatachalam. The first defendant is in absolute possession and enjoyment of the property and she has every right to alienate the property, since it is the absolute property of the first defendant, she executed gift deed in favour of the second defendant, who is the youngest daughter of the first defendant. The first defendant extended huge money for the marriage of the plaintiff and she also presented with 60 sovereigns of gold jewels to the plaintiff and Rs.1.5 lakhs in cash for marriage expenses and also presented gold chain to the husband of the plaintiff. Inorder to prove the case of defendants, they have examined D.W.1 to D.W.3 and marked exhibits Ex.B.1 to B.3 and the



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trial Court, after analysing evidence adduced on either side correctly came to conclusion that the plaintiff failed to prove that she also contributed the amount and the property is a common property and hence the appeal is liable to be dismissed.

11. This Court heard both sides and perused the records and upon hearing both sides and perusing the records including the judgment of the trial Court the points for determination in this appeal are as follows:

1) Whether the suit property was allotted in favour of the first defendant on her individual capacity?

2) Whether the house constructed on the suit property was constructed with the funds of the joint family properties ?

3) Whether the first defendant is the absolute owner of the property?

4) Whether the plaintiff is having 1/4th share over the suit property?

5) Whether the plaintiff is entitled for partition of her 1/4 the share over the property?

6) Whether the plaintiff has right to execute settlement deed in respect of the suit property?

7) Whether the plaintiff is entitled to declaration in



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respect of gift deed dated 23.06.1992?

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8) Whether the appeal is liable to be allowed or not?

9) To what other relief the parties are entitled to?

12. In this case, there is no dispute in respect of relationship of the parties and it is admitted that the deceased Kasi Arunachalam is the husband of the first defendant, the plaintiff and the other defendants are the daughters of the first defendant. The deceased Kasi Arunachalam was the member of Co-operative Society. It is an admitted fact that the suit scheduled property was allotted by Cooperative Housing Society, Tirunelveli. It is also admitted that initially allotment was made in favour of the Kasi Arunachalam and then it was cancelled. According to the plaintiff, after the demise of his father, the allotment was cancelled and thereafter, all the legal heirs of the deceased had given consent for allotment in favour of the first defendant and thereafter only plot was allotted in the name of the first defendant. According to the first defendant, though allotment was made in favour of Kasi Arunachalam after his demise the same was canceled and thereafter, the allotment was allotted only in favour of the first defendant. She only purchased the property from the Co-operative Society. In this context, now the question is whether the property



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was allotted under individual capacity of the first defendant or to the member of the Housing society namely, Kasi Arunachalam.

13.It is admitted that earlier property was allotted to Kasi Arunachalam and thereafter, the same was cancelled . Thereafter, it was allotted in the name of the first respndent. In this context P.w.1 has filed proof affidavit by reiterating the plaint averments and documents also marked as Ex.A.1 to A.10. Ex.A.7 is the copy of sale deed executed by the Society in favour of the first defendant. On careful persual of the above said sale deed recitals shows that, since Kasi Arunachalam was the member of the Society and property was allotted to him and subsequently he died and then the same was conveyed to the first defendant. Therefore it shows that the property was conveyed in the name of the first defendant based on the allotment made to the deceased Kasi Arunachalam. The first defendant was examined as D.W.1 and she also in her cross examination admitteed that “ அந்த சங்கமானது NGO சங்கம் என்பதால் NGO க்களுக்கு தான் மனை ஒதுக்கீடு செய்வார்கள் என்றால் சரிதான். என் கணவர் NGO என்பதால் தான் அதைக் கொடுத்தார்கள். நான் மனை ஒதுக்கீடு கேட்டதற்கு நான் NGO இல்லாததால் கொடுக்க முடியாது என்று மறுத்துள்ளார்கள் என்றால் சரிதான். The PW.2 also in her cross xamination admitted that the property was allotted since her father was member of the society.



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IN this context she stated in her cross examination that தாவா மனையானது என் தகப்பனாருக்கு ஒதுக்கப்பட்டது என்றால் சரிதான். இப்போது அப்பா இறந்ததால் ரத்து செய்யப்பட்டதென தானாகச் சொல்கிறார். என் தகப்பனார் NGO ஆவார். NGOவிற்கு மட்டுமே கொடுக்க முடியுமென்றும் வேறு யாருக்கும் கொடுக்க இயலாது என்று சொசைட்டியிலிருந்து மறுப்பு சொல்லியுள்ளார்கள் என்றால் சரிதான். Therefore, the D.W.1 herself admitted that the property was conveyed based on the allotment allotted to her husband. Further the defendants also produced Ex.B.1 to B3. Ex.B.1 is the letter sent to first defendant by society , Ex.B.2 is the request made by the first defendant for allotment of plot in her name. Ex.B.3 is the agreement. On careful perusal of those documents they revealed that the property was allotted to the first defendant based on the allotment allotted to her husband, Kasi Arunachalam and since he died the said allotment was made to the first defendant. Therefore, it is clear that the property was allotted based on the allotment made to the husband of the first defendant.

14. In this context, the learned counsel appearing for the appellant has relied on the judgment of this Court in the case of ***K.Ambigapathy .vs. K.Subha and others reported in 2019 SCC Online Mad 35536***, wherein it is held as follows:

12. Adverting to the contentions of the learned counsel for the appellants, I do not think that those contentions merit



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acceptance. The Sale Deed was executed by the Tamil Nadu Slum Clearance Board on 26.06.2001. The written statement filed by the Tamil Nadu Slum Clearance Board clearly stated that the property was allotted to Kalimuthu and the sale deed was executed in favour of the first defendant as heir of Kalimuthu, since she claimed to be only heir of Kalimuthu. Therefore, the claim that the first defendant becomes the absolute owner of the property since the Sale Deed has been executed in favour of Kalimuthu cannot be accepted. This Court has in Rita v. C.Suseela, referred to supra, held that if an allotment is made and the Sale Deed is executed in favour of one of the legal heirs of the allottee, the said legal heir will hold the property in trust for other legal heirs.

13. It is also pointed out that the Personal Laws that applied to the parties do not stand excluded in matters of allotment made by the Tamil Nadu Slum Clearance Board. Once it is found that the first defendant was holding the property as a trustee on behalf of the other heirs, she has no right to deal with the entirety of the property. The Settlement Deed executed by the first defendant in favour of the fifth defendant would be valid only to the extent of her share and it will not affect the shares of the plaintiffs and other sharers

15. On careful reading of the above said judgments, it is clear once the allotment is made and sale deed executed in favour of one of the legal heir of the allottee, the said legal heir will hold the property in trust for other legal heirs. In the case on hand initially the property was allotted in the name of the husband of the first defendant, father of the appellant and after his demise it was allotted in the name of the first defendant, thereby, the first defendant is only trustee for the other legal heirs thereby, she



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cannot claim absolute claim as her absolute property. According to the plaintiff the property was purchased by the first defendant through sale proceeds of the joint family properties. The P.W.1 also in her evidence stated that she along with the second and third defendants executed a power deed in favour of the first defendant and based on that power deed the first defendant sold the joint family properties. From the sale proceeds the first defendant purchased the property and also made construction. The plaintiff also marked Ex.A4 and Ex.A.4 sale deeds. A3 is the power deed executed by the plaintiff, second and third defendants in favour of the first defendant. Ex.A.4 and Ex.A5 are the sale deeds executed by the first defendant for herself and on behalf of her daughters. Therefore from the evidence of plaintiff and Exs.A1 to A5 they revealed that some of the family properties were sold by the plaintiff and the defendants prior to the purchase of the suit scheduled property. According to the first defendant she purchased the property through her own earnings and constructed house through the funds supplied by her brother. In this connection the first defendant stated in her evidence that her brother Venkatachalam provided funds for construction but no any documents produced to prove the contention. Moreover the said Venkatachalam was not examined as witness on the side of the



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defendants. Further there is no evidence that the first defendant had source of income to purchase the property and construct the house. Therefore from the above said evidences it is clear that the plaintiff probabalized her case and the defendants failed to prove that the construction was made through the funds provided by her brother. Therefore this Court is of the opinion that the suit property was not allotted to the first defendant on her individual capacity and the property was purchased through joint family income and the construction of the house was made with the joint family funds. In view of the above discussions it is clear that the first defendant is not absolute owner of the suit property. Thus, points 1 to 3 are answered.

Points No. 4 and 5

16. This Court has already decided in previous points that the allotment was made in the name of the husband of the first defendant and sale deed was executed in favour of first defendant and she is the trustee of the property, thereby the property belongs to all the legal heirs of the deceased Kasi Arunachalam. Therefore, the plaintiff being one of the legal heir of the deceased is entitled to $\frac{1}{4}$ share over the suit property and the other defendants each are entitled to $\frac{1}{4}$ share of the property. Therefore the plaintiff is entitled



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to preliminary decree for partition over her $\frac{1}{4}$ th share of the suit property. Thus point nos.4 and 5 are answered.

Point Nos.6 and 7

17. Since this Court already decided that the plaintiff is entitled to $\frac{1}{4}$ th share over the property the first defendant is the only trustee for the other legal heirs she has no right to execute the gift deed for the entire property. Therefore, the gift deed executed by the first defendant in favour of the second respondent is not binding on the plaintiff in respect of her $\frac{1}{4}$ share. Since the plaintiff is having $\frac{1}{4}$ share over the suit property the first defendant could execute gift to the respondent on her $\frac{1}{4}$ share but not for entire property. Therefore the plaintiff is entitled to decree for declaration in respect of her $\frac{1}{4}$ share. Thus point nos. 6 and 7 are answered.

18. The trial Court after analysing evidence adduced on both side held that the plaintiff has not proved the case, that the property was common property in the name of the first defendant. There is no evidence that the plaintiff contributed amount and she also contributed for the construction, but the trial Court failed to consider that the plot itself was allotted due to death of Kasi Arunachalam and the plaintiff also produced Exs.A1 to A6 and these



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documents clearly shows that, the plaintiff and others sold the family properties and also the plaintiff and other defendants executed power of attorney in favour of the first defendant. Based on power of attorney also the first defendant sold some properties. The first defendant failed to prove her source of income to construct the building. The plaintiff is having $\frac{1}{4}$ th share over the property. Therefore construction of house was made only by the first defendant is not acceptable and the available evidence shows that property was not constructed by the first defendant through her own funds and , it is to be presumed that the construction was made by common fund since the property of the plaintiff and defendants were sold prior to the construction. Therefore, as discussed supra, this Court is of the opinion that the decree and judgement passed by the trial Court are unsustainable and liable to be set aside. In view of the same, the decree and judgment passed by the trial Court are set aside and the plaintiff is entitled for partition of $\frac{1}{4}$ share over the property and the plaintiff is entitled to the relief of declaration that the gift deed dated 13.06.2014 is not binding upon the plaintiff in respect of her $\frac{1}{4}$ share.

19. In the result, the Appeal suit is allowed and the decree and judgment passed in passed in O.S.No.108 of 2018 on the file of the



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District Court, Tirunelveli, are set aside and the suit is decreed in favour of the plaintiff by declaring that the plaintiff is entitled to $\frac{1}{4}$ th share over the properties and preliminary decree is passed to divide the suit property into four equal shares and allot one such share to the plaintiff.

20. It is hereby declared that the gift deed dated 13.06.2014 executed by the first defendant in favour of the second defendant in respect of the suit property is not binding upon $\frac{1}{4}$ th share of the plaintiff. The plaintiff is at liberty to file appropriate application for final decree proceedings. Consequently connected miscellaneous petition is closed.

08.02.2024

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
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To:

1. The Principal District Judge, Tirunelveli
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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P. DHANABAL,J.

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