



S.A.No.965 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11.07.2025

CORAM :

THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP

Second Appeal No.965 of 2013 and
M.P.No.1 of 2013

1. Ramasamy
2. Ramayee (Died)
3. Poongodi
4. Minor.Kavin
5. Priya

... Appellants

Versus

1. K.Rangasamy
2. K.Chidambaram

... Respondents

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 19.07.2011 made in A.S.No.92 of 2010 on the file of the learned I Additional Sub Judge, Erode, reversing the judgment and decree dated 30.06.2010 made in O.S.No.40 of 2008 on the file of the learned I Additional District Munsif, Erode.

For Appellants

: M/s.N.Manokaran

For Respondents

: Mr.V.S.Kesavan

JUDGMENT

This Second Appeal has been filed against the judgment and decree dated 19.07.2011 made in A.S.No.92 of 2010 on the file of the learned I Additional Sub Court, Erode reversal of the judgment and decree dated 30.06.2010 made in O.S.No.40 of 2008 on the file of the learned I Additional



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2. The learned Counsel for the Appellants Mr.N.Manokaran submitted that the Appellants herein were the Defendants in the Suit in O.S.No.40 of 2008 on the file of the learned I Additional District Munsif, Erode. The Suit property originally belonged to the paternal grandfather of the Plaintiffs viz., Nallamuthu Gounder. Nallamuthu Gounder had two sons viz., Kulanthaisamy and Muthusamy. The said Kulanthaisamy had two sons viz., Rangasamy and Chidambaram/Plaintiffs. The Plaintiffs' paternal grandfather died intestate. The suit properties are the ancestral properties of the Plaintiffs. The Plaintiffs' paternal uncle viz., Muthusamy Gounder had two daughters viz., Subbulakshmi and Kasthuri. They had sold the property to Ramasamy and Periyasamy. The sale deeds were marked during trial as Ex.B-2 and Ex.B-3, dated 08.08.1991.

3. It is the contention of the Defendants before the trial Court that the Plaintiffs herein filed the Suit in O.S.No.492 of 1991 seeking preemption before the learned Sub Judge, Erode. The Suit was dismissed and restored thrice and lastly dismissed on 08.10.1998. The Petition in I.A.No.946 of 1999 was filed by the Plaintiffs for restoration which was also dismissed. Against which, the Plaintiffs had preferred the Appeal in CMA.No.56 of 2000 which



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was also dismissed. While so, the Plaintiffs had preferred the Suit for partition without seeking leave of the Court as the Suit for preemption had not been restored. The Defendants in their written statement had clearly stated that the Suit filed by the Plaintiffs is not maintainable as it is hit by the principles of partial partition and also there was already oral partition in the family in which the Plaintiffs had already relinquished their share. Therefore, the Suit for partition is not maintainable.

4. The learned Counsel for the Appellants invited the attention of this Court to the discussion of the evidence by the learned I Additional District Munsif in his Judgment in Paragraph Nos.8 to 11 and had on accepting grounds raised by the Defendants in the written statement which was proved in the evidence, the learned I Additional District Munsif had dismissed the Suit on 30.06.2010. Paragraph Nos.8 to 11 in the judgment of the learned I Additional District Munsif are extracted as under:

“8. வாதிகளுக்கு ஆதரவாக விசாரிக்கப்பட்ட சாட்சி வா.சா.1 2ம் வாதி சிதம்பரம் அவரது குறுக்கு விசாரணையில், “தாவா சொத்தானது குழுவக்காடு, பாழியக்காடு, பூச்சக்காடு நல்லமுத்துக்கவுண்டருக்கு பாத்தியப்பட்டது என்றும் பூர்வீகச் சொத்து என்றும் சொன்னால் சரிதான் என்றும், பாழியக்காடு 26 சென்ட்டை தனது சித்தப்பா முத்துசாமி கவுண்டர் மற்றும் அவரது மகள்கள் 2 பேரும் சேர்ந்து சின்னுசாமிக்கு விற்று விட்டார்கள் என்றும், அவ்வாறு விற்பனை செய்த பத்திரம் 1880/96 என்றால் சரிதான் என்றும், அவ்வாறு விற்பனை பாழியக்காட்டை இந்த வழக்கில் சம்பந்தம்



இல்லாததால் சேர்க்கவில்லை என்றும் கூறியுள்ளார்.” மேலும் அவருடைய குறுக்கு விசாரணையில் “தனது அப்பா பங்கிற்கு சேர்ந்த பங்கினை தானும் தனது சகோதரரும் பிரித்து அனுபவித்துவருகிறோம் என்றால் சரியல்ல என்றும், வாய்மொழியாக பிரித்து தனது சித்தப்பா மற்றும் வா.சா.2 பாழியக்காடு, குழுவக்காடு ஆகியவற்றை பிரித்துக் கொண்டோம் என்றால் சரிதான் என்றும், குழுவக்காட்டை தனது சித்தப்பா தட்சிணாமூர்த்தி என்பவருக்கு விற்று விட்டார் என்றால் சரிதான் என்றும், தாவா சொத்தில் உள்ள குழுவக்காடு, பாழியக்காடு ஆகியவற்றை பொறுத்து வழக்கு தாக்கல் செய்யவில்லை என்றும் வாய்மொழி மூலமாக முத்துசாமி கவுண்டருக்கு பிரிந்த பாகத்தை தான் பிரதிவாதிகள் வாங்கினார்கள் என்றும் சொன்னால் சரிதான் என்றும் அவ்வாறு தாவா சொத்தினை விற்பனையின் மூலம் வாங்கிய 1ம் பிரதிவாதியும் பெரியசாமியும் விவசாயம் செய்து வந்தார்கள் என்றும் சொன்னால் சரியல்ல என்றும், அவர்கள் நிலத்தினை அளந்து பிரித்துக்கொண்டார்கள் என்றும், குழுவக்காடு, பாழியக்காடு, பூச்சக்காடு ஆகியவற்றை வாய்மொழியாக பிரித்துக் கொண்டதை வழக்குரையில் சொல்லவில்லை என்றும், பாழியக்காடு, குழுவக்காடு, பூச்சக்காடு ஆகியவை ஏற்கனவே பாகப் பிரிவினை செய்து கொண்டோம் என்பது பற்றி வழக்குரையில் சொல்லவில்லை என்றும் கூறியுள்ளார்.” மேற்படி வா.சா.1ன் சாட்சியத்தை பரிசீலிக்கும் போது தாவா சொத்துடன் மற்ற சொத்துக்கள் உள்ளன என்றும் மற்ற சொத்துக்களையும் சேர்த்து வாதிகள் பாகப்பிரிவினை செய்து தர வேண்டும் என்று பரிகாரம் கேட்காத படியால் ஏற்கனவே தாவாச் சொத்து மற்றும் இதர சொத்துக்களைப் பொறுத்து வாய்மொழியாக பிரித்துக் கொண்டார்கள் என்றும் வாதி தரப்பு சாட்சியான வா.சா.1ன் சாட்சியத்திலிருந்து தெளிவாகத் தெரிகிறது.

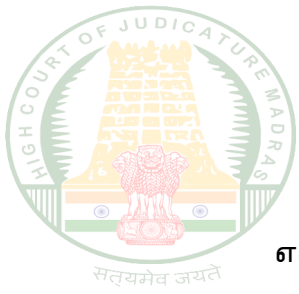
9. பிரதிவாதிகள் தரப்பு சான்றாவணங்களை பரிசீலிக்கும் போது பி.சா.ஆ.1 18.07.1996ம் தேதியில் முத்துசாமி கவுண்டர் 2, 3 பிரதிவாதிகளின் தகப்பனார் சின்னசாமி என்பவருக்கு விற்பனை செய்துள்ள கிரைய பத்திரம், மேற்படி கிரைய பத்திரத்தின் மூலமாக தாவா சொத்து தவிர மற்ற சொத்துக்களை முத்துசாமி கவுண்டர் விற்பனை செய்துள்ளது இந்நீதிமன்றத்திற்கு தெளிவாகத்தெரிகிறது. பி.சா.ஆ.2, 3 ஆவணங்கள் 8.8.1991ம் தேதியில் முத்துசாமி கவுண்டர்,



அவரது மகள்கள் சுப்புலட்சுமி, கஸ்தூரி ஆகிய மூவரும் சேர்ந்து 1ம் பிரதிவாதி மற்றும் 2, 3 பிரதிவாதிகளின் தந்தை பெரியசாமிக்கு தாவா சொத்தை பொறுத்து விற்பனை செய்து எழுதி கொடுத்த கிரைய பத்திரம். மேற்படி ஆவணங்களை பரிசீலிக்கும் போது தாவா சொத்தானது 1991ம் வருத்திலேயே மேற்படி முத்துசாமி மற்றும் சுப்புலட்சுமி, கஸ்தூரி ஆகியோருக்கு பிதுரார்ஜிதமாக பாத்தியப்பட்ட அவர்களுடைய சுவாதீனத்திலிருந்து விற்பனை செய்துள்ள விபரம் இந்நீதிமன்றத்திற்கு தெளிவாகத் தெரிகிறது.

10. தாவா சொத்தினைப் பொறுத்து நீதிமன்ற ஆணையர் நியமனம் செய்யப்பட்டு, அவர் தாக்கல் செய்துள்ள நீ.ம.சா.ஆ.1, 2 ஆகியவற்றை ஆராயும்போது நீ.ம.சா.ஆ.1 அறிக்கையில் தாவா சொத்தானது இரண்டு கூறுகளாக உள்ளது என்றும் “எ” சொத்து 71 செண்ட் என்றும் “பி” சொத்து 31 செண்ட் என்றும் குறிப்பிட்டுள்ளார். மேற்படி ஆணையர் அறிக்கையில் எந்தவித குறிப்புகளும் தெரிவிக்கப்படவில்லை.

11. பிரதிவாதிகளுக்கு ஆதரவாக விசாரிக்கப்பட்ட சாட்சி 1ம் பிரதிவாதி ராமசாமி பி.சா.1 தனது குறுக்கு விசாரணையில் “முத்துசாமி எந்த பக்கம் ஓட்டி வந்தாரோ அந்த பக்கத்தை தான் கிரையம் வாங்கினோம் என்றும், முத்துசாமி தனக்கு வாய்மொழியாக கறாரான பாகத்தை வாய்மொழிப்படி பிரிந்த பாகத்தை தான் நான் அனுபவிக்க வேண்டும் என்று முத்துசாமி கூறினார் அவ்வாறு கிரைய ஆவணங்களிலும், வருவாய்துறை ஆவணங்களில் எந்த மாற்றமும் ஏற்படவில்லை என்றும் கூறியுள்ளார்.” பி.சா.1ன் சாட்சியத்தை பொறுத்து ஏற்கனவே வாய்மொழியாக தாவா சொத்து மற்றும் மற்ற சொத்துக்கள் பாகப் பிரிவினை செய்யப்பட்டுள்ளது என்று இந்நீதிமன்றத்திற்கு தெளிவாக தெரிகிறது. பி.சா.2ன் குறுக்கு விசாரணையில் “தாவா சொத்து பொதுவில் அனுபவித்து வருகிறார்கள் என்றால் சரி தான் என்றும், தாவாச் சொத்துக்களை வாதிகள் பிரதிவாதிகள் அனுபவிக்கிறார்கள் என்றும் வழக்கிற்காக பொய்யாக சாட்சி சொல்கிறேன் என்றால் சரியல்ல என்றும் தெளிவாக கூறியுள்ளார்” அவருடைய சாட்சியத்தை பொறுத்து தாவா சொத்தை வாதிகள் மற்றும் பிரதிவாதிகள் பொதுவில் அனுபவித்து வரவில்லை



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என்றும் தாவாச் சொத்து மற்றும் மற்ற சொத்துக்கள் ஏற்கனவே பாகப்பிரிவினை செய்யப்பட்டுள்ளது என்பதும் இந்நீதிமன்றத்திற்கு தெளிவாக தெரிகிறது. எனவே வாதிகள் ஏற்கனவே தாவா சொத்துக்களை பொறுத்து பகுதி பாகப்பிரிவினை செய்யப் பட்டுள்ளது என்பது தெளிவாகி தெரிகிறது.”

5. Aggrieved by the same, the Plaintiffs preferred the Appeal in A.S.No.92 of 2010 on the file of the learned I Additional Sub Judge, Erode. The learned I Additional Sub Judge, Erode, by Judgment in A.S.No.92 of 2010 dated 19.07.2011 set aside the Judgment of dismissal by the learned I Additional District Munsif and reversed the Judgment thereby granting the relief of decree for partition.

6. It is the contention of the learned Counsel for the Appellants in the Second Appeal that the Judgment of the learned Appellate Judge particularly in the discussion in Paragraph Nos.12 to 16 is perverse. Paragraphs 12 to 16 are extracted as under:

“12. The suit properties are the ancestral properties and it originally belonged to Nallamuthu Gounder. He died intestate leaving behind his two sons Kolandasamy and Kuppusamy. Muthusamy and his two daughters namely Subbulakshmi and Kasthuri owned undivided 1/2 share in the suit properties. Likewise the plaintiffs also owned undivided 1/2 share in the suit properties. Muthusamy and his two daughters sold their undivided 1/2 share in the suit properties to the first defendant and one Periyasamy on 8.8.91, under two sale deeds (B2 & B3). The said Periyasamy died leaving behind the defendants 2 to 5 (Mother, wife, son and daughter respectively) as his legal heirs. These facts are not seriously disputed.



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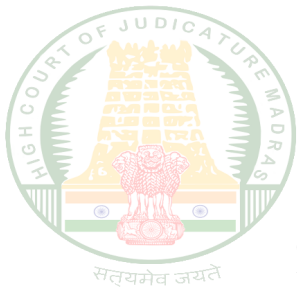
13. According to the plaintiffs they were enjoying the suit properties along with the defendants without any permanent partition and they felt difficulty to be in joint possession and they demanded the defendants for an amicable division for which the defendants refused. Hence, the suit.

14. The defendants have taken mainly two defences. One is that in the last week of thai 2001. Plaintiffs relinquished their right over the plot Nos. 1, 3 and 5 shown as "A" schedule in Commissioner report and 9 and 10 in the "B" schedule properties shown in the Commissioners report and plan in favour of the first defendant and Periyasamy and enjoyed the properties in Plot Nos. 2, 4 & 6 in "A" schedule and plot Nos. 7 & 8 in "B" schedule. The second one is that the original owner Nallamuthu Gounder owned lands in R.S.Nos.238, 238/10, 245/14, 249/6 in Nasiyanoor Village and also house properties. They are also ancestral properties and the said properties were not included in this suit and so suit is bad for partial partition.

15. The burden of proving the oral partition is upon the defendants. In the written statement the defendants have not given any particulars of relinquishment of right by plaintiffs. They have not stated in whose presence the said oral relinquishment took place and who were the mediators etc. The first defendant D.W-1 during cross examination clearly admitted that

“எங்களுக்கும் வாதிகளுக்கும் நேரடியாக வாய்மொழி கறார் எதுவும் இல்லை. நான் தனியாக சொத்தை அனுபவித்து வந்ததற்கு ஆவணங்கள் எதுவும் இல்லை என்றால் சரிதான். வருவாய்துறை ஆவணங்களில் எந்த மாற்றமும் ஏற்படுத்தவில்லை.”

Therefore, the evidence of D.W-1 itself goes against the averment of the written statement in respect of alleged relinquishment of right by plaintiffs. In the evidence also the D.W-1 has not given any material particulars about the said relinquishment. D.W-2 has deposed that there was an oral partition. He stated that on 16.9.2007 he measured and laid survey stones for the lands of defendants 1 & 3. But it is not the case of the defendants. D.W-2 has not stated about the alleged oral partition in the year 2001 and so his evidence is no way support the case of defendants. The defendants relied upon the Commissioner's report and plan Ex.C-1 and Ex.C-2. But the Commissioner has not measured the suit properties. He has only noted down the physical features of the suit properties. The Advocate Commissioner cannot say about the possession and



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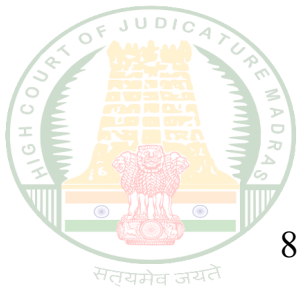


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enjoyment of the lands by particular persons. It is settled position of law. Therefore, the Commissioner's report and plan, as rightly contended by the learned Counsel for the appellant, cannot be relied upon to decide about the oral partition, in the absence of independent evidences, oral as well as documentary. The trial Court by picking up some portion of the evidence, from evidence of P.W-1, has given a finding that an oral partition was admitted by the plaintiffs. But the evidence has to be read as a whole. It is the consistent case of the plaintiffs and evidence of P.W-1 that there was no permanent partition between the plaintiffs and the defendants which has been admitted by D.W-1 also. That being so it is not proper to read in between the lines of P.W-1's deposition and pick up holes from the said evidence and come to a conclusion that there had been an oral partition. Further the Muthusamy, who is the vendor of the defendants was examined as P.W-2 and he deposed that he enjoyed the suit property in common along with the plaintiffs and sold the same to the Periyasamy and Ramasamy and no permanent partition had taken place between them till date. Therefore, his evidence is also not support the case of the defendants.

16. Further Ex.A-1 to Ex.A-14 are the patta and A register Extract in respect of the suit properties. They reveal that the revenue records stands in the name of original owner Nallamuthu Gounder. If really a partition had taken place in the year 2001 itself, as stated by the defendants, naturally mutation of entries in the revenue records ought to have taken place in the names of the defendants separately. On this ground also the defence plea of oral Partition is unreliable.”

7. The learned Judge had not at all discussed about the admissions made by P.W-1 in the cross-examination which was relied by the learned trial Judge. The learned Judge had misdirected himself and placed the burden on the Defendants and thereby reversed the Judgment of the learned I Additional District Munsif and granted preliminary decree for partition. Also, he would submit that the learned Judge had not heard the Respondents in the Appeal in A.S.No.92 of 2010, they were set ex-parte.



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8. While admitting this Second Appeal on 23.10.2013, this Court had

framed the following Substantial Questions of Law:

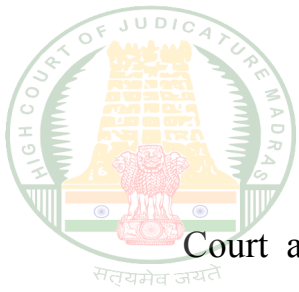
(i) Whether the first Appellate Court has erred in law and misdirected itself in granting the preliminary decree merely on the basis of oral assertion in the evidence of P.W-1 in the absence of any other oral and documentary evidence to disprove the separate possession and enjoyment of the respective sharers?

(ii) Whether the first Appellate Court is right in allowing the appeal suit by treating the appellants 1 to 3 herein as ex parte even though they had not been served any notice as per the mandate of law?

(iii) Whether the judgment of the first Appellate Court is vitiated for protecting the interest of the minor appellants 4 and 5 in a proper perspective in the appeal suit?"

9. The substantial questions of law were admitted by this Court on 23.10.2013. Therefore, he seeks to remand this case to the first Appellate Court with a direction to hear the Appeal afresh by affording an opportunity to the Respondents to put forth their submissions.

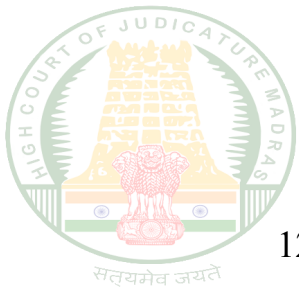
10. The learned Counsel for the Respondents submitted his arguments by way of reply to the argument made by the learned Counsel for the Appellants in the Second Appeal. As per the submission of the learned Counsel for the Respondents, the Respondents are the Plaintiffs before the trial



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Court and the Appellants before the Appellate Court. The trial Court had dismissed the suit for partition on the ground raised by the Defendants in the written statement that (i) *There was already an oral partition and (ii) There was partial partition. Therefore, the suit was dismissed.*

11. Aggrieved by the dismissal of the suit for partition preferred by the Plaintiffs in O.S.No.40 of 2008, the Plaintiffs in O.S.No.40 of 2008 had preferred Appeal in A.S.No.92 of 2010. The Appellate Court had issued summons to the Defendants, even though Defendants as Respondents in the Appeal in A.S.No.92 of 2010 received summons, they failed to appear before the first Appellate Court. Since there were minor Defendants, the minors interest had been protected. Therefore, the Appellate Court appointed Advocate Tmt.Indrani as Court Guardian of the minors. The Guardian of the minors as Respondents also advanced arguments defending the judgment of the trial Court and claiming that the judgment of the trial Court was on proper appreciation of evidence and it is a well reasoned judgment that does not warrant any interference. The appeal lacks merit and is to be dismissed. Therefore, the submission of the learned Counsel for the Respondents that the Respondents were not heard and Respondents were not served with summons cannot be accepted.



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12. The learned Appellate Judge had afforded opportunity to the Respondents in the Appellate Court. After hearing the arguments of the learned Counsel for the Appellants (Plaintiffs before trial Court) and the Respondents (Defendants before the trial Court) after independently assessing the evidence before the trial Court had discussed the judgment of the learned trial Judge and faulted the judgment of the trial Court for not considering the evidence of the Defendants.

13. As per the submission of the learned Counsel for the Respondents in this Second Appeal who were the Appellants before the first Appellate Court, the burden of proof regarding the facts stated in the written statement is upon the Defendants. The Defendants claim that there was oral partition and also partial partition in the family of the Plaintiff and vendors of the Defendants.

14. As per Section 102 of the Indian Evidence Act, the facts pleaded in the plaint or written statement by the respective parties, the burden is on the respective parties to prove those facts. Here the Defendants in the written statement claim that there was oral partition and also partial partition in the family of the Plaintiffs and vendor of the Defendants. The pleadings filed by the Defendant-1 and Defendant-2 in the written statement had to be proved by



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them. The burden is on them as per Section 102 of the Indian Evidence Act.

They had not discharged the burden cast upon them. Therefore, the contention that the partial partition and oral partition is to be considered as contents of the written statement not proved by the Defendants as per the Indian Evidence Act. The learned trial Judge, I Additional District Munsif, Erode had misdirected himself/herself and dismissed the suit.

15. The learned Appellate Judge had re-assessed the entire materials and found out that the Plaintiffs had proved their case. The Defendants had not proved their pleadings in the written statement through proper evidence as per the provisions of the Indian Evidence Act. Therefore, the learned first Appellate Judge, the learned I Additional Subordinate Judge, Erode had on proper appreciation of evidence set aside the judgment of the trial Court and granted preliminary decree for partition. When the Defendants had not proved their contention in the written statement through proper evidence before the trial Court, the claim of the Plaintiffs for partition had to be decreed. Therefore, the learned first Appellate Judge had granted preliminary decree for partition. Now, I.A.No.991 of 2012 filed by the Plaintiffs before the I Additional District Munsif, Erode is pending for passing of final decree. The Advocate Commissioner had been appointed already. He visited the suit property and filed his report. Based on his report, final decree is to be passed by the learned I



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Additional District Munsif, Erode in continuation of the preliminary decree granted by the learned first Appellate Judge in A.S.No.92 of 2010.

16. The learned Counsel for the Respondents further submitted that the submission of the learned Counsel for the Appellants stating that the suit for partition is not maintainable. When the suit for preemption already filed by the Plaintiffs was dismissed thrice for non-prosecution and the petition seeking to restore the suit was dismissed. Aggrieved by the same, the appeal in C.M.A.No.56 of 2000 preferred by the Plaintiff in O.S.No.492 of 1991 as petitioner in I.A.No.946 of 1999 was also dismissed by the learned Principal District and Sessions Judge. It is the right of the Plaintiffs to seek remedy and to prosecute the case. Merely the suit for preemption was dismissed, it does not mean that the suit for partition preferred by the very same Plaintiffs is not maintainable. The suit for partition is maintainable.

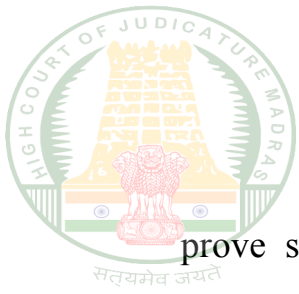
17. The learned Counsel for the Respondents also vehemently objected regarding the submission of the learned Counsel for the Appellants that the Second Appeal may be disposed of with a direction to the learned first Appellate Court Judge to consider afresh the argument of the Appellants in A.S.No.92 of 2010 and the Respondents (Defendants before the trial Court) and dispose of the A.S. After this long period of time, the same need not be



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remanded back to the first Appellate Court. Instead the Second Appeal can be disposed of on merits. This Second Appeal preferred by the Defendants in the suit before the learned I Additional District Munsif, Erode and the Appellants before the first Appellate Court was disposed of by the first Appellate Judge on proper appreciation of evidence, after hearing both parties, Appellants as well as the Respondents.

18. The learned Counsel for the Respondents invited the attention of this Court to Paragraphs 15 and 16 of the Appellate Court Judgment (as Extracted in paragraph 6 above), wherein it is found that the learned first Appellate Judge has discussed the evidence properly and also shifted the burden as per the Indian Evidence Act. The specific plea of the Defendants regarding the oral partition and partial partition was not proved in their evidence. Therefore, the learned Judge had found that the Defendants had abandoned the contents in the written statement. Nothing is found perverse in the Judgment of the learned first Appellate Judge. As per the provisions of the Indian Evidence Act under Section 101, the Plaintiff has to prove his or her own case through cogent acceptable evidence. As per Section 102 of the Indian Evidence Act, the specific plea made either by the Plaintiffs or the Defendants has to be disposed of by them. The burden of proof is on the Defendants who had made the claim of partial partition and oral partition. To

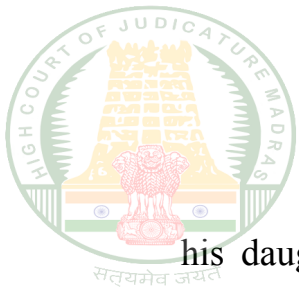


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prove such oral partition and partial partition through cogent evidence by marking documents, and examining witnesses who remained as witnesses in the oral partition or as witnesses for the partial partition, the learned first Appellate Judge had rightly reversed the finding given by the learned trial Judge. Therefore, the learned Counsel for the Respondents seeks to dismiss the Second Appeal as having no merit.

19. Heard the learned Counsel for the Appellants, Mr.N.Manokaran and the learned Counsel for the Respondents, Mr.V.S.Kesavan. Perused the Judgment of the trial Court and the first Appellate Court. Perused the evidence of the Plaintiffs and Defendants before the trial Court through P.W-1 and D.W-1, Ex.A-1 to Ex.A-8, Ex.B-1 to Ex.B-3 and Ex.C-1 and Ex.C-2.

20. On Perusal of the judgment of the learned I Additional District Munsif, Erode, in O.S.No.40 of 2008, it is found that the learned I Additional District Munsif had on proper appreciation of evidence dismissed the claim of the Plaintiff for partition on the ground that the 2nd Plaintiff as P.W-1 in his cross examination admitted that there was an oral partition between the father of the Plaintiffs Kulandaisamy and their uncle Muthusamy. The properties that were enjoyed by Muthusamy, the paternal uncle of the Plaintiff was purchased by Defendant-1 and one Periyasamy through two sale deeds. Muthusamy and

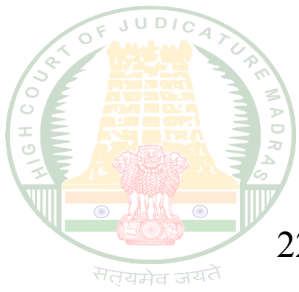


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his daughters sold their undivided half share in the suit property to the 1st

Defendant Ramasamy and one Periyasamy on 08.08.1991 under two sale deeds without informing the Plaintiffs who had got undivided half share therein. Hence, the Plaintiffs filed the suit for enforcing the right of preemption in O.S.No.492 of 1991 before the learned Sub Judge, Erode. The Defendant-1 in the suit in O.S.No.40 of 2008 and the Late. Periyasamy were included as Defendants 4 and 5 in the earlier suit in O.S.No.492 of 1991 before the learned Sub Judge, Erode. The Plaintiffs were unable to proceed with the said suit due to unavoidable circumstances. Hence, the suit was dismissed for default on 08.10.1998. Thereafter, the Plaintiffs could have pursued the matter because the petition to restore was also dismissed. In any event, the Plaintiffs, the Defendant-1/Ramasamy and the said Periyasamy jointly enjoyed the properties. The said Periyasamy died about six months ago leaving behind Defendants 2 to 5 as his legal heirs. This is the gist of the plaint. Therefore, the Plaintiff sought partition of half share in the suit property.

21. The Defendant-1 filed written statement which was adopted by the other Defendants whereby they had stoutly disputed the claim of the Plaintiffs stating that the Plaintiffs in this suit in O.S.No.40 of 2008 had filed the suit for partial partition with an intention to cause harassment to the Defendants 1 to 5.



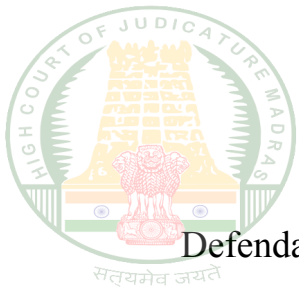
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22. It is the contention of the Defendants that there was an oral partition in the family of the Plaintiffs and the vendor of the Defendants, Muthusamy, whereby they had orally partitioned the properties and enjoyed them. What was orally partitioned and in enjoyment of Muthusamy, was sold to Defendant-1/ Ramasamy and one Periyasamy. Since Periyasamy died, the wife and children of Periyasamy are the Defendants 2 to 5, including Defendants 4 and 5 minor children.

23. Also, it is the contention of the Defendants in the written statement that the suit for partial partition is not maintainable. The suit was stoutly disputed by the Defendants. The learned I Additional District Munsif, Erode on the pleadings of both the parties had framed following issues.

1. Whether the Plaintiff is entitled to relief of partition of their half share?
2. Whether the claim of partial partition claimed by the Defendants is true ?
3. To what other relief the Plaintiff is entitled?

24. The 2nd Plaintiff Chidambaram examined himself as P.W-1 and in his evidence he had marked documents relied by him as Ex.A-1 to Ex.A-8. Ex.A-1 and Ex.A-2 are patta. Ex.A-3 and Ex.A-4 are A-Register Extract. Ex.A-5 is the kist receipt. Ex.A-6 is the certified copy of the earlier suit filed by the Plaintiff in O.S.No.492 of 1991. Ex.A-7 is the written statement filed by Defendant-1 in O.S.No.492 of 1991. Ex.A-8 is the written statement of minor



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Defendants 4 and 5. Muthusamy was examined as P.W-2. Plaintiff evidence closed with P.W-2. The Defendant-1 examined himself as D.W-1. In the evidence of Defendant-1, Ex.B-1 to Ex.B-3 were marked. Ex.B-1 is the sale deed in favour of Defendant-1 and Periyasamy dated 18.07.1996. Ex.B-2 is the sale deed dated 08.08.1991 in favour of the Defendants. Ex.B-3 is the sale deed dated 08.08.1991 in favour of Periyasamy. When P.W-1 was cross examined, he had specifically admitted the suggestion of the learned Counsel for the Defendant that there was oral partition in the family between the father of the Plaintiff and paternal uncle Muthusamy.

25. Ex.B-1 is the certified copy of the sale deed in favour of Chinnaswamy by Muthusamy son of Nallamuthu Gounder dated 18.07.1996. Ex.B-2 is the sale deed dated 08.08.1991 in favour of Ramasamy, the Defendant-1 by Muthusamy son of Nalla Muthu Gounder. Ex.B-3 is the sale deed dated 08.08.1991 in favour of Periyasamy, son of Tulasi Mani Gounder, Father of Defendants 4 and 5. In the cross examination of P.W-1/ Chidambaram, he had clearly admitted that there was oral partition between his father Kolandasamy and his paternal uncle Muthusamy. Also, he had clearly admitted that the property that was orally partitioned between Muthusamy Gounder, the vendor of the Defendants and the father of the Plaintiff was sold by Muthusamy Gounder to the Defendants that the partition was oral partition



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with metes and bounds was also admitted. There is specific admission that the oral partition between Muthusamy Gounder and the father of the Plaintiff Kolandasamy was 30 years prior to the filing of the suit. He had specifically admitted that the oral partition was not mentioned in the plaint. Kuzhuvakadu, Pazhiyakadu, Poochakaddu had not been included in the suit property.

26. Under those circumstances, on appreciation of evidence admission being the best evidence, the learned I Additional District Munsif, Erode by judgment dated 30.06.2010 dismissed the suit of the Plaintiffs for partition in O.S.No.40 of 2008. Aggrieved the Plaintiffs had filed Appeal in A.S.No.92 of 2010. In the A.S, the Defendants were not served. The minor Defendants 4 and 5 were set ex parte and Court Guardian was appointed.

27. On re-appreciation of evidence, the learned I Additional Sub Judge, Erode without properly appreciating the evidence, set aside the judgment of the learned Additional District Munsif in O.S.No.40 of 2008 dated 30.06.2010. Aggrieved the Defendants are before this Court by filing this Second Appeal.

28. On perusal of the judgment of the learned Additional Sub Judge, it is found that the learned Additional Sub Judge had ignored the best evidence



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available before the trial Court, the admission of the Plaintiff in cross examination regarding oral partition in the family of the Plaintiffs' father and his paternal uncle Muthusamy 30 years prior to the filing of the suit. Under those circumstances, the learned I Additional District Munsif had rejected the claim of the Plaintiffs for partition. The best evidence is available. What was in enjoyment of the paternal uncle Muthusamy Gounder was sold by him and his daughters.

29. The paternal uncle of the Plaintiffs, Muthusami Gounder himself had examined as P.W-2. He was subjected to cross examination. He had admitted in his cross examination that the subject matter of the suit was the properties in Poochakadu. The properties in Poochakadu were in enjoyment of the Plaintiffs' father. The properties in Kuzhuvakadu, Paaliyankaadu were in enjoyment of P.W-2 was admitted by him. He would further add that there was no deed of partition. Had it not been partitioned, the Plaintiffs and the Defendants were entitled to half share in all the properties in Kuzhuvakadu, Paaliyankaadu and Poochakadu was denied by him stating that there was oral partition. He had admitted that the Plaintiffs in the suit in O.S.No.40 of 2008 had filed earlier suit in O.S.No.492 of 1991 against Muthusamy and his daughters. From the cross examination of P.W-2, who is none other than the vendor of the Defendants, the claim of the Defendants had been proved that the



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property is in Paalakadu, Other properties are in Kuzhuvakadu, Paaliyakaadu and Poochakadu. Therefore, the suit is for partition for the properties in Paalakadu alone and the other properties were left out, that indicates that there had been oral partition as admitted by P.W-2. There was no partition between P.W-2 and father of Plaintiffs. Therefore, the learned I Additional District Munsif had rightly dismissed the suit of the Plaintiffs for partial partition and on the basis, oral partition was proved.

30. The learned I Additional Sub Judge had reversed the finding of the learned District Munsif on the basis of the argument put forth by the learned Counsel for the Appellants/Defendants as Appellants, by setting aside the Defendants *ex parte* in the Appeal, thereby granted the decree for partition and half share in the suit properties which is against the accepted principles of partition. As per Hindu law, all the properties enjoyed by the family had to be brought to partition.

31. Here, there is specific admission by the paternal uncle as P.W-2 that only one property was brought for partition and rest of the properties were left out that indicates shares sold by the paternal uncle of the Defendants alone was subjected to partition. Rest of the properties left by the grandfather of the Plaintiffs and the father of the paternal uncle P.W-2/ Muthusami Gounder had



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not been brought under partition by including those properties in the suit in

O.S.No.40 of 2008 which was lost sight by the learned I Additional Sub Judge.

The learned I Additional Sub Judge rejecting the claim of partial partition, decreed the suit. It is specific admission of P.W-2 vendor of the Defendants that there are three properties. Only one property is brought to partition. Therefore, the judgment of the learned I Additional Sub Judge is perverse.

Substantial Question of Law – 1:-

32. The learned I Additional Sub Judge without taking effective summons to minors Defendants 4 and 5 had set the Defendants *ex parte* and appointed Court Guardian for the Minors which will not serve the purpose in this case. The Minors are the children of Periyasamy, the purchaser of the property along with Defendant-1 Ramasamy. Their interest is affected by the mischief played by the Plaintiffs. The Plaintiffs had already filed the suit for right of preemption against the very same Defendants in O.S.No.492 of 1991 which was dismissed for non-prosecution. Therefore, the claim of the Defendants that it is an attempt to harass them is found justified from the evidence available on record. The Defendants in the written statement had stoutly disputed the claim made by the Plaintiffs. In the cross examination, the vendor of the Defendants/the paternal uncle of the Plaintiffs was examined as P.W-2 who had in his cross examination admitted that the properties were

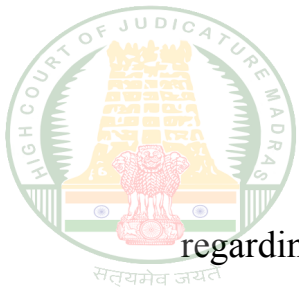


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enjoyed more than that. The Plaintiff-2 himself in the cross examination admitted that 30 years prior to filing of the suit, the properties were orally partitioned by metes and bounds and was enjoyed by the paternal uncle as such. The paternal uncle Muthusami Gounder and his daughters disposed of the properties that they enjoyed to the Defendants 1 to 5. Therefore, the suit for partition claiming half share, is found to be mischievous when they had not included the entire family properties. When P.W-2 was confronted regarding the partition, that all the properties to be brought for partition stated that there was no deed of partition still there was oral partition. The learned I Additional Sub Judge on re-appreciation of evidence failed to consider these admissions as admission is the best evidence available in the case. Accordingly, **the Substantial Question of Law-1 is answered in favour of the Defendants and against the Plaintiffs in O.S.No.40 of 2008 on the file of the learned I Additional District Munsif, Erode.** The first Appellate Court had erred in law and misdirected itself in granting the preliminary decree merely on the basis of oral assertion in the evidence of P.W-1 in the absence of any other oral and documentary evidence to disprove the separate possession and enjoyment of the respective sharers.

Substantial Question of Law-2:-

33. It is the specific case of the Plaintiff that there was no document



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regarding enjoyment of the properties for generations. On perusal of the records, it is found that after entertaining the Appeal, summons was ordered to the Respondents 1 to 5/Defendants 1 to 5. Summons to the Respondents 1 to 5 was returned unserved. Therefore, at the request of the Appellants/Plaintiffs paper publication was ordered in **“Kaalai Kathir”** and accordingly, paper publication was effected by the Appellants/Plaintiffs. Based on the paper publication, the learned Appellate Judge/learned I Additional Sub Judge, Erode, had on 12.04.2011 set the Respondents 1 to 3 *ex parte*. Since the 4th and 5th Respondents are minors, Mrs.P.Indirani, Advocate was appointed as Court Guardian for the minor Respondents 4 and 5.

34. In the introduction paragraph, the learned Judge had observed as follows:

“This appeal is coming on 7.7.2011 for final hearing before me in the presence of Thiru.P.Manickam, Advocate for the appellants and court guardian Tmt.P.Indrani, Advocate for the minor respondents 4 and 5 and R1 to R3 are being called absent set ex parte and upon hearing the arguments on both sides and upon perusing all the documents on record and having stood over for consideration till this day, this court delivered the following:-”

35. On perusal of the judgment, it is found that the argument of the learned Counsel for the Appellants was accepted by the learned I Additional Sub Judge, since the Respondents remained *ex parte* and the Court Guardian as



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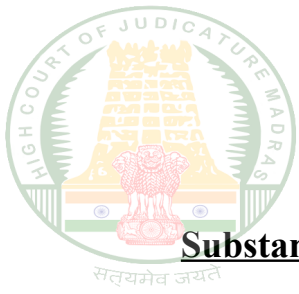
Guardian of Minor 4th and 5th Respondents had not effectively argued the case

the learned Judge had reversed the judgment of the learned I Additional District Munsif, Erode in O.S.No.40 of 2008. It is an acceptable principle as laid down by the Hon'ble Supreme Court that while the Court appreciates evidence, the Plaintiff who knocks the door of the Court seeking relief in favour of the Plaintiff has to let in evidence and the Plaintiff is not expected to seek a decree by picking holes in the evidence of the Defendant. The Plaintiff has to stand or fall on the strength of his/her pleadings and evidence. Here, the Plaintiffs had sought partition of the property. It is the specific case of the Defendants that there was already an oral partition in the family consisting of Muthusamy Gounder and Kulanthaisamy Gounder, the sons of Nallamuthu Gounder and Muthusamy Gounder had sold the property to the Defendants Ramasamy and Periyasamy. Since patta and revenue records stood in the name of Nallamuthu Gounder, Muthusamy Gounder along with his daughters had sold his share of the property to Ramasamy and Periyasamy, the Defendants 1 to 5. While so, the learned I Additional District Munsif, Erode, had on proper appreciation of evidence, rejected the claim of the Plaintiffs thereby dismissed the suit. Whereas the learned I Additional Sub Judge, Erode, as Appellate Judge, set the Defendants *ex parte* and the Court Guardian Mrs.P.Indirani, appointed as Guardian of the minor Respondents 4 and 5 had not effectively argued the case of the Defendants, the legal heirs of the deceased Periyasamy



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thereby the learned I Additional Sub Judge, Erode had granted preliminary decree for partition ignoring the admissions in cross-examination of the Plaintiffs before the learned I Additional District Munsif, Erode and the principles laid down by the Hon'ble Supreme Court regarding the appreciation of evidence and grant of decree to the Plaintiffs by picking holes in the evidence of the Defendants (Defendants being set *ex parte* in the Appeal). The learned I Additional Sub Judge, Erode, had granted preliminary decree after having set the contesting Defendants *ex parte*, after issuing paper publication whereas effective summons was not served. Therefore, the learned Counsel for the Appellants in the Second Appeal/Defendants in the suit in O.S.No.40 of 2008 had sought remand of the case to the learned I Additional Sub Judge, Erode to hear the first Appeal on merits and dispose of the appeal on merits. Since the re-appreciation of evidence is found erroneous, **the Substantial Question of Law-2 is answered in favour of the Defendants and against the Plaintiffs in O.S.No.40 of 2008 on the file of the learned I Additional District Munsif, Erode.** The first Appellate Court is not right in allowing the Appeal Suit by treating the Appellants 1 to 3 herein (Defendants before the learned I Additional District Munsif, Erode in O.S.No.40 of 2008) as *ex parte* even though they had not been served any notice as per the provisions of the Code of Civil Procedure, as per the mandate of law.



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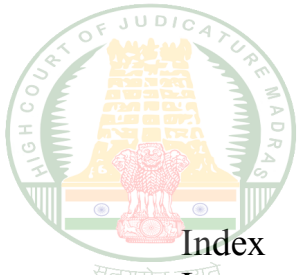
Substantial Question of Law-3:-

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36. In the light of the Substantial Question of Law-2 having been answered against the Plaintiffs in O.S.No.40 of 2008 on the file of the learned I Additional District Munsif, Erode, on the same reasoning, the judgment of the first Appellate Court is vitiated for not protecting the interest of the minor Appellants 4 and 5 in a proper perspective in the Appeal Suit. **The Substantial Questions of Law-3 is answered in favour of the Defendants and against the Plaintiffs in O.S.No.40 of 2008 on the file of the learned I Additional District Munsif, Erode.**

In the result, **this Second Appeal is allowed with cost throughout.** The Judgment and decree dated 19.07.2011 passed in A.S.No.92 of 2010 by the learned I Additional Sub Judge, Erode, is set aside. The judgment and decree dated 30.06.2010 in O.S.No.40 of 2008 by the learned I Additional District Munsif, Erode, is found well reasoned judgment and on proper appreciation of evidence. The same is restored. The suit of the Plaintiffs in O.S.No.40 of 2008 is dismissed. Consequently, the connected miscellaneous petition is closed.

11.07.2025

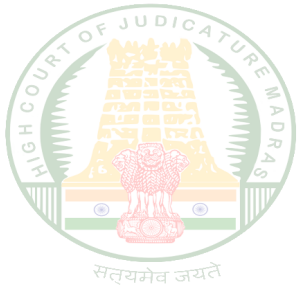


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Speaking/Non-Speaking Order
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To

1. The I Additional Sub Court
Erode.
2. The I Additional District Munsif,
Erode.
3. The Section Officer,
V.R. Section,
High Court, Madras.



WEB COPY



S.A.No.965 of 2013

SATHI KUMAR SUKUMARA KURUP, J.

shl

Judgment made in
S.A.No.965 of 2013

11.07.2025