

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.03.2015

Delivered on : 09.06.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

A.S.No.926 of 2010

and

M.P.No.1 of 2010

Umamaheswari

Appellant/Plaintiff

-Vs-

Saroja (died on 13.09.2009)

1.Nagarajan

2.Muthu

.. Respondents/Defendants 2&3

Appeal filed under Section 96 of the Civil Procedure code against the judgement and decree of the Additional District Court (Fast Track Court No.2) at Salem, dated 31.08.2009 made in O.S.No.154 of 2007.

For Appellants : Mr.P.Valliappan

For Respondent : Mr.R.Subramanian

for Mr.D.Thirumoorthy for R1

Mr.B.T.Seshadri for R2

JUDGMENT

This appeal arises out of the judgment and decree of the trial court [Additional District Judge (Fast Track Court No.2), Salem] dated 31.08.2009 made in O.S.No.154 of 2007. Originally the said suit was filed by the appellant herein on the file of the Sub Court, Mettur as O.S.No.38/2005 against deceased Sarojammal the respondents herein for the relief of partition, separate possession and for a permanent injunction restraining the said Saroja and the respondent No.1/defendants 1 and 2 from alienating the properties in favour of 2nd respondent/third defendant. Subsequently, it was transferred to the file of the Additional District Judge (Fast Track Court No.2), Salem and re-numbered as O.S.No.154/2007. The learned trial Judge, decreed the suit for partition granting a preliminary decree declaring the appellant herein/plaintiff to be entitled to 1/3 share in the suit properties. However the learned trial judge incorporated a direction in the preliminary decree to the effect that at the time of passing of the final decree, the entire first item of the suit

properties should be allotted towards the 2/3rd share of Saroja and the first respondent herein/defendants 1 and 2 in equity and that the appellant/plaintiff will be entitled to allotment of more extent in the second item of the suit properties so as to compensate the loss of 1/3rd share in respect of first item of the suit properties. So far as the relief of injunction is concerned, it was granted against Saroja and the first respondent herein/defendants 1 and 2 in respect of the second item of the suit properties alone.

2. Aggrieved by the direction incorporated in the preliminary decree for allotment of first item of the suit property in entirety to the 2nd respondent herein/3rd defendant representing the 2/3rd share of Saroja and first respondent herein/defendants 1 and 2 and as against the refusal to grant the relief of injunction in respect of the first item of the suit property, the appellant herein/plaintiff has come forward with the present appeal on various grounds set out in the memorandum of grounds of appeal.

3. After the disposal of the suit by the trial court, the first defendant Saroja passed away and hence the defendants 2 and 3 have been shown as respondents 1 and 2 in this appeal. In order to avoid confusion and to achieve clarity, the parties are referred to in accordance with their ranks in the suit and at appropriate places, their ranks in the appeal also are provided.

4. The case of the appellant/plaintiff, in brief, can be stated thus:

i) The deceased first defendant Saroja is the mother of the plaintiff Uma Maheswari and the second defendant Nagarajan. The second defendant Nagarajan is the brother-cum-son-in-law of the plaintiff. The third defendant Muthu is a third party, who is alleged to be the holder of an agreement for sale executed by the defendants 1 and 2. Under two sale deeds dated 19.01.1948 and 01.03.1948, Venkatraman (the father of the plaintiff) purchased two adjacent properties along with his brothers from out of their self-earned money. However, the sale deeds were taken in the name of their mother Nagammal out of the love and respect they did have towards their mother. One Rukmani Ammal, the sister of Nagammal purchased another property in or about the year 1935. She had no issues and she had also lost her husband. As such, she was looked after by Nagammal and his sons. Out of her love and affection towards the sons of Nagammal, Rukmani Ammal gifted the property purchased by her to the sons of Nagammal under a registered Settlement Deed of the year 1969. Nagammal died in the year 1971. Even during the life time of Nagammal, the property purchased in her name and the property settled by Rukmani Ammal were jointly enjoyed by all the three sons of Nagammal. In the year 1973, they effected an oral partition of the above said properties and started enjoying their respective shares separately. Meanwhile Venkatraman died in the year 1975. The first defendant Saroja and the 2nd defendant Nagarajan were his wife and

son respectively. As certain disputes arose regarding the enjoyment of the properties that stood in the name of Nagammal, Arunachalam, Krishnasamy and the first and 2nd defendant (wife and son of Venkatraman entered into a partition under a registered deed dated 13.04.1984 confirming and reiterating the division made in 1973. Accordingly, the share allotted to Venkatraman in the above said oral partition of the year 1973, which came to be confirmed by the registered partition deed dated 13.04.1984, became the joint properties of the plaintiff and defendants 1 and 2. The property settled by Rukmani Ammal in favour of the sons of Nagammal was enjoyed by the sons of Nagammal, namely Venkatraman and his brothers jointly. The 1/3rd share allotted to Venkatraman in the property purchased in the name of Nagammal is shown as the first item of the suit properties. The 1/3rd share of Venkatraman as per the Settlement Deed of the year 1969 executed by Rukmani Ammal is shown as the second item of the suit properties.

ii) The plaintiff and the defendants 1 and 2 demolished the old building that was in existence in the first item of the suit properties and started constructing a new building to augment income. As the defendants 1 and 2 could not mobilise funds for contributing towards their share of the expenditure of the construction, they expressed their inability to make further investment as promised and gave out their intention to sell away their share in the suit properties to third parties. As the appellant was ready to purchase the share of the defendants 1 and 2 and they also agreed for the same, all of them entered into an agreement for sale dated 01.06.2003 under which the plaintiff agreed to purchase and the defendants 1 and 2 agreed to sell their 2/3rd share of the suit properties to the plaintiff. As per the terms of the agreement to which the wife of the second defendant was also a party, the balance sale consideration of Rs.1,00,000/- was to be paid and the sale deed was to be executed on such payment within two years. Thereafter, the defendants 1 and 2 developed hostile attitude towards the wife of the second defendant (daughter of the plaintiff) and they started ill treating her and drove her away from the matrimonial home so as to compel her to get a huge amount from her father. Though the plaintiff was demanding the completion of the sale as per the agreement dated 01.06.2003, the defendants 1 and 2 clandestinely created a sale agreement dated 10.02.2005 in the name of the third defendant for the sale of the suit properties in favour of the third defendant. The third defendant was very much aware of the agreement for sale executed by the defendants 1 and 2 in favour of the plaintiff. Under such circumstances, the plaintiff made a demand for the division of the suit properties into three equal shares and allotment of 1/3rd share in both the items to her, such demand was not accepted. Hence the plaintiff was forced to issue a lawyer's notice on 28.03.2005 demanding partition and fulfillment of the obligations under the agreement for sale dated 01.06.2003. The defendants 1 and 2 gave a reply containing false allegations as if the plaintiff had no share in the suit properties and that there was no sale agreement executed

by them in her favour for the sale of their 2/3rd share. Separate legal proceedings are being initiated for enforcement of the appellant's right under the agreement for sale dated 01.06.2003 in respect of the 2/3rd share of the defendants 1 and 2. In view of the above said circumstances, the plaintiff was constrained to seek the relief of partition, separate possession and injunction as indicated supra by filing the suit.

5. The first defendant filed a written statement and the same was adopted by the second defendant. The contentions raised in the written statement are summarised as follows:

The plaint allegation in support of the claim of the plaintiff that she is entitled to an undivided 1/3rd share in each one of the items of suit properties described in plaint schedule is true. The averments in the plaint regarding the sale deeds obtained in the name of Nagammal dated 19.01.1948 and 01.03.1948 are true. It is also true that a registered partition among Arunachalam, Krishnasamy and the defendants 1 and 2 took place on 13.04.1984. However, the averment to the effect that there was an oral partition in the year 1973 among the sons of Nagammal and their subsequent enjoyment of their respective shares are false. The further averment made in the plaint to the effect that the plaintiff was getting a share in the income is also false. The claim of the plaintiff that she is entitled to 1/3rd share in the suit properties cannot be sustained. The plaint allegations to the effect that the defendants 1 and 2 were not able to mobilise funds for contributing towards their share of the expenditure for the construction of building and that they agreed to sell their 2/3rd share in the suit properties to the plaintiff under an agreement for sale dated 01.06.2003 is utter falsehood. The first defendant executed a settlement deed on 19.09.2003 in favour of the second defendant. The contention of the plaintiff that the said settlement is not binding on her is untenable. The suit properties and other properties originally belonged to Nagammal and she enjoyed them along with her sons Arunachalam, Krishnasamy and Venkatraman. Only after the death of Nagammal, her sons Arunachalam and Krishnasamy along with the defendants 1 and 2 representing Nagammal's predeceased son Venkatraman effected a division by a registered partition deed. At the time of partition, the plaintiff had got married and was well settled in her in-law's house. After such partition, the defendants 1 and 2 enjoyed the properties allotted to them. One Karpagavalli, the paternal aunt of the plaintiff filed a suit for partition in O.S.No.525/1986 on the file of the District Munsif Court, Mettur. In the said suit, Uma Mahesari, the plaintiff herein figured as second defendant. Later on, the said suit was dismissed as settled out of court. Besides filing another suit for specific performance, the present suit has been filed to harass the defendants to the maximum extent possible. The third defendant filed a pauper OP in Pauper O.P.No.3/2005 on the file of the District Munsif, Omalur. The first defendant executed a registered Gift Settlement Deed dated 19.09.2003 in favour of the second defendant

registered as Document No.3866/2003 in respect of her share in the suit properties. The contention of the plaintiff that such Gift Settlement Deed is illegal and not binding on her cannot be accepted. Apart from that, the second defendant executed a registered sale deed bearing Document No.2154/2005 registered in the office of the Sub Registrar, Omalur in favour of the third defendant on 01.06.2005. The cause of action alleged is false. The suit has not been valued properly for the purpose of court fee and jurisdiction. The suit filed by the appellant should be dismissed.

6. The third defendant filed a written statement containing almost similar averments made by the first and second defendants in their written statement. In addition, the third defendant also contended that by virtue of a registered partition deed dated 13.04.1984, Saroja (deceased first defendant) and Nagarajan (2nd defendant) were allotted the suit properties; that thereafter by virtue of a gift settlement deed dated 19.09.2003 executed by Saroja (deceased first defendant) in favour of her son, namely the first defendant, he became the absolute owner in entirety of the suit properties; that on 10.02.2005, under a document registered as document No.408/2005 in the office of the Sub Registrar, Omalur, the first defendant entered into an agreement with the third defendant agreeing to sell the suit first item for a sum of Rs.7,65,000/- and received a sum of Rs.2,00,000/- as advance; that though at the time of entering into an agreement three months time had been stipulated for completion of sale, by a registered deed of extension of time dated 27.04.2005, time for execution of sale was extended by 11 months to enable the vendor under the agreement to obtain encumbrance certificate; that thereafter, within the extended time, namely on 01.06.2005, the first and second defendants received the balance sale consideration of Rs.5,65,000/- and executed a sale deed registered as document No.2154/2005 in the office of the Sub Registrar, Omalur in favour of the third defendant and that thus the third defendant became the absolute owner of the first item of the suit properties in which the appellant/plaintiff could not make any claim to a share. It was further averred in his written statement that the appellant/plaintiff, who allowed the registered partition deed dated 13.04.1984 to be acted upon, also allowed a gift settlement deed dated 19.09.2003 to be executed by the deceased first defendant in favour of the second defendant. Subsequently, the plaintiff obtained an antedated unregistered sale agreement dated 01.06.2003 and filed the suit for specific performance in O.S.No.80/2005 on the file of the very same trial court with a view to defeat the rights of the third defendant, besides filing the suit concerned in this appeal for partition. Contending further that the suit for partition was not maintainable as he had become the absolute owner of the first item of the suit properties, the third defendant prayed for dismissal of the suit as against him.

7. Based on the pleadings, five issues and one additional issue were framed, which are as follows:

Issues:

1. Whether the plaintiff is entitled to a decree of partition as prayed for?

2. Whether the plaintiff is entitled to 1/3 share in the suit property as prayed for?

3. Whether the 1st defendant is entitled to execute a valid gift settlement deed for the suit property is in favour of the 2nd defendant as alleged in the written statement?

4. Whether the plaintiff is entitled to permanent injunction as prayed for?

5. To what relief?

Additional Issue:

Whether the defendant No.3 acquires title & interest over the 1st item of the suit property by virtue of sale deed dated 1-6-2005?

8. The parties went for trial based on the issues and additional issue framed by the trial court. In the trial, appellant herein/plaintiff figured as the sole witness (PW1) and produced 20 documents marked as Exs.A1 to A20 on her side. On the side of the defendants, the second and third defendants were examined as DW1 and DW2 and no document was marked on their side. The learned trial judge, after hearing the arguments advanced on both sides, considered the evidence and on appreciation of evidence, accepted the case of the plaintiff that she is having an undivided 1/3rd share in both the items of the suit properties and that she is entitled to a preliminary decree declaring the said share and directing partition and separation of her share. However, without relegating the question of working out of equity in the matter of allotment of specific portions towards the shares of the plaintiff and the others, the learned trial judge chose to hold that, since the third defendant has got a sale deed executed by the second defendant in his favour in respect of the first item of the suit properties, the entire first item should be allotted to the third defendant representing the 2/3rd share of the defendants 1 and 2 and that corresponding adjustment should be made while allotting a share to the appellant/plaintiff in item 2 of the suit properties. For the very same reason, the learned trial judge chose to restrict the relief of permanent injunction in respect of the 2/3rd share of the defendants 1 and 2 in the second item of the plaint schedule properties alone. As against such a direction for allotment of the suit first item in entirety to the third defendant representing 2/3rd share of defendants 1 and 2 and as against the restriction of the injunction to suit second item alone, the appellant/plaintiff has come forward with the present appeal on various grounds set out in the memorandum of grounds of appeal.

9. The points that arise for consideration in the appeal are as follows:

1. Whether the appellant/plaintiff is entitled to an undivided 1/3rd share in both items of the suit properties?

2. Whether the Gift Settlement Deed dated 19.09.2003 executed by the first defendant in favour of the second defendant and the sale deed dated 01.06.2005 executed by the second defendant in favour of the third defendant shall have the effect of effecting the share of the appellant/plaintiff in the suit properties?

3. Whether the trial court committed an error in incorporating a direction in the preliminary decree for the allotment of the first item of the suit properties in entirety to the third defendant representing the 2/3rd share of the defendants 1 and 2?

4. Whether the appellant/plaintiff is entitled to the relief of injunction as sought for in respect of the first item of the suit properties?

5. To what other relief the appellant/plaintiff is entitled?

10. The arguments advanced by Mr.P.Valliappan, learned counsel appearing for the appellant, by Mr.R.Subramanian, learned counsel for Mr.D.Thirumoorthy, counsel on record for the first respondent and B.T.Seshadri, learned counsel for the second respondent were heard. The materials available on record were also perused.

Point Nos.1 to 3:-

11. The plaintiff in the original suit is the appellant in the first appeal. Claiming to be entitled to an undivided 1/3rd share in the suit properties, the appellant/plaintiff filed the suit for partition and also for a permanent injunction restraining the other co-sharers, namely the defendants 1 and 2 from alienating the suit property in favour of the third defendant (2nd respondent) or any other person. The second defendant Nagarajan is the brother of Uma Maheswari, the appellant/plaintiff and both of them are the children of late Venkataraman and Saroja, the first defendant. The second defendant Nagarajan is not only the brother of the plaintiff Uma Maheswari, but also her son-in-law, having married her daughter Akilandeswari. The third defendant Muthu is a stranger and he has purchased the first item of the suit properties from the second defendant under a sale deed dated 01.06.2005, a copy of which has been marked as Ex.A20. The suit was filed on 13.04.2005 but the sale deed came to be executed on 01.06.2005.

12. A larger extent of which the first item of the suit property forms part was purchased by Venkataraman and his brothers from out of their self-earned money in the name of their mother Nagammal and after the death of Nagammal in the year 1971, Venkataraman and his brothers Arunachalam and Krishnasamy orally divided the same in the year 1973 and the property thus allotted in the oral partition to Venkataraman towards his 1/3rd share is the property described as first item of the suit properties. Though the first item of the suit properties allotted to the share of Venkataraman and the remaining part allotted to the shares of Arunachalam and Krishnasamy in the oral partition in the said survey number were stated to have been purchased by Venkataraman and his brothers in the name of their mother Nagammal, in view of the provisions in the Benami Transactions (Prohibition) Act, 1988, the sons of Nagammal could not validly take a stand that the purchases made in the name of Nagammal were actually the purchases made by them and hence they were the real owners of the properties. Copies of the sale deeds dated 19.01.1948 and 01.03.1948 under which a larger property consisting of the suit first item formed part, was purchased, have been produced as Exs.A1 and A2. Even as per the plaint averments, the said properties purchased under the originals of Exs.A1 and A2 were partitioned equally among her sons, namely Arunachalam, Venkataraman and Krishnasamy orally in 1973 i.e. after the death of Nagammal in the year 1971. There is no plea or evidence to show that the said Nagammal had any other legal heir, especially female heirs apart from her sons Arunachalam, Venkataraman and Krishnasamy. Therefore the said partition could not be termed a partition of coparcenary property. It was a property held by a female Hindu, regarding which her legal heirs, namely sons, got equal shares on her death and divided in accordance with their shares.

13. Even assuming that Benami Transaction (Prohibition) Act, 1988 will not be applicable, since the said property was purchased by Venkataraman and his brothers in the name of Nagammal and the division took place in 1973 much before the Benami Transactions (Prohibition) Act, 1988 came into force, it cannot be contended that the said property purchased under the originals of Exs.A1 and A2 were the coparcenary properties of Arunachalam, Venkataraman and Krishnasamy. It was the clear and categorical assertion made by the appellant/plaintiff in her plaint that the purchase was made by them with their own self-earned money. Therefore, either in case of their succession to the property as legal heirs of Nagammal or in case of the real purchasers having got the property before the passing of the Benami Transactions (Prohibition) Act, 1988, the said property in their hands would be their absolute properties and not a coparcenary property, in which their sons or daughters would get a right to share by birth.

14. There is also no dispute that in the oral partition that took place in the year 1973 among Venkataraman, Arunachalam and

Krishnasamy, the first item of the suit property was allotted to the share of Venkataraman. It is the further contention of the appellant/plaintiff that on 13.04.1984, a registered partition deed was executed among Arunachalam, Krishnasamy and defendants 1 and 2 (since Venkataraman had died in the year 1975 itself), reiterating the oral division made in the year 1973. The registration copy of the said deed of partition dated 13.04.1984 has been produced and marked as Ex.A7. A perusal of Ex.A7 will show that the first defendant for herself and on behalf of the second defendant Nagarajan (as he was minor at that point of time), was made a party to the partition deed representing the share of Venkataraman. Though a recital had been made in the said document to the effect that the parties to the partition deed were members of Hindu Undivided Family, the further recitals made therein clear that the property divided therein had been purchased by late Venkataraman and his brothers with their self-earnings. It has also been referred to in the partition deed that Nagammal, during her lifetime, executed a will dated 27.12.1969 bequeathing her properties equally in favour of Venkataraman and his two brothers. Even if it is taken that the properties came to the said persons as her testamentary legal heirs, they would be the absolute owners of their respective shares and not as members of the Hindu Undivided Family having a share in the coparcenary.

15. Admittedly, the second defendant Nagarajan is the younger brother of the appellant/plaintiff Uma Maheswari. She was not made a party to either the oral partition or the partition effected under Ex.A7. Therefore, it can be best inferred that, since the oral partition alleged to have taken place in 1973 was between Venkataraman and his two brothers was there, none of the legal heirs of Venkataraman, namely the plaintiff and the defendants 1 and 2 was not made a party to that partition. However on the death of Venkataraman in 1975, as per Section 8 of the Hindu Succession Act, his wife, namely the first defendant Saroja, son, namely the second defendant and daughter, namely the appellant/plaintiff became entitled to succeed to his properties equally. However, in the partition deed marked as Ex.A7, the appellant/plaintiff was not made a party. According to the appellant/ plaintiff, since the same was executed in order to reiterate the oral partition effected in the year 1973 during the life time of Venkataraman, she was not aggrieved by her non-inclusion as a party to Ex.A7. Though the first and second defendants alone were shown to be parties to Ex.A7 representing the share of Venkataraman, the appellant/plaintiff has accepted the said allotment as one made in favour of all the legal heirs of Venkataraman and on that basis alone, she has made a claim that she is entitled to an undivided 1/3rd share in the first item of the suit property.

16. In this regard, the contention of the defendants 1 and 2 is that the first item of the suit property and other properties originally belonged to Nagammal as her self-acquisition and she enjoyed all those properties along with her sons Arunachalam,

Krishnasamy and Venkataraman; that the said properties were partitioned among the sons of Nagammal on 13.04.1984 and that since one of the sons of Nagammal, namely Venkataraman had died, his wife and son, namely defendants 1 and 2 took part in the transaction, namely partition. It has also been stated therein that the appellant/plaintiff, who was elder to the second second defendant, had got married with all stridhana and seervarisai at the time of her marriage, which took place on 18.05.1983 and the same is cited as the reason for not allotting a share to her. However it is not the case of the defendants 1 and 2 that the appellant/plaintiff Uma Maheswari took part in the partition and relinquished her share. In the oral partition alleged by the plaintiff as well as the partition under the registered partition deed, a copy of which has been marked as Ex.A7, 1/3rd share of the properties purchased in the name of Nagammal under the originals of Exs.A1 and A2 - sale deeds came to be allotted to the share of Venkataraman, which was represented by his wife and his son, namely defendants 1 and 2 under Ex.A7. There is no plea of ouster and adverse possession by which the right of the appellant/plaintiff could have got extinguished. The learned trial judge has arrived at a correct conclusion that the appellant herein/plaintiff Uma Maheswari was entitled to 1/3rd share in the plaint 'A' schedule property and that she was entitled to a preliminary decree declaring her 1/3rd share in respect of the first item of the plaint schedule properties.

17. Admittedly, the second item of the suit properties represents 1/3rd portion of the property purchased by Rukmani Ammal, who was the sister of Nagammal, under the original of Ex.A3-sale deed dated 09.05.1935. Thus it was her separate property (stridhana property) and she had absolute power of disposition over the same. She died issueless and her husband also pre-deceased her. The said Rukmani Ammal executed a registered Gift Settlement Deed under Ex.A4 dated 20.10.1969 in favour of the sons of Nagammal, namely Arunachalam, Venkataraman and Krishnasamy. Accordingly, the said property settled on them by Rukmani Ammal became the absolute properties of Arunachalam, Venkataraman and Krishnasamy. According to the appellant/plaintiff, the said property was also divided among Arunachalam, Venkataraman and Krishnasamy in the oral partition that took place in 1973 the property thus allotted in the oral partition to Venkataraman is the second item of plaint schedule properties. The original of Ex.A7-partition deed was executed reiterating the oral division made in 1973. Whatever observations that have been made regarding the first item of the suit properties shall apply to the second item of the suit properties also, as it has been admitted in clear terms that the settlement came to be made by Rukmani Ammal after the Hindu Succession Act, 1956 came into force. Any property obtained by way of gift settlement, which is not conditional, shall be the absolute property of the settlee and they cannot be construed to be the coparcenary properties. The allotment of the second item of the suit properties to the first and second defendants under Ex.A7-Partition Deed was also made in their favour as they were

representing the estate of deceased Venkataraman. Succession to the estate of late Venkataraman opened in the year 1975 when he died. Appellant/plaintiff, being the daughter, the first defendant being the wife and the second defendant, being the son were entitled to equal shares in the estate left by Venkataraman. Therefore, the claim of the appellant/plaintiff that she became entitled to 1/3rd share in the second item of suit properties was rightly upheld by the trial court and the same does not deserve any interference. Point Nos.1 to 3 are answered accordingly.

Point Nos.4 and 5:-

18. After the death of Nagammal and Venkataraman, one Karpagavalli, a daughter of Nagammal chose to issue a notice claiming to be one of the legal heirs of Nagammal in respect of the properties purchased by her under Exs.A1 and A2. She caused a lawyer's notice to be issued to Arunachalam, Krishnasamy and the first defendant Saroja. A copy of the said notice dated 10.06.1983 is Ex.A5. The copy of the reply dated 17.06.1983 sent by Arunachalam, Krishnasamy and Saroja through their lawyer has been produced as Ex.A6. In the said reply itself they had taken a categorical stand that though the property purchased under the originals of Exs.A1 and A2 were purchased in the name of Nagammal, it was actually purchased by Arunachalam, Venkataraman and Krishnasamy, namely the sons of Nagammal; that the sale deed had been taken in their mother's name out of love and respect for her; that the said property was partitioned by means of a family arrangement dated 25.03.1973 and that in pursuance of the family arrangement, the property was enjoyed by the sons of Nagammal in their own rights. They took such a clear plea that though the property was purchased benami in the name of their mother, the actual purchasers were the sons of Nagammal and they partitioned the property in the year 1973 and thus they were in possession and enjoyment of the same ever since the purchase made in the name of their mother. In view of the claim made by Karpagavalli, a daughter of Nagammal, by issuing such a notice under Ex.A6, they thought it fit to have a partition deed executed and registered, pursuant to which alone, the partition deed dated 13.04.1984, a registration copy of which has been marked as Ex.A7, came to be brought in to existence. The said Karpagavalli, thereafter, filed a suit in O.S.No.525/1986 on the file of the District Munsif Court, Mettur for partition of the properties purchased under Exs.A1 and A2 claiming 1/6th share in it. From the said document, it is obvious that Nagammal did have three daughters including the said Karpagavalli apart from the three sons referred to above as Class 1 heirs of Nagammal. The said Karpagavalli claimed 1/6th share in the property. In addition to the stand taken by the first defendant, Arunachalam and Krishnasamy in the reply notice, they took the very same stand in their written statement filed in the above said suit filed by Karpagavalli. A copy of the said written statement has been marked as Ex.A9. Additional written statement filed by one Porselvi, after the death of Arunachalam and her impleadment as the legal heir of

Arunachalam also supported the case of the appellant herein/plaintiff that there was a family arrangement in 1973. However, it was stated therein that the same was made by way of an unregistered deed dated 25.03.1973. It was also averred in clear terms that from the date of said partition, the sons of Nagammal enjoyed the shares allotted to them under the partition effected in 1973 and that they got mutation of their names in the revenue records and were paying the taxes to the Government in their names. At last, the above said suit for partition filed by Karpagavalli came to be dismissed by a decree dated 22.11.1995. Copies of the decree and judgment in the said suit has been produced as Exs.A11 and A12. There is nothing to show that any appeal was filed there from and there is no evidence to show that any such appeal against the above said decree passed in O.S.No.525/86 is pending. From the said documents it has become abundantly clear that in respect of the first item of the suit properties Karpagavalli was not entitled to any share.

19. Even though the court below came to a correct conclusion that the appellant herein/plaintiff was entitled to an undivided 1/3rd share in both items of suit properties and declared her to be entitled to such 1/3rd undivided share in the suit properties, the learned trial judge proceeded further to direct that since the entire first item of the suit properties came to be sold in favour of the third defendant Muthu under a sale deed dated 01.06.2005, a copy of which has been marked as Ex.A20, in equity, he was entitled to the allotment of the entire first item of the suit properties to the 2/3rd share of defendants 1 and 2 and that the loss occasioned to the plaintiff shall be compensated while making allotment of shares in item 2 of the suit properties.

20. In this regard, the appellant/plaintiff has claimed that she had got an agreement for sale from the defendants 1 and 2 for the sale of their 2/3rd share to her in the first item of property. The copy of the sale agreement dated 01.06.2003 allegedly executed in favour of the plaintiff has been produced as Ex.A13. The said agreement is stated to have been executed by defendants 1 and 2 and one Akilandeswari (wife of the second defendant), who is none other than the daughter of the appellant/plaintiff.

21. It is the case of the plaintiff that Saroja (first defendant) and the second defendant Nagarajan were not able to contribute their share for the new building constructed in the suit first item and hence they had borrowed for the said purpose Rs.5,00,000/- from the appellant/plaintiff and that since they were unable to repay the said amount, they came forward to sell the property for a sum of Rs.6,00,000/- and thus the agreement for sale came to be executed. A Copy of the said agreement has been marked as Ex.A13. The gift settlement deed dated 19.09.2003 came to be executed by Saroja in favour of her son Nagarajan as if she had got half share in the said property and she was giving it by way of gift to her son Nagarajan. On the strength of the above said settlement deed marked

as Ex.A14, second defendant Nagarajan executed a sale agreement dated 10.02.2005 in favour of the third defendant Muthu and a copy of the said sale agreement has been marked as Ex.A15. From the said documents it will be obvious that, after the dismissal of the suit filed by Karpagavalli, the defendants 1 and 2 started asserting exclusive right to them in respect of first item of the suit properties from 19.09.2003. The same made the appellant/plaintiff to issue a lawyer's notice dated 28.03.2005 under Ex.A16 to defendants 1 and 2 and Akilandeswari, the wife of the second defendant, demanding partition in respect of the suit properties and for execution of a sale deed in respect of the first item of the suit properties on receipt of the balance sale consideration of Rs.1,00,000/-. The reply sent on behalf of the defendants 1 and 2 has been marked as Ex.A19. Though the notice sent to the second defendant was returned, he also joined with the first defendant in issuing a reply. A copy of the said reply dated has been marked as Ex.A19. Ex.A16 sent to Akilandeswari was served and Ex.A17 is the acknowledgment card. Ex.A18 is the returned cover addressed to V.Nagarajan. Thereafter the appellant/plaintiff filed the present suit for partition and injunction. After the filing of the suit, the defendants 1 and 2 seem to have executed a sale deed under Ex.A20 on 01.06.2005 in favour of the third defendant Muthu. The question of genuineness and validity of the suit agreement for sale produced as Ex.A13 and relied on by the plaintiff is quite irrelevant for the purpose of taking a decision on the issue involved in this case, which has been filed for the relief of partition and a consequential injunction. Suffice to point out that the suit properties are the properties regarding which the plaintiff and the defendants 1 and 2 were the co-owners and no partition among them binding on the appellant/plaintiff took place and that therefore the appellant/plaintiff is entitled to a preliminary decree for partition declaring her share in the suit properties to be 1/3rd and directing division of the suit properties into three equal shares and allotment of one such share to the appellant/plaintiff. As against the preliminary decree declaring that the plaintiff is entitled to 1/3 share in the suit properties, none of the defendants has chosen to file an appeal or cross objection. However, not stopping with the declaration of the share of the appellant/plaintiff and granting a preliminary decree for the division of the suit properties into three equal shares and allotment of one such share to the appellant/plaintiff, the court below went one step further to include a direction in the preliminary decree to the effect that the entire first item of the suit properties should be allotted to the third defendant representing the 2/3rd share of the defendants 1 and 2 and the appellant/plaintiff shall be compensated by allotment of more extent in item 2 of the suit properties. The trial court seems to have taken a suo motu decision that in equity, the third defendant would be entitled to the allotment of the suit first item in its entirety towards the share of the first and second defendants and that the difference could be

adjusted while making allotment of shares in respect of the second item of the suit properties. Only as against the said direction, the appellant/plaintiff has come forward with the present appeal.

22. The finding of the court below that the plaintiff is entitled to 1/3rd share in both items of the the suit properties and that she is entitled to a decree for partition has not been challenged by defendants either by preferring an appeal or a cross-objection. Hence the said part of the decree has become final and it has got to be confirmed. So far as the direction for allotment of the first item of the suit properties in entirety to the third defendant representing the 2/3rd share of defendants 1 and 2 is concerned, such an observation in the preliminary decree, without framing an issue and without providing an opportunity to the parties to adduce evidence regarding how the equities are to be worked out, is quite improper and unwarranted. The trial court ought not to have incorporated such a direction which pertains to the realm of consideration in the final decree proceedings. Hence the said direction in the preliminary decree deserves to be interfered with and set aside.

23. So far as the relief of permanent injunction is concerned, the learned trial judge has chosen to grant such a relief in respect of the second item alone. The relief of injunction not to alienate the suit properties either in favour of the third defendant or any one else was sought for against the first and second defendants alone. No challenge has been made by any of the defendants to the decree of the trial court relating to the relief of permanent injunction concerning the second item of suit properties. The relief of permanent injunction in respect of first item has been negatived solely on the ground that the first item of the suit properties had been sold in entirety by the second defendant to the third defendant relying on the Gift Settlement Deed executed by the first defendant marked as Ex.A14 and also in view of the direction for allotment of the first item of the suit properties in equity to the third defendant representing 2/3rd share of respondents 1 and 2. First of all the relief of permanent injunction in respect of the first item had been sought for only against respondents 1 and 2 restraining them from encumbering or alienating by way of sale deed or any other deed in favour of the third defendant or any other person, until a division is made and the appellant/plaintiff is put in possession. But the entire property has been conveyed under Ex.A20 dated 01.06.2005 by the second defendant in favour of the third defendant. The first defendant claiming to be entitled to half share, executed Ex.A14-settlement deed in favour of her son, namely the second defendant. Thus, the second defendant, claiming to have become entitled to the entire first item of the suit properties to the exclusion of others, chose to execute the said sale deed in favour of the third defendant. Such a sale deed shall not affect the share of the plaintiff in the first item of the suit properties.

24. In the foregoing discussions, this court has held that the said settlement deed marked as Ex.A14 and the sale deed marked as Ex.A20 shall not in any way take away or curtail the right of the appellant/plaintiff to claim her share in respect of the suit properties including the first item. The preliminary decree has been granted declaring her 1/3rd share in respect of both items of suit properties. Under such circumstances, the non-granting of injunction against the defendants 1 and 2 not to encumber or alienate the first item of suit properties shall not work hardship on the appellant/plaintiff as any such alienation or encumbrance will be subject to the result of the suit, as the same will be hit by the principle of lis pendens. Furthermore, the first and second defendants have parted with their shares in respect of the first item of the suit properties in favour of the third defendant. No injunction has been sought for against the third defendant. Simply because a suit for partition has been filed and is pending, a person who is admittedly a co-sharer cannot be restrained by a blanket decree of injunction not to encumber or alienate, unless such prayer is qualified by a condition that alienation of undivided share with specific boundaries should not be made. Therefore, this court comes to the conclusion that no interference is warranted in respect of that part of the decree refusing to grant the relief of injunction in respect of the first item of the suit properties. Point Nos.4 and 5 are answered accordingly.

In the result, the appeal is allowed in part and the decree of the trial court dated 31.08.2009 is modified by setting side and removing the direction to allot the first item of the suit properties in entirety to the /third defendant towards the 2/3 share of the defendants 1 and 2. In all other respects the preliminary decree of the trial court shall stand confirmed. The question of working out equities in allotment of shares shall be kept open to be canvassed and decided in the final decree proceedings. No cost. Consequently, the connected miscellaneous petition is closed.

asr

s/d-
Assistant Registrar (CO)

True Copy

Sub-Assistant Registrar

To

The Additional District Judge
(Fast Track Court No.2),
Salem

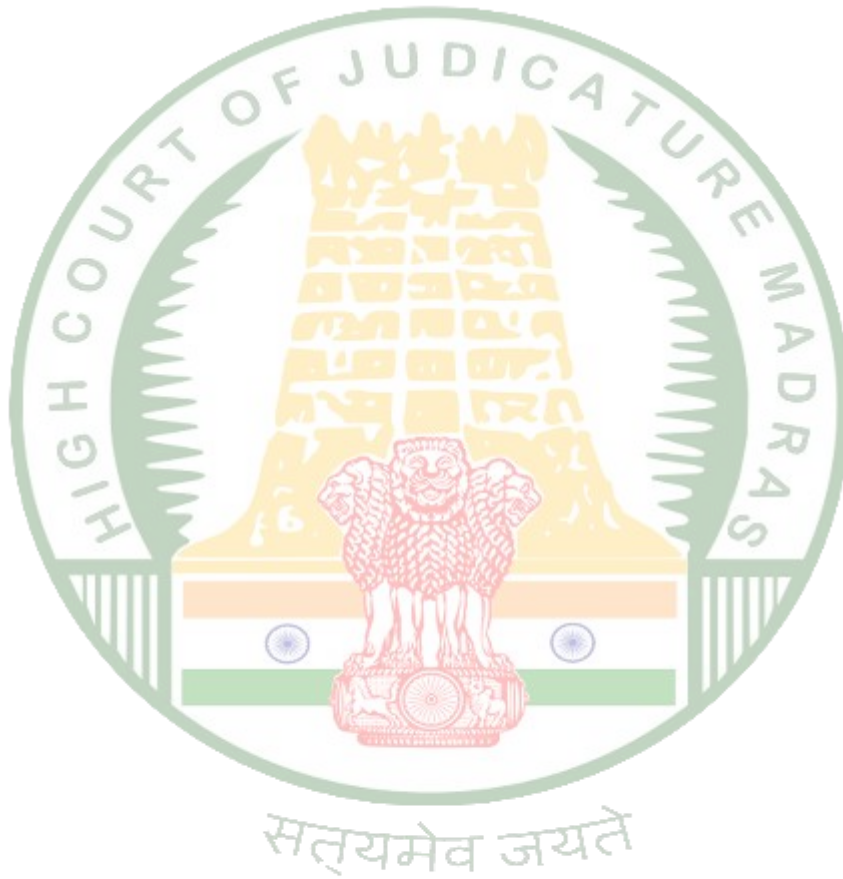
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V.R.Section, High Court,
Madras

+ 1 cc to Mr.P.Valliappan, Advocate SR 27856

+ 1 cc to Mr.B.T.Seshadri, Advocate SR 27681

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A.S.No.926 of 2010



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