

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.12.2016

DELIVERED ON : 03.01.2017

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

C.S.No.419 of 2013

1.G.Saraswathi
2.M.Lakshmi
3.D.Kirubavathi
4.S.Uma

.. Plaintiffs

vs.

1.K.Ganesan
2.J.Ponniammal
3.J.Balachandar
4.J.Janarthanan

.. Defendants

Civil Suit filed under Order VII Rule 1 of CPC
read with Order 4 Rule 1 of O.S. Rules praying for the
following judgment and decree against the defendants.

i) for partition and separate possession of the
plaintiffs 4/6th share in the properties morefully described
in the 'A' and 'B' schedule below after division of the
properties by metes and bounds; and

ii) to pay the costs of the suit.

For Plaintiffs : Mr. R.Damodaran

For defendants : Mr. M.Madhu Prakash

J U D G M E N T

The suit is filed for partition and separate possession of the plaintiffs 4/6th share in the properties morefully described in the 'A' and 'B' schedule below after division of the properties by metes and bounds.

2.The brief facts of the case of the plaintiffs are as follows:

(i) According to the plaintiffs, their father, viz., Kanniappa Naicker inherited an extent of 2128 sq.ft. of land from his late father, viz., Murugesu Naicker as his share at Door No.21/23 at Mettu Street, Ayanavaram, Chennai with a right to use common passage of 40'x 4' in Paimash No.1036/2 and T.S.No.14, Block No.29, Patta No.1665 along with his brother, viz., Panchatchara Naicker, vide a Deed of partition dated 15.04.1964, registered as Document No.1264/64 at S.R.O., Sembium. The said Kanniappa Naicker had been in possession and enjoyment of the said 2128 sq.ft. land without any interruption.

(ii) The plaintiffs state that though the Kanniappa Naicker had two sons and 4 daughters, he has settled the inherited property dividing it into two halves settling 1124 sq.ft. in the name of his elder son Ganesan, the first defendant, vide gift settlement dated bearing No.2144/86 dated 26.6.1986 at S.R.O., Sembium and the other extent viz., 1072 sq.ft. in favour of his second son, K.Jeyabal, the husband of the second defendant and father of the defendants 3 and 4, vide Settlement Deed document No.2143 of 2008, dated 26.6.1986. Thereafter, the said Kanniappa Naicker had cancelled the said two Settlement Deeds made in favour of his two sons by executing two Cancellation Deeds, viz, 992/95, dated 19.4.1995 with regard to his elder son Ganesan and 1228/1995, dated 8.5.1995 with regard to his younger son Jayapal.

(iii) The plaintiffs further submit that after the said cancellation, the suit properties were possessed and enjoyed by the said Kanniappa Naicker till his death on 6.4.2004. His younger son K.Jayapal also died on 04.02.2005 leaving behind him his wife Ponniammal, the second defendant and two sons J.Balachandar and J.Janarthanan, the third and fourth defendants

respectively, as his legal heirs. After the death of Kanniappa Naicker, his wife Chellammal and her sons and daughters were in joint possession and enjoyment of the suit properties. While so, the said Chellammal died on 10.02.208. Since then, the defendants 1 to 4 were demanding the plaintiffs to partition the schedule mentioned properties equally among all the legal heirs of late Kanniappa Naicker, but, on some pretext or other, the defendants 1 to 4 have been evading the same.

(iv) The plaintiffs further state that the third defendant had instituted a suit in O.S.No.9403 of 2011 on the file of the XIV City Civil Court, Chennai, without arraying his mother and brother as plaintiffs in the suit praying for permanent injunction against the first defendant and the plaintiffs herein with regard to suit 'B' schedule property and that the same is pending as on the date of filing of this suit. In these circumstances, they have left with no other option but to file the present suit for partition and separate possession.

3.The brief facts of the case of the defendants 2 to 4 are as follows:

(i) The second defendant filed his written

statement denying the averments made in the plaint on behalf of defendants 3 & 4 also.

(ii) According to the second defendant, though Kanniappa Naicker had two sons and four daughters, he has settled the inherited property dividing it into two halves settling 1124 sq.ft. in the name of his elder son Ganesan, the first defendant, vide gift settlement dated bearing No.2144/86 dated 26.6.1986 at S.R.O., Sembium and the other extent viz., 1072 sq.ft. in favour of his second son, K.Jeyabal, the husband of the second defendant and father of the defendants 3 and 4, vide Settlement Deed document No.2143 of 2008, dated 26.6.1986 at S.R.O., Sembium.

(iii) The second defendant further submits that the said Kanniappa Naicker is none other than the Grandfather of the defendants 3 and 4 and father-in-law of the second defendant. Further, the second defendant states that her father-in-law settled 'B' schedule suit property of 1124 sq.ft. to her husband's elder brother and he also stated that he has already given Sridhana to his daughters during their marriage and hence, he wants to settle the above stated suit schedule properties only to his two sons alone.

(iv) The second defendant also submits that immediately after the Cancellation of the Gift Settlement Deed, Jayapal, husband of the second defendant and father of the defendants 3 and 4, challenged the Cancellation of Settlement made by Kanniappa Naicker by filing a suit in O.S.No.7104 of 1999 on the file of XII Assistant Judge, City Civil Court, Madras and the said suit was decreed in favour of Jayapal ordering that the said Cancellation of Gift Settlement Deed was not valid and validating the execution of the Gift Settlement Deed in favour of K.Jayapal. The second defendant submits that the said facts were suppressed by the plaintiffs in their plaint.

(v) The second defendant also submits that her husband Jayapal died intestate on 04.02.2005 by leaving his surviving legal heirs viz., wife and his two sons, i.e., defendants 2 to 4 respectively. Further, for the past 20 years, the second defendant and her sons, viz., third and fourth defendants, respectively, are in possession of the 'B' schedule property building and all the maintenance and other expenses was borne by them.

(vi) According to the second defendant, the plaintiffs were trying to take illegal possession of the 'B' schedule property and hence, she, immediately filed a suit in O.S.No.9403 of 2011 before the City Civil Court and the said suit was also decreed on 05.11.2014 in favour of the second defendant. She also states that she had lost her husband and she has no support from any of her family members and she has only this piece of land for her children's future. However, the plaintiffs are trying to grab the 'B' schedule property without any legal basis. Hence, the defendants prayed for dismissal of the suit.

4. On the above pleadings, originally, this Court, on 12.10.2015, has framed the following issues:

1. Were the suit schedule properties are the absolute property of the plaintiffs and the first defendant's father, second defendant's father in law and the third and fourth defendants' paternal grand father late Mr.Kanniappa Naicker?

2. Was late Kanniappa Naicker

only a co-sharer of the suit properties along with his two sons and four daughters?

4Was the late Kanniappa Naicker the exclusive title holder of the suit properties having full right to settle the suit properties in the year 1986 in favour of his two sons viz., K.Ganesan (second defendant) and late Jayapal (the second defendant's husband and the third and fourth defendant's father)?

5Was late Kanniappa Naicker right in cancelling the two settlement deeds executed by him in favour of his said two sons in the year 1995 with regard to the suit properties?

6 Would the orders dated 12.10.2000 in O.S.No.7104/99 on the file of XII Assistant Judge, City Civil Court declaring the cancellation of settlement deed not valid in respect of suit 'B' schedule property be binding on the daughters of late Kanniappa

Naicker, who are also legal co-sharers of suit 'A' and 'B' properties?

7 Would the plaintiffs be entitled to the relief claimed in the suit for partition and separate possession of the plaintiffs' collective 4/6th share in the suit 'A' and 'B' properties?

8 Would the plaintiffs be entitled to costs of the suit?

13. To what other relief the plaintiffs are entitled to?

5. On the side of the plaintiffs, P.W.1 was examined and Exs.P1 to P11 were marked and on the side of the defendants, D.W.1 was examined and Exs.D1 to D6 were marked. The details of the documents are hereunder:-

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Exhibits produced on the side of the plaintiffs:

<i>S. No</i>	<i>Exhibits</i>	<i>Date</i>	<i>Description of documents</i>
1.	P-1	15.04.1964	The certified copy of the partition deed
2.	P-2	26.06.1986	The certified copy of the gift settlement deed
3.	P-3	19.04.1995	The original cancellation deed executed by Kanniappa Naicker
4.	P-4	08.05.1995	The certified copy of the cancellation deed
5	P-5	26.07.2005	The certified copy of the death certificate of Kanniappa Naicker
6	P-6	-	The certified copy of the plaint in O.S.No.9403/2011
7	P-7	12.04.2013	The original encumbrance certificate for the period from 01.01.1982 to 31.12.1986 for A-schedule property
8	P-8	12.04.2013	The original encumbrance certificate dated for the period from 01.01.1987 to 07.04.2013 for 'A' schedule property
9	P-9	12.04.2013	The original encumbrance certificate for the period from 01.01.1986 to 31.12.1986
10	P-10	12.04.2013	The original encumbrance certificate for the period from 01.01.1987 to 07.04.2013 for 'B' schedule property

<i>S. No</i>	<i>Exhib its</i>	<i>Date</i>	<i>Description of documents</i>
11	P-11	26.06.1986	The certified coy of deed of gift settlement registered as document No.2144/1986 before the Sub-Registrar, the cadre of District Registrar, Anna Nagar, Chennai-40.

Exhibits produced on the side of the defendants:

<i>S. No</i>	<i>Exhib its</i>	<i>Date</i>	<i>Description of documents</i>
1	D-1	12.10.2000	Order copy in favour of Mr.Jayapal bearing O.S.No.7104 of 1999 with clean copy
2	D-2	24.06.2004	Death Certificate of Mr.Jayapal
3	D-3	04.02.2005	Legal heir certificate of Mr. (late) Jayapal
4	D-4	18.10.2007	Revenue Record in the name of the second defendant and her 2 sons
5	D-5	27.05.2010	Electricity record in the name of the second defendant
6	D-6	03.03.2011	Patta issued in favour of defendants 2 -4

Witnesses examined on the side of the plaintiffs:

P.W.1. - M.Lakshmi

Witnesses examined on the side of the defendants

D.W.1 - J.Balachander

6. Heard, Mr.R.Dhamodaran, the learned counsel appearing for the plaintiffs and Mr.M.Madhu Prakash, the learned counsel appearing for the defendants and perused the records.

7. The learned counsel for the plaintiffs submitted that the suit property was originally inherited by Kanniappa Naicker, who is the father of the plaintiffs and the defendants 3 to 4 are the legal heirs of one K.Jeyapal, who is another son of the Kanniappa Naicker. The learned counsel for the plaintiffs further submitted that the suit property, being the ancestral property, was originally allotted to Kanniappa Naicker under Ex.P1 along with his brothers. Thereafter, in the oral partition between the Kanniappa Naicker and his brothers, the suit property was allotted to the said Kanniappa Naicker. The said Kanniappa Naicker, settled the suit properties in the name of his sons in the year 1986 equally. Thereafter, in the year 1995, he cancelled the settlement and the said Kanniappa Naicker was enjoying the suit property. Since the said Kanniappa Naicker died on 06.4.2004, his legal heirs are in joint possession and enjoyment of the suit

property. The third defendant, who is the son of K.Jeyapal, the younger son of the said Kanniappa Naicker, filed a suit for permanent injunction against the plaintiffs in O.S.No.9403 of 2011 on the file of the XIV City Civil Court, Chennai. The above suit has been decreed.

8. It is the submission of the learned counsel for the plaintiffs that since the suit properties are the ancestral properties and that the Settlement Deed has also been cancelled, the plaintiffs, being the daughters of the deceased Kanniappa Naicker, are entitled to 4/6 share in the suit properties. According to the plaintiffs' counsel, Ex.P1 proves the character of the property. It is the submission of the learned counsel for the plaintiffs that Kanniappa Naicker, being the coparcener along with his son and daughters, could not have executed the Settlement Deed in favour of his sons. At the most, he could have executed the settlement only in respect of 1/3 share whereas his two sons were settled ½ share each. Hence, it is submitted by the learned counsel for the plaintiffs that settlement is not valid in the eye of law. Therefore, the plaintiffs, being the daughters of the said Kannaiappa Naicker, are entitled to share in the ancestral property.

9. Per contra, it is the contention of the learned counsel for the defendants 2 to 4 that Settlement Deeds were executed by their father, Kanniappa Naicker, and in that, the second plaintiffs stood as attesting witness and hence, the settlement cannot be revoked, unless the power of revocation is specifically reflects in the Settlement Deed. The learned counsel for the defendants submitted that the properties are in possession of two sons of the said Kanniappa Naicker and that settlement are done with the knowledge of the plaintiffs. It is submitted that properties stands in the name of the defendants and they are enjoying the properties as per the Settlement Deed. It is further submitted that the defendants had paid the loan of Kanniappa Naicker and that the alleged revocation is not binding on them. It is also submitted by the learned counsel for the defendants that one of the revocation deed was also set aside by the decree of the Court. Therefore, the plaintiffs have no right to claim partition. Hence, the learned counsel for the defendants prayed for dismissal of the suit.

10. In the light of the above submissions, this Court has to analyse the issues one by one.

Issue No.1:

11. It is not disputed by both sides that the extent of 2128 sq.ft. was allotted to the deceased Kanniappa Naicker, father of the plaintiffs and the first defendant and one Jeyapal, another son of Kanniappa Naicker. Insofar as the question as to whether the property is ancestral property or self acquired property is concerned, this Court does not find any difficulty in finding the character of the property.

12. Ex.P1, is the Partition Deed dated 15.4.1964 entered into between the Kanniappa Naicker and his brothers, wherein an extent of 5128 sq.ft. were jointly allotted to both Kanniappa Naicker and his brother. It is also not disputed by both sides that an extent of 5128 sq.ft of land was equally partitioned by the said Kanniappa Naicker and his brothers. Accordingly, an extent of 2128 sq.ft was allotted to the said Kanniappa Naicker and he was enjoying the said property. The recital in Ex.P1, Partition Deed of the year 1964, clearly show that the vacant site allotted to the parties are ancestral properties and only the buildings are constructed out of

their self earnings. This fact clearly indicate that the property was devolved upon the Kanniappa Naicker and his brother. Therefore, this Court hold that the property, which was inherited by Kanniappa Naicker, is the ancestral property and not the self acquired property of Kanniappa Naicker. Accordingly, this issue is answered.

Issue No.2 and 3:

13. It is to be noted that on the date of inheritance of the property under Ex.P1, sons of the Kanniappa Naicker, namely, the first defendant herein and one Jeyapal, are the male members in the family. This fact is also not disputed by both parties. Therefore, on the date of inheritance of the property only Kannaiappa Naicker and his two sons were admittedly the coparcener in respect of the ancestral property. The male members got their right by birth to the properties of the coparcenary at the relevant time. The female members, namely, the daughters were admittedly not coparcener at the relevant time. The right to become a coparcener by birth available only from the advent of the Act 1/90 of The Hindu Succession Act as well as Act 39 of 2005. To claim any right under the Act 1/1990, Tamil Nadu Amendment Act, certain conditions

stipulated thereto to be fulfilled. But absolutely, no evidence, whatsoever, available on record to extend the benefit of the Act 1/90 to the plaintiffs. There is no evidence available on record, as to the date when plaintiffs got married and whether their marriage was performed before the cut of date provided under the Act, to claim coparcenary right in the property.

14. Similarly, from the admitted evidence, father of the plaintiffs, namely, Kanniappa Naicker, died in the year 2004, i.e., before the Act 39/ 2005 came into existence. Therefore, even as per the Act 39/ 2005, they are not entitled to get coparcenary right. It is well settled now, that Act 39 / 2005 is prospective in nature and one of the pre-requisite condition for the daughters to become coparceners along with their brothers is that the father should alive on the date of the Act came into force. Therefore, now as per the Act 39 of 2005 also, the plaintiffs cannot claim coparcenary right, since their father died in the year 2004.

15. It is further to be noted that admittedly,

Kanniappa Naicker has settled the property to both sons in the year 1986 itself. This fact is also not in dispute. Ex.P2, is the certified copy of the Gift Settlement executed in favour of one Jeyapal by Kanniappa Naicker. The execution of the gift has not been disputed. The only contention of the plaintiffs is that the said Gift Settlement Deed has been subsequently cancelled in the year 1995. When the settlement has been admitted by either side, question of proving the same by examining the attesting witness does not arise at all. When Ex.P2 is carefully perused, the said Kanniappa Naicker, settled an extent of 1072 sq.ft of the property in favour of one of his son. In the same Settlement Deed itself, it is clearly recited to the effect that remaining extent has been settled to another son, namely, the first defendant herein. Ex.P11 is another Settlement Deed, wherein an extent of 1124 sq.feet of vacant land was settled in favour of Ganesan, the first defendant herein. In the above Deed also, it is clearly mentioned about the remaining property, which was settled in favour of another brother of the first defendant. His both Settlement Deeds were executed simultaneously on 26.06.1986. The document Nos. of Settlement Deeds are 2143

of 1986 and 2144 of 1986.

16. It is curious to note that the plaintiffs 1 and 3 attested the above documents. Though the properties were settled as if the absolute property of Kanniappa Naicker, the fact remains that, in fact, these properties are ancestral properties. It is to be noted that settlement or gift in respect of the ancestral property cannot be done in normal circumstances. But, at the same time, with the consent of all other co-parceners, settlement can be effected in respect of the ancestral properties.

17. Admittedly, Exs.P2 and P11 clearly show that the settlement in respect of the other son has been clearly mentioned in the documents. This fact would show that settlements were effected only with the consent of all the co-parceners and settlements were effected only in favour of the other co-parceners and not against the third party or stranger whatsoever. Though the settlements were effected by one of the co-parcener settling the property to the remaining co-parceners with the consent, such settlement cannot be held to be invalid. It may be stated

that settlor has no right to execute the settlement in respect of the entire properties as absolute owner, since he had only 1/3 share at the relevant time as a coparcener. Even assuming that he was a coparcener and he was entitled to only 1/3 share at the relevant time in the suit property, the transfer by way of settlement in respect of 1/3 share is valid. The consent of other co-parceners were apparent on the face of the document itself. Hence, this Court is of the view, the settlement is valid and the transfer is already completed in favour of the other co- parceners in respect of 1/3 of Kanniappa Naicker share as per Exs.P2 and P11.

18. Therefore, this Court hold that even though settlor has no right over the entire property settled in favour of his sons, the settlement can be held to be valid in respect of 1/3 share of Kanniapa Naicker in the ancestral property in favour of two sons, who are the other coparceners. Accordingly, these issues are answered.

Issue No.4 and 5:

19. It appears that the Settlement Deeds executed were

revoked by the settlor himself under Ex.P3 dated 19.4.1995. The reason assigned for revocation of settlement in the above documents is that he has lost his hope that his sons will maintain him till his death. Fact remains that cancelling the settlements unilaterally cannot be sustained in law unless the power of revocation is reserved in the very Settlement Deeds. Exs.P2 and P11, Settlement Deeds do not show any reservation with regard to the right of power of revocation. Unless and until the power of revocation is reserved in the documents, such unilateral revocation cannot be sustained in law. It is well settled that settlement can be revoked only if it falls within the exception under Section 126 of the Transfer of Property Act. Without bringing the case under exception provided in the Transfer of Property Act, the unilateral cancellation of the document is not permissible in law. Once the settlement is executed, title passes to the settlee and transfer is completed, the same cannot be cancelled unilaterally by the settlor.

20. In this regard, it is useful to refer the the judgment of this Court reported in 2014 (3) CTC 113

(**V.LOGANATHAN V. THE SUB REGISTRAR**), wherein this Court has held as follows:

".. ..6. In fact the registration of cancellation of the Settlement Deed is against the Public Policy as it was not open to the Sub - Registrar to register the cancellation of the Deed, when the Settlement Deed is unconditional and irrevocable. If at all the party who has executed the document is aggrieved by the Settlement Deed, he could have very well approached the Civil Court to set it aside, but certainly could not unilaterally cancel it, by getting the Deed of Cancellation registered with the Sub Registrar. The Cancellation Deed and its registration, therefore, being without jurisdiction, is liable to be set aside."

21. Similarly, in the judgment of the Full Bench of this Court reported in 2011 (2) CTC 1, (**LATIF ESTTE LINE**

INDIA LTD., V. HADEEJA AMMAL), this Court has held that the unilateral execution of the Cancellation Deed cannot annul a registered document duly executed by him as such an act of the vendor is opposed to public policy. It is further held that a Deed of Cancellation of a sale unilaterally executed by the transferor does not create, assign, limit or extinguish any right, title or interest in the property and is of no effect. Such a document does not create any encumbrance in the property already transferred. Hence such a Deed of Cancellation cannot be accepted for registration.

22. In the judgment reported in (2007) 13 SCC 210, **(ASOKAN V. LAKSHMIKUTTY AND OTEHRS)**, the Hon'ble Apex Court has held that once a gift is complete, the same cannot be rescinded. For any reason whatsoever, the subsequent conduct of a donee cannot be a ground for rescission of a valid gift. Similarly, in the latest judgment reported in 2014 9 SCC 445 **(RENIKUNTLA RAJAMMA (D) BY LRS V. K.SARWANAMMA)** the Hon'ble Apex Court has held that "transfer of possession" of the property covered by the registered instrument of the gift duly signed by the

donor and attested as required is not a sine qua non for the making of a valid gift under the provisions of the Transfer of Property Act. It is further held that delivery of possession of gifted property is not essential conditions for completing the valid gift.

23. Having regard to the above judgments, once the settlement has been executed in the year 1996, the settlor has no right to revoke the same unilaterally and such revocation is not binding on the first defendant as well as Jeyapal, who has also died on 04.12.2005. It is to be noted that the first defendant has already challenged the Cancellation Deed via suit and the said suit also appears to be decreed in O.S.No.7104 of 2008 in respect of "B" schedule property. At any event, one of the son Jeyapal, has not filed any suit. However, as per law, unilateral cancellation itself is not valid. In view of this fact, the said Cancellation is invalid. Exs.D5, Electricity Receipt and D6 extract from Town Survey Land Register show the names of the defendant Nos. 2 to 4. Similarly they also paid electricity connection in respect of "A" schedule property. Though the plaintiffs have field several

documents, none of the documents evidencing their possession in the suit properties.

24. It is further to be noted that suit filed by the third defendant against the plaintiffs for permanent injunction on the file of the 14th Assistant Judge is also now decreed. This fact is admitted by both counsels. This fact also clearly indicate that the plaintiffs are never in possession of the property at any point of time. At any event, once the transfer of property is effected by way of registered Deed in the year 1996, the plaintiffs now cannot claim any right over the suit properties. Further the Settlement executed in the year 1986 also can be construed as partition among the co-owners. Since the father has settled his share to other coparceners and once the property has been effectively transferred, the plaintiffs cannot claim any share in the properties at this stage. Further, the plaintiffs failed to prove the entitlement as per Act 1/90. In view of the settlement effected by the plaintiffs' father in respect of his share as early as on 1986, the plaintiffs cannot claim any share under the Act 39 of 2005 also. In the light of the above,

this Court is of the view that the plaintiffs are not entitled for partition. According the issues are answered.

Issue Nos. 6,7 and 8:

25. In view of the discussions held in the foregoing issues, the plaintiffs are not entitled to partition. Accordingly, these issues are answered.

26. In the result, the suit is dismissed. However, considering the relationship between the parties, there shall be no order as to cost.

sd/-N.S.K.J

03.01.2017

//Certified to be a true copy//

Dated this the day of 2017

R.s/22.11.2017

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