

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 11.12.2017
PRONOUNCED ON : 18.12.2017
CORAM
THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.3 of 2001

1. Thangammal
2. Ponniammal
3. Saraswathi ...Appellants/Plaintiffs
(Represented by her power agent
Ponniammal the 2nd Appellant herein)

Vs.

1. Karuppa Pillai
2. Mannankatti
3. Ramayya ...Respondents 1 to 3/Defendants 5,7 & 8
4. Lakshmi
5. Muniya Pillai
6. Pushpam
7. Malar
8. Ponnambalam ... Respondents 4 to 8/LRs of the deceased
9. 6th Defendants

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Subordinate Judge's Court at Kallakurichi, dated 26.7.2000 in A.S.No.101 of 1997, reversing the judgment and decree of the I Additional District Munsif Court at Kallakurichi, dated 31.1.1997 in O.S.No.932 of 1990.

For Appellants : Mrs. Mythili Suresh
for M/s. Sarvabhauman Associates

For Respondents: Mr.J.Anthony Jesus
1,2,4 to 8
R3 : No appearance

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 26.7.2000, passed in A.S.No.101 of 1997, on the file of the Subordinate Court, Kallakurichi, reversing the judgment and decree dated 31.1.1997, passed in O.S.No.932 of 1990, on the file of the I Additional District Munsif Court, Kallakurichi,

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for partition.

4. The case of the plaintiffs, in brief, is that the plaint schedule properties originally belonged to the joint family consisting of Narayanasami Maniam and his three sons namely, Govindasami, Samidurai and Selvaraj. Selvaraj is the first defendant, Govindasami died about 20 years ago, leaving behind his sons and wife, who are the defendants 2 to 4 and his mother, who is the first plaintiff, as his legal representatives and Samidurai died as a bachelor, leaving his mother, the first plaintiff as his legal representative and Narayanasami Maniam died about 15 years ago. The plaintiffs 2 and 3 are the daughters of Narayanasami Maniam and in the suit properties, Narayanasami Maniam and his three sons are each entitled to 1/4th share and as Govindasami died, his 1/4th share devolved upon the plaintiff and the defendants 2 to 4 each getting 1/16th share and as Samidurai died as bachelor, his 1/4 share devolved upon the first plaintiff, his mother and on the death of Narayanasami Maniam his 1/4th share devolved upon the plaintiffs and the defendants 1 to 4 and each of them getting 1/20th share there from and thus, in all, the first plaintiff has 29/80 in the suit properties. The plaintiffs 2 and 3 are each entitled to 1/20 share and the plaintiffs together are entitled to 37/80 share and the first defendant is entitled to 24/80 share and the defendants 2 to 4 are together entitled to 19/80 share. However, taking advantage of the plaintiffs 2 and 3 living in their husbands house and the first plaintiff being an old lady, the defendants 1 to 4 started alienating the suit properties for the past 4 to 5 years and the defendants 5 to 8 had purchased the suit properties and in possession of the same. Hence, the plaintiff issued notice to the defendants demanding partition and the defendants 5 and 6 sent replies containing false allegations and it is false to state that the first defendant had given her jewels to the plaintiffs 2 and 3 and thereby, the plaintiffs 2 and 3 had released their rights in the suit properties. The first plaintiff has no jewels at all and the plaintiffs 2 and 3 have not released their rights in the suit properties and hence, the suit for partition.

5. The case of the defendants, in brief, is that the suit properties and the properties not included in the suit belong to Narayanasami Maniam as his ancestral properties and a panchayat was convened in respect of the division of the suit properties and accordingly, jewels given to the first plaintiff by her husband were directed to be given to the plaintiffs 2 and 3 in lieu of their share and accordingly, the plaintiffs 2 and 3 had relinquished their right/share in the suit properties and thereafter, the suit properties had been enjoyed only by the remaining sharers and as per the case of the defendants, the first plaintiff would be entitled to 51/144 share, the first

defendant would be entitled to 48/144 share, the second and third defendants are each entitled to 19/144 share and the fourth defendant would be entitled to 7/144 share and the quantum of share claimed by the plaintiffs, is on the wrong side and excessive. All the family properties had not been included in the suit and hence, the suit is bad for partial partition and the defendants 5 to 8 have purchased the various suit properties from the defendants 1 to 4 by way of various sale transactions and enjoying the same and with a view to grab the suit properties, the case had been falsely laid by the plaintiffs. In the additional written statement, the defendants have also pleaded that Samidurai did not die as a bachelor, on the other hand, he married one Kandammal and they lived together as husband and wife for a long period of time and on the death of Samidurai, Kandammal is also entitled to the share in the suit properties and she is a proper and necessary party to the suit and the suit without impleading her as a party, is bad for non-joinder of necessary parties and the brother of the first plaintiff had purchased some of the family properties and other family properties had also been sold to one Muthusamy of Udayanachi village. The aforesaid alienees and the properties sold to them have not been included in the suit, on the above score also the suit is liable to be dismissed.

6. In support of the plaintiffs' case PW1 has been examined, Exs.A1 to A3 were marked. On the side of the defendants DWs 1 to 3 were examined and Exs. B1 to B11 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to grant the preliminary decree in favour of the plaintiffs as prayed for. On appeal, the first appellate Court, on an appreciation of the materials placed on record, was pleased to set-aside the judgment and decree of the trial Court and by allowing the appeal preferred by the defendants 5 to 8, dismissed the suit laid by the plaintiffs. Aggrieved over the same, the present second appeal has come to be laid.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

1. Whether the Lower Appellate Court is justified in law in dismissing the suit on the ground that it is barred by limitation overlooking the mandatory provisions of Article 65 of the Limitation Act, 1963, which clearly states that to outst the right of a co-owner, the possession of the other co-owner should be adverse and hostile?

2. Whether the Lower Appellate Court is correct in law in holding that Samidurai had married Kandammal on the basis of Ex.B1 Sale deed dated 2.7.1977 especially when the same does not prove the factum of marriage as required in law.

9. The relationship between the plaintiffs and the defendants 1 to 4 is not disputed. It is also not in dispute that the suit properties originally belong to Narayanasami Maniam, the husband of the first plaintiff and the father of the first defendant. The defendants 2 to 4 are the sons and the wife of the deceased son Govindhasami. According to the plaintiffs, the deceased son Samidurai died as a bachelor, however, according to the defendants, he was married to one Kandammal and left behind Kandammal as one of his legal heirs. The plaintiffs 2 and 3 are the daughters of Narayanasami Maniam and the first plaintiff. According to the plaintiffs, ignoring their right in respect of the suit properties, the defendants 1 to 4 had alienated the same in favour of the defendants 5 to 8 and therefore, as they are entitled to their lawful share in the suit properties as detailed in the plaint, according to them, they had been necessitated to lay the suit for partition.

10. The defendants have taken a plea that Samidurai did not die as a bachelor, on the other hand, he married one Kandammal and they lived together as husband and wife for a long period of time and hence, according to them, Samidurai's wife Kandammal is still alive and without impleading her as a party in the proceedings, it is their contention that the suit is bad for non-joinder of necessary party. Per contra, it is the case of the plaintiffs that Samidurai died as bachelor leaving behind the first plaintiff, his mother as the legal representative. Inasmuch as the defendants have pleaded that Samidurai married one Kandammal and lived together as husband and wife and the same had been denied by the plaintiffs, it is seen that it is for the defendants to establish that Samidurai married Kandammal as pleaded by them and that they lived together as husband and wife. However, the defendants have miserably failed to establish the above said plea. Though the defendants would contend that Samidurai had married Kandammal they had not detailed as to when and what is the mode of marriage conducted between them etc. Very vaguely they have pleaded that Samidurai married one Kandammal and they lived as husband and wife. If that be so, necessary proof would have been placed by the defendants to establish the said fact. However, not an iota of evidence has been placed on their part to safely conclude that Samidurai had married Kandammal as put forth by them. If Samidurai had married Kandammal and they had lived together as husband and wife in the eyes of the society at large, necessary documents would have been placed with reference to the same. However, the only document projected by the defendants is the sale deed, marked as Ex.B1. Ex.B1 is found to be a sale deed

dated 2.7.1977 executed by the fourth defendant, in favour of the fifth defendant in respect of certain suit properties. Though there is a reference as Samidurai had a wife in the said document, as rightly put forth by the plaintiffs, when the plaintiffs are not parties to Ex.B1 and when there is no further proof to vouch safe the above said contents found in Ex.B1, it is found that the above said recitals would not in any manner bind the plaintiffs legally. Therefore, the recitals projected by the defendants as found in Ex.A1 above stated cannot be held to be a proof for holding that Samidurai had married Kandammal as his legally wedded wife. If that be so, the other clinching evidence pointing to the same would have been produced by the defendants. When the above said recitals contained in Ex.B1 had been disputed by the plaintiffs and the plaintiffs are not parties to Ex.B1, it is seen that Ex.B1 cannot be safely relied upon and would be of no use to sustain the case of the defendants that Kandammal is the legally wedded wife of Samidurai.

11. That apart, the defendants have examined the first defendant Selvaraj as DW3 and DW3 in his evidence would state that Samidurai had married Kandammal. However, he would admit that no invitation card had been printed for their marriage and he has also not disclosed, as to when, in what manner or mode their marriage had been conducted and further also not placed acceptable and reliable evidence to safely hold that they had lived as husband and wife after the alleged marriage. In this case, though DW3 has been cited as the first defendant, strangely the first defendant has not contested the case of the plaintiffs and remained ex-parte. However, he would come and depose on behalf of the defendants 5 to 8, who are contesting the plaintiffs' case and as above seen, the defendants 5 to 8 are the alienees of the suit properties from the defendants 1 to 4. If really the above case of DW3 has any resemblance of truth, it does not stand to reasons as to why he has not chosen to contest the plaintiffs' case by stating the above facts by way of his defence. In any event, particularly, from the oral testimony of DW3 without any support, it cannot be held that Samidurai had married Kandammal as put forth by him. Barring the above said piece of evidence, there is no other material placed to hold that Samidurai had married Kandammal and they both lived together as husband and wife. If that be so, some other independent witnesses should have been examined to show that the society had recognised them as husband and wife, after the alleged marriage or even if no marriage had been celebrated between them, they had been treated as husband and wife by the society at large. However, with reference to the same, sans proof, it is seen that the case projected by defendants that Samidurai had married Kandammal cannot be accepted in any manner.

12. The next plea raised by the defendants to thwart the plaintiffs' case is that the suit laid by the plaintiffs is bad

for partial partition and according to them, the family of Narayanasami Maniam owns other properties other than the suit properties and the failure of the plaintiffs to include all the properties in the suit would result in the dismissal of the suit, on the ground of partial partition. In this connection, the Chitta and A register copies marked as Exs.B10 and B11 are pressed into service. However, it is seen that the above said documents do not stand in the name of Narayanasami Maniam as such or in the name of the first plaintiff. It stands in the name of the fourth defendant and others and on the basis of the same, we cannot safely conclude that the properties described therein are belonging to the family of the Narayanasami Maniam as such. Though the defendants would claim that certain family properties had been sold to one Ponnusamy and Muthusamy, with reference to their above plea, there is no material forth coming. In the light of the above position, when the defendants have not placed any acceptable and reliable materials to safely hold that the family of Narayanasami Maniam had owned other properties also as putforth in Ex.B10 and B11, it cannot be held that the suit is bad for partial partition.

13. Further according to the plaintiffs' counsel, the above plea of partial partition cannot be given legal credence for dismissing the plaintiffs' suit, as according to her, inasmuch as the plaintiffs have laid the suit claiming their share in the suit properties, which had been sold to the defendants 5 to 8 by the defendants 1 to 4, depriving the share of the plaintiffs thereby in respect of the same, according to the plaintiffs' counsel, the suit laid by the plaintiffs for the partition of the above said properties alone is maintainable and in such a suit, the plaintiffs are not required to include all the family properties of Narayanasami Maniam and in this connection, strong reliance is placed upon the decision reported in 1933 65 MLJ 696 (Kandaswami Goundan (Deceased Vs. Venkatarama Goundan and Ors) where the position of law, as regards the above issue, is discussed and determined as follows:-

6. The real contending defendant is riot the 1st defendant but the 8th defendant, a purchaser from him. In these circumstances the question arises, because it has been argued by the learned advocate for the respondent, whether the suit merely for a share of the Alasandapuram lands is maintainable. In view of the fact that the plaintiff has claimed an alternative relief for a general partition, the question is academic apart from the question of proper court-fees payable by the plaintiff. But the point has been argued, and we are of opinion that the suit for partition of merely Alasandapuram lands apart from a general partition is sustainable. We proceed to give reasons for this conclusion. Mr. Padmanabha

Aiyangar contended that the suit for a share of the Alasandapuram lands is not maintainable because it is a suit for partial partition. Now cases establish two or three well-recognised principles. Firstly, as between members of a joint family no suit for partial partition lies. Secondly, a member or members of a joint family may sue an alienee from a member or members of the joint family for his or their share of the property alienated without suing for a general partition. In so doing they affirm the sale by the other member or members but the real basis of the rule is that as the rule against partial partition is a rule for the protection of the joint family against being harassed by multiplicity of suits at the instance of alienees from recalcitrant members, they can waive the benefit of it and they can bring a suit to separate themselves from the undesirable stranger. The remarks in *Iburamsa Rowthan v. Thiruvenkatasami Naick* (1920) I.L.R. 34 Mad. 269 : 20 M.L.J. 743 (F.B.) show that the rule is recognised on the ground that it has been acted upon in a series of cases, and it is too late to examine whether the foundation of the rule is sound or unsound. So it is unnecessary to analyse the reasons for the rule. It is enough to say that the rule exists as between members of a joint family and an alienee from a member or members. We have got the actual decision in *Iburamsa Rowthan v. Thiruvenkatasami Naick* (1920) I.L.R. 34 Mad. 269 : 20 M.L.J. 743 (F.B.) where the plaintiff is an alienee from one member and the defendant is an alienee from another member of the joint family. The suit was held to be maintainable.....

The truth is that once you recognise the right of a member of a coparcenary to bring a suit against an alienee, the right of an alienee from a coparcener to sue another alienee immediately follows as a corollary and the distinction between first alienee and second alienee is entirely irrelevant.

None of these cases supports the distinction sought to be drawn that the rule in *Iburamsa Rowthan v. Thiruvenkatasami Naick* (1910) I.L.R. 34 Mad. 269 : 20 M.L.J. 743 (F.B.) should be confined to a second alienee and cannot be followed with reference to a first

alienee from a member of the family. Apart from all this, in this particular case there is no more joint family, it being conceded by all the parties that there is a division in status. Though in such a case, as between members of the family there ought to be one suit in respect of all the items as held by Kumaraswami Sastri, J. in Yerukola v. Yerukola (1922) I.L.R. 45 Mad. 648 : 42 M.L.J. 507 (F.B.), still as between two strangers who are alienees from members of the family we do not see any reason why there could not be a suit for partition of those items in respect of which the contending parties to the suit are tenants-in-common. We think that the suit even in respect of the Alasandapuram lands is therefore maintainable.

A perusal of the above said decision would go to show that, as rightly contended by the plaintiffs' counsel, a member or members of the joint family may sue an alienee from a member or member of the joint family for his share or their share of the properties alienated without suing for a general partition. The principles of law outlined in the above said decision about the entitlement to the claim of partition by a member or members of the joint family only in respect of the properties alienated to third parties has been discussed in the above said decision as above, based upon the remarks of the Full Bench decision of the Madras High Court reported in 1920 ILR 34 Madras 269.

14. The above decision has also been followed by our Madras High Court in the decision reported in (1948) 2 MLJ 181 Nalluri Subbarayudu Vs. Ranpati Ramanaiah And Ors. In the light of the above said authorities pronounced, it is found that the present suit laid by the plaintiffs for partition against the alienees namely, the defendants 5 to 8 by impleading the other co-owners as parties for their shares of the alienated properties cannot be defeated on the footing that, the plaintiffs have failed to include all the family properties of Narayanasami Maniam. When it is found that the suit for partition of the plaintiff is not a suit for general partition only amongst the members of the family, it is seen that the plaintiffs would be entitled to maintain the suit, even assuming for the sake of arguments that the other family properties of Narayanasami Maniam had not been included in the suit properties. It is thus found that the first appellate Court has holding that the suit laid by the plaintiffs is bad for partial partition.

15. The next plea putforth by the defendants is that the suit laid by the plaintiffs is beyond time and they have come forward with the suit nearly 15 years after the death of Narayanasami Maniam and therefore, the plaintiffs' suit should be dismissed as out of time. However, the above plea cannot be

accepted. The above plea stems on the footing that for the past several years, it is only the defendants 1 to 4 and their alienees had been enjoying the suit properties by asserting their title openly and continuously, hostile to the knowledge of the plaintiffs and therefore, their title having been crystallised on account of the above said hostile enjoyment and the suit not laid by the plaintiffs within the time allowed by law, the plaintiffs cannot maintain the suit for partition. However, the above plea of the defendants cannot be accepted. The plaintiffs have claimed their share in the suit properties, on the footing that they are the co-owners or the legal heirs of the co-owners, who are entitled to stake their claim for the share in the suit properties. Accordingly, it is found that as per the plaint averments, the defendants 1 to 4 are stated to have alienated the suit properties in favour of the defendants 5 to 8 for the past 4 to 5 years depriving the share of the plaintiffs. The suit has come to be laid by the plaintiffs on 05.10.1990. The sale deed under which the defendants 5 to 8 have purchased the suit properties are of the years only from 1980 onwards, excepting Ex.B1, which is dated 12.7.1977. It is thus found that within 10 years of alienation of the properties by way of Exs.B2 to B9, the plaintiffs have come forward with the suit on 05.10.1990. The defence to reject the plaintiffs suit on the ground of limitation is raised on the plea of adverse title. However, the defendants have not clearly spelt out in the written statement, as to since when from their possession and enjoyment of the suit properties had turned adverse to the interest of the plaintiffs. When the defendants have not pleaded that from a particular point of time their possession and enjoyment of the suit properties had become adverse to the interest of the plaintiffs and when there is also no material to hold that the defendants have been adversely enjoying the suit properties openly and continuously exhibiting hostile attitude to the interest of the plaintiffs beyond the statutory period and when it is seen that the plaintiffs being the co-sharers of the suit properties along with the other co-sharers, as rightly contended by the plaintiffs' counsel that the enjoyment of the defendants, either by the defendants 1 to 4 or by the defendants 5 to 8, as the case may be, can only be termed as the enjoyment on behalf of the other co-sharers including the plaintiffs and such being the position, the possession of the other co-sharers by itself could not be held to be adverse and hostile to the interest of the plaintiffs in the suit properties. When as per the Article 65 of the Limitation Act, the 12 years period for claiming the adverse title commences only when the possession of the defendants becomes adverse to the plaintiffs and applying the same to the case at hand, when it is found that the defendants have not pleaded as to when from their possession had become adverse and when it is found that their possession of suit properties can only be taken as the possession in the capacity of the co-sharers on behalf of the other co-sharers namely the plaintiffs and that apart, when there is no material to hold that the

defendants had exercised absolute ownership over the suit properties by continuous and uninterrupted enjoyment for more than the statutory period, showing animus attitude against the plaintiffs, it is seen that the suit laid by the plaintiffs cannot be determined to be barred by limitation. It is thus found that the first appellate Court has failed to consider the above said aspects of the legal position in the right perspective and particularly, when it is noted that the plaintiffs and the defendants being the co-sharers/co-owners of the suit properties and when the defendants have not even pleaded ouster and also not established the same by placing reliable materials, it is seen that the defendants cannot be allowed to stifle the case of the plaintiffs on the plea of limitation.

16. The defendants have also raised the plea that the plaintiffs 2 and 3 had relinquished their share in the suit properties, at the time of the oral partition by receiving the jewels from the first plaintiff and hence, they are not entitled to seek any further share in the suit properties by way of the present suit. In this connection, it is alleged by the defendants that an oral partition took place in the family of Narayanasami Maniam and at that time, the first plaintiff was directed to hand over the jewels to the plaintiffs 2 and 3 and accordingly, the plaintiffs 2 and 3 had received the jewels from the first plaintiff and relinquished their right to claim share in the suit properties and therefore, the defence had been taken that the plaintiffs 2 and 3 are not entitled to seek any share. The above said plea put forth by the defendants is stoutly disputed by the plaintiffs. With reference to the above said version of the defendants, there is no convincing material forth coming. If really the plaintiffs 2 and 3 had received any jewels from the first plaintiff and given up their right to claim share in the suit properties, at the time of the alleged oral partition, as rightly put forth by them, necessary acknowledgement or receipt would have been secured from them with reference to the same. The relinquishment pleaded by the defendants, if true, they would have obtained necessary release deed as per law from the plaintiffs 2 and 3. That apart, there is no material to hold that as to when the alleged oral partition pleaded by the defendants took place, who were the members of the said partition and at whose instance the said partition was brought about and who were the mediators or panchayatdars who had participated in the said partition. With reference to the above case, there is no pleading at all by the defendants in the written statement. Further, none of the Mediators/panchayatdars has been examined to substantiate their above case. However, they would rely upon the evidence of DW3. Merely on the basis of the oral testimony of DW3, who has not even cared to repudiate the plaintiffs case by filing the written statement and remaining ex-parte, it is seen that his unreliable and unacceptable evidence without corroboration cannot be the sole factor for upholding that the plaintiffs 2

and 3 had relinquished their share in the suit properties. Further, there is also no material to show that from the time of the alleged oral partition, the plaintiffs 2 and 3 had been deprived of their share of the suit properties in the manner known to law or that the plaintiffs 2 and 3 had been prevented from the enjoyment of the suit properties as co-owners thereof as per law. Such being the position, the plea of relinquishment of the plaintiffs 2 and 3 of their share in the suit properties, as raised by the defendants, cannot at all be countenanced in any manner.

17. Other than the above pleas putforth, the defendants have not raised any other valid plea to reject the plaintiffs case. In the light of the above discussions, the substantial questions of law formulated in this second appeal are accordingly answered in favour of the plaintiffs and against the defendants.

18. In conclusion, the judgment and decree of the Subordinate Court, Kallakurichi are set-aside and the judgment and decree of the I Additional District Munsif Court, Kallakurichi are confirmed. Accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition if any, is closed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

sli

To

1. The Subordinate Court, Kallakurichi.
2. The I Additional District Munsif Court, Kallakurichi.

Copy to: The Section Officer,
VR Section, High Court, Madras (2 copies)

+1cc to Mr.T.Antony Jesus, Advocate SR.No.90057

+1cc to M/s.Sarvabhauman Associates, Sr.No.90115

RSI(CO)

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