



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 26.07.2018

Pronounced on: 13.08.2018

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

S.A.(MD).No. 500 of 2017 &
CMP(MD)No.6429 of 2018
and
C.R.P.(MD)No. 513 of 2018

S.A(MD)No.500 of 2017

M. Gandhimathi ... Appellant/1st respondent/plaintiff
-Vs-
1.S.Raja Hussain
2.R.Haseenarani ..Respondents 1 & 2/Appellants/Defendants 4 &5
3.S.Rajapandian
4.S.Palraj
5.R.Pandi ..Respondents 3 to 5/Respondents 2 to4/
Defendants 1 to 3

PRAYER: Second Appeal is filed under Section 100 of C.P.C., against the Common Judgment and Decree dated 02.02.2017 made in A.S.No.59 of 2015 on the file of the 1st Additional District Judge, Madurai, by reversing the Judgment and Decree dated 08.09.2014 made in O.S.No.681 of 2010 on the file of the III Additional Subordinate Judge, Madurai.

CRP(MD)No.513 of 2018

M. Gandhimathi ... Petitioner/Petitioner/1st Respondent
-Vs-
1.S.Raja Hussain
2.R.Haseenarani .. Respondents 1&2/Respondents 1&2/Appellants
3.S.Rajapandian
4.S.Palraj
5.R.Pandi ... Respondents 3 to 5/Respondents 3 to 5/
Respondents 2 to 4

PRAYER: Civil Revision Petition is filed under Section 115 of C.P.C., against the Order and Decreetal Order dated 25.01.2017 made in I.A.No.389 of 2016 in A.S.No.59 of 2015 on the file of the 1st Additional District Judge, Madurai.

(In both the cases)

For Petitioner : Mr.R.Devaraj

For Respondents : Mr.C.M.Arumugam (for R1 & R2)

Mr.P.Santhosh Kumar (No Appearance)
(for R3 to R5)

COMMON ORDER

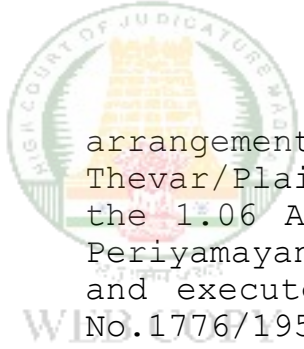
S.A.(MD)No.500 of 2017 is preferred challenging the judgement and decree dated 02.02.2017 in A.S.No.59 of 2015 on the file of the learned 1st Additional District Judge, Madurai, reversing the judgement and decree dated 08.09.2014 in O.S.No.681 of 2010 on the file of the learned III Additional Subordinate Judge, Madurai.

2.C.R.P.(MD)No.513 of 2018 is preferred against the order dated 25.01.2017 in I.A.No.389 of 2016 in A.S.No.59 of 2015 on the file of the learned 1st Additional District Judge, Madurai.

3.For convenience and easy identification of the parties to these proceedings are referred to according to their respective ranking before the Trial Court. Appellant is the Plaintiff in the suit. While Respondents 3 to 5 are defendants 1 to 3 and Respondents 1 and 2 are defendants 4 and 5 in the suit.

4.The following are the brief facts germane for the disposal of both the Second Appeal as well as the Civil Revision Petition.

5.A Civil Suit in O.S.No.170 of 2009 was preferred by the Plaintiff before the learned District Court, Madurai seeking partition and separate possession of the suit property to an extent of 1 acre and 06 cents contending that the appellant along with respondents 3 to 4 are entitled to $\frac{1}{4}$ share each in it being the surviving legal heirs of one Sami Thevar. The defendants 1 and 2 are brothers of the plaintiff and the 3rd defendant is son of the deceased elder brother of the plaintiff. According to the Plaintiff her father Sami Thevar and his brothers Periyakaruppa Thevar, Periyamayandi Thevar, Ramasamy Thevar and Ocha Thevar jointly purchased the total extent of 1.06 acres of lands under Sale Deeds dated 10.04.1948 and 24.05.1948 registered as Document Nos.752/1948 and 1432/1948 respectively and were in joint enjoyment and occupation of the said lands. Pursuant to an oral partition



arrangement between the five brothers, 46 Cents was allotted to Sami Thevar/Plaintiff's father and the balance extent of 60 Cents out of the 1.06 Acres was allotted to Periyamayandi Thevar. Subsequently, Periyamayandi Thevar, for himself and on behalf of his sons, sold and executed a sale deed dated 28.05.1954, registered as Document No.1776/1954, conveying the extent of 60 Cents out of the 1.06 Acres allotted to him to Sami Thevar. Thus Sami Thevar became the sole owner of the entire 1.06 Acres of land. After the death of Sami Thevar in 1957, the lands were in the joint enjoyment and occupation of Sami Thevar's wife (Ramayi ammal) and their sons Raju alias Periyakaruupan (father of 3rd defendant), S.Rajapandian and S.Palraj (defendants 1 and 2) and their only daughter(Plaintiff). Sami Thevar's wife (Ramayi ammal) died in 2007. Plaintiff claims that she has got $\frac{1}{4}$ share in the property by virtue of the amendment introduced in Hindu Succession Act in the year 2005; that she claimed partition and allotment of her $\frac{1}{4}$ share in the 1.06 acres and the defendants were evasive; that upon her coming to know about the proposal of defendants 1 to 3 to alienate the property she had come forward with the suit seeking partition and separate possession of her share and also a decree for permanent injunction as against defendants 1 to 3 from alienating the property to defendants 4 and 5 or to anyone else.

6.The said suit was transferred to the file of the learned III Additional Subordinate Judge, Madurai and was renumbered as O.S.No.681 of 2010.

7.The first Defendant filed a written statement which was adopted by second defendant. The first Defendant admitted the relationship between the parties and the entitlement of the plaintiff to a share in the property. The first Defendant stated that he executed a sale deed dated 15.12.2002 in respect of a portion of the suit property to the 4th defendant and that his wife executed another sale deed on the same date in respect of another portion of the suit property to the fifth defendant as per instructions of one Bose, serving in the police department, as a security to the monies lent by him since the said Bose being a Government servant, cannot purchase properties in his name. According to the first defendant he and his wife had not received any consideration for executing the two sale deeds dated 15.12.2002 in favour of the 4th and 5th defendants; that they are sham and nominal documents executed only as security to the monies lent by the said Bose.

8.The 3rd defendant remained absent and was set ex-parte and he did not also file any written statement.



9. The Defendants 4 and 5 filed a written statement contending that the plaintiff having been given and presented with enough streedhanam at the time of her marriage is not entitled to claim any share in the suit property pursuant to the Amendment introduced in 2005 to the Hindu Succession Act; that Sami Thevar owned several other properties and the suit is bad for seeking partial partition leaving the other properties; that in order to deprive the defendants 4 and 5 of their rights in the suit property, the suit is filed in collusion with the other defendants; that plaintiff had not sought for any share when her brothers partitioned the other properties of Sami Thevar among themselves; that plaintiff was ousted from the joint family; that at no point of time she took steps to include her name in the revenue records; that plaintiff preferred the suit using false records obtained with the help of the first defendant from the revenue authorities; that FIR was registered pursuant to his complaint and a case is pending in that regard.

10. Before the trial Court plaintiff examined herself as PW1 and produced 3 documents marked as Exhibits A-1 to A-3. The first defendant was examined as DW-1 and his wife Manjula was examined as DW-2. Pandi, third defendant was examined as DW-3 at the instance of the 4th defendant. 4th defendant examined himself as DW-4. Exhibits B-1 to B-13 were marked on the side of defendants 4 and 5. However DW-3 failed to make himself available for cross examination and therefore his evidence in chief examination was eschewed and not considered.

11. The Trial Court upon considering the case pleaded by the parties and the oral and documentary evidence tendered before it arrived at a finding that the suit property is self acquired property of Sami Thevar. Though the 4th defendant in Para 5 of his written statement pleaded that Sami Thevar was owning several properties he had not produced any concrete evidence to prove the said plea. However through DW-3, (Pandi) he had marked Ex.B-2, a Sale Deed relating to lands in Survey No.341. The Trial Court though eschewed and rejected the evidence of DW-3 had taken into consideration Ex.B-2, Sale Deed to come to the conclusion that Sami Thevar owned other properties also. In that view and taking into consideration that plaintiff had not adduced any reason in her plaint as to why she did not add the other properties owned by Sami Thevar and failed to seek partition in respect of those properties also, though plaintiff in her cross examination stated that her father represented to her that she will be given a share in the suit properties, the Trial Court held that the suit is bad for seeking partial partition.



12. The 4th defendant in his cross examination had categorically admitted that he does not know the details about the suit property, its boundaries etc., personally and that his deceased brother alone knows about such details. He admits in his cross examination that he does not know as to the persons who are born along with the plaintiff, that he had not seen Exhibits A-1 and A-2, that he does not know if wife of Sami Thevar is dead and also states that he does know about the brothers of 1st defendant. He further failed to produce any document including the encumbrance certificate that he obtained before purchasing the suit property under Exhibits B-3 and B-4. The evidence of 4th defendant about the payment of sale consideration for Exhibits B-3 and B-4 does not inspire confidence since he gives contradictory versions in the cross examination. Further he admits that he had not demanded from his sellers the prior title documents relating to the suit property and that he is not aware about the title of his sellers and documents based on which the said Exhibits B-3 and B-4 were prepared. Though he states in the cross examination that the property is located in Madurai Usilampatti High Way, he could not say the exact extent of the property and on which side of the high way it is located. Therefore the Trial Court found that 4th and 5th defendants could not be considered as the Owners of the suit property based on Exhibits B-3 and B-4. Upon considering the pleadings and oral evidence tendered by the 1st defendant and his wife as PW-2 and the various admissions of the 4th defendant as DW-4 Trial Court held that the Exhibits B-3 and B-4, under which he and his wife, the 5th defendant claimed title to the suit properties as purchasers from the 1st defendant, his sons and his wife are null and void as they are sham and nominal documents.

13. The documents under Exhibits B-5 and B-6 (patta pass books) issued in 2007 are rejected by the Trial Court on the ground that issue of computerised pattas was introduced long back before 2007. Similarly, Exhibits B-8 and B-9 kist receipts show that land revenue was paid only on 08.03.2010 after the filing of the suit. Defendants 4 and 5 ought to have paid land revenue from 2002 after their purchase and such kist receipts have not been produced. Exhibit B-10 adangal also does not inspire confidence though paddy is said to have been cultivated in the suit property, admission of 4th defendant in his cross examination shows that he could not have cultivated the suit property. Though the third defendant / Pandi was examined as DW-3 and some documents were marked through him, he failed to make himself available for cross examination and the Trial Court rightly rejected the entire evidence of DW-3. It is in this factual background the Trial Court held that Exhibits B-3 and B-4 are null and void.



14. The Trial Court held that the plaintiff is entitled to 1/4th share in the suit property along with defendants 1 to 3, they being the surviving legal heirs of Sami Thevar. The Trial Court in view of its finding that the suit is not maintainable for partial partition dismissed the prayer for partition, but in view of its finding that the plaintiff has got a right in the suit property granted a decree restraining defendants 1 to 3 from alienating or creating any encumbrance over the suit property either in favour of 4th and 5th defendants or in favour of any one else.

15. The 4th and 5th defendants preferred A.S.No.59 of 2015 against that portion of the decree which restrained defendants 1 to 3 from alienating and encumbering the suit property. The plaintiff or defendants 1 to 3 did not prefer any appeal. However when the appeal being heard the plaintiff preferred I.A.No.389 of 2016 in A.S.No.59 of 2015 seeking condonation of delay of 240 days in filing her cross objections in the said appeal. The said I.A.No.389 of 2016 was dismissed by order dated 25.01.2017. Challenging the said order dated 25.01.2017 in I.A.No.389 of 2016 plaintiff had preferred the above CRP(MD)No.513 of 2018. Since A.S.No.59 of 2015 was allowed by the Lower Appellate Court on 02.02.2017, setting aside the decree granted in favour of the plaintiff in O.S.No.681 of 2010, the plaintiff has come forward with the above S.A.(MD)No.500 of 2017 before this Court. Since parties to both the Second Appeal as well as the Civil Revision Petition are one and the same and both proceedings arise out of the same suit in O.S.No.681 of 2010 and for the reason that the order that may be passed in CRP(MD)No.513 of 2018 will have a bearing on the outcome of the Second appeal, both the cases are heard together and this common judgement is being delivered.

16. Before the Lower Appellate Court the defendants 4 and 5 contended that the decree of the Trial Court granting injunction as against defendants 1 to 3 from alienating the suit property either to defendants 4 and 5 or any one else is unsustainable since that Court rejected the prayer of the plaintiff for partition holding that the suit is not maintainable for partial partition and that the suit itself was rendered infructuous even on the day when the suit was filed on 02.11.2009 since Exhibits B-3 and B-4 Sale Deed were executed as early as on 15.12.2002. They further contended that plaintiff cannot claim any right pursuant to the amendment made in the Hindu Succession Act, in the year 2005.

17. The plaintiff on the other hand contended that the suit is not bad for partial partition since she claims right only in the suit property on account of her father's representation that she will be given a share in the same and that she is not interested in

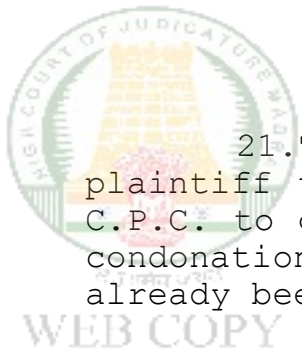


any other properties left behind by Sami Thevar. It was also contended that she had preferred cross objections, of course with a petition to condone the delay in filing such cross objections. In the alternative it was contended that the Appellate Court is empowered to grant relief to a party who had not filed any appeal or cross objections against the finding rendered by the Trial Court or rejection of any relief prayed for in the suit, invoking the provisions under Order XLI Rule 33 of C.P.C.

18.The defendants 1 to 3 supported the case of the plaintiff before Lower Appellate Court also. The Lower Appellate Court came to the conclusion that Sami Thevar, father of plaintiff is the absolute owner of the suit property and that plaintiff and defendants 1 to 3 being legal heirs of Sami Thevar after his death inherited the suit property. The Lower Appellate Court rightly held that Section 6 of the Hindu Succession Act and the Central Amendment Act, 2005 had no application to the facts of the case since it is neither pleaded nor established that the suit property is a coparcenary property or a joint family property, and held that the suit property devolved on plaintiff and defendants 1 to 3 under Section 8 of the Hindu Succession Act, 1956.

19.The Lower Appellate Court further held that the suit is not maintainable for partial partition in view of the admission of plaintiff and defendants 1 to 3 that there were other properties owned by Sami Thevar. The Lower Appellate Court refused to countenance and accept the memo filed by plaintiff stating that she had relinquished her rights, if any, in respect of any other properties belonging to her father, though she had stated the same in her cross examination on the ground that the existence of other properties were not mentioned in the plaint. The Lower Appellate Court further held that the suit is bad for non-joinder of a sharer in the present partition suit since the wife of Periakaruppan / mother of the 3rd defendant will also be a sharer on the death of her husband along with her son and that she had not been impleaded as a party to the suit even though she is alive.

20.With regard to the relief of injunction granted by the Trial Court, the Lower Appellate Court held that the prayer for injunction had become infructuous even on the day when the suit was filed since Exhibits B-3 and B-4 Sale deeds were executed in favour of the defendants 4 and 5 long before the filing of the suit and plaintiff had not challenged the said Sale Deeds. In that view of the case the Lower Appellate Court held that the relief of injunction cannot be sustained, when the entitlement of the plaintiff to any share has not been decided by the Trial Court.



21. The Lower Appellate Court rejected the contention of the plaintiff that it can invoke the provision of Order XLI Rule 33 of C.P.C. to grant relief to her, since the I.A.No.389 of 2016 seeking condonation of delay of 240 days in filing her cross objections has already been dismissed on 25.01.2017.

22. As stated above the said order dated 25.01.2017 in I.A.No.389 of 2016 is challenged by the plaintiff in the above CRP (MD) No.513 of 2018 and the judgement and decree dated 02.02.2017 allowing the A.S.No.59 of 2015, the above S.A.(MD)No.500 of 2017 has been filed by the plaintiff.

23. Before going into the merits of the case in the Second Appeal it is just and proper for this Court to examine the contentions raised in the Civil Revision Petition. The revision petitioner contends that the Lower Appellate Court ought to have allowed the I.A. and condoned the delay of 240 days in filing the cross objections since the main appeal in A.S.No.59 of 2015 was pending on the date when the cross objections was filed and on the date when the said application was decided. The revision petitioner further contends that she had given sufficient explanation for the delay in filing the cross objections and that by condoning the delay ends of justice will be met. Revision petitioner also contends that the finding of the Trial Court that Exhibits B-3 and B-4 Sale Deeds are make believe transaction and as such they are not binding on her, more so when she is not a party to those Sale Deeds merits consideration. It is her further case that she had not included any other properties owned by her father since her father had promised to give her a share only in the suit property and that her brothers having partitioned among themselves the other properties she is not interested in them and had relinquished her right in such properties. In any event it is contended that she is entitled to elect and seek partition only in respect of the property in which she is interested and it is for the other co-sharers to oppose the prayer for partition in respect of one property alone if they intend to bring all the other properties in the hotch pot by giving all necessary particulars about such other properties for being included in the schedule to the plaint. It is further contended by the revision petitioner that the 4th and 5th defendants being strangers cannot contend that the suit is bad for partial partition in view of the specific admission of defendants 1 and 2 and the failure of 3rd defendant to contest the suit by remaining ex-parte. The defendants 4 and 5 contended that the reasons adduced by the plaintiff in her affidavit filed in support of I.A.No.389 of 2016 cannot be considered as sufficient cause and each and every days delay had not been explained. The filing of the cross objections and the condone delay petition about 6 months after entering appearance in the



appeal and during the course of hearing of the appeal cannot be accepted.

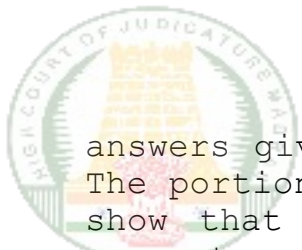
24.I have gone through the Order of the Lower Appellate Court in I.A.No.389 of 2016. No doubt to entertain and accept an application under Section 5 of the Limitation Act "sufficient cause" has to be pleaded and established. The exercise of discretion while considering the prayer for condonation of delay under Sec.5 of the Limitation Act, is no more a contentious issue. This Court as well as the Hon'ble Apex Court had occasions to consider the issue and have held that Court should not adopt a pedantic approach and should see whether the reasons adduced in the affidavit, taken as a whole, exhibit the bonafides of the petitioner. The length of the delay is not the criterion and acceptability of the explanation is the criterion. Though sufficient cause is one of the essential conditions which must be taken into consideration for condoning the delay, the word "sufficient cause" should receive liberal consideration, so as to advance substantial justice as observed by the Hon'ble Supreme Court in very many judgements. In the matter of condonation of delay the approach that should be adopted by Court must be pragmatic and justice oriented in order to render justice between the parties and technical considerations shall not prevail over the cause of substantial justice. It must be remembered by the Court that in every case of delay there can be lapses on the part of litigant concerned but that alone is not enough to turn down his or her plea and shut the door against him or her. If the explanation does not smack of malafide nor is it put forth as a part of dilatory strategy, the Court must show utmost consideration to the petitioner seeking condonation of delay. The Hon'ble Supreme Court has observed that the Court should adopt a justice oriented approach and should not refuse to condone the delay under Section 5 of the Limitation Act if the refusal to condone the delay remits in grave miscarriage of justice.

25.Keeping in mind the above principles laid down by the Hon'ble Supreme Court in various decisions and considering the fact that the main appeal in A.S.No.59 of 2015 was pending, it cannot be held that the plaintiff was so negligent in prosecuting a proper remedy. The totality of the circumstances pleaded in the affidavit filed in support of the I.A.No.389 of 2016 have to be considered with pragmatism and in a justice oriented approach to advance the cause of justice. In my view the approach adopted by the Lower Appellate Court while declined to condone the delay is not proper. It cannot be stated that no reason at all had been pleaded. The 4th and 5th defendants cannot be termed to be put in a disadvantageous position if the delay is condoned and they are put the defend the cross objections. If the case of defendants 4 and 5 is so



meritorious and requires to be accepted by the Court then they need not worry at all as there will be no difficulty for them to succeed in their appeal. Considering all these factors and the principles of law laid down by the Hon'ble Supreme Court while exercising the discretion under Section 5 of the Limitation Act, and the fact that the main appeal was pending and no dilatory tactics had been adopted by the plaintiff, I am inclined to allow the revision and set aside the Order dated 25.01.2017, in I.A.No.389 of 2016 in A.S.No.59 of 2015. The revision petition in C.R.P.(MD) No.513 of 2018 therefore stands allowed and the delay is condoned.

26.However in order to settle the dispute between the parties once and for all, this Court is inclined to dispose of the Second Appeal on merits without driving the parties to agitate their rights before the Lower Appellate Court again. On behalf of the plaintiff it is contended that the non consideration of the cross objections by the Lower Appellate Court in view of the dismissal of I.A.No.389 of 2016 and the failure of the Lower Appellate Court to invoke the provision of Order XLI Rule 33 of C.P.C. to decide the issues between the parties in a holistic manner vitiate the judgement challenged in this appeal. The Counsel for plaintiff contends that the Lower Appellate Court had failed to appreciate the evidence and materials available before it in a proper manner and that the admissions of the 4th defendant during his cross examination go to prove that the Sale Deeds relied on by him and his wife under Exhibits B3 and B4 are sham and nominal documents, not supported by consideration and are null and void and not binding on the plaintiff. Further according to the Counsel for Plaintiff, the evidence tendered by the 1st defendant and his wife as DWs-1 and 2 supports the case of the plaintiff wholly. In as much as the plaintiff had elected to seek partition only in respect of the suit property, in the absence of any objection from defendants 1 to 3, the 4th and 5th defendants are estopped from contending that the suit is bad for partial partition. It is also the case of the plaintiff / appellant that she is entitled to take shelter under the provisions of Order XLI Rule 33 of C.P.C. to seek a decree in her favour even in the absence of an appeal or cross objections. It is further contended that the reliance on exhibit B-2 produced by DW-3, during his chief examination cannot be countenanced in the face of his non availability for cross examination. Counsel for Appellant / plaintiff contended that both the Trial Court as well as the Lower Appellate Court grossly erred in law by considering exhibit B-2. It is also contended that a first appeal being a continuation of the suit, all the issues between the parties are open for discussion and as such the Lower Appellate Court should have thoroughly examined the entire evidence on record in a legally sustainable manner. The Lower Appellate Court had omitted to consider the effect of the



answers given by 4th defendant as DW-4 during his cross examination. The portion of cross examination if properly looked into would go to show that 4th and 5th defendants do not derive any title to suit property under exhibits B-3 and B-4. The non-consideration of such material evidence by the Lower Appellate Court according to the Counsel for Appellant is a serious error of law apparent on the face of the record. Learned Counsel also contended that the observation of the Lower Appellate Court stating that the Trial Court did not give any finding with regard to the entitlement or share of the plaintiff of the suit property is perverse, since the Trial Court had categorically found that plaintiff and defendants 1 to 3 are entitled to a share in the properties that devolved on them consequent to the death of Sami Thevar. The learned counsel for the defendants 1 to 3 supported the case of the plaintiff and prayed that a preliminary decree for partition of the suit property may be granted.

27. Per contra, Learned Counsel for the 4th and 5th defendants contended that the second appeal is devoid of merits and is liable to be dismissed. He argued that the plaintiff's claim is based on Central Act, 39 of 2005, amending the Hindu Succession Act and in the absence of any pleading and evidence to show that the suit property is a coparcenary property or joint family property the suit is liable to be dismissed. He further argued that the suit is also not maintainable for partial partition in the face of availability of other properties owned by Sami Thevar.

28. I heard Mr. R. Devaraj, learned counsel for the petitioner/appellant and Mr. C. M. Arumugam, learned counsel for the respondents 1 and 2 in both the cases and oral and documentary evidence tendered by the parties to the suit.

29. Exhibits A-1 and A-2 are the two sale deeds dated 10-04-1948 and 24-05-1948 registered as Document Nos. 752/1948 and 1432/1948 respectively under which Plaintiff's father, Sami Thevar, and his brothers Periyakaruppa Thevar, Periyamayandi Thevar, Ramasamy Thevar and Ocha Thevar jointly purchased the suit lands of a total extent of 1.06 acres. Ex. A-3 is the sale deed dated 28.05.1954, registered as Document No. 1776/1954, conveying the extent of 60 Cents out of the 1.06 Acres allotted to him to Sami Thevar. These sale deeds are not disputed by any one of the defendants. Defendants 1 to 3 as well as defendants 4 and 5 in their oral evidence do not dispute the title of Sami Thevar to the suit property. From a reading of these documents and the oral evidence of the parties to the suit it can be reasonably held that Sami Thevar is the owner of the suit properties. Whether the suit property is a coparcenary or joint family property as pleaded by the



plaintiff is to be looked into and considered with reference to her prayer for partition in the suit. No doubt it is true that the plaintiff claimed that the suit property is a coparcenary property and that she is entitled to a share in the same under the provision of Hindu Succession Act as amended by Central Act, 39 of 2005. But the parties to the suit have understood what is the claim, what is the nature of the evidence that has to be let in, etc. and have let in evidence. It is the admitted case of all the parties to the suit that the suit property is self acquired property of Sami Thevar under exhibits A-1 to A-3. Even the 4th and 5th defendants accept the same and have not come forward with any different case. In such circumstances this Court is to examine the right of the plaintiff for the relief asked for. Rightly the Lower Appellate Court arrived at a finding that the suit property is self acquired property of Sami Thevar and upon his death the property devolves upon his legal heirs and succession has to be determined only under Section 8 of the Hindu Succession Act. Admittedly plaintiff, defendants 1 and 2 are his daughter and sons respectively. 3rd defendant is the son of a predeceased son and he represents the estate of such predeceased son and thus is another legal heir. The legal heirs of the predeceased son of Sami Thevar take one share and the next is taken by plaintiff and defendants 1 and 2. The mother of the plaintiff and defendants 1 and 2 also died in 2007. Hence as one of the surviving legal heirs of Sami Thevar plaintiff is admittedly entitled to a share in the property that was left by Sami Thevar. Eventhough plaintiff claimed a share as a coparcenar which is not correct as a matter of fact and as per law she is entitled to a share under Section 8 of the Hindu Succession Act. Therefore the finding of the Trial Court that the suit property is an absolute property of Sami Thevar is rightly affirmed by the Lower Appellate Court and the same does not need any interference. Similarly, the finding that plaintiff is entitled to a share in the suit property since it devolves on the legal heirs of Sami Thevar is also absolutely correct.

30. The Lower Appellate Court declined the relief of partition to the plaintiff on the ground that she had preferred the suit for partial partition and without impleading the wife of her deceased eldest brother Periakaruppan. The fact remains that the estate of Periakaruppan (predeceased son of Sami Thevar) is represented by the 3rd defendant and the branch of Periakaruppan is entitled to one share only is not denied by plaintiff or defendants 1 and 2. While such is the case merely because the wife of plaintiff's deceased eldest brother Periakaruppan is not arrayed as a party to the suit, the suit cannot be termed as bad for non-joinder of necessary parties. Though the wife of plaintiff's deceased eldest brother Periakaruppan is a proper party when her own son is arrayed as a party to represent the estate it cannot be contended that the suit



is bad for non-joinder of necessary parties. Hence the reasoning of the Lower Appellate Court in this regard is erroneous and unsustainable in law.

31. Though 4th and 5th defendants contend that the suit is not maintainable as it seeks only a partial partition, I am unable to accept the same since it is not the case of 4th and 5th defendants that the so called other properties left by Sami Thevar remained unpartitioned. In para 5 of the written statement filed by them they clearly state as follows:

"Apart from that though the plaintiff has absolute knowledge about the division of properties of her father among her brothers, she did not raise any question when the properties were divided among her brothers respectively. Further all the divided properties had brought to the possession of respective persons and mutation were effected according to the oral partition for several before with the knowledge and consent of the plaintiff".

32. There is no pleading in the written statement of defendants 4 and 5 that the suit property was also partitioned among her brothers after the death of Sami Thevar and that revenue records were also mutated accordingly. Hence it is plain and clear that the suit property alone is left out without being partitioned among the brothers. It is also clear that plaintiff had acquiesced to the rights of her brothers in the other properties left out by Sami Thevar except the suit property. In such circumstances it will be unjust and illegal to deny the right of the plaintiff in the only property that is still available without being partitioned among the co sharers after the death of Sami Thevar in 1957. The reasoning of the Lower Appellate Court in this regard is fallacious and unsustainable. Only on account of the fact that all other properties except the suit property have been divided among the brothers of the plaintiff and when she acquiesced to such division among her brothers and when she did not want any share in those properties she has come forward with the present suit claiming partition of the only available property which remains unpartitioned as on the date of suit. Merely because the plaintiff failed to state in the plaint about the previous partition of other properties among her brothers and about which she never raised her little finger right from 1956 till 2009 and in which she did not claim any rights, the suit cannot be thrown out as bad for partial partition. The approach of Lower Appellate Court in this regard is unsustainable and it does not advance the cause of justice. Hence the suit in my opinion is not vitiated for partial partition and as such it is maintainable in law.

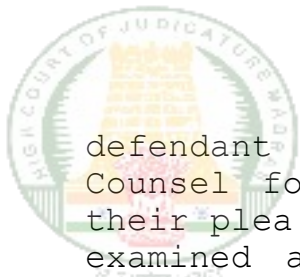


33. In view of the above findings and my conclusion that the plaintiff is entitled into a share in the only available suit property, with defendants 1 and 2 and the branch of her predeceased brother represented by 3rd defendant taking other shares the suit is maintainable and not vitiated for partial partition. The plaintiff is entitled to a preliminary decree as prayed for.

34. But the relief to which the plaintiff is entitled vis-a-vis the 4th and 5th defendants revolves around the genuineness, validity or otherwise of exhibit B-3 and B-4 Sale Deeds dated 15.12.2002, under which 4th and 5th defendants purchased the suit property and claim that the prayer for injunction by the plaintiff had become infructuous already. The defendants 4 and 5 have not pleaded in the written statement that they are bonafide purchasers for value and that they have purchased the property after satisfying themselves as to the title of their vendors. They only plead that the plaintiff has got no right in the suit property since she had been excluded from the joint family immediately after her marriage and she was given enough Sridhanam property at the time of her marriage. It is also stated that the present suit for partition is filed upon the ill advice of the 1st defendant.

35. The 1st defendant's written statement adopted by the 2nd defendant is to the effect that the Sale Deeds dated 15.12.2002 were executed by the 1st defendant and his wife, as directed by one Bose, a police officer, showing 4th and 5th defendants as Purchasers even though they do not know anything about the defendants 4 and 5. They pleaded that 1st defendant and his wife were directed to do so by the said Bose, since the said Bose had lent monies to the 1st defendant and to secure the loan given by him, he had got the said Sale Deeds executed by 1st defendant and his wife upon the representation that the property would be reconveyed to them once the principal and interest due to him is settled. It is pleaded that no consideration whatever had been received by the executants of exhibit B-3 and B-4. Though the suit property belongs to the plaintiff and defendants 1 to 3 the said deeds were executed only as a security to the loan obtained and not with intent to defraud the co sharers. It is a sham and nominal document and not enforceable. The plaintiff and defendants 2 and 3 were not aware of the execution of such documents. The above said Bose forced the first defendant and his wife to get such documents executed. As against this pleadings 4th and 5th defendants have not made any specific denial in their written statement nor did they file any additional written statement or rejoinder.

36. During the course of examination of witnesses the 1st



defendant or the 2nd defendant had not been cross examined by the Counsel for defendants 4 and 5 to elicit any answer contrary to their plea in the written statement. On the other hand 4th defendant examined as DW-4, had in his cross examination answered to the effect that his deceased brother alone arranged for the purchase of the property and the said brother alone knows about the property. He also stated that he does not know anything about the family of the plaintiff, and he had not gone through Exs.A-1 and A-2 at any time. When he is not aware if the wife of Sami Thevar is dead, that he does not know about any brothers of the 1st defendant and that he does not know anything about the suit property personally. Though he states that he has got an encumbrance certificate relating to the suit property with him, he has not produced the same. There are serious contradictions in the evidence of the 4th defendant relating to the payment of sale consideration. In the 1st instance he says that the sale consideration was paid to the 1st defendant directly in the presence of the Sub Registrar. Later he contradicts his evidence and says that the payment was not in the presence of the Sub Registrar. He further says that he did not demand the prior documents of title and the partition deeds from the 1st defendant, and he does not know who is the witness in the Sale Deeds, and he also not aware as to how title to the suit property was traced in the Sale Deeds. He also made his statement that he does not know the exact extent of the suit property or on which side of the highway the lands are located. The other documents relied on by him in Ex.B-5 to B-11 are also do not go to strengthen the title of defendants 4 and 5. The issue of patta pass books was discontinued and only computerised patta is being issued for a long time and as such Exs.B-5 and B-6, issued in 2007 cannot be believed. Ex.B-8, the kist receipt dated 08.03.2010 is obtained long after the filing of the suit. No other kist receipts from the date of purchase have been produced before Court. Though in the adangal Ex.B-10, it is stated that paddy is being cultivated the evidence of DW-4 does not inspire confidence. In such circumstances the finding of the Trial Court that the Sale Deeds dated 15.10.2002 in Exs.B-3 and B-4 are sham and nominal and null and void cannot be found fault with. However the Lower Appellate Court miserably failed to examine the above aspects and did not render any finding with regard to Exs.B-3 and B-4. This is a serious error committed by the Lower Appellate Court. The Lower Appellate Court failed to consider the material evidence on record and also failed to render any finding with regard to the documents under which the defendants 4 and 5 claim title.

37. In this view of the matter the judgement and decree of the Lower Appellate Court is liable to be interfered with. Further the approach of the Lower Appellate Court not considering the request of the plaintiff to consider her case in the absence of an appeal

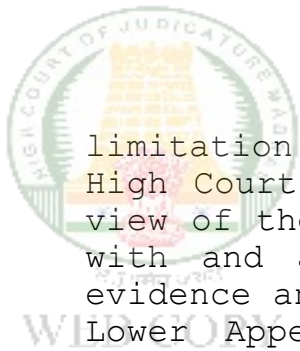


against the Lower Courts judgement or any cross objections is also erroneous and unsustainable. Already I had held that the refusal to condone the delay in filing the cross objections is unsustainable and the delay is liable to be condoned. Once the delay is condoned the cross objections ought to be considered. However since this Court had decided to consider the entire case it is just and necessary that all the points raised by the plaintiff are considered.

38.The Power under Rule 33 of Order XLI can be exercised by Appellate Court even if the appeal is only against a part of the decree of the Lower Court. The Appellate Court can exercise that power in favour of all or any of the respondents although such respondents may not have filed any appeal or objection. This sweep of the power under Rule 33 is wide enough to determine any question not only between the appellate and respondents but also between the respondent and co respondents. The appellate Court can pass any decree and order which ought to have been passed in the circumstances of the case. The appellate Court can also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order XLI have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. The only constraints are that the parties before the Lower Court should be there before the Appellate Court and the question raised must properly arise out of judgement of the Lower Court. If these two requirements are there the Appellate Court can consider any objection against any part of the judgement or decree of the Lower Court. It may be urged by any party to the appeal (see AIR 1978, Madras 285).

39.The same view has been confirmed by the Hon'ble Supreme Court in AIR 1999, Supreme Court 2626 (State of Punjab & others vs Bakshish Singh), to enable to do complete justice to the parties as the nature of the case may require notwithstanding that the party in whose favour the power is ought to be exercised has not filed any appeal or cross objections.

40.In view of the fact that I have gone into the merits of the case of the respective parties and held that the suit is maintainable and not bad for partial partition or non-joinder of necessary parties and that the plaintiff is entitled to a preliminary decree of partition as claimed I do not wish to add any further regarding the failure of the Lower Appellate Court to invoke the provisions of Order XLI Rule 33 C.P.C. as requested by the plaintiff. I have already held that the Sale Deeds dated 15.12.2002 marked as Exs.B-3 and B-4, are null and void, sham and nominal and not binding on the plaintiff. The defendants 4 and 5 have no right, title or interest in the suit property. I am conscious of the



limitation while exercising jurisdiction 100 of C.P.C. where the High Court can interfere only on a substantial question of law. In view of the fact that the entire merits of the case have been dealt with and also the question regarding admissibility of Ex.B-2 as evidence and non consideration of material evidence on record by the Lower Appellate Court has been discussed, I do not propose to separately discuss about the substantial question of law. In any event non consideration of material evidence on record and the issue regarding admissibility of evidence are substantial question of law and I hold that the Lower Appellate Court is not correct in those aspects.

41.I have already said that the revision petition is allowed by setting aside the order dated 25.01.2017 in I.A.No.389 of 2016 in A.S.No.59 of 2015. The revision petition in C.R.P.(MD)No.513 of 2018 therefore stands allowed and the delay of 240 days in filing the cross objections in A.S.No.59 of 2015 by the plaintiff is condoned.

42.For all the above reasons, the Second Appeal is allowed and there shall be a preliminary decree for partition in respect of the plaintiff's 1/4 share in the suit property. In view of the fact that defendants 1 and 2 have categorically admitted that plaintiff has got a share in the suit property and the 3rd defendant having remained ex-parte, there shall be a decree for permanent injunction restraining the defendants 1 to 3 and anyone claiming under them from alienating or encumbering the 1/4th share of the plaintiff in the suit property.

Sd/

03.09.2018

"For Being mentioned"

These Second Appeal and Civil Revision Petition having been posted on Monday, the Third day of September, Two Thousand and Eighteen(03.09.2018) 'FOR BEING MENTIONED'. In Pursuance of the order of this Court dated 13.08.2018 and made herein in the presence of the abovesaid Advocate, this Court made the following order:

This Court by order dated 13.08.2018 allowed both the Second Appeal in S.A.(MD)No.500 of 2017 and the Civil Revision Petition in CRP(MD)No.513 of 2018.

2.While the copy of the order is about to be issued, the Registry makes a query and wants clarification before this Court that if the Civil Revision Petition which is challenged the order of dismissal in condone delay application for filing the Cross Objection before the learned First Appellate Court is allowed on 13.08.2018, then this Court ought to have directed the First



Appellate Court to number the Cross Objection and take up the same along with the First Appeal in A.S.No.59 of 2015, but by order dated 13.08.2018, the Civil Revision Petition (MD)No.513 of 2018 is allowed along with the Second Appeal (MD)No.500 of 2017.

3. Therefore, both the cases in S.A.(MD)No.500 of 2017 and C.R.P.(MD)No.513 of 2018 has been listed today under the caption "for clarification" before this Court.

4. As per the query made by the Registry, I have gone through the judgments both in S.A.(MD)No.500 of 2017 and C.R.P.(MD)No.513 of 2018, it is absolutely correct that if the Second Appeal is allowed on merits, there is no necessity to consider the Civil Revision Petition which was challenged the order of dismissal of condone delay application and if the Civil Revision Petition which was challenged the order of dismissal of condone delay application is consider on merits, then the S.A.(MD)No.500 of 2017 ought to be dismissed and directed both the parties to go before the First Appellate Court and appropriate direction to be given to the First Appellate Court to number the Cross Objection and decide the same on merits along with the First Appeal.

5. Heard the arguments of both the learned counsels.

6. This Court has considered the Second Appeal in SA(MD)No.500 of 2017 on merits and hence, the Civil Revision Petition in CRP(MD)No.513 of 2018 is need not be considered. Therefore, the First Appeal in A.S.No.59 of 2015 was considered on merits and the Second Appeal was allowed. Hence, the order passed in the Civil Revision Petition in CRP(MD)No.513 of 2018 is re-called and the Civil Revision Petition is closed and the CMP(MD)No.6429 of 2018 filed in the Civil Revision Petition for amendment is unnecessary and the same is also closed.

7. Hence, the Registry is directed to issue fresh order copy along with this order dated 03.09.2018.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar (CS-IV)



To

1. The 1st Additional District Judge,
Madurai.

2. The III Additional Subordinate Judge,
Madurai.

3. The Records Keeper, V.R. Section,
Madurai Bench of Madras High court, Madurai. (2 copies)

+1 CC To MR.R.DEVARAJ, Advocate SR. NO. 78672

+1 CC To MR.C.M.ARUMUGAM, Advocate SR. NO.78724

S.A.(MD).No. 500 of 2017 &
CMP(MD)No.6429 of 2018
and
C.R.P.(MD)No. 513 of 2018

13.08.2018

VSV

KK/SV/SAR-IV/28.09.2018/19P-7C