

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Judgment Reserved on : 30.08.2019
Judgment Pronounced on : 22.11.2019
CORAM:
THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN
S.A.No.53 of 2001

1.G.Dharmichand Sowcar (Deceased)

2.Paroskumari

[2nd appellant LR of the deceased
1st appellant as per memo dated 27.02.2018 and
vide order of Court dated 13.03.2018 made in
C.M.P.No.5387 of 2018 in S.A.No.53 of 2001 (MDIJ)]

3.Goutham Chand

4.Deepika

5.Minor Sejal

(Minors 4&5 Rep.by appellant Deepika)

6.Minor Dharshan

7.Sangeetha

[Appellants 3 to 7 and respondent No.14 are impleaded
LRs of the deceased 1st appellant vide order of Court dated
04.09.2018 made in C.M.P.No.5387 of 2018 in
S.A.No.53 of 2001 (RHJ)] ...Appellants/Plaintiff

...Versus...

1.Jayaraman (Deceased)

2.Lakshmipathi

3.Nandakumar (Deceased)

4.Rajagopal

5.Kannan (Deceased)

6.Balakrishnan

7.Lakshmanan

8.Raju

9.Krishnaveni

10.Geethavahini

11.Revathi

12.Yogavisagarajan

13.Alamelu

14.Dinesh Kumar

[RR9 to 13 brought on record as LR of the
deceased R3 vide order of Court dated 13.08.2018
made in C.M.P.No.5126 of 2018 in S.A.No.53 of 2001]

15.Alamelu

16.Vijayarani

17.Ganga
18.Chitra
19.Sampath
20.Geetha
21.Vijay
22.Srinivasan

[RR15 to R22 are brought on record as LR's of the deceased
R1 vide order of Court dated 04.09.2018 made in C.M.P.No.
1326 of 2009 in S.A.No.53 of 2001(RHJ)]

23.Thara

24.Prasanna

[RR23 & 24 are brought on record as LR's of the deceased
as vide order of Court dated 04.09.2018 made in C.M.P.No.
1327 of 2009 in S.A.No.53 of 2001 (RHJ)] ..Respondents/defendants

PRAYER:This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 20.07.1999 made in A.S.No.23 of 1998 on the file of the Additional District Judge, Nagapattinam, in confirming the judgment and decree in O.S.No.125 of 1995 dated 15.04.1997 on the file of the Additional Sub-Judge, Mayiladuthurai.

For Appellants	::	Mr.S.Sounthar
For R2 to R4,9		
to 12 and 16 to 24	::	Mr.S.V.Jayaraman, Senior Counsel
For R6	::	Mr.Sadasivam
For R7 7 8	::	No appearance
for R14	::	Not Ready in notice

JUDGMENT

The unsuccessful plaintiff is the appellant herein. The appellant/plaintiff has filed the suit in O.S.No.125 of 1995, before the Additional Sub-Court, Myladuthurai, seeking relief of declaration of title in respect of "B"schedule property and for recovery of possession of the "C" schedule property, or in the alternate seeking partition of the 2/3rd, which was morefully describd as "B"schedule property, "C" schedule property is the common pathway.

2. The plaint proceeds on the basis that:-

(a) the entire "A" schedule property was originally belongs to one Varadharajulu Naidu, who died intestate leaving his wife Subbammal and first defendant Jayaraman and Krishnamurthy Naidu.

(b) During the life time of Subbammal, she had executed Ex.A5-Settlement Deed, dated 28.11.1974 in favour of her younger

son Krishnamurthy Naidu in respect of her 1/3rd share in the suit property.

(c) Thereafter, the said Krishnamurthy Naidu along with first respondent Jayaraman had executed a sale agreement on 15.02.1975, which is marked as Ex.A4, in favour of one Murugappa Chettiar in respect of entire "A" schedule property as the first defendant had refused and failed to execute the Sale Deed in favour of the agreement holder Murugappa Chettiar. Krishnamurthy and his son Arivoli only executed Ex.A3-Sale Deed, dated 05.10.1976 in favour of the said Murugappa Chettiar in respect of "B" schedule property ["B" schedule property is described by means and bounds which was disputed by the defendant in the written statement] and thus,

(d) the plaintiff/claimant has stated that the 1/3rd share of Subbammal, which was settled in favour of Krishnamurthy and the original 1/3rd share of Krishnamurthy clubbed together, 2/3rd share was sold by the Krishnamurthy and his sons under Ex.A3 and hence, he has entitled for 2/3rd share and he has also sought for alternative prayer of partition.

3. In the written statement, the defendants have categorically denied Ex.A5-Settlement Deed on the ground that at the time of execution of Ex.A5-Settlement Deed, Subbammal was not in proper state of mind to settle the property in favour of one of her son and they also denied the sale in favour of the plaintiff by Krishnamurthy and boundaries are not binding upon the defendants.

4. The Trial Court, on consideration of both oral and documentary evidence, has held that Ex.A5-Settlement Deed is clouded with suspicion and though a finding was rendered that Krishnamurthy is entitled for 1/2 share, however, in view of the compensate prayer, the entire suit has been dismissed.

5. Aggrieved against the said judgment and decree, the plaintiff had preferred A.S.No.23 of 1998 before the learned Additional District Judge, Myladuthurai and on consideration of the submissions made by both the parties, the learned Additional District Judge has held that Ex.A5 was not proved in the manner known to law and cross objection with regard to the plea of adverse possession by the defendants have also been negatived and further held that there is no partition among the parties by means and bounds as stated in Ex.A3 and confirmed the Judgment of the Trial Court and hence, the Second Appeal.

6. The above Second Appeal has been admitted on 19.01.2001 on the following substantial questions of law at the time of admission.

"Whether the judgments of the Courts below are vitiated in their failure to exercise jurisdiction vested with it by refusing to grant decree for partition of admitted 1/2 share of plaintiff".

7. The Additional Substantial Questions of Law:-

(i) Whether the Judgments of the Courts below holding that Ex.A5 settlement deed is not valid is sustainable in law when Exhibit A5 was admitted by the respondents in Ex.A4 sale agreement? Whether the judgment of the Courts below are result of mis-leading of material evidence on record?

(ii) Whether the respondents are estopped from defending the present suit in view of Ex.A4 sale agreement and in view of Sec.114 of Evidence Act and equitable doctrine of 'Equitable Estoppel'?

(iii) Whether the judgment of the Courts below is vitiated by error apparent on face of record in holding decree for partition can't be granted in the absence of other sharers?

8. The learned counsel for the appellant/plaintiff would contend that while, Jayaraman is arrayed as a first defendant, the son and daughter of the first defendant are arrayed as D2 and D6 and the tenants of the "C" schedule property were arrayed as defendants 7 and 8. During the pendency of the proceedings on the appellate stage as well as on the second appellate stage, some of the defendants have died and their legal representatives are brought on record as R9 and R24. As the first appellant died pending second appeal, his legal representatives are brought on record as A3 to A7 and as one of the legal heirs of the deceased first appellant was out of the station, he could not file any application before this Court to bring on record the legal representatives. However, any order passed in this Second Appeal, will be as against the appellant is also binding upon him.

9. The learned counsel for the appellant contended that both the Courts below non suited the plaintiff on the ground that Ex.A5/settlement deed is not proved in the manner known to law, based upon the answer elicited in the cross-examination of P.W.3, regarding the mental status of the settlor and also taken note of the admission of D.W.1, (who is third defendant and

practicing as an advocate at Myladuthurai) and also drew my attention to the fact that the trial Court rendered a finding as against Ex.A3/Sale deed executed by Krishnamurthy in favour of Murugappa Chettiar, which is not valid as he was not absolute owner of the property and the same is erroneous in law and contended that as admittedly he was one of the co-owner of the property and hence, the sale deed is binding to the extent of his legal share and the observation made by the trial Court does not reflect the sound provisions of law and failed to note the non joinder of vendor of the plaintiff viz., Krishnamurthy, which is vital to the issue by holding that the suit is bad for non joinder of necessary party and further contended that as the Ex.A3/Sale deed whereby the entire interest of the Krishnamurthy in the suit schedule property has been conveyed to the plaintiff and insofar as the interest has been conveyed under the valid sale deed and interest deemed to have been represented by the subsequent purchaser and hence, contended that both the finding rendered by the trial Court which was not dealt with by the lower Appellate Court has to be vacated and also draw my attention to the admission of DW1 regarding 1/2 share of the vendor of the plaintiff.

10. Mr.S.V.Jeyaraman, learned Senior Counsel appearing for the respondent/defendants would submit that the framing of the suit seeking the relief without declaration is non-maintainable and further submitted that Ex.A5-Settlement Deed was denied and challenged by the defendants and therefore, Ex.A3 in consequence. Furthermore, as Ex.A5-Settlement Deed is not proved in the manner known to law. In the absence of any positive evidence for the proper attestation and execution of Ex.A5-Settlement Deed, both the Courts below has rightly come to the conclusion and further submitted that the question of any estoppel does not arises has raised by the learned counsel for the appellant.

11. Admittedly, the property was a self-acquired property of Varadharajulu Naidu and on his death, his widow-Subbammal first defendant-Jayaraman and predecessor in title of the plaintiff namely, Krishnamoorthy Naidu are the legal heirs to succeed the property. Accordingly, each are entitled to 1/3rd share in the property. The plaintiff in the suit is the purchaser. From the predecessor in title of said Krishnamoorthy Naidu, and has filed the suit with alternative prayer for partition.

12. The schedule to the plaint is described wherein schedule 'A' is the entire property. While, schedule 'B' is the 2/3rd share of the property said to have been conveyed to the

plaintiff by the said Krishnamoorthy Naidu through Murugappa Chettiyar and from whom, the plaintiff said to have been purchased the property. While, 'C' schedule is the property which is a common area said to have been in possession of the defendant. In respect of 'C' schedule property, the relief of recovery of possession has sought for.

13. The period of the death of the Varadharajulu Naidu, the original owner of the property was in the year 1971 leaving behind his wife Subbammal, Jeyaraman and Krishnamoorthy Naidu are not in dispute. The defendants 2 to 6 are sons of the first defendant. While, The defendants 7 and 8 are the tenants in 'C' schedule property said to have been inducted into possession by the first defendant. Respondents 9 to 14 are the legal heirs of the deceased R3. While, R25 is the one of the legal heir of the first appellant who died pending appeal. Appellants and R25 are now stands for seeking the relief.

14. Ex.A5-Settlement Deed alleged to have been executed by Subbammal, W/o. said Velayathua Naidu in favour of her second son Krishnamoorthy Naidu and his son Arivoli. In view of the derivative nature of the title, Krishnamoorthy Naidu being a son of the deceased Varadharajulu Naidu is entitled to 1/3rd share and it is claimed that by virtue of Ex.A5 settlement deed, another 1/3rd share belongs to widow is also carried with him and accordingly, appellant/plaintiff claims to have purchased 2/3rd share by virtue of Ex.A3 sale deed in favour of the Murugappa Chettiyar. Since, there is no cloud over the title of the plaintiffs 1 and 2 because of Exs.A1 and A2 sale deed executed by Murugappa Chettiyar and 3 others, they have filed the suit for recovery of possession and with alternative for the partition.

15. For the sake of resolving dispute between the parties, it is suffice to refer to Ex.A3 dated 05.10.1973 sale deed executed by Krishnamoorthy Naidu and his son Arivoli in favour of Murugappa Chettiyar who in turn have sold the property in favour of plaintiffs 1 and 2 under Exs.A1 and A2.

16. At this juncture, Ex.A5-Settlement Deed dated 28.11.1974 by Subbammal in favour of Krishnamoorthy Naidu whereby, 1/3rd share are said to have been settled in favour of the Krishnamoorthy Naidu and Ex.A4 is the sale agreement entered between Murugappa Chettiyar and defendants 1 to 6 and Krishnamoorthy Naidu.

17. For the sake of convenience, it is to be stated that the suit property was purchased by the Varadharajulu Naidu from

Angammal under Ex.A11 on 06.07.1927. As per Ex.A12-Krishnamoorthy Naidu, first defendant Jeyaraman have executed an agreement of sale in favour of Murugappa Chettiyar on 19.06.1974 for which, the sons and the daughters of the first defendant-Jeyaraman Naidu had issued legal notice under Ex.A11 on 03.08.1974. On 15.02.1975, the first defendant along with the predecessor-in-title of the plaintiff have entered into an agreement of sale as per Ex.A4 assumes significance.

18. The suit properties originally belonged to Varadharajulu Naidu who died leaving his wife Subbammal-first defendant Jeyaraman Naidu and Krishnamoorthy Naidu. Thereafter, the wife of said Naidu -Subbammal executed a settlement under Ex.A5 (28.11.1974) in favour of his younger son Krishnamoorthy Naidu in respect of her 1/3rd share in the suit property. Along with said Krishnamoorthy Naidu, the first defendant also to execute a sale agreement on 15.02.1975 namely Ex.A4. This is in connection 'B' schedule property as the defendants 1 to 6 failed to execute the sale deed in favour of agreement holder Murugappa Chettiyar in respect of 'B' schedule property. Krishnamoorthy and his son Arivoli executed a sale deed on 15.10.1976 in favour of the said Murugappa Chettiyar in connection 'B' schedule property. Thereafter, the said Murugappa Chettiyar along with 3 others executed sale deed Exs.A1 and A2 dated 12.11.1984 whereby the plaintiff's have acquired title. Since the Virudhachala Naidu purchased the property from Angammal, it is his individual and separate property and on his death, all the 3 persons mentioned therein have obtained 1/3rd share in the suit property cannot be legally disputed.

19. At this juncture, the respondent/defendant contended that the alleged settlement Ex.A5 is not true and valid and sale deed Ex.A3 in favour of Murugappa Chettiyar is not valid. Consequently, Exs.A1 and A2 are not valid in law and hence, opposed for the prayer.

20. Admittedly, the original owner Varadharajulu Naidu who is the father of the first defendant Jeyaraman Naidu and Krishnamoorthy Naidu (vendor of the vendor the plaintiff died in the year 1975). Consequently, all the 3 persons namely Subbammal, Jeyaraman and Krishnamoorthy Naidu are entitled to 1/3rd share. On the legal validity of Ex.B5-Settlement Deed, P.W.2 was examined who is the attestor of the document, he has clearly deposed regarding attestation and execution of the document.

21. On perusal of the cross examination of P.W.2, a snap answer said to have been obtained as relating to age and mental

status. However, on a combine reading of the chief and cross-examination of P.W.2, the attessor, it is seen that the evidence of the attessor clearly demonstrate the execution of the settlement deed and mental status of the executrix namely Subbammal and hence, merely because snap answer has been obtained in the cross-examination, the entire chief and cross examination of the said attesting witnesses cannot be doubted upon. Furthermore, P.W.3 is a Village Officer of the village from where Varadharajulu Naidu hailed and P.W.3 has taken a keen interest in the welfare of all family members and also attested and signed the various documents made in the family and hence, without any valid reasons, his evidence cannot be thrown to wind.

22. On perusal of recital of Ex.A4 Agreement of Sale executed by the vendor of the vendor of the plaintiff along with the first defendant and his family members. All are signed the said Ex.A4 - sale agreement with one Murugappa Chettiyar (vendor of the plaintiff) wherein, there is a clear recital recording the settlement deed executed by Subbammal in favour of the Krishnamoorthy Naidu and hence, this Court is of the considered view that when the defendant and their sons and daughters have attested Ex.A4 and on 15.02.1975, they cannot go back and say and challenge the said Settlement Deed is another angle to negative the claim of the defendant/respondent herein.

23. On perusal of Ex.A4- Agreement of sale entered between (vendor of the plaintiff) along with the defendants 1 to 6 and the said Krishnamoorthy Naidu and his son, it is seen that, to note both parties composed their differences and settled by defining and demarcating the share of Krishnamurthy and clearly recording the same in the second agreement. Ex.A4, as per which, the separated portion of Krishnamurthy alone was agreed to be sold but signed by the 1st defendant as well as his sons defendants 2 to 6 not only for accepting the division and also joining in the sale deed.

24. In view of the nature of the dispute now raised by the defendant taking into consideration entirety of the circumstances and the executant of Ex.A4 namely the defendants 1 to 6 are all well educated and knowledgeable person, they could not have signed the paper without knowing the contents thereon and thus, Ex.A4 Agreement of Sale between the vendor of the plaintiff and the defendant and his sons on the other side could have reached only after considerable deliberation and settlement of all disputed of the parties as the first agreement Ex.A12 was given up after notice by defendants 2 to 6 under Ex.A13.

25. At this juncture, it remains to be stated that there was a first agreement which is marked as Ex.A12. On 19.06.1974,

entered between Murugappa Chettiyar (vendor of the plaintiff) and the first defendant and the Krishnamoorthy Naidu assumes significance wherein, the said agreement was given after issuance of legal notice by D2 to D6 herein under Ex.A3 and thus, this Court finds that the clear recital contained in Ex.A4 about the partition arrangement is only to bind the parties to assure that the vendor has given a clear title and therefore, in view of Ex.A13 legal notice (=Ex.B2), the earlier agreement under Ex.A12 was not given effect to and subsequently, Ex.A5 Settlement Deed came into existence by re-aligning rights of the parties thereafter. Ex.A4 Agreement of Sale with the vendor of the plaintiff along with the contesting defendants are entered upon is clearly demonstrated by the oral and documentary evidence before the Court.

26. Though the plea raised as to the proof of Ex.A5 Settlement Deed, for the reasons stated therein, coupled with the evidence of the attesor, P.W.3 regarding execution and attestation of Ex.B5 coupled with a fact that acknowledgment of Ex.B5 Settlement Deed (in favour of Krishnamoorthy Naidu by none other than the first defendant and 3 sons) under Ex.A4, this Court holds that both the Courts below have erroneously come to the conclusion that Ex.B5 was not proved in the manner known to law and the same is hereby stands vacated.

27. For the reasons stated supra, those findings are vacated and held that Ex.A5-Settlement Deed is held to be true and valid binding on the first defendant and consequently, Ex.A5 is held to be proved in the manner known to law.

28. It is a specific evidence of D.W.1 that Krishnamoorthy Naidu and his father alone entitled to share, they have equal share in the property and no other persons have any claim or suit property and further the suit property is the only property to be divided. Consequently, in view of the admission of D.W.1, in cross-examination, the purchaser viz plaintiff have acquired right, title and earliest of vendor Krishnamurthy and hence, they are entitled for partition relief.

29. In view of the discussion in the preceding paragraphs that the Settlement Deed in favour of Krishnamoorthy Naidu is held to be a valid and hence, the sale in favour of the plaintiff under Exs.A1 and A2 to the extent of $\frac{1}{3}$ and $\frac{1}{3} = \frac{2}{3}$ is valid and hence, the finding of the trial Court that the plaintiff is not entitled for alternative relief of partition does not have any ground to stand. Furthermore, in view of admission of D.W.1 except Subbammal and the first defendant-

Jayaraman and the Krishnamoorthy Naidu, there is no other person to claim the right over the property, both the Courts below appears to have committed a gross error in holding that absence of other sharers is fatal to the case. In this view, the same is unsustainable and the same is hereby vacated.

30. When an undivided interest of title owned by Krishnamoorthy Naidu was transferred to Murugappa Chettiar who in turn sold to the plaintiff, the transferee steps into shoes of his vendor and his right to file a suit for partition and accordingly, the contra finding recorded by both the Courts below is hereby liable to be vacated. Furthermore, even if the partition arrangement pleaded and recorded under Ex.A4 is not accepted by the Courts below, still the share of the Krishnamoorthy Naidu which is not extinguished must satisfy the plaintiff's claim.

31. Therefore, both the Courts below ought to have allowed the partition to the extent of 2/3rd share has claimed by the plaintiff are admittedly by the D.W.1 on the contra entire suit has been dismissed it is legally unsustainable.

32. The sale deeds Ex.A1 and A2 whereby, the plaintiffs have derived title from Murugappa Chettiar who had purchased the property under Ex.A3 from Krishnamoorthy Naidu and his son Arivoli. Exs.A1 to A3 are Sale Deeds which are not compulsorily attested document and hence, there is no need to call for the attesting witness to speak to depose regarding the attestation as it is required in case of a Will. Furthermore, Ex.A3 Sale Deed executed by one of the co-sharer namely Krishnamoorthy Naidu, brother of the first defendant in favour of Murugappa Chettiar was marked without any objection during the trial also assumes significance.

33. In view of the discussion in the preceding paragraphs, this Court finds the order passed by the Lower Appellate Court is not sustainable in law. All the substantial questions of law are answered in confirmative in favour of the appellants and the appellants are entitled for the decree of partition.

34. Accordingly,

(i) This Second Appeal is allowed-in-part.

(ii) The judgments and decrees of the First Appellate Court and Trial Court are set aside. O.S is stands decreed in respect of alternative prayer only.

(iii) No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Additional District Judge, Nagapattinam,
2. The Additional Sub-Judge, Mayiladuthurai.

+2 cc to Mr.S.Sadasivam Advocate sr19640

+1 cc to Mr.S.Sounthar Advocate sr97885

+1 cc to Mr.N.Pragasam Advocate sr97673

S.No.53 of 2001

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