

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.07.2019

CORAM:

THE HON'BLE MR.JUSTICE N.SESHASAYEE

S.A.NO.95 OF 2004

1.Rathinasami ... Plaintiff/Respondent/  
Appellant

2.Mangalalakshmi

3.G.Jeyavel

4.G.Kalaiselvi

5.G.Kavitha

...Appellants

[Appellants 2 to 5 brought on record  
as LRS of the deceased R2 Vide order  
of Court dated 15/07/2019 made in  
CMP.No.5228 to 5230/2016 in  
SA.No.95/2004 (NSSJ) ]

Vs.

1.Ezhumalai

2.Gunasekaran(died)

3.Damodaran

... Defendants 1 to 3/  
Respondents 2 to 4/Respondents

4.Abdul Basudeen

... Defendant/Appellant/  
Respondent

Prayer:-

Second Appeals filed under Section 100 of Civil Procedure Code against the Judgment and Decree in A.S.91/93 on the file of the Subordinate Court, Cuddalore and dated 12.11.93 in reversing the well considered judgment and decree in O.S.196/89 on the file of the Court of the Additional District Munsif, Cuddalore and dated 18.12.1993.

For Appellant : Mr.J.Adhinarayanan for  
Mr.V.Raghavachari

For Respondents: Mr.T.S.Baskaran for R4  
R1 - Not ready in notice  
R2 - died  
R3 - Exparte

## JUDGMENT

This appeal was originally laid by the plaintiff, who is now dead, against his two sons (the first and second defendants), and their alienees, namely, defendants 3 and 4, for partition of his alleged 1/3<sup>rd</sup> share in the suit properties. There are four items of suit properties and the plaintiff/father contended that they are the ancestral properties in which he and his two sons had right. The first defendant had sold the suit properties to the defendants 3 and 4 and therefore, the suit came to be laid. Parties would be referred to by their rank before the trial Court.

2.The suit was contested only by the alienees of the first defendant and not by defendants 1 and 2. Their contention was that there was an oral partition between the father and his two sons, in which the certain properties came to be allotted to the share of the first defendant.

3.1 During trial, the plaintiff has examined himself as P.W.1. He also examined certain Ramalingam as P.W.2. For the defendants, both defendants 3 and 4 were examined respectively as D.W.2 and D.W.1 and they have also examined one Chandira Kasu. To prove the oral partition, the contesting defendants produced Ext.B-1 and Ext.B-2, both of which are mortgage deeds, executed by the first defendant, in favour of the fourth defendant. In Ext.B-1, the plaintiff was one of the attestors. Subsequently, as the first defendant could not pay the debts to the fourth defendant, he executed a sale deed(Ext.B.3) dated 08.01.1987 in favour of the latter. So far as the third defendant is concerned, he contends that the first defendant has executed Ext.B.9 sale deed in his favour.

3.2 The trial Court held that the suit properties are ancestral in character, and that mere attestation by one of the co-sharers would not amount to an admission of an oral partition and granted a decree of 1/3<sup>rd</sup> share. It may be mentioned here that, P.W.1 in his testimony before the Court had adduced that besides the properties involved in the present suit, there are other properties available for partition. This aspect however was not taken note of by the trial Court. Aggrieved by the decree of the trial Court, the fourth defendant preferred first appeal in A.S.No.91 of 1993 before the Sub-Court, Cuddalore. The first Appellate Court reversed the finding of the trial Court on two grounds;

- a) That the suit is laid for partial partition, for which it relied on the testimony of P.W.1.

b) That Ext.B.1 indicates that there has been a partial oral partition between the parties.

4. Aggrieved by the same, the plaintiff has preferred the present appeal. During the pendency of the second appeal he died. Therefore, his two sons, the defendants 1 and 2 became his heirs. It is not known if the plaintiff had left behind any class 1 female heirs. While so, both defendants 1 and 2 have died. The legal heirs of the second defendant came to implead themselves as heirs of the plaintiff.

5. This appeal is admitted on the following substantial questions of law:

Whether the Court below has erred in law in failing to see that the joint family is presumed to be joint unless there is evidence to prove the contrary and that the burden lies on the 3rd and 4th defendants to prove the partition and they having failed to lodge their burden, whether the suit ought not to have been decreed as prayed for?

6. The learned counsel for the appellants submitted that when the properties are ancestral in character, it is not possible for any of the sharer to sell his property and hence, even if the first defendant had sold some properties under Ext.B.3 and Ext.B.9, respectively to the fourth and the third defendants, still they do not bind the share of the plaintiff.

7. Refuting the same, the learned counsel for the fourth defendant would argue that the very contention of the appellants counsel overlooks the deposition of the plaintiff as P.W.1, in which he had deposed that there existed other properties available for partition. It is settled law that suit for partial partition would not lie. It is also brought to notice of this Court that the first defendant, the executant of sale deeds, Ext.B.3 and Ext.B.9 also has died without issues.

8. The status of the present appellants notwithstanding, they cannot improve upon the evidence available on record. Admittedly, the plaintiff is dead, and he had deposed that there are properties other than the suit properties available for partition. Hence, primarily the suit for partition has to fail. So far as the sale of the suit properties is concerned, since the father had died interstate, the shares would divide equally between his two sons since the properties are admitted as ancestral property, irrespective of whether there was an earlier oral partition as contended by the contesting defendants. The properties sold by the first defendant could now be conveniently allotted to his purchasers and this necessarily has to be worked

out in the final decree proceedings, even if there should be a decree for partition. In other words, it is just going to be an academic exercise to consider the case of the appellants at this stage, and this court is not inclined to engage in that exercise, more so when the suit itself is bad for seeking partial partition.

9. Inasmuch as the suit is laid only for partial partition, this appeal cannot be maintained and the appeal is dismissed and the judgment and Decree in A.S.91 of 1993 on the file of the Subordinate Court, Cuddalore reversing the judgment and decree in O.S.196 of 1989 on the file of the Court of the Additional District Munsif, Cuddalore is upheld. No costs.

Sd/-  
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

tsg

To:

1. The Subordinate Court,  
Cuddalore.
2. The Additional District Munsif,  
Cuddalore.
3. The Section Officer  
VR Section, High Court,  
Madras.

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.64948  
+1cc to Mr.T.S.Baskaran, Advocate, S.R.No.64874

S.A.No.95 of 2004

PVS(CO)  
CS/14/12/2020

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