



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S. (MD) .No.73 of 2019

and

C.M.P. (MD) .No.4105 of 2019

B.Mahendran

... Appellant/5th Defendant

Vs.

1.K.Rani (died)

2.S.Sargunam

3.S.Senthil Kumar

4.S.Selvaraj

5.S.Radha

... Respondents 2 to 5/Defendants 1 to 4

6.K.Chandrakandham

7.K.Rajalakshmi

(RR6 and 7 were already on record and

recorded as LRs. of deceased R1 vide

Court order dated 04.12.2019 made in

C.M.P.No.4104 of 2019 in A.S.No.73 of 2019)

... Respondents 6 & 7/Defendants 6 & 7

Prayer: The Appeal filed under Section 96 of Civil Procedure Code against the judgment and preliminary decree, dated 01.12.2018 made in O.S.No.4 of 2017 on the file of the Additional District Court, Fast Track Court, Theni.

For Appellant: Mr.G.Gomathi Sankar for
M/s.Veera Associates

For R2 to R5 : No appearance

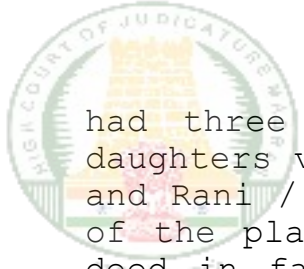
For R6 & R7 : Mr.V.Chandrasekar

J U D G M E N T

This appeal has been filed against the preliminary decree passed by the trial Court.

2. The brief facts leading to the filing of this appeal is as follows:

The plaintiff and the defendants 6 and 7 are the sisters and the defendants 1 to 4 are the legal heirs of one Subburaj / the brother of the plaintiff. The 5th defendant is the purchaser of the property through Subburaj. The suit property originally belonged to one Kandhasamy Naidu, through registered sale deed in the year 1918. He had only one son viz., Alagarsamy Naidu. Alagarsamy Naidu had three sons viz., Krishnasamy Naidu, Kandhasamy and Durairaj. Kandhasamy and Durairaj died as bachelors. Therefore, the said Krishnasamy has become the owner of the entire suit property and he



had three sons viz., Subburaj, Subbaiah and Selvaraj and three daughters viz., Chandrakandham, Rajalakshmi / the defendants 6 and 7 and Rani / the plaintiff therein. The said Krishnasamy / the father of the plaintiff, 6th and 7th defendants, had executed a settlement deed in favour of his three sons, on 19.08.1965. Among the three sons, Subbaiah and Selvaraj were died intestate as bachelors. Therefore, remaining son Subburaj said to have executed a power of attorney in favour of one Bethanasamy. The said Bethanasmy has sold the property in favour of the fifth defendant. As the Selvaraj and Subbaiah died intestate, the plaintiff being the Class II legal heir, filed a suit for partition claiming the share.

3. The fifth defendant alone has filed a written statement contending that the release deed executed by the defendants 6 and 7 in favour of the plaintiff on 18.02.2011, is a fraudulent document and it was created by the plaintiff and not binding on the fifth defendant. According to him, he has purchased the property and he is in possession of the property. The defendants 6 and 7 had received the share amount in the suit property and the suit is barred by limitation.

4. It is the case of the 6th defendant that they are Class II legal heirs and they are entitled to share in the suit property.

5. On the basis of the above pleadings, the following issues are framed:

1. Whether the plaintiff and other sisters aware and gave consent to sell the properties to 5th defendant?

2. Whether the defendants 6 and 7 have relinquished their share in favour of plaintiff through the registered release deed dated 18.02.2011?

3. Whether Subburaj had absolute right in the suit property to execute the Power Deed dated 13.09.2004 in favour of Bethanasamy?

4. Whether the 5th defendant has got absolute right over the suit property through the sale deeds dated 27.10.2006, 01.11.2006, 10.11.2008 and 21.01.2009?

5. Whether the plaintiff is entitled to $\frac{3}{4}$ share ie., 83.49 cents out of 111.32 cents of her brothers Subbiah and Selvaraj?

6. Whether the plaintiff is entitled to preliminary decree for partition of $\frac{1}{2}$ share in the suit property and for consequential injunction?

7. Whether the plaintiff is entitled to the relief of declaration as prayed for?

8. To what other relief and cost, the plaintiff is entitled?

<https://hcservices.courts.gov.in/hcservices/> 6. Before the trial Court, on the side of the plaintiff, P.Ws.1 and 2 were examined and Exs.A1 to A13 were marked and on the side of the defendants, D.Ws.1 and 2 were examined and Exs.B1 to B6 were



marked.

7. The trial Court has decreed the suit and passed a preliminary decree for partition of the plaintiff's $\frac{3}{4}$ th share i.e., 83.49 cents out of 111.32 cents belonged to Subbaiah and Selvaraj and also passed declaration that the power of attorney dated 13.09.2004, executed by Subburaj in favour of Bethanasamy and the sale deeds dated 27.10.2006, 01.11.2006, 10.01.2008 and 21.01.2009 are null and void. Challenging the same, the 5th defendant has filed an appeal.

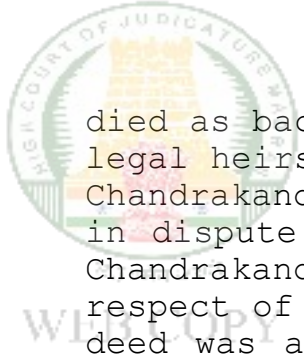
8. The learned counsel appearing for the appellant would submit that the suit itself is filed for partition and the share worked out by the trial Court is not proper and not as per law. Hence, it is his contention that $\frac{1}{3}$ rd share in the entire suit property, as per the gift settlement deed, after the death of his own brother, $\frac{2}{3}$ rd share again will be divided among the Subburaj and three sisters. Now, his contention is that the plaintiff also died and hence, the share has to be worked out, as per the entitlement. Therefore, the judgment and decree of the trial Court in setting aside the entire sale deed and power of attorney, is not valid.

9. The learned counsel appearing for the respondents would submit that the shares worked out by the trial Court is not proper. Now, in view of the subsequent development, the plaintiff is entitled to $\frac{1}{2}$ share and the 5th defendant is entitled to $\frac{1}{2}$ share in the suit property. Accordingly, he has no objection for passing a preliminary decree in respect of the shares of the suit property.

10. In view of the above, now the point for consideration in this appeal is

- (i) Whether the shares worked out by the trial Court is correct? and
- (ii) Whether the finding of the trial Court in setting aside the sale deed executed by one of the sharer is null and void is valid in the eye of law?
- (iii) To what relief entitled?

11. It is not in dispute by both sides even in the pleadings and also in the argument of this Court that originally the suit property owned by Kandasamy Naidu and he had only one son viz., Alagarsamy Naidu. The said Alagarsamy Naidu had three sons viz., Krishnasamy Naidu, Kandhasamy and Durairaj and his two sons viz., Kandhasamy and Durairaj were died as bachelors. Therefore, the said Krishnasamy become entitled to the entire suit property. He had three sons viz., Subburaj, Subbaiah and Selvaraj and three daughters viz., Chandrakandham, Rajalakshmi and Rani. It is also not in dispute by both sides that the said Krishnasamy has executed a settlement deed in respect of the entire suit property in favour of his three sons, which is marked as Ex.A1. It is an admitted fact that two sons of Krishnasamy viz., Kandhasamy and Durairaj were



died as bachelors. On their death, $2/3^{\text{rd}}$ share devolved upon Class II legal heirs viz., their own brother Subburaj and their sisters viz., Chandrakandham, Rajalakshmi and Rani equally. This fact is also not in dispute. It is also an admitted fact that his two sisters viz., Chandrakandham and Rajalakshmi have executed a release deed in respect of their shares in favour of the plaintiff Rani. The release deed was also filed as Ex.A4. The above said Subburaj has given a power of attorney in favour of one Bethanasamy in respect of the entire suit property. Based on the power of attorney, the fifth defendant has purchased the property. At this stage, the suit came to be filed by one of the daughter of Krishnasamy viz., Rani / the plaintiff. Now, it is also admitted by both sides that the plaintiff herein also died as a bachelor and leaving behind her sisters and his brother Subburaj. Therefore, now the entire $2/3^{\text{rd}}$ share originally acquired by Rani will be again divided among two sisters and one brother Subburaj as legal heirs in equal shares.

12. Such being the position, in the entire suit properties, the Subburaj have already $1/3^{\text{rd}}$ share, as per the settlement deed and after the death of his two brothers and his one sister Rani / plaintiff, he will get $1/3^{\text{rd}} + 1/6^{\text{th}}$ share. Therefore, he is entitled to $\frac{1}{2}$ share in the entire suit properties. Likewise, the respondents 6 and 7, who are the sisters of Subburaj, are also entitled to $\frac{1}{2}$ share in the suit property. This Court is of the view that the shares work out by the trial Court is not correct and the preliminary decree is passed for dividing the suit property in two equal shares and allot one such share to 6th and 7th respondents together and another $\frac{1}{2}$ share to the 5th defendant, on payment of necessary Court fee by the respective parties. It is also made clear that the finding of the trial Court in setting aside the sale deed executed by Subburaj entirely is not in accordance with law. It is also settled that the co-owner is entitled to deal with these properties by way of sale or mortgage etc. The stranger purchaser will get a right of his vendor to seek for partition, though he is not entitled to get exclusive possession, but he steps into the shoes of the vendor, to seek for partition.

13. Such being the matter, the finding of the trial Court in setting aside the sale deed in entirety is not correct. Accordingly, such finding alone is set aside and the preliminary decree is passed for dividing the suit property into two equal shares and $\frac{1}{2}$ share shall be allotted to 6th and 7th respondents together and $\frac{1}{2}$ share shall be allotted to the 5th defendant.

14. With the above modification, the appeal is allowed. No costs. Consequently, the connected Miscellaneous Petition is closed.

15. It is also brought to the notice of this Court by both sides that the final decree proceedings is almost over and it is pending for passing a decree and the Commissioner has divided the property into two equal shares.



16. In view of the above, the trial Court is directed to pass a final decree in terms of the preliminary decree passed in this appeal, taking into consideration of the division made by the Commissioner.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

Akv

To
The Additional District Judge,
Fast Track Court,
Theni.

Copy to: The Section Officer, V.R.Section (2 copies)
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.V.CHANDRASEKAR, Advocate (SR-147[F] dated 03/01/2020)
+1 CC to M/s.VEERA ASSOCIATES, Advocate (SR-331[F] dated 06/01/2020)

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