



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 09.12.2020

CORAM:

THE HONOURABLE MR.JUSTICE M. GOVINDARAJ

AS(MD).No. 207 of 2019 and

CMP(MD).No.10463 of 2019

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S. Murugesan : Appellant / Plaintiff
Vs.

1. N. Sangili servai
2. S. Muthunayagam
3.S.Kannan @ Nagendran
4.N.Muthulakshmi : Respondents / Defendants

Prayer: Appeal Suit filed under Section 96 of the Code of Civil Procedure code against the Judgment and Decree, dated 27.03.2019 passed in O.S.No.132 of 2013, on the file of the IV Additional District Court, Madurai.

For appellant : Mr. M. Ramasubramanian
For respondents 1 to 4 : Mr. M. Saravanan

JUDGMENT

This appeal suit is directed against the Judgment and decree passed by the Court below in a suit for partition.

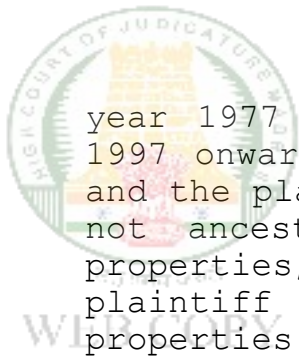
2. The appellant herein is the plaintiff and the respondents 1 to 4 are the defendants in the suit.

3. According to the appellant / plaintiff, one Nagu Servai, who was his grand father, acquired the properties. From him his father viz., first respondent / first defendant inherited the properties.

4. There are two children viz., the plaintiff and fourth defendant through the first wife and two children viz., second and third defendant through the second wife. Till the year 1995, the plaintiff and the defendants were living together as a joint family and from the year 1995 onwards, the plaintiff had come out of the family. The first defendant, father who was giving share of the income derived from the properties till recently. But, the second wife of first defendant changed the patta in the name of the defendant Nos. 2 and 3 and she is trying to defeat his rights to 1/5th share in the ancestral properties. The appellant / plaintiff has caused a legal notice to the defendants on 13.03.2013, which was acknowledged on 15.03.2013. But, no reply was forthcoming. Therefore, he filed a suit for partition claiming 1/5th share.

5. Countering the submission, the first defendant has filed a written statement that the property was already partitioned in the

<https://hcservices.ecourts.gov.in/hcservices/>



year 1977 by virtue of a partition deed, dated 03.10.1997. From 1997 onwards, division of status arose between the first defendant and the plaintiff. The properties were self acquired properties and not ancestral properties. Even though, it was not ancestral properties, the first defendant had given the share of the plaintiff as well as the fourth defendant retaining certain properties for mother. Since the properties were already partitioned, there cannot be another partition during the life time of the first respondent. Secondly, even after the partition, they settled two more properties by way of settlement deed in favour of the plaintiff. Therefore, the properties are not liable for partition and the suit is liable to be dismissed.

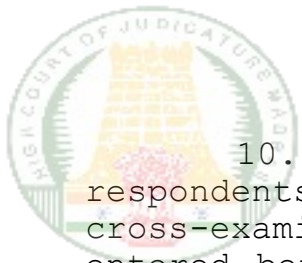
6. The trial Court has framed the following issues:

- 1) Whether the plaintiff got separated from the joint family in the year 1977?
- 2) Whether the 1st defendant and his 2nd wife purchased property out of the income derived from the ancestral nucleus?
- 3) Whether the plaintiff has got 1/5th share in the suit property?
4. To what relief?

7. Before the Trial Court, on the side of the plaintiff two witnesses were examined as PW.1 and PW.2 and marked six documents as Exs.A1 to A6. On the side of the defendants, DW.1 and DW.2 were examined and 17 documents were marked as Exs.B1 to B17.

8. After considering the evidence, both oral and documentary, the trial Court came to conclusion that the plaintiff is not entitled to reopen the partition, which has already been acted upon and he is not entitled to 1/5th share as claimed by him and dismissed the suit.

9. The learned counsel appearing for the appellant would contend that the so called partition, dated 03.10.1997 is an unregistered document and therefore, it cannot be received in evidence. Further, the said partition deed was not acted upon. Therefore, the trial Court had erred in receiving an unregistered document in evidence and relying on that for arriving at that decision. Furthermore, Exs. B2 and B4 - sale deed, dated 11.07.1979 and 13.10.2008 respectively was jointly executed by the plaintiff and his father and therefore, it is clear that the partition deed was not acted upon. Insofar as the property given to the fourth defendant, one of the items was sold in favour of the third party on 8.12.2008. In that event, the trial Court should have considered that the partition deed is only an nominal document. But, actually partition has not taken place. Therefore, the contention is made that by virtue of birth the appellant / plaintiff as a coparcener is entitled to partition and seek for setting aside the Judgment passed



10. Per contra, the learned counsel appearing for the respondents / defendants would submit that the plaintiff in his cross-examination has categorically admitted that a partition was entered between himself, his father and his sister on 03.10.1997. On the basis of the partition deed, he sold two properties vide Exs.B3 and B13, wherein, it is categorically recited that he has inherited the property from his father through the partition deed and conveyed the same to the third party. Likewise, he had sold some other properties also. At the time of partition in the year 1987, "A" schedule property was allotted to the father, "B" schedule property was allotted to the plaintiff and the "C" schedule property was allotted to 4th defendant.

11. Even though the plaintiff / appellant claims that all the properties are ancestral properties, he had chosen to claim partition only in respect of "A" schedule property and conveniently leaving out the other properties of the family. The partition which has happened on 03.10.1987 was acted upon and that the suit is bad for partial partition. Therefore, he would pray for dismissal of the appeal preferred by the appellant.

12. I have considered the submissions made on either side and perused the materials placed before this Court.

13. On the basis of the submission made by the learned counsel appearing on either side, the following points have to be taken into consideration:

1) Whether un-registered partition deed can be received in evidence?

2) Whether the partition can be reopened again?

3) Whether the plaintiff is entitled to 1/5th share as claimed by him?

14. At the outset, the evidence of the plaintiff / appellant categorically show the factum of partition on 03.10.1987. Even though it is contended by the plaintiff that it is an ancestral property, he has not adduced any evidence to prove to that it is an ancestral property. The plaintiff had sold two properties by virtue of Exs. B3 and B16, wherein, he had recited that the said property was in possession and enjoyment of his father and after the partition, he came to be in possession and enjoyment through partition, as such, he is entitled to sell the property. Therefore, the fact that there was a partition between the parties and the partition deed, dated 03.10.1987 was acted upon by the appellant and others. Even assuming that there was no partition at all as contended by him, the plaintiff cannot sell the ancestral properties in his individual capacity to the detriment of right of other coparceners. The plaintiff had also no grievance or complaint against the settlement made by the father, the first defendant herein. By virtue of Exs.B14 and B17, the ancestral properties were



coparceners and that itself show that the suit properties are not ancestral properties, but, joint family properties earned by the father. By accepting the settlement, the plaintiff acknowledges the title of the first defendant and the contention that they are ancestral properties cannot be sustained.

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15. The trial Court has elaborately discussed the evidence particularly, the admission made by the plaintiff as to partition and had come to the conclusion that the property is not liable for partition. The property has already been partitioned and it cannot be reopened. The said finding is legally tenable. Once the division of status comes between the plaintiff and the joint family and the plaintiff has taken his share of the properties, he cannot claim partition once again against the properties allotted to the share of other coparceners. By severing his relationship with the joint family and by taking away his shares, through partition, the other properties become the properties of the allotted co-sharers in their independent capacity. The appellant can have no right over the same. Further, from the evidence of this appellant it is found that there are other properties originally belonged to the joint family. After selling away the properties, the appellant cannot claim only in respect of part of the joint family properties. The plaintiff has conveniently left out the properties allotted to his share. Even assuming that there was no partition and the partition deed, executed on 03.10.1987 was nominal, all the properties belonging to the joint family should be included. Therefore, the suit is bad for partial partition and the plaintiff is not entitled to partition of other co-sharers properties. The Courts below have considered all these aspects and arrived at the right decision.

16. Therefore, I do not find any discrepancy in the Judgment and Decree passed by the Court below. The appeal suit merits no consideration and accordingly, the same is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CSII)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

trp

Note : In view of the present lock down owing to COVID - 19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.



To

1. IV Additional District Judge, Madurai.
2. The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.

+1CC to Mr.R.Subramanian,Advocate in Sr.No.24792 dated
10/12/2020

AS (MD) .No. 207 of 2019 and
CMP (MD) .No.10463 of 2019
09.12.2020

NA (CO)
KB (27.01.2021) 5P 5C