



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.02.2020

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CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S. (MD) .No.76 of 2018

and

Cross Obj. (MD) .No.22 of 2019

A.S. (MD) .No.76 of 2018

S.Ganesan

... Appellant

Vs.

1.M.Saraswathi

2.Anbu

3.Srithar

4.Rajkumar

5.N.Seeni Iburahmsha

6.M.Raja

... Respondents

Prayer : The Appeal is filed under Section 96 of Civil Procedure Code against the judgment and decree made in O.S.No.44 of 2011 on the file of the Additional District Judge, Ramanathapuram, dated 01.11.2017.

For Appellant	:	Mrs.P.Yasmin Begum
For R1 to R3	:	No appearance
For R4	:	Mr.A.Arumugam for Mrs.R.Yamuna
For R5 & R6	:	Mr.V.Nagarajan

Cross Obj. (MD) .No.22 of 2019

Rajkumar

... Cross Appellant

Vs.

1.S.Ganesan

2.M.Saraswathi

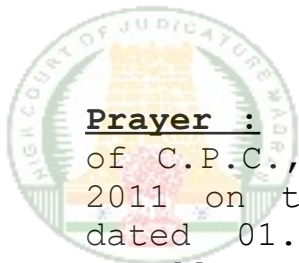
3.Anbu

4.Srithar

5.N.Seeni Iburahmsha

6.M.Raja

... Respondents



Prayer : The Cross Objection is filed under Order 41 Rule 22(2) of C.P.C., against the judgment and decree made in O.S.No.44 of 2011 on the file of Additional District Judge, Ramanathapuram, dated 01.11.2017, in which the notice served to the cross appellant on 23.06.2018.

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For Cross Objectors : Mr.A.Arumugam
for Mrs.K.Yamuna
For Respondent No. : Mrs.P.Yasmin Begum
For RR2 to 4 : No Appearance
For RR5&6 : Mr.V.Nagarajan

C O M M O N J U D G M E N T

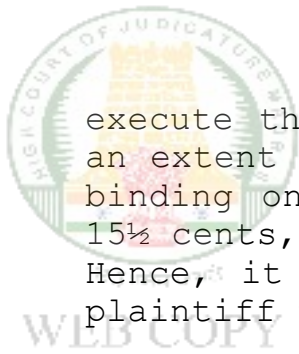
The appeal suit has been filed as against the judgment of the trial Court, dismissing the suit filed by the plaintiff for partition. The Cross Appeal has been filed by the fourth defendant claiming 1/9th share.

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

The suit property originally belonged to the mother of the plaintiff and the first defendant one Kannamma. The plaintiff's another sister is one Meenal. Kannamma died in the year 1998. The suit property is in possession of the plaintiff and the defendants 1 to 4. When the matter stood thus, the plaintiff has executed a general power of attorney on 07.03.2007, in favour of the first defendant for the purpose of maintaining the suit property, without any power to sell the property. However, the first defendant has sold the part of the suit property to the 5th defendant and the first defendant has not paid any consideration to the plaintiff. Similarly, the first defendant has also executed a sale agreement in favour of the 6th defendant. The plaintiff has not received any consideration either from the first defendant or from the 5th and 6th defendants. When the matter stood thus, the 5th and 6th defendants had encroached the suit property. Hence, the suit has been filed by the plaintiff for partition claiming 1/3rd share.

3. The 4th defendant is one of the sons of Meenal, who is the daughter of Kannamma, and he has filed a written statement to the effect that the suit property originally belonged to Kannamma and after her death, they are entitled to get share.

4. The 5th defendant has filed a written statement contending that he has purchased to an extent of 28 cents of land from the first defendant. It is stated by the fifth defendant that Kannamma had no daughter named by Meenal. Therefore, it is denied that the defendants 2 to 4 are the legal heirs of the said Meenal. The plaintiff has given absolute power to the first defendant to



execute the sale deed. As such, the 5th defendant has purchased to an extent of 28 cents for valuable sale consideration. The same is binding on the plaintiff and others. In respect of the remaining 15½ cents, an agreement was entered in favour of the 6th defendant. Hence, it is the contention that the suit has been filed by the plaintiff with the collusion of the defendants 1 to 4.

5. The 6th defendant has filed a written statement contending that he is an agreement holder for 15½ cents. It is his contention that he has entered into an agreement with the first defendant for purchasing of the property for a total sale consideration of Rs.3,00,000/- and paid a sum of Rs.2,50,000/- towards advance sale consideration. He has already filed a suit in O.S.No.104 of 2011 before the Sub Court, Ramanathapuram for specific performance and obtained a decree as against the first defendant. The plaintiff has suppressed the above facts and filed the suit. Hence, he prayed for dismissal of the suit.

6. On the basis of the above pleadings of the parties, the trial Court has framed the following issues:

(i) *Whether the power of attorney deed executed by the plaintiff in favour of the 1st defendant on 07.03.2007 was only for maintenance of the suit property?*

(ii) *Whether the plaintiff is entitled for declaration that the sale deed executed by the 1st defendant in favour of the 5th defendant on 20.11.2008 in respect of 25 cents of the suit property is null and void?*

(iii) *Whether the suit property is in joint possession and enjoyment of the plaintiff and defendants 1 to 4?*

(iv) *Whether the Court fee paid is correct?*

(v) *Whether the details of legal heirs of Kannamma narrated in the plaint is correct? Whether Meenal was the daughter of Kannamma?*

(vi) *Whether the defendants 2 to 4 are legal heirs of Kannamma?*

(vii) *Whether the plaintiff is entitled for partition as claimed?*

7. On the side of the plaintiff, P.W.1 was examined and Exs.A1 to A7 were marked, on the side of the defendants, D.Ws.1 to 3 were examined and Exs.B1 to B16 were marked and the proceedings of the Tahsildar, Thiruvadanai was marked as Ex.X1.

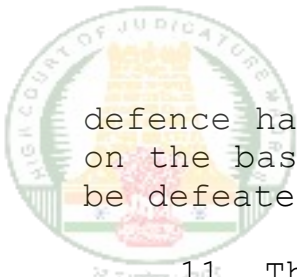
8. The trial Court, on appreciation of evidence, answered the issue No.V in favour of the cross-appellant herein. However, the trial Court has answered the other issues against him and dismissed the suit in totality and the trial Court has also held



that the 4th defendant/cross-appellant is not entitled for claiming partition. Aggrieved over the same, the present appeal came to be filed.

9. The main contention of the learned counsel for the appellant/plaintiff is that the power of attorney was executed only for the maintenance of the property and the first respondent/first defendant has fraudulently sold 28 cents to the 5th defendant and entered into an agreement in respect of the remaining property in favour of the 6th defendant. Hence, it is his contention that the legal heirship has been suppressed and the legal heirship certificate has been fraudulently obtained by the first defendant in collusion with the 5th defendant. Ex.B7 is the copy of the legal heirship certificate and the same has been fraudulently obtained, which has been established in evidence. Hence, it is his contention that since the power did not confer any right to convey the property, the sale in favour of the 5th defendant is not valid in the eye of law. Hence, he prayed for allowing the appeal.

10. Whereas, it is the contention of the learned counsel for the cross-appellant that the evidence of P.W.1 and D.W.3, and Exs.A6 and A7 clearly proves the relationship of parties. Their evidences clearly show that Kannamma had the daughter viz., Meenal. The first defendant has suppressed the legal heirship and obtained a false legal heirship certificate under Ex.B7. Ex.X1/the proceedings of the Tahsildar, Thiruvadanai filed before the trial Court clearly show that Ex.B7 was created only for the purpose of sale of the property, to show as if Kannamma had only two legal heirs. It is his contention that Ex.X1 clearly indicated that on proper enquiry, legal heirship certificate was issued, wherein, Meenal is one of the daughters of Kannamma. Therefore, merely because the first defendant had played fraud, the rights of the other legal heirs cannot be defeated. However, the purchaser, who is the third party to the family, except contending that the cross-appellant is not the legal heir of Kannamma, no material whatsoever filed to substantiate the same. Further, he has purchased the property merely on the basis of representation made by the first defendant and he has not made any reasonable enquiry as a purchaser to find out who are the legal heirs. Admittedly, the property is owned by Kannamma. Therefore, the purchaser ought to have made a reasonable enquiry as to who are the legal heirs. In the absence of any evidence to show that only after such a reasonable enquiry, the property has been purchased, it cannot be said that he is a *bona fide* purchaser. Hence, it is his contention that the trial Court having found that the cross appellant is the legal heir of Kannamma non-suited him only on the ground that some other property is not included. Hence, the plea of partial partition has never been raised before the trial Court. No such



defence has been taken in the written statement. Therefore, merely on the basis of stray admission, the rights of the parties cannot be defeated. Hence, he prayed for allowing the appeal.

11. The learned counsel for the respondents in the main appeal submitted that Kannamma has died in the year 1998 and the cross appellant and his brother made a claim in the year 2016. But, no document was filed to show that they are the legal heirs of Kannamma. Except Ex.A6, which was obtained later, no other document to show that they are the legal heirs of Kannamma. Whereas, the first defendant has sold the property on the basis of the power of attorney. Such being the matter, the legal heirship certificate obtained by them is created only for the purpose of the case. It is his further contention that the 6th defendant has already filed a suit for specific performance as against the first defendant and obtained a decree in his favour. Only to defeat the above decree and to defeat the sale, the Cross Appeal has been introduced. Hence, he has submitted that the trial Court has analysed the evidence properly and dismissed the suit. It is his contention that P.W1 himself admitted that there are other two properties, which were already partitioned. There was no evidence to show that Meenal was allotted any share in the suit property and Ex.X1 covering letter clearly show that even without saying about Ex.B7, it is stated as if the signature found in Ex.B7 is not that of the Tahsildar. These facts clearly show that the legal heir certificates have been created only for the purpose of the case. Hence, according to him, the respondents are the *bona fide* purchasers of the property. Hence, he prayed for dismissal of the appeal.

12. In the light of the above submissions, now, the points for consideration in these appeals are as follows:

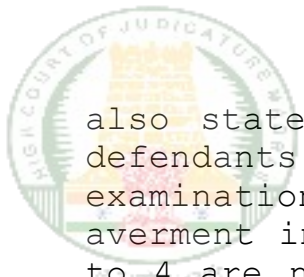
- (i) Whether the original owner Kannamma had only two legal heirs?
- (ii) Whether the defendants 2 to 4 are the legal heirs of Kannamma?
- (iii) Whether the sale made by the first defendant is not binding on the appellant/plaintiff?
- (iv) Whether the cross-appellant is entitled to partition of the share?
- (v) What relief the parties are entitled to?

13. The suit has been filed claiming partition of 1/3rd share. It is not in dispute by both sides that the property originally purchased by Kannamma. Though it is claimed for 50 cents, the suit has been filed to an extent of 43 ½ cents. Be that as it may, the title of the property is not in dispute. It is the contention of the plaintiff that after the death of Kannamma, the plaintiff, the first defendant and the legal heirs of his sister Meenal were in



possession of the property. When the matter stood thus, the plaintiff has executed a power of attorney to deal with the property in favour of the first defendant. Whereas, the first defendant, taking advantage of the power of attorney, has sold the property in favour of the 5th defendant and also entered into an agreement of sale, in respect of the remaining property, in favour of the sixth defendant. Hence, it is the contention of the appellant/plaintiff that the sale made in pursuant to the power of attorney is not binding on the plaintiff. The contention of the appellant cannot be countenanced for the simple reason that admittedly, the execution of the power of attorney is not disputed by the plaintiff. The first defendant has executed a sale in pursuant to the power of attorney in favour of the 5th defendant. It is to be noted that both the plaintiff and the first defendant have suppressed the availability of some other legal heirs in the power of attorney. In fact, Ex.B7 filed on the side of the defendants clearly indicated that the legal heirship certificate was obtained by the first defendant, at the time of sale to show as if only two legal heirs were left by Kannamma. Therefore, once the power of attorney was executed, now it cannot be complained by the plaintiff that any sale made pursuant to the power of attorney is not binding on him. The power of attorney, which is marked as Ex.A3, makes it clear that it is a general power of attorney. It is not a specific power of attorney and power has been given to deal with the property including the alienation. Therefore, unless the execution of the power deed is suffered by fraud or undue influence or coercion etc., it cannot be said that the sale executed pursuant to the power deed is not binding on the plaintiff. Merely because, the consideration is said to have been not paid by the first defendant, that cannot be a ground to annul the entire transaction. Even assuming that the first defendant appears to have cheated the plaintiff, it is for the plaintiff to take appropriate action against the first defendant legally for recovery of money, if the consideration is not paid by her. Therefore, without doing so, he cannot avoid the entire sale made in pursuant to the power of attorney. Accordingly, the contention of the appellant cannot be countenanced.

14. Now, with regard to the legal heirship issue, it is the definite case of the plaintiff that her mother had three children viz., the plaintiff, the first defendant and one Meenal. The defendants 2 to 4 are the husband and children of Meenal. Whereas, the subsequent purchasers viz., the 5th defendant and the 6th defendant have taken a defence that the defendants 2 to 4 are not the legal heirs of Meenal. It is to be noted that the 4th defendant was also examined as D.W.1. He has also admitted in his evidence that his mother name is Meenal, who is one of the daughters of Kannamma. The plaintiff has also admitted in the plaint that the defendants 2 to 4 are the husband and children of Meenal. It is



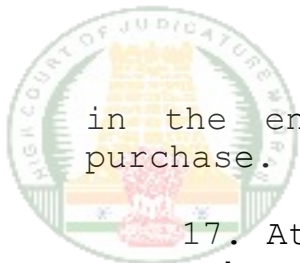
also stated that the said Meenal died in the year 1997 and the defendants 2 to 4 are the legal heirs of Meenal. The cross examination of D.W.3 carefully seen. Though there is a positive averment in the written statement contending that the defendants 2 to 4 are not the legal heirs of Meenal and the Meenal is not the daughter of Kannamma, there is no other averment to show that Meenal is not from this family and is from the different family. Exs.A6 and A7/legal heirship certificates filed to show that Meenal is one of the daughters of Kannamma. Though Ex.B7 is filed, it is the contention of the appellant/plaintiff that Ex.B7 was obtained at the time of sale by the first defendant and handed over to the 5th defendant. When the records relating to Ex.B7 was sought for, D.W.2 has sent a letter to the Court. Besides the letter, he has also deposed before the Court stating that records relating to Ex.B7 is not available and there is no corresponding files available in respect of Ex.B7. In his evidence, he has also stated that the signature found in Ex.B7 is not that of the Then Tahsildar. Though the letter indicated that the signature found in Ex.B7 is not that of the then Thalsildar, such a report has been given without verifying, which has been clearly recorded by the trial Court. But the fact remains that the records relating to Ex.B7 is not available in the Revenue Department. Whereas, Ex.X1 clearly show that on proper enquiry and on recording the statement from the people residing in that locality and verifying the earlier document, legal heirship certificate was issued under Ex.A6 and one of the documents verified by the Revenue Department while issuing Ex.A6 is that of the ration card of Kannamma for the year 1998 to 2003. The entries made in the ration card is also clearly indicated that D.Ws.2 to 4 are also residing with Kannamma, at the relevant point of time. It is admitted by both sides that Kannamma died in the year 1998 and Meenal died in the year 1997. As a grand children, the defendants 2 to 4 were residing with Kannamma/ grandmother. It could be seen from the ration card, which is relied upon by the Revenue Department, while issuing Ex.A6. Therefore, merely on the basis of Ex.B7, which was obtained at the time of dealing with the properties by the first defendant and handed over to the 5th defendant, the contention of the defendants cannot be countenanced, as far as the legal heirship is concerned. Whereas the evidence of D.W.1 and Ex.X1 clearly substantiate that the defendants 2 to 4 are the legal heirs of Meenal, who is the daughter of Kannamma/original owner. Therefore, merely because one of the legal heirs viz., the first defendant had suppressed the legal heirship and obtained the legal heirship certificate fraudulently and dealt with the property same will not take away the right of the remaining legal heirs to claim their shares. It is to be noted that P.W.1 though party to the power of attorney, he has also joined with the first defendant, at the relevant point of time, that itself cannot be a ground to deny the rights of other legal heirs. It is also to be



noted that the defendants 5 and 6 are the stranger to the family and they are claiming to be the purchaser for a valuable consideration.

15. Admittedly, the title is with the Kannamma. At the relevant point of time, the 5th and 6th defendants ought to have made a reasonable enquiry as to the legal heirs left by Kannamma. In the absence of any evidence or materials to show that they made a reasonable enquiry to find out who are the legal heirs. Therefore, merely on the basis of the representation made by one of the legal heirs, now they cannot contend that the defendants 2 to 4 are not the legal heirs of Kannamma. The trial Court has also found that the defendants 2 to 4 are the legal heirs of Meenal and Meenal is the daughter of Kannamma, however she non-suited them on the ground that they claimed the share only with the delay of 16 years. It is to be noted that it is not the case of the defendants that they perfected title by adverse possession. In the absence of any such plea and proof, mere delay in coming to the Court and claiming the share will not defeat the valid right of the parties who have the shares by way of succession. The trial Court has also non-suited the cross-appellant on the ground that P.W.1 has admitted that there are other two properties one by Kannamma. Those properties are partitioned. It is to be noted that in the present suit no such defence raised in the written statement. Therefore, merely on the basis of some stray admission of P.W.1 as to the availability of some other property, the suit cannot be dismissed on the ground of partial partition, without there being any issue or evidence with regard to the partial partition. Without even any evidence and proof as to the availability of other properties and no pleadings raised in that regard, the suit cannot be defeated, merely on the basis of the admission of P.W.1. Therefore, this Court is of the view that the trial Court having found that the cross appellant, his father and his brother being the legal heirs of Meenal, who is the daughter of original owner Kannamma, ought to have determined their share in the suit itself. Therefore, the rights of the parties has to be decided and the shares has to be determined. Paragraph-11 of the 4th defendant's written statement also indicates that to claim their respective shares, they have also paid the Court fee. Such being the matter, the trial Court ought to have determined the shares of the defendants 2 to 4. No doubt, the plaintiff and the first defendant shares already been dealt and sold to the 5th defendant and an agreement of sale also entered into in respect of the remaining property in favour of the 6th defendant.

16. This Court is of the view that the defendants 2 to 4 together entitled to 1/3rd share in the suit property and the defendants 5 and 6 are entitled to the remaining property only. It is for the defendants 5 and 6 to work out as per their entitlement



in the entire suit property proportionally according to their purchase.

17. At this stage, it is stated by the learned counsel for the respondents that the cross appellant, during the pendency of the suit, has sold an extent of 14 ½ cents. In such a case, except the share of 1/9th share, the sale deed will not convey any title to any of the purchasers. The 5th and 6th defendants represented by the same counsel would submit that they have purchased the remaining shares. Out of the purchase, they will proportionally take the property. The learned counsel for the respondents would submit that out of 29 cents, the 5th defendant will take 19 ½ cents and the 6th defendant will take 9 ½ cents. The 6th defendant is present before this Court and the submissions of the counsel also recorded. Liberty is also granted to the respondents 5 and 6 to take appropriate legal proceedings for recovery of money for dealing with the defective title. Accordingly, the Appal suit is disposed of and the Cross-Appeal is allowed. Preliminary decree is passed. No costs.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

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To
The Additional District Judge,
Ramanathapuram.

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