



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on
24.02.2021

Judgment Pronounced on
19.03.2021

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CORAM:

THE HONOURABLE MR. JUSTICE T.RAJA
and
THE HONOURABLE MR. JUSTICE G.CHANDRASEKHARAN

A.S.No.226 of 2013
and
M.P.No.1 of 2013

A.Suresh ...Appellant/1st Defendant

..VS..

1. Minor.Pavishna
Represented by next friend and mother
Revathi @ Loganayagi ...1st Respondent/Plaintiff
2. A.Annakodi
3. K.Malathi ...Respondents 2 & 3/Defendant 2 & 3

This Appeal is filed under Section 96 of Civil Procedure Code against judgement and decree dated 07.03.2013 made in O.S.No.287 of 2010 on the file of II Additional District Court, Erode.

For Appellant : Mr.V.P.Sengottuvel
For Respondent-1 : Mr.N.Manokaran
For Respondents 2 & 3 : Mr.K.Surendranath

JUDGMENT

(Judgment of the Court was delivered by G.CHANDRASEKHARAN, J.,)

This appeal is filed against the judgment and decree of the II Additional District Judge, Erode in O.S.No.287 of 2010 dated 07.03.2013. The first respondent filed the suit in O.S.No.287 of 2010 against the appellant and respondents 2 and 3 claiming partition of 2/6 share in the suit properties.

2. It is the case of the first respondent that the appellant is her father, respondents 2 and 3 are mother and sister of the appellant. Originally, the suit properties belonged to Arumuga Gounder. Second respondent is wife of



Arumuga Gounder. Appellant and third respondent are their children. Arumuga Gounder died intestate about 30 years above leaving the appellant and respondents 2 and 3 as his legal heirs. Appellant married first respondent's mother Revathi on 29.10.2001. Due to the ill advice of second and third respondents, appellant filed a divorce petition in HMOP No.166 of 2007 against first respondent's mother on the file of Principal Subordinate Judge, Erode. With the sole intention of denying the legal share of the first respondent in the suit properties, appellant and respondents 2 and 3 executed a partition deed dated 19.12.2007. In the said partition, respondents 2 and 3 have been allotted lion's share and the appellant was allotted only a meagre share. The first respondent is entitled to 2/6 share in the suit properties. Execution of partition deed dated 19.12.2007 clearly shows that the appellant, respondents 2 and 3 wanted to defeat the legal right of the first respondent in claiming 2/6 share in the suit properties. Therefore, this case came to be filed.

3. The appellant filed a written statement admitting that the suit properties originally belonged to Arumuga Gounder and stating that after his death, the suit properties have been enjoyed by appellant and respondents 2 and 3 alone. He claimed that the suit properties were partitioned between the appellant and respondents 2 and 3 on 19.12.2007. They succeeded to the suit properties as absolute owners and have been enjoying their respective shares. First respondent has no right to claim partition in the suit property. The suit filed without the prayer for declaration and other reliefs is not maintainable and Court Fee paid is also not correct for the reason that first respondent is not in possession of the suit property. Third respondent had also filed written statement on the same line.

4. The trial Court framed the following issues for trial:-

1. Whether the plaintiff is entitled to claim partition and possession as claimed ?
2. Whether the partition deed dated 19.12.2007 binds the plaintiff ?
3. To what other relief, if any, the plaintiff is entitled ?

5. During the course of trial, PW.1 was examined on the side of the plaintiff. Exs.A1 to A8 had been marked. DW.1 was examined on the side of the defendants and Exs.B1 to B5 had been marked. On considering the oral and documentary evidence, learned trial Judge found that first respondent/plaintiff is entitled to claim 2/6 share in the suit properties and accordingly, passed a preliminary decree for partition. Against the said judgment, appellant/first defendant filed this appeal.



6. Learned counsel for appellant submitted that the trial court failed to take note of the fact that since the suit properties are self acquired properties of Arumuga Gounder, only the appellant and respondents 2 and 3 are entitled for the suit properties and by virtue of partition effected among themselves on 19.12.2007, each of them had been allotted distinct shares and have been enjoying their respective shares. Therefore, the claim of first respondent that she is entitled to 2/6 share in the suit properties has no legal basis. Next, without a prayer for declaration that partition deed dated 19.12.2007 is not valid, this suit is not maintainable. The learned counsel for appellant submitted that the trial Court has not considered these aspects and wrongly decreed the suit and prayed for setting aside the judgment of the trial Court and for dismissal of the suit.

7. In response, the learned counsel for first respondent submitted that after the amendment to the Hindu Succession Act, 1956 Act 2005 by Act 39 of 2005, daughters are co-parceners on par with sons and therefore, plaintiff/first respondent in this case acquires right in the suit properties by birth as a co-parcener. When this being the legal position, the partition effected among appellant and respondents 2 and 3 on 19.12.2007, without including first respondent in the partition, will not bind the first respondent and the first respondent is entitled to ignore the said partition. Acknowledging the right of first respondent under the amended Hindu Succession Act, learned trial Judge has rightly decreed the suit and therefore, learned counsel for first respondent prayed for the dismissal of this Appeal by confirming the judgment and decree of the trial Court.

8. Points for consideration are:-

- 1) Whether the finding of the trial Court that the first respondent is entitled to 2/6 share in the suit properties is correct ?
- 2) Whether the suit filed without a prayer for setting aside the partition deed dated 19.12.2007 is maintainable ?
- 3) Whether the appeal can be allowed ?

9. Points 1 to 3:-

Admittedly there is no dispute with regard to the relationship between the parties. First respondent is the daughter of appellant. Second and third respondents are the mother and sister of appellant respectively. First respondent's mother Revathi alias Loganayagi was married to appellant on 29.10.2001. Out of this wedlock, first respondent was born to them on 08.06.2003. It appears from the record that the marital life between the appellant and his wife, first respondent's mother Revathi alias Loganayagi was not smooth and there were allegations of demand of dowry and harassment alleged



against the appellant by his wife. It is admitted by both the parties that the appellant filed divorce petition before the Principal Sub Court, Erode in HMOP No.166 of 2007 and after contest, the petition was allowed on 04.01.2011 dissolving the marriage and granting divorce. Subsequently, Revathi alias Loganayagi filed CMA No.4 of 2011 on the file of learned Principal District Judge at Erode. After hearing parties elaborately, learned Principal District Judge allowed the Civil Miscellaneous Appeal and dismissed HMOP No.166 of 2007. Copies of fair and final orders in HMOP No.166 of 2007 and CMA No.4 of 2011 and copy of the petition in HMOP No.166 of 2007 were produced as Exs.A4 to A8. The discordant and tumultuous married life between the appellant and mother of the first respondent Revathi alias Loganayagi and the matrimonial proceedings between them were just referred to give a background, with which this case came to be filed. We are not concerned about the marital life between the appellant and his wife and the matrimonial proceedings between them in this appeal. We are concerned only about the first respondent's claim of right and entitlement of 2/6 share in the suit properties as a co-parcener.

10. It is the case of the first respondent that the suit properties originally belonged to Arumuga Gounder, father of the appellant and after his death, it was enjoyed by the appellant and respondents 2 and 3 and in order to defeat the right of the first respondent's legitimate share in the suit properties, the appellant and respondents 2 and 3 had executed Ex.B1 partition deed among themselves. Appellant and third respondent admitted in their written statement that the suit properties were originally belonged to late Arumuga Gounder and after his death, the properties are being enjoyed only by the appellant and respondents 2 and 3 and they had divided the properties on 19.12.2007 through a registered partition deed and since then they are enjoying their respective shares independently. Thus, it is seen from the admitted case of the parties that the suit properties originally belonged to Arumuga Gounder and after his death, his class-I heirs, namely, appellant and respondents 2 and 3 are entitled to share in the suit properties. It is pertinent to refer to the evidence of the appellant, who was examined as DW.1, in this regard. He candidly admitted that the suit properties are ancestral properties and was enjoyed by the predecessors for generations together. The plaintiff/first respondent was born on 08.06.2003.

11. After the introduction of Amendment to Hindu Succession Act by Act 39 of 2005 to Section 6, on and from 09.09.2005, the daughter of a co-parcener shall by birth become a co-parcener in her own right in the same manner as the son. Thus, the first respondent, who was born on 08.06.2003 becomes a co-parcener with appellant, entitled to the rights and subject to



liabilities as that of a son. However, forgetting the presence of first respondent, who is also co-parcener along with appellant and entitled for share appellant and respondents 2 and 3 had executed Ex.B1-partition deed on 19.12.2007 dividing the suit properties among themselves. Though there was an attempt made by learned counsel appearing for appellant and learned counsel appearing for respondents 2 and 3 that first respondent cannot be considered as a co-parcener and she cannot claim share in the suit properties as co-parcener, the attempt appears to be a feeble attempt not supported by factual and legal backing.

12. Learned counsel for appellant mainly focused on one legal submission that first respondent should have filed the suit with a prayer for declaration that Ex.B1-partition deed is null and void and not binding on her, and without this prayer, the suit filed for mere partition relief is not maintainable. Learned counsel for appellant had also drawn the attention of this Court to Section 31 of Specific Relief Act to highlight that when a person claims an instrument as void or voidable, he should pray for cancellation of that instrument. In support of his argument, learned counsel for the appellant relied on the following rulings:-

(i) (2001) 2 CTC 641 (K.Jagannathan ..vs.. A.M.Vasudevan Chettiar and 12 others) wherein it has been held as follows:-

"27. There is no dispute that even under Ex.A-4, the plaintiff who was a minor at the relevant time, was made eo nomine party. In such a circumstance, as rightly contended, he has to pray for cancellation of the earlier partition expressly or impliedly by paying necessary court-fees, in this regard, it is useful to refer a Full Bench decision of this Court in Sankaranarayana v. Kandasamia, AIR 1956 Mad. 670. The following conclusion of Their Lordships is relevant:- (para 23)

"There is no doubt whatever that a transaction entered into by a guardian relating to the minor's properties is not void and if the minor does not sue to set it aside within three years of his attaining majority it becomes valid under Article 44, Limitation Act. In such a case the minor is deemed to be a party to the transaction. But where the document is executed by a manager of the family and it is not binding on the family, the minor or any other member can ignore the transaction and recover possession of the property. To such a case section 7(v), Court-Fees Act will apply.

We are here not concerned with decrees to which the minor is eo nomine a party. Our answer to the first question is that if the



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minor is eo nomine a party to a sale deed or other document of alienations, he must sue for the cancellation of the document under Section 7(iv-A), Court-Fees Act and it is not enough if he applies for possession under Section 7(v) of the Act and to the second question our answer is that there can be no distinction whether the father as guardian of the minor and not as the manager of the joint family executes the deed. Even in that case also the document has to be set aside."

Admittedly, the plaintiff/appellant herein, who was a minor eo nomine party did not question the said partition and he filed the suit only for partition and separate possession of his 1/9th share in the suit properties. In such a circumstance, on this ground also the claim of the plaintiff is liable to be rejected."

(ii) (2019) SCC Online Mad 9125 (K.Narayanasamy ..vs.. K.Thulasiraman and others) wherein it has been held as follows:-

15. In this regard, Section 31 of the Specific Relief Act as follows :

"31. When cancellation may be ordered.—(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

"(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation."

16. On a careful perusal of the above section makes it clear that any person against whom the written instrument is void or voidable, he has to seek declaration to avoid such document or cancel the document. But it has not been done so. Therefore, without avoiding such document, the plaintiffs cannot seek for partition."



(iii) AIR 1956 Mad 670 (Sankaranarayana Pillai and another ..vs.. Kandasamia Pillai). The relevant portion reads as follows:-

".... We are here not concerned with decrees to which the minor is eo nomine a party. Our answer to the first question is that if the minor is eo nomine a party to a sale-deed or other document of alienations, he must sue for the cancellation of the document under Section 7(iv-A) of the Court-fees Act and it is not enough if he applies for possession under Section 7(v) of the Act"

(iv) (1996) 1 CTC 661 (P.B.Ramjee and others ..vs.. P.B.Lakshmanasamy and others), wherein it has been held as follows:-

"19. A Division Bench of this Court, in which one of us was a party, had recently an occasion to consider the question in Sridharan & others .vs. Arumugham & others , 1993 (3) MLJ 428 and it has held that insofar as the documents in which the minor children are made parties, they are bound in law to pray for setting aside the same and without such prayer, the suit is not sustainable in relation to those documents."

(v) (2004) 13 SCC 480 (Nagappan ..vs.. Ammasai Gounder and others), wherein it has been held as follows:-

"10. Under sub-section (3) disposal of immovable property by a natural guardian in contravention of sub-S.(1) or sub-S.(2) of S.8 is made voidable at the instance of the minor or any other person claiming under him. Reading of the section itself shows that the sale made by the natural guardian in contravention of sub-sections (1) and (2) is voidable at the instance of the minor. If the requirement of law is to have the alienation set aside before making any claim in respect of the property sold then a suit without such a prayer would be of no avail. "

13. In reply, learned counsel for first respondent submitted that when a document is void-ab-initio, it is not necessary to seek for a decree for setting aside the document. He relied on the ruling reported in (2006) 5 SCC 353 (Prem Singh and others ..vs.. Birbal and others) and unreported judgment of this Court in S.A.No.69 of 2014 (R.Shanmugam ..vs.. R.Pangajam and others) in this regard. The relevant portions in (2006) 5 SCC 353 cited above are extracted hereunder: -

" 15. Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable document. It provides for a discretionary relief.



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16. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non-est in the eye of law, as it would be a nullity."

The relevant portions in S.A.No.69 of 2014 (R.Shanmugam ..vs.. R.Pangajam and others) reads as follows:-

" 14. The prayer for setting aside will arise only when a person suing to invalidate the document is party to the instrument. If the person suing is not a party to the instrument, then such person need not seek to set aside or cancel the instrument before seeking partition. "

14. Reading of the judgments referred above would show that the minor was a eo-nomine a party in the case concerned in ruling reported in (2001) 2 CTC 641 (cited supra). The ruling reported in 2019 SCC Online Madras 9125 (cited supra) does not deal with the right of a minor co-parcener. In the case concerned in ruling reported in AIR 1956 Madras 670 (cited supra), the minor was an eo-nomine a party. The judgment reported in (2004) 13 SCC 480 (cited supra) dealt with the right of a natural guardian of a Hindu minor to deal with the immovable property of minor under Section 8 of Hindu Minority and Guardianship Act, 1956. However in the case before hand, it is seen from Ex.B1-partition deed that the first respondent was not even shown as eo-nomine a party. Her presence and existence at the time of execution of partition deed was not at all recognised. The partition deed was not executed by the appellant on his behalf and on behalf of the first respondent. Therefore, we are of the view that the aforesaid judgments relied on by the learned counsel for the appellant are not applicable to the facts and circumstances of this case.

15. On the other hand, it is seen from the judgment reported in (2006) 5 SCC 353 (cited supra) that Section 31 of Specific Relief Act refers only those void and voidable documents and if a document is void-ab-initio, a decree for setting aside the same would not be necessary as the same is non-est in the eye of law as it would be nullity. It is also seen from the unreported judgment of this Court in S.A.No.69 of 2014 dated 16.09.2015 (cited supra) that the prayer for setting aside a document will arise only when a person suing to invalidate the document is a party to the instrument and if the person suing the document is not a party to that instrument, then such a person need not seek to set aside or cancel the instrument before seeking partition.



16. Thus, from the reading and understanding of judgments relied on by both the sides, this Court finds that the judgments relied on by the first respondent apply to the facts and circumstances of this case and the judgments relied on by the appellant are not applicable to the facts and circumstances of this case. Therefore, this Court is of the considered view that when the first respondent is not a party to Ex.B1-partition deed, the partition deed insofar as the first respondent is concerned is void-ab-initio and it is not necessary for her to seek the prayer to set aside the partition deed or to seek cancellation of the partition deed. In this view of the matter, this Court finds that the argument advanced on behalf of the appellant and respondents 2 and 3 that the suit filed without a prayer for declaration that Ex.B1-partition deed is null and void and not binding on the first respondent (or) without a prayer for its cancellation, is not maintainable, cannot be accepted and the argument in this regard is rejected.

17. It is found that the first respondent is a co-parcener and therefore, she is entitled for a share in the suit properties. The question now arises for consideration is whether the first respondent can institute the suit claiming partition when her father is alive. The necessity, according to the first respondent, arose for filing this suit for partition because of the reason that Ex.B1-partition deed had been executed among the appellant and respondents 2 and 3 to defeat the legitimate right and share of the first respondent. It was demonstrated before this Court that the appellant was allotted only a meagre share in the partition and respondents 2 and 3 were allotted bulk of share. The perusal of Ex.B1-partition deed shows that the suit properties were divided into three schedules namely A, B and C schedule properties. 'A' schedule property was allotted to the second respondent, 'B' schedule property was allotted to the third respondent and 'C' schedule property was allotted to the appellant. The valuation of the properties allotted is given in page 17 of the partition deed in the form of an 'Abstract'. It shows that the value of 'A' schedule property is Rs.75,26,778/-, 'B' schedule property is Rs.52,18,875/- and 'C' schedule property is Rs.8,74,830/-. Thus, it is patently clear that the appellant was allotted only a very meagre share when compared to respondents 2 and 3. Therefore, there is merit in the contention of the first respondent that only to deny her legitimate share, appellant and respondents 2 and 3 had allotted only a meagre share to the appellant. Therefore, the filing of the suit by the first respondent to protect her right to the legitimate share in the suit properties cannot be faulted. In this regard, learned counsel for the appellant relied on the ruling reported in (2016) 15 SCC 463 (cited supra) for the position that the parties to the partition deed can agree for unequal division of



undivided property. Here again the facts of the case shows that the minor's interest is not involved and the parties challenging the partition deed were parties to the partition deed. That is not the case here. Here in this case, first respondent is not even an eo-nomine a party in the partition deed. Therefore, this judgment is not applicable to the facts and circumstances of this case.

18. It was found that the first respondent is a co-parcener and therefore, this Court concurs with the finding of the trial Court that the first respondent is entitled to share in the suit properties. When it comes to allotment of shares in the presence of the second respondent, who is class-I heir of Arumuga Gounder, the division has to take place on the basis of notional partition. In that event, Arumuga Gounder, appellant and third respondent would have got $\frac{1}{3}$ share each. From Arumuga Gounder's $\frac{1}{3}$ share, appellant and respondents 2 and 3 would each get $\frac{1}{9}$ share. Thus, appellant and third respondent would get $\frac{4}{9}$ share each and the second respondent would get $\frac{1}{9}$ share. From the appellant's share of $\frac{4}{9}$ share, the first respondent/plaintiff would get $\frac{2}{9}$ share. In this view of the matter, this Court confirms the judgment and decree of trial Court with the aforesaid modification that the first respondent/plaintiff is entitled to $\frac{2}{9}$ share in the suit properties and a preliminary decree for partition is passed accordingly.

19. With the above modification, the Appeal is partly allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-
Assistant Registrar

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Sub-Assistant Registrar

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1. The Additional District Judge,
II Additional District Court,
Erode.

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GJ (CO)
LS (05/08/2021)