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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.08.2021

CORAM

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.NO.1533 OF 2008

1. Navamani, W/o. Late Subramaniam
2. Sampath, S/o. Late Subramaniam
3. Jayanthi, D/o. Late Subramaniam

...Appellants/
Appellants/Defendants 1 to 3

.Vs.

1. Shanmugam (deceased)
S/o. Perumal Gounder
2. Karuppanna Gounder
S/o. Late Perumal Gounder
3. Chidambaram
S/o. Karuppanna Gounder
4. Jayachitra
D/o. Karuppanna Gounder
5. Ramasamy
S/o. Marappa Gounder
6. Muthu Gounder
S/o. Karuppanna Gounder
7. Thulasimani
S/o. Palani Gounder
8. Karuppanna Gounder
S/o. Appachi Gounder
9. Nallasamy
S/o. Palanisamy
- 10.The President
Poothan Board, Chennai
- 11.Somu
S/o. Late Palani Gounder
- 12.Duraisamy
S/o. Palani Gounder
- 13.Maheswari
W/o. Arumugham
- 14.Mythili
W/o. NM.K. Ganeshan
- 15.Krishnaveni
W/o. Ramasamy

...1st Respondent/
1st Respondent/Plaintiff

... Respondents 2 to 15/
... Respondents 2 to 9, 12 to 17/
Defendants 4 to 11, 14 to 19



16.Mrs. Geetha Ramani
W/o. Shanmugam

... 16th Respondent

(R2 to R15 remained ex-parte before the Court below
Hence notice to them may be dispensed with)
R16 brought on record as LR of the deceased 1st
respondent vide order of court dated. 03.02.2020
made in CMP No.4576 to 4578 of 2016 in S.A.
No.1533 of 2008.

Prayer:

Second Appeal filed under Section 100 of CPC, 1908 against the decree and judgment dated 12.06.2008 on the file of the I Additional Sub Court, Erode, in A.S. No.102 of 2006 upholding the decree and judgment dated 27.04.2006 on the file of the Principal District Munsif Court, Erode in O.S. No.658 of 2004.

For Appellants : Mr.S.Kaithamalai Kumaran
For Respondents : No apperance.

JUDGMENT

The appellants herein are the defendants in O.S. No. 658 of 2004 on the file of the Principal District Munsif, Erode. The first respondent (since deceased)/plaintiff filed the above suit for partition and separate possession of his half share in suit Item No.1 and 1/3 share in suit Item No.2. A preliminary decree for partition and separate possession was passed by the learned Principal District Munsif, Erode, vide his decree and judgment dated 27.04.2006, dividing the suit Item No.1 into two equal shares and to allot one such share to the plaintiff and as far as the suit Item No.2 is concerned, the learned Principal District Munsif held that the plaintiff is entitled to 1/3 share in all the Survey Numbers mentioned in Item No.2 except Survey Number 800/5B of Peredu Village, Thayirpalayam, Bhavani Sub Disivion, Erode.

2. Aggrieved over the same, the defendants 1 to 3 (appellants herein) filed an appeal in A.S. No.102/06 before the I Additional Subordinate Court, Erode. The said appeal was dismissed and the decree and judgment dated 27.04.2006 of the Principal District Munsif, Erode, was upheld. Now, the present second appeal is filed against the concurrent findings of both the courts below.

3. For the sake of convenience, the parties are referred to as per their rankings in the trial court and in appropriate



places, their rankings in the present appeal would also be indicated.

4. The facts of the case relevant for this Second Appeal in brief:

The plaintiff, late Subramaniam (husband of the first defendant and father of the defendants 2 and 3) and the fourth defendant are the sons of one Perumal Gounder. The suit items 1 and 2 are the properties of the late Perumal Gounder. After the death of Perumal Gounder, the plaintiff, late Subramaniam and the fourth defendant became entitled to 1/3 share in both the items of the suit properties. However, since the fourth defendant relinquished his share in suit Item No. 1, the plaintiff and the defendants 1 to 3, who are the legal heirs of late Subramaniam became entitled to 1/2 share each. It is further averred in the plaint that though a gift deed was said to have been executed in favour of the 14th defendant, the Bhoodhan movement, the property was not actually handed over to the said movement and therefore, the said deed was not acted upon.

5. The defendants 1 to 6 and 14 alone contested the suit. The fourth defendant filed a written statement and an additional written statement and the same were adopted by the defendants 1 to 3 and 5 and 6. However, the defendants 4 to 6, during the course of trial, remained absent and were set exparte. The other defendants, except the defendants 1 to 3 and 14, also remained absent and were set exparte. In the written statement filed by the fourth defendant, the relationship between the parties was admitted. There is no dispute with regard to the ownership of the suit property. However, it is contended that the fourth defendant executed a release deed dated 27.04.1991 in favour of the first defendant in respect of his 1/3 share in suit Item No.1 of the suit property. The fourth defendant has also prayed the trial court to decide the amount to be paid by the plaintiff in favour of the first defendant as the plaintiff did not pay any amount to him. It is further contended by the fourth defendant in his written statement that he is in possession of the property in Survey No.800/5B, even though the same was gifted to the 14th defendant.

On the contrary, the 14th defendant, the Bhoodhan movement, in their written statement, have contended that Survey No.800/5B was gifted to them by one Subbraraya Gounder and Tmt. Karuppayee ammal through a gift deed (Ex.B6) dated 23.08.1956 and as per Sections 17 and 20 of the Tamil Nadu Bhoomi Dhana Act 1958, the gift deed was confirmed and was also registered as document No.384/65 on the file of the Sub Registrar, Bhavani, for which, according to the 14th defendant, the patta was also came to be issued in their favour. Therefore, the 14th defendant prayed



for dismissal of the suit as far as survey No.800/5B is concerned.

6. On the basis of the above pleadings, the trial court framed the following issues.

- 1) "Whether the plaintiff is entitled for a preliminary decree for partition and separate possession?
- 2) Whether the suit is bad for non joinder of necessary parties?
- 3) Whether the survey No.800/5B ad-measuring 0.50 cents belongs to Bhoodan movement?

7. In the trial court, the plaintiff examined himself and marked the certified copies of the decree and judgment passed in O.S. No.322/91 on the file of the Principal Subordinate Judge, Erode, as Ex.A1 and Ex.A2 respectively. The first defendant examined herself. However, no documentary evidence was adduced on her side. One witness was examined on the side of the 14th defendant and Ex.B1 to Ex.B6 were marked.

8. After full contest, the suit was decreed and a preliminary decree for partition was passed by the learned Principal District Munsif as prayed for by the plaintiff except survey No.800/5B in the suit item No.2, the property which was proved to be gifted to the 14th defendant. The decree and judgment of the trial court was upheld by the first appellate court. Now the present second appeal is filed by the defendants 1 to 3.

9. Mr. S.Kaithamalai Kumaran, learned counsel appearing for the appellants/defendants 1 to 3, contended that the present appeal is filed only with regard to Item No.1 of the suit property. According to him, since the fourth defendant relinquished his 1/3 share in favour of the first defendant/first appellant, the plaintiff's share in the said item can only be 1/3 and not 1/2 as held by both the courts below.

10. At the outset, it may be observed that though the fourth defendant, in his written statement, admitted that he relinquished his 1/3 share in suit Item No.1 in favour of the first defendant, did not examine himself to prove the contents of the written statement. The release deed was not also produced before both the courts below.

11. The earlier suit in O.S. No.322/91 was filed by the same plaintiff for declaration and partition of the suit properties mentioned herein. The fourth defendant in the present suit, was



shown as a party in that suit and he filed a written statement contending that he never relinquished his share in favour of the plaintiff and the first defendant/first respondent. However, the learned Principal Subordinate Judge, Erode, had observed in his judgment in O.S.No.322/91 (Ex.A2) that the fourth defendant had relinquished his share in respect of Item No.1 and hence, the shares of both the plaintiff and the present appellants/defendants 1 to 3 got enlarged. The suit with regard to the partition of the suit properties was dismissed by the learned Principal Subordinate Judge, on the ground that necessary parties were not impleaded in the said suit. Admittedly, no appeal was filed against the decree and judgment in O.S. No.322/91 (Ex.A1).

12. It is also relevant to point out that the fourth defendant in the instant suit did not file any appeal against the decree and judgment of the Principal District Munsif, Erode. However, as already observed, the relinquishment deed was not produced to find out as to,

- 1) Whether the relinquishment deed is registered or not.
- 2) Whether by means of the release deed, the fourth defendant had conveyed his share in favour of the first defendant.

However, since it is admitted by the fourth respondent that he had renounced his share as regards suit Item No.1, points to be decided here are:

- 1) Whether the fourth defendant has renounced his 1/3rd share in favour of the first appellant alone as alleged by the appellants.
- 2) Whether both the courts below are right in upholding that the fourth respondent cannot renounce his share only in favour of one co-sharer when other co-sharers are in existence.

13. It is pertinent to point out at this juncture that the written statement filed by the fourth defendant was adopted by the defendants 1 to 3 (appellants herein) and 5 and 6. In paragraph 3 of the written statement, the fourth defendant had taken up the following two different stands in respect of the execution of the release deed dated 27.04.1991.

- 1) The fourth defendant on his behalf and on behalf of his family members had relinquished his 1/3 share in favour of the



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first defendant.

- 2) On 27.04.1991, the fourth defendant executed a relinquishment deed after receiving the market value of Item No.1 and that the plaintiff did not pay any amount to him and hence the Court should decide the amount to be paid by the plaintiff to the first defendant/first appellant.

Therefore, it is clear that the intention of the fourth defendant was only to renounce his share in favour of the other co-sharers and it is for the first defendant/first appellant to prove that the share of the first defendant was actually conveyed only in her favour. At this juncture, it is relevant to extract Section 101 of the Indian Evidence Act, which reads as under:

Section 101 - Burden of Proof

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Hence, as per Section 101 of the Indian Evidence Act, the burden of proof lies on the party who substantially asserts the affirmative of the issue, and not upon the party who denies it. Until such burden is discharged, the other party, namely, the plaintiff/first respondent is not required to prove the negative. In the instant case, the appellants did not prove by adducing acceptable evidence before both the courts below that suit item No.1 was conveyed in favour of the first appellant.

14. A deed of release is an instrument by which one of the co-owners releases or renounces his interest in the specified property and the result of such release would be enlargement of the share of the other co-owners. Each co-owner in theory is entitled to enjoy the entire property in part or in whole.

15. In the decision in P.R. Munuswamy Naidu vs. V. Venkatesan and others reported in 1997-3-L.W.333, a single Judge of this Court has held as follows:

10. Derrett on 'Introduction to Modern Hindu Law' (1963 Edition) has stated (at pages 250 and 251) as to what is the nature of a coparcener's interest in a family property. The relevant portion reads thus:-



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"No individual member of the coparcenary can claim before partition (in which he participates) that he owns a certain definite share either of the corpus or of its income. The rights of a coparcener are (i) to be maintained; (ii) to demand partition and on account of the state of the family property; (iii) to become manager if the managership is vacant and no coparcener effectively objects; (iv) to alienate (in South Indian only) in effect his undivided interest in the joint-family property; and (v) to take, so long as he remains undivided, by survivorship so much of the interests of deceased coparceners as will serve proportionately to increase his presumptive share, which will become ascertained for the first time at partition. Thus coparceners have a community of interest and of possession of the joint-family property and are comparable with joint-tenants at English law with benefit of survivorship, save that their individual rights commence independently and by operation of law, not by transfer between parties. No one can create a coparcenary interest, any more than he can create, with a stranger, a joint Hindu Family. He can, no doubt, provide in, for example, a will that property over which he exercises a right of disposition shall be enjoyed by the transferees as if it were Mitakshara joint-family property and they were coparceners at Hindu law in respect of it; but that is a different matter."

11. In Mayne's 'Hindu Law & Usage' - 14th Edition (1996), at page 767, the learned Author says thus:-

"A gift by a coparcener of his entire undivided interest in favour of the other coparcener or coparceners will be valid whether it is regarded as one made with the consent of the other or others or as a renunciation of his interest in favour of all. Where a coparcener purported to make a gift of his share to one brother, the



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Supreme Court held that though ostensibly a gift, it was a relinquishment of his share and enures for the benefit of all the coparceners; the gift was construed in such a manner as to render it valid. Renunciation with a condition to pay maintenance to him is also valid. Such a renunciation can be effected by an expression of an intention to that effect, and no formality is necessary."

12. In N.R. Raghavachariar's 'Hindu Law - Principles and Precedents' - 8th Edition (1987), at page 237, it is said thus:-

"A coparcener can renounce his interest in the joint family estate. The renunciation does not result in a general partition of the family. Such a renunciation merely extinguishes his interest in that estate, but does not affect the status of the remaining members quoad the family property, and they continue to be coparceners as before, the only effect of the renunciation being to reduce the number of persons to whom shares would be allotted if, and when, a division of the estate takes place. A coparcener can renounce his interest only in favour of all the coparceners and when he renounces in favour of only one of them, the renunciation enures for the benefit of even the others,.... his renunciation which enures for the benefit of all the other coparceners may take the form of a gift of the entire interest of a coparcener in favour of another coparcener."

(Emphasis supplied)

13. In Mulla's 'Hindu Law' - 15th Edition (1982), at page 357, it is said thus:-

"Renunciation or relinquishment of his share... A coparcener may renounce his interest in the coparcenary property in favour of the other coparceners as a body but not in favour of one or more of them. If he renounces in favour of one or more of them the renunciation enures for the benefit of all other coparceners and not for the sole benefit of the coparcener or



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coparceners in whose favour the renunciation is made. Such renunciation is not invalid even if the renouncing coparcener makes it a condition that he would be paid something towards maintenance. The renunciation or relinquishment must, of course, be genuine. If fictitious and not acted upon it would be operative as between the parties and partition can be claimed....."

14. In a Full Bench decision of this Court reported in AIR 1945 Madras 142 = 58 L.W. 54 (Chella Subbanna and another v. Chella Balasubbareddi and others), (at page 143), it was held as follows:—

"...The relinquishment by one coparcener of his interest in the family estate in favour of the members of the coparcenary does not amount to an alienation; it merely amounts to an extinction of his interest in favour of the others. The gift of his interest to one of several other coparceners would not mean the extinction of that interest. It would mean an alienation of it. It is well settled law that there cannot be such a gift to a stranger and it is now clear that there cannot be a gift to a fellow coparcener if the family is to remain undivided.

....

16. These decisions were considered in a decision of our High Court reported in 1980-I-M.L.J. 507 (Durai alias Karunanidhi v. D. Devarajalu Naidu & 10 Others) wherein V. Sethuraman, J. held thus:—

"A coparcener can make over his interest in the joint family properties, but that has to be in favour of the entire coparcenary as such. In such an event, it would be in the nature of a renunciation, so that the person who renounced would be in the same position as one who went out of the family and the other persons would continue in the coparcenary as reduced to that extent."



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17. In view of the settled position of law, the conclusion is irresistible, namely, that even if the document is taken as one for consideration, the executants of Ex. B-6 are only effacing themselves from the family and to that extent, the share of the remaining coparceners is increased. The relinquishment can only be in favour of the family even if the document is only for consideration. The finding of the lower Appellate Court is, therefore, correct, and accordingly the Second Appeal is dismissed. No Costs."

16. In view of the settled legal position, the fourth respondent cannot renounce his share in favour of the first defendant/first appellant alone when the other co-sharers existed. The point Nos.1 and 2 are answered against the appellants.

In the result, the appeal is dismissed and the decree and judgment of both the courts below are upheld. There shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

bga

To

1. I Additional Sub Court, Erode,
2. Principal District Munsif Court, Erode.

+1cc to Mr.S.Kaithamalai Kumaran, Advocate, S.R.No.39485

S.A.No.1533 of 2008

CP (CO)
PM/18/11/2021