



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 19.03.2021

CORAM:

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

A.S.No.596 of 2018

N.Thangamani @ Radhamani ...Appellant/Plaintiff

..vs..

1.A.Velliangiri

2.A.Alagiriammal (died) ...Respondents/Defendants

(Second respondent died. Appellant and first respondent are the LR's of the deceased second respondent. Recorded as per the memo dated 21.03.2017 (SR 2897) and vide court order dated 27.03.2017 made in MP No.1 of 2014 in AS (SR) 38773 of 2014)

This Appeal is filed under Section 96 of Code of Civil Procedure against the judgment and decree passed by the learned III Additional District and Sessions Judge, Salem in OS No.207 of 2009 on 26.07.2013.

For Appellant : Mr.M.Devaraj

For Respondent-1 : Mr.V.P.K.Gowtham

JUDGMENT

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

The appellant filed a suit in O.S.No.207 of 2009 on the file of III Additional District and Sessions Judge, Salem claiming 2/3 share in the suit properties. The suit was filed against her brother Vellingiri, appellant herein and her mother Alagiri Ammal. Alagiri Ammal, the second respondent in this appeal died during the pendency of this appeal leaving behind the appellant and the first respondent, and it was recorded. Now the appeal is contested by the first respondent Vellingiri.

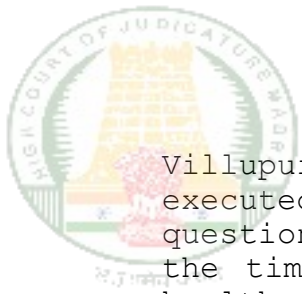
2. The case of the appellant is that the suit properties and other properties were ancestral properties and in the



partition between her father Annamalai Gounder and his brothers in 1962, the suit properties were allotted to Annamalai Gounder. The partition list was registered on 04.02.1992. Annamalai Gounder was in possession and enjoyment of the properties allotted to him along with the appellant, respondent, deceased mother and one more brother Arunagiri. They constituted Hindu Undivided Joint Family (HUF). Arunagiri left the family in the year 1984 without getting marriage and his whereabouts is not known till now. He is presumed to be dead in law. Annamalai Gounder died intestate on 09.09.2008. The suit properties are still undivided and being enjoyed in common by the appellant and respondent. The appellant demanded the respondent to effect partition on several occasions. However the respondent has not come forward to effect partition and give share to the appellant. During the pendency of this suit, the mother Alagiri Ammal executed a registered release deed in respect of her undivided 1/3 share in the suit properties in favour of the appellant for a valid consideration. As such the appellant is entitled to 2/3 share in the suit properties. Therefore, this suit claiming 2/3 share in the suit properties.

3. Respondent filed a written statement and additional written statement and his case, in brief, is as follows:-

The relationship between the parties is admitted. It is false to state that the suit properties are ancestral properties of Annamalai Gounder. The suit properties are the self acquired properties of Vavura Gounder, the grandfather of respondent. He purchased the suit properties through sale deeds dated 15.12.1950, 23.02.1960, 31.01.1961 and 31.08.1965. After his death, his sons namely Annamalai Gounder, Palaniappa Gounder and Natesan were enjoying the properties without any division. There was a partition koorchit executed between Annamalai Gounder and his brothers on 04.02.1992 and it was notarised on 04.02.1993. It is true that the suit properties are not divided by metes and bounds, but it is false to state that the suit properties are enjoyed in common by the appellant and respondent. The suit properties are not joint family properties. Since the suit properties were derived by Annamalai Gounder by way of partition koorchit dated 04.02.1992, they are to be treated as his individual properties. Appellant's marriage was celebrated in a fabulous manner by giving 50 sovereigns of gold along with other household articles. Respondent and Arunagiri along with the father celebrated the marriage of the appellant with the income derived from agriculture. It is false to state that Arunagiri left the family in the year 1984 without getting married and his whereabouts is not known and it has to be presumed that he is dead as per law. Respondent came to know that Arunagiri is living in a village somewhere in and around Chinnasalem,



Villupuram District. The alleged release deed said to have been executed by mother Alagiri Ammal came to be executed in questionable circumstances. Alagiri Ammal was 75 years old at the time of execution of alleged release deed. Her mind and health was not stable for the past 6 to 7 years and she was not able to understand anything in proper manner. Alagiri Ammal was in the custody of appellant. Taking advantage of the fact that Alagiri Ammal was in her custody and clutches, the release deed dated 18.01.2010 had been executed using misrepresentation, undue influence and coercion. Appellant had no means to pay Rs.10,00,000/- as a consideration for the execution of release deed. Alagiri Ammal had no necessity for Rs.10,00,000/- and releasing her right in the suit properties detrimental to the interest of the respondent. In fact, she was receiving family pension of Rs.5,560/- per month and there was no necessity for her to execute the release deed for a sum of Rs.10,00,000/-. Earlier also, appellant had made Alagiri Ammal to execute a frivolous settlement deed dated 28.12.2005 in respect of the property, which was purchased in the name of Alagiri Ammal by Annamalai Gounder. Challenging the same and claiming partition, respondent filed O.S.No.8 of 2009 on the file of Sub Court, Salem and the case is still pending. Only to deny the respondent's legitimate share, the appellant created these settlement and release deeds. The release deed dated 18.01.2010 is a sham, nominal and fraudulent document and the appellant cannot claim any share on the basis of release deed. Therefore, respondent prayed for dismissal of this suit.

4. During the trial, appellant was examined as PW.1 and Ex.A1 was marked. Respondent was examined as DW.1 and Exs.B1 to B3 were marked. On considering the oral and documentary evidence, learned trial Judge found that the fact of civil death of Arunagiri was not proved, the settlement deed dated 18.01.2010 was not executed by Alagiri Ammal for valid consideration and on sound disposing state of mind and concluded that the appellant/plaintiff has not established her case and dismissed the claim for partition. Against the said judgment, appellant/plaintiff has filed this appeal.

5. Assailing the judgment, learned counsel for the appellant submitted that Arunagiri was missing from 1984 and till date he was not heard of by those, who would naturally have heard of him, being he had been alive. When the respondent claims that Arunagiri is alive and living somewhere near Chinnasalem, Villupuram district and positively asserts that, it is for the respondent to prove that Arunagiri is alive. Respondent has not produced any evidence in this regard. It is proved that Arunagiri has not been heard of since 1984. Therefore, the dismissal of the suit for non impleading Arunagiri and on the principle of non-joinder of necessary party



is not correct. The appellant had proved the execution of release deed by Alagiri Ammal, by producing the release deed and adducing evidence. There is no reason for suspecting the execution of release deed for the reason that the appellant was taking care of Alagiri Ammal after the death of her father. Out of natural love and affection and to meet her medical and other expenses, Alagiri Ammal received Rs.10,00,000/- as consideration for releasing her 1/3 share in the suit properties. So, there is nothing to suspect the genuineness of the release deed dated 18.01.2010. However, learned trial Judge without properly appreciating the close relationship between the appellant and her mother and the surrounding circumstances, wrongly concluded that the appellant failed to prove that the release deed was executed for consideration and while Alagiri Ammal was in sound disposing state of mind. Admittedly, the suit properties are ancestral properties and therefore, the appellant is entitled for 1/3 share in the suit properties and on Alagiri Ammal executing release deed in respect of her undivided 1/3 share in the suit properties, the appellant is now entitled to 2/3 share. Learned trial Judge has wrongly appreciated the evidence and unjustifiably dismissed the suit. Therefore, learned counsel for the appellant prayed for setting aside the judgment and for decreeing the suit as prayed for.

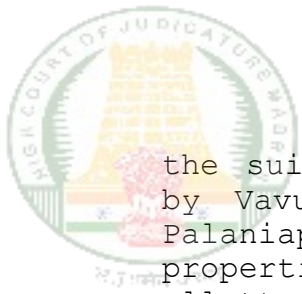
6. Supporting the judgment, learned counsel for the respondent submitted that the alleged civil death of Arunagiri was not proved by any evidence and the release deed dated 18.01.2010 came to be executed under suspicious circumstances when Alagiri Ammal was 75 years old and with infirm physical and mental condition. Learned trial Judge has properly analysed the evidence in detail and came to the right conclusion by dismissing the suit. Learned counsel for the respondent prayed for confirming the judgment of the learned trial Judge and for dismissal of this appeal.

7. Points for consideration in this appeal are:-

- 1) Whether the finding of trial Court that the suit is bad for non-joinder of necessary party i.e. Arunagiri is correct ?
- 2) Whether the finding of trial Court that the appellant has not proved that the release deed dated 18.01.2010 was executed for valid consideration and when Alagiri Ammal was in sound disposing state of mind is correct ?
- 3) Whether this appeal can be allowed ?

8. Points 1 to 3:-

As seen from the admitted case of the parties that the relationship between the parties are admitted. Appellant and respondent are the children of Annamalai Gounder and Alagiri Ammal. Annamalai Gounder and Alagiri Ammal had one more son named Arunagiri. It is also admitted by both the parties that



the suit properties along with other properties were purchased by Vavura Gounder and he had three sons Annamalai Gounder, Palaniappa Gounder and Natesan. Later, the sons had divided the properties among themselves and the suit properties came to be allotted to the share of Annamalai Gounder. Absolutely, there is no dispute in this regard. As per Act 39 of 2005, daughters are co-parceners by birth. Therefore, there is no doubt that the appellant as a daughter of Annamalai Gounder is entitled to share in the suit properties as co-parcener. Even if we admit the case of the respondent that since suit properties had been allotted to Annamalai Gounder in the partition, it became his self acquired properties is correct, even then the appellant is entitled to share in the suit properties under Section 8 of Hindu Succession Act as a class-I heir, for the reason that Annamalai Gounder died intestate. Therefore, there is absolutely no iota of any doubt with regard to the entitlement of the share in the suit properties to the appellant. The question is whether the suit filed by her without impleading Arunagiri is maintainable and whether she can claim additional 1/3 share by virtue of the release deed dated 18.01.2010 said to have been executed by her mother Alagiri Ammal in her favour.

9. Coming to non-joinder of Arunagiri, it is stated in the plaint that Arunagiri left the family in the year 1984 without getting marriage and his whereabouts is not known since then. Hence, as per law, it is presumed that he is dead. Respondent denies this case in his written statement and contends that recently he came to know Arunagiri is living in a village somewhere in and around Chinnasalem, Villupuram District. However, he has not chosen to implead Arunagiri as a necessary party under Order 1 Rule 10 CPC nor did he take any steps to summon him even as a witness. He did not reveal either to the appellant or to the Court the address and other necessary details which would have helped the appellant to implead Arunagiri as a party to the suit. Section 108 of Indian Evidence Act Reads as follows:-

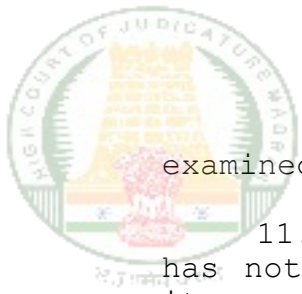
108. Burden of proving that person is alive who has not been heard of for seven years.—1 [Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is 2 [shifted to] the person who affirms it."

When he denied the claim that Arunagiri left the family in the year 1984 and therefore it has to be presumed that he is dead in law, strangely in a suit filed in O.S.No.8 of 2009 on the file



of Sub Court, Salem, he pleaded that "Arunagiri had gone out of the family even in the year 1984 without marriage and his whereabouts is not known. He has not been heard of since the year 1984. As such, in law, he is deemed to be "civilly dead". This copy of the plaint has been marked as Ex.B1. Thus, it is clear from his own pleadings in O.S.No.8 of 2009 that the respondent admitted that Arunagiri left the family in the year 1984 and he has not been heard of since then. Now he has taken contrary stand when he positively allege that Arunagiri is living in a village somewhere near Chinnasalem, it is for him to prove that Arunagiri is alive and living, but he has not chosen to do so. Therefore, it has to be concluded on the basis of his pleadings in O.S.No.8 of 2009 and also the case of the plaintiff in this case that Arunagiri has not been heard of for more than 7 years by those, who would have naturally heard him, if he had been alive. The logical conclusion that has to be drawn is that he is to be considered as "dead" in law. In this view of the matter, this Court finds that the finding of the learned trial Judge that the suit is bad for non-joinder of Arunagiri is not correct and dismissal on this ground is also not correct.

10. The next point to be considered is whether the release deed dated 18.01.2010 was executed by Alagiri Ammal in sound disposing state of mind and for valid consideration. It is seen from the judgment that the release deed was marked as Ex.A1. However, while discussing about this release deed, the learned trial Judge referred it as Ex.A1 in some places and Ex.A2 in some places. He has also referred the koorchit dated 04.02.1992 as Ex.A1. But the judgment shows that the said koorchit was not marked at all. Therefore, it is clear that the reference with regard to koorchit dated 04.02.1992 (Ex.A1) and release deed dated 18.01.2010 as Ex.A2 is not correct. However, we go by the appendix to the judgment, in which it is shown that 18.01.2010 release deed is marked as Ex.A1. The reading of this document shows that the suit properties were allotted to Annamalai Gounder and after his death, the properties are being enjoyed by appellant, respondent and Alagiri Ammal and each of them is entitled to 1/3 share. Since Alagiri Ammal is 75 years old and not in a position to jointly enjoy the property and she requires money to meet her medical and other expenses, she said to have released her undivided 1/3 share of the suit properties for a consideration of Rs.10,00,000/-. The execution of settlement deed is vehemently denied and opposed by the respondent. It is a specific case of the respondent that Alagiri Ammal was 75 years old, she was physically and mentally infirm and was not able to understand anything. She was in the custody of the appellant. Taking advantage of the custody and exercising undue influence, coercion and misrepresentation, the release deed dated 18.01.2010 came to be executed. There is no independent witness



examined to prove the execution of this release deed.

11. Admittedly, except the oral evidence of appellant, she has not examined the attestors to Ex.A1- release deed to prove its execution. Though she claimed that she paid Rs.10,00,000/- from her savings, no evidence was produced to show that she had Rs.10,00,000/- cash to pay as a consideration for execution of release deed. Admittedly, Alagiri Ammal was in the care and custody of appellant. She was 75 years old at the time of alleged execution of the release deed. There is every possibility that taking advantage of the custody of Alagiri Ammal, the appellant might have misrepresented, exercised undue influence and got the Ex.A1 release deed executed. Absolutely, there is no iota of any evidence as to what had happened to Rs.10,00,000/- said to have been paid to Alagiri Ammal. How did she spend it. Whether she kept Rs.10,00,000/- as liquid cash or whether she had deposited in the bank- absolutely there is no evidence. These are all circumstances creating strong doubt in the execution of Ex.A1-release deed. Aforesaid surrounding circumstances, old age of mother, her custody by the appellant and the failure on the part of the appellant to examine independent witnesses, who attested the release deed, to dispel the apprehension raised by the respondent with regard to the genuineness of Ex.A1-release deed, supports the case of the respondent that Ex.A1 release deed was not executed for valid consideration and when Alagiri Ammal was in sound disposing state of mind. The trial Court has also found that the appellant has failed to prove that Ex.A1-release deed was executed by Alagiri Ammal for valid consideration and while she was in sound disposing state of mind. This Court, for the reasons stated above, concurs with the finding of the trial Court and finds that the appellant cannot claim any share in the suit properties on the basis of Ex.A1-release deed.

12. It was already decided that the appellant as the daughter of Annamalai Gounder is entitled for share in the suit properties. At the time of filing the suit, appellant's mother Alagiri Ammal was also a party. She died during the pendency of this appeal and the same had been recorded and there are no other legal representatives to Alagiri Ammal. Only the appellant and respondent are the legal heirs to succeed to the suit properties. Accordingly, this Court finds that the appellant and respondent are entitled to $\frac{1}{2}$ share each in the suit properties and a preliminary decree for partition of $\frac{1}{2}$ share in the suit properties and division by metes and bounds is passed in favour of the appellant. In this view of the matter, the judgment and decree of the learned trial Judge in O.S.No.207 of 2009 dated 26.07.2013 is set aside and this appeal is partly allowed. Thus, the points are answered.



13. In conclusion, this Court finds that the appellant and respondent are entitled to $\frac{1}{2}$ share each in the suit properties and a preliminary decree for partition of $\frac{1}{2}$ share in the suit properties and division by metes and bounds is passed in favour of the appellant. Considering the relationship of the parties, the parties are directed to bear their own costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

mra

To

The III Additional District and Sessions Judge
Salem.

Copy to:

The Section Officer,
V.R.Section,
High Court,
Madras-104.

+1cc to Mr.M.Devaraj, Advocate Sr No.17873

A.S.No.596 of 2018

SSD (CO)
PR (28/10/2021)