

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.03.2021

Pronounced on : 20.04.2021

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRP.PD.No.3636 of 2017
and CMP.No.16959 of 2017

1.Tamilzhselvi
2.Gunachithra
3.Pavithra
4.Thirupurasundari
5.Minor Priyadharshini
rep. by next friend mother
first plaintiff Tamilzhselvi

..Petitioners

Vs.

Kaliyavardhan

..Respondent

PRAYER:

The Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal order passed in I.A.No.979 of 2015 in OS.No.194 of 2013 dated 03.07.2017 on the file of II Additional Sub Judge, Villupuram.

For Petitioners : Mr.N.Suresh

For Respondent : M/s.Elizabeth Ravi

ORDER

This civil revision petition is arising out of fair and decreetal order passed in I.A.No.979 of 2015 in OS.No.194 of 2013 dated 03.07.2017 on the file of II Additional Sub Judge, Villupuram, thereby directed the petitioners to value the suit under Section 40 (1) of Tamil Nadu Court Fees and Suits Valuation Act.

2. The petitioners are the plaintiffs and the respondent is the defendant. The petitioners filed petition for amendment to include the prayer of declaration declaring that the partition deed dated 21.01.2013 is null and void. The trial court allowed the petition for seeking amendment and directed the petitioners to value the suit under Section 40 (1) of the Tamil Nadu Court Fees and Suits Valuation Act instead of Section 25 (a) of Tamil Nadu Court Fees and Suits Valuation Act. Aggrieved by the same, the petitioners have preferred the present Civil Revision Petition.

3. The learned counsel for the petitioners would submit that a partition deed operates as readjustment of rights between the shareholders in the properties jointly owned by them and therefore the

partition deed cannot be construed as a document of the nature envisaged in Section 40 of the said Act for cancellation of which alone the court fees will have to be paid on the value of the property in the document. Therefore, the provisions under Section 25 (a) is only applicable and Section 40 (1) of the Tamil Nadu Court Fees and Suits Valuation Act is not applicable. He further submitted that the petitioners are in joint possession of the suit property and already they are in possession and enjoyment of the same. Therefore, the partition deed entered between the family members does not create or assign any new rights for the first time among the share holders. In support of his contention, he relied upon the following judgments:

- (i) Varadaraja Pillai Vs. Muthusamy Pillai
reported in CDJ 1996 MHC 760
- (ii) N.Ramachandran Vs. Munisamy and 6 others
reported in 1998-2 LW 152
- (iii) S.Periasami Vs. Chellammal and another
reported in 1980-1-MLJ 46
- (iv) Aralappa & etc. Vs. Jagannath & Ors.
reported in AIR 2007 Karnataka 91

4. The learned counsel for the respondent submitted that when the suit is filed for declaration that the suit document is null and void, it should have been valued on the market value on the date of plaint under Section 40 (1) of the Tamil Nadu Court Fees and Suits Valuation Act. When the document is challenged as void, the relief in substance indirectly amounts to seek for cancellation and therefore, the Section applicable is only under Section 40 of the said Act. As such it is clear that whether it is cancellation of sale deeds or cancellation of partition deeds, it makes no difference and that too when the plaintiff is party to such instrument and when the pleading could establish the intention of the plaintiff to cancel such document only under Section 40 of the Tamil Nadu Court Fees and Suits Valuation Act is attracted. In support of her contention, she relied upon the following judgments:

(i) M.Panneerselvam Vs. Suseela and others
reported in 2017 (2) CTC 309

(ii) J.Vasanthi and others Vs. N.Ramani Kanthammal
rep. by LR's and others reported in 2017 (6) CTC 201

(iii) S.Rajasekaran Vs. K.Sargunam reported in (2007) 1 MLJ 696

(iv) J.Shanker Vs. P.Jayabal reported in (2007) 6 MLJ 298

5. Heard, Mr.N.Suresh, the learned counsel for the petitioners and M/s.Elizabeth Ravi, the learned counsel for the respondent.

6. The petitioners are the plaintiffs and they filed suit for partition as against the respondent herein. While pending the suit, the petitioners filed petition for amendment to include the prayer of declaration declaring that the partition deed 21.01.2013 is void. The court below allowed the petition for amendment and directed the petitioners to value the suit under Section 40 (1) instead of Section 25 (a) of Tamil Nadu Court Fees and Suits Valuation Act. In this regard, the learned counsel for the petitioners relied upon the judgment in the case of **Varadaraja Pillai Vs. Muthusamy Pillai** reported in **CDJ 1996 MHC 760**, wherein it is held as follows:

As per the decision reported in Periasamy v. Smt. Chellammal, 1980 (1) MLJ 46, what the [Section 40](#) of the Act contemplates is a document which purports or operates to create, declare, limit or extinguish whether in present or in future any right or interest in money, movable or immovable property, and that a partition deed entered into

between members of a joint family does not create or assign a right in properties for the first time among the sharers, not does it limit or extinguish their right over all items of properties dealt with in the partition. It has been further held in the above decision that a partition deed operates as a re-adjustment of the rights between the sharers in the properties jointly owned by all of them till the time of partition and therefore, it is doubtful if a partition deed can be construed as a document of the nature envisaged under [Section 40](#) of the Court Fees and Suit Valuation Act. The above decision would show that the partition deed dated 17.2.1987 cannot be considered as a document of the nature envisaged in Section 40 of the Tamil Nadu Court-Fees and [Suits Valuation Act](#). As per [Section 37\(4\)](#) under which the Court-Fee Examiner has directed the plaintiff to pay the court-fee, the court-fee has to be paid under [Section 37\(1\)](#) only if there is a prayer for the relief of cancellation of the document. The plaintiff has not asked for cancellation of the document. He has simply alleged in the plaint that he is in possession of the property in question along with the defendants and has prayed for partition. The relief which the Court-Fee Examiner wants the plaintiff to ask is a relief which is not asked for by the plaintiff. Therefore, it cannot be imported as to charge court fee thereon.

7. He also relied upon the judgment in the case of

S.Periasami Vs. Chellammal and another reported in **1980-1-MLJ 46**, wherein it is held as follows:

10. It will be apposite to point out here that [Section 39](#) of the Transfer of Property Act, lays down that where a third person has a right to receive maintenance, or a provision for advancement or marriage from the profits of immovable property, and such property is transferred the right may be enforced against the transferee, if he has notice thereof. In the instant case, the petitioner who is the son cannot certainly plead want of notice about his mother being entitled to get maintenance from out of the income of the family properties. Therefore the partition of the family properties between the petitioner and the first defendant can have no impact whatever on the right of the first respondent to proceed against the properties for getting maintenance.

11. Lastly a partition deed cannot in the strict sense be construed as one of the documents referred to in Section 40 of the Tamil Nadu Court-fees and [Suits Valuation Act](#). What [Section 40](#) of that Act contemplates is a document which purports or operates to create, declare, limit or extinguish whether in present or in future any right, or interest in money, movable or immovable property. A partition deed entered into between members of a joint family does not create or assign right in properties for the first time among the sharers; nor does it limit or extinguish their right

over all items of properties dealt with in the partition. A partition deed operates as a readjustment of the rights between sharers in the properties jointly owned by all of them till the time of partition. Therefore, it is doubtful if a partition deed can be construed as a document of the nature envisaged in Section 40 of the Tamil Nadu Court-fees and [Suits Valuation Act](#), for the cancellation of which alone court-fees will have to be paid on the value of the subject-matter of the property concerned in the document.

8. He also relied upon the judgment in the case of ***Aralappa & etc. Vs. Jagannath & Ors.*** reported in ***AIR 2007 Karnataka 91***, wherein it is held as follows:

16. The Supreme Court in the case of [The Commissioner of Income Tax, Gujarat, v. Keshavlal Lallubhai Patel](#) dealing with the question whether the partition is a transfer, has held that, "it is not".

18. Again the Supreme Court in the case of [Sk. Sattar Sk. Mohd. Choudhari v. Gundappa Amabadas Bukate](#) after reviewing the entire case law on the point has held that [Section 5](#) contemplates transfer of property by a person who has a title in the said property to another person who has no title. A family arrangement, on the contrary, is a

transaction between members of the same family for the benefit of the family so as to preserve the family property, the peace and security of the family, avoidance of family dispute and litigation and also for saving the honour of the family. Such an arrangement is based on the assumption that there was an antecedent title in the parties and the agreement acknowledges and defines what that title is. It is for this reason that a family arrangement by which each party takes a share in the property has been held as not amounting to a "conveyance of property" from a person who has title to it to a person who has no title. However, if a partition of the joint family property takes place by act of parties, it would not be treated as 'transfer' within the meaning of [Section 5](#) of the Act.

21. The word "Vibhaga" in Sanskrit, "Bhaga" in Kannada is usually rendered into English by the words "Partition". It denotes adjustment of diverse rights regarding the whole by distributing them in particular portions of the aggregate. It is a process by which the joint enjoyment of a property is transformed into an enjoyment in severalty. It may be by the agreement between the parties or by a decree of the court. However, in either of the cases, the parties to the partition possess an antecedent title in the property and through the process of partition, the antecedent title is specifically defined. Before partition, the property was enjoyed jointly and after partition, they would

enjoy the property in severalty. Therefore, in the partition no party gets the title for the first time. In other words, partition does not give title or create title. If the party to the partition has an antecedent title to the property, it only enables him to obtain what is his own in a definite and specific form, Section 5 of the Transfer of Property Act contemplates transfer of property by a person whose title in the said property, to another person who has no title. In a partition, no one transfers title which he possesses in favour of a person who does not possess a title. Every one has an antecedent title. Therefore, no conveyance is involved, in the process as conferment of a new title is not necessary. It does not amount to transfer. Therefore, partition is not a transfer and by partition no body acquires title to any property for the first time. Consequently the partition deed only recognises an existing right, which each party to the deed has in the joint property and no right spring from the deed of partition.

The Hon'ble Supreme Court of India as well as this Court held that if a partition of joint family property takes place by act of parties, it would not be treated as transfer within the meaning of Section 5 of Transfer of Property Act. Before partition, the property was enjoyed jointly and after partition, they would enjoy the property in severalty. Therefore, in the partition no party gets the title for the first time. In other words, partition

does not give title or create title.

9. In the case on hand, the petitioners filed petition to cancel the partition deed between the respondent and the first petitioner's husband dated 21.01.2013. According to the petitioners, they are in joint possession of the suit property and they are already in possession and enjoyment of the suit property and as such it does not give any title or create title to the property. It would not be treated as transfer within the meaning of Section 5 of Transfer of Property Act. Therefore, the partition deed cannot in the strict sense be construed as one of the documents referred to in Section 40 of the Tamil Nadu Court Fees and Suits Valuation Act

10. In view of the above judgments, the judgments cited by the learned counsel for the respondent are not helpful to the case on hand and the judgments cited by the learned counsel for the petitioners are squarely applicable to the case on hand. That apart, Section 40 of the Act contemplates is a document which purports or operates to create, declare, limit or extinguish whether in praesenti or in future any right or

interest in money, movable or immovable property, and that a partition deed entered into between members of a joint family does not create or assign a right in properties for the first time among the shareholders, nor does it limit or extinguish their right over all items of properties dealt with in the partition. Therefore, the partition deed cannot be construed as a document of the nature envisaged under Section 40 of the Tamil Nadu Court Fees and Suits Valuation Act

11. In view of the above discussion, this civil revision petition is allowed and the order passed in I.A.No.979 of 2015 in OS.No.194 of 2013 dated 03.07.2017 on the file of II Additional Sub Judge, Villupuram is set aside insofar as the direction issued alone. Consequently, connected miscellaneous petition is closed. No order as to costs.

20.04.2021

Speaking/Non-speaking order
Index : Yes/No
Internet : Yes/No
lok

To

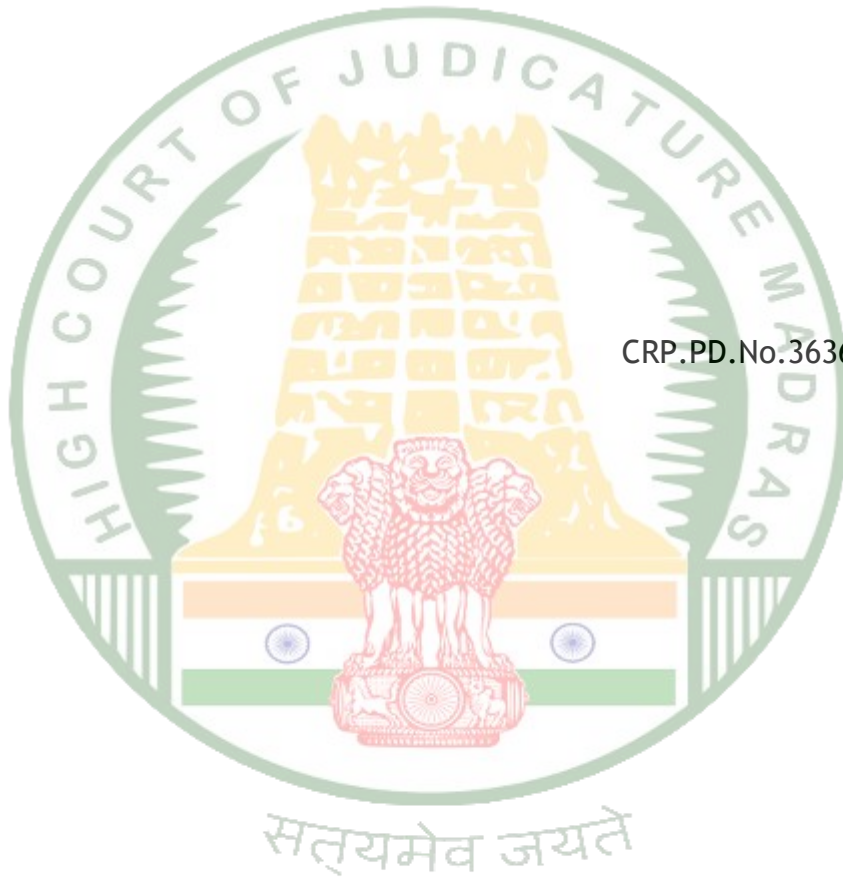
The II Additional Sub Judge,
Villupuram.



WEB COPY

G.K.ILANTHIRAIYAN,J.

lok



CRP.PD.No.3636 of 2017

WEB COPY

20.04.2021