



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DTED : 31.03.2021

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.(MD)No.174 of 2011

and

M.P.(MD)No.1 of 2011

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1.V.S.Guruswamy Nadar (died) ... Appellant /1st Defendant
2.Petchiyammal
3.Ayyam Perumal
4.Thayammal
5.Shanthi
6.Johnsi Rani
7.Kanaga
8.Renuga
9.Murugan
10.Jeevanantham
11.Bubesh
12.Selvarani
13.Velavan
14.Karlmarx ...Lrs of Appellant

(A2 to A14 are brought on record as legal heirs of the deceased sole appellant)

Vs.

1.S.Ananthammal ..Plaintiff/1st Respondent
2.V.S.Balagurusamy Nadar
3.Ammathai (died)
4.Ponnammal
5.Kamaraj (died)
6.Pon Gurusamy
7.Balagurusamy
8.Baskar
9.Jayachandra
10.Pon Rathi
11.Indira
12.Palani Velammal ..Respondents 2 to 12/Defendants 2 to 12
13.Kalirajan
14.Ganesamoorthi
15.Rajasekar
16.Dhanaraj
17.Malarvily
18.Vijayalakshmi
19.Pratheep Kumar
20.Prema
21.Jayalakshmi
22.Kasikani



23.Thenmozhi
24.Edison

..Respondents

(R13 to R20 were brought on record as legal heirs of the deceased third respondent)

(R21 to R24 were brought on record as legal heirs of the deceased fifth respondent)

PRAYER: This Appeal Suit is filed under Section 96 of the Civil Procedure Code, against the judgment and decree of the learned Additional District Judge, Fast Track Court No.1, Thoothukudi dated 28.06.2011 in O.S.No.12 of 2009.

For Appellants	: Mr.T.M.Hariharan
For R2	: Mr.H.Lakshmi Shankar
For RR6-8, 11, 21, 22 & 24	: Mr.B.Brijesh Kishore
For R12	: Ms.J.Anandhavalli
For R13 to R20	: Mr.B.Christopher
For R23	: No Appearance

JUDGMENT

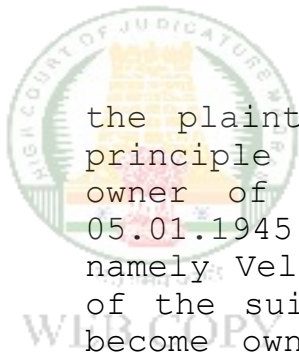
Aggrieved over the decree and the judgment of the trial Court passing preliminary decree in favour of the plaintiff, the present appeal is filed by the first defendant.

2. For the sake of convenience, the parties are referred to herein, as per their rank before the trial Court.

3.The brief facts, leading to the filing of this Appeal Suit, are as follows:-

The suit property belonged to one Shanumga Nadar. He had three sons and two daughters through his first wife Thayammal. After the death of the first wife, the said Shanmuga Nadar married the plaintiff in the year 1961 and begotten one girl child/12th defendant herein. The first and second defendants are the sons of the Shanmuga Nadar. Third defendant is the daughter of the said Shanmuga Nadar. Defendants 4 to 11 are the legal heirs of Thenammal, another daughter of Shanmuga Nadar. The said Shanmuga Nadar inherited the property. Thereafter, the suit property is in joint possession of his legal heirs. Hence, the suit for partition.

4. The first defendant denying the allegations in the plaint submitted that the plaintiff is the third party to the family. The plaintiff is not the wife of Shanmuga Nadar. The suit has been filed in collusion with the second defendant. It is contended that the suit in O.S.No.66 of 1971 has been filed by the first and second defendants as against the father and the same was decreed. Now to blackmail the first defendant, the present suit has been filed by



the plaintiff. The suit is barred by limitation as well as the principle of *res judicata*. The defendants 1 and 2 have become the owner of the property by virtue of the settlement deed dated 05.01.1945 executed by the grandfather of the defendants 1 and 2, namely Velayutha Nadar. The above document was the subject matter of the suit in O.S.No.66 of 1971. As the defendants 1 and 2 had become owners as per the settlement deed, there was a partition between the first and second defendants in respect of the suit property and after the partition, the second defendant along with his son Velmurugan had sold his share under various sale deeds in favour of the first defendant. Item Nos.5, 6 and 7 are in possession of Poyyazhi Gounder son of Kandasamy Gounder, who has purchased the property from the third party and he has not been added as party. Hence, the suit is barred by limitation.

5. The second defendant admitting the settlement executed by the grandfather of the first and second defendants, it is the contention of the second defendant that the above document has not been acted upon. Similarly, the partition deed executed between the defendants 1 and 2 was also not acted upon. Hence, his contention is that the properties are in joint possession. The first defendant is the kartha of the family. Hence, it is submitted that the properties are liable to be partitioned.

6. The 12th defendant filed a written statement stating that the judgment made in O.S.No.66 of 1971 will not bind the 12th defendant and she is claiming right as the legal heir of late Shanmuga Nadar and she is entitled to get a share in the suit property as daughter of late Shanmuga Nadar. It is also admitted that the property is in possession of the family.

7. Based on the pleadings, the following issues were framed by the trial Court:-

- 1) ***1. Whether the plaintiff and 12th defendant are the legal heirs of deceased V. Shanmuga Nadar?***
2. ***Whether the suit is bad for non-joinder of necessary parties?***
3. ***Whether the plaint schedule properties are in the joint possession and enjoyment of the plaintiff and defendants?***
4. ***Whether the present suit is hit by resjudicata?***
5. ***Whether the plaintiff is entitled to 1/6th share in respect of the plaint schedule properties?***
6. ***Whether the plaintiff is entitled to mesne profits?***
7. ***Whether the plaintiff is entitled to get any other reliefs?***



8. Before the trial Court, on the side of the plaintiff P.W.1 to P.W.3 were examined and Exs.A1 to A9 were marked and on the side of the defendants D.W.1 to D.W.5 were examined and Exs.B1 to B35 marked.

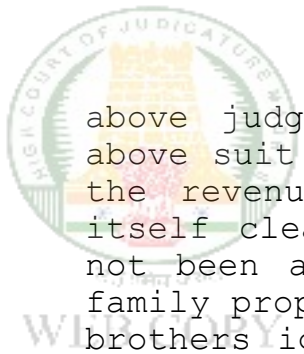
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9. The trial Court after analyzing the materials available on record, allowed the suit holding that the settlement deed, Ex.B4 is void by the rule of perpetuity and granted partition in favour of the plaintiff. Challenging the same, the present appeal came to be filed by the first defendant.

10. A memo has been filed by the learned counsel for the first respondent/plaintiff stating that the first respondent died leaving behind the 12th respondent as her only legal heir and the same is recorded.

11. The learned counsel appearing for the appellants vehemently contended that the plaint proceeded as if the property is the ancestral property but a different stand has been taken during trial. The trial Court has not even considered the entire document particularly, Ex.B4, settlement deed executed by Velayutham Nadar. The property is absolutely settled in favour of the first and second defendants, legal heirs of Velayutha Nadar. What was restricted in the above document is only life interest in favour of the settler and Shanmuga Nadar and the vested remainder was given to the defendants 1 and 2. Contrary to the above settlement deed, when the father of the first and second defendants had acted upon, the suit came to be filed in O.S.No.66 of 1971. In the above suit, the father of the first and second defendants took a stand during his evidence that the property was purchased by himself in the name of his father. After contest, in the above suit, the Court has held that the property is the absolute property of the Velayutham Nadar and what was given in the settlement deed is only life interest in favour of Shanmuga Nadar and absolute interest in favour of the defendants 1 and 2 herein. After the said suit, partition was effected between the first and second defendants and the second defendant along with his son had sold his share in favour of the first defendant. All these documents have not been considered by the trial Court. Hence, it is the contention that the findings of the Courts below that Ex.B4 is hit by rule of perpetuity is absolutely perverse and not maintainable in the eye of law. The plaintiff is now claiming right through the said Shanmuga Nadar, who was also a party in the earlier suit and the plaintiff is bound by the earlier judgment. Hence, the judgment of the trial Court has to be set aside.

12. The learned counsel appearing for the respondents namely, plaintiff and the 12th defendant vehemently contended that the trial Court in fact considered the entire documents in the earlier judgment in O.S.No.66 of 1971, which is marked as Ex.B4. In the



above judgment Shanmuga Nadar remained ex-parte. Therefore, the above suit is not binding on the plaintiff and 12th defendant. All the revenue records stand in the name of Shanmuga Nadar. That itself clearly shows that the so-called Ex.B4 settlement deed has not been acted upon and the property was always enjoyed as joint family property. Such being the position, the partition between two brothers ignoring the other legal heirs would not convey any title to them. Therefore, if any such partition between two brothers is effected, it is not valid and the same will not affect the rights of the 12th defendant, who is the daughter of Shanmuga Nadar. Hence, it is her contention that the judgment of the trial Court is well balanced and does not require any interference.

13. The learned counsel appearing for the second defendant vehemently contended that Ex.B4 has not been acted upon and the earlier judgment in O.S.No.66 of 1971 does not operate as *res judicata*. Pleadings in the earlier suit have not been filed. The plea of *res judicata* has to be established with the pleadings. Admittedly, the pleading in the earlier suit had not been filed. The burden of establishing the plea of *res judicata* is not discharged by the first defendant and hence, mere findings in earlier suit with regard to Ex.B4 will not bind the other co-owners. It is the contention that the so-called partition deed executed between two brothers is also not established. The second defendant has categorically taken a stand that he has not signed any document and the first defendant has not taken any steps to seek expert opinion on the admitted signature of the second defendant by comparison. That itself shows that the partition deed relied upon by the first defendant has not been established. It is the further contention that admittedly, the second defendant is residing far away from the suit property in the village called Kannankattai. It has been admitted by the first defendant. That being the position executing the sale deeds in favour of first defendant by the second defendant cannot be presumed. When Ex.B4 itself clearly indicates that absolute interest was given to Shanmuga Nadar, later recitals in the settlement deed cannot be given much importance. The later recitals restricting the enjoyment would be void as far as the settlement is concerned. Hence, it is submitted that the judgment of the trial Court granting decree does not require any interference.

14. In respect of his submission, he has relied upon the following judgment:-

1.V.Rajeshwari (SMT) vs. T.C.Saravanabava [(2004) 1 SCC 551]

15. In the light of the above submissions, now the points arise for consideration in this appeal are:-

1. Whether Shanmuga Nadar had any interest in the suit property?

<https://hcservices.ecourts.gov.in/hcservices/>



2. Whether the defendants 1 and 2 became absolute owners of the property by virtue of Ex.B4, settlement deed, dated 05.01.1945?

3. Whether the decree and judgment in O.S.No.66 of 1971 is not binding on the plaintiff, 2 and 12th defendants?

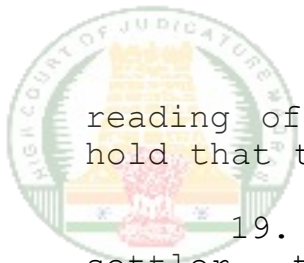
4. To what other reliefs, the parties are entitled?

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16. Though the plaint proceeded that the plaintiff is the second wife of Shanmuga Nadar, such contention has been denied by the first defendant, who is the contesting defendant. The fact that whether the plaintiff is the wife of Shanmuga Nadar or the marriage between them performed assumes insignificance in this matter, since the parties have not disputed the birth of the 12th defendant born to Shanmuga Nadar. Now what has to be seen in this appeal is that the entitlement of the parties for the partition in the suit properties. The suit proceeded as if the properties are inherited by Shanmuga Nadar and it is in joint possession of his legal heirs. Therefore, the plaintiff being the second wife of Shanmuga Nadar and her daughter/12th defendant, are also entitled to a share.

17. It is the specific case of the first defendant that the suit property was originally owned by Velayutham Nadar, grandfather of the first and second defendants, who executed a settlement deed under Ex.B4, dated 05.01.1945 reserving the right of life interest for himself and his son Shanmuga Nadar and vested remainder to the first and second defendants, who are the grandchildren of Velayutham Nadar. The entire recitals in Ex.B4, when carefully seen, it is clear that nowhere it has been averred that whether the suit property is ancestral property or self acquired property. But the recitals make it very clear that the document of settlement was executed in favour of his son Shanmuga Nadar. When the transfer was in presenti, any later clause creating any restriction in enjoyment normally would be void and cannot be given effect. But at the same time, to ascertain the intention of the parties, construction of the entire document is absolutely necessary. The entire recitals have to be read in harmoniously.

18. Perusal of the entire recital in Ex.B4, the clause indicates that the settlement was not executed in favour of Shanmuga Nadar absolutely. There was a reservation made by the settler restricting the life interest not only for himself but also for his son Shanmuga Nadar. Absolute, the right is vested with his grandchildren namely the first and second defendant. The very recital, 'சர்வசுத்திரம்' in the document makes it very clear that the document is intended only for settlement giving absolute interest in favour of the defendants 1 and 2 being grandchildren of Velayudham Nadar. Therefore, the contention of Mr.Lakshmi Shankar, learned counsel appearing for the second respondent herein that the later clause would be void cannot be given effect and cannot be countenanced, since in view of the construction and harmonious



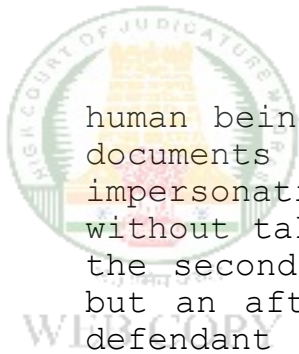
reading of the entire documents, this Court has no hesitation to hold that the said document is nothing but a settlement deed.

19. It is also to be noted that after the death of the settler, the sons of Shanmuga Nadar, namely first and second defendants filed a suit to declare that they have the vested reminders in the suit property and for injunction restraining alienation by their father, namely the life interest holder. In the above suit, the said Shanmuga Nadar was examined as D.W.1 and took a stand that the suit property, which was the subject matter of the settlement under Ex.B4 was purchased by himself in the name of his father. Thereafter, the said Shanmuga Nadar remained exparte. The Court after appreciating the entire materials and evidence found that such contention is not established and held that the property is belonged to Velayutha Nadar and the settlement is valid one. The said judgment is marked as Ex.B5.

20. It is to be noted that the second defendant is one of the beneficiary under the settlement deed, Ex.B4 and the same is not disputed. On the other hand, only evasive defense has been taken in the written statement in the present suit that the same was not acted upon. After the above suit, partition deed came to be executed between the first and second defendants under Ex.B8 on 22.09.1979. After such partition, the second defendant along with his son sold the properties under Exs.B9 to B12 in favour of the first defendant. Now it is the contention of the second defendant is that the partition deed has not been acted upon. But the fact remains that in the entire written statement he has not denied the very execution of the partition deed.

21. Be that as it may, it is also to be noted that D.W.2, in his evidence took a stand as if the sale deed was not signed by him and it was created only by his brother. Though much emphasis was made on the fact that the second defendant was residing far away from the suit field and he is no way connected with the suit property, this Court is unable to persuade itself with such contention. When the second defendant has not even denied the partition deed, no whisper whatsoever has been made with regard to the sale deeds referred in his written statement.

22. Mr.Lakshmi Shankar, learned counsel for the second respondent made much emphasis to contend that the written statement copy would not be served on the co-defendant, it is to be noted that the second and twelfth defendants are sailing with each other. The sale deed executed by the second defendant in favour of the first defendant and his sons is not denied in the written statement filed by the second defendant and no other counter claim or additional written statement whatsoever has been filed by him. Therefore, without any specific denial with regard to those documents, its executant merely on the oral evidence, cannot challenge those documents. If such allegations are true, the normal conduct of the



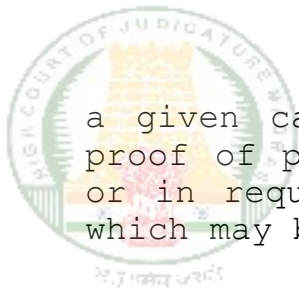
human being is to take immediate action and steps to show that the documents are created in a fraudulent manner and there was an impersonation while executing the document, but keeping silent without taking any action indicates that the contention put forth by the second defendant in his evidence for the first time is nothing but an afterthought. Therefore, the burden casts upon the second defendant to establish that the documents under Ex.B9 to B12 sale deeds was not executed either by him or by his sons but the said burden has not been discharged by him.

23. Ex.B5, judgment and Ex.B6, decree made in the earlier suit in O.S.No.66 of 1971 cited by the first and second defendants when carefully seen, it is clear that the plaintiffs in the above suit are none other than first and second defendants in the present suit. Though it is denied by the second defendant in his evidence that he has not engaged or authorised any lawyer in the above matter, there is no whisper with regard to the previous suit in his entire written statement. Whereas, in Ex.B8, partition deed, there is a recital with regard to the previous proceedings. Therefore, the contention that he has not authorised any Lawyer to file a suit cannot be countenanced. The judgment of the above suit is marked as Ex.B5 herein.

24. In the above suit, one of the main issues are that 'Are the suit properties ancestral properties of the first defendant and his father, Shanmuga Nadar?'. The second issue is 'Whether the suit property was self acquired property of Velayutha Nadar?'. The third issue was with regard to validity of the settlement deed executed by Velayutha Nadar and whether the same has been acted upon. With regard to the first and second issues in the previous suit, the Court has concluded, after elaborate discussion that the absolute interest is created only in favour of the first and second defendants herein and also concluded that the suit property is the absolute property of Velayutha Nadar. Ex.B4, settlement deed herein was also held to be valid in the previous suit.

25. When the second defendant and his father Shanmuga Nadar were also parties to the earlier suit, which was contested and decreed, the above judgment and decree will certainly bind not only on Shanmuga Nadar but also the defendants 1 and 2 also. Much emphasis was made on the fact that the above judgment and decree does not operate as *res judicata*, since the pleading in the earlier suit was not produced.

26. In the judgment in *V.Rajeshwari (SMT) vs. T.C.Saravanabava* [(2004) 1 SCC 551], in paragraph No.13, the Hon'ble Supreme Court has held that normally to prove the plea of *res judicata*, the parties are required to file the respective pleadings of the previous suit and then to find out as to what has been decided by the judgment, which operates as *res judicata*. May be in



a given case only copy of judgment in previous suit is filed in proof of plea of *res judicata* and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof.

27. The earlier judgment arrived at by considering the materials cannot be ignored altogether, merely on the basis of the earlier pleadings have not been filed. When the judgment contains exhaustive pleadings and decision is made on the basis of the pleadings, there is no bar in the eye of law to take the above judgment to look into the plea of *res judicata*. The plaintiff and the second defendant are claiming right through Shanmuga Nadar, who was also a party in the earlier suit and whose defense was negatived. Therefore, the above judgment certainly bind on the second defendant the 12th defendant. They cannot claim any other right other than the right acquired by Shenbaga Nadar. The judgment in the earlier suit makes it very clear that Shenbaga Nadar did not have any absolute right in the suit property. What was entitled is only life interest for the lift time. Therefore, the plaintiff and the 12th defendant will not get any title or right to claim a share in the suit property after the death of Shanmuga Nadar. Therefore, viewed from any angle, either the plaintiff or the 12th defendant cannot claim any right.

28. It is also to be noted that though the other legal heirs have also been made as a party, except the second defendant and 12th defendant, the other legal heirs have not contested the suit challenging Ex.B4. In fact, one of the issue in the earlier suit was with regard to the alienation made by Shanmuga Nadar in favour of his one of his daughters Ammathai, namely the third defendant, the same is also sought to be annulled in the earlier proceedings. The Court has also granted declaration that the sale is not valid after the life time of Shanmuga Nadar. This is the another reason for not raising any finger about Ex.B4 by the other legal heirs. Therefore, the finding of the trial Court that Ex.B4, is hit by rule of perpetuity is absolutely wrong.

29. It is also pleaded in the plaint as if Shanmuga Nadar has inherited the property. If the entire pleading is read harmoniously, it will give a meaning as if the suit properties are ancestral properties. Even if that plea is taken as such, it is relevant to note that the plaintiff was never been a coparcener in the suit property. The 12th defendant's position elevated as coparcener only after advent of the Act 1 of 1990 of Tamil Nadu Act or Act 39 of 2005 of the Hindu Succession Act. But the fact remains that in this case, the partition was effected between the co-owners in the year 1979 itself. Therefore, applicability of Act 1 of 1990 or Act 39 of 2005 also will not arise to claim any share. For all these reasons, the judgment of the trial Court granting decree for partition has to fail. Accordingly, all the points are answered.



30. In the result, the decree and the judgment of the trial Court is set aside and this appeal suit is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-I)

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Sub Assistant Registrar(CS)

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To

1.The Additional District Judge, Fast Track Court No.1,
Thoothukudi

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The Section Officer,
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Madurai Bench of Madras High Court,
Madurai.(2 copies)

+2 CC to M/s.T.M.HARIHARAN, Advocate (SR-14950[F] dated
31/03/2021)

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01/04/2021)

+1 CC to M/s.J.ANANDHAVALLI, Advocate SR-15050[F] dated 01/04/2021

Judgment made in
A.S.(MD)No.174 of 2011
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