



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A(MD)No.364 of 2008

WEB COPY

T.Sugumaran

... Plaintiff / 1st Respondent /
Appellant

-Vs-

1.T.Sundaresan

... 1st Defendant / Appellant /
1st Respondent

2.Paulthangam

3.T.Lakshmi

4.Suganthi

5.Sulochana

6.Subathra

7.Sucila (Died)

... Defendants 3 to 8 / Respondents
2 to 7/ Respondents

8.Chandrayah

9.Chandrakumar

10.Chandrasekar

(Respondents 8 to 10 are brought on record
as Lrs of the deceased 7th respondent vide order
dated 09.08.2021 in C.M.P(MD)Nos.5915, 5916, 5919 & 5921 of 2021)

... Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 14.09.2007 rendered in A.S.No.111 of 2005 on the file of the Principal Subordinate Judge, Nagercoil, modifying the decree and judgment dated 11.04.2005 rendered in O.S.No.706 of 2001 on the file of the second Additional District Munsif, Nagercoil.

For Appellant	: Shri.S.Subbiah senior counsel for Mrs.P.Jessi Jeeva Priya
For R1	: Mr.E.V.M.Siva
For R2 & R4	: no appearance
For R5 to R7	: Mr.S.Xavier Rajini

JUDGMENT

The plaintiff in O.S.No.706 of 2001 on the file of the second Additional District Munsif, Nagercoil, is the appellant in this second appeal.



2. The suit was one for partition. The case of the appellant was that the suit properties which are three in number are ancestral properties and that he has 1/3rd share in them. The specific grievance of the appellant was that even though he caused to issue notice dated 14.06.1999 calling upon his father Thanka Nadar not to encumber or alienate the properties, his father went ahead and sold the suit first item in favour of the third defendant Paul Thangam vide sale deed Ex.A4 dated 15.10.2001. In the plaint, the father Thanka Nadar was shown as the first defendant. The plaintiff's younger brother Sundaresan was shown as the second defendant. The purchaser of the first item was shown as the third defendant. During the pendency of the suit, the first defendant Thanka Nadar passed away. His wife and four daughters were brought on record as D4 to D8 vide order dated 08.10.2003 in I.A.No.1449 of 2002. Before his demise, Thanka Nadar did not file any written statement. It was only the second defendant who filed the written statement. D4 to D8 remained exparte. The plaintiff examined himself as P.W.1 and marked Ex.A1 to Ex.A7. The second defendant examined himself as D.W.1. Suganthi and Subathra were examined as D.W.2 and D.W.3. On the side of the defendants, no documentary evidence was marked. After a consideration of the evidence on record, the trial Court by judgment and decree dated 11.04.2005 declared that the plaintiff is entitled to 8/21th share in the suit properties by metes and bounds. Aggrieved by the same, the second defendant Sundaresan alone filed A.S.No.111 of 2005 before the Principal Sub Court, Nagercoil. The first appellate court by the impugned judgment and decree dated 14.09.2007, modified the decision of the trial court and held that the suit item No.1 was not amenable to partition. The suit came to be dismissed as regards the first item. The plaintiff was held entitled to 1/7th share in the suit items 2 and 3. The appeal was partly allowed by the first appellate court. Challenging the same, this second appeal came to be filed. The second appeal was admitted on the following substantial question of law:-

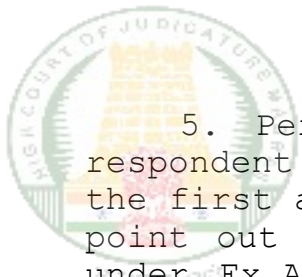
"Whether the judgment and decree of the court below is perverse on account of its misconstruction of document Ex.A3 to come to a finding that the property of the first defendant is self-acquired and it will not have the status of the joint family property?"

3. The learned senior counsel appearing for the appellant / plaintiff took me through the pleadings as well as the evidence and contended that the suit first item by no stretch of imagination can be considered as self acquired property of the deceased first defendant. He pointed out that the suit item was allotted to D1 under Ex.A3 dated 04.09.1957. It was a registered partition that took place between D1 and his brothers. He placed reliance on the decision reported in **2017 (3) TNLJ 122 (Civil) (Pachiammal Vs.Manivasagam and others)**. He contended that the said item No.1 was obviously a joint family property and that the contrary finding



given by the first appellate court is perverse on the very face of it. Once it is held that the suit first item No.1 is a joint family property, it could not have been alienated by the first defendant, unless there was family necessity. He also pointed out that in the year 1999 itself under Ex.A1, the plaintiff had issued a legal notice thereby disrupting the joint family status. The sale of item No.1 under Ex.A4 took place only in the year 2001. By then, the first defendant Thanka Nadar ceased to be the manager of the joint family. He would point out that the burden lay on the alienee to show that the alienation was justified with reference to family necessity. He pointedly contended that the alienee did not even enter the witness box. The evidence given by D.W.1 who is the plaintiff's sibling does not establish that there was family necessity. The defendants' witnesses were unable to furnish any details regarding the debts allegedly contracted by the deceased father. Merely because, there was a recital in Ex.A4 that the suit item No.1 was being sold to liquidate the liabilities incurred in connection with the marriage of daughter Subathra, that would not by itself establish that there was any family necessity. In this regard, the learned counsel placed reliance on the decision reported in **1970 (3) SCC 722 (Rani Vs. Santa Bala Debnath)**. In paragraph No.11 of the said decision, it was held that recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in evidence, their value vary according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of legal necessity.

4. In this case, the evidence of the defendants' witnesses does not prove that there was any such legal necessity as claimed in the recital set out in Ex.A4. He therefore submitted that first appellate court went thoroughly wrong in holding that the suit first item is not amenable to partition. He also would point out that when the alienee suffered decree at the hands of the trial court, it was for her to challenge the same. She did not do so. Instead, it was the second defendant who filed the first appeal. Though alienee was shown as respondent in the first appeal filed by the second defendant, she did not take any step for transposing herself as co-appellant before the first appellate court. The learned senior counsel would state that as per Section 96 of C.P.C, only a person who is aggrieved by a decree can maintain the appeal. A person who is not aggrieved is not entitled to maintain the appeal. He would point out that the judgment of the trial court was in fact favouring the second defendant and therefore, an appeal filed by him was not competent. Since this point was not originally urged, he called upon this Court to frame additional substantial question of law in this regard. He also would remark that even before this Court, the alienee did not choose to contest this second appeal.



5. Per contra, the learned counsel appearing for the first respondent submitted that the impugned judgment and decree passed by the first appellate court do not warrant any interference. He would point out that suit item No.1 was allotted to the deceased father under Ex.A3 registered partition deed subject to fulfilment of a condition. Therefore, the said property became the absolute property of the father and it cannot partake the character of a joint family property. In the alternative, he pleaded that the plaintiff himself had taken the stand that the sale would not affect his share in the property. The learned counsel also stated that there are totally three items of properties and that since the deceased father would definitely have a share in all the three items, the offending sale can be sustained by adjusting the father's overall share.

6. I carefully considered the rival contentions and went through the evidence on record. The first contention urged by the learned senior counsel appearing for the appellant is that in view of issuance of Ex.A1-notice, the joint family status got disrupted and that therefore, the first defendant could not have sold the suit item No.1 in favour of the third defendant. Even though there is a considerable force in this contention, its weight in turn would depend upon proof of service of the notice. What were marked before the Court below were office copy of the notice dated 13.06.1999 (Ex.A1) and the returned cover (Ex.A2). Postal endorsement reads that it was refused. Though in normal circumstance it should be taken that notice should be deemed to have been served, since there is nothing to show that the contents of the notice were known to the deceased first defendant, I am not able to conclude that the joint family status suffered disruption in June 1999 itself.

7. Be that as it may, I have to necessarily sustain the contention of the learned senior counsel that family necessity has not been established. As rightly pointed out by the learned senior counsel, burden lay on the alienee Paul Thangam. Paul Thangam did not even enter the witness box. However, that would not render the entire sale transaction void. It would not affect the share of the plaintiff. The first appellate court failed to bear in mind these two basic principles.

(a) When the joint family properties are partitioned among the brothers and one item is allotted to one of the brothers, it would remain a separate property in his hands only if he did not have children. The moment children are born to him, the property will acquire the character of a joint family property. Therefore, the suit item No.1 clearly bears the character of joint family property.

(b) Since the family necessity was not established, the sale will not bind the share of the plaintiff.



8. The substantial question of law is answered in favour of the appellant. The judgment and decree passed by the first appellate court is modified. In view of the recent decision of the Hon'ble Supreme Court reported in **(2020) 9 SCC 1 (Vineeta Sharma Vs. Rakesh Sharma)**, the sisters also will have equal share along with the brothers. It is declared that the plaintiff will be entitled to 1/6th share in each of the three items of the suit schedule properties. The second appeal is allowed. No costs.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To

1.The Principal Subordinate Judge, Nagercoil.

2.The second Additional District Munsif, Nagercoil.

Copy To

The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.P.JESSI JEEVA PRIYA, Advocate (SR-29192[F] dated 15/09/2021)

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14.09.2021

RK (27/10/2021) 5P 6C