



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.07.2021

CORAM:

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THE HONOURABLE MR.JUSTICE **G.R.SWAMINATHAN**

S.A. (MD)No.954 of 2011

1.Dhanalakshmi
2.Subramani

... Plaintiffs 1 & 2/Respondents 1 & 2/
Appellants

-Vs-

1.Soliyappan
2.Rajeswari
3.Palaniappan @ Palanisamy
4.Kaliyammal
5.Selvi
6.Ramadurai

... Defendants 1 & 2 / Respondents 3 & 4/
Respondents 1 & 2
... Defendants 3 & 4 / Appellants 1 & 2/
Respondents 3 & 4
... Defendants 5 & 6 / Respondents 5 & 6/
Respondents 5 & 6

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 15.02.2011 in A.S.No.12 of 2010 on the file of the District Judge, Karur in reversing the judgment and decree dated 04.12.2009 made in O.S.No.177 of 2006 on the file of the Principal Subordinate Judge, Karur.

For Appellant	: Mr.M.P.Senthil
For R1	: No appearance
For R2 to R6	: Mr.Suresh
	for Mr.E.K.Kumaresan

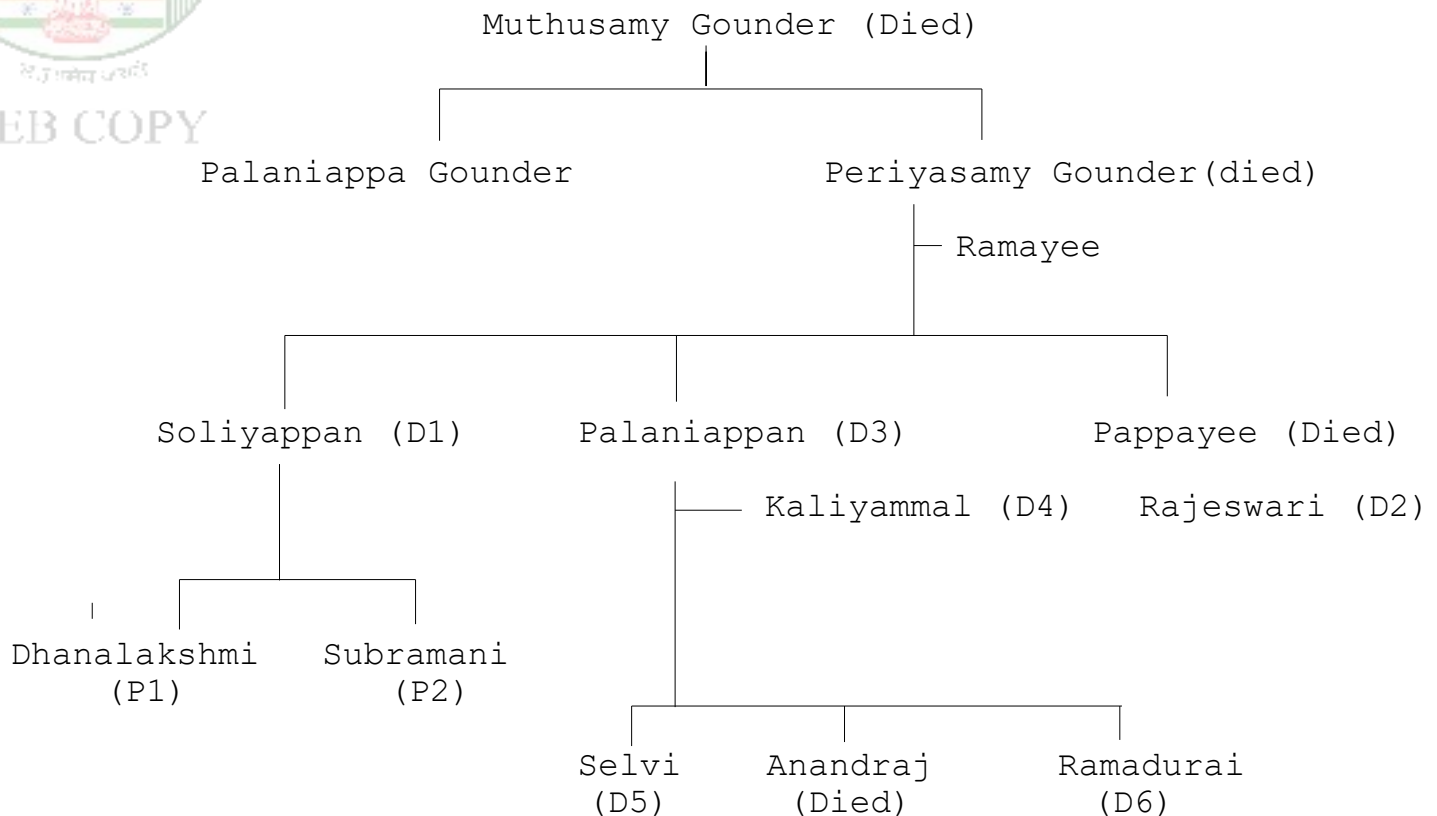
JUDGMENT

The plaintiffs in O.S.No.177 of 2006 on the file of the Principal Subordinate Judge, Karur, are the appellants in this second appeal.

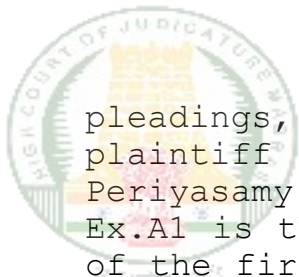


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2.The suit was filed for the relief of partition. The genealogy is as follows:



3.The plaintiffs are the son and daughter of Soliyappan. The contention of the plaintiffs is that the suit properties originally belonged to Muthusamy Gounder / their great-grandfather. Muthusamy Gounder had two sons namely Palaniappa Gounder and Periyasamy Gounder. There was a partition between the two sons. Palaniappa Gounder is no longer in the scene. According to the plaintiffs, they are also coparceners and that they are entitled to $\frac{4}{36}$ th share each in the suit items which are 29 in number. According to them, the properties of Periyasamy Gounder were not divided at all. Of-course, for the sake of convenience, there has been a sort of separate enjoyment. But then, there was no formal partition by metes and bounds. With these averments, the suit came to be instituted. The first defendant, the father of the plaintiffs remained exparte and did not contest the proceedings. The second defendant Rajeswari who is the daughter of Pappayee also remained exparte and did not contest the proceedings. The other defendants filed their written statement controverting the plaint averments. Their defence was that a oral partition took place between Soliyappan / first defendant and Palaniappan / third defendant way back in the year 1977. It was pleaded that certain items were allotted to the first defendant Soliyappan and certain items were allotted to Palaniappan. A few items such as well and pathway were kept in common. After partition, separate pattas were also issued in their respective names. Since the partition had already taken place, the present suit is not maintainable. Based on the rival



pleadings, the trial Court framed the necessary issues. The first plaintiff Dhanalakshmi examined herself as P.W.1 and one Periyasamy was examined as P.W.2. Ex.A1 to Ex.A3 were marked. Ex.A1 is the genealogy, while Ex.A2 is the wedding invitation card of the first plaintiff. Ex.A2 was probably marked to show that she was an unmarried daughter, when Tamil Nadu Act 1 of 1990 came into force whereby an unmarried daughter was also recognized as coparcener. On the side of the defendants, the third defendant examined himself as D.W.1 and one Rajendran examined himself as D.W.2. Ex.B1 to Ex.B14 were marked. After considering the evidence on record, the trial Court passed preliminary decree granting 8/36th share in the suit property. Liberty was given to work out the mesne profits in separate proceedings to be filed under Order 20 Rule 12 of C.P.C., Challenging the judgment dated 04.12.2009 granting preliminary decree, the contesting defendants 3 and 4 filed A.S.No.12 of 2010 before the District Judge, Karur. By judgment and decree dated 15.02.2011, the appeal was allowed and the suit was dismissed. Challenging the same, this second appeal came to be filed.

4. The second appeal was admitted on the following substantial questions of law:-

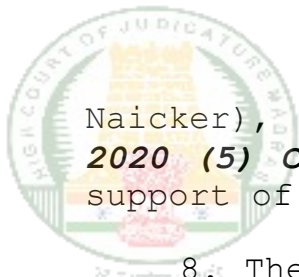
"(a) Whether the finding of the learned Appellate Judge in reversing the well considered judgment of the trial Court without assigning reasons for not accepting the finding of the trial Court is sustainable in law? and

(b) Whether in law the learned Appellate Judge is right in placing the burden on the plaintiff and by picking holes in the plaintiff's case and taking adverse inference against the plaintiff and giving finding in favour of the third defendant in respect of the oral partition pleaded by him?"

5. Heard the learned counsel on either side.

6. The learned counsel appearing for the appellants submitted that the plaintiffs are very much members of the coparcenary comprising the descendants of Periyasamy and all that they had asked for was only their share in the properties. It is true that the revenue records in respect of most of the items are standing in the individual names of the first defendant and the third defendant. But he would urge that the right of partition cannot be defeated on the strength of entries in the revenue records. He would state that the first appellant being a daughter, her right cannot be defeated by invoking oral partition. He pointed out that though the oral partition is said to have taken place in the year 1977 in the presence of panchayadhars, not even a single independent witness was examined.

7. The learned counsel placed reliance on the decisions reported in **1999 (3) CTC 650** (Guruvammal and another Vs. Subbiah



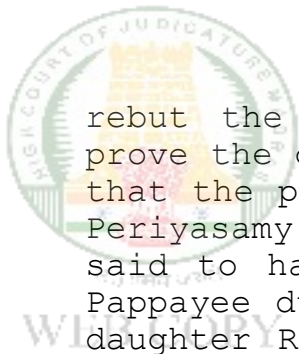
Naicker), **2009(3) L.W. 622** (Ramulu Ammal Vs. Ramachandra Reddy) and **2020 (5) CTC 302** (Vineeta Sharma Vs. Rakesh Sharma and others) in support of his contentions.

8. The learned counsel appearing for the contesting respondents submitted that no substantial question of law really arises for determination in this appeal.

9. I carefully considered the rival contentions and went through the evidence on record. It is true that the defence taken by the contesting defendants is one of oral partition. There can be no dispute that law recognizes oral partition. However, the said plea will have to be affirmatively established through convincing evidence. The only question that arises for determination is whether the defendants have really proved that the oral partition took place between Soliyappan and Palaniyappan in the year 1977. The appellants / plaintiffs are the children of Soliyappan. The other party to the oral partition namely Palaniappan had examined himself as D.W.1. But Soliyappan did not enter the witness box to contest the theory of oral partition pleaded by the defendants.

10. The learned counsel appearing for the respondents pointed out that the plaintiff/P.W.1 herself had admitted that items 4 to 6, 11 to 14, 22, 25, 26 and 28 are in the names of her father Soliyappan. In fact, from the boundary description given in the suit schedule, one can very easily come to the conclusion that the properties are in the separate enjoyment of the parties. For instance, Item No.10 is described as lying to the west of Soliyappan's land. Item No.4 is described as lying to the south of Palanisamy @ Palaniappan's land / D3. Thus, from the description given in respect of the items, one can safely come to the conclusion that the properties had been divided between the first defendant and the third defendant. The revenue records also indicate that pattas have been separately issued in the names of the first defendant and the third defendant. It is easy to remark that the revenue records cannot be decisive of the issue.

11. But then, I fail to understand what other document can be produced before the Court to show that there was oral partition between them and that after partition, the properties are being enjoyed separately. The learned counsel appearing for the contesting respondents would show that a simple arithmetic would indicate that the first defendant was totally given 4.44 acres, while the third defendant was allotted 4.66 acres. There appears to have been a broad equality in the matter of division of the properties. Of-course, some items are still kept in common. But they are none other than the pathways and the wells. The first appellate Court had given clear reasons for differing with the approach of the trial Court. The first appellate Court had noted that the first defendant chose to remain exparte and therefore, the plaintiffs could not



rebut the defence taken by the defendants by examining D.W.1 to prove the oral partition. The first appellate Court has also stated that the plaintiffs cannot raise the plea that Pappayee daughter of Periyasamy Gounder was totally ignored in the oral partition that is said to have been taken place in the year 1997. If that be so, Pappayee during her life time could have challenged even Pappayee's daughter Rajeswari who was impleaded as the second defendant chose to remain exparte. When Rajeswari chose to remain silent, it is not for the plaintiffs to bat for her. The first appellate Court has also rightly observed that failure to examine the panchayatdars will not invalidate the defence of oral partition. Admittedly, the suit was filed only in the year 2006. The oral partition is said to have taken place in the year 1977, that is some 29 years prior to the filing of the suit. Therefore, non examination of Panchayatdars is not fatal. In any event, D3 who claimed to be a party to the oral partition entered the witness box and faced cross examination at the hands of the plaintiffs.

12. The first appellate Court rightly came to the conclusion that oral partition has been proved by the third defendant. I answer the substantial questions of law against the appellants. I do not find any merit in the appeal. The second appeal stands dismissed. No costs.

Sd/-

Assistant Registrar (CO)

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/ /2021

Sub Assistant Registrar(CS)

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To

1.The District Judge, Karur.

2.The Principal Subordinate Judge, Karur.

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The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.M.P.SENTHIL, Advocate (SR-23775[F] dated 23/07/2021)

S.A. (MD)No.954 of 2011

23.07.2021

PS (CO)

RS/NS (19.11.2021) 5P 6C

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