



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.08.2021

CORAM

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

S.A.(MD)No.465 of 2014 and

M.P.(MD)No.1 of 2014

1. Paldurai  
2. Selvachitra  
3. Satheeskumar  
4. Anithakumari

... Appellants / Appellants /  
Defendants 1 to 4

Vs.

1. Sarojini  
2. Rani

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

3. Tamil Nadu Mercantile Bank Ltd.,  
Through its Branch Manager,  
Nagercoil Branch,  
Office at No.229/1,  
Charles Millers Street,  
College Road, Nagercoil,  
Kanyakumari District.

... 3<sup>rd</sup> Respondent /  
3<sup>rd</sup> Respondent /  
5<sup>th</sup> Defendant

**Prayer:** Second appeal filed under Section 100 of C.P.C., against the judgment and decree dated 22.10.2013 made in A.S.No.30 of 2011 on the file of the District Court, Nagercoil, confirming the judgment and decree dated 11.03.2010 made in O.S.No.307 of 2008 on the file of the II Additional Sub-Court, Nagercoil.

For Appellants : Mr.G.Aravinthan,  
for M/s.B.Tamilnidhi.  
For R-1&R-2 : Mr.J.Ashok,  
for Mr.Jeyapaul.  
For R-3 : Mr.A.R.M.Ramesh

### **J U D G M E N T**

The contesting defendants in O.S.No.307 of 2008 on the file of the II Additional Subordinate Judge, Nagercoil, are the appellants in this second appeal.

2. The suit was for partition. The suit was filed by respondents 1 and 2 herein, namely, Sarojini and Rani. Their brother was shown as the first defendant. Children of the first defendant were shown as defendants 2 to 4. Since the suit properties were already under mortgage, the mortgagee bank was shown as the fifth



respondent.

3. The case of the plaintiffs was that the suit property was purchased by their mother Chellam on 19.04.1961 under a registered sale deed(Ex.A.1). Their mother died shortly thereafter. She left behind her husband Lakshmanan Nadar, the plaintiffs herein and the first defendant as her surviving legal heirs. The plaintiffs' father Lakshmanan Nadar also passed away in the year 1989. Lakshmanan Nadar had contracted second marriage but the second wife Chinnammal also passed away in the year 1991 without leaving any issue. The case of the plaintiffs was that they are entitled to  $\frac{1}{2}$  share in the suit properties.

4. The third defendant, son of the first defendant filed written statement controverting the plaint averments. It was also contended that the suit property was dealt with by the defendants and that those transactions have not been mentioned in the plaint. The plaintiffs cannot maintain a simple suit for partition without seeking a declaration that the transactions that have been taken place in respect of the suit property are not binding on them. Based on the rival pleadings, the learned trial Judge framed the necessary issues. The first plaintiff examined herself as P.W.1 and Ex.A.1 to Ex.A.4 were marked. The third defendant examined himself as D.W.1 and the first defendant Pauldurai examined himself as D.W.2 and Ex.B.1 was marked. After a consideration of the evidence on record, by judgment and decree dated 11.03.2010, the trial Court granted  $\frac{1}{2}$  share in favour of the plaintiffs. Aggrieved by the same, defendants 1 to 4 filed A.S.No.30 of 2011 before the District Court, Nagercoil. By the impugned judgment and decree dated 22.10.2013, the first appeal was dismissed. Challenging the same, this second appeal came to be filed.

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

" a) When the very institution of the suit in the Court which lacks the reliefs of declaration of the subsequent registered deeds as null and void, whether the judgment and decree is not sustainable?

b) Whether the failure of the Courts below to find that the relief of declaration that the subsequent documents as null and void is good law?

c) When the partition opens in the year 1989, whether the institution of suit in the year 2008 is barred by time? "

6. The learned counsel appearing for the appellants pointed out that it is apparent from the evidence on record that the suit property was dealt with by Late Lakshmanan Nadar as well as the first defendant vide settlement deed dated 16.12.1985(Ex.A.2). The first defendant also executed a settlement deed in respect of ' B '

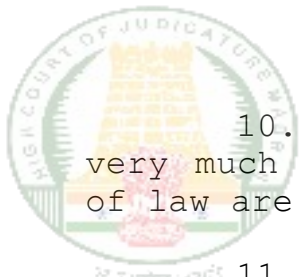


schedule property vide Ex.A.3 dated 05.11.2004. Defendants 2 to 4 mortgaged the suit property in favour of the fifth defendant bank vide Ex.A.4 dated 25.05.2007. It is seen that as many as on three occasions, the suit property was dealt with by defendants 1 to 4. Therefore, the plaintiffs have not sought any declaration that those transactions are not binding on them. It is not open to the plaintiffs to maintain a simple suit for partition. In this regard, the learned counsel placed reliance on the decision reported in (2017) 6 MLJ 257 (Mrs.Rehana V. Mrs.Maunihal Begum).

7. The learned counsel appearing for the appellant also submitted that the right of the plaintiffs stood extinguished by ouster. The plaintiffs were not in possession along with the first defendant in the suit property. Admittedly, the mother passed away in the year 1961. The father also passed away in the year 1989. The suit for partition came to be filed only in the year 2008. On the very face of it, the suit is time barred. Therefore, the learned counsel submitted that the substantial questions of law will have to be answered in favour of the appellants. He called upon this Court to reverse the impugned judgment and decree and dismiss the suit in *toto*.

8. Per contra, the learned counsel appearing for the contesting respondents submitted that the impugned judgment and decree passed by the Courts below do not call for any interference.

9. There is no dispute that the suit property was purchased by the mother of the plaintiffs, namely, Chellam in the year 1961 under a registered sale deed. The property stood only in her name. Following her demise, it devolved in equal shares on the husband Lakshmanan Nadar and the son Pauldurai and two daughters, namely, the plaintiffs herein. It is true that Lakshmanan Nadar as well as the first defendant executed settlement deeds in respect of the suit properties. It is also true that the settlees had subsequently mortgaged the suit property in favour of the fifth defendant bank. Now the only question is whether the plaintiffs should have sought a declaration that those documents are not binding on them. It is true that in the judgment of the Hon'ble Division Bench relied on by the learned counsel appearing for the appellants, there is an observation that the plaintiffs had filed a suit for partition without seeking any relief regarding declaration. But no proposition or ratio as such has been laid down. It is well settled that a co-sharer is entitled to ignore the transactions which the other co-sharers might have entered into. In this case, each of them, namely, Lakshmanan Nadar, Pauldurai, Sarojini and Rani had 1/4<sup>th</sup> share in the suit property. If Lakshmanan Nadar and Pauldurai chose to deal with the suit property, that would affect only their shares and it could not have affected the right of the plaintiffs.



10. Therefore, the Courts below held that the suit prayer is very much maintainable. The first and second substantial questions of law are answered against the appellants.

11. As regards the third substantial question of law, I must note that there is absolutely no pleading in the written statement that "ouster" has occurred. In the absence of pleadings, the defendants cannot be permitted to advance any defence of ouster. The suit cannot be said to be time barred. The right to file a partition suit can be lost only by ouster and the said defence is not available to the appellants. A partition suit will have to be filed within twelve years after the right accrues. Right to sue will accrue, when the right of the plaintiff was denied. There is nothing on record to show that the suit was not filed within time. The Courts below had correctly appreciated the facts and applied the legal principles. The third substantial question of law is answered against the appellants. There is no merit in this second appeal.

12. This second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

PMU

**Note:** In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

**To:**

1. The District Judge,  
Nagercoil.
2. The II Additional Sub Judge,  
Nagercoil.
3. The Record Keeper, V.R.Section,  
Madurai Bench of Madras High Court,  
Madurai.



+1 CC to M/s.B.TAMILNIDHI, Advocate ( SR-26877[F] dated 19/08/2021 )

+1 CC to M/s.J.ASHOK, Advocate ( SR-27085[F] dated 24/08/2021 )

S.A. (MD) No.465 of 2014  
19.08.2021

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