



AS.No..483/2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 14.10.2022

CORAM

THE HONOURABLE MR. JUSTICE S.S.SUNDAR

AND

THE HONOURABLE MRS. JUSTICE N.MALA

AS.No.483/2011

P.P.Mathivanan

.. Appellant
/ Defendant

Versus

1.P.P.Jayalakshmi

2.P.P.Sasikala

3.P.P.Malarkodi

4.P.P.Deepa

/

.. Respondents
Plaintiffs

Prayer:- Appeal Suit filed under Order 41 Rule 1 and 2 read with Section 96 of CPC against the judgment and decree made in OS.No.6/2010 on the file of the learned Principal District Judge at Dharmapuri dated 11.04.2011 and dismiss the said suit.

For Appellant	:	Mr.V.Ayyadurai Senior counsel for Mr.V.B.Perumal Raj
For Respondents	:	Mr.P.Mani



AS.No..483/2011

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JUDGMENT

[Judgment of the Court was delivered by S.S.SUNDAR, J.,]

- (1) The defendant in the suit in OS.No.6/2010 on the file of the Principal District Court, Dharmapuri, is the appellant in the above Appeal Suit.
- (2) The respondents in the above Appeal as plaintiffs, filed the suit in OS.No.6/2010 for partition and separate possession of 4/5th shares in the suit schedule properties and for consequential reliefs.
- (3) The appellant and the respondents are brother and sisters.
- (4) The case of the plaintiffs in the plaint is that the suit properties are the joint family properties of their father by name Thiru.Pandu and that their father also purchased one of the items of the suit schedule properties in S.NO.488/3 [an extent of 70 cents] in Kuppur Village out of the income from the joint family properties. It is admitted that the father of plaintiffs and appellant/defendant died on 25.08.2007 leaving behind the plaintiffs and the defendant who is the brother of plaintiffs, as his legal heirs. It is admitted that their mother predeceased their father. It is also alleged in the plaint that



AS.No..483/2011

the defendant who is only entitled to 1/5th share, swindled the income from the suit properties and evaded to divide the properties among all the heirs of late Thiru.Pandu.

- (5) The suit for partition was defended by the defendant by filing a written statement on the ground that their father had spent several lakhs of rupees for the education of plaintiffs and to give them in marriage. It is also contended by the defendant/appellant that a sum of Rs.17 lakhs was spent for the 1st respondent/1st plaintiff and a further sum of Rs.15 lakhs was spent on the 2nd respondent / 2nd plaintiff. Stating that a sum of Rs.19 lakhs was spent on the 3rd respondent / 3rd plaintiff and a sum of Rs.4 lakhs was spent for the 4th respondent / 4th plaintiff to complete her Diploma in Tteacher Training, the defendant/appellant pleaded that the plaintiffs have no legal or moral grounds to seek partition of the suit properties.
- (6) The Trial Court, after framing a specific issue as to whether the defendant had spent for the education of plaintiffs or their marriage, found that no evidence is adduced by the defendant to support his case that he or his father had spent several lakhs for the education



AS.No..483/2011

and marriage of the plaintiffs. Holding that the suit properties are self-acquired properties of Thiru.Pandu and that the properties are not partitioned, the Trial Court held that the plaintiffs are entitled to get 4/5th shares in the suit properties. Even though the Trial Court observed in one place that the suit properties are proved to be ancestral properties, irrespective of the character of the properties, the plaintiffs are entitled to 4/5th shares in respect of all properties of Thiru.Pandu by virtue of 2005 Amendment to Hindu Succession Act. Aggrieved by the judgment and decree of the Trial Court, the defendant has preferred the above the Appeal Suit.

- (7) Heard the submissions of the learned Senior counsel appearing for the appellant/defendant and the learned counsel appearing for the respondents/plaintiffs.
- (8) Mr.V.Ayyadurai, learned Senior counsel appearing for the appellant, after arguing elaborately on all issues, found himself in a difficult situation to convince this Court as no document is produced by the appellant before the Trial Court regarding the expenses incurred by the defendant/appellant on any of the



AS.No..483/2011

plaintiffs/respondents after the death of their father. Assuming that their father had spent some money on the plaintiffs for their education or at the time of giving them in marriage, that will not disentitle the plaintiffs/respondents from getting their share in the joint family properties which are available and inherited by the plaintiffs by virtue of their status as daughters of Thiru.Pandu.

- (9) The learned Senior Counsel then pointed out to the evidence of PW1 wherein she has stated in her cross-examination as follows:-

1 முதல் 3 வாதிகளுக்கு திருமணம் ஆகிவிட்டது. தந்தை இறந்த பின்பு லாக்கரில் இருந்த நகையை எடுத்து முன்று பேரும் பிரித்துக்கொண்டோம். எங்கள் படிப்பு, திருமணம் ஆகியவற்றிற்க்காக எங்கள் தந்தை வெளியில் கடன் வாங்கினார் என்று சொன்னால் அவ்வாறு இல்லை. பிரதிவாதியும் அவரின் மனைவி அரசு பணியில் இல்லை.....

- (10) Based on the above evidence of PW1, the learned Senior counsel submitted that PW1 has admitted the existence of jewels which are available for partition and therefore, the suit is liable to be dismissed for partial partition.
- (11) First of all, the suggestion put to PW1 was denied and the evidence



AS.No..483/2011

is not explicit. Further, absolutely there is neither a pleading in the written statement about the availability of jewels for partition nor a plea questioning the maintainability of the suit on the ground of partial partition. This issue is raised for the first time by the learned Senior counsel appearing for the appellant before this Court. It is to be noted that the plea of partial partition is not even raised in the Memorandum of Grounds.

- (12) The learned Senior counsel relied upon a judgment of a learned Single Judge of this Court in the case of *P.Arunachalam Vs. M.Kaliyammal* reported in *2022 [5] CTC 204*, and submitted that when a plea challenging the maintainability of suit seeking partial partition is raised, it is the duty of the plaintiffs to seek amendment of pleadings to include the properties which is left out. The said judgment has no application to the facts of the case on hand as the plea of partial partition is not raised by the defendant/appellant anywhere in the written statement nor in the grounds of Appeal before this Court. The learned senior counsel gets an idea of raising this issue on the basis of the so-called admission of PW1/1st



AS.No..483/2011

plaintiff about the partition of jewels by the female heirs Thiru.Pandu. Had there been a plea of partial partition in the written statement, the respondents/plaintiffs would have certainly explained the same in the evidence.

- (13) The learned Senior counsel then relied upon the judgment of the Hon'ble Supreme Court in the case of ***V.Prabhakara Vs. Basavanraj K [dead] by LRs and another*** reported in 2022 [1] ***SCC 115***. Paragraphs 14 and 21 of the said judgment was relied upon by the learned Senior counsel which read as follows:-

"14. Section 3 of the Evidence Act defines "a fact". Conduct of a party would be construed as a fact under Section 8. Such a conduct may either be a previous or subsequent one. It is the product of a motive or a preparation. When evidence is given on the conduct of a party and if it is proved to the satisfaction of the court particularly when it involves an admission, adequate weightage is required to be given. Such a conduct would include a silence emanating from a party who is expected to speak and express. When a party makes a claim based upon revocation of the earlier will, as indicated in the



AS.No..483/2011

subsequent one, the said acknowledgment of the former would form part of a conduct leading to a relevant fact vis-à-vis a fact in issue.

.....

21. A relief can only be on the basis of the pleadings alone. Evidence is also to be based on such pleadings. The only exception would be when the parties know each other's case very well and such a pleading is implicit in an issue. Additionally, a court can take judicial note of a fact when it is so apparent on the face of the record. A useful reference can be made to the following passage in Bachhaj Nahar v. Nilima Mandal [Bachhaj Nahar v. Nilima Mandal, (2008) 17 SCC 491 : (2009) 5 SCC (Civ) 927] : (SCC pp. 497 & 500, paras 15 & 23)

“15. The relevant principle relating to circumstances in which the deficiency in, or absence of, pleadings could be ignored, was stated by a Constitution Bench of this Court in Bhagwati

Prasad v. Chandramaul [Bhagwati

Prasad v. Chandramaul, AIR 1966 SC 735] :

(AIR p. 738, para 10)



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AS.No..483/2011

'10. ... If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in



WEB COPY



AS.No..483/2011

the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the court cannot do injustice to another.'

23. *[Ed. : Para 23 corrected vide Official Corrigendum No. F.3/Ed.B.J./89/2009 dated 17-7-2009.]*
It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds



WEB COPY



AS.No..483/2011

barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties, etc. which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs. In a suit for recovery possession of property “A”, court cannot grant possession of property “B”. In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.”

- (14) This Court is able to find that the judgment cited by the learned Senior counsel is not in favour accepting the principle on the basis of which the learned Senior counsel press his plea of partial



AS.No..483/2011

partition in this appeal. Law is settled that no amount of evidence can be let in or considered in the absence of any specific pleading. The judgment relied upon by the learned Senior Counsel for the appellant only reiterates the importance of pleadings before seeking particular relief before the Civil Court. The illustration that was quoted by the Hon'ble Supreme Court in ***Bachhaj Nahar Vs. Nilima Mandal and Another*** reported in **2008 [17] SCC 491**, is against the argument advanced by the learned Senior counsel in this case. Therefore, the argument advanced by the learned Senior counsel now before this Court that the suit is bad for partial partition, cannot be countenanced.

- (15) The learned counsel for the respondents / plaintiffs has relied upon the judgment of a learned Single Judge of this Court in the case of ***G.Maharajan Asari Vs. G.Natarajan Asari*** reported in **2011 [2] CTC 527 [Mad]**, wherein it is held as follows:

"14. With regard to the First question, it is the contention of the learned Counsel appearing for the Appellant/Defendant that the Respondent/Plaintiff has admitted in his evidence that he has not included



AS.No..483/2011

one of the properties of his father measuring to an extent of 3.5 cents in the suit scheduled properties for partition. Hence, it is clear from the evidence of P.W.1 that the Suit was filed only for partial partition and therefore, the Lower Appellate Court ought to have dismissed the Appeal filed by the Respondent/Plaintiff since the Suit for partial partition is not legally sustainable. But on a perusal of the materials available on record, this Court finds that the defence of partial partition had never been an issue before the Trial Court and in fact, the Appellant/Defendant has neither pleaded the defence of partial partition nor adduced evidence that the Suit is bad for partial partition. On the other hand, it is the contention of the Appellant/Defendant before the Trial Court that the Gift Deed executed by the said Thapasiammal in favour of the Respondent/Plaintiff is a fraudulent document. The Trial Court has rendered a finding that the Respondent/Plaintiff has not proved the Gift Deed in the manner known to law and dismissed the Suit. But on Appeal though the said finding was confirmed, the Lower Appellate Court has rightly come to the conclusion that the Respondent/Plaintiff is entitled



AS.No..483/2011

for half share in the Suit scheduled properties by way of inheritance. Therefore, it is evident that the defence of partial partition had never been raised as an issue before the Courts below.

15. Though the learned Counsel appearing for the Appellant/Defendant has relied upon two decisions in support of his contentions that the defence of partial partition is only question of law and as such the same could be urged at the Appellate stage, I am of the view, unless there is an evidence on the side of the Appellant/Defendant, the issue with regard to the partial partition cannot be considered at the appellate stage since the issue of partial partition is totally based on the pleading and the evidence available in the case. Therefore, the judgment relied upon by the learned Counsel for the Appellant/Defendant cannot be made applicable to the facts of this case. Hence, I am not inclined to accept the submission made by the learned Counsel for the Appellant/Defendant that the Appeal has to be allowed since the Suit is bad in law for partial partition."

(16) A Division Bench of this Court in **OSA.No.22/2011 [G.Geetha and**



AS.No..483/2011

Another Vs. B.Santha and others] vide judgment dated 08.08.2016 has held as follows:-

“14.As rightly pointed out on the side of the appellants/plaintiffs, no specific plea has been raised with regard to partial partition and no issue has also been framed with regard to that aspect. Even though no specific plea has been raised in the written statement and no specific issue has been framed, the learned Single Judge has erroneously dismissed the entire suit mainly on the ground of partial partition. Since no such plea has been raised in the written statement and no issue has been framed, the finding given by the learned Single Judge with regard to partial partition cannot be accepted.”

- (17) The plea of partial partition cannot be allowed to be raised in the Appeal without there being a pleading in the written statement and it settled by this Court in several judgments. Merely on the basis of some stray admission of PW1 as to the partition of some jewels among the female heirs, the suit cannot be dismissed on the ground



AS.No..483/2011

of partial partition without there being any specific issue or evidence adduced by parties with regard to partial partition before the Lower Court. A plea of partial partition cannot be permitted at the appellate stage. No doubt, it is true that in a suit for partition of the joint family properties, all the movable and immovable properties should be included so that there will be equitable division of all the properties which are held to be joint properties of the members of the family of co-owners. However, there are several exceptions to the general rule and the Court may even allow partial partition in certain cases. Where different portions of the family properties are located in different places coming under the jurisdiction of different Courts, separate suits for partition can be maintained. When some of the joint family properties are incapable of partition or a particular property from its nature cannot be divided a suit for partition excluding such properties is maintainable. There may be cases in which some of the properties may be held jointly with strangers who need not be joined as parties in the general suit for partition. Even in such cases, a suit is



AS.No..483/2011

maintainable excluding the properties which are to be shared with strangers to the family. Even in a case where parties, by inadvertence, omit to include a property in the previous suit for partition, a second suit for partition can be maintained.

- (18) In certain instances, the parties themselves can decide to make partition of a particular item which is a joint family property, to be divided at a later point of time. It is also to be noted that the cause of action for the suit to seek partition survive till all the properties are divided by metes and bounds. Having regard to the peculiar nature of a right of co-owner or co-parcener to seek partition, this Court has even held that a fresh suit for partition is still maintainable even though the previous suit for partition is dismissed for default. This Court has held that Order 9 Rule 9 of CPC is not applicable to a suit for partition. A plea relating to partial partition cannot be accepted to deny the shares of plaintiffs/respondents as mere omission does not abrogate the rights of co-owners to take their share in all the joint family properties. Even though the general rule that the suit for partition should



AS.No..483/2011

embrace all the joint family properties, the same cannot be applied to non-suit the plaintiffs/respondents after this length of time without a plea regarding maintainability of suit for partial partition.

(19) In view of the settled position of law as reiterated by this Court in various judgment above referred to and the view of this Court expressed in previous paragraphs, the plea raised for the first time before this Court regarding partial partition by the learned Senior counsel for the appellant cannot be entertained and this Court finds no merit in this Appeal Suit.

(20) Since the appellant/defendant relied upon the evidence of PW1 regarding admission of certain jewels, this Court is inclined to give liberty to the appellant to file a separate suit for partition without expressing any opinion on the merits of the so-called admission of the plaintiffs through PW1 which may also be explained by the plaintiffs/respondents if such a suit is filed. In other words, this Court permit the respondents to raise any other plea that may be available to them to defend such suit if filed.

(21) In the result, the Appeal Suit stands **dismissed subject to the**



AS.No..483/2011

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liberty preserved to the appellant. Since the parties are sisters and brother, there shall be no order as to cost.

[SSSRJ] [NMJ]

14.10.2022

AP

Internet : Yes

To

1.The Principal District Judge at Dharmapuri.

2.The Section Officer
VR Section, High Court
Chennai.



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AS.No..483/2011

S.S.SUNDAR, J.,
AND
N.MALA, J.,

AP

Judgment in
AS.No.483/2011

14.10.2022