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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 19.04.2022

PRONOUNCING ORDERS ON : 21.04.2022

CORAM:

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

SECOND APPEAL NO.525 OF 2013

AND

MP NO.1 OF 2013

1. Ganesan (Deceased)

.. Appellant/2nd Respondent/4th Defendant

2. G.Vasanth

3. G.Maragatham

4. G.Maheswari

5. G.Baskar

6. G.Venkatesan

.. Appellants

*Appellants 2 to 6 brought on record as LRS of the deceased sole appellant vide order of Court dt.04.03.2019 made in CMP No.1 to 3/2015 in S.A.No.525/2013)PRMJ)

..Vs..

1. Nagajothi

2. Krishnamurthy

3. Krishnaveni

4. Sathiya

5. Sarala

6. Mummoorthy

..Respondents 1 to 6/Appellants/Plaintiffs

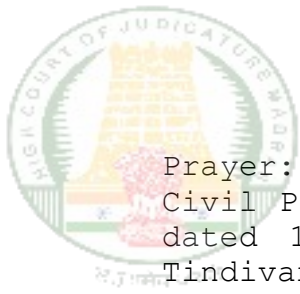
7. Elumalai

..7th Respondent/1st Respondent/1st Defendant

8. Sathiyasoruban

9. Manikandan

..Respondents 8 & 9/Respondents 3 & 4/Defendants 5 & 6



Prayer: Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree in A.S.14/2012 dated 19.12.2012 on the file of Principal Subordinate Judge, Tindivanam, reversing the judgment and decree in OS.No.3/2007 dt.29.7.2011 on the file of the Principal District Munsif, Tindivanam.

For Appellant : Mr.N.Suresh

For Respondents : Ms.J.Prithivi
for Mr.S.Kaithamalai Kumaran
for R1 to R6
Mr.J.Hudson Samuel
for M/s.Paul and Paul
for R8 & R9

No Appearance for R7

J U D G M E N T

The 4th defendant is the appellant in this Second Appeal.

2.Respondents 1 to 6/plaintiffs filed a suit seeking for the relief of declaration to declare the sale deed dated 31.12.1989 executed by the 1st defendant in favour of the 2nd and 3rd defendants as null and void and for the relief of partition pertaining to the "B" schedule property and for allotment of 5/6th share in favour of the plaintiffs.

3.The case of the plaintiffs was that the suit property originally belonged to their grandfather Muniyan and he died intestate leaving behind his son Ezhumalai, who is the 1st defendant in this suit. The 1st defendant was doing agriculture. He married one Krishnaveni and out of the said wedlock, the 1st and 2nd plaintiffs were born. On her death, the 1st defendant married the 3rd defendant and plaintiffs 4 to 6 were born to the 3rd defendant.

4.The further case of the plaintiffs is that the 1st defendant started leading a wayward life and failed to maintain the plaintiffs and was selling the properties unilaterally even though the properties were in the nature of joint family properties. The 1st defendant sold the "A" schedule property in favour of the 2nd and 3rd defendants through a registered sale



deed dated 31.12.1989, marked as Ex.A1. Thereafter, the 1st defendant sold the 1st item of the "B" schedule property in favour of the 4th defendant through a sale deed dated 8.6.1995, marked as Ex. A2/B1. In the same manner, the 2nd item of the "B" schedule property was also sold in favour of the 5th and 6th defendants. According to the plaintiffs, the sale deeds executed in favour of defendants 4 to 6 by the 1st defendant with respect to the "B" schedule property was null and void and not binding on the plaintiffs.

5.The plaintiffs issued a legal notice to the defendants on 18.8.2006, marked as Ex.A6. The 4th defendant gave a reply notice dated 22.9.2006, marked as Ex.A13. Since the issue was not getting resolved, the plaintiffs proceeded to file the suit seeking for the reliefs mentioned supra.

6.The 4th defendant filed a written statement. He took a stand that the 1st defendant as the Karta of the family sold the 1st item of the "B" schedule in favour of the 4th defendant through a sale deed dated 8.6.1995. This sale deed was executed by the 1st defendant for himself and on behalf of his minor children. The 2nd plaintiff had also signed as a witness in this document and the plaintiffs were very much aware about the sale of the property in favour of the 4th defendant. The 4th defendant has alleged that the suit itself has been filed on the instigation of the 1st defendant and he took a stand that the plaintiffs are not entitled for any share in the 1st item of the "B" schedule. Accordingly, the 4th defendant sought for the dismissal of the suit.

7.The Trial Court on considering the facts and circumstances of the case and on appreciation of the oral and documentary evidence, dismissed the suit through Judgment and Decree dated 29.7.2011. Aggrieved by the same, the plaintiffs filed an appeal before the Principal Sub-Court, Tindivanam in A.S. No.14 of 2012 . The Lower Appellate Court on re-appreciation of the oral and documentary evidence and after considering the findings of the trial Court, was pleased to allow the appeal through Judgment and Decree dated 19.12.2012. The plaintiffs compromised the dispute with respect to the "A" schedule property with the 2nd and 3rd defendants and hence, the suit was not pressed insofar as the relief of declaration is concerned. The suit was decreed by the lower Appellate Court insofar as the "B" schedule properties are concerned and a preliminary decree was passed allotting 5/6th share in favour of the plaintiffs.



8. The 4th defendant aggrieved by the Judgment and Decree passed by the lower Appellate Court, filed the present Second Appeal. During the pendency of the Second Appeal, the 4th defendant expired and his legal representatives have been impleaded as appellants 2 to 6, who are prosecuting this Second Appeal.

9. When the Second Appeal was admitted, the following substantial questions of law were framed by this Court for consideration:

1. Whether the Court below is right in reversing the Judgment and decree of the Trial Court when it is admitted even in the plaint itself that the properties are the self acquired properties of Muniyan, the grandfather of the plaintiffs and as such on the death of Muniyan the 1st defendant being the only son alone is entitled to the properties?

2. Whether the Court below has erred in decreeing the suit when admittedly the plaintiffs have not included other properties in the suit partition and as such the suit is bad for partial partition?

3. Whether the Court below has erred in allowing the appeal even without framing points for determination by not following provisions of Order 41 Rule 31 CPC?

4. Whether the Courts below are right in giving a finding that the sale deed executed in favour of the 4th defendant by the 1st defendant is not proved without taking into consideration the specific admission made in the plaint regarding the execution of sale deed in favour of the 4th defendant by the 1st defendant on 08.06.1995?

10. Heard Mr. N. Suresh, learned counsel for the appellants, Ms. J. Prithivi, learned counsel for the respondents 1 to 6 and M/s. Paul and Paul, learned counsel for respondents 8 and 9. This Court also carefully perused the materials available on record and the findings of both the Courts below.

11. The trial Court took into consideration the various anomalies that surrounded Ex. A2/B1 and also the fact that the 4th defendant did not get into the box to explain the circumstances when the sale deed was executed in his favour and rendered a finding to the effect that the said document is not valid and not binding on the plaintiffs. However, the suit was dismissed by the trial Court on the ground that there were several other properties belonging to the joint family which were sold to



third parties by the 1st defendant and neither the properties nor the persons in whose favour it was sold, were added in the suit and hence the suit is hit by partial partition.

12. The Lower Appellate Court also concurred with the findings of the trial Court and held that the sale deed in favour of the 4th defendant is a void document and not binding on the plaintiffs. However, the findings of the trial Court on the issue of partial partition was set aside and the appeal was allowed by passing a preliminary decree in favour of the plaintiffs by allotting 5/6th share in the suit "B" schedule property.

13. The learned counsel for the appellant submitted that the suit itself was instituted with a malafide intention after the properties were sold by the 1st defendant to third parties. The learned counsel further submitted that the sale deed executed in favour of the 4th defendant was not challenged in the suit and on this ground alone, the suit is liable to be dismissed with respect to the 1st item of the "B" schedule property. The learned counsel further relied upon the evidence of PW-1 and submitted that he is the 2nd plaintiff in this suit and he has clearly admitted in the cross-examination about the execution of the sale deed in favour of the 4th defendant. He has further admitted that the 4th defendant was running his business very near to the suit property. It was further submitted that the adjacent property was sold in favour of 7 to 8 persons by conveying plots and conveniently those properties were not included in the suit and those parties were also not added as defendants. The learned counsel therefore submitted that it clearly shows the attitude of the plaintiffs and conveniently the 1st defendant also chose to keep away from the proceedings.

14. Per contra, the learned counsel for the respondents/plaintiffs submitted that Ex.A2 /Ex.B1 was a fabricated document and the same has been discussed in detail by both the Courts below and hence, there was no necessity to challenge the said document which was void ab initio. The learned counsel further submitted that the 4th defendant did not get into the box and only his Power of Attorney agent was examined. Therefore, adverse inference must be drawn against the 4th defendant. The learned counsel concluded her arguments by submitting that a third party cannot raise the ground of partial partition and in support of her submission, the learned counsel relied upon the judgment in Karuppiyah and another Vs. C. Muniyappan and others reported in 2014 (2) CTC 706 and the



judgment in Balakrishna Udayar and 3 others Vs. Chellammal reported in (1998) 2 LW 414.

15. In the present case, all the parties have proceeded on the premise that the properties in question were joint family properties. In fact, Ex.A2/B1 which was relied upon by the 4th defendant speaks about the sale deed being executed by the 1st defendant for himself and on behalf of his minor sons. If really the properties were the exclusive properties of the 1st defendant, there was no requirement to include the minor sons in the sale deed. For the first time in the Second Appeal, an attempt is made to project as if the properties were the exclusive properties of the grandfather and it was inherited by the 1st defendant and he has the exclusive right over the same and can deal with it on his own. Such a plea cannot be raised for the first time in the Second Appeal and this contention cannot be accepted by this Court. The first substantial question of law is answered accordingly.

16. Both the Courts below have concurrently given a finding that Ex.A2/B1 was a fabricated document. The reasons assigned by both the Courts below was that this document was executed by the 1st defendant for himself and his minor sons Jayamurthi and Murthi. The name Krishnamurthi has been written and it has been scored off. The 2nd plaintiff has denied his signature found as a witness in this document. That apart, this sale deed has been executed in a stamp paper that was purchased in the year 1993 and whereas the sale deed has been executed only in the year 1995. The document also shows as if there are two minor sons named Jayamurthi and Murthi and whereas there was only one minor son named as Mummurthi. The 4th defendant also did not choose to get into the witness box and give evidence. The Power of Attorney agent who was examined as DW-1 did not have any personal knowledge about the transaction. On appreciation of all these factors, both the Courts below proceeded to render such a finding.

17. The adverse finding that was rendered against the 4th defendant by the trial Court, was never put to challenge by the 4th defendant even by way of cross-objection under Order XLI Rule 22 of CPC., when the plaintiffs had filed an appeal against the Judgment and Decree of the trial Court. The cross-objection is more or less in the nature of a cross-appeal and it is a substantive right given under Order XLI Rule 22 of CPC. Since the 4th defendant did not avail the substantive right that was available to him, the adverse finding rendered against him by the trial Court had become final and it was merely confirmed by



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the lower Appellate Court for the very same reasons. In view of the same, this finding which has become final against the 4th defendant cannot be interfered in this Second Appeal. Even otherwise, this Court does not find any perversity in the findings rendered by both the Courts since it was based on appreciation of evidence. The fourth substantial question of law is answered accordingly.

18. Insofar as the plea of partial partition is concerned, it cannot be raised by the 4th defendant who was an alienee. Useful reference can be made to the Judgment of this Court in Karuppiiah v. C. Muniyappan referred supra. The relevant portions in the judgment are extracted hereunder:

"21. So far as the objection to partial partition is concerned, the said objection can be raised only by a sharer and the Seventh Defendant not being the co-owner, it is not open to him to take the plea. The present Suit is one between the co-owner and an alienee and not really between the members of the family. Therefore, the co-owner is entitled to recover his share of the property in the Schedule Item and an alienee cannot contend that the Suit is barred for partial partition when that right is given only to the members of the family.

22. In this regard, it is relevant to quote the decision reported in Balakrishna Udayar and 3 others v. Chellammal, 1998 (2) LW 414, wherein this Court has decided the question of partial partition:

"8. The only question to be decided is, whether the Suit is bad for partial partition.

9. In the decision reported in Mst. Hateshar Kuer v. Sakaldeo Singh, 1969 (2) SCWR 414, Their Lordships held that:

"The rule requiring inclusion of the entire joint estate in a Suit for Partition is not a rigid and inelastic rule which can admit of no exception. This rule aims at preventing multiplicity of Legal proceedings which must result if separate Suit were to be instituted in respect of fragments of joint estates. Normally speaking, it is more convenient to institute one Suit for Partition of all the joint properties and implead all the interested co-sharers so that all questions relating to the share of the various co-owners and the equitable distribution and adjustment of accounts can be finally determined. But this being a rule dictated by consideration of



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practical convenience and equity may justifiably be ignored when, in a given case there are cogent grounds for departing from it. When an item of property is not admitted by all the parties to the Suit to be their joint property and it is contended by some of them that it belongs to an outsider, then a Suit for Partition of joint property excluding such items does not become legally incompetent because of any rule against partial partition."

(Emphasis supplied)

The above decision was followed by V.R. Krishna Iyer, J., as he then was, in Parameswara Menon v. Sachidananda Menon, 1970 KLT 1031. In Para 5, the learned Judge has reiterated the decision rendered by Mukherjea, J. in Rajendra Kumar v. Brojendra Kumar, AIR 1923 Cal. 501. The observation of the learned Judge (of the Calcutta High Court) reads thus:-

"The established rule may accordingly be taken to be that a Suit for Partition should include all the lands of the co-tenancy, and if it does not, any party interested may insist that the omitted land or lands be included in the Suit...

Exceptions to the rule that a Suit cannot lie for partition of a portion of the family property have been recognised when different portions of the family property are situated in different jurisdictions, and separate Suits for separate portions have sometimes been allowed, where different rules of substantive or adjective law prevail in the different Courts."

V.R. Krishna Iyer, J., in the aforesaid decision, has taken into consideration another decision of the Rajasthan High Court reported in Sambhudutt v. Srinarain, AIR 1954 Raj. 269, wherein, Wanchoo, C.J., as he then was, had considered a similar question, and held thus:

"The general rule of Hindu Law is that where a Suit for Partition is brought by a co-parcener against the other co-parceners it should embrace the whole family property. This rule is subject to certain exceptions, e.g., where a portion of the property is not available for actual partition, or where it is held jointly by the family with a stranger, or where part of the joint property consists of land situated outside the jurisdiction of the Court in which the



Suit for Partition is brought. This principle, however, has not been applied with full force to the case of partition between co-tenants."

The learned Judge (Wanchoo, C.J.) explained the rationale of the rule in regard to Joint Family partitions and its inapplicability to cases of co-tenancy thus:

"The reason why in the case of partition between co-parceners all the property must be thrown in the hotchpots except for certain well recognised exceptions is that where a member of a Joint Hindu family, who broke up the joint status, wants the Joint Family property to be divided, the cause of action arises at one time, and he must therefore include every item of property in the Suit. But in the case of Tenants-in-common, it is not necessary that the cause of action for partition of every item of the property which is held in common must arise at the same time. Therefore, it may be possible in cases of co-tenants that a Suit may lie for one item of property at one time and for another item at another time."

(Emphasis supplied)

In the Rajasthan case, the learned Judges summed up thus:

"It is clear, therefore, that in the case of Tenants-in-common it is not essential that all the property held in common should be brought into hotchpots though it is desirable as far as possible, in order to avoid multiplicity of Suits, all the property should be included in one Suit. It is, however, for the Court in each case to decide whether the case is of such a nature that the Plaintiff should be ordered to include the remaining property also in the Suit for division, provided of course the property is within the jurisdiction of the court in case it is immovable property. But the Suit, in our opinion, cannot be thrown out on the mere ground that all the property which is capable of partition was not included."

Their Lordships V.R. Krishna Iyer, J. also, referred to a decision of the Patna High Court reported in SM.A. Samad v. Shahid Hussain, AIR 1963 Pat. 375, wherein a Bench of that Court also dealt with a similar question and held that:



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"the ordinary rule that a Suit for partial partition is not maintainable does not apply to the case of co-owners who hold land as Tenants-in-common as distinguished from co-sharers holding land as joint Tenants."

In that decision, the Bench of the Patna High Court summarised the principle thus:

"From the foregoing discussions, it appears to be well settled that:

(1) The rule that the Suit for Partition must cover the entire property held jointly by the parties is merely a rule of equity and convenience;

(2) A Suit for Partition must embrace only the property to which the parties have community of interest and unity of possession;

(3) There is substantially no difference in respect of the subject-matter of a Suit for partition amongst Muslim co-owners or Hindu co-owners where they hold property as Tenants-in-common; and

(4) A Suit for Partition of even one item of such property is maintainable, provided that the partition can be effected without much inconvenience to the other co-owners, In other words, in the case of Tenants-in-common, whether such Tenants are Mohammedans or Hindus, one of them is not obliged to sue for the partition of all the items of the property in which they are interested, inasmuch as each of them is entitled to his definite share in every item of the property, unless the partition sought for results inconvenience to the other Tenants-in-common."

23. In view of the foregoing decision, the contention of the alienee, questioning the partial partition against the non-alienating co-owner is unsustainable and the question of law is answered against the Appellant."

19. In view of the settled principles of law, the 4th defendant cannot question the plaintiffs for not including the other properties and other alienees in the suit. The plea of partial partition does not lie in the mouth of the 4th defendant. The second substantial question of law is answered accordingly.

20. The lower Appellate Court has properly discussed the issues and assigned reasons while reversing the judgment of the trial Court and this Court does not find any violation of the



mandate prescribed under Order XLI Rule 31 of CPC. The third substantial question of law is answered accordingly.

21. The learned counsel for the appellants urged this Court to take into consideration the fact that the 1st defendant was the Karta of the family and was entitled to deal with the joint family properties and it is only a voidable transaction which ought to have been challenged by the plaintiffs. There is no requirement for this Court to render a finding on this contention raised by the learned counsel for the appellant since Ex.A2/B1 document has already been held to be a fabricated document.

22. The above discussion leads to the only conclusion that there are no grounds to interfere with the Judgment and Decree passed by the lower Appellate Court. This Court does not find any perversity in the findings rendered by the lower Appellate Court. Thus, all the substantial questions of law are answered against the appellants.

23. In the result, the Second Appeal is liable to be dismissed and the Judgment and Decree of the lower Appellate Court is hereby confirmed. Considering the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

KP

To

1. The Principal Subordinate Judge, Tindivanam.

2. The Principal District Munsif, Tindivanam.

+1cc to Mr.N.Suresh, Advocate, S.R.No.27207

+1cc to Mr.S.Kaithamalai Kumaran, Advocate, S.R.No.27275

+1cc to M/s.Paul and Paul, Advocate, S.R.No.27356

Second Appeal No.525 of 2013

VBM(CO)

RLP(16/06/2022)