



A.S.(MD)No.48 of 2009

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:22.12.2022

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

and

THE HONOURABLE MR.JUSTICE SUNER MOHAN

A.S.(MD)No.48 of 2009

and

M.P(MD)Nos.1 & 2 of 2011

1.Shanmugaraja

2.Ponnusamy

.. Appellants/Defendants

Vs.

1.Ayyadurai Nadar (died)

2.Ganesan

.. Respondents/Plaintiffs

3. Rajkumar

4.Sugumar

5.Selvi

6.Rajakumari

7.Shekar

8.Durai

9.Suganthi



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10.Vasanthi

11.Jayanthi

12.Santhi

13.Indira Sujatha

14.Chandra Tomas

.. Respondents

[R3 to R14 are brought on record as
LRs of the deceased R1 vide order
dated 14.02.2002 made in
C.M.P(MD)No.11313/2021]

PRAYER: Appeal Suit filed under Section 96 of the Civil Procedure Code,
against the judgment and decree, dated 06.03.2007 made in O.S.No.60 of 2005,
on the file of the Additional District Judge/Fast Track Court No.1, Tirunelveli.

For Appellants : Mr.T.Antony Arulraj

For Respondents :Mr.S.Rangasamy for R2
:Mr.S.Kumar for R3, R5 & R6
:No appearance
for R4,R7, R9, R11 R12 & R13



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JUDGMENT

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DR.G.JAYACHANDRAN, J.
and
SUNDER MOHAN, J.

This Appeal suit is arising out of preliminary decree passed by the Court below in a partition suit preferred by the respondents.

2. The sum and substance of the pleadings runs as follows:

The suit schedule property belongs to Subbiah Nadar. He had four sons and four daughters. Subbiah Nadar died in the year 1976 intestate leaving behind his wife and sons. Later, his wife died in the year 1992. Among the legal heirs of Subbiah Nadar, initially a suit was filed for partition. Later, the female heirs entered into a settlement with the male heirs and relinquished their right in the suit property. Thus, all the four members are entitled 1/4th share each in the suit property. While so, in the year 2001, in respect of building in item No.1 of the suit schedule, an oral partition was effected between the parties. But it was not given effect due to non cooperation of the defendants. In respect of the remaining properties described in the schedule to the plaint, attempts were made for amicable division through mediators but all the attempts went in



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futile, which has forced the plaintiffs, who are the two sons of Subbiah Nadar, to file the suit against the remaining two sons after casting pre suit notice dated 22.07.2005.

2.1. The suit was resisted by the defendants stating that the arrangement between the sharers in the year 2001 is true, but the averment that it did not given effect to, is incorrect. The first plaintiff is carrying a business at Chennai and settled permanently at Chennai with all wealth and assets. The second plaintiff is working as a Senior Officer in Indian Bank also beneficially affluent. Taking note of this fact, the parties have arrived at settlement that the plaintiffs have no right in the residential premises in Tirunelveli, which is more fully described in item No.1 in the plaint schedule. In the year 2005, a family arrangement was arrived at between the sons and daughters of Subbiah Nadar at the instance of the first plaintiff in which the sons and daughters participated and arrived at a settlement. In terms of the said family arrangement, the plaintiffs had taken their share of the property and left the suit schedule property to be enjoyed by the defendants. Suppressing the fact, a suit has been filed as if no division among the legal heirs been effected. It is further contended in the written statement that in terms of the family arrangement,



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which claim to be acted upon by them, a sum of Rs.4,14,000/- has to be paid by the first defendant to the first plaintiff and an identical amount to be paid by the second defendant to the second plaintiff, thereafter, they have to register the deeds on or before 30.10.2005 as per the family arrangement. When the defendants inform the plaintiffs to receive the money and honour the family arrangement by executing the deed, but they gave lame excuses and avoided and thereafter cast a notice through their lawyer. Interim reply was given by the defendants. Despite interim reply, the plaintiffs have rushed to the Court suppressing the fact that the income derived from the joint family property been properly shared by all the four sons of Subbiah Nadar every year in the month of May after performing the annual obsequies till the year 2005. To this written statement, a reply statement by the plaintiffs denying the averments made in the written statement was filed.

3. After the additional written statement filed on the side of the defendants, the Court below framed the following issues.

- “1. Whether the plaintiffs are entitled to 1/4th share each in the schedule mentioned properties?
2. Whether it is true to alleged that both the plaintiffs and



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defendants entered into a family arrangement on 27.05.2005 and same was acted upon?

3. What other relief the plaintiffs are entitled to?"

4. On behalf of the plaintiffs, both the first and second plaintiffs mounted the witness box as P.W-1 and P.W-2, on their behalf 17 exhibits were marked. The defendants on their part mounted witness box as D.W-1 and D.W-2 and marked 5 exhibits.

5. The trial Court, after appreciating the evidence placed by the respective parties, allowed the suit for partition seeking 1/4th share to each of the parties and preliminary decree passed to that effect.

6. The trial Court, in the course of appreciating the evidence, has observed that it is an admitted fact that the properties belonged to Subbiah Nadar and after excluding the female heirs in view of the compromise entered between the male heirs and female heirs, the entire suit schedule property devolved on the parties. Ex.A1, dated 11.06.2001, the memo of arrangement in respect of first item property not been acted upon since there is no supportive



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documents to infer that the said arrangement came into effect and relying upon Ex.B4 and Ex.B5 letters and photographs to substantiate the plea that the shares of the income been regularly divided among the parties, the trial Court drawn an inference that this would only substantiate the claim of the plaintiffs that there was no family arrangement dated 27.05.2005 as pleaded.

7. Aggrieved by the judgment and decree, the appeal suit is filed on the ground that the trial Court erred in rejecting the plea taken by the appellants and the documentary evidence and the oral evidence adduced on behalf of the defendants ought to have been appreciated properly. Instead, holding that the defendants failed to prove the family settlement arrived in the month of May 2005 is erroneous and contrary to the evidence. The trial Court ought not to have drawn an adverse inference for not replying the pre suit notice. Further, it erred in drawing the adverse inference for not producing the alleged family arrangement dated 27.05.2005 inspite of the plea that the original is with the plaintiffs and notice to produce the same was caused to the plaintiffs but they failed to produce the documents.



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8. The points for determination is as follows:

1. Whether the Court below erred in holding that the family arrangement dated 27.05.2005 alleged to have been entered between the parties not given effect?
2. Whether the trial Court right in allowing the suit ascertaining 1/4th share to each of the parties in all the suit schedule properties?

9. The admitted facts in this case is that the plaintiffs as well as the defendants are entitled to have an equal share in the property left by Subbiah Nadar. It is also an admitted fact that the suit schedule property are the property left by Subbiah Nadar. In the said circumstances, since Subbiah Nadar died intestate, the apportionment of the property as accepted by the parties, in the normal course, each of them are entitled for 1/4th share. However, the defendants has put forth case of family arrangement between the members first originally in the year 2001 and reduced into writing, which is marked as Ex.A1, but it was not acted upon. Subsequently, they arrived at an arrangement on 27.05.2005. Though the defendants were ready to perform their part of agreement as per the family arrangement and tendered Rs.4,14,000/- each to



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both the plaintiffs, same was not received by them. Any event, they already enforce the family arrangement but not seek for partition.

10. The issue therefore boils down as to whether the said family arrangement dated 27.05.2005 was acted upon or enforceable.

11. The parties have not produced the said family arrangement. The defendants are supposed to produce the document who has rely upon the document claims that they caused notice to the plaintiffs alleging that the original is with the plaintiffs and they should produce the same. The plaintiffs denied the existence of such documents in their possession. Even assuming that the document is in possession of the plaintiffs and for some reason, they have not produced it, the defendants ought to have let evidence to show that in terms of the family arrangement dated 27.05.2005, they have tendered Rs.4,14,000/- each and performed their part of compromise. When it is pleaded that as per the family arrangement, they are supposed to pay Rs.4,14,000/- each, to both the plaintiffs, there is no material placed by the defendants to substantiate this plea. The five documents relied by the defendants are the courier receipts, postal card and photographs. These documents are not relevant for the Court to test and



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uphold the contention of the defendants that the family arrangement dated 27.05.2005 entered and acted upon atleast by the defendants. To be noted that the exhibits marked as B series on behalf of the defendants are all subsequent to the suits. Only in this context, the trial Court has made some observation that the failure of the defendants not replying to the pre suit notice to be drawn adverse to the defendants. The burden of proof is on the party, who pleads the fact.

12. In this case, the factum of family arrangement dated 27.05.2005 has not proved through document, atleast the defendants ought to have let in evidence that pursuant to the family arrangement, they have acted upon and it is the failure of the plaintiffs to honour the terms of family arrangement. From the records, this Court finds that the defendants have miserably failed to prove that they compromised as per the terms of family arrangement and therefore, it should be deemed to have been acted upon. Under these circumstances, this Court finds that the reasoning given by the trial Court for allowing the suit for partition is consonance with the law and facts and there is no reason to interfere with the trial Court judgment and decree. The points for consideration is answered accordingly.



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13. The learned counsel for the appellants would submit that pending appeal, the first respondent/1st plaintiff died and there is some dispute between the LRs of the deceased first respondent and the matter is now seized of by the Hon'ble High Court in TOS No.7/2013. This Court is of the view that the pendency of TOS has no bearing to this partition suit since this partition suit is in respect of the share which Ayyadurai Nadar is entitled and if there is any dispute between the LRs of Ayyadurai Nadar regarding the property inherited by Ayyadurai Nadar, it is an independent cause of action which has to be worked out by the legal heirs and the beneficiary of the so called Will.

14. In the result, this appeal suit is dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

[G.J., J.] & [S.M., J.]
22.12.2022

Index : Yes/No
Internet : Yes
PJJ



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DR.G.JAYACHANDRAN, J.
and
SUNDER MOHAN, J.

PJL

To
The Additional District Judge,
Fast Track Court No.1,
Tirunelveli.

Judgment made in
A.S(MD)No.48 of 2009

22.12.2022