



A.S. (MD) No.81 of 2013

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 14.07.2022

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

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and

M.P.(MD) No.2 of 2013

Krishnasamy Naicker
Through his Power Agent
S.Duraisamy,
S/o.Chellasamy Naicker
Pillaiyar Kovil Street,
Gopalakrishnapuram,
Sevalkulam Post,
Sankarankovil Taluk,
Tirunelveli District.

... Appellant/1st Defendant

Vs.

1.Rukmani
2.Engammal
3.Navaneetham
4.Dhanalakshmi
5.Iyammal
6.Gurusamy Naicker
7.Mallika
8.Indira
9.Chithra
10.Nallasamy Naicker

... 1 to 9 Respondents/Plaintiffs
... 10th Respondent/2nd Defendant



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PRAYER: Appeal Suit filed under Section 96 of the Civil Procedure Code, against the judgment and decree passed in O.S.No.89 of 2010, on the file of the I Additional District Court, Thoothukudi, dated 07.11.2012.

For Appellant : Mr.R.J.Arivukumar

For Respondents : Mr.D.Nallathambi

J U D G M E N T

The respondents 1 to 9 are the plaintiffs and the 10th respondent is the 2nd defendant and the appellant is the 1st defendant in the suit in O.S.No. 89 of 2010, on the file of the I Additional District Court, Thoothukudi. The respondents 1 to 9 filed a suit against the appellant and the 10th respondent for partition from the schedule mentioned properties and the said suit was decreed in favour of the respondents 1 to 9/plaintiffs.

2.Brief facts to the case of the plaintiffs/respondents 1 to 9, as per the plaint, are that the 1st and 2nd schedule property belongs to Sankarappa Naicker, who is the father of the plaintiffs 1 to 5 and the deceased Lakshmi and defendants 1 and 2. The 3rd schedule property belongs to the wife of



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Sankarappa Naicker one Seetha Ammal. It is her ancestral property. Since Lakshmi is no more, her husband is added as 6th plaintiff and her children are added as 7th to 9th plaintiffs. The Sankarappa Naicker died some 29 years before and his wife died some 13 years before. After their death, the schedule properties were enjoyed by the plaintiffs and the defendants jointly. No partition was effected between them. The 1st defendant was living in Singapore and he is a Singapore citizen. On the instigation of the 1st defendant, the 2nd defendant had tried to change the patta from the name of Sankarappa Naicker into the name of Defendants 1 and 2 and after getting patta, they intent to sell those properties. So, the transfer of patta was objected by the plaintiffs and they had sent an objection to the Tahsildar, Kovilpatti. Soon after that, in the month of July 2010 plaintiffs asked the 2nd defendant to partition their share in the schedule property. Since defendants 1 and 2 are not willing to partition the property and joint possession is not possible, therefore, the plaintiffs have come forward with the suit. The plaintiffs further stated that from the amount sent by Sankarappa Naicker, Seethai Ammal and her female heirs purchased the



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land and they have done the cultivation work. It is further stated that no dowry was given to the female heirs at the time of marriage. Sankarappa Naicker told them that he will give dowry from his retirement benefits.

3. The 1st defendant resisted the suit by filing a written statement stating that the suit properties are in joint possession of the plaintiffs and the defendants is denied. The relationship mentioned in the plaint is admitted. The 1st defendant is in Malaysia and the same was also admitted. At the time of filing of the suit the first defendant came to India. It is further denied that on the instigation of the 1st defendant, the 2nd defendant had tried to transfer the patta in the name of defendants 1 and 2. The plaintiffs are not entitled for any share in the schedule property. It is further stated that the first item of property was purchased from one Padmavathi Ammal in the name of the defendants 1 & 2 and their brother Subburamu. The sale deed is marked as Ex.B1. The Patta for the 1st schedule stands in the name of the defendants 1 and 2 and the deceased Subburam. That patta is marked as Ex.B4. So, the 1st schedule belongs to the defendants 1 and 2



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and the deceased Subburam and it is not the property of Sankarappa Naicker. It is further stated that with regard to the 1st schedule and other properties, Subburam had executed a release deed in favour of the 1st defendant on 27.09.1972 after getting Rs.4,000/- from him. The release deed is marked as Ex.B2. So, in that property 1st defendant had 2/3rd share and 2nd defendant had 1/3rd share. The plaintiffs are not residing in the place where suit properties are situated. So, they are not in joint possession along with defendants 1 and 2. As per the family arrangement, the 2nd schedule property was given to the male heirs of Sankarappa Naicker and they are in possession and enjoyment of the 2nd schedule property. With regard to the 2nd schedule also, Sankarappa Naicker had executed a release deed and therefore, 2nd schedule property also belongs to defendants 1 and 2 alone. Since 1st defendant is entitled to have 2/3rd share in the 1st schedule and 1/2 share in the 2nd schedule, he sent a notice to 2nd defendant on 18.12.2010. It is further stated that all the properties of Sankarappa Naicker are not added as schedule of properties in the suit and therefore, the suit is hit by partial partition. It is further stated that the 3rd schedule is a house. Since



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that house was a very old one it was demolished by 1st defendant in the year 1969 and he had constructed a new house.

4. The second defendant filed a written statement and stated that Sankarappa Naicker did not send any money from Malaysiya. All the female heirs were given cash, jewels, dowry as per the customary rites. It is further stated that 2nd defendant take care of his mother for about 25 years. After the marriage, all the plaintiffs are permanently residing at Kovilpatti. So they are in joint possession of the property is a false one. It is further stated that the agricultural operations were presently carried by 2nd defendant through lease for the past 25 years.

5. On the basis of the above pleadings, the learned trial Judge framed the following issues for consideration:

- (i) Whether the plaintiffs are not in joint possession of the schedule properties and they are ousted from the enjoyment of the schedule properties?*
- (ii) Whether the court fee paid by the plaintiffs are not*



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correct?

(iii) Whether the plaintiffs are entitled to 6/8 share in the

(iv) Whether the plaintiffs are entitled to preliminary decree for partition as prayed for?

(v) To what other relief?

Additional issues:-

(vi) Whether Subburamu had executed a registered release deed, dated 29.07.1972 in favour of defendant 1?

(vii) Whether item 2 is the separate property of Defendants 1 & 2 ?

6. In order to substantiate the case, on the side of the plaintiffs, three witnesses were examined as PW1 to PW3 and 3 documents were marked as Exs.A1 to Ex.A3. On the side of the defendants, three witnesses were examined as D.W.1 to D.W.3 and 5 documents were marked as Ex.B1 to Ex.B5.

7. After completing the trial and on hearing of arguments advanced on either side, the learned trial Judge, considered the evidence available on record, decreed the suit.



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8. The learned counsel appearing for the appellant would submit that 'A' schedule property was purchased in the name of three brothers, who are the appellant and the 2nd defendant and one Subburam. It is only a 10th respondent purchased the properties out of the income sent by the appellant from Singapore. Therefore, the respondents 1 to 9/plaintiffs are not entitled to share. It is neither the joint family property nor the ancestral property. It is purely a self acquired property of the appellant. He would further submit that 'C' schedule property is a old dilapidated building, in which, the appellant has removed the old construction and constructed a new building out of his own income. The third schedule property is concerned, the properties are enjoying by three brothers and the respondents 1 to 9 are out of possession for more than 12 years of statutory period and they are ouster. Therefore, the respondents 1 to 9 are not entitled to any share in the suit properties. One of the brothers executed a relinquish deed in favour of the appellant with regard to his share in the 'A' schedule property and therefore, only, the appellant and the 10th respondent alone is entitled to share in the suit 'A' schedule property. The respondents 1 to 9 did not have any right in



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the suit property and did not have any share. Unfortunately, the trial Court failed to consider the fact that the appellant is a Singapore Citizen and he was earning well and he sent money to India and the 10th respondent had purchased all the properties in their name and building also constructed out of his fund, namely, 'C' schedule property. More than that, more than 20 years, the appellant is in possession. The respondents 1 to 9 are out of possession, therefore, they lost their right by Ouster.

9. The learned counsel appearing for the respondents 1 to 9 would submit that all the properties of 1st and 2nd schedule properties are family properties. The third property belongs to their mother. Both the father and mother died intestate and therefore, all the respondents are equally entitled to the share. Further, relinquishment stated by the appellant was not proved in the manner known to law and therefore, disbelieved the relinquishment deed said to have been executed by the deceased brother in favour of the appellant. He would further submit that the appellant is a Singapore citizen and no evidence to show that he settled in foreign Country and sent money



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and that money was used for purchasing the property and developing the property and constructing the 'C' schedule property. Even, one of the defendants namely, the 10th respondent herein only entered into the witness box and he admitted that all the property are family properties. Whereas, the appellant has not come to the witness box since he was not subjected to cross-examination and therefore, his defence cannot be taken into. When the power of attorney entered into the witness box, it is a settled proposition of law that the power of attorney cannot speak about the personal knowledge of the principal. Therefore, power of attorney, in his evidence, does not speak about the source of the income and character of the property. Therefore, at the time of evidence, the 2nd defendant has clearly admitted that all the properties are family properties. It is a settled proposition of law that admitted fact need not be proved. Therefore, under these circumstances, the appellant has failed to prove the defence taken in the written statement. Since the suit is filed for partition, the plaintiffs and defendants are vice versa both plaintiff and defendant and therefore, it is the duty of the appellant to prove that it is not a family property and it is a self



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acquired property and therefore, the trial Court has rightly appreciated the oral and document evidence. He would further submit that the deed of relinquishment said to have executed by the deceased brother in favour of the appellant was not proved. Taking into consideration of the admission made by the 10th respondent, who is also the 2nd defendant in the suit, the trial court decreed the suit. The 10th respondent adopted the arguments made by the counsel for the other respondents.

10. Heard the learned counsel appearing for the appellant, the learned counsel appearing for the respondents, perused the pleadings, issues framed by the trial Court, oral and documentary evidence adduced and produced by both parties.

11. Admittedly, the respondents 1 to 9 are the plaintiffs and they filed a suit for partition stating that all the properties are family properties and their parents died intestate, therefore, all the brothers and sisters, who are the legal heirs, are entitled to share in the suit properties. When the



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appellant as a 1st defendant has taken the main defence that 1st and 2nd item of the properties are self acquired properties and the third item of the property is their mother's property and he invested his own money for construction. Though 'A' schedule property is purchased in the name of three brothers, the 10th respondent, who is 2nd defendant, admitted that the said property is family property and the same was purchased out of the joint family income.

12. Admittedly, the appellant is not in India and he never reside in India. Therefore, he had not participated either in the sale deed or in the release deed. Further, the power of attorney, who has entered into the witness box, has not clearly stated about the money transferred from Singapore to Tamil Nadu and out of the appellant's, money the property was purchased in the name of three brothers. Therefore, under these circumstances, under Section 58 of the Indian Evidence Act, once admitted, the admitted fact need not be proved and one of the co-defendant, who is the 10th respondent, who is also party to the sale deed, which is clearly shows



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that it is not purchased out of the sole income of the appellant and it is purchased out of the family income. Therefore, as far as the third item of the property is concerned, admittedly, the property stands in the name of the mother and their mother died intestate. Though the appellant has stated that the building was in dilapidated condition and he removed the construction and also constructed a new house on his own fund, for which, he has not produced any documentary evidence. Oral evidence is also not supported to this case. Admittedly, at the relevant point of time, appellant was in Singapore and at that time, the amount was transferred from Singapore to India for construction of house and none of the witnesses spoken out that the building was constructed out of the fund received from the appellant.

13. More so, the 10th respondent herein stated that all the three properties are family properties and even power of attorney of the appellant, who was examined as D.W.1, has not clearly spoken regarding the fund received from the appellant and utilised the same for construction. For ouster is concerned, once the appellant claimed the plea of ouster, he could



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say that with the knowledge of the respondents, appellant enjoying the property as his own, for more than statutory period and plead the hostile pleading. In this case, admittedly, once the 10th respondent admitted that it is a family property, he denied the right and share of the other co-owners and especially, the title, the right to ouster would not arise. The appellant is not in possession of the property. He cannot be pleaded the ouster when the other persons, who were not in possession. All the defence taken by the appellant are not substantiated by the oral and documentary evidence. The trial Court has rightly appreciated and finds that the properties are joint family properties, which are available for partition, so, the appellant and respondents are entitled for partition. Therefore, preliminary decree has been passed to that effect and there is no merit in the appeal and there is no ground to interfere with the findings of the trial Court. The first appellate Court is a fact finding Court it can re-appreciate the entire materials and give independent conclusion.



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14. A reading of the pleadings, issues, oral and documentary evidence, this Court also finds that the 10th respondent, who is one of the co-defendants, have admitted that all the properties are joint family properties and the appellant has not come to the witness box and only examined the power of attorney, who has no the personal knowledge about the family income and source to purchase those properties, the respondents are also entitled to get a share and the trial Court has rightly decreed the suit.

15. Hence, the appeal fails and the same is dismissed. The judgment and decree passed by the trial Court is confirmed. In a recent judgment of the Hon'ble Supreme Court reported in **2022 Live Law (SC) 549, Kattukandi Edathil Krishnan and another vs. Kattukandi Edathil Valsan and others**, it has been held as follows:-

"33. We are of the view that once a preliminary decree is passed by the Trial Court, the court should proceed with the case for drawing up the final decree suo motu. After passing of the preliminary decree, the Trial Court has to list the matter for taking



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steps under Order XX Rule 18 of the CPC. The courts should not adjourn the matter sine die, as has been done in the instant case. There is also no need to file a separate final decree proceedings. In the same suit, the court should allow the concerned party to file an appropriate application for drawing up the final decree. Needless to state that the suit comes to an end only when a final decree is drawn. Therefore, we direct the Trial Courts to list the matter for taking steps under Order XX Rule 18 of the CPC soon after passing of the preliminary decree for partition and separate possession of the property, suo motu and without requiring initiation of any separate proceedings.

34. We direct the Registry of this Court to forward a copy of this judgment to the Registrar Generals of all the High Courts who in turn are directed to circulate the directions contained in paragraph '33' of this judgment to the concerned Trial Courts in their respective States."



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16.As per the above latest decision of the Hon'ble Supreme Court, a party need not file a final decree application separately. The Court itself can *suo motu* initiate final decree proceedings after passing the preliminary decree. Therefore, the appellant is are directed to divide the property by metes and bounds and hand over the possession to the respondents as per the judgment and decree passed by the trial Court, within a month from the date of receipt of a copy of this judgment, otherwise, the trial Court is directed to initiate *suo motu* final decree proceedings and appoint an advocate commissioner and proceed with the same and pass a final decree. Since already the suit is pending from 2010, all the final decree proceedings shall be completed within a period of six months from the date of its initiation. Registry is directed to send the original records to the trial Court concerned along with the judgment and decree made in this appeal within a period of fifteen days from the date of this judgment.



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17. Considering the facts and circumstances of the case and also the relationship between the parties, there shall be no order as to costs.

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Index : Yes / No

Speaking Order : Yes / No

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To

1. The I Additional District Court,
Thoothukudi.

2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN, J.

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