



S.A.No.918 of 1994

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.11.2022

CORAM: JUSTICE N.SESHASAYEE

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1.Chellam Servai (Died)
2.Bhoominathan (Died)
3.Naganathan

... Appellants 1 to 3/
Respondents 2, 4 & 5/
Defendants 2, 4 & 5

4.Arunagiri
5.N.Malliga
6.K.Sethukarasu
7.Saranyadevi

... Appellants 4 to 7/
LRs of the 1st Appellant

8.Poovendharan
9.Nagalakshmi
10.Pugalendhi Devi
11.Suganthi

... Appellants 8 to 11/
LRs of the 2nd Appellant

[Appellants 4 to 7 were brought on record as LR's of the deceased first appellant made in C.M.P.(MD).No.368 of 2013 in S.A.No.918 of 1994 and Appellants 8 to 11 were brought on record as LR's of the deceased second appellant made in C.M.P.(MD).No.371 of 2013 in S.A.No.918 of 1994 vide common order dated 13.01.2015]

[Appellants 5 to 7 are represented by their Power Agent Arunagiri, 4th Appellant]

Vs

1.Pushpammal
2.Padmini
3.Seethalakshmi



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4.Bhanumathy
5.Jothiguru
6.Karnan
7.Karungu
8.Palkarasu
9.Karuppiah
10.Dharmalingam
11.Rakku
12.Nagu
13.Thangavelu

... Respondents/
Appellants & Respondents 3 & 6 to 12/
Plaintiffs & Defendants 3 & 6 to 12

[Respondents Nos.6 to 13 are not necessary parties to this Appeal and they are shown only for the purpose of cause title]

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 13.07.1992 made in A.S.No.52 of 1991 on the file of the Additional District Court, Ramanathapuram, Madurai, reversing the judgment and decree dated 04.10.1985 made in O.S.No.296 of 1983 on the file of the District Munsif's Court, Manamadurai.

For Appellants	:	Mr.G.Prabhu Rajadurai
For Respondents	:	Mr.V.M.Jegadeeshapandian for R2
	:	Mr.J.Barathan for R6
	:	No appearance for RR1, 3, 4, 5

JUDGMENT

The Defendants 2, 4 and 5 in O.S.No.296 of 1983 on the file of the District Munsif's Court, Manamadurai, are the appellants herein. The suit was laid for



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partition of three items of the suit properties. The suit was dismissed by the trial Court and in an appeal preferred by the plaintiffs in A.S.No.52 of 1991 before the Additional District Court, Ramanathapuram, they were successful. Hence, defendants 2, 4 and 5 are before this Court with this appeal. For narrative convenience, the parties would be referred to by their rank before the trial Court.

2.1 The introductory facts are as below:

- There are three items of properties in Soorankottai Village, Ramanathapuram Taluk, and the details are as below:

Item	Survey Number	Extent
I	228/2-A and 228/2-K	2.56 acres
II	121/1	2.6 acres
III	128/3	3.83 acres

- According to the plaintiffs, the suit properties originally belonged to a certain Ramasamy Servai. He had three sons and two daughters: They are Sethuraja Servai, the first defendant herein; Chellam Servai, the second defendant herein; Arunachalam @ Ramasamy Servai; Sethu



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Muthammal; and Thangammal.

- The suit essentially concerns with the heirs of Arunachalam versus defendants 1 and 2, and the purchasers of the first defendant.

2.2 Arunachalam @ Ramasamy Servai was married twice. Through his first wife, he had a son who is the third defendant herein. His second wife is the first plaintiff herein, and his four children through the first plaintiff are plaintiffs 2 to 5. The plaint allegation goes as below:

- There was a partition of the three items of suit properties and other properties of Ramasamy Servai between him and his three sons, and a memorandum of the oral partition was prepared in the form of a list. Subsequent to the demise of Ramasamy Servai, there was yet another partition of the shares allotted to him between his three sons. But in the aforesaid two partitions, the three items of the suit properties were not included and the reason why they were not included was essentially because Ramasamy Servai had mortgaged these items of the properties to third parties. These mortgages were ultimately redeemed by the second defendant.

Therefore, the plaintiffs offered to pay their contribution towards the share of



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their mortgage-liability proportionate to the value of redemption, and sought partition of their shares in the three items of the properties.

2.3 Defendants 1 and 2 have filed separate written statements, but adopted an identical line of defence. According to them, there was an oral partition between Ramasamy Servai and his three sons as alleged by the plaintiffs and that the same was reduced to writing into a Memorandum vide Ext.B.1 dated 11.02.1959. In this partition, the properties were divided into four schedules from 'A' Schedule to 'D' Schedule, and they came to be allotted respectively to Ramasamy Servai ('A' Schedule), Arunachalam ('B' Schedule), the first defendant ('C' Schedule) and the second defendant ('D' Schedule). The plaint Item Nos.1 and 3 are included in 'D' Schedule in Ext.B.1 as Item Nos.8 and 7 respectively.

2.4 So far as the plaint Item No.1 is concerned, subsequent to the execution of Ext.B.1, on 07.08.1959 Ramasamy Servai had mortgaged it to Halva Beevi under Ext.B.11. Then, on 10.07.1961, the mortgagee had assigned it to one Chellammal under Ext.B.12, and there were successive assignments from Chellammal under Ext.B.13 and Ext.B.14. Subsequently, vide Ext.B.16 dated



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22.09.1977, the second defendant had redeemed the plaint Item No.1. It is indeed the redemption of the property allotted to him in the earlier mentioned partition. So far as Item No.3 of the property is concerned, this was also outstanding on a mortgage, but it was made prior to Ext.B.1. And, this property was also allotted to the share of the second defendant under Ext.B.1.

2.5 So far as the plaint Item No.2 is concerned, in terms of Ext.B.1, this had been allotted to the share of Ramasamy Servai, but in the oral partition that took place subsequent to the demise of Ramasamy Servai, it was allotted to the share of the first defendant. The first defendant pleads that he had sold Item No.2 of the property to defendants 4 and 5.

3. The defendants 4 and 5 have filed their separate written statements contending that they have purchased Item No.2 of the property from the first defendant under Ext.B.21 dated 16.04.1980, and in other aspect, they support the case of their vendor.

4.1 The dispute went to trial and before the trial Court, on the side of the plaintiff, the 5th plaintiff and 1st plaintiff have examined themselves



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respectively as P.W.1 and P.W.2. For the defendants, the second defendant examined himself as D.W.1 and examined an attesor to Ext.B.1 as D.W.2. While the plaintiffs have produced Ext.A.1 to Ext.A.23, the defendants on their side have produced Ext.B.1 to Ext.B.21.

4.2 After appreciating the evidence before it, the trial Court chose to dismiss the suit as it believed Ext.B.1-Memorandum of Partition and accepted the case of the contesting defendants. When the matter reached the first appellate Court at the instance of the plaintiffs in A.S.No.52 of 1991, the first appellate Court disbelieved Ext.B.1.

5. Here it may have to be stated that what was produced before the Court was only a certified copy of Ext.B.1 issued by the learned District Munsif, Manamadurai, since the original of this document was produced before that Court in O.S.No.296 of 1983. The first appellate Court believed that the second defendant ought to have produced the very original of Ext.B.1 and that formed its basis for negating the defence and for decreeing the suit. Hence, this appeal.



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6. This appeal was admitted for considering the following substantial question of law:

“Whether the first appellate Court was correct in reversing the judgment and decree of the trial Court, disbelieving the partition list dated 11.02.1959 on the basis of oral evidence and passing a preliminary decree, granting 11/54 shares to the plaintiffs in items 1 to 3 of the suit schedule properties?”

7. The learned counsel appearing for the appellants made the following submissions:

- Ext.B.1 was not pleaded by the plaintiffs but was pleaded only by the defendants in their written statements. However, what is significant is that after filing the written statements, the plaintiffs amended the plaint and inserted paragraph No.2A in which they had admitted the terms of the oral partition or the allotment made as was pleaded by the defendants. When the plaintiffs themselves admit the oral partition, it hardly requires to be proved. Here the defendants have produced Ext.B.1 and claim that the partition took place in accordance with Ext.B.1. Now, if the plaintiffs dispute the allotment as evidenced by Ext.B.1, then the



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burden is on them to establish the allotment made in the oral partition which they chose to admit.

- Turning to Item No.1, in terms of Ext.B.1, this was allotted to the second defendant, and he had redeemed the mortgage liability outstanding on it vide Ext.B.16. So far as Item Nos.2 and 3 are concerned, as pleaded by the defendants, in the second partition that took place after the demise of Ramasamy Servai, they were respectively allotted to the first plaintiff and to the second defendant. The plaintiffs having admitted the second oral partition, the burden is on them to establish that these properties indeed were omitted to be included in the second oral partition.

8. Learned counsel for the 2nd plaintiff ably supported by the learned counsel for the 3rd defendant submitted that the plaintiffs have only admitted that a memorandum of oral partition earlier entered and reduced to writing on 11.02.1959 was made, but did not specifically admit Ext.B.1-list. Indeed Ext.B.1-list is not the original, but only a certified copy issued by Sub Court, Ramanathapuram, from its records in an appeal in A.S.No.120 of 1971 on its file. Unless the original is before this Court, there is no knowing whether this is a document which the parties have signed. When the first partition goes,



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necessarily there is huge uncertainty about the properties allotted to Ramasamy, the father-in-law of the first plaintiff and the paternal grandfather of other plaintiffs.

9. The rival contentions are carefully weighed. It is an admitted fact that the memorandum of list of an oral partition was made and signed by Ramasamy Servai and his three sons. This includes the first plaintiff's husband, Arunalacham as well. And, while she did not choose to disclose this oral partition in her plaint, she did admit it after defendants 1 and 2 have filed their written statement. In particular, in paragraph 2A, the plaintiffs admit the memorandum of list of partition referred to in the written statement of defendants 1 and 2. If Ext.B.1 is not the document, then what it is? After all, Arunachalam under whom the present plaintiffs claim was also allotted some properties, in which case the plaintiffs should have come clean on the properties allotted to Arunachalam in the said partition. The plaintiffs very apparently appear to be seen wobbling in strategising their cause of action. They admit the existence of a memorandum of partition, but deny Ext.B.1 and refuse to speak about the properties allotted to Arunachalam, and thus deny the Court an opportunity to ascertain if the allotments made were consistent



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with Ext.B.1. Indeed when the 2nd defendant was in the box as D.W.1, but he was not adequately cross examined on the same. The selective but a determined silence on aspects which the plaintiffs are under a duty to speak hardly appears to help them in this litigious pursuit. And, needless to state it aids the defendants.

10. Turning to the oral partition of the properties allotted to Ramasamy subsequent to his demise, the defendants have come out with a clear case whereas the plaintiffs again find themselves stranded in a no man's land. Having admitted the first partition that had taken place between Ramasamy Servai and his sons, it is they who have to make a statement as to the properties that are specifically allotted to Ramasamy which would be available for partition after his demise. But by denying the allotments made as evidenced by Ext.B.1, the plaintiffs do not have an elbow-space to negotiate the second oral partition as asserted by defendants 1 and 2.

11. Turning to the line of reasoning of the first appellate Court, it was seen harping on Ext.B.1 and has spent considerable time suspecting its genuineness, but it was plainly unnecessary when the plaintiffs have admitted the burden by



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admitting the oral partition vide an amendment to the plaint. If only the plaintiffs have remained silent and let the defendants to prove the oral partition, the situation would have been different, and it is then the line of approach of the first appellate Court could be termed appropriate. But not in this case when the plaintiffs have literally walked into the snare which the defendants have set for them.

12. In fine, this Second Appeal is allowed and the judgment and decree dated 13.07.1992 made in A.S.No.52 of 1991 on the file of the Additional District Court, Ramanathapuram, Madurai, reversing the judgment and decree dated 04.10.1985 made in O.S.No.296 of 1983 on the file of the District Munsif's Court, Manamadurai, is set aside. No costs.

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Index : Yes/No
Internet : Yes/No

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To

- 1.The Additional District Judge,
Ramanathapuram.
- 2.The District Munsif,
Manamadurai.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.



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N.SESHASAYEE, J.

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