



S.A.Nos.760 and 761 of 1999

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 14.11.2022

CORAM: JUSTICE N.SESHASAYEE

S.A.Nos.760 and 761 of 1999

and

C.M.P.(MD) No.8000 of 1999

S.A.No.760 of 1999 :

1.Duraisamy

2.Sivasubramanian

3.Ayyannu Vathiyar (Died)

4.Vellaidurai Konar

... Appellants 1 to 4/ Respondents 1 to 3 & 7/
Defendants 1 to 3 & 8

5.Ponnuthai

6.Nalliah

7.Latha Mangaiyarkarasi

8.Thilagarasi

9.Jeyanthi

10.Senthamarai Kannan

... Appellants 5 to 6

[Appellants 5 to 10 were brought on record as LR's of the deceased third appellant vide order dated 13.10.2011 made in M.P(MD).Nos.1 to 3 of 2011 in S.A.No.760 of 1999]

Vs

1.Vellaidurai (Died)

2.Ariya Thevar

3.Duraipandi Thevar

4.Muthiah Thevar

... Respondents 1 to 4/Appellant &
Respondents 4 & 6/
Plaintiff & Defendants 4 to 6

5.Kuruvammal

6.Isuki



S.A.Nos.760 and 761 of 1999

7.Murugaiya Pandian
8.Thangamani
9.Muthupandi (minor)
Rep., by his mother
and guardian Kuruvammal ... Respondents 5 to 9

[RR5 to 9 were brought on record as LR's of the deceased 1st respondent vide order dated 31.10.2003 made in C.M.P.Nos. 5069 to 5071 of 2003]

Prayer: Second Appeal filed under Section 100 of Code of Civil Procedure to set aside the judgment and decree dated 24.06.1998 made in A.S.No.41 of 1996 on the file of the Principal Sub Court, Tenkasi reversing the judgment and decree dated 29.01.1996 made in O.S.No.368 of 1991 on the file of the District Munsif's Court, Tenkasi.

For Appellants	:	Mr.F.X.Eugene
For Respondents	:	Mr.S.Ramesh
	:	for Mr.V.Raghavachari for R6 to R8
	:	R1 – Died
	:	R2 & R3 – Exparte
	:	R4 - Dismissed

S.A.No.761 of 1999 :

1.Duraisamy	
2.Sivasubramanian	
3.Ayyannu Vathiyar (Died)	... Appellants/Respondents/Plaintiffs
4.Ponnuthai	
5.Nalliah	
6.Latha Mangaiyarkarasi	
7.Thilagarasi	
8.Jeyanthi	
9.Senthamarai Kannan	... Appellants 4 to 9



S.A.Nos.760 and 761 of 1999

[Appellants 4 to 9 were brought on record as LR's of the deceased third appellant vide order dated 13.10.2011 made in M.P(MD).Nos.1 to 3 of 2011 in S.A.No.761 of 1999]

Vs

1.Vellaidurai (Died)

... Respondent/Appellant/Defendant

2.Kuruvammal

3.Isuki

4.Murugaiya Pandian

5.Thangamani

6.Muthupandi (minor)

Rep., by his mother and guardian

Kuruvammal

... Respondents 2 to 6

[RR2 to 6 were brought on record as LR's of the deceased sole respondent vide order dated 31.10.2003 made in C.M.P.Nos.5072 to 5074 of 2003]

Prayer: Second Appeal filed under Section 100 of Code of Civil Procedure to set aside the judgment and decree dated 24.06.1998 made in A.S.No.48 of 1996 on the file of the Principal Sub Court, Tenkasi, reversing the judgment and decree dated 29.01.1996 made in O.S.No.272 of 1991 on the file of the District Munsif's Court, Tenkasi.

For Appellants : Mr.F.X.Eugene

For Respondents : Mr.S.Ramesh for R3 to R5
: Mr.Ramesh @ Ramiah for R2 & R6
: R1 – Died



S.A.Nos.760 and 761 of 1999

COMMON JUDGMENT

WEB COPY

There are two suits from which these second appeals arise. The first of the suits is O.S.No.272 of 1991 which was laid for declaration of title and for permanent injunction. The defendant in the said suit for his part would institute a suit for partition in O.S.No.368 of 1991. Both the suits were tried jointly, and the evidence was recorded in O.S.No.272 of 1991. The trial Court decreed the suit for declaration of title in O.S.No.272 of 1991 and dismissed the suit for partition. Aggrieved by the same, the defendant in O.S.No.272 of 1991 came up with A.S.No.41 of 1996 (against O.S.No.368 of 1991) and A.S.No.48 of 1996 (against O.S.No.272 of 1991). The first appellate Court found reasons to reverse the decree of the trial Court. Accordingly, a preliminary decree came to be passed in the partition suit, and the declaration suit in O.S.No.272 of 1991 came to be dismissed. Hence, the present appeals at the instance of the plaintiffs in O.S.No.272 of 1991 (the parties would be referred to by their rank in O.S.No.272 of 1991).

2. The facts are:

Even though the evidence was recorded in O.S.No.272 of 1991 and though it is indicated that the reference to the parties would be based on their rank in that



S.A.Nos.760 and 761 of 1999

suit, yet for narrative convenience, the case of the defendants as stated in O.S.No.368 of 1991 would be appropriate.

- There are six items of suit properties in relation to which partition is claimed, of which only Item-2 is involved in the suit for declaration of title in O.S.No.272 of 1991.
- All the six items of the properties originally belonged to a certain Arunagiri Thevar. Arunagiri Thevar had three sons and they are Periyasamy Thevar, Pandi Thevar and Muthaiah Thevar. Periyasamy Thevar's heirs are the defendants 4 to 6 (in O.S.No.368 of 1991). The plaintiff (in O.S.No.368 of 1991) is the sole heir of Muthiah Thevar and the 7th defendant (in O.S.No.368 of 1991) is the heir of Pandi Thevar.
- According to the plaintiffs, on the demise of Arunagiri Thevar, the suit properties jointly devolved on the aforesaid three sons of Arunagiri Thevar. Later Muthaiah Thevar moved to another village to be with his father-in-law, and both Periyasamy Thevar and Pandi Thevar had been cultivating the lands for themselves and also on behalf of their brother Muthaiah Thevar and used to share 1/3rd of the profits with him.
- While so, on 08.10.1943 vide Ext.B.2, Pandi Thevar had sold the 1st Item of property to one Navamani Nadar and when objection was raised by



S.A.Nos.760 and 761 of 1999

WEB COPY

Muthaiah Thevar to this unilateral sale by Pandi Thevar, an agreement was reached as between them, as per which, when the partition of other properties takes place, Muthaiah Thevar would be compensated. On 22.04.1991, under Ext.B.4, Navamani Nadar had sold the 1st Item of property to the 8th defendant (in O.S.No.368 of 1991).

Contending that the defendants 4 to 7, joining hands with defendants 1 to 3, are attempting to alienate some properties, the plaintiff had rushed to the Court with O.S.No.368 of 1991.

3. The suit was essentially contested by the plaintiffs in O.S.No.272 of 1991 (defendants 1 to 3 in O.S.No.368 of 1991) and the fourth defendant in O.S.No. 368 of 1991. And they seek declaration of their title to Item-2 in the partition suit comprised in S.No.385/1 measuring 1.24 acres. Their contentions are that:

- The properties described in the suit lie either to the north or to the east of the village where the parties live. After the demise of Arunagiri Thevar, there took place an oral partition between his three sons namely Periyasamy Thevar, Pandi Thevar and Muthaiah Thevar. The nature of the oral partition is as below:



S.A.Nos.760 and 761 of 1999

Location of the properties	Allottee	share
Property to the north of the village	Muthiah Thevar	2/3 rd
	Pandi Thevar	1/3 rd
Property to the east of the village	Periyasamy Thevar	2/3 rd
	Pandi Thevar	1/3 rd

- Of the six items of the properties, the 1st and 5th Items of properties lie to the east of the village and they came to be allotted to Periyasamy Thevar and Pandi Thevar.
- While so, on 13.05.1977 vide Ext.A.1, the first plaintiff had purchased eastern 83 cents in the 2nd Item (in O.S.No.272 of 1991) from Periyasamy Thevar and his sons. Then, on 31.10.1979 under Ext.A2, the second plaintiff had purchased 41.25 cents in the 3rd Item (in O.S.No.272 of 1991) and also in 5th Item from Pandi Thevar and his son Thangaiya. On 01.03.1990, under Ext.A5, the sixth defendant in O.S.No.368 of 1991, viz., Muthaiya Thevar, had sold 27 cents in the 4th Item (in O.S.No.272 of 1991) to the third plaintiff. However, plaintiffs 1 to 3 have arrived at an arrangement to share the 2nd Item of property and therefore, there is no dispute between themselves.



S.A.Nos.760 and 761 of 1999

4. The dispute went to trial and before the trial Court, both sides adduced their oral and documentary evidence. For the plaintiffs, the 2nd plaintiff examined himself as P.W.1 and he has produced Ext.A.1 to Ext.A.5. For the defendant, he has entered the box and deposed as D.W.1 and the 8th defendant in O.S.No. 368 of 1991 was examined as D.W.2. They have produced Ext.B.1 to Ext.B. 10.

5. As already outlined in the opening paragraph, the trial Court dismissed the suit for partition, as it chose to rely on an earlier oral partition as pleaded by the defendants, and promptly granted a decree for declaration in favour of the plaintiffs in O.S.272/91, over 1.24 acres in S.No.385/1, (scheduled as Item No. 2 in the partition suit). For arriving its conclusion, it essentially relied on Ext.A.1, sale deed dated 13.05.1977 under which the first plaintiff had purchased 83 cents from Periyasami Thevar, wherein it was recited that the property transacted was allotted to him. It also relied on Ext.B.1 under which the plaintiff's (in O.S.No.368 of 1991) father Muthaiah Thevar had sold 39 cents to Navamani Nadar. This document also appears to indicate that there was a partition. It may have to be recorded here that the description of the property sold under this document so ambiguous that neither side is in a



S.A.Nos.760 and 761 of 1999

position to make a definite statement that it relates to any specific items of property scheduled to in the suit for partition in O.S.No.368 of 1991. However, both sides agreed that it should relate to the 1st Item of property in O.S.No.368 of 1991.

6. When the matter reached the first appellate Court, it reversed the findings as it chose to rely on Ext.A.2 under which the 2nd plaintiff had purchased 41.25 cents from Periyasami Thevar, and it was recited in this document that he was selling his undivided share in the property. Hence, the plaintiffs in O.S.No.272 of 1991/defendants 1 to 3 in O.S.No.368 of 1991 are before this Court.

7. The appeals were admitted for considering the following substantial question of law:

“Whether the findings of the first appellate Court that the defendants 1 to 3 have failed to prove the oral partition among the members of the family is perverse?”

8. The learned counsel for the appellants submitted that the properties were divided among the father of the plaintiff (in O.S.No.368 of 1991) Muthaiah



S.A.Nos.760 and 761 of 1999

Thevar and the latter's brothers Pandi Thevar and Periyasamy Thevar. This is borne out by Ext.B.1 under which Muthiah Thevar had sold 39 cents. Indeed even Periyasamy Thevar had sold 83 cents to the first plaintiff under Ext.A.1. And the recital in Ext.A.2 that Periyasami Thevar purported to deal with his undivided share, can, under the circumstances be only a mistake, since Ext.A.2 was executed some 2½ years after the execution of Ext.A.1. If this is ignored, then it is possible to conclude that there should have been an oral partition as pleaded by the defendants (in O.S.No.368 of 1991).

9. Per contra, the learned counsel appearing for the 1st respondent/plaintiff in O.S.No.368 of 1991 argued that the pleading regarding oral partition is absolutely vague. It is an admitted fact that Arunagiri Thevar owned six items of suit properties, but the nature of oral partition pleaded by the defendants (in O.S.No.368 of 1991) is not with regard to any specific items of properties, but with regard to their location. Indeed it was pleaded that the properties to the north of the village was allotted to some sharers, and the properties to the east of the village was allotted to some other sharers in different ratio. This does not settle the issue at all. It is true that the father of the plaintiff (in O.S.No. 368 of 1991) Muthiah Thevar had executed Ext.B.1 wherein he had sold 39



S.A.Nos.760 and 761 of 1999

cents to Navamani Nadar, but it is not adequately evident whether it pertained to Item-1. Even if it is presumed to be Item-1, it can only represent approximately his 1/3rd share out of 1.18 acres in Item-1. Indeed there may not be a need for any investigation, since Navamani Nadar had purchased the remaining property under Ext.B.2, and has also subsequently sold the same to the 8th defendant in O.S.No.368 of 1991. Therefore, if at all some one can claim share in Item-1, it can only relate to Periyasami Thever's share, but there is an issue between Periyasami Thevar and the 8th defendant in O.S.No.368 of 1991. And neither Ext.B.1 nor Ext.B.2 is conclusive as to the exact nature of partition that took place between the parties. Therefore, whether there was an oral partition or not is something which the defendants (in O.S.No.368 of 1991) have to establish candidly, but even their own documents oscillate and wobble regarding the details and the specifics of the oral partition.

10. Was there an oral partition, is the issue before the Court. If the arguments on either side are closely analysed and the documents pertaining to the same are carefully weighed, it may indicate both. If there was an oral partition, the Court needs some specific information as to the exact properties allotted to the specific sharers. It might be that the property could be identified in terms of



S.A.Nos.760 and 761 of 1999

the broad location as lying to the north of the village or east of the village, but what eludes is the specific property so dealt with thereunder. And as rightly contended by the learned counsel for the defendant/plaintiff in O.S.No.368 of 1991 one who can truly challenge this are the co-sharers of the plaintiffs and they opted to stay silent. The evidence produced by the plaintiffs is not adequate enough to clinch the issue, since their own documents viz., Ext.A.1 and Ext.A.2 executed by Periyasami Thevar taken together would indicate that there could have been an earlier partition but as earlier indicated its opposite – one of no partition is an equal possibility. And none of the co-sharers chose to contest the matter to support and to establish the case of the earlier oral partition. Necessarily this Court has to presume that there was no earlier oral partition and has to proceed accordingly. Having stated thus, it has come in evidence that under Ext.B.1 and Ext.B.2, the entire property in Item-1 was sold to one Navamani Nadar, who in turn had sold it to the 8th defendant in O.S.No. 368 of 1991 under Ext.B.3. And with Muthaiah Thevar, the father of the plaintiff (in O.S.No.368 of 1991), having sold his 39 cents, the latter no more can claim this property is liable to be excluded.

11. So far as other items are concerned, the whole of S.No.385/1 has been



S.A.Nos.760 and 761 of 1999

entirely sold to the plaintiffs in O.S.No.272 of 1991. Since they have been in long enjoyment of this property for more than 40 years, now it is only appropriate that their possession might have to be preserved to the extent possible and the *inter se* right of parties and the equities required to be adjusted need to be done during the final decree proceedings.

12. In conclusion, these appeals are partly allowed and this Court chooses to modify the preliminary decree of the trial Court in O.S.No.368 of 1991 to an extent of 1/3rd share in Item Nos.2 to 6, but subject to the right of the plaintiffs in O.S.No.272 of 1991 to retain the property that they have purchased to the extent possible during the final decree proceedings. No costs. Consequently, connected miscellaneous petition is closed.

14.11.2022

Index : Yes/No

Internet : Yes

ssb/abr

To

- 1.The Principal Sub Judge, Tenkasi.
- 2.The District Munsif, Tenkasi.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court, Madurai.



WEB COPY



S.A.Nos.760 and 761 of 1999

N.SESHASAYEE, J.

abr/ssb

S.A.Nos.760 & 761 of 1999

14.11.2022