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S.A.No.479 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.03.2023

CORAM

THE HONOURABLE MRS.JUSTICE T.V.THAMILSELVI

S.A.No.479 of 2017

1. Major Kavinesan
2. Major Reenadevi
3. Mani alias Periyasamy

....Appellants

**Appellants 1 & 2 declared as major their mother
discharged from the guardianship vide Court order
dated 06.06.2022 made in CMP.No.1530 of 2022
in S.A.No.479 of 2017.**

Vs.

1. Minor Rasika
2. Chandra alias Sakunthala
Minor rep by her next friend and
Mother Chandra alias Sakunthala

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree of the learned Principal District Judge, Namakkal in A.S.No.54 of 2010 dated 02.06.2011, confirming the Judgement and Decree of the Learned Subordinate Judge, Rasipuram, in O.S.No.191 of 2008 dated 12.03.2010.



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For Appellants : Mr.S.Kaithamalai kumaran
For Mr.A.K.Kumarasamy

For Respondents : M/s.K.Arumugathai
For Ms.K.S.Kamatchi

JUDGMENT

This Second Appeal has been filed by the plaintiffs against the Judgment and Decree passed by the learned Principal District Judge, Namakkal in A.S.No.54 of 2010 dated 02.06.2011, confirming the Judgement and Decree passed by the Learned Subordinate Judge, Rasipuram, in O.S.No.191 of 2008 dated 12.03.2010.

2. The appellants herein are the plaintiffs filed the suit in O.S.No.191 of 2008 on the file of Subordinate Judge, Rasipuram for the relief of partition and other consequential reliefs.

3. The brief facts of the plaintiffs are as follows:-

(i) The plaintiffs filed a suit in O.S.No.191 of 2008 on the file of the learned Subordinate Judge, Rasipuram for the relief of partition and also for permanent injunction restraining the defendants from encumbering the suit



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properties till the disposal of the suit. According to the plaintiffs, the 1st

defendant is a daughter of Palanivel, who is the brother of the 3rd plaintiff.

The 2nd defendant is wife of Palanivel, who is the brother of 3rd plaintiff.

The 1st plaintiff and 2nd plaintiff is the son and daughter of the 3rd plaintiff.

The father of the 3rd plaintiff Nalliappa Gounder had two sons, Mani @

Periyasamy and Palanivel. Further, the suit properties originally belonged to

the Joint family of Nalliappa Gounder and his brother Kumara Gounder,

There was partition in the joint family on 29.11.2004, and the same was

registered and the property of 'A' schedule fell to the share of the Plaintiff's

family. Further, the said Nalliappa Gounder had purchased 2nd and 3rd items

of the suit properties in the year 1966 and 1980 from the joint family

income.

(ii) The 3rd plaintiff and the husband of the 2nd defendant

viz., Palanivel are the sons of Nalliyappa Gounder. The suit properties are

the ancestral properties of Nalliyappa Gounder, he purchased the 2nd and 3rd

items in the year 1966 and 1980 out of his income derived from the

ancestral properties and enjoyed the joint family properties. But with regard

to ancestral properties, the Nalliappa Gounder and his brother entered into



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the partition in the year 2004, wherein the 1st item of 'A' schedule property was allotted to the Nalliappa Gounder, the 2nd and 3rd items were also enjoyed by the Nalliappa Gounder. The mother of the 3rd plaintiff Athayee died on 03.04.2006 and Nalliappa Gounder died on 22.06.2006. Palanivel brother of 3rd plaintiff died on 23.03.2004. Hence, the 2nd defendant is in possession and enjoyment of all items of the suit properties 1 to 3. In the suit properties, the plaintiffs were entitled to half share in the properties, but the defendant declined to partition of parties. Hence, the plaintiffs filed a suit for partition and other reliefs.

4. The brief case of the defendants are as follows:-

The 3rd plaintiff's brother Palanivel died and his legal heir, his wife/second defendant contended that the items 2 and 3 are the self acquired properties of Nalliappa Gounder, it was never treated as joint family properties as alleged by the plaintiffs. But with regard to ancestral properties during the life time of Nalliappa Gounder with other legal heir, there was partition, and during his life time, the Nalliappa Gounder had purchased the 2nd and 3rd items which were the self acquired properties and out of love and affection, he executed the settlement deed in favour of his



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grand daughter/1st defendant and except the property covered under the settlement deed, she has no objection to divide the other properties.

5. Before the trial Court framed issues, on the side of the plaintiffs examined as PW1 to PW5 and documents Exs.A1 to A23 were marked and on the side of the defendants examined as DW1 to DW3 and documents Exs.B1 to B4 were marked.

6. The defendants contested the suit, on hearing both sides, the trial Court had partly allowed the suit as the plaintiffs are entitled to 4/24th share and the defendants are entitled to 12/24 share in the suit properties except S.No.103/1A, an extent of 2.67 acres and the suit was dismissed relates to other reliefs.

7. Aggrieved over the findings of the trial Court, the plaintiffs have filed an appeal in A.S.No.54 of 2010 on the file of the learned Principal District Judge, Namakkal and the same was dismissed and confirming the finding of the trial Court. Aggrieved over the said findings of the Courts below, the plaintiffs have preferred this second appeal.



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8. The appellants have raised the following substantial questions of law:-

(a) Are the courts below justified in upholding Ex.B-4 settlement deed overlooking that the settler had no right to make a gift of joint family property?

(b) Are not the Courts below right in not considering the oral evidence let in by the appellants before rendering findings on the issues framed?

9. Heard the learned counsel appearing for the appellants and the learned counsel for the respondents and perused the materials available on record.

10. The learned counsel for the appellants/plaintiffs submitted that in the year 1966 and 1980 through Exs.A2 and A3 properties were purchased by the said Nalliappa Gounder out of income derived from the joint family properties. With regard to the ancestral properties, the said Nalliappa Gounder and his brother divided the suit properties in the year 2004, wherein, the first item of 'A' schedule property was allotted to Nalliappa Gounder, who was enjoyed along with items 2 and 3 and after his demise, the properties were yet to be divided. He further submitted that there was no



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cordial relationship between the second defendant and her father-in-law/Nalliappa Gounder and also pointed out that she filed a suit for Maintenance against her father-in-law/Nalliappa Gounder in M.C.No.10 of 2005. In such circumstances, the gift settlement deed was executed by her father-in-law in favour of the 1st defendant is suspicious and fraud. Thereby, the trial Court had framed one of the issues that whether the settlement deed is valid or not. When the defendants claimed that items 2 and 3 are the self acquired properties of Nalliappa Gounder in S.No.103/1A an extent of 2 acres 67 cents and S.No.112/2B an extent of 78 cents, based upon the settlement deed, she failed to prove that the settlement was executed by his father-in-law in favour of 1st defendant.

11. The learned counsel appearing for the appellants/plaintiffs further submitted that the plaintiffs able to establish that the properties were the joint family properties and enjoyed the same along with the items 2 and 3. That apart there is no cordial relationship between the said Nalliappa Gounder and the second defendant, without appreciating evidence, the Courts below erroneously concluded that the properties were purchased by the said Nalliyappa Gounder as self acquired properties and also held that



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the settlement deed (Ex.B4) is valid. Hence, he prayed to set aside the findings of the Courts below by allowing the second appeal.

12. The learned counsel for the respondents/defendants submitted that the 3rd plaintiff grandfather Sengoda Gounder, had ancestral properties, in Thoppampatti Village, in S.No.173/4 and extent of 2 acre 76 cents S.No.197/1 an extent of 3 acres 61 cents, and in Pachudampalayam Village, in S.No.112/1 an extent of 3 acres 9 cents, and in S.No.78/1 an extent of 78 cents and totally an extent of 10 acres. The said Sengoda Gounder had two sons Nalliappa Gounder and Komara Gounder and they lived as joint family. The said Nalliappa Gounder got married in the year 1958 and lived as a joint family, as there was difference of opinion in the family, Nalliappa Gounder demanded partition in the family properties, but Sengoda Gounder and Komara Gounder, declined partition. Then Nalliappa Gounder with his own earning, and Sridhana properties of his wife/Athayee have purchased the properties on 10.03.1966 S.No.102/2, 103/1 and 112/1 for sum of Rs.30.000/- and was in possession and enjoyment of the property. Further, on 06.06.1980, the said Nalliappa Gounder purchased property S.No.102/2, an extent of 71 cents, by his own self acquired funds and was in possession



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enjoyment of the property. Further, it is stated that there was partition in the family on 29.11.2004, leaving the properties purchased in the year 1996 and 1980 by Nalliappa Gounder. He further submitted that in the partition dated 29.11.2004, the said Nalliappa Gounder got A Schedule property in S.No.112/1C, and extent of 3 acre and 9 cents in S.No.112/2D and extent of 78 cents, and Komara Gounder, got B schedule properties, in S.No.173/4 an extend of 2 acre 78 cents. On 03.04.2006, Nalliappa Gounder's second son Palanivel also died leaving the defendants as legal heirs. Fag end of his life, Nalliappa Gounder due to his old age, was not able to live separately and lived with the defendants. The 2nd defendant as daughter-in-law looked after Nalliappa Gounder. When it is so, the said Nalliappa Gounder voluntarily out of his own volition, executed a settlement in respect of his self acquired properties in S.No.103/1A, an extent of 2 acres 67 cents in favour of the 1st defendant/minor Rasika and the 2nd defendant as guardian accepted the settlement deed and is in possession and enjoyment of the property. It is stated as, leaving S.No.103/1A, an extent of 2 acres 67 cents and the defendants have no objection to partition the other properties except the self acquired properties as stated above.



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13. On consider the submissions of either side, the trial Court concluded that the suit properties of item 2 and 3 are the self acquired properties of Nalliappa Gounder and not been enjoyed as joint family properties. Furthermore, with regard to execution of settlement deed (Ex.B4) in favour of the 1st defendant. The trial Court found that the suit property in S.No.112/2B an extent of 78 cents is ancestral property against which, the said Nalliappa Gounder has no right to execute the settlement, but with regard to S.No.103/1A an extent of 2.67 cents as self acquired property of Nalliappa Gounder (Ex.A2) is sustainable.

14. Against which, the plaintiffs have preferred the appeal in A.S.No.54 of 2010 and the same was dismissed, wherein, the Lower Appellate Judge independently analysed the facts and arrived conclusion that the plaintiffs have not produced any of the materials to show that the settlement deed was obtained by fraud, by the second defendant and also appreciated the witnesses DW2 and DW3. Further, the said Nalliyappa Gounder executed the settlement deed which is valid one in respect of S.No.103/1A an extent of 2.67 cents and confirming the trial Court findings



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and dismissed the appeal.

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15. Challenging the said Judgement and decree of the Courts below, the plaintiffs have preferred this second appeal.

16. Admittedly, the suit properties (item 2 and 3) was purchased in the year 1966 and 1980, at that time, the plaintiffs were not aware of the facts directly but the counsel for the appellants/plaintiffs submitted that there was a ancestral properties belongs to one Sengoda Gounder and the same was partition only in the year 2004 itself. During the evidence of PW1/3rd plaintiff son of Nalliappa Gounder deposed that with regard to the ancestral property his father Nalliappa Gounder and his brother Komara Gounder partitioned these properties in the year 2004 (Ex.A1). Admittedly, PW1 is also being the son of Nalliappa Gounder also one of the party in the document. It is also admitted fact that at the time of partition, suit properties item 2 and 3 stands in the name of Nalliappa Gounder and his wife is not treated as the joint family property for partition. If really those properties were purchased out of income derived from the ancestral property, those properties also ought to have been included. However, PW1 admits that the brother of Nalliappa Gounder not raised any objection at that time of



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partition in the year 2004. Furthermore, the 3rd plaintiff/ PW1 also not raised any objection with regard to the non-inclusion of items 2 and 3 partition in the year 2004 and signed the partition deed.

17. After two years, the plaintiffs have filed the suit contending that the suit properties item 2 and 3 are the joint family properties purchased by the said Nalliappa Gounder is unsustainable one. Hence, the plaintiff failed to establish that the properties were as the joint family properties.

18. As discussed above, the authorities relied by the learned counsel for the appellant Judgment in ***Malla Naicker @ Singari and others vs Jeeva (minor) and others (2012 (1) CTC 128)*** wherein para 17 and 18 are as follows:-

"17. Therefore, having regard to the presumption as per the law laid down by the Hon'ble Supreme Court as well as our High Court as referred to above, and as stated in Mulla's Hindu Law that when a Kartha claims certain properties as a separate properties and the join family admittedly possessed of some nucleus, the burden is on the Kartha to prove that the properties are his separate properties and not purchased out



of the joint family properties' income. On the other hand, if the co-parcener claims certain properties as his separate properties, then the burden is cast on the other co-parcener, who claims that the property is a joint family property to prove that property purchased in the name of one of the co-parceners was purchases out of the joint family properties income and it was not a separate property.

18. Therefore, the law recognize two standards of burden of proofs, one of the Kartha of the joint family and another fo it fo-parcener, when they claim that certain properties are their separate properties and not joint family properties. Admittedly, the joint family possessed of some nucleus, eventhough no evidence was adduced by the Respondent/Plaintiffs about the nature of income from that nucleus, in the absence of any source of independent income by the other co-parcener, in whose name, the property was purchased, it can be presumed that the joint family properties would have provided the consideration for the purchase of the suit properties.

The above Judgement relied by the learned counsel for the appellant is not applicable in the case in hand.

19. Hence, the Courts below rightly appreciated all these aspects and decided the issues partly in favour of the plaintiff by giving sufficient



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reasons which warrants no interference of this Court, accordingly, the questions of law (a) and (b) are answered.

20. With regard to execution of settlement, witness examined as DW2 and DW3 are the attestors of the settlement deed categorically stated that out of his full knowledge with consent of Nalliappa Gounder executed the settlement deed in favour of the 1st defendant in respect of the suit properties purchased by him.

21. Disputing the execution of settlement deed, the appellants/plaintiffs contended that under the partition deed Ex.A1, the said Nalliappa Gounder put his signature, on the other hand, in the settlement deed there is one thumb impression said to be obtained from the Nalliappa Gounder is suspicious for the reason that he used to sign by attesting his, not used to be thumb impression in the document. But attestors of settlement deed, DW2 and DW3 deposed that he attested his thumb impression at his own will. Law does not require both signature and thumb impression, even mark is permitted.

22. Thus, the defendants have proved that the settlement deed was



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executed by Nalliappa Gounder in the presence of the witness with sound state of mind. The plaintiff who dispute the settlement deed was fraudulent document by disputing that thumb impression not that of Nalliappa Gounder, not taken any steps to disprove the same. Hence, the plaintiff failed to establish that the settlement deed was not executed by the Nalliappa Gounder fraudulently created by defendants.

23. On perusal of the records, the trial Court as well as the Lower Appellate Court rightly appreciated the facts and evidence, concluded that the settlement deed (Ex.B4) is valid document. But in the settlement deed items 2 and 3 mentioning in S.F.No.103/1A an extend of 2.67 cents was purchased by Nalliappa Gounder. Hence, the said properties deems as self acquired property of the Nalliappa Gounder, thereby the settlement deed with regard to the said items 2 and 3 are the self acquired property and transferred in favour of the 1st defendant as per the settlement deed (Ex.B4).

24.The another item mentioning in the settlement deed not proved that it absolutely belongs to Nalliappa Gounder indeed the 2nd defendant also accept this fact. Hence, the Courts below rightly appreciated all those



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facts and evidence properly and granted relief of partition except

S.No.103/1A an extent of 2.67 cents which needs no interference. Thus, suit

is decreed as follows:-

Suit is decreed partly. The plaintiffs are each entitled to 4/24th share and the defendants are entitled to 12/24 share in the suit properties except S.No.103/1A, an extent of 2.67 acres and the suit was dismissed relates to other reliefs.

25. Accordingly, the second is dismissed as no merits. The findings rendered by the Courts below is confirmed. No costs.

09.03.2023

Speaking / Non Speaking order

Neutral Citation : Yes/No

Index : Yes/No

msrm

To

1. The Principal District Court, Namakkal.
2. The Sub Court, Rasipuram.
3. The Section Officer,
VR Section.



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T.V.THAMILSELVI, J.

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