



SA. No.669 of 2019

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.12.2023

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

SA. Nos. 669 of 2019 & 386 of 2023

P.Samiyappan

...Appellant in both second appeals

Vs.

1.Maragatham (Deceased)

2.N.Thamarai Manokaran

3.Valarmathi

4. Kalaivani

5.Kaliammal

(R1 died viz., Maragatham. Memo dated 18.01.2019 is recorded. R2 to R4 are recorded as LR of the deceased R1 viz., maragatham vide order of the Court dated 18.01.2019 made in S.A SR. No. 98497 of 2017(PTAJ))

(R2 to R4 are recorded as Lrs of the deceased R1 viz., maragatham vide order of the Court dated 18.01.2019 made in CMP No. 20963 of 2018 in S.A SR. No. 37228 of 2017(PTAJ))

...Respondents in both second appeals



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PRAYER IN SA No. 669 of 2019 : This Second appeal filed under Section 100 of Civil Procedure Code, to set aside the judgement and decree dated 20.04.2016 on the file of the Sub Court, Sathyamangalam in A.S No. 51 of 2014 reversing the judgment and decree dated 30.04.2013 in O.S No. 166 of 2009 as on the file of District Munsif Court, Sathyamangalam.

PRAYER IN SA No. 386 of 2023 : This Second appeal filed under Section 100 of Civil Procedure Code, to set aside the judgement and decree dated 20.04.2016 on the file of the Sub Court, Sathyamangalam in A.S No. 77 of 2013 confirming the judgment and decree dated 30.04.2013 in O.S No. 166 of 2009 as on the file of District Munsif Court, Sathyamangalam.

For Appellant : Mrs.Chitra Sampath, Senior counsel.

(in both second appeals) For M.Roshanatiq

For R2 to R4 : Mr. Akhil Akbar Ali

(in both second appeals) For M/s Akhil Akbar Ali

For R5 : Mr.G.K.Muthukumar

(in both second appeals)

COMMON JUDGMENT

The Second appeal in S.A No. 669 of 2019 has been filed to set aside the judgement and decree dated 20.04.2016 on the file of the Sub Court, Sathyamangalam in A.S No. 51 of 2014 reversing the judgment and decree dated 30.04.2013 in O.S No. 166 of 2009 as on the file of District Munsif



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Court, Sathyamangalam.

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2. The Second appeal in S.A No. 386 of 2023 has been filed to set aside the judgement and decree dated 20.04.2016 on the file of the Sub Court, Sathyamangalam in A.S No. 77 of 2013 confirming the judgment and decree dated 30.04.2013 in O.S No. 166 of 2009 as on the file of District Munsif Court, Sathyamangalam.

3. The case of the plaintiff is that the suit properties are the ancestral properties that belongs to Appachi Gounder. The said Appachi Gounder had two sons namely Marappa Gounder and Palanisamy Gounder. The plaintiff is the son of deceased Palanisamy Gounder. The Marappa Gounder has one son namely Nanjappa gounder and one daughter/Kaliammal/5th defendant herein. The said Nanjappa Gounder died leaving behind his wife Marakatham/first defendant and the defendants 2 to 4 are his sons and daughter. The Son of Appachi Gounder had not divided the properties among themselves. After the death of the Marappa Gounder and Palanisamy Gounder, the plaintiff and the Nanjappa Gounder were enjoying the properties jointly and after the death of Nanjappa Gounder, the plaintiff and his legal heirs/the defendants are in joint possession. There were some disputes between the plaintiff and Palanisamy Gounder in enjoying the



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properties jointly and therefore the plaintiff herein was filed a suit in O.S No.

212 of 1989 for injunction not to encumber or alienate the suit properties.

As a counter blast to the suit the plaintiff's father Palanisamy Gounder had filed the suit in respect of a portion of the fourth item of the suit property in O.S No. 214 of 1989. On the assurance given by the parties the plaintiff claims not to have prosecuted O.S No. 212 of 1989 whereas Palanisamy Gounder got an exparte decree in O.S No. 214 of 1989 on 13.09.1993. Thereafter the said Palanisamy Gounder died. After his death the plaintiff was enjoying the suit properties along with other heirs jointly. The second defendant herein in his written statement filed in O.S No. 178 of 2007 has alleged that there was a partition between the Planisamy Gounder and Marappa Gounder about 60 years ago, subsequently partition also between the plaintiff and the Palanisamy Gounder in the year 1983, Palanisamy Gounder is said to have allotted 0.66 cents in survey No. 75/1 and 0.65 cents in survey No. 161/1 to the share of the Plaintiff herein apart from giving him a sum of Rs.25,000/- in cash and Palanisamy Gounder had got separated the plaintiff from the suit properties. The second defendant had further claimed in the said statement that Palanisamy Gounder had executed a Will on 27.04.2001 bequeathing a portion of his properties to



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him and had executed another will giving a portion of properties to her mother Maragatham, the first defendant herein. The plaintiff herein claims that the allegations made in the said suit are not true, and as the contents of the said suit created a cloud over the plaintiff's title over the suit property and as the Wills had been obtained by fraud and undue influence taking advantage of the age of the Planisamy Gounder, plaintiff claims that it has become impossible in being joint possession with the defendants. Hence the suit.

4. The defendants case is as follows:

The defendants denied the plaintiffs allegation made in the plaint. According to them. After the death of Appachi gounder, Palanisamy Gounder and his brother Marappa gounder had orally divided the properties 62 years ago and they were enjoying the properties as per this partition. The plaintiff's mother Nanjammal developed misunderstanding with Palanisamy gounder and separately live along with plaintiff. They had also filed a suit in O.S No. 168 of 1959 for maintenance and had obtained a decree on 06.11.1959. Against the said decree they had preferred an appeal which was also allowed in part on 18.03.1960. Therefore, the plaintiff was never in joint possession of the suit properties as he had been living separately with his



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mother. The plaintiff's father was living with the defendants herein and the defendants taken care of him. Therefore, he had bequeathed his properties, after allotting 66 cents in survey No. 75/1 and properties in survey No. 161/1 and a sum of Rs.25,000/- in cash in partition in the year 1983 to the plaintiff herein, to the second defendant and his mother through different Wills. The fifth defendant was given in marriage long back with sufficient seers and she has been residing in her husband's house she was never in joint possession of the suit property and she had never demanded any share in the suit properties. The 1 to 4 defendants/sons and their father Marappa Gounder were enjoying the properties continuously without any obstruction and therefore they claimed that they have prescribed title by adverse possession against the fifth defendant and therefore she is not entitled to claim any share in his properties at this juncture. This defendant claims that he and his mother were taking care of Palanisamy Gounder by providing him all medical treatments and had also discharged the debts of Palanisamy Gounder and therefore Palanisamy gounder was treating the second defendant as his own grandchildren and out of love and affection had bequeathed properties to him. After the death of Palanisamy gounder the defendants claim that the Wills executed by Palanisamy gounder came into



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force and on the basis of the wills these defendants claim to be in possession and enjoyment of the shares of Palanisamy gounder along with share of Marappa gounder.

5. After considering the oral and documentary evidence, the Trial Court held that the suit properties are ancestral properties in which Marappa Gounder and Palansisamy are entitle to half share as a legal heir of Palanisamy Gounder, trial Court passed preliminary decree by allotting 2/8 share to the plaintiff/Samiyappan, and, 1/8 share to fifth defendant and 1/8 share to the defendants 1 & 2 and, 3/8 share to the defendants 1 to 4 in the suit properties. Challenging the said findings both the plaintiff and the defendants 1 to 4 preferred an appeal in A.S No.77 of 2013 and A.S. No.51 of 2014, respectively, before the Sub court Sathiyamangalam, the learned first appellate judge independently analysed facts and circumstances of the case, allowed the appeal filed by the defendants and dismissed the appeal filed by the plaintiff. Challenging the same, the plaintiff/Samiyappan filed this second appeal.



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6. This Court admitted the second appeals with the following

substantial questions of law:

1. Whether the Will dated 16.06.2003(Ex.B20) has been proved in accordance with law?

2. Whether the Will dated 27.04.2001(E.B21) has been proved in accordance with law?

3. On whom is the burden of proof lies as far as the allegation of partition done between marappa Gounder and Palanisamy Gounder?

4. Whether separate possession without partition will disentitle a subsequent claim of partition?

7. Heard the learned counsel for the appellant and the learned counsel appearing for the respondents.

8. The case of the appellant is that the suit properties are ancestral joint family properties originally it belongs to the appellants' grandfather Appachi Gounder, the said Appachi Gounder has two sons namely Marappa gounder and Palanisamy Gounder. The appellant is the son of Palanisamy Gounder and the respondents are the descendants of Marappa Gounder. The relationship between the parties are admitted. The said Marappa Gounder and Palanisamy Gounder enjoyed the suit properties without any division. The appellant being the son of Palanisamy Gounder filed the suit for partition claiming half share in the suit property against the defendants who are the descendants of the Marappa Gounder. Admittedly, the respondents 1



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to 4 are the the legal heirs of the Nanjappa Gounder who is the son of Marappa Gounder the 5th defendant is the daughter of the said Marappa Gounder. The contention of the defendants is that suit properties were already partitioned between the Marappa Gounder and the Palanisamy Gounder. Thereafter, panchayat was held between them, in which, item No. 2 and item No. 5 of the suit property along with twenty five thousand was given to the plaintiff in the year 1983. Thereafter he got separated from his father. Besides, already oral partition was entered between the plaintiff's father about sixty years ago. Thus, the defendants totally denied the plaintiff's claim of partition. However, the defendants claimed that there was a oral partition entered between them. Hence, the burden is on them to prove the suit properties were divided by way of oral partition as well as by way of panchayat held between the plaintiff and his father. To substantiate their defence the defendants relied the written statement filed by the plaintiff's father Palanisamy in O.S No. 212 of 1989 which was marked as Ex.A2.

9. For the sake of convenience, the parties are denoted a per suit. The facts reveals that there was dispute between the plaintiff and his father in respect of enjoying the property hence in the year 1989 the plaintiff herein



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filed suit in O.S No. 212 of 1989 in that suit he prayed for injunction not to alienate the suit properties including his $\frac{1}{4}$ share, in the said suit, the plaintiff's father filed written statement stating that suit property was belongs to Appachi Gounder during his lifetime the said Appachi Gounder sold one of the property, in respect of the remaining properties in Survey No. 75/1, out of 2.64 cents, each 0.66 cent was allotted to the plaintiff remaining properties allotted to the plaintiff's father based on the oral partition held between them, So also the share allotted to this brother Marappa Gounder was enjoyed by the defendants thereby denied the joint possession of the property. Admittedly, the said suit was dismissed for default and no issues were adjudicated between the parties but by relying the averments in the written statement the defendants contended that the suit properties were already divided. But, the plaintiff denied the said oral partition to disprove the averment in the written statement he relied the sale deed executed by his father which was marked as Ex.A20, it is a sale deed of the year 1963 wherein, the plaintiff's father Palanisamy Gounder sold the portion of the property to the third parties, as per the boundary description he sold the undivided share. On the other side, the defendants relied the will said to be executed by the plaintiff's father in favour of the defendants which was



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marked as Ex.B20 in that Will also plaintiff's father bequeathed the undivided share in the entire suit property. Though he made recital in the said Will that properties were already divided between himself and his son. But contrary to that entire description of the property common share was bequeathed in favour of the alleged beneficiaries the second defendant. Therefore, mere relying the written statement alone is not sufficient to prove that the properties were already divided among the plaintiff's and his father, contrary to the sale deed and the alleged Will was said to be executed by the plaintiff's father himself proves that the properties were not divided with metes and bounds indeed the Trial Court rightly analysed these facts. Accordingly, question of law 3 and 4 is answered.

10. But the first appellate judge failed to appreciate the above facts and circumstances surrounding with said documents in Ex.A26 erroneously held that already properties were divided as such is unjust and liable to be set aside. Therefore, the defendants failed to prove that the suit properties were already divided with metes and bounds. According to the defendants the suit properties were divided between the plaintiff's father and his brother Marappa gounder about sixty years back but there is no evidence on their part to prove the said facts and the same was rightly observed by the Trial



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Court which needs no interference. Furthermore, the defendant contended that the Panchayat was held between the family members in the year 1983, wherein the portion of the properties were allotted to the defendant but to prove the same there is no concrete evidence on their part. The fact reveals that the plaintiff's father Palanisamy Gounder failed to maintain his mother, so she was forcefully leave the matrimonial home along with son Samiyappan hence he filed O.S No. 178 of 2007. Thereafter she live separately with his son and the plaintiff's father was lived under the care of the present defendants who are the legal heirs of his brother Marappa Gounder and these facts were not been denied by the plaintiff. Therefore, though he lived with his mother as co-sharer his possession deemed to be constructive possession along with other sharers is settled proposition. The another suit filed by the plaintiff's father in O.S No. 214 of 1989 claiming that suit for injunction against son/plaintiff herein not to cause interference in enjoyment of 68 cents in survey number in 79/1 stating that the suit property was allotted to him by way of partition with his son/plaintiff in that suit suit properties in survey No. 75/6 an extent of 66 cents. Admittedly, in that suit he obtained exparte decree as there is no specific issue framed and decided in respect of partition held in the family. Moreover, the plaintiff's



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father also not been established that equal share was allotted to the plaintiff even assuming that there was partition in the family and alleged partition also amount to inequal partition. Therefore, suit in O.S No. 214 of 1989 would not support the defendants for the reasons that the properties were not already divided and the Trial judge rightly appreciated the facts. However, the first appellate judge by relying the earlier suit proceedings held that already properties were divided between the plaintiff's and his father as such is totally erroneous for the reason that the first appellate judge failed to take note of the documents like sale deed and Will executed by the plaintiff's father who, himself transferred the properties with undivided share not with specific boundaries . Furthermore, the first appellate Judge made a observation that while filing the suit in the year 1989(present plaintiff)/he failed to reserve his right to claim comprehensive issue for invoking order 2 Rule 2 of CPC, therefore he is not entitle to file subsequent suit for partition. Admittedly, earlier suit filed by the plaintiff was dismissed for default in that suit the plaintiff stand was that he is having $\frac{1}{4}$ share in the entire suit property. As discussed above, the suit was dismissed for default hence necessity not arose to file application for seeking permission by invoking order 2 Rule 2 of CPC for filing comprehensive suit for partition. The



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present suit was filed by the plaintiff for partition as such is maintainable as discussed above, the plaintiffs established that the suit properties had not been divided and enjoyed by the sharers without division with metes and bounds. Therefore, mere enjoyment by the sharers not amount to valid partition with metes and bounds it is settled proposition. Therefore, the defendants who claiming that already the suit properties were divided but had not been established with the evidence. Therefore, all the parties deemed to be shares in ancestral joint family property in which tin which plaintiff's father having $\frac{1}{2}$ share hence the plaintiff is entitle to $\frac{1}{4}$ share the same was rightly appreciated by the Trial Court. But the first appellate Judge, erroneously held that property were divided among the sharers and declined the plaintiff's claim as such is liable to be set aside. 11. During the lifetime of the plaintiff's father executed Will in favour of the second defendant who is the legal heir of the Nanjappa Gounder and executed another Will in favour of the first defendant. The two will were marked as Ex.A20, 21 to prove the execution of the Will on the side of the defendant attesor was examined as per his evidence, at the instance of testator Will was prepared the plaintiff's father stated that he was under the care of the defendants' family after his wife left the matrimonial



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house, the plaintiff also admits that matrimonial dispute between the plaintiff's father and his mother. It probablise that till his life time the plaintiff's father was under the care of the defendants as per the Will he conveyed his half share in favour of the first and second defendant. As discussed above, Palanisamy Gounder is having $\frac{1}{4}$ share and his son(appellant) is having $\frac{1}{4}$ share in the suit properties. Even though there is minor discrepancy in respect of the execution of Will as such probablise that Palanisamy Gounder was under the care of the defendants family. Moreover, not much contradiction extracted from the mouth of the defendants witness therefore the Will executed by the Palanisamy Gounder in favour of first and second defendant is valid only upto $\frac{1}{4}$ share not to entire undivided half share. The trial Court rightly held this aspect which need no interference but the findings rendered by the appellate judge is erroneous. Accordingly, questions of law 1 and 2 is answered.

12. Moreover, there was a suit filed by the second defendant against the plaintiff, wherein description of the property is mentioned as undivided share so it strengthen the fact that there is no actual partition between the



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sharers and it not supporting the case of the defendants and the same was rightly appreciated by the Trial Court, all these facts and evidence reveals that there is no partition entered into between the shares but the first appellate judge erroneously held that already properties were divided as such is erroneous findings of the first appellate judge is set aside. Findings of the Trial Court is confirmed. Accordingly, the suit is decreed by allotting 2/8 share to the plaintiff/Samiyappan and, 1/8 share to fifth defendant and 1/8 share to the defendants 1 & 2 and, 3/8 share to the defendants 1 to 4 in the suit properties. Admittedly, the appellants are senior citizen aged about 90 years old therefore the Trial Court is directed to pass the final decree within a period of two months from the date of receipt of a copy of this judgment.

13. In the result, these second appeals are allowed. No cost. Consequentially, connected miscellaneous petition are closed.

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T.V.THAMILSELVI,J.

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To

1. The District Munsif Court, Sathyamangalam
- 2.The Sub Court, Sathyamangalam
- 3.The Section Officer,
V.R Section.

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