



A.S.(MD)No.29 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 27.07.2023

PRONOUNCED ON :14.09.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

**A.S.(MD)No.29 of 2019
and
C.M.P.(MD)No.5516 of 2019**

S.Jeyakodi : Appellant/Plaintiff

Vs.

1.Tmt.Pitchaiammal
2.Kanchana : Respondents /Defendants

PRAYER:- Appeal Suit filed under Section 96 r/w 41 of the Code of Civil Procedure, 1908 against the Judgment and Decree, passed by the V Additional District Judge, Madurai, in O.S.No.150 of 2013, dated 28.04.2018.

For Appellant : Mr.S.Meenakshi Sundaram
Senior Counsel
for Mr.M.S.Mahesh babu

For Respondents :Mr.A.Arumugam



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JUDGMENT

The Appeal Suit is directed against the judgment and decree passed in O.S.No.150 of 2013, dated 28.04.2013 on the file of V Additional District Court, Madurai.

2. The suit is for partition and for declarations.

3. For the sake of convenience and brevity, the parties will hereinafter be referred as per their status/ranking in their original suit.

4. Admittedly, the plaintiff and the second defendant are sisters and are the daughters of the first defendant. The case of the plaintiff is that the suit properties were belonging to her father Chellam Konar, who had acquired several immovable properties in Maniyanji and Pothumbu villages from the ancestral nucleus funds, that he had also purchased some properties in the name of his wife – first defendant, that the said Chellam Konar died intestate on 07.06.1987 leaving behind his wife – first defendant and her two daughters – the plaintiff and the second defendant, that after the death of Chellam Konar, taxes were paid in the



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name of the first defendant being the mother and elder member of the family, though the patta stands jointly in the name of all the parties, that there was an oral partiton in 1990 between the plaintiff and the defendants 1 and 2 with regard to some immovable properties and as per the partition, the plaintiff and the second defendant were in separate possession and enjoyment of the properties allotted to them, that all the parties to the partition have agreed to enjoy the suit properties jointly without partition, that though the property in S.No.85/2A in Kumaram Village, Vadipatti Taluk admeasuring 1.69 acres allotted to the plaintiff had been in possession and enjoyment of the plaintiff for over 23 years, the first defendant had executed a sham and nominal settlement deed dated 27.08.2012 in favour of the second defendant, that since the first defendant had no right in the said property, the settlement executed by her is illegal and not binding on the plaintiff, that the plaintiff had then approached the defendants and enquired about the alleged settlement deed and the defendants 1 and 2 informed that it was included by mistake and agreed to cancel the same, that since the defendants had not cancelled the settlement deed, the plaintiff was forced to send a legal notice on 16.092013 calling upon the defendants 1 and 2 to cancel the settlement deed dated 27.08.2012, that the defendants 1 and 2 having



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received the notice, had sent a reply with ill motive requesting to send the contents of the notice in Tamil, that the suit properties are the ancestral properties of the plaintiff and the second defendant and are in their actual and constructive possession, that since the plaintiff had lost all the hopes on the defendants 1 and 2 and there is no possibility of continuing their joint possession, the plaintiff approached the defendants with the elders of the village and demanded partition and that though the defendants agreed for partition, they were postponing the same on some pretext or the other and that therefore, the plaintiff was constrained to file the above suit for partition and allotment of 4/9 shares in the suit properties and for declaration that the gift settlement deed dated 27.08.2012 executed by the first defendant in favour of the second defendant as null and void.

5. During the pendency of the suit, the plaintiff has amended the plaint and by alleging that the first defendant had executed a gift settlement deed dated 04.09.2012 in favour of the second defendant in respect of item No.11 of the suit properties, which is illegal and unlawful and that the plaintiff is having 1/3rd share in the said property, has prayed for another declarative relief that the gift settlement deed dated



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04.09.2012 executed by the first defendant in favour of the second defendant as null and void in respect of the plaintiff's 1/3 share.

6. The defence of the defendants 1 and 2 is that the first defendant and Chellam Konar were belonging to the Village of Maniyanji and at the time of their marriage, the parents of the first defendant who were very rich have given several sovereigns of gold, seethanam, houses and immovable properties at Kumaram, Pothumpu and Rengarajapuram villages, that the first defendant had several ancestral properties, that the first defendant had settled the property in S.No.5/1 at Pothumpu Village and the property in S.No.85/1 and 85/2A in Kumaram Village, in favour of the second defendant, as the same were the absolute properties of the first defendant and not connected with Chellam Konar and the ancestral nucleus alleged by the plaintiff, that after the death of Chellam Konar, the second defendant alone has been looking after the first defendant, but the plaintiff or her husband had never taken care of the first defendant, that the Wills executed by the first defendant in the year 1990 and subsequently on 11.06.2010 were already cancelled by the first defendant, that Chellam Konar was a cultivating tenant to an extent of 7.28 acres of land in Kumaram and Rengarajapuram Villages and after



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his death, the plaintiff's husband had swallowed the entire land and that therefore, the plaintiff is not entitled to claim partition and the plaintiff's suit is liable to be dismissed.

7. The second defendant has filed an additional written statement taking a new plea that her father Chellam Konar entered into a partition on 09.04.1981 with his brothers and in that partition, the property shown in "A" schedule therein (item Nos.10 and 11 of the suit schedule properties) were allotted to the share of Chellam Konar, that the said Chellam Konar had then settled the said properties to his brother's son Suresh, wife - first defendant and the second defendant's daughter Umaiyal and that the properties therein were equally divided between them.

8. The learned trial Judge, upon perusing the above pleadings, has framed the following issues and additional issues:

(1) Whether the plaintiff is entitled to 4/9th share in the suit properties?

(2) Whether the gift settlement deed dated 27.08.2012 Doc.No. 4521/2012 is liable to be declared as null and void?



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(3) Whether the plaintiff is entitled to preliminary decree for partition of 4/9th share as prayed for?

(4) Whether the plaintiff is entitled to the relief of declaration as prayed for?

(5) To what other relief and cost the plaintiff is entitled to?

Additional Issues:

(1) Whether the gift settlement deed dated 04.09.2012 to be declared as null and void in respect of 1/3rd share?

(2) Whether the 1st defendant is entitled to execute gift settlement with respect to Chellamkonar's property in favour of 2nd defendant?

9. During trial, the plaintiff has examined her husband – Thiru.E.Subramanian as P.W.1 and exhibited 27 documents as Exs.A.1 to A.27. The defendants have examined themselves as D.W.1 and D.W.2 respectively and one Thiru.S.Jeganathan as D.W.3 and exhibited 8 documents as Exs.B.1 to B.8. The learned trial Judge, upon considering the evidence both oral and documentary evidence and on hearing the arguments of both sides, has passed the impugned judgment dated 28.04.2018, granting preliminary decree, allotting 1/3rd share to the plaintiff in the suit properties except item No.11 of the suit properties and



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by declaring that the gift settlement deed dated 27.08.2012 executed by the first defendant in favour of the second defendant as null and void and dismissing the suit with regard to the prayer for declaration that gift settlement deed dated 04.09.2012 as null and void. Aggrieved by the above said judgment and decree, the plaintiff has preferred the present appeal.

10. During the pendency of the appeal, the appellant/plaintiff has filed an application in C.M.P.(MD)No.4519 of 2023 for reception of additional evidence under Order 41 Rule 27 C.P.C., and the learned Predecessor, vide order dated 11.04.2023 permitted for the reception of the documents and directed the parties to adduce the oral evidence. It is not in dispute that the plaintiff's P.W.1 was recalled and further examined in chief and at that time, the sale deed dated 12.11.2007 executed by the plaintiff and the defendants 1 and 2 in favour of one third party and the settlement deed executed by the first defendant dated 19.02.2019, during the pendency of the appeal, came to be marked as Exs.A.28 and Exs.A.29 respectively and thereafter P.W.1 was cross-examined by the other side.



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11. The learned Senior Counsel for the appellant would submit that item No.11 of the suit properties was obtained by Chellam Konar through the partition deed dated 07.04.1981 under Ex.A.7 and he was entitled to 1/3 share only, as it was ancestral properties, that since Chellam Konar had only 1/3 share in the properties, he has no right to execute the settlement deed in respect of the entire properties under Ex.B.8 and the same is not binding on the plaintiff, that Ex.B.8 settlement was also not acted upon, as Chellam Konar was enjoying the said properties, even after the said settlement deed and that therefore, the alleged gift settlement deed under Ex.B.4 executed by the first defendant in favour of the second defendant is without any valid title with regard to the entire extent.

12. The learned Senior Counsel would further contend that the plaintiff had proved that the properties are ancestral properties and she is entitled to 4/9 shares in the suit properties as Chellam Konar got the properties from the nucleus covered under Ex.A.27 partition deed, that in the sale deed executed by the plaintiff and the defendants 1 and 2 under Ex.A.28, dated 12.11.2007, they have specifically mentioned that the sale



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properties are ancestral properties of Chellam Konar, that the defendants 1 and 2 in their evidence would clearly admit the ancestral nature of the suit properties and that since the plaintiff has clearly proved the initial burden that the properties are ancestral nature, the burden got shifted to the defendants who claim that they are the individual properties and since they have failed to prove the same, the plaintiff is certainly entitled to 4/9 share in the suit properties. The learned Senior Counsel would further contend that the defendants have not preferred any appeal or cross-appeal challenging the judgment and decree of the trial Court in declaring that the gift settlement deed dated 27.08.2012 as null and void and that therefore, it has attained finality.

13. The learned Counsel for the defendants would submit that even according to the plaintiff, Chellam Konar got the properties by inheritance from his father and it is not their case that Chellam Konar's grandfather was the owner of the properties and the properties inherited by Chellam Konar from his father after 1956 is the separate properties of Chellam Konar, that since Chellam Konar died intestate leaving behind his wife and two daughters and as such, as per Section 8 of the Hindu Succession Act, they are entitled to get 1/3rd share and that therefore, the



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claim of the plaintiff that she is entitled to 4/9 shares is legally wrong, as the succession to the estate of the deceased opens on the date of the death of the deceased, does not wait for, till the suit for partition is filed.

14. The learned Counsel for the defendants would further submit that the Hindu Succession Amendment Act 2005 does not apply to the case on hand, as the rights of the parties got crystalised even in the year 1987, that Chellam Konar was the last surviving coparcener in the joint family and hence he is entitled to encumber or alienate the properties and hence, the gift deed executed by Chellam Konar in 1981 is valid and no one can question it and that since the plaintiff was not a coparcener on the date of settlement, she cannot question it and even otherwise the alienation made prior to 2005 was saved by the proviso to Section 6(5) of the Hindu Succession Amendment Act, 2005.

15. The learned Counsel would further contend that since the alienation made in the year 1981 was not questioned by the plaintiff, the second alienation made in the year 2012 cannot be questioned by her, that when the first alienation is valid, the donee becomes the absolute owner and he was entitled to alienate the property by second alienation



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also, that when there was no coparcener between 1987 and 2005, the plaintiff cannot invoke the provisions of Hindu Succession Amendment Act 2005 and that therefore, the trial Court has rightly worked out the shares and there is nothing to interfere with the judgment of the trial Court.

16. The point for determination are:

(1) Whether the trial Court erred in rejecting the prayer for declaration that the gift settlement dated 04.09.2012 as null and void, despite showing that the property covered therein are the ancestral properties, as the same were obtained by Chellam Konar in the partition effected between himself and his brothers under Ex.A.27 and that therefore, Chellam Konar had no right to execute settlement in respect of the entire properties and the settlement deed executed by him under Ex.B.8 is valid with respect to his 1/3rd share only and that even after the settlement under Ex.B.8, Chellam Konar had been enjoying the said property, as the same was considered as ancestral property?

(2) whether the learned trial Judge erred in granting preliminary decree allotting 1/3 share to the plaintiff in the suit properties except 11th



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item of the suit properties, despite showing that the properties are the ancestral and joint family properties as the same were purchased by Chellam Konar with the ancestral nucleus?

(3) Whether the judgment and decree of the trial Court rejecting the declaration that the gift settlement deed dated 04.09.2012 as null and void is liable to be interfered with?

(4) To what relief, the parties are entitled?

Points 1 to 4:

17. Originally, the plaintiff has laid the suit for partition alleging that the suit properties are the ancestral properties. The defendants have taken a stand that the suit properties are the separate properties of the first defendant and her husband Chellam Konar. When the trial was in progress before the trial Court, the plaintiff has taken a stand that Chellam Konar had entered into a partition with his brothers on 07.04.1981 and produced the partition deed under Ex.A.27. Thereafter, the second defendant has filed the additional written statement taking a plea that the item 11 of the suit properties was obtained by Chellam Konar in the partition effected between himself and his brothers under



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Ex.A.27 and that Chellam Konar had settled the said properties in favour of his brother's son, first defendant and his daughter's daughter Umaiyaal on 30.08.1981 under Ex.B.8.

18. It is admitted by both parties that since Chellam Konar had obtained item 11 of the suit properties in a partition effected between himself and his brothers, the same are his ancestral properties. The main contention of the plaintiff is that since the properties obtained under Ex.A.27 are the ancestral properties, Chellam Konar had no right to execute the settlement in respect of the entire properties, as he was entitled for 1/3 share only and that therefore, the said settlement deed executed under Ex.B.8 with regard to the entire extent was not binding on the plaintiff. It is the further contention of the plaintiff that in view of the Hindu Succession Amendment Act 2005, the plaintiff and the second defendant being the coparcener along with their father Chellam Konar are entitled to get 1/3 share in the properties obtained by Chellam Konar under Ex.A.27 partition and that Chellam Konar has no right to settle the shares of the other coparceners.



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19. In the case on hand, admittedly Chellam Konar had died on 07.06.1987 and the Hindu Succession Amendment Act 2005 came into effect from 09.09.2005. There were decisions to the effect that a male coparcener from whom the daughters are claiming the benefit under the Hindu Succession Amendment Act, must be alive as on date when the Act came into force. But the Full Bench of the Hon'ble Supreme Court has now settled the position in *Vineeta Sharma Vs. Rakesh Sharma and Others* reported in **2020(5) CTC 302** that it is not necessary that there should be living coparcener or father as on the date of amendment and that the daughter would step into the coparcenary as that of a son by taking birth before or after the Act and that daughter born before can claim these rights only with effect from the date of the amendment, i.e., 09.09.2005. In order to claim the benefits under the Amendment Act, the daughter has to show the existence of a coparcenary as on 09.09.2005.

20. In the case on hand, when Chellam Konar had executed Ex.B.8 settlement, admittedly he was the sole surviving coparcener in the joint family consisting of himself, his wife and daughters. Neither the Hindu Succession Tamil Nadu Amendment Act, 1989 nor the Hindu Succession Central Amendment Act, 2005, has come into force at that time. Hence,



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the question of treating the plaintiff and the second defendant as coparcener on the date of Ex.B.8 settlement does not arise at all.

21. At this juncture, it is necessary to refer the decision of the Hon'ble Supreme Court in ***Dharma Shamrao Agalawe Vs. Pandurang Miragu Agalawe and others*** reported in ***AIR 1988 SC 845***, relied on by the learned Counsel for the defendants and the relevant paragraph is extracted hereunder:

“We respectfully agree with the above observations of this Court in Vasant's case (supra). The joint family property does not cease to be joint family property when it passes to the hands of a sole surviving coparcener. If a son is born to the sole surviving coparcener, the said properties become the joint family properties in his hands and in the hands of his son. The only difference between the right of a manager of a joint Hindu family over the joint family properties where there are two or more coparceners and the right of a sole surviving coparcener in respect of the joint family properties is that while the former can alienate the joint family properties only for legal necessity or for family benefit, the latter is entitled to dispose of the coparcenary property as if it were his separate property as long as he remains a sole



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surviving coparcener and he may sell or mortgage the coparcenary property even though there is no legal necessity or family benefit or may even make a gift of the coparcenary property. If a son is subsequently born to or adopted by the sole surviving coparcener or a new coparcener is inducted into the family on an adoption made by a widow of a deceased coparcener an alienation made by the sole surviving coparcener before the birth of a new coparcener or the induction of a coparcener by adoption into the family whether by way of sale, mortgage or gift would however stand, for the coparcener who is born or adopted after the alienation cannot object to alienations made before he was begotten or adopted.

22. Considering the above, since Chellam Konar was the last surviving coparcener till his death in 1987, though the properties obtained under Ex.A.27 are the ancestral properties, he had every right to alienate the properties, as if it were his separate properties and that the plaintiff who is claiming to be the coparcener under the Hindu Succession Amendment Act, has no right or *locus standi* to object to the alienations made before. Hence, this Court has no hesitation to hold that the settlement deed executed by Chellam Konar under Ex.B.8 is absolutely valid and legal and the plaintiff cannot question the same.



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23. The next contention of the plaintiff is that even after Ex.B.8 settlement, Chellam Konar had been enjoying the settled properties and received income from the same and that he had purchased other properties with the help of the income derived from the said properties. In the plaint itself, the plaintiff has taken a stand that the properties were purchased by Chellam Konar with the help of the ancestral nucleus. It is pertinent to note that the plaintiff has not produced any iota of materials to show that Chellam Konar was having ancestral properties and that he was deriving income from the said properties. As already pointed out, when the trial was in progress, both parties have taken a stand that item No.11 was obtained by Chellam Konar in the partition under Ex.A.27 between himself and his brothers and that therefore, they are ancestral properties.

24. It is pertinent to note that the plaintiff's husband as P.W.1 in his cross-examination would specifically admit that after the death of Chellam Konar, Suresh (one of the settlee under Ex.B.8) had taken out his share and came out, that the said Suresh after his marriage had died subsequently and that his share is being enjoyed by his wife and children. P.W.1 would further admit that the share settled in favour of Umaiyaal was



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in her enjoyment. In Ex.B.4 settlement deed executed by the first defendant and Umaiya in favour of the second defendant, they have specifically stated that the properties to be settled were in their possession and enjoyment and the relevant portion is extracted hereunder:

“ எங்கள் பெயரால் 595 நிர் கூட்டுப்பட்டா ஏற்பட்டும்
தேநாள் வரையிலும் நாட்கள் சர்வ சுதந்திரப் பாத்தியமாய் அடைந்து
சர்க்கார் தீர்வைகள் முதலியனவைகள் செலுத்தி எங்கள் அனுபவத்தில்
நேந்து வரக்கூடிய ”

25. Considering the specific admission made by P.W.1 and the recitals in Ex.B.4, it can easily be inferred that Ex.B.8 settlement was acted upon and that the settlees therein had taken possession of their shares and were enjoying the properties. Even assuming for arguments sake, that Chellam Konar had been enjoying the properties even after Ex.B.8 settlement, it can be only considered as he was possessing and enjoying on behalf of the settlees and even if any income was derived therefrom, it can easily be considered as the income derived by the settlees, since the coparcenary or ancestral character of the said properties got vanished, the moment Chellam Konar had executed Ex.B.8



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settlement as the sole surviving coparcener.

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26. As rightly contended by the learned Counsel for the defendants, since the properties obtained under Ex.B.8 by the first defendant and her granddaughter Umaiya are their separate properties, they have every right to execute settlement deed and as such, the execution of Ex.B.4 in favour of the second defendant cannot be found fault with.

27. Now turning to the share declared by the trial Court, according to the plaintiff, since the suit properties are the ancestral properties and that since his father Chellam Konar died intestate, herself and the second defendant are entitled to 4/9 share each and her mother – first defendant is entitled to 1/9 share. As already observed, except the 11th item, the plaintiff has miserably failed to show that there existed ancestral properties in the hand of Chellam Konar, that he derived income from those properties and that he has purchased the other properties from the surplus income derived from those properties. Moreover, in the written statement, the first defendant has alleged that her parents being rich, had given so much a gold jewels and properties. But the first defendant in



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her cross-examination would specifically admit that at the time of her marriage, her parents had given 30 sovereigns of jewels and 5 cents of land, that his father Irulappa Konar had executed a document in respect of 5 cents of land before her marriage and that she had no other properties.

28. The learned trial Judge, considering the evidence available on record, has rightly come to a decision that since the properties were owned by Chellam Konar and he died intestate, the first defendant being the wife and the plaintiff and the second defendant being the daughters as class-I legal heirs, are entitled to get 1/3 share in the remaining suit properties. Hence, there is nothing to interfere with the decree and judgment of the trial Court. Consequently, this Court concludes that the Appeal Suit is devoid of merits and the same is liable to be set aside. Considering the other facts and circumstances and also the relationship between the parties, this Court further decides that the parties are to be directed to bear their own costs and the above points are answered accordingly.

29. In the result, the Appeal Suit is dismissed, by confirming the



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judgment and decree, dated 28.04.2018, passed in O.S.No.150 of 2013, on the file of V Additional District Court, Madurai. Consequently, the connected Miscellaneous Petition is also dismissed. The parties are directed to bear their own costs.

14.09.2023

Index : Yes : No

Internet : Yes : No

Additional documents marked before this Court:

Ex.A.28 : Copy of the sale deed (Doct.No.3871/2007) executed by the plaintiff and the defendant in favour of third party.

Ex.A.29 : Copy of the Gift deed (Doc.NO.1436/2019) executed by the first defendant in favour of the second defendant.

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To

1. V Additional District Court, Madurai.

2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

SSL

PRE-DELIVERY JUDGMENT MADE IN

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