



*S.A.(MD)No.381 of 2019
and CMP.(MD).No.7851 of 2019*

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 20.09.2023

PRNOUNCED ON: 20.10.2023

CORAM:

THE HONOURABLE Mr.JUSTICE **C.KUMARAPPAN**

S.A.(MD)No.381 of 2019
and
CMP.(MD).No.7851 of 2019

Kaliyamoorthy (died)

1. Dharmalingam,
S/o.Kaliyamoorthy,
2. Shanthi
W/o.Sekar
3. Anbalagan
S/o.Late.Kaliyamoorthy
4. Muthusamy
S/o.Kunjan
5. Arivalagi

... Appellants

-Vs.-

1. Vathilingam (Died)
2. Pottu Ammal
Kathayee (died)
3. Santhanam
4. Arivalagan
5. Padmini
6. Thavamani
7. Sukumaran

(R6 & R7 brought on record as LR's of the deceased
1st respondent vide order dated 08.10.2021 made
in CMP.(MD).No.5731 of 2021)

... Respondents



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Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure praying to set aside the judgment and decree passed by the Sub Court, Pattukkottai in A.S.No.34 of 2014 dated 29.01.2019 which confirm the Judgement and decree passed by the District Munsif Court cum Judicial Magistrate, Orathanadu in OS.S.No.57 of 2007 on 20.10.2014 and allow the Second Appeal.

For Appellants : Mr.T.S.R.Venkatrama
Senior Counsel
for Mr.A.Prithiviraj
For Respondents : Mr.A.Balaji
for Mr.B.Jameel Arasu for R6 & R7
: R3 to R5 – Dispensed with.

JUDGMENT

The brief averments of the plaint:-

The appellants 2 to 5 are the children of the deceased 1st appellant. The deceased 1st appellant was the original plaintiff. The defendants 1 to 3 are the respondents 1 to 3 herein. The respondents 3 to 7 herein are the legal heirs of the deceased 3rd defendant. The deceased first plaintiff and the defendants 1 to 3 are the children of one Marimuthu. According to the plaintiffs, the suit properties were originally belongs to one Marimuthu. After his demise, the property was devolved upon his male children viz., Srinivasan, the deceased first plaintiff late Mr.Kaliyamoorthy and the first defendant Vaithilingam.



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2. It is the submission of the plaintiffs that, the rights of the female heirs have been ousted, as they were provided with sufficient gifts and sridhana during their marriage. The plaintiffs further submits that, the eldest son Srinivasan died issueless. Therefore, according to the plaintiffs, the first plaintiff is entitled for a half share over the suit property. These plaintiffs submits that the father of the first plaintiff and the first defendant namely Mr.Marimuthu died on 10.02.1992. There was an earlier suit in OS.No.122 of 1999 for partition. However, the same was dismissed as both the plaintiffs to the said suit were died issueless.

3. **The brief averments of the Written Statement of the first defendant:-**

The defendants, questioned the maintainability of the suit on the ground of non-joinder of necessary parties, as one of the daughter of late Marimuthu viz., Kathayee was not impleaded as a party to the suit. This defendant disputes the joint ownership of the suit property. According to this defendant, even during the lifetime of their father Late Marimuthu, there was a oral partition in respect of the property belongs to Marimuthu. As per the oral partition, the deceased son Srinivasan was allotted the property situate in Papanadu village. Likewise, the first plaintiff Kaliyamoorthy was allotted



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with the property situate in Arumalai Village. Similarly, the first defendant was allotted the property situate in Tondarampet village. To put it otherwise, the first defendant states that the suit property is his absolute property by virtue of the oral partition. It is the further submission of the first defendant that the first plaintiff has led a wayward life and mortgaged the family property against the wish of the family, which were subsequently redeemed by their father Marimuthu. This defendant would further submits that the non inclusion of the property situate in Papanadu village, and Arumalai Village would only exemplify the oral partition among the first plaintiff and the first defendant and one Srinivasan. Therefore, this defendant submits that the suit is liable to be dismissed.

4. The defendants 4 & 5 have also filed the Written Statement after their impleadment on account of the death of their mother Kathayee, who was originally arrayed as the 3rd defendant.

5. **The brief statement of the Written Statement of the defendants 4 & 5:-**

These defendants admit the plea of ouster in respect of the property belongs to late Marimuthu. Further, they reiterate the contention of the first defendant and states that there was a oral partition among the first plaintiff



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and the first defendant and one Srinivasan. Therefore, prayed to dismiss the suit.

6. Oral and Documentary Evidences:-

Before the Court below, the plaintiffs marked 8 documents as Ex.A1 to A8, and examined 3 witnesses as PW1 to PW3. On behalf of the defendants, no documents have been marked, however, 3 witnesses were examined as DW1 to DW3.

7. Finding of the Trial Court as well as First Appellate Court:-

a) After considering the oral and documentary evidence and also upon considering the arguments of either parties, the Trial Court though disbelieved the oral partition, however, on the ground of partial partition, as the property situate in Arumalai village has not been included in the suit property, has ultimately dismissed the suit.

b). Aggrieved with the said finding, the plaintiffs preferred an appeal in A.S.No.34 of 2014. Wherein the First Appellate Court, though has not agreed with the findings recorded by the Trial Court, still has dismissed the appeal on the ground of partial partition, as some of the properties mentioned in Ex.A1- Mortgage Deed was not included while filing the suit for partition. Aggrieved with the said findings, the plaintiffs have preferred the Second Appeal.

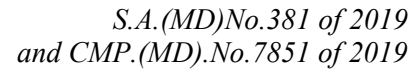


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8. Petition filed under Order 41 Rule 27 of CPC:-

During the pendency of the appeal, the plaintiffs/appellants have also moved an application in CMP.No.7851 of 2019 under Order 41 Rule 27 CPC, to receive two documents as additional evidence. In the said petition, they contended that the First Appellate Court, without there being any pleadings and contrary to the factual position, has found that some of the properties mentioned in Ex.A1 has not been included and ultimately dismissed the suit. In order to establish the fallacy in the finding of the First Appellate Court and to show that those properties have already been sold, the plaintiffs sought permission to receive the Sale deed executed by Marimuthu, to one Mr.Marks on 22.07.2018 and to one Mr.Ayyakannu on 18.10.1995. According to the plaintiffs, the receipt of those documents as additional evidence would be very much useful to render effective finding in the Second Appeal and to advance the substantial justice.



9. Substantial Question of Law:-

This Court, after hearing the appellants, on 16.02.2021, has framed the following substantial question of law:-

“(i) Whether the lower appellate court was right in dismissing the suit on the ground that the suit is bad for partial partition in the absence of any plea to that effect in the written statement?”

(ii) *Whether the lower appellate court was right in taking the plaintiff by surprise by going into Ex.A1 and non-suiting the plaintiff on the ground that all the properties found in Ex.A1 have not been included in the suit? ”*

10. Submissions of the counsel on either side:-

a) For the sake of convenience, the parties shall be referred to by their respective ranks before the Trial Court.

b) The learned senior counsel appearing for the plaintiffs/appellants would contend that, though both the Courts below have found that there was no oral partition, ought to have decreed the suit, however misdirected by themselves. It is the further submission of the learned Senior Counsel that the Trial Court has been misdirected on the ground of partial partition as the property situate in Arumalai Village has not been included. Whereas, the said



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contention though disbelieved by the First Appellate Court, still relied Ex.A1 and has given altogether new finding that all the properties mentioned in Ex.A1 has not been included in the suit, and has ultimately dismissed the suit on the ground of partial partition. It is the submission of the learned Senior counsel that the defendants did not take such a defence as to the partial partition. The learned senior counsel further submits that the main defence put forth by the defendants is that there was a oral partition and in the said oral partition, the suit property was allotted to the defendants and therefore, sought for the dismissal of the suit.

c) Therefore, it is the submission of the learned senior counsel that without there being any pleadings, the findings recorded by the Court below on the ground of partial partition is liable to be interfered with and prayed to allow the appeal. It is the further submission of the learned senior counsel that in the event of allowing the application to receive the additional documents, no necessity would arise for remand of the matter, as the issue can be decided based upon the available records. However, only to substantiate the erroneous finding of the First Appellate Court, the additional documents have been filed as an additional evidence, therefore, would contend that those documents could be received and the very appeal can be simultaneously



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disposed by this Court, without any remand.

11. Per contra, the learned counsel for the respondents would strenuously contend that in the event of the additional evidence being received, then to satisfy the natural justice, they must be provided with an opportunity to rebut the contention put forth by the plaintiffs. Therefore, would contend that in the event of receipt of the additional documents, prayed to remand back the matter to the Court below. Apart from that, it is the specific submission of the learned counsel for the respondent that the findings recorded by the First Appellate Court as to the partial partition is based on materials. Therefore, prayed to confirm the same.

12. I have given my anxious consideration on either side submissions.

Discussion:-

13. Before we embark into the merits of the instant Second appeal, it is incumbent upon this Court to look into the prayer made in the Order 41 Rule 27 CPC application. According to the petitioner, the specific defence put forth by the defendants is about the existence of the oral partition, and that through such oral partition, the suit property was allotted to the first defendant. Whereas the First Appellate Court, without there being any pleadings, by relying 1968-Mortgage deed-Ex.A1, executed by the first



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plaintiff and the first defendant, has concluded that some of the properties mentioned in the said Mortgage Deed have not been included as a suit property and has ultimately dismissed the suit.

14. In that background the learned Senior Counsel for the appellants would submit that the reason for non inclusion of the property is the sale of those properties. Therefore, only to substantiate such contention, they wanted to mark those documents.

15. However, the objection put forth by the learned counsel for the respondents is by relying the judgment of the Hon'ble Supreme Court in ***Corporation of Madras and another Vs. M.Parthasarathy and others*** reported in ***AIR 2018 SC 3777*** and ***Akilesh Singh @ Akhileshwar*** reported in ***2018 3 CTC 883***. Wherein, it was held that, if in any case document is ordered to be received, the Appeal has to be remitted back, so as to give opportunity to other side to rebut the document, which is ordered to be received. Therefore, in view of the above position, this Court would like to proceed with the merits of the main appeal, and to find out whether from the existing available factual scenario can the substantial question of law be disposed of effectively. Or the document, which is sought to be produced under Order 41 Rule 27, by the petitioner is relevant for the ultimate disposal



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of the suit.

16. It is pertinent to mention here that, in respect of the first substantial question of law, Whether a dismissal of a suit on the ground of partial partition in the absence of pleading to that effect is sustainable or not, to be seen. In this regard, this Court has carefully gone through the written statement. As rightly submitted by the learned senior counsel of the plaintiffs, nowhere in the written statement the defence of partial partition have been put forth. However, there is a reference about the property situate in Arumalai village, Papanadu village. But the same have been referred only to demonstrate the division of property, through the alleged oral partition between them. But as rightly indicated by the learned Senior counsel both the Trial Court and the First Appellate Court has disbelieved the case of oral partition and a finding of fact was recorded that there was no oral partition between the first plaintiff and the first defendant. However, the Trial Court, without there being any pleading, on the ground of doctrine of blending, hold that the suit is hit by partial partition, as Arumalai property though blended was not included in the suit property.

17. It is pertinent to mention here that the First Appellate Court has rightly rejected the finding of partial partition recorded by the Trial Court. In



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this regard, the First Appellate Court relied upon the evidence of DW1, where he did not submit any proof to show that the Papanadu village property and Arumalai Village property are their ancestral property. Therefore, as contended by the learned Senior counsel, though the Trial Court disbelieved the oral partition and partial partition, still has wrongly dismissed the suit on the new and special ground of partial partition on the different ground. As contended by the learned senior counsel, the First Appellate Court though rectified the defective finding, but misdirected itself by simply referring Ex.A1-mortgage deed and again landed to same conclusion of partial partition, however, with a different perspective.

18. The First Appellate Court has simply relied upon Ex.A1 and would found that out of the 9 properties, only 6 properties have been included in the suit and non suited the plaintiffs on the ground of partial partition. But the learned Senior counsel would invite the attention of this Court that the plaint item 4 & 5 are not the properties referred in Ex.A1. In other words, the plaint item 1 to 3 alone are in the Ex.A1-Mortgage deed. Therefore, it is the submission of the learned senior counsel that even on the plain reading of the finding recorded by the First Appellate Court, it is an erroneous finding, as only 4 properties out of Ex.A1 have been arrayed as the suit property. It is the



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submission of the learned senior counsel that the other properties referred in Ex.A1 has already been sold by Marimuthu, the father of the first plaintiff and the first defendant during 1985 and 1988 and only to prove that aspect, they wanted to mark the additional documents.

19. However, this Court in order to decide the substantial question of law, the very additional document though appears to be relevant, is not necessary for the final adjudication of this case. Because as rightly contended by the learned Senior Counsel, it is not the case of the defendant that on account of non inclusion of the property referred to in Ex.A1-Mortgage Deed, the suit is bad and liable to be dismissed. To put it otherwise, nowhere in the written statement, the defendants pleaded about the partial partition. Therefore, this Court is of the view that when there are no proof towards the oral partition and when there is no pleadings as to the partial partition, more pertinently when the first defendant admits the suit properties were originally belong to Marimuthu, naturally, the plaintiff is entitled to have a share in the suit property. Thus, all the substantial questions of law are answered in favour of the appellant.

20. In view of the same, the findings recorded by the Trial Court as well



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as the First Appellate Court is liable to be reversed.

21. In the result, the Second Appeal is allowed by setting aside the judgment and decree of the Trial Court as well as the First Appellate Court. As a concomitant, the suit is decreed as prayed for. Since the suit could be decided with available material, CMP.No.7851 of 2019 is dismissed.

20.10.2023

Index :Yes/No

Speaking Order: Yes/No

NCC : Yes/No

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To

1.The District Munsif-cum-Judicial Magistrate,
Orathanadu.

2. The Sub Court,
Pattukkottai.

3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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C.KUMARAPPAN, J.

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