



A.S. (MD) No.195 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 01.08.2023

PRONOUNCED ON : 23.08.2023

CORAM:

**THE HONOURABLE DR.JUSTICE ANITA SUMANTH
AND
THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR**

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1.S.Ashokan

2.S.Bhoopathy

...Appellants

Vs

1.S.Elangovan

2.S.Rahupathy(died)

3.S.Pasupathy

4.S.Muthukumar

5.Muthulakshmi

6.Bharathiraja

7.Pushpalatha

...Respondents

(Respondents 5 to 7 are brought on record as legal heirs of the deceased 2nd respondent vide Court order dated 27.10.2022 in CMP(MD).Nos.9091 to 9093 of 2022)



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Prayer: Appeal filed under Section 96 of Civil Procedure Code to set aside the judgment and decree dated 28.04.2014 passed in O.S.No.73 of 2012 on the file of II Additional District Judge, Tiruchirappalli, in so far as dismissing the suit in respect of 1st item in 'A' schedule and items 1 to 3 in 'B' schedule is concerned, and allow the present appeal.

For Appellants : Mr.P.Vinoth
For Mr.R.Subramanian

For R1 & R4 : Mr.Raguvaran Gopalan

For R3, R5 to R7 : No Appearance

R2 : Died

J U D G M E N T

(Judgment of the Court was made by **R.VIJAYAKUMAR, J.**)

The plaintiffs in a suit for partition are the appellants herein challenging the disallowed portion.

2.The plaintiffs had filed O.S.No.73 of 2012 on the file of II Additional District Court, Trichy for the relief of partition and separate possession of three items of 'A' schedule property and four items of 'B' schedule property.

3.The defendants 1 and 4 have filed a written statement raising a counter claim seeking recovery of possession from the first plaintiff in favour of the fourth defendant over a portion of second item of 'A' schedule property.



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4.The trial Court dismissed the suit with regard to the first item of 'A' schedule property and Item Nos.1 to 3 of 'B' schedule property. The suit was decreed only with regard to Item Nos.2 and 3 of 'A' schedule property and Item No.4 of 'B' schedule property. The trial Court had dismissed the counter claim made by the fourth defendant. Challenging the said judgement and decree, the plaintiff alone has preferred the first appeal and therefore, the partition decree granting partition with regard to some of the items and dismissal of the counter claim have attained finality.

5.Contentions of the plaintiffs:

(i)The plaintiffs 1 and 2 and defendants 1 to 4 are the sons of one M.Sundaramoorthy who had ancestral property. The said M.Sundaramoorthy had also acquired property in the name of his wife utilizing his ancestral nucleus.

(ii)During the life time of M.Sundaramoorthy, the father and his sons entered into a registered partition deed on 20.02.1998 under Exhibit B3 with regard to some of the properties. The other properties were kept in common enjoyment of the plaintiffs and the defendants.

(iii) On 19.08.2007, the said M.Sundaramoorthy died intestate. Thereafter, the sons entered into a partition agreement on 25.12.2008 in respect of the properties shown as 'A' schedule property. As per the said agreement, the



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plaintiffs and the defendants have agreed to execute a registered partition deed in respect of the said properties on a future date. However, there was no partition by metes and bounds.

(iv)The properties that were not covered under partition agreement dated 25.12.2008 are shown as 'B' schedule properties which were left by M.Sundaramoorthy as intestate. The plaintiffs jointly claimed 2/6th share in all the suit schedule properties.

6.Contentions of the defendants 1 and 4:

(i)The defendants admitted the registered partition deed dated 20.02.1998, but contended that they are the absolute properties of their father M.Sundaramoorthy.

(ii)In the second item of 'A' schedule properties, there are two houses with Door Nos.2/68 and 2/69.

(iii)Door No.2/68 has been bequeathed by Sundaramoorthy in favour of the fourth defendant by way of a Will dated 05.12.2006 and therefore, the possession of the said house property should be handed over by the first plaintiff to the fourth defendant.

(iv)As far as Door No.2/69 is concerned, all the brothers are residing in separate portions of the said house and therefore, they have no objection for partitioning the same.



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(v) The defendants did not have any objection for partitioning 3rd item of 'A' schedule property and 4th item of 'B' schedule property. As far as the first item of 'A' schedule property is concerned it has been allotted to the first defendant in the partition deed dated 20.02.1998 and therefore, the same is not available for partition.

(vi) The 1st and 3rd item of 'B' schedule properties were allotted to the share of the father Sundaramoorthy under partition deed dated 20.02.1998 and therefore, they are the separate properties of the father. He had executed a settlement deed under Exhibit B6 on 05.12.2006 settling these two items in favour of the fourth defendant. Therefore, these two items are also not available for partition.

(vii) The second item of 'B' schedule property is the absolute property of Logambal who is the mother of the plaintiffs and the defendants. She had executed Exhibit B7 settlement deed with regard to the said property on 05.12.2006 in favour of the first defendant. Therefore, this item of property is also not available for partition.

(viii) The fourth defendant has sought in the counter claim seeking partition of Door No.2/69 in item No.2 of 'A' schedule property and recovery of possession of Door No.2/68 in the second item of 'A' schedule property from the plaintiffs on payment of Court fee.



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7.Findings of the trial Court:

(i)The fourth defendant has not proved the Will dated 08.12.2006 marked as Exhibit B5 which covers Door No.2/68 in the second item of 'A' schedule property. Therefore, the said property is available for partition.

(ii)The defendants 1 and 2 have proved Exhibits B6 and B7 and therefore, item Nos.1 to 3 of 'B' schedule property which are covered under these two documents are not available for partition.

(iii)The plaintiffs have failed to prove that the properties are the ancestral properties of Sundaramoorthy. Therefore, after partition under Exhibit B3, they are the separate properties of Sundaramoorthy and hence, they are entitled to execute Exhibits B6 and B7 settlement deeds.

(iv)Since the Will under Exhibit B5 has not been proved by the fifth defendant, the counter claim relating to Door No.2/68 is liable to be dismissed and the same is also available for partition.

8.Challenging the above said judgment and the decree, the plaintiffs had filed the above first appeal seeking partition of the first item of 'A' schedule property and item Nos.1 to 3 of 'B' schedule properties.

9.Contentions of the learned counsel appearing for the appellants:

(i)The plaintiffs had established that there was some ancestral nucleus and income from the same and therefore, the entire burden is upon the



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defendants to establish that they are the separate properties of Sundaramoorthy.

(ii) When the trial Court has found that Exhibit B5 Will has been created, the same finding ought to have been extended to Exhibits B6 and B7 settlement deeds also.

(iii) When the plaintiffs had specifically disputed Exhibits B6 and B7 settlement deeds, the defendants are duty bound to prove the said documents in a manner known to law. However, in the present case, the defendants have miserably failed to prove Exhibits B6 and B7 and therefore, the trial Court had committed an error in accepting these two documents without assigning any legal acceptable reason.

(iv) He had further contended that Exhibit A7 partition arrangement is a genuine one and the defendants have refused to take forward the said document to culminate in a partition deed. The trial Court ought to have decreed the suit in entirety in view of recitals in Exhibit A7 partition agreement.

(v) Defendants 1 and 4 are the beneficiaries of Exhibits B6 and B7 settlement deeds and therefore, the entire burden is upon them to establish the genuineness and validity of these documents. The trial Court had erroneously shifted the burden upon the plaintiffs to establish that Exhibits B6 and B7 are invalid documents.



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(vi)When there was an ancestral nucleus and the father had no separate income, the trial Court had erred in holding that after Exhibit B3 partition deed, the properties have become separate properties of the father.

(vii)The trial Court without properly appreciating the recitals in Exhibit B3 partition deed, had arrived at an erroneous finding that the first item of 'A' schedule property was allotted to the first defendant.

(viii)When Exhibits B6 and B7 have not been proved in a manner known to law, then item Nos.1 to 3 in 'B' schedule properties are also liable for partition.

10.Contentions of the learned counsel for the respondents:

(i)A perusal of Exhibit B3 partition deed indicates that the first item of 'A' schedule property namely Survey No.41/2 has been allotted to the share of the first defendant namely Elangovan. The plaintiffs being parties to the said partition deed, cannot again seek partition of the same property which was allotted to a different co-sharer.

(ii)Defendants 1 and 4 have examined themselves as DW2 and DW3 who are the attestors of Exhibits B6 and B7 to prove the said documents. On the other hand, the plaintiffs have not raised any doubt with regard to the manner of execution or registration of those documents.



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(iii) Though the plaintiffs had relied upon a partition agreement dated 25.12.2008, they have not chosen to mark the said document during the trial, for reasons best known to them when the entire suit is based upon the said document.

(iv) Under Exhibit B3, the father and all the sons were parties to the partition deed and therefore, whatever properties that were allotted to the share of father Sundaramoorthy, they became his separate property. The ancestral character of the property does not continue after partition vis-a-vis the parties to the document. Once they are separate properties, the father is entitled to execute any document to settle the properties in favour of defendants 1 and 4.

(v) As far as the second item of 'B' schedule property is concerned, it is the absolute property of mother Logambal and therefore, the plaintiffs cannot be heard to contend that it is an ancestral property. The said property has been settled by her in favour of the first defendant under Exhibit B7.

(vi) The plaintiffs have miserably failed to establish that there was an ancestral nucleus that would fetch surplus income and the said surplus income was utilized for purchasing the suit schedule property. Hence, he prayed for confirming the judgment and decree of the trial Court.

11. We have given anxious consideration to the submissions made on either side and perused the material records.



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12.The present first appeal filed by the plaintiffs is in relation to the disallowed portion of the decree of the trial Court namely item No.1 of 'A' schedule property and item Nos.1 to 3 of 'B' schedule property.

13. Item No.1 of 'A' schedule property:

(i)The said property is located in Survey No.44/2 having extent of 20 cents. According to the plaintiffs, all items shown in 'A' schedule were the subject matter of a partition agreement dated 25.12.2008 under which the plaintiffs and defendants have agreed to execute a registered partition deed on a future date. Though the said agreement dated 25.12.2008 is shown as Document No.4 in the list of document annexed to the plaint, the same has not been marked at the time of trial.

(ii)The defendants 1 and 4 in their written statement had contended that the said first item of 'A' schedule property was allotted to the share of the first defendant in the registered partition deed dated 19.02.1998 in which the plaintiffs, the defendants and their father were parties. A perusal of Exhibit B3 indicates that Survey No.44/2 has been allotted to the first defendant. In the said partition deed, the plaintiffs are also parties. Once a property is partitioned and allotted to one of the sharers in a partition deed, the same cannot be a subject matter of the partition suit. Therefore, the trial Court was right in dismissing the suit with regard to the first item of 'A' schedule property.



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14. Item Nos.1 and 3 in 'B' schedule property:

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(i) Survey Nos.44/1A and 128/17C are shown as items 1 and 3 of 'B' schedule property in the plaint. A perusal of Exhibit B3 partition deed indicates that these two survey numbers with the same extent have been allotted to the share of the father of the plaintiffs and the defendants. According to the plaintiffs, these were the properties left by their father M.Sundaramoorthy and there was no partition between the plaintiffs and the defendants.

(ii) The plaintiffs have further contended that after the death of Sundaramoorthy, each one of the sons are entitled to 1/6th share in the property. But the defendants had contended that these properties having been allotted to Sundaramoorthy under Exhibit B3 partition deed, they became the separate properties of their father and therefore, he is entitled to deal with the said properties as per his wish. The fourth defendant had relied upon Exhibit B6 settlement deed executed by his father with regard to Item Nos.1 and 3 of 'B' schedule properties. According to the defendants, these items after having allotted to the father in the partition had become the separate property and therefore, he is entitled to execute the said document. However, the plaintiff had contended that these properties continue with their character of ancestral properties.



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15.The Hon'ble Supreme Court in a judgment reported in (2018) 7 SCC 646 (*Shyam Narayan Prasad Vs. Krishna Prasad and others*) in paragraph No.

16 has held as follows:

“16. Therefore, the properties acquired by Defendant 2 in the partition dated 31.07.1987 although are separate properties qua other relations but it is a coparcenary property insofar as his sons and grandsons are concerned.

16.In view of the judgment of the Hon'ble Supreme Court, it is clear that whatever property that is allotted to the share of a sharer under a partition deed is to be treated as a separate property vis-a-vis, the other parties to the said partition deed. However, it will retain the character of coparcener property of a sharer vis-a-vis his children. In the present case, the properties having been allotted to the father of the plaintiffs under Exhibit B3 in which the plaintiffs were also parties, the said properties should only be treated as separate properties of the father of the plaintiffs. Therefore, the father has got every right to deal with the said property as per his wish.

17.The fourth defendant had relied upon Exhibit B6 settlement with regard to Item Nos.1 and 3 of 'B' schedule properties to claim title to those items. A perusal of Exhibit B6 indicates that the said document has been executed on 05.12.2006 by the father in favour of the first defendant and



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possession was handed over to him on the said date. The document has been attested by the first defendant Elangovan and by one Gnanamani and Gunasekaran. The first defendant who is the attester of Exhibit B6 has been examined as DW1. In his chief examination, he had admitted his attestation to the said document. Though suggestions were put to him that Exhibit B6 was created for the purpose of the suit, he had denied the same. Though specific pleadings relating to Exhibit B6 are found in the written statement, the defendants have not chosen to cross examine DW1 (attester of Exhibit B6) challenging the execution or attestation of the said document. The evidence of DW1 has not been discredited during the cross examination with regard to Exhibit B6.

18.The cross examination of DW1 revolves around the character of the property that was allotted to his father Sundaramoorthy under Exhibit B3. Therefore, the said cross examination would not serve any useful purpose to invalidate Exhibit B6. Hence, we are of the considered opinion that the trial Court was right in relying upon Exhibit B6 settlement deed in order to dismiss the suit for partition with regard to item Nos.1 and 3 of the plaint schedule property.



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19. Second Item of 'B' schedule property:

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(i) Survey No.44/1B is shown as second item of 'B' schedule property. In the plaint, the plaintiffs had contended that their father had acquired some properties in his name and in his wife's name utilizing the ancestral nucleus. In Paragraph No.3 of the written statement, the defendants had specifically denied the said fact and had contended that all the properties except 2nd item of 'B' schedule properties are the absolute properties of their father Sundaramoorthy. The defendants had further contended that the second item of 'B' schedule property is the absolute property of their mother Logambal.

(ii) The plaintiffs have not let in any oral or documentary evidence to establish that there were ancestral properties to their family and by using the surplus income, the properties in 'A' and 'B' schedule properties were purchased. During cross examination, the plaintiff has admitted that the second schedule of 'B' schedule property belongs to his mother Logambal. The plaintiffs had further admitted that the mother is still alive and she is residing in a portion of the second item of 'B' schedule property. However, the plaintiffs had not impleaded their mother as one of the parties to the suit for partition for the reasons best known to them.

(iii) Admittedly, the second item of 'B' schedule property stands in the name of the mother of the plaintiffs and the defendants. She was alive not only



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on the date of filing of the suit but also on the date when PW1 deposed before the Court. Without impleading his mother Logambal, who is the owner as per the document, the plaintiffs cannot be heard to contend that the said property is not the absolute property of their mother, but it was purchased by their father out of the ancestral nucleus.

(iv) The plaintiffs have not even chosen to examine their mother as one of the witness on their side to prove the fact that the properties were purchased out of joint family nucleus. The mother who had executed a settlement deed under Exhibit B7 in favour of the first defendant has not chosen to dispute the said document. The plaintiffs have not established the character of the second item of 'B' schedule property as that of a joint family property and the mother who had executed Exhibit B7 in favour of the first defendant has not chosen to challenge the same. In view of the above said deliberations, we do not find any reason to interfere in the order of the trial Court dismissing the suit for partition with regard to the second item of 'B' schedule property.

20. Though the plaintiffs/appellants have made an attempt to contend that Exhibits B6 and B7 have not been proved in accordance with law, we are of the considered opinion that the attestors of Exhibit B6 and B7 have been examined as DW1 and DW2 and their depositions have not been discredited during the cross examination. The character of the properties in dispute, are separate



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properties of the settlors and the plaintiffs were not able to establish the invalidity of Exhibits B6 and B7. We are of the considered opinion that there are no merits to interfere in the appeal. The judgement and decree of the trial Court are confirmed. The First Appeal stands dismissed. No costs.

**[A.S.M.J.,] & [R.V.J.,]
23.08.2023**

NCC : yes/no
Index :yes/no
Internet :yes/no
msa

To
1.The II Additional District Judge,
Tiruchirappalli,

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



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DR.ANITA SUMANTH, J.
AND
R.VIJAYAKUMAR, J.

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Pre-delivery Judgment made in
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