



A.S.(MD)No.47 of 2016

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 18.11.2022

PRONOUNCED ON:16.03.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

A.S.(MD)No.47 of 2016
and
C.M.P.(MD)No.3408 of 2016

Maria Michael Ammal (died)

1.Antony Sowndiraraj
2.Jeyandiran
3.Yogaraj
4.Milton
5.Bernardsha
6.Ingarsal
7.Annamani

: Appellants 1 to 7 / Defendants 2 to 6 &8

Vs.

1.Michael Durai
2.Annai Kubera Selvasingh

; Respondents 1 and 2/
Plaintiffs 1 and 2

3.Annie Besant

: 3rd Respondent/7th Defendant

PRAYER:- Appeal Suit filed under Section 96 of the Code of Civil Procedure against the Decree and Judgment passed on 31.07.2014, in O.S.No.6 of 2013, by II additional District Court, Tuticorin.



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For Appellants : Mr.S.Ramesh @ Ramaiah

For Respondents :Mr.M.Muthu Geethaiyan
for Mr.A.Thiruvadi Kumar
for R.1 and R.2
: No Appearance for R.3

JUDGMENT

The Appeal Suit is directed against the judgment and decree passed in O.S.No.6 of 2013, dated 31.07.2014, on the file of II Additional District Court, Tuticorin.

2. The suit is for partition.

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

4. The case of the plaintiffs is that the suit properties originally belonged to Micheal Thiraviya Nadar and he had been in possession and enjoyment of the same, that the said Micheal Thiraviya Nadar had nine children – the defendants 2 to 9 and Mariya Chandra, that the said



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Mariya Chandhra had predeceased her father on 10.05.1991 leaving behind her husband and son – the plaintiffs herein, that the first defendant is the wife of the said Micheal Thiraviya Nadar, that the said Micheal Thiraviya Nadar died intestate on 31.03.1992 and after his death, the suit properties devolved on his legal heirs – the plaintiffs and the defendants and as such, the plaintiffs are entitled to get 1/10th share in the suit properties, that the plaintiffs' request to partition the properties by metes and bounds on several occasions were of no avail, that the plaintiffs came to know in the second week of October 2012 that all the defendants had colluded together and executed a partition deed dated 06.09.2010, partitioning the suit properties among them and hence, the partition deed is null and void, as it was executed without consent or knowledge of the plaintiffs, that the plaintiffs sent a legal notice dated 26.12.2012 to the defendants calling upon them to partition the properties and allot 1/10th share to the plaintiffs, that all the defendants received the notice and refused to send any reply and that therefore, the plaintiffs were constrained to file the above suit for partition.

5. The first defendant and the defendants 2 to 6, 8 and 9 and 7 have filed their written statements separately. The defence of the defendants is



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that Micheal Thiraviya Nadar during his life time allowed his sons to construct separate houses in the suit properties, that when he was sick, he partitioned the suit properties in the presence of his family friends Johnson, Antony Roctin and Antony raj on 02.01.1991, that Micheal Thiraviya Nadar's daughters - 7th defendant and Maria Chandhra expressed that they did not want any share at that time, that Micheal Thiraviya Nadar had sold 5 cents in the first item of the property and the balance was divided into 13 parts, out of which, 3 cents adjacent to Thalamuthu Nagar road was allotted to the third defendant and the second defendant was allotted 7 $\frac{1}{4}$ cents on the southern side, that the western portion, 11 $\frac{3}{4}$ cents in two parts were allotted to the ninth defendant, that another western portion of 4 cents was allotted to 8th defendant, that another 10 $\frac{3}{4}$ cents on the western side was allotted to 5th defendant, that another 5 cents on the western side was allotted to 3rd defendant and another 5 cents on the western side was allotted to 2nd defendant and that 15 cents on the eastern portion was allotted to 8th defendant, that $\frac{1}{4}$ cents on the eastern side of the second defendant's house was divided into 4 parts and was allotted to defendants 8, 6, 9 and 2 respectively. The first plaintiff and his wife were present at the time of partition and they did not claim any share, since the defendants have



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been enjoying the properties allotted to them, which was known to the first plaintiff and as such, the plaintiffs are estopped from denying the said partition. As the defendants are in separate possession and enjoyment of the suit properties for over 20 years, the plaintiffs have lost their right, if any, by ouster. The suit is barred by limitation. The plaintiffs' side have no right over the suit properties and on that basis, the suit is liable to be dismissed.

6. Based on the above pleadings, the trial Court has framed the following issues:

(1) Whether the plaintiffs are ousted from possession and enjoyment of the schedule properties?

(2) Whether the suit brought by the plaintiffs is barred by limitation?

(3) Whether the plaintiffs are estopped by the earlier partition?

(4) Whether the plaintiffs are entitled to declaration that the partition deed dated 06.09.2010 and registered as Doc.No.3232/10 is null and void and not binding on the plaintiffs?

(5) Whether the plaintiffs are entitled to 1/10 share in the plaint schedule properties?



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(6) Whether the plaintiffs are entitled to preliminary decree for partition?

(7) To what relief?

7. During trial, the plaintiffs have examined the first plaintiff as P.W.1 and exhibited five documents as Exs.A.1 to A.5. The defendants have examined the second defendant – Antony Sowndararaj and one Antony raj as D.W.1 and D.W.2 respectively and exhibited 7 documents as Exs.B.1 to B.7. The learned trial Judge, upon considering the evidence, both oral and documentary and on hearing the arguments of both sides, has passed the impugned judgment dated 31.07.2014 granting preliminary decree for partition of plaintiffs' 2/27 shares over the suit properties and also granted declaration that the partition deed dated 06.09.2010 is null and void and not binding on the plaintiffs. Aggrieved by the said judgment and decree, the defendants 2 to 6, 8 and 9 have come forward with the present Appeal Suit.

8. The appeal grounds raised by the defendants 2 to 6, 8 and 9 in short are as follows:



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(i) The trial Court erred in not holding that the oral partition pleaded by the appellants is amply proved and substantiated;

(ii) The trial Court erred in not holding the plea of the appellants that the properties were given to them in a divided fashion orally in January 1991 itself by their father Micheal Thiraviya Nadar and the sons have constructed and put up buildings of their own even during his life time;

(iii) The trial Court failed to appreciate the plea of the appellants that only to get a written and registered document for loan purposes, a registered partition deed dated 06.09.2010 was entered into in tune with the oral division of properties;

(iv) The trial Court erred in placing reliance on the revenue documents under Exs.A.1 and A.2 and placing heavy reliance on Ex.A.5 and arrive at a conclusion that the properties remain only in joint possession and without any independent proof from the respondents/plaintiffs;



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(v) The trial Court failed to appreciate the stand of the appellants that they are in separate enjoyment of the various portions of the property as absolute owners right from January 1991 and that they have put up many constructions and houses in it and have produced house tax and EB receipts to vouch the same;

(vi) The trial Court has not properly considered the plea of ouster and the plea of limitation and the long separate possession of the appellants in proper perspective;

(vii) The trial Court has committed an error in working out the succession to the properties allegedly left by the said Micheal Thiraviya Nadar and the shares thereon. Hence, the appeal is liable to be dismissed.

9. The points that arise for consideration are

(i) Whether the trial Court erred in rendering a finding that the defendants have failed to prove the plea of ouster, despite showing that the defendants have been in separate possession and enjoyment of the



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property as absolute owners from January 1991 and they have put up many constructions and houses therein?

(ii) Whether the trial Court erred in granting preliminary decree, despite showing that the daughters of Micheal Thiraviya Nadar had relinquished their shares at the time of oral partition effected by him?

(iii) Whether the plaintiffs are entitled to get the relief of partition?

If so, what share?

Point Nos.(i) to (iii):

10. Admittedly, the suit properties were originally owned by Micheal Thiraviya Nadar. It is not in dispute that the first defendant – Maria Michael Ammal is the wife, the defendants 2, 3, 4, 5, 6, 8 and 9 are the sons and the seventh defendant and one Mariya Chandhra are the daughters of the said Micheal Thiraviya Nadar and that the said Mariya Chandhra had predeceased her father on 10.05.1991 leaving behind her husband – Micheal Durai – the first plaintiff and her son – Annai Kubera Selvasingh – the second plaintiff herein.



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11. The plaintiffs, by alleging that Micheal Thiraviya Nadar had died intestate, claimed partition and allotment of 1/10th share in the suit properties. The defence of the defendants is that when Micheal Thiraviya Nadar was alive, he allowed his sons to construct separate houses in the suit properties and that on 02.01.1991 in the presence of his family friends Johnson, Antony Roctin and Antony raj had effected partition of the suit properties and that at that time, the daughters – 7th defendant and Mariya Chandhra had relinquished their shares in the suit properties and informed that they did not want any share in the suit properties. It is their further defence that after the death of their father Micheal Thiraviya Nadar, for loan purposes, they have entered into a registered partition deed on 06.09.2010 confirming the oral partition effected in 1991.

12. Considering the above, the main issue to be decided is as to whether there was a oral partition effected by Micheal Thiraviya Nadar on 02.01.1991 as claimed by the defendants. According to the defendants, their father Micheal Thiraviya Nadar had allowed his sons to construct separate houses in the suit properties and accordingly,



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constructions were made. Subsequently, according to them, on 02.01.1991 their father Micheal Thiraviya Nadar, in the presence of his friends had effected oral partition allotting the properties to his sons, which were constructed by them and in possession of the same. In order to prove the alleged oral partition, the defendants have produced the kist receipts and E.B., receipts standing in favour of the defendants 2 and 4 and the kist receipt in favour of the sixth defendant. Though the sons of Micheal Thiraviya Nadar have alleged that they have made constructions, they have not produced any records or documents to show that the constructions were made by them in their names. They have also not produced any records to show that the house tax assessment, electricity connection, water connection were obtained in their names.

13. As rightly contended by the learned Counsel for the respondents/plaintiffs, the defendants have produced house tax receipts standing in the name of the second defendant and fourth defendant and the receipts in the name of the sixth defendant. Ex.B.3 house receipt is with respect to the period 1997-1998. Ex.B.5 is with respect to 1996 to 1998 and Ex.P.7 is with respect to two different door numbers for the three years period between 2007 and 2010. Ex.B.4 – Electricity Bill is



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dated 21.09.1985, Ex.B.6 receipt is dated 13.11.1991 standing in favour of the defendants 2 and 4. Except for the above period, the defendants 2, 4 and 6 have not produced any other house tax receipt or E.B., receipt for the subsequent period.

14. As rightly contended by the learned Counsel for the plaintiffs, even according to the defendants, the oral partition was effected only on 02.01.1991 and as such, they have not offered any reason or explanation for producing the E.B., receipts under Ex.B.4. But on the other hand, the plaintiffs have produced computer pata standing in favour of Micheal Thiraviya Nadar under Exs.A.1 and A.2. As rightly contended by the learned Counsel for the plaintiffs, admittedly no changes were made in the revenue records and there is absolutely no evidence to show that there was mutation of records subsequent to 02.01.1991.

15. Now coming to Ex.A.5 – partition deed dated 06.09.2010, according to the defendants, they have registered the document, for loan purposes. Admittedly, all the defendants were the parties to Ex.A.5 – partition deed and more importantly, the plaintiffs were not made as parties to the said document. Though the defendants have been alleging



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that Ex.A.5 partition was entered into in tune with the oral partition effected on 02.01.1991, but more importantly, the oral partition alleged to have been taken place on 02.01.1991 does not find place in Ex.A.5 – partition deed. Moreover, in Ex.A.5, it has been mentioned that they were partitioning the properties, which were being enjoyed by them jointly till then and the relevant portion is extracted hereunder:

“தேன் தபசில் கண்ட சொத்துக்களை துவரை நாம் கூட்டாம்
பொதுவாய் அனுபவித்து வந்தாம். நம் அனுபாக வசதியைக் கருதி
மனாராசியாக தனித்தனியாக பாகம் செய்து கொள்ளுவண்டும் என்று
முடிவு செய்து கொண்டபடியால் நாளது உத்தி முதல் “.

16. Considering the above recitals, it is clearly evident that there was absolutely no mentioning of oral partition or the constructions made by the defendants and they are in separate possession and enjoyment of the same. Moreover, according to the defendants, the daughters of Micheal Thiraviya Nadar - 7th defendant and Maria Chandhra had relinquished their shares in the suit properties and informed their father that they did not want any share in the suit properties. If that be so, there is no reason or explanation offered as to why the seventh defendant was made as a party to Ex.A.5. Moreover, the first defendant – wife of



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Micheal Thiraviya Nadar and the mother of other defendants was also not allotted to any share in the suit properties in Ex.A.5., but why she was made as a party to Ex.A.5 remains unexplained.

17. It is the specific contention of the plaintiffs that they came to know about Ex.A.5 only in the second week of October 2012. The second defendant in his cross-examination, would admit that since the plaintiffs have already expressed that they did not want any share in the suit properties, they were not informed about the execution of Ex.A.5 – partition deed.

18. Considering the above admission of the second defendant and by relying the judgment of this Court in ***Pugazhenthai and another Vs. Sundari Ammal and others*** reported in ***2013(2) CTC -160***, the trial Court has rightly held that since the plaintiffs being necessary parties, were not made as parties to the partition deed under Ex.A.5, the same is held to be invalid and null and void. As rightly contended by the learned Counsel for the plaintiffs, the defendants have not produced any evidence to prove their long, uninterrupted and separate possession of the specific



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portions of the suit properties. The trial Court, by rightly applying the legal position that the possession of one of co-sharer is deemed to be the possession for himself and on behalf of other co-sharers as long as the properties remained un-partitioned, has come to the decision that the defendants have miserably failed to prove the plea of ouster.

19. Admittedly the parties are Christians. Though the plaintiffs have claimed 1/10th share, the trial Court, by invoking Section 33 of the Indian Succession Act and by holding that the widow shall take 1/3 share and the remaining 2/3 share shall go to the lineal descendants, has granted the preliminary decree declaring that the plaintiffs are entitled to get 2/27 shares in the suit properties. After passing of the preliminary decree, admittedly the first defendant – mother had died intestate and as such, her 1/3 share shall go to her sons and daughters and also the legal heirs of the deceased daughter Maria Chandhra. Considering the above, the plaintiffs and defendants 2 to 9 each are entitled to get 1/9th shares in the suit properties. Except the above modification in the shares consequent to the death of the first defendant, the Appeal Suit is devoid of merits and the same is liable to be dismissed. Accordingly, the above Substantial Questions of Law are answered.



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20. In the result, the preliminary decree passed by the trial Court declaring the plaintiffs are entitled to get 2/27 shares in the suit properties is modified to the effect that the plaintiffs are entitled to get 1/9th share in the suit properties. With the above modification, the Appeal Suit is dismissed. Consequently, the connected Miscellaneous Petition is also dismissed. The parties are directed to bear their own costs.

16.03.2023

Index : Yes : No
Internet : Yes : No
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To

- 1.The II Additional District Court, Tuticorin.
- 2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

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16. 03.2023