



A.S.(MD)No.24 of 2015

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 03.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.(MD)No.24 of 2015

Fazaludeen (Died)
2.Junaitha Begam
3.Shahnawaz
4.Mohamed Ajmal

... Appellants / 1st plaintiff

(Appellants 2 to 4 are brought on record as LR's
of the deceased sole appellant vide Court order dated
12.09.2022 in C.M.P.(MD)No.7784 of 2022)

Vs.

1.R.Kamala
2.Razia Begum
3.Salma Beevi
4.S.Abdul Suban

... Respondents 1 to 4 /
Defendants 2 & 4 to 6

5.Noorjahan
6.Mumtax Begum
7.Mallika Begum

... Respondents 5 to 7 /
plaintiffs 2 to 4

PRAYER: This Appeal Suit is filed under Section 96 of C.P.C. against the judgment and decree dated 16.07.2013 passed by the First Additional District Court, Thanjavur in O.S.No.203 of 2004.



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For Appellants : Mr.S.Anand Chandrasekar
for M/s.Sarvabhauman Associates

For Respondents : Mr.P.Sesubalan Raja for R1
Mrs.M.Rajeshwari for
Mr.S.M.S.Johnny Basha for R2 to R4, R7 & R5

JUDGMENT

This Appeal Suit is filed by the first plaintiff against the decree and judgment of the trial Court in allotting 5/7th shares in item Nos.1 and 2 of 'A' schedule property and the entire items of C, D and E properties and for not allotting shares in other properties.

2. For the sake of convenience, the parties are referred to herein, as per their own ranking before the Trial Court.

3. The brief facts, leading to the filing of this Appeal Suit, are as follows:-

3.1. The first plaintiff and the first defendant are the sons of the deceased Abdul Subhan and Fathima Bivi. The plaintiffs 2 to 4 are their sisters. The suit properties and other properties originally belonged to Abdul Subhan and his two sisters Fathima Bivi and Kushid Bivi. A suit in O.S.No.25 of 1969 on the file of



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Principal Subordinate Court was filed and the same was entered into a compromise. The plaintiffs in the above suit were allotted $\frac{1}{4}^{\text{th}}$ shares and one Kurshid Bivi's daughter allotted another $\frac{1}{4}^{\text{th}}$ share. The first plaintiff and the first defendant in this suit and the other legal heirs were arrayed as defendants in the above suit. According to the plaintiffs, the properties originally allotted to the earlier suit and other properties were remained in joint possession of the plaintiffs and the defendants. Hence, the first plaintiff is entitled to $\frac{2}{7}^{\text{th}}$ shares, the plaintiffs 2 to 4 are each entitled to $\frac{1}{7}^{\text{th}}$ shares and the first defendant is entitled to $\frac{2}{7}^{\text{th}}$ shares. Though the plaintiffs 2 to 4 have no actual possession of suit properties, they are deemed to be in joint possession.

3.2. It is also the contention of the plaintiff that item No.1 in 'A' schedule property, there was oral partition and vacant site has been allotted to the first plaintiff in the year 1994 and he has built up a building of his own in the year 1995 spending more than two lakhs. Hence, item No.1 in 'A' schedule property may be allotted to the first plaintiff. The first defendant sold 'E' schedule property to the District Collector, Thanjavur on 17.03.1999 and as if he is the owner of the property. Item No.1 in 'B' schedule property was allotted in the final decree proceedings in O.S.No.25 of 1969 to the fifteenth defendant in the said suit and



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the said Item No.1 in 'B' schedule property was in possession of the first defendant. Since the 15th defendant in the above said suit did not take possession of item No.1 in 'B' schedule property, the first defendant continues to be in possession and therefore, the plaintiff is also entitled to share in item No.1 of 'B' schedule property. Hence, the suit.

4. The first defendant filed a written statement admitting the relationship. It is the contention of the first defendant that the father of the plaintiff and the first defendant had settled item Nos.3 and 4 in 'A' schedule properties and all the items in 'B' schedule property in favour of his eldest son viz., the first defendant herein under a registered settlement deed, dated 30.12.1964. The said settlement deed came into effect and acted upon and possession was also handed over to the first defendant. The first defendant has also settled 4th item in 'A' schedule property in favour of his daughter on 05.07.2000. Settlement deed was also acted upon. The first defendant has sold 'B' schedule property to one S.N.M.Ismayil for valuable consideration. Besides, the first defendant had purchased 0.91 cents in R.S.No. 601/8 and 0.41 cents in R.S.No.579/6, totalling 1 acre 32 cents in the name of his brother viz., the first plaintiff on 30.10.1968. At the time of purchase of property in 1968, the first plaintiff has no employment or he has not done any work or he



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has no separate income of his own to purchase the land in his name. Therefore, the property cannot be treated as his separate property or exclusive property of his own. The plaintiffs have not included the above 2 items of the lands for partition for the reasons best known to them. The first defendant's father Abdul Subhan had purchased 0.83 cents in R.S.No.601/6 of punja land in Soorakottai Village in the name of his daughter Noorjahan, the second plaintiff, on 21.06.1993 for the benefit of the family. She also has no employment at the relevant point of time. Similarly, the first defendant and his father had settled 1.66 acres in favour of the 4th plaintiff under a registered deed of settlement. Those properties also not included in the suit.

5. Further, in the written statement, it is the contention of the first defendant that there was an oral partition in the year 1994, wherein the first item of 'A' schedule property was allotted to the first plaintiff, second item in 'A' schedule property was allotted to the first defendant. 3rd and 4th item in 'A' schedule and 'B' schedule suit properties were already given to the first defendant by his father under a registered settlement deed dated 30.12.1964. The settlement deed was given effect to and acted upon. Similarly, 2 acres and 34 cents in 'C' schedule property and 'E' schedule properties were allotted to the first defendant. The



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remaining item in 'C' schedule property and all the items in 'D' schedule properties were allotted to the plaintiffs jointly. Similarly the property purchased in the name of the second plaintiff were allotted to the second plaintiff and the properties purchased in the name of the fourth plaintiff were allotted to the fourth defendant. The plaintiff and the first defendant accepted the oral partition and accordingly, they were enjoying the property. The plaintiffs jointly enjoying 'C' and 'D' schedule property, whereas, the first defendant was allotted with only one item in 'C' schedule i.e., the nanja land in R.S.No:572/1, measuring 2 acres 34 cents and 'E' schedule suit properties. Hence, the oral partition between the plaintiff and the first defendant held in the year 1994 was fair and proper. Hence, opposed the suit.

6. The third defendant has filed a written statement stating that he is not in possession of the plaint 'A' schedule property under any arrangement with the first defendant.

7. The fourth defendant has filed a written statement stating that by virtue of the settlement deed dated 30.12.1964, the first defendant became the owner of item Nos.3 and 4 in 'A' schedule property and all the items in 'B' schedule properties. The first defendant has settled the 4th item in 'A' schedule property in



favour of his daughter on 05.07.2000, as the absolute owner of the same. Hence, prayed that the 4th item in 'A' schedule may be allotted to the share of the first defendant to work out equity.

8. The sixth defendant has filed a written statement adopting the stand taken by the fifth defendant.

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

1. Whether the settlement deed dated 30.12.1964 alleged to have been executed by deceased Abdul Subhahan in favour of the 1st defendant is true, valid and acted upon?

2. Whether there was a oral partial partition in the year 1994 and the 1st item of the suit properties was allotted as a vacant site to the 1st plaintiff?

3. Whether there was a full partition in the year 1994 and the 2nd item of A schedule 3rd item of C schedule and entire item of E schedule properties were allotted to the 1st defendant, the 1st item of A schedule was allotted to the plaintiffs exclusively and entire item except 3rd item of and entire item of B schedule properties were allotted to the plaintiffs jointly?

4. Whether the settlement deed dated 5.7.2000 executed by the 1st defendant in favour of 4th defendant in respect of item 4th to the schedule property is valid?



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5. Whether the plaintiffs are entitled to 5/7th shares in the suit properties?

6. To what relief the plaintiffs are entitled to?

10. On the side of the plaintiffs, first plaintiff was examined as P.W.1 and 15 documents were marked as Ex.A1 to A15. On the side of the defendants, sixth defendant and fourth defendants were examined as D.W.1 and D.W.2 respectively and 9 documents were marked as Ex.B1 to B9.

11. After analysing the entire evidence and materials, the trial Court has granted partition in respect of item Nos.1 and 2 of 'A' schedule property and the entire items of 'C', 'D' and 'E' schedule properties and granted 5/7th shares jointly to the plaintiffs i.e., 2/7th share to the first plaintiff and each 1/7th shares to the plaintiffs 2 to 4 and 2/7th share to the first defendant.

12. Though several grounds have been raised in the appeal, the learned counsel appearing for the first plaintiff / appellants mainly pointed out that as far as the disallowed partition, particularly, schedule 'B' of the properties, he has no case, since the settlement deed has been executed by his father in favour of the first defendant. The only grievance of the learned counsel appearing for the first



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plaintiff / appellants that despite the fact the first plaintiff and the first defendant pleaded oral partition and it is also accepted by the plaintiffs in respect of item No. 1 and other properties, the lower Court did not accept the oral partition. According to him, even *dehors* the oral partition, it is admitted by the parties, as far as item No.1 in 'A' schedule property, that the first plaintiff has put up a construction, which has been admitted in evidence. Such being the position, at least in equity the first plaintiff may be allotted to item No.1 in 'A' schedule property towards his share. Yet another submission of the learned counsel appearing for the first plaintiff / appellants is that the trial Court has held that though the properties was purchased in the name of the first plaintiff under Ex.B3, it is purchased only from the income of the family. That observation is without any evidence. Hence, such finding has to go.

13. The learned counsel appearing for the defendants / respondents would submit that as far as the allotment of the first item in 'A' schedule property, the same can be worked out in the final decree in equity, but in respect of other aspects, it is his contention that the trial Court has rightly considered the evidence and passed order. Hence, the suit may be dismissed.



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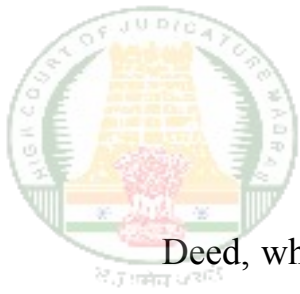
14. In view of the above submissions, now the points arise for consideration in this Appeal Suit are as follows:

1. Whether the plaintiff is entitled to allotment of item No. 1 in 'A' schedule of property on equity?

2. Whether the findings of the trial Court holding that plaintiff had no independent income to purchase the property in his name is proper?

15. It is not disputed by all the parties before this Court about the shares worked out by the trial Court. The trial Court has dismissed the suit in respect of 'B' schedule of property and granted preliminary decree in respect of item Nos.1 and 2 of 'A' schedule properties and the entire items of C, D and E schedule of properties.

16. The trial Court, in fact considering Ex.B8, has held that since the properties in item Nos.3 and 4 of 'A' schedule property and the entire 'B' schedule properties were settled in favour of the first defendant under Ex.B8-Settlement



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Deed, which is also not disputed seriously by the plaintiffs, has dismissed the suit in respect of Item Nos.3 and 4 of 'A' schedule property and entire 'B' schedule properties were in possession of the first defendant and the same has also been taken note of by the trial Court. As far as Item No.1 of 'A' schedule property is concerned, it is admitted by the parties that there was a partial oral partition and the first plaintiff has constructed a house in the year 1995 in item No.1 of 'A' schedule property. Though the parties are not disputed the construction of the house by the first plaintiff, the trial Court having found that the house has been constructed in the first item of 'A' schedule property by the first plaintiff, however, declined to allot 'A' schedule property in item No.1 to the first plaintiff, since he has not paid any separate Court fee. However, in para 27, the trial Court has held that item No.1 of 'A' schedule property is to be allotted to the share of the plaintiffs in the final decree proceedings. As the plaintiffs and the defendants have not disputed putting up of construction by the first plaintiff in item No.1 of 'A' schedule property and the shares of the plaintiffs were also determined, this Court is of the view that as the parties are also not disputed about the construction and the investment made by the first plaintiff, the findings of the trial Court that during the final decree proceedings, the first item may be allotted to the first plaintiff in equity towards his share is proper.



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17. As far as the findings of the trial Court that the first plaintiff would not have purchased the property, since at that time he was 20 years old, it is relevant to note that the subject matter of the property purchased under Ex.B3 is not a subject matter of suit itself. Therefore, without any evidence to show that the family had provided the fund and the property has been purchased in the name of the first plaintiff, merely on the presumption, the trial Court has held that the property under Ex.B3 would have purchased from the family income. Such finding, in my view, is not based on any material. Accordingly, the finding as against Ex.B3 by the trial Court alone is set aside and the partition of the shares are confirmed.

18. Accordingly, this Appeal Suit is partly allowed and confirmed the judgment of the trial Court and the first plaintiff may be allotted to the first item of 'A' schedule property towards his share in equity in a final decree proceedings. No costs.

03.04.2023

NCC : Yes

Index : Yes/No
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To

- 1.The First Additional District Court,
Thanjavur.
- 2.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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N.SATHISH KUMAR, J.

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