



A.S.(MD).No.180 of 2017 & Cros.Obj(MD)No.3 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 15.11.2023	Delivered on: .11.2023
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CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

AND

THE HONOURABLE MR.JUSTICE P.B.BALAJI

A.S.(MD).No.180 of 2017 & C.M.P.(MD)No.10360 of 2017
and
Cros.Obj.(MD)No.3 of 2018 & C.M.P.(MD)No.533 of 2018

A.S.(MD).No.180 of 2017

1.Sundar

2.Chandrasekaran

... Appellants / Defendants 1 & 2

Vs.

1. Suresh Babu

.. 1st Respondent/ Plaintiff

2.Muruganandam

.. 2nd Respondent / 3rd defendant

Prayer:- Appeal filed under Section 96 of the Code of Civil Procedure, against the judgment and decree, dated 23.02.2016, passed in O.S.No.45 of 2012, on the file of the Principal District Judge, Thanjavur.

For Appellants : Mr.R.Sreenivasan

For Respondents : Mr.S.Vellaichamy for R1

: R2 Exparte



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Suresh Babu

... Cross appellant / 1st respondent/ plaintiff

Vs.

1.Sundar

2.Chandrasekaran

.. Respondents 1 &2/ Defendants 1 &2

3.Muruganandam

.. 3rd Respondent / 3rd defendant

(Since R3 exparte before lower
Court, notice not necessary)

Prayer:- Cross Objection filed under Order 41 Rule 22 of the Code of Civil Procedure, against the judgment and decree, dated 23.02.2016, passed in O.S.No.45 of 2012, on the file of the Principal District Judge, Thanjavur.

For Cross Appellant : Mr.S.Vellaichamy

For Respondents : Mr.R.Sreenivasan for R1 & R2

COMMON JUDGMENT

P.B.BALAJI,J.

The defeated defendants 1 and 2 in a suit for partition are the appellants in the present First Appeal, before us. The plaintiff, aggrieved by disallowed share, has preferred a cross objection. Both the matters have been heard together.



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2. For the sake of convenience, the parties are referred to as per their rank before the trial Court.

3. The plaintiff filed a suit in O.S.No.45 of 2012, before the Principal District Judge, Thanjavur, for partition in respect of the 2 schedule properties. The third defendant, one Muruganandam has been impleaded on the premise that he has been carrying on cultivation, though not as a cultivating tenant in the 2nd item of suit property. According to the plaintiff, the 1st item of property is a house property situated in Chennai and the 2nd item of property is a cultivatable land of an extent of 2 Acres in Kumbakonam, where the third defendant is said to be cultivating the lands. The father of the plaintiff and the defendants 1 and 2, viz., K.Nagarajan has purchased item No.1 property, viz., house property, vide Ex.A1- sale deed, dated 29.04.1965 and their father constructed the residential house in the said item of the property, out of his own funds. It is contended in the plaint that the 2nd item being ancestral in nature was being enjoyed by the father till his life time. The said Nagarajan died on 17.05.1983 and after his demise, the mother of the plaintiff and the defendants 1 and 2,



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namely, Lakshmi was enjoying both the suit items till here demise, i.e. on 10.05.2008.

4. The plaintiff has further pleaded that during the life time of the father, the second defendant was given in adoption to the elder sister of Nagarajan, the father of the plaintiff and the defendants 1 & 2 and therefore, the second defendant is not entitled to any right in the suit property and consequently the plaintiff and the first defendant were entitled to 50% each. The plaintiff issued a lawyer's notice on 12.05.2012 to the defendants 1 and 2, claiming his half share. However, the defendants 1 & 2 sent a reply notice on 14.06.2012, claiming that they had spent their money for construction of the building and that the allegation of adoption was also false. With these averments and allegations, the suit for partition came to be filed.

5. The defendants 1 and 2 filed their written statement admitting the purchase of the 1st item of the property by their father Nagarajan. However, insofar as the 2nd item – land is concerned, they denied the very existence of the property and stated that if really the said property was



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available then all the parties, viz., the plaintiff and the defendants 1 and 2 were entitled to an equal share. However, they have stated that they do not claim any right in the 2nd item of the suit property, viz., agricultural land and therefore expressed in the written statement that the plaintiff could take over the same by establishing title independently. The averments regarding adoption of the second defendant to Pitchaiammal was denied. The defendants reiterated their stand in the reply notice that the defendants, out of their earnings develop the house by putting up additional construction work spending about Rs.25,00,000/-. According to the defendants, the plaintiff has been instigated by their maternal uncle Mr.Ganesan, to file the suit.

6. Before the trial Court, the plaintiff examined himself as P.W.1 and two other witnesses, viz., Subramanian and Ramamurthy as P.W.2 and P.W.3 and as many as 40 documents were marked as Ex.A1 to Ex.A40. On the side of the defendants, the defendants 1 and 2 examined themselves as D.W.1 and D.W.2 and one N.Mangalam was examined as D.W.3 and 27 documents were marked as Ex.B1 to Ex.B27.



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7. Based upon the pleadings of the parties, the trial Court framed the following issues :

“1. Whether the plaintiff is entitled to partition of his half share in the suit properties?

2. Whether the suit properties viz., item Nos.1 & 2 belonged to the family of the plaintiff and the defendants 1 & 2?

3. Whether the allegation that the 2nd defendant is the adopted son of one Pichaiyammal, is true? and if so, the 2nd defendant is not entitled to partition?

4. Whether the defendants 1 & 2 improved the 1st item of the suit property from and out of their own earnings?

5. Whether the plaintiff is not entitled to 1st item of the suit property on the basis of plea of ouster by the defendants 1 & 2?

6. Whether the plaintiff is entitled to the relief of partition as prayed for?

7. Whether the plaintiff is entitled to past mesne profits of Rs.20,000/- from the 1st defendants? and

8. To what relief, the plaintiff is entitled?”

8. The trial Court after considering the oral and documentary evidence came to the conclusion that the adoption alleged by the plaintiff



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was untrue and ultimately decreed the suit partly, declaring that the plaintiff is entitled to 1/3rd share and not 1/2 share as claimed by the plaintiff.

9. Aggrieved by the said decree, the defendants 1 and 2 have preferred the above First Appeal on the grounds that the trial Court failed to see that the defendants had proved that the plaintiff was ousted from the suit properties; the plaintiff was never in joint possession of the suit property; the trial Court having found that the adoption pleaded by the plaintiff was not true, ought to have non-suited the plaintiff, who had come to the Court with unclean hands; the trial Court failed to see that the first defendant alone discharged the loan borrowed by putting up construction in item No.1 of the suit property and for these amongst other grounds, prayed for the Appeal being allowed.

10. The plaintiff has filed a cross objection insofar as the disallowed the portion, viz., the trial Court disbelieving the case of adoption of the second defendant to the paternal Aunt of the plaintiff and the defendants 1 and 2 stating that the trial Court has erred in not



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appreciating the oral and documentary evidence adduced by the plaintiff regarding the said adoption and therefore, prayed for the Cross Objection being allowed and for modification of the preliminary decree to the effect that the plaintiff had 50% share in the suit properties.

11. We have heard Mr.R.Sreenivasan, learned counsel for the appellants /defendants 1 and 2 and Mr.S.Vellaichamy, learned counsel for the cross appellant/plaintiff. We have also perused the records and the impugned judgment and decree of the trial Court.

12. Points that are necessary for determination in this appeal are as under:

(i) Whether the plaintiff is entitled for partition of $\frac{1}{2}$ share in the suit property?

(ii) Whether the allegation that the second defendant is the adopted son of one Pitchaiyammal, is true?, and if so, whether the second defendant is not entitled to partition?

(iii) Whether the relief of partition granted by the trial Court is sustainable in law?



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(iv) Whether the plaintiff (defendants and the Cross Objector) are entitled for mesne profits?

Point Nos.(i) and (ii):

13. We have given our careful consideration to the oral and documentary evidence, especially Ex.B12 & Ex.P19. Ex.B12 is a petition filed by the mother of the plaintiff and the defendants 1 and 2, seeking maintenance from their father, under Section 127 Cr.P.C. In Ex.B19, suit filed by the mother of the plaintiff, even when the plaintiff was the minor, against the Integral Coach Factory and Pitchammal, the paternal aunt of the plaintiff and the defendants 1 and 2, the mother has categorically averred in the plaint that she is the lawfully wedded of Nagarajan, who is working as Inspector, ICF, Madras and the plaintiff and the defendants 1 and 2 herein are the sons of said Nagarajan and herself. The mother has nowhere referred to any adoption in the said plaint. In fact, the said suit was also decreed as seen from Ex.B24, declaring that the mother as well as all the three sons were entitled to the death benefits of Nagarajan. The second defendant has also produced Ex.B26, which is a Transfer Certificate, which also reflects his father's name only as K.Nagarajan.



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14. Even though the plaintiff examined P.W.2 and P.W.3, to prove the ceremony of adoption, P.W.2 has stated that he is the elder brother of the mother of the plaintiff and P.W.3 is also a close relative of the plaintiff. The plaintiff has not examined any independent witness to prove the adoption ceremony. The trial Court has also rightly found that P.W.2 and P.W.3 are interested witnesses and much importance cannot be attached to their evidence. The suit, in O.S.No.314 of 1983, filed by the mother as first plaintiff and the plaintiff herein as the second plaintiff in Ex.B19 is more relevant document to decide the factum of adoption of the second defendant. If really, the second defendant had been given in adoption, then the said suit, which was filed only in the year 1983 would have clearly referred to the adoption and the death benefits would have been claimed only by the mother, plaintiff and the first defendant. There can be no better evidence than the statement of the mother, regarding the adoption of one of her sons.

15(a). The trial Court has elaborately discussed the documents exhibited and found that the invitation as well as the adoption deed, have



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been concocted by using old paper and specifically relied on the use of word “லை”, which was never in use during the period of time.

15(b). The learned counsel for the appellant drew our attention to Ex.A.14 and Ex.A.15 dated 01.09.1963 to urge the point that by way of adoption, the second defendant has left the family and was given in adoption to another family and therefore, he is not entitled for share in partition. P.W.2 and P.W.3 were examined in support of the same. At the outset, the Tamil letter லை was used in the said exhibits and the same is taken note of by the trial Court and held that Ex.A.14 and Ex.A.15 are fabricated documents for the purpose of this case.

15(c). It remains to be stated that the Tamil letters underwent reforms by way of reforms to the letters of Tamil by adopting the writing method as that of “தந்தை பெரியார்” in the year 1977-78 only, thereafter, instead of old லை new லை was adopted and hence, we are of the considered view that in respect of a document alleged to be in the year 1963 would not have incorporated the reforms in Tamil letters introduced by the Government, which was only in the year 1977 and therefore, the



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finding of the trial Court that Ex.A.14 and Ex.A.15 are fabricated is well considered and well merited does not require any interference by this Court.

15(d). Therefore, we uphold the finding of the trial Court that the plaintiff has not proved the adoption and consequently, the plaintiff is entitled to only for 1/3rd share in the suit properties. We, accordingly, answer Points Nos.(i) and (ii) in favour of the appellants / defendants 1 and 2 and against the cross appellant / plaintiff.

Point No.(iii):

16(a). Though the defendants 1 and 2 have claimed that the plaintiff stood ousted from the suit property and it is only the defendants 1 and 2 who ought to have been in enjoyment of the suit properties and that they have made substantial additions to the 1st item of suit property, we are unable to find any satisfactory evidence being adduced by the defendants 1 & 2, to establish such pleas taken by them before the trial Court.

16(b). Merely because, one or some of the co-owners are in physical possession of the suit property it would not mean that the other co-owners



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stand ousted and that they have lost their right to claim partition of the suit property.

16(c). The term “joint possession” to satisfy the requirement in a suit for partition can also be constructive possession and need not always be actual or physical possession. If the plaintiff has established his right or he has established his entitlement to a share in the suit property and in the absence of any other valid / registered document, which is in the nature of defeating or ousting the plaintiff's right and such document has also been given effect to and the plaintiff has also acquired of the same, then alone the plea of ouster can be said to have been established.

16(d). However, evidence is available on record to show that the defendants have enjoyed the 1st item of suit property, however, their enjoyment at best is only co-owners along with the plaintiff and not as separate or absolute owners. We do not find any material whatsoever, from the pleadings and evidence available on record that the plaintiff's right has been ousted in the 1st item of the suit property and consequently, he is not entitled to any share. Therefore, we answer Point No.(iii), accordingly.



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Point No.(iv):

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17. Insofar as the mesne profits, the trial Court has found that though the plaintiff has claimed Rs.25,000/- from the first defendant towards past mesne profits, the plaintiff has not filed any proof for the same and on mere assumptions, the plaintiff could not be entitled to relief of past mesne profits, we do not find any ground to interfere with this finding. We answer the point No.(iv) accordingly.

18. In fine, we do not find any grounds to interfere with the findings of the trial Court. Accordingly, the Appeal Suit as well as the Cross Objection stand dismissed. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

(T.K.R.J.) & (P.B.B.J)
.11.2023

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To

1.The District and Sessions Court,
Kanyakumari at Nagercoil.

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



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RMT.TEEKAA RAMAN, J.,
and
P.B.BALAJI, J

Ls

Pre-delivery judgment in

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and
Cros.Obj.(MD)No.3 of 2018 & C.M.P.(MD)No.533 of 2018

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