



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

DATED : 22.08.2023

CORAM:

THE HONOURABLE MR.JUSTICE C.KUMARAPPAN

A.S(MD)No.3 of 2017
and
S.A.(MD)No.21 of 2017
and
C.M.P(MD) No.409 of 2017

1. Jeyarani
2. Selvarani
3. Innasi Ammal
4. Motchamary

... Appellants/Plaintiffs

-vs-

1. V.Ayyappan
2. P.Ramasubramanian
3. PR.Murugappan
4. Francis
5. Arockiam
6. Xavier

... Respondents/Defendants

PRAYER: First Appeal is filed under Section 96 of C.P.C, against the decree and judgment passed in O.S.No.60 of 2013 on the file of the District Judge, Sivagangai, dated 30.10.2015.



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

WEB COPY

For Appellants : Mr.G.Mohankumar

For Respondents : Mr.V.R.Shanmuganathan – for R1 to R4
: Mr.S.Srinivasa Ragahavan -for R5 and R6

S.A.(MD)No.21 of 2017

Arockiyam

... Appellant/Appellant/Plaintiff

-vs-

1. Francis (Died)

2. Jeyarani

3. Selvarani

4. Innasi Ammal

5. Xavier

6. Motchamary

7. Murugappan

... Respondents/Respondents/
Defendants

8. F.Selvamary

9. Antony Jeyam

10. Arockia Danial

... Proposed Respondents

(Respondents 8 to 10 are brought on record as legal heirs of the deceased first respondent vide order of this Court dated 28.06.2022 made in C.M.P(MD) No.6223 of 2021 in S.A.(MD) No.21 of 2017)



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

WEB COPY

PRAYER: Second Appeal is filed under Section 100 of C.P.C, against the judgment and decree dated 30.10.2015 made in A.S.No.15 of 2013 on the file of the District Court, Sivagangai, confirming the judgment and decree dated 01.03.2013 made in O.S.No.161 of 2010 on the file of the Sub Court, Devakottai.

For Appellant : Mr.S.Srinivasa Raghavan

For Respondents : Mr.N.Tamilmani – for R2 to R6

: Mr.V.R.Shanmuganathan – for R7

: No appearance- for R8 to R10

COMMON JUDGMENT

The present Appeal Suit has been filed against the decree and judgment passed in O.S.No.60 of 2013 on the file of the District Judge, Sivagangai, dated 30.10.2015.

2. The instant First Appeal has been listed before this Court as per order of the Hon'ble Administrative Judge, dated 25.07.2023, tagged along with the S.A.(MD)No.21 of 2017. That is how, this Court had an opportunity to dispose of this first Appeal.



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

WEB COPY **A.S(MD)No.3 of 2017**

3. The appellants are the plaintiffs and the respondents are the defendants before the Court below.

4. For the sake of convenience, the parties will be referred to as per the litigative status before the trial Court.

5. The brief averments of the plaint is as follows:-

The plaintiffs 1 to 3 and the defendants 4 to 6 are the children of one Late.Savarimuthu Nadar and the fourth defendant who is the wife of the said Savarimuthu Nadar. The suit property absolutely belonged to Savarimuthu Nadar, by virtue of a sale deed, dated 31.01.1966. During his life time, he has been in actual physical possession and enjoyment of the suit property and the revenue records were standing in his name. While being so, he died intestate on 05.04.1988. After the demise of the said Savarimuthu Nadar, the property devolves upon the the legal heirs, namely, the plaintiffs and the defendants 4 to 6. The plaintiffs further submits that the fourth defendant without having any absolute rights over the suit property illegally,



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

WEB COPY
sold the same to the first and second defendants. In turn, the first and second defendants sold the property to the third defendant. According to the plaintiffs, they were in joint possession with the defendants and entitled for partition. Hence, prayed for a partition of 4/7 shares.

6. The brief averments of the written statement of the third defendant, adopted by the defendants 1, 2 and 4, are as follows:-

This defendant submits that the fifth defendant, who is the brother of the plaintiff, has already filed a suit in O.S.No.161 of 2010. In which, he himself has admitted an oral partition which culminated into a written memorandum of partition vide document dated 18.02.1989. In the said suit, these plaintiffs were also parties. Against the dismissal of the suit in O.S.No.161 of 2010, the fifth defendant herein has filed A.S.No.15 of 2013. Even in the First Appeal, these plaintiffs were set exparte and have not appeared before the Court. As per the oral partition, the suit property was allotted to one Francis, who is the fourth defendant herein. As per the partition, he has been in actual physical possession and enjoyment over the same. The said Francis has sold the property to the third defendant on 05.01.2000. In turn, the third defendant has sold the same to the defendants 1



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

and 2, on 29.01.2010. Therefore, this defendant submits that the very suit is liable to be dismissed and the same is barred by limitation. Hence, prayed to dismiss the suit.

7. Before the Court below, the plaintiffs have examined as P.W.1 to P.W.3 and marked 12 documents as Ex.A1 to Ex.A12. On behalf of the defendants, the third defendant was examined as D.W.1 and 3 documents were marked as Ex.B1 to Ex.B3.

8. After considering both sides, the Court below has dismissed the suit with the finding that the instant suit is hit by the principle of *res judicata*, in view of the earlier decree in respect of the very same property, between the very same parties in O.S.No.161 of 2010 .

9. Aggrieved with the said judgment and decree, the plaintiffs have come up with the instant First Appeal.

10. The learned counsel for the plaintiffs would submit that the very Memorandum of Partition (Muchalika) on 14.08.1988, which is marked



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

as Ex.A12, is an unregistered document. Therefore, no reliance can be drawn in respect of such partition deed. It is also the further submission of the appellants that the earlier suit in O.S.No.161 of 2010 is now at the second appeal stage, therefore the decree in O.S.No.161 of 2010 cannot be considered as a *res judicata*. It is also the submission of the learned counsel for the appellants that the admission made by one of the co-sharers, namely, the third defendant herein will in no way affect the rights of the plaintiffs. Hence, prayed to allow this Appeal.

11. Per contra, the learned counsel for the respondent would vehemently submit that in respect of the very same suit property, the fifth defendant herein has filed the suit in O.S.No.161 of 2010. Wherein these plaintiffs and other legal heirs of Savarimuthu Nadra were arrayed as parties and that the fifth defendant herein has admitted the oral partition and the allotment of the suit schedule property to the fourth defendant herein. It is the specific submission of the learned counsel for the respondents that these plaintiffs are parties to the said suit, therefore, the findings of the suit in O.S.No.161 of 2010 will bind the plaintiff. Therefore, the learned counsel for the plaintiff would submit that the suit is hit by the principle of *res judicata*.



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

It is also the submission of the respondent that Ex.A12-Partition Muchalika is dated 14.08.1988 and the instant suit is filed after the period of 12 years. Therefore, the present suit is also liable to be dismissed on the ground of limitation. Hence, prayed to dismiss the first Appeal.

12. I have given my anxious consideration to the either side submissions.

13. While considering the fact and law affirmed by the appellant and disputed by the respondent herein, the following issues are arisen for consideration:

- (i) Whether the plaintiffs are entitled for partition as prayed for?
- (ii) Whether the suit in O.S.No.161 of 2000 is *res judicata* for the instant suit?
- (iii) What are the reliefs?

14. Since all the issues are intertwined, this Court deems it appropriate to take all the issues for discussion.



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

Issue Nos. 1 to 3:

15. The main arguments of the respondents is that the suit in O.S.No.161 of 2010 is a *res judicata* to the instant suit. In this regard, the learned counsel for the respondent would invite the attention of this Court in respect of Ex.P1, viz., judgment passed by the Court below in O.S.No.161 of 2010. It is also pertinent to mention here that the Court below, while considering such defence, has found that the suit in O.S.No.161 of 2010 is a *res judicata* to the instant suit.

16. This Court carefully perused the judgment in O.S.No.161 of 2010. On perusal of the same, these plaintiffs were parties to the above suit. However, since the plaintiffs did not appear before the Court below, they were set *ex parte*. While perusing the judgment, the Sub Judge has relied upon the admission made by the fifth defendant herein. Wherein he has admitted that after the demise of Savarimuthu, there was an oral partition on 14.08.1988 and that, in pursuance of oral partition, a Partition Muchalika was executed among them. It was also admitted by him that according to the Partition Muchalika, the suit properties were allotted to one Francis viz., the fourth defendant herein.



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

WEB COPY

17. Though the plaintiff in O.S.No.161 of 2010 not satisfied with the judgment, has preferred an appeal in A.S.No.15 of 2013. However, the order of dismissal was confirmed by the first Appellate Court. More pertinently, even before the first Appellate Court, these plaintiffs were not thought fit to appear and contest the same. Therefore, when the plaintiffs were arrayed as parties in earlier suit in O.S.No.161 of 2010, when they have not thought fit to appear and contest the same, there is a binding decree against this plaintiff in the previously instituted suit. Therefore, after suffering a decree in previous suit and filing a fresh suit in O.S.No.60 of 2013 as if they did not aware about previously instituted suit, cannot be accepted and encouraged, as the same is hit by *res judicata*. Therefore, this Court confirms the finding of the Court below that the present suit is hit by the principle of *res judicata*.

18. In view of the above findings, the order of the Court below is liable to be confirmed. As a result of which, the plaintiff is not entitled for any partition. It is pertinent to mention here that the appellant has not made out or brought before this Court any material so as to interfere with the order of the Court below.



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

WEB COPY

19. In the result, this Appeal Suit is liable to be dismissed.

S.A.(MD)No.21 of 2017

20. The present Second Appeal has been filed against the judgment and decree dated 30.10.2015 made in A.S.No.15 of 2013 on the file of the District Court, Sivagangai, confirming the judgment and decree dated 01.03.2013 made in O.S.No.161 of 2010 on the file of the Sub Court, Devakottai.

21. The appellant herein is the appellant /plaintiff and the respondents 1 to 7 herein are the respondent /defendants before the Court below. The respondents 8 to 10 herein are the legal heirs of the deceased first respondent.

22. For the sake of convenience, the parties will be referred to as per the litigative status before the trial Court.



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

WEB COPY

23. Brief averment of the plaint is as follows:

The plaintiff and the defendants 1 to 5 are the children of one Savarimuthu Nadar and the sixth defendant is the wife of late Savarimuthu Nadar. The suit properties originally belongs to Savarimuthu Nadar, by virtue of sale deed, dated 31.01.1966. The said Savarimuthu Nadar died intestate on 05.04.1988 leaving behind the plaintiff and the defendants 1 to 6 as legal heirs. This plaintiff submits that when they visited the village, where the suit properties situated, on 17.10.2010, the seventh defendant was cleaning the suit properties and on enquiry, he came to know about the sale by the first defendant in favour of the seventh defendant. According to the plaintiff, the suit property is an undivided property and the plaintiff as well as the defendants 1 to 6 are entitled to have shares. However, he filed a suit for partition demanding partition of his 1/7th share in the suit properties.

24. Brief statement of the written statement filed by the first defendant, is as follows:

The defendant submits that there was an oral partition in their family on 14.08.1988. In pursuance of the same, a Partition Muchalika was



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

entered between the plaintiff and the fifth defendant on 18.02.1989. The defendant submits that according to the said Partition Muchalika, the suit properties were allotted to the first defendant. The first defendant further submits that according to the said Partition Muchalika, the suit property was allotted to the first defendant and that since he being the absolute owner of the suit property, sold the same to the seventh defendant on 05.01.2000. In turn, the seventh defendant sold the property to one Ayyappan and Ramasubramaniyan on 29.11.2010. Now, the property is in actual physical possession and enjoyment of Ayyappan and Ramasubramaniyan. Since the real owners have not been impleaded, the instant suit is liable to be dismissed, on the ground of non-joinder of necessary parties. The defendant further disputed the valuation of the suit. Hence, the defendant prayed to dismiss the suit.

25. In the said suit, the defendants 2, 3,4 and 6 did not appear and they were set exparte.

26. Before the trial Court, the plaintiff has examined 1 witness as P.W.1 and has marked 3 documents as Ex.P1 to Ex.P3. On behalf of the



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

defendants, 1 witness was examined as D.W.1 and no documents have been marked.

27. After considering the either side submissions, pleadings, evidence and materials on record, the trial Court has ultimately dismissed the suit, on the ground of allotment of the suit property to the first defendant in the oral partition. It is also found that through the oral partition, the suit property was allotted to the first defendant – Francis.

28. Aggrieved with the said order, the plaintiff has filed an Appeal in A.S.No.15 of 2013. Even the first appellate Court has confirmed the judgment and decree of the trial Court and has dismissed the first Appeal.

29. Aggrieved with the concurrent finding of the trial Court and the first Appellate Court, the appellant has come forward with the instant Second Appeal.

30. The learned counsel for the appellant would submit that the unregistered partition Muchalika is not valid and binding upon the legal heir



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

of late Savarimuthu Nadar. It is also the submission of the appellant that the reasoning adduced by the trial Court as well as the First Appellate Court is not based upon the evidence and law. Hence, prayed to allow the second appeal.

31. Per contra, the learned counsel for the respondents would vehemently submit that the main contention of the plaintiff is that the suit property is common to the plaintiff as well as the defendants 1 to 6. Whereas, during the cross examination of the plaintiff, he himself has admitted in respect of an oral partition and subsequent allotment of suit property to the first defendant. Therefore, the learned counsel for the respondent would submit that when the plaintiff himself admitted the oral partition and admitted the allotment of the suit property to the first defendant, the very suit for partition is not maintainable. Hence, would submit that the finding of the trial Court and the first Appellate Court is reasoned one and it does not require any interference.

32. This Court, by its order, dated 01.02.2017 has admitted the Second Appeal on the following substantial questions of law:



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

WEB COPY

i) Whether the Courts below have committed an error by their omission to find out that the alleged partition propounded by the respondents/ defendants was not legal and lawful?

ii) Whether the Courts below have committed a mistake by finding that the suit property was comprised within the alleged partition propounded by the defendants without appreciating the evidence available on record?

(iii) Whether Courts below are justified in finding that the so called partition deed comprised of the suit property and whether the courts below have committed an error by holding that the suit for partition is liable to be dismissed?

(iv) Whether the first appellate Court has committed an error by rejecting the additional evidence which would go to show that the so called partition propounded by the defendant was not true and genuine?

33. I have given my anxious consideration to the either side submissions.



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

WEB COPY

34. From the submissions of the either side, what would emerge is that if there was an oral partition as contended by the first defendant, then the plaintiff has no right to have the partition once again.

35. It is an admitted fact that the plaintiff himself has admitted during the cross examination, that the suit property has already been divided. In this regard, the trial Court as well as the First Appellate Court has referred the admissions made by the plaintiff, during his cross examination. By relying the admission, the trial Court as well as the first Appellate Court has found that the plaintiff is not entitled for the partition. The very admission of the plaintiff in respect of the partition is further vindicated by the sale by the first defendant in favour of the seventh defendant, and in turn, to some third parties.

36. It is also pertinent to mention here that, when the plaintiff himself admits the division of property during 1988, and filing a suit during 2010, would only fortify the division among Savarimuthu Nadar's property. Therefore, this Court is in full agreement with the findings arrived at by the



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

WEB COPY

trial Court as well as the first Appellate Court. The appellant has not brought out any material so as to interfere with the well considered order of the Courts below.

37. As such, this Court could not find any substantial question of law in favour of the appellant. Hence, the Second Appeal stands **dismissed**.

38. In the result, both the First Appeal and the Second Appeal stand **dismissed**. There shall be no order as to costs. Consequently, the connected Miscellaneous Petition is closed.

22.08.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes / No
Ls



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

WEB COPY To

- 1.The District Court,
Sivagangai.
- 2.The Sub Court,
Devakottai.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



A.S(MD).No.3 of 2017 and S.A.(MD)No.21 of 2017

C.KUMARAPPAN,J.

LS

A.S.(MD)No. 3 of 2017 and
S.A.(MD)No.21 of 2017

22.08.2023