



S.A.(MD).No.747 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.06.2023

CORAM

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

S.A.(MD).No.747 of 2022

and

C.M.P.(MD).No.11146 of 2022

1.N.Mohana Sundaram

2.M.Bhavani

...Appellants/Appellants/Defendants

Vs.

1.N.Jothi

2.M.Rajeswari

3.N.Rajendra Prasadh

...Respondents/Respondents/Plaintiffs

Prayer: Second Appeal is filed under Section 100 of CPC to set aside the judgment and decree passed by the Court of the Principal District Judge, Virudhunagar District at Srivilliputtur in A.S.No.40 of 2020 on 26.07.2022 in confirming the judgment and decree passed by the Sub Court, Sivakasi in O.S.No.55 of 2013 on 02.03.2020 and allow this Second Appeal.

For Appellants : Mr.M.Jothi Basu

For Respondents : Mr.N.Dilip Kumar



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JUDGMENT

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This Second Appeal has been filed challenging the concurrent findings of the Courts below. The defendants in the suit O.S.No.55 of 2013 on the file of the Sub Court, Sivakasi are the appellants herein. The respondents are the plaintiffs in the said suit. In the forthcoming paragraphs, the parties are described as per their litigative status in the suit.

2. The plaintiffs filed O.S.No.55 of 2013 on the file of the Sub Court, Sivakasi seeking for the relief of partition of their respective 1/4th share and for a consequential relief of permanent injunction restraining the defendants from alienating or subletting the suit mentioned property to third parties. According to the plaintiffs, they along with the first defendant are the legal heirs of the deceased Natesan, who died intestate on 08.03.2005. The first plaintiff is his wife, the second plaintiff is the daughter and the third plaintiff and the first defendant are the sons of the deceased Natesan. The second defendant is the wife of the first defendant. According to the plaintiffs, the suit schedule property was enjoyed in common by the legal heirs after the demise of Natesan. According to the plaintiffs, in order to defraud plaintiffs' right and share over the suit schedule property, the first defendant has made attempts to encumber the suit schedule property. In such circumstances, the suit was filed for partition and for permanent injunction by the plaintiffs.



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3. However, as seen from the written statement filed by the defendants, they would claim that the suit schedule property is a self-acquired property of late Natesan, who died intestate. However, according to them, the plaintiffs relinquished their share in the suit schedule property by orally agreeing to execute a release deed in favour of the first defendant. According to the defendants, the plaintiffs received money, property and jewels from the first defendant for agreeing to relinquish their shares in the suit schedule property in favour of the first defendant. The defendants have also taken a plea of partial partition, as according to them, the plaintiffs are keeping gold articles, silver ornaments, furniture and also Rs.12,50,000/- in the form of cash received by them by the sale of Shri.Jeya match factory which the first defendant claims was developed by him. The defendants have also pleaded that the Court fee paid by the plaintiffs under Section 37(2) of Tamil Nadu Court fees Act is incorrect and they have denied joint possession of the suit schedule property.

4. Based on the pleadings of the respective parties, the Trial Court, namely, the Sub Court, Sivakasi in O.S.No.55 of 2013 framed the following issues:

- a) Whether the suit is bad for partial partition?
- b) Whether the plaintiffs are entitled to get the preliminary decree for partition in respect of their 1/4th share each in the suit schedule property?



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c) Whether the plaintiffs are entitled to get a decree for permanent injunction as prayed for?

d) What is the order regarding the costs of the suit?

e) Whether the plaintiffs are entitled to get any other relief?

5. Before the Trial Court, the plaintiffs filed ten documents which were marked as exhibits A1 to A10. The third plaintiff by name Rajendra Prasadh was examined as P.W.1. On the side of the defendants, nine documents were filed which were marked as exhibits B1 to B9 and the first defendant was examined as a witness (D.W.1).

6. Based on the oral and documentary evidence available on record, after giving careful consideration to the same, the Trial Court, namely, the Sub Court, Sivakasi by its judgment and decree dated 02.03.2020 in O.S.No.55 of 2013 granted a preliminary decree in favour of the plaintiffs by granting 1/4th share each in the suit schedule property as prayed for in the plaint. The Trial Court has categorically held that the defendants have not proved that there was an oral partition between the parties by which the first defendant became the absolute owner of the suit schedule property. The alleged relinquishment said to have been made by the plaintiffs in favour of the defendants has also not been proved by the defendants as seen from the findings of the Trial Court. The



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Trial Court has held that the oral evidence of D.W.1 (first defendant) also does not speak about the oral partition. The Trial Court has also held that Shri Jeya match factory is not a family property of the plaintiffs and the defendants and is a different entity and its sale proceeds are irrelevant for the purpose of adjudicating the dispute, which is the subject matter of the present suit. Excepting for taking a plea for partial partition, the Trial Court has held that the defendants have not filed any documents by giving correct particulars of the gold jewels, silver ornaments and furnitures said to have been given to the plaintiffs in lieu of the suit schedule property by the defendants. The Trial Court has given a categorical finding that the defendants have not produced any oral or documentary evidence to prove that the sale proceeds of Rs.12.5 lakhs in respect of the sale of Shri Jaya match factory was received by the plaintiffs from the first defendant. The Trial Court has also given due consideration to the documents filed by the defendants which were marked as exhibits B1 to B9 and has rightly observed that the said documents are not relevant for the purpose of proving that there was oral partition between the parties.

7. Admittedly, the said documents does not refer to the oral partition alleged to have been entered into between the plaintiffs and the first defendant in respect of the suit schedule property. It is settled law that in the case of co-owners, the possession of one is in law the possession of all, unless ouster or



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exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or any part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and nature of the property as joint is not disputed, the law presumes that he is in joint possession unless he is excluded from such possession. The said proposition is reiterated in the judgment of the Hon'ble Supreme Court in the case of *Neelavathi and others Vs. N.Natarajan and others* reported in **1980 (2) SCC 247**. Hence, the payment of Court fee under Section 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act by the plaintiffs cannot be found fault with as the suit was properly valued and Court fee was paid under Section 37(2) of the Tamil Nadu Court fees Act. Only based on the oral and documentary evidence available on record, the Trial Court has rightly decreed the suit in favour of the plaintiffs by granting a preliminary decree as prayed for in the plaint.

8. The Lower Appellate Court, namely, the Principal District Court, Virudhunagar District at Srivilliputtur in the first appeal filed by the defendants in A.S.No.40 of 2020 has also rightly confirmed the findings of the Trial Court by dismissing the first appeal by its judgment and decree dated 26.07.2022 passed in A.S.No.40 of 2020. Before the Lower Appellate Court, the



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defendants had filed an application under Order 41 Rule 27 of CPC for reception of certain additional documents as additional evidence. While dismissing the said application, the Lower Appellate Court has rightly observed that the documents, namely,

- a) general power of attorney dated 05.12.2007,
- b) Sale deed executed by Jeyakani Nadar in favour of the purchaser by name, Subashri and Lalitha Bharathi dated 29.09.2008,
- c) Registration certificate in the name of the first defendant in respect of Shri.Jeya match industry,
- d) Cancellation deed of the said registration,
- e) Electricity card and
- f) material purchased for development and construction of house

are all documents which do not speak about the oral partition claimed by the first defendant and therefore, they are irrelevant documents. This Court does not find any infirmity in the said findings also. Only based on the oral and documentary evidence available on record, the Courts below have rightly held that the plaintiffs are entitled for a preliminary decree for partition as prayed for by them in the suit.

9. With regard to the contention of the learned counsel for the appellants that no proper points for consideration as required under Order 41 Rule 31 of



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CPC were framed by the Lower Appellate Court is concerned, the said contention has to be rejected as the Lower Appellate Court under the impugned judgment and decree, in paragraph 14 of the said judgment, has framed point for consideration by stating as follows:

"The question before this Court is whether the partition granted by the Trial Court is based on evidence and material facts at all."

10. The only issue that arose for consideration in the suit is whether there was an oral partition between the parties or not, as contended by the first defendant in the suit. Having framed the aforesaid point for consideration which in the considered view of this Court cannot be found to be improper as alleged by the learned counsel for the appellants, this Court is of the considered view that the judgment relied upon by the learned counsel for the appellants with regard to the framing of points for consideration under Order 41 Rule 31 of CPC in the case of ***Malluru Mallappa (Dead) through LRs Vs. Kuruvathappa and others*** reported in ***2020 SAR (Civil) 699*** has been duly followed by the Lower Appellate Court as only after framing point for consideration, namely, as to whether the partition granted by the Trial Court is based on evidence and material facts at all, the Lower Appellate Court, after giving due consideration to the said question based on oral and documentary



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evidence available on record and after giving due consideration to the judgment of the Trial Court, has rightly dismissed the first appeal filed by the defendants in the suit. Infact as seen from the judgment reported in **2020 SAR (Civil) 699** relied upon by the learned counsel for the appellants, in paragraph 19, it has been made clear that the First Appellate Court has to set out points for determination, record the decision thereon and give its own reasons. In the case on hand, it is not in dispute that point for determination was framed by the Lower Appellate Court as required under Order 41 Rule 31 CPC and reasons have also been given by the Lower Appellate Court for confirming the findings of the Trial Court. Therefore, the contention of the learned counsel for the appellants that points for determination as required under Order 41 Rule 31 of CPC was not adhered to by the Lower Appellate Court is not correct. Only based on the oral and documentary evidence available on record, the Courts below have rightly held that the first defendant has not proved oral partition between the parties and therefore, has rightly granted the relief of partition in favour of the plaintiffs as prayed for in the plaint by passing a preliminary decree.

11. This Court on 30.03.2023 admitted the Second Appeal by formulating the following substantial questions of law:

"i) Whether the lower Appellate Court was right in



giving due consideration to the documentary evidence produced by the appellants along with an application filed under Order XLI Rule 27 C.P.C without giving any opportunity for them to place their submissions with regard to the same and dismissing the application filed by the appellants under Order XLI Rule 27 C.P.C?

ii) Whether the first Appellate Court is correct in disposing of the appeal without framing points for consideration which is mandatory as per Provisions under Order XLI Rule 27 C.P.C?

iii) Whether the courts below were correct in non framing of specific issue about the court fee paid by the plaintiffs under Section 37(2) of the Tamil Nadu Court Fees Suits Valuation Act, 1955 since the plaintiffs are not in possession and enjoyment of the suit schedule property?

iv) Whether the courts below were right in rejecting the oral partition claimed by the appellants/defendants despite the appellants having produced evidence to that effect?

12. For the foregoing reasons, the substantial questions of law formulated by this Court at the time of admission of this Second Appeal are answered against the appellants/defendants as they have not proved through their oral and documentary evidence that there was an oral partition between the plaintiffs and the defendants and that the plaintiffs had released their share in the suit schedule property in favour of the defendants. In the result, there is no merit in



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this Second Appeal. Accordingly, this Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

27.06.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
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To

- 1.The Principal District Court,
Virudhunagar District at Srivilliputtur.
- 2.The Sub Court,
Sivakasi.
- 3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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ABDUL QUDDHOSE, J.

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