



Judgment dated 13.06.2023 in
S.A.No.1786 of 1999

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 13.06.2023

Coram:

THE HONOURABLE MR.JUSTICE P.VELUMURUGAN

S.A.No.1786 of 1999

1. Sellappen (died), S/o Marimuthu
2. A.Shanmugavel, S/o Late Sellappan
3. Raja, S/o Late Sellappan
4. Selvaraj, S/o Late Sellappan

(Appellants 2 to 4 are impleaded/brought on record as Legal Representatives of the deceased sole appellant, Vide Court order, dated 18.03.2022 made in C.M.P.(MD).Nos.2355, 2356 and 2358 of 2022 in S.A.No.1786 of 1999)

.. Appellants

Vs.

Periyasamy (died)

1. Govindammal, W/o Periyasamy
2. Thiagarajan, S/o Periyasamy
3. Karunakaran, S/o Periyasamy
4. Vijayalakshmi, W/o Pathalam
5. Ravichandran, S/o Periyasamy
6. Sridharan (died), S/o Periyasamy
7. Kanagambal (died), W/o Late Maruthamuthu

(Seventh respondent impleaded/brought on record as Legal Representative of the deceased sole appellant, Vide Court order, dated 18.03.2022 made in

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C.M.P.(MD).Nos.2355, 2356 and 2358 of 2022
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8. Mrs.Kamali, W/o Late Sridharan

9. Minor Sreeha, D/o Late Sridharan

10. Minor Vaseeharan, S/o Late Sridharan

(Respondents 8 to 10, are brought on record
as Legal Representatives of the deceased
sixth respondent, vide Court Order, dated 27.04.2023
made in C.M.P.(MD).Nos.2903 to 2905 of 2023
in S.A.No.1786 of 1999)

.. Respondents

Second Appeal filed under Section 100 of the Code of Civil Procedure,
against the judgment and decree dated 23.01.1998 in the Appeal Suit No.186 of
1995 on the file of the Subordinate Court, Kulithalai, reversing the judgment and
decree dated 30.10.1992 in Original Suit No.656 of 1989 on the file of the
District Munsif Court, Kulithalai.

For appellant : M/s.Ponnupandi and K.Govindarajan
for M/s.Sarvabhauman Associates

For respondents: No appearance

JUDGMENT

The defendant in O.S.No.656 of 1989 on the file of the District Munsif
Court, Kulithalai, is the appellant herien.

2. During the pendency of the appeal, the original appellant died and
therefore, his legal heirs have been impleaded.

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3. The respondent/Periasamy (since deceased) in the Second Appeal, was the plaintiff in the above said suit. During the pendency of the Second Appeal, he died and therefore, his legal representatives have been impleaded as respective respondents herein.

4. One Periasamy who is the plaintiff, has filed the suit for partition and also claimed mesne profits. The said suit was dismissed on 30.10.1992. Challenging the same, the plaintiff filed First Appeal in Appeal Suit No.186 of 1995. The First Appellate Court (lower appellate Court), after hearing the arguments and re-appreciating the evidence, allowed the First Appeal and set aside the judgment and decree passed by the trial Court and the suit was decreed. Challenging the said judgment and decree passed by the lower appellate Court, the defendant has preferred this Second Appeal.

5. This Second Appeal is of the year 1999 and the same is pending in the stage of 'Notice of Motion'. Heard the arguments of the learned counsel for the appellants/defendants. There is no representation for all the respondents. Hence, on a perusal of the records connected with the Second Appeal, while this judgment is being disposed of by now today (13.06.2023), this Court formulates the following substantial questions of law:

(i) Whether the lower appellate Court is correct in granting a decree for partition, when admittedly the plaint proceeds on the basis of prior partition ?



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(ii) Whether the lower appellate Court is correct in granting a decree for partition, in the absence of joint ownership and joint possession ? and

(iii) Whether the lower appellate Court is correct in granting preliminary decree for partition, when admittedly the respective parties are in possession of the different shares within the specified boundaries ?

6. Brief averments made in the plaint are that, the suit property originally belonged to one Periannan Muthuraja and he died, leaving behind his four sons, namely Manickam, Malaikozhunthan, Arumugam and Vairakondaan. Thereafter, these four sons inherited the ancestral joint property and each of them was entitled to equal shares, i.e. undivided 1/4 share in the suit property. The eldest of them, i.e. Manickam got Western side and the younger son, namely Vairakondaan got the Eastern side and the other two brothers got the middle portion of the suit property and they were under separate possession and enjoyment of the same.

7. Subsequently the brothers of the said Vairankondaan and Manickam, sold their share to one Karuppayee Ammal on 27.10.1941 and thereafter, the said Karuppayee Ammal sold the property to one Vellaiyan. Subsequently, the plaintiff purchased the said property from the said Vellaiyan on 25.02.1961. In that way, the defendant purchased the property from Malaikozhundhan and



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Manickam and thereafter, on 01.06.1953, and even subsequently, the defendants obtained Patta for a larger extent and therefore, they have applied for cancellation of Patta and also obtained joint Patta. The defendant was enjoying larger extent, i.e. out of 56 cents, they were using 37 cents, and more than that, they have purchased it.

8. It is the further case of the plaintiff that the defendant was only enjoying 31 cents and the plaintiff was left with only 19 cents, and therefore, the plaintiff had filed the present suit for partition.

9. The case of the defendant as per the written statement is that the suit property originally belonged to the wife of Periannan, i.e. Aariyanachi. After death of the wife of Periannan, their four sons, namely Manickam, Malaikozhundhan, Arumugam and Vairakondaan inherited the property and they divided the suit property and they are entitled to 1/4 share and the plaintiff purchased the property under Ex.A-1 from two brothers, namely Vairakondaan and Arumugam. The defendant purchased the property from Malaikozhundhan and Manickam, and the Eastern portion of 28 cents had been purchased by the plaintiff with four boundaries and the defendant also purchased 28 cents. When the plaintiff purchased the property with four boundaries and as he has not purchased the property of undivided share, the plaintiff is not entitled to file the suit for partition.



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10. It is the further case of the defendants that they were enjoying 37 cents out of 56 cents and obtained Patta for the same and without their knowledge, the plaintiff cancelled the Patta behind the back of the defendant and obtained joint Patta, against which, there is an appeal remedy before the appellate authority. Therefore, the defendant is entitled to adverse possession for the excess land, which is also under possession. Since the four brothers divided the property and sold their respective shares, two of the brothers sold the property to the plaintiff and two of the brothers sold the property to the defendant and the plaintiff obtained the boundaries, whereas, the plaintiff suppressed the facts and sold the suit property as if it is undivided property and filed the present suit, and therefore, there is no cause of action to file the present suit, which may be dismissed.

11. Based on the pleadings, the trial Court framed the following issues:

- (a) Whether the suit for partition filed by the plaintiff, is valid ?
- (b) Whether the suit property is correct ?
- (c) Whether the plaintiff has prescribed title by adverse possession of 37 cents ?
- (d) Whether the plaintiff is entitled to get partition as prayed for in the plaint ?
- (e) Whether the plaintiff is entitled to get mesne profits as claimed in the



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plaint ?

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(f) Whether the plaintiff is entitled to get the future mesne profits ? and

(g) To what other relief the plaintiff is entitled to ?

Subsequently, on 12.06.1989, additional issue was framed to the effect that, "whether the defendant is liable to pay Rs.6,000/- as past mesne profits on production of accounts for enjoyment of 37 cents? "

12. In order to prove their case, on the side of plaintiff, two witnesses were examined as P.Ws.1 and 2 and nine documents were marked as Exs.A-1 to A-9. On the side of defendant, one witness was examined as D.W.1 and 30 documents were marked as Exs.B-1 to B-30. Besides, two Court documents were marked as Exs.C-1 and C-2.

13. After trial and after hearing the arguments advanced on either side, and also considering the oral and documentary evidence, the trial Court dismissed the suit on the ground that already four brothers divided the property, and the plaintiff purchased the property with four boundaries of 28 cents, and therefore, the plaintiff is not entitled to file the suit for partition, and also based on the Advocate Commissioner's report, the defendant was not in enjoyment of the entire 56 cents, and hence, the plaintiff is not entitled to any mesne profits also, and therefore, the suit was dismissed.

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14. Challenging the judgment and decree of the trial Court, the plaintiff preferred First Appeal (Appeal Suit) before the Subordinate Court, Kulithalai and the learned Sub-Judge, after hearing the arguments, taken the following points for determination:

- (a) Whether the appeal is liable to be allowed ?
- (b) Whether the plaintiff is entitled to get the relief as prayed for ? and
- (c) Whether the defendant had prescribed title by adverse possession of 37 cents ?

15. Based on the pleadings and also considering the grounds of the First Appeal, and also considering the judgment and decree of the trial Court, the First Appellate Court, while re-appreciating the evidence, partly allowed the First Appeal and the judgment and decree passed by the trial Court, were modified and therefore, the defendant in the suit has filed the present Second Appeal.

16. During the pendency of the First Appeal, the plaintiff died and therefore, his legal heirs are impleaded as parties.

17. The Second Appeal is of the year 1999 and is pending for a long time in the 'notice of motion' stage itself and finally, it is taken up by this Court today and the following substantial questions of law are framed and the judgment is being delivered now as such:



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(i) Whether the lower appellate Court is correct in granting a decree for partition, when admittedly, the plaint proceeds on the basis of prior partition?

(ii) Whether the lower appellate Court is correct in granting a decree for partition, in the absence of joint ownership and joint possession?

(iii) Whether the lower appellate Court is correct in granting the preliminary decree for partition, when admittedly respective parties are in possession of the different share within the specified boundaries?

18. Though the case of the plaintiff is that the suit property originally belonged to one Periannan Muthu Raja, according to the defendant, the suit property originally belonged to the wife of the said Perianna Muthu Raja. However, both parties admitted that they have got 4 sons, by name Manickam, Marikozhundan, Arumugam and Vairakondaan and the four brothers inherited the property and subsequently they have divided the property. Both the parties have admitted that the suit property is of 56 cents with title. All the four brothers are entitled to 1/4 share, i.e. 14 cents. Manickam got the Western most of the property and the said Vairakondaan got Eastern most of the 1/4 share and Arumugam and Marikozhundaan got the middle portion of the property.

19. According to the respondent/plaintiff (since deceased and legal heirs impleaded) had purchased the property from Vairakondaan and Arumugam of an



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extent of 28 cents with four boundaries. The deceased defendant earlier filed a portion of Manickam and Marikozhundaan and therefore, from the pleadings and evidence, it is clear that the plaintiff had purchased 28 cents on the Western side of 56 cents, and the plaintiff purchased Eastern side of 28 cents of 56 cents and the defendant purchased Western side of 28 cents.

20. Now, on a perusal of the records, it is clear that the plaintiff filed the suit for partition and mesne profits as if the plaintiff and defendant are joint owners and the property is undivided property and therefore, the plaintiff has filed the present suit.

21. Further, Ex.A-1 sale deed itself shows the boundaries and extent, but whereas in the plaint, the plaintiff has shown as if it is undivided of total extent of 56 cents, which itself clearly shows that the plaintiff has not approached the Court with clean hands and also as if the plaintiff was in joint possession with the defendant and in all, 56 cents and the plaintiff is not enjoying the suit property, and he is only having constructive possession and therefore, he asked that the plaintiff alone is in physical possession as joint owner and is liable to pay the past and mesne profits. Even from the Advocate Commissioner's report, i.e. Ex.C-1 and Ex.C-2, and also from the plaintiff's evidence, though there is joint Patta, according to the defendant, the appellant has challenged the same before the Revenue Divisional Officer concerned, and the same is pending at the time of



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filing the suit itself. But however, the fact remains that the defendant was enjoying 37 cents out of 56 cents.

22. The specific case of the defendant is that they have purchased the share of only Manickam and Malaikozhudaan and out of four brothers, he purchased the property from two brothers and therefore, the plaintiff has also purchased from the shares of only two brothers and the plaintiff's vendor's predecessors purchased from the sales and at last, the plaintiff purchased only the share of the two brothers specifically with an extent of 28 cents. The plaintiff and the defendant admitted that the four brothers are entitled to each 1/4 share equally and they also, during the life-time, divided the property and also the Eastern side of the property was allotted to Vairankondaan and the Western side was allotted to Manickam and therefore, they purchased the property with boundaries and it is not as if the recitals in the sale deed, he is not entitled to 1/2 share and hence, the plaintiff is not entitled to file the present suit for partition.

23. Though the trial Court rightly appreciated the pleadings and evidence, and dismissed the suit, however, when the plaintiff filed First Appeal, the first appellate Court failed to appreciate their own pleadings and admissions and only taking into consideration the fact that there is joint Patta and the appellants herein are enjoying their extent, and therefore, the First Appeal was partly



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allowed and the suit for partition was decreed.

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24. Re-appreciation of evidence by the lower appellate Court, is erroneous and perverse, because even the appellant and respondent in their pleadings, have admitted that the four brothers inherited the property from their parents and each of them are entitled to 1/4 share and throughout their lifetime, they have divided the property and one of the brother got the Eastern portion and the other brother got Western end and the plaintiff purchased from the share of the two of the brothers and the defendant also purchased the shares of the two of the brothers.

25. Even as pointed out by the trial Court, the plaintiff purchased the property from the successors of the two brothers and Ex.A-1 clearly shows that they have purchased 28 cents with four boundaries, i.e. half of the suit property, whereas he suppressed the same in the suit and the suit property is shown as 56 cents, and therefore, this Court finds that the plaintiff has not approached the Court with clean hands.

26. Though the plaintiff purchased half of the property and the defendant had purchased half of the property, of course from the Advocate Commissioner's report and the other evidence and even the written statement, it is seen that the appellant admitted that they are enjoying more than the extent which they have purchased the shares of the two of the brothers, but if once they have



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purchased the specific extent and the documents and not as undivided share only and then if a person is enjoying larger extent, the plaintiff ought to have filed the suit for recovery of possession. If the defendant is claiming title and possession, he should have also filed the suit for partition. The appellant also claimed adverse possession, i.e. he admitted the title of the plaintiff, and therefore, even after filing of the written statement, the plaintiff ought to have amended the plaint and that the appellant had admitted the partition and he purchased only the shares of the two of the brothers and he has admitted that he is enjoying more than that extent and therefore, he ought to have amended the plaint for recovery of possession. Therefore, when once the plea is of adverse possession, and he admitted the title of the defendant for larger extent, but however, the defendant maintained the suit from the date of plaint till the second appeal is filed and therefore, the suit for partition was filed with claim of mesne profits also. Therefore, the lower appellate Court failed to consider and re-appreciate the evidence and the admission made by the plaintiff and also the documents obtained by both the parties.

27. Further, only during the UDR Scheme, there was some mistake and the respondent managed to get a joint Patta. When they both have admitted the purchase of the divided property, they have to apply for separate Patta and got the same and moved for sub-division, but without doing that, the plaintiff had



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filed the present suit for partition.

28. Admittedly, the appellant and respondent are not common ancestors or common coparceners, but they have admitted purchase from the common ancestors/coparceners. Both are strangers to the original owner of the property and they have only purchased the property and they are claiming right only through the sale deed and therefore, the plaintiff has to go with the plaint and the recitals are also not stated and possession had also not been taken and there was joint possession, but once the recitals say that they have divided the property on the date of sale with the possession of the specific boundaries and extent was handed over to the purchaser and unless the plaintiff proves that the document was not acted upon, all the said 56 cents were enjoyed commonly without any boundaries, and he is entitled to file the suit for partition, even though one of the sons stated that earlier, they have filed the suit for partition, but preliminary decree was passed, but within the limitation, but no steps were taken for final decree proceedings and the final decree was thereafter obtained and the property was divided by metes and bounds, but however, in the present pleadings and oral and documentary evidence, it is clear that both the parties admitted and four brothers of the original owner of the family and they have divided during their lifetime and the plaintiff purchased from two brothers under a document and the defendant purchased from two brothers with 1/4 : 1/4 share

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in the suit property. The plaintiff also purchased the two portions of the property in both boundaries and hence, the suit for partition is not maintainable.

29. Therefore, substantial questions of law are answered accordingly in favour of the defendant and the judgment and decree of the first appellate Court are set aside and the suit shall stand dismissed. Consequently, the Second Appeal is allowed, but without costs.

13.06.2023

Index: Yes/no

Speaking Order: Yes/no

Neutral Citation: Yes/no

CS

To

1. The Additional District Munsif, Kulithalai.
2. The Subordinate Judge, Kulithalai.
3. The Section Officer, V.R.Section,
Madurai Bench of Madras High Court, Madurai.



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