

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.10.2023

CORAM

THE HONOURABLE MRS.JUSTICE R.KALAIMATHI

S.A.No.1131 of 2002

1.Manickam(Died)

2.Poomanidhas

(R2 is recorded as LR of the deceased

1st appellant vide order dated 08.06.2012

made in S.A.No.1131 of 2002)

... Appellants/Appellants/Defendants

-Vs-

1.Varampetran(Died)

2.Arumaidhas

3.Palammal

4.Manohar

5.Amutha

6.Babu

... Respondents/Respondents/Plaintiffs

(R3 to R6 are brought on record as LR's
of the deceased 1st respondent vide Court
order dated 15.06.2023 made in
M.P(MD)Nos.1 to 3 of 2012)

PRAYER: Second Appeal filed under Section 100 of the Civil

Procedure Code, against the judgment and decree of the District Judge, Nagercoil made in A.S.No.34 of 2001 dated 15.03.2002 pursuant to the judgment and decree dated 11.01.2001 in O.S.No.19 of 1996 on the file of the Principal District Munsif, Nagercoil.

For Appellants : Mr.V.Meenakshi Sundaram,
for Mr.K.Sreekumaran Nair

For R1, R3 to R5 : No appearance

J U D G M E N T

Aggrieved by the judgment and decree passed by the First Appellate Court viz., the District Court, Nagercoil in A.S.No.34 of 2001, dated 15.03.2002, the two sons of Boothathan (son of Valan) viz., Manickam(D1) and Poomanidhas(D2) have preferred this second appeal.

2.Originally, the two sons of Madan, S/o.Vallan viz., Varampetran(P1) and Arumaidhas(P2) filed a suit before the Principal District Munsif Court, Nagercoil, in O.S.No.19 of 1996 against the appellants herein for the relief of partition of below said property and

for permanent injunction not to interfere with the construction in the suit schedule property. The suit property details are as follows;

District	-	Kanyakumari
Taluk	-	Thovazhai
Village	-	Chenbagaraman Pudhoor
Janmam	-	Pandarakudi
Old S.No.1571-A and Resurvey No.442/5,		
Total extent	-	8cents (3 ares). Inclusive of 5 ½

cents of land and building out of the total extent of 8 cents(3 ares) [partition is sought for 5 ½ cents of land and building as mentioned supra]. Besides counteracting the details of plaint, the defendants have made counter claim for declaration of title for the extent shown in the rough sketch attached with the written statement as “A E J D” and for delivery of possession of the suit property.

3.The trial Court, after hearing both sides and upon consideration of oral and documentary evidence, concluded that based on the available evidence of D.W2 and Ex.A7, Ex.D8 to Ex.D10, it could be inferred that though it was partitioned among the sharers, still the suit property was not divided, as per the partition deed and the suit was decreed by granting preliminary decree for partition as prayed for and the counter claim made by the defendants was dismissed.

4.Aggrieved, the defendants viz., P.Manickam, S/o.Boothathan and Poomanidhas, S/o.Manickam preferred an appeal before the District Court, Nagercoil. The learned First Appellate Court has concluded that even the first defendant who is examined as D.W.2, in his evidence, he would admit that as per Ex.A.1 partition deed, which was executed in the year 1953, the suit property was not divided and even at the time of construction of the house by the defendants also four boundaries of each sharer was not

delineated and it has also been observed that even the Advocate Commissioner in his Ex.C.1/report has made a mention that the parties to the partition deed have not divided the suit property and concluded that the plaintiffs are entitled for the relief of partition. As regards the counter claim, it was concluded that no document was filed by the defendants to show that the two cents in the suit survey number was being enjoyed by the mother of the first defendant and at present by the defendants and the judgment of the trial Court was confirmed by dismissing the first appeal.

5.According to the plaintiffs, the plaint schedule property originally owned by their grandfather viz., Valan, S/o.Madan, and pursuant to his death, the property devolved upon his sons viz., Boothathan, Paradesi and Madan, plaintiffs' father herein: the three sons of Valan partitioned their family properties on 20.03.1953: the total extent of the suit property is 8 cents and out of which, Boothathan was allotted 2 ½ cents('A' schedule Item No.2): 2 ¼

cents was allotted to Paradesi('B' schedule Item No.2): 3 ¼ cents was allotted to the share of Madan (C schedule Item No.2). It was further claimed that they are in possession and enjoyment of their respective shares: Paradesi sold his share of 2¼ cents on 06.03.1964 in favour of his brother Madan and thereafter, Madan is in possession and enjoyment of 5½ cents, out of 8 cents: that in the plaint schedule property, except the house of the second plaintiff bearing Door No.1/86 in Chenbagaraman Pudhoor Panchayat, the remaining extent is kept vacant and the plaintiffs as well as the defendants are in common enjoyment of the remaining extent of the plaint schedule property: At request by the plaintiffs, 1½ cents in the southern side of the plaintiffs' house was spared in March 1994 with an understanding to adjust the area on the rear portion, in which, the defendants got land. The plaintiffs further claimed that the second plaintiff had also put up a bath-room and latrine on the western side of the side of the second defendant's house and is in enjoyment of the same for the past several years. The defendants failed to adjust

1½ cents which was given to them, they arose issues in peaceful enjoyment. Hence, the suit for partition of 5 ½ cents and for permanent injunction not to interfere with the construction in the suit schedule property.

6.Counteracting to the plaint details, the defendants have claimed that the grandfather of the parties to the suit viz., Valan, S/o.Madan, purchased the suit property, which was a vacant site measuring 6 cents only and not 8 cents as the plaintiff would claim. This is evident from the sale deed, dated 21.03.1100 M.E, registered as per Document No.580/1100 M.E, of the Boothapandy Sub-Registry, which was executed by the vendor Devasagayam Nadar: their paternal grandfather Valan was in possession and enjoyment till his death and after his life time in 1953, they had partitioned the suit properties and other properties. The description of the area as 8 cents is denied as it was a clerical error which had un-intentionally crept in the document: that the defendants would claim that as Valan

purchased only 6 cents in the year 1100 M.E, his descendants cannot get more than what their father had got: that in the partition deed of 1953, an area approximately measuring $\frac{1}{2}$ cents was left as the common pathway on the northern area of the property, so that the three brothers have got only $\frac{1}{3}$ share in 6 cents inclusive of the pathway and it was stoutly denied by the defendants that $5\frac{1}{2}$ cents of property comprised in the plaint schedule was left for the plaintiffs, as they are not entitled to that much area: The defendants have further claimed that the second plaintiff has put up a residential house in 1983, there was a thatched house in about 1 cent bearing Door No.1-86: The said thatched house was removed by him and the house was constructed in the said property: The defendants stoutly denied that the plaintiffs asked for adjustment of $1\frac{1}{2}$ cents on the western portion: By way of counter claim, declaration of title of the second defendant over the property marked as "A E J D" in the rough sketch appended to the written statement and for recovery of possession of the property have been sought for.

7.The trial Court has framed the relevant issues.

8.The learned trial Judge decreed the suit by granting preliminary decree for partition and dismissed the counter claim. Assailing the judgment of the trial Court, the defendants filed the first appeal in A.S.No.34 of 2001, dated 15.03.2002, before the District Court, Nagercoil, was dismissed by confirming the judgment of the trial Court. This Second Appeal is preferred by the defendants.

9.Despite the receipt of notice, the respondents neither appeared nor represented through their counsel.

10.The learned counsel appearing for the appellants/defendants 1 and 2 would vehemently argue that the suit property belonged to Valan and after his life time, the three sons of Valan partitioned the suit property as well as the other properties through Ex.A.1 dated 23.03.1953 and in the suit property,

Boothathan got 2 ½ cents ('A' schedule Item No:2). It is his further argument that the suit property was purchased by their grandfather Valan through a registered sale deed dated 21.03.1100M.E.,(Ex.B.4). The extent dealt with in Ex.B.4 is only 6 cents. Therefore, the extent of the suit property is 8 cents is incorrect. It is his further argument that their mother Smt.Arumugam Boothathan purchased ¼ x 4 feet(கால் அடக்கு 4 அடி), through Ex.B.3 sale deed. Joint Patta, Ex.B13 is filed and it is granted for 3 ares. It is his further argument that the trial Court, without advertng to the contents of Ex.B3 and Ex.B4, has decreed the suit is also incorrect. The First Appellate Court, after taking into consideration of Ex.A13 and Ex.A14, receipts issued by the Sub-Registrar of Boothapandi, has concluded that the extent of the suit property is 8 cents is totally incorrect and prayed to allow his counter claim and dismissed the suit.

11.Heard the learned counsel appearing for the appellants and perused the materials available on record.

12.At trial, the second plaintiff Arumaidhas, was examined as P.W.1. Ex.A1 to Ex.A12 were marked and the payment receipts issued by the Sub-Registrar, Boothapandi were marked as Ex.A13 and Ex.A14 by the First Appellate Court. On the defendants' side, the defendants were examined as D.W.1 and D.W.2 and one Pappathiammal has been examined as D.W.3. Ex.B1 to Ex.B34 were marked. Advocate Commissioner's report and his rough sketch are Ex.C.1 and Ex.C.2.

13.The following substantial questions of law arise for consideration:

(i)As Valan had only purchased 6 cents under Ex.B4, dated 21.03.1100M.E.,(1985 AD) whether the trial Court was right in granting a preliminary decree for partition of 5½ cents to the plaintiffs.

(ii)whether the trial Court was incorrect in not granting declaration of title in favour of the second defendant over the property marked as A E J D in the rough sketch appended to the

written statement and for recovery of possession from the second plaintiff, based on the sale deed of their mother Ex.B3.

14.Valan, S/o. Madan, had three sons viz., Boothathan(father of the first defendant Manickam), Paradesi and Madan (sons of first and second plaintiffs). Boothathan's wife is Smt.Arumugam Boothathan.

15.The prime issue in the suit is whether the Valan owned 6 cents or 8 cents in the suit survey number. As per the partition deed, Ex.A1, dated 20.03.1953, it was executed between the above said three sons of Valan, son of Madan. As per the partition deed, A schedule was allotted to Boothathan, B schedule was allotted to Paradesi and C schedule was allotted to Madan. In the partition deed, they are only concerned about the suit property alone. In the partition deed, the above said three sons were allotted as follows:

Boothathan	- 2 ½ cents
Paradesi	- 2 ¼ cents
Madan	- 3 ¼ cents
Total	- 8 cents

16.As contended by the plaintiffs on 06.03.1964, Paradesi has sold 2¼ cents in the suit survey number viz., S.No.1571A, in favour of Madan and therefore, plaintiffs claim 5½ cents out of 8 cents.

17.With regard to the extent of the suit property, the defendants claim that the extent of suit property is only 6 cents and not 8 cents, as claimed by the plaintiffs and to substantiate the said details, Ex.B4/sale deed in the name of Valan, S/o.Madan, was marked. Ex.B4 is executed on 21st Aippasi 1100 by Devasagayam Nadar, wherein an extent of only 6 cents, in suit survey number was dealt with. The relevant English date of Ex.B4 is, first week of

November 1925. On the date of Ex.B4, it appears that Valan, son of Madan, had purchased in the first week of 1925 an extent of 6 cents in S.No.1571-A from one Devasagayam Nadar, out of 1.27 cents. The plaintiffs have claimed that as per the partition deed in the said suit survey number, 8 cents was partitioned among 3 sons of Valan as mentioned supra. How did Valan get the suit property was not mentioned in the plaint, whereas, the extent was refuted by the defendants and as averred in the written statement, to substantiate the said claim, sale deed in the name of Valan, S/o.Madan is marked Ex.B.4, would clearly go to show that Valan's family had got only 6 cents in S.No.1571A, not 8 cents, as alleged. Therefore, the plaintiffs are claiming over and above the extent dealt with in Ex.B4, which they cannot.

18.The Advocate Commissioner's report narrates the physical features of the suit property and of course the construction details.

19.As regards the plaintiffs' side documents, kist receipts standing in the name of Paradesi for S.No.1571A, is Ex.A4. Kist receipt in the years 1961 to 1963 for the suit property stands in the name of Boothathan, is Ex.A5, wherein the extent is mentioned as 2½ cents in Ex.A5. House tax receipts in the name of Arumaidhas are Ex.A8 and Ex.A9. Ex.B2 is the gift deed, dated 22.07.1991, executed by the first defendant Manickam in favour of his son Poomanidhas in respect of his share in the suit property. Kist receipt in the name of first defendant Manickam in respect of the suit property for an extent of 2½ cents pertaining fasli years 1377 and 1378 is Ex.B6. Ex.B13 is the Patta Pass Book, dated 20.05.1986 granted in the name of Boothathan, son Manickam, Valan, son of Madan and Yesuvadiyal daughter Arumugam, for the S.No.442/5 and the extent mentioned therein is three ares. Kist receipts in the name of Poomanidhas for the said patta number are Ex.B16 and Ex.B17. Ex.B.34 – A Register Extract wherein S.No.442/5 stands in the name of 1.Manickam, 2.Madan and 3.Smt.Arumugam for the extent of 3

ares.

20.As regards the counter claim, it was claimed by the defendants that the first defendant's mother Smt.Arumugam had purchased an extent of ¼ feet x 4 feet (கால் அடக்கு 4 அடி) from one Laxmanan on 14th Aadi 1098 M.E, which falls on 30.07.1933. Ex.B3, sale deed reads that ஏசுவடியாள் மகள் ஆறுமுகம் பேருக்கு மேற்படி வகைப்படி சிவன்னாஞ்சான் மகன் லெட்கமணன் எழுதிக்கொடுத்த விலையாதாரம். survey number is mentioned as 1571 out of one acre 10 cents. The certified copy of the said sale deed is Ex.B29. Ex.B5 is the connected kist receipts in the name of Yesuvadiyal Arumugam for S.No.1571-A for the fasli years 1377 and 1378. Even in the patta, in Ex.B13, Boothathan's wife Arumugam name is found as joint patta. In the counter claim, the relevant reliefs are claimed for declaration of title of the second defendant for the property marked as “A E J D” in the rough sketch appended to the written statement and for recovery of possession of the said property from the second plaintiff.

21.Of course along with the written statement, rough sketch is enclosed and it is marked as Ex.B1. Ex.B3 dates back to 1923. Partition was taken place on 20.03.1953(Ex.A1). The case of the defendants is that the counter claim property is situated in the same survey number. The sale deed and kist receipts have been filed in order to identify the counter claim property. To clarify the details, if the revenue official is examined with reference to the documents, it would have thrown much light on the issue. In the counter claim, the extent of the properties is not stated. The defendants have not clarified the extent of the counter claim property. For want of the details, this Court is not in a position to appreciate the above said documents pertaining to Arumugam and the effect is counter claim of the defendants viz., counter claim falls on the ground.

22.Though an extent of 8 cents in S.No.1571-A was dealt with by the sons of Valan, it was made clear that the said Valan purchased only 6 cents through Ex.B4. It is interesting to note that

the document number of Ex.B4 finds a place in Ex.A1 in the last portion.

23.As per Ex.A2, admittedly Paradesi has sold his share in the suit property in favour of his brother Madan through Ex.A2, dated 06.03.1964. As per Ex.A1 as mentioned supra, out of 8 cents, Boothathan was allotted 2 ½ cents, Paradesi was allotted 2 ¼ cents and Madan was allotted 3 ¼ cents. Now, it is concluded that Valan son of Madan had only purchased through Ex.B4 an extent of 6 cents and not 8 cents. Therefore, instead of 8 cents, the parties to the partition deed have to partition out of 6 cents. Admittedly, Madan purchased the share of Paradesi. Therefore, in the same proportion, Boothathan and Madan are entitled to get partition in the 6 cents in S.No.1571-A of Chenbagaraman Pudhoor Village. The same can be worked out in the final decree for partition. Out of 6 cents, it is worked out as follows:

8 Cents

2.50 = 31.25% (Boothathan)
2.25 = 28.125% (Paradesi)
3.25 = 40.625% (Madan)

6 Cents

31.25% = 1.875 cents (Boothathan)
28.125% = 1.687 cents (Paradesi)
40.625% = 2.437 cents (Madan)

Total -----
5.999 cents

24.As per Ex.B4 sale deed, it was made clear that Valan, son of Madan, who is the paternal grandfather of both the plaintiffs and the defendants had purchased only 6 cents in S.No.1571A, but in Ex.A1, partition deed, in the same survey number, 8 cents was dealt with and all the three sons of Valan was allotted a share. Therefore, based on Ex.B4, Valan has purchased only 6 cents and the trial Court concluded that as it was not objected to by the defendants' father at the time of execution of Ex.A1, partition deed, is

not acceptable. As regards the counter claim, what is the extent of the property claimed is not mentioned in the prayer. It is useful to extract the provisions of Order 7 Rule 3 of C.P.C:

“3.Where the subject-matter of the suit is immovable property.- Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. “

As per Order 7 Rule 3 of C.P.C., the plaint shall contain description of the property. Sufficient to identify the same. In the counter claim, extent is not mentioned in clear terms.

25.Ex.B3 is the sale deed in the name of the first defendant's mother Yesuvadiyal Arumugam registered on 14th Aadi 1098 M.E,(30.07.1933). Joint patta in the name of Tmt.Arumugam

Boothathan and the relevant house tax receipts (Ex.B5) have been filed. Though patta and kist receipts have been filed, what is the extent for which, the counter claim is filed is not known and not clarified through examining the revenue officials. Non-mentioning of extent is fatal for the defendants.

26.Thus, the first question of law is answered in favour of the defendants. The second question of law is answered against the defendants. Therefore, the trial Court was right in rejecting the claim of the defendants.

27.Based on the aforesaid discussion, the second appeal stands allowed in part. The suit is decreed to the effect that out of 6 cents, based on the above said ratio, Madan having purchased the share of Paradesi also. Therefore, preliminary decree for partition of 4.12 cents is passed in favour of the plaintiffs and the counter claim of the defendant stands dismissed. The judgment and decree passed

in A.S.No.34 of 2001 by the District Court, Nagercoil, stand set aside.
Considering the relationship between the parties.,there is no order as
to costs.

20.10.2023

NCC:Yes/No

Index:Yes/No

Internet::Yes/No

To

- 1.The District Court,
Nagercoil.
- 2.The Principal District Munsif,
Nagercoil.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

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