



S.A.No.833 of 2004

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 15.12.2023

CORAM

THE HONOURABLE MRS.JUSTICE R.KALAIMATHI

S.A.No.833 of 2004

Sundar Raj

...Appellant

vs.

1.Harris

2.Kanakaraj

... Respondents

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 01.12.2003 in A.S.No.38 of 2003 on the file of the District Judge, Kanyakumari at Nagercoil reversing the Judgment and Decree dated 20.11.2002 in O.S.No.116 of 1998 on the file of the Subordinate Judge, Padmanabapuram.

For Appellant : Mr.M.R.Sreenivasan

For Respondents : Mr.K.N.Thambi



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## JUDGMENT

Aggrieved by the Judgment of the first Appellate Court on the file of District Judge, Kanyakumari at Nagercoil in A.S.No.38 of 2003, the sole defendant has preferred this Second Appeal.

2. For the sake of convenience, the parties are referred to hereunder according to their litigative status indicated before the Trial Court.

3.The plaintiffs namely Harris and Kanakaraj, sons of Ayyakutti, filed a suit against Sundar Raj for partition and for separate possession in respect of 50 cents of land in S.No.81/3A situated at Keelakulam Village, Vilavangodu Taluk, Kanyakumari District.

4. According to the plaintiffs, the plaint schedule property originally belong to Pillaikannu Nadar. Pillaikannu Nadar had two sons, namely, Ayyakutti and Ponnaiyan. The plaintiffs are the sons of Ayyakutti. The defendant is the son of Ponnaiyan. The



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father of the plaintiffs and the father of the defendant are entitled to each 1/2 share right over the plaint schedule property. The plaintiffs' father Ayyakutti executed a Gift Deed in favour of the plaintiffs on his western 1/2 share of the plaint schedule property by Deed No.156, dated 21.09.1995 of the Munchira Sub Registrar Office, thereby the plaintiffs together secured half right over the plaint schedule property. The plaint schedule property is being enjoyed jointly by the plaintiffs and the defendant. The joint enjoyment of the plaint schedule property by the plaintiffs and the defendant causes inconvenience in enjoyment of the property and impedes effective improvement and it is necessary that meets and bounds partition of the plaint schedule property of the respective shares of the parties to be carried out. The plaintiffs demanded meets and bounds partition on several occasions and lastly on 14.06.1998, it was not at all accepted by the defendant. Hence, the suit.

5. *Per contra*, except the relationship between the parties as narrated in the plaint, other details were denied by the sole



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defendant Sundar Raj. He claimed that one acre of property was purchased by Padmanaban and his brother Gnanakannu. They orally divided the property purchased by them. Gnanakannu took the western half and eastern half belong to Padmanaban by virtue of oral division. On the same day, he divided the suit property into two halves for the benefit of his children. The northern half was earmarked to Ponnaiyan and southern half to Ayyakutti. Padmanaban died. Ponnaiyan gifted northern half to the defendant on 18.09.1997. The gift was accepted. At present, the defendant is in possession and he is paying tax. Therefore, there is no need for re-partition. According to the defendant, on the northern side, a panchayat road came into existence in 1975 long after oral partition. The plaintiffs have filed the suit for re-partition in order to appropriate road frontage suppressing the oral division and created a gift deed with false descriptions. The defendant claims that the suit is misconceived and vexatious and sought for dismissal of the same.



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6. The Trial Court framed the following issues.

- (i) Is it right that the suit property has already been partitioned?
- (ii) Whether the plaintiffs are entitled to the relief of partition and separate possession as sought for in the suit?
- (iii) What other reliefs are the plaintiffs entitled to?

7. At trial, the first plaintiff has examined himself as PW1. The Gift Deed executed by Ayyakutti in favour of the plaintiffs dated 21.09.1995 is Ex.A1. Tax receipt dated 01.10.1997 is Ex.A2. On the side of the defendant, sole defendant has examined himself as DW1. His father Ponnaiyan is DW2. One Thangamani independent witness is examined as DW3. Gift Deed dated 18.09.1997 executed by Ponnaiyan in favour of the sole defendant Sundar Raj is Ex.B1. Kist receipt dated 11.06.1998 is Ex.B2.



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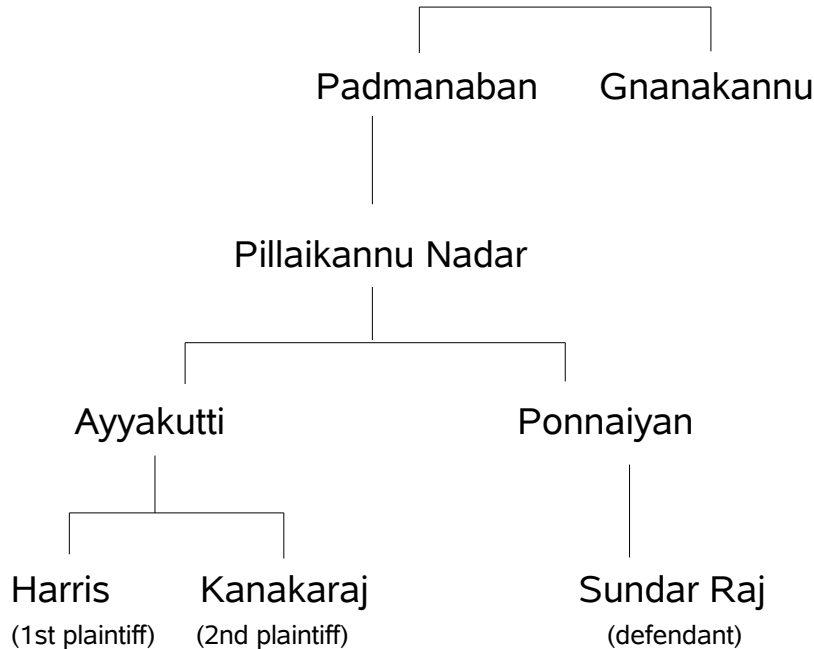
8. The Trial Court concluded that the stand taken by the defendant that oral partition was effected between his father and the plaintiffs' father is acceptable and chosen to dismiss the suit.

9. Aggrieved, the plaintiffs preferred appeal before the District Judge, Kanyakumari in A.S.No.38 of 2003.

10. The first Appellate Court has observed that eventhough the suit property has been divided orally, there must be a document for partition by meets and bounds and concluded that the plaintiffs on the one side and the defendant on the other side are entitled for 1/2 share in the suit property.

11. Against which, now the defendant has preferred this Second Appeal.

12. In order to have a clear understanding, genealogical tree is drawn, which is not in dispute.



13. Succinctly to state the facts as follows.

13.1. Pillaikannu Nadar died intestate leaving behind his sons Ayyakutti and Ponnaiyan and the suit property namely 50 cents of land in S.No.81/3A is the property got by Pillaikannu Nadar from his father. The plaintiffs' candid case is that the said 50 cents of land is in joint possession of the plaintiffs and the defendant and it has to be divided equally. The plaintiffs also claimed that their father has executed a gift deed in favour of both



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the plaintiffs and the western half is dealt with in Ex.A1 Gift deed and it was contended that in order to execute a Gift Deed, it was stated so and no partition was effected.

13.2. Whereas, the sole defendant while admitting the genealogy details, *per contra*, claims that the suit property was divided between his father and the plaintiffs' father and his father was allotted northern 25 cents and the plaintiffs' father was allotted southern 25 cents. Subsequently, on 18.09.1997, Ponnaiyan has executed a Gift Deed in favour of his son Sundar Raj, Ex.B1, wherein the northern half of suit property is dealt with.

14. The learned counsel appearing for the appellant / defendant vehemently argued that the suit property was orally divided between Ayyakutti and Ponnaiyan. Ponnaiyan was allotted northern 25 cents and the same was gifted to the defendant through Ex.B1 Gift Deed, dated 18.09.1997. Therefore, the plaintiffs cannot lay a claim for partition and the relief of partition granted has to be set aside.



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15. *Per contra*, the learned counsel appearing for the respondents / plaintiffs would strenuously contend that partition is a process taken place on a definite date. Though oral partition was stated to have been effected, no date of partition was specifically mentioned in the written statement. Hence, it has to be taken that no oral partition has taken place as alleged by the defendant. It is his further argument that in Ex.B1, there is no whisper about the oral partition and the date of partition. He also drew the attention of this Court to Ex.B2 and stated that in the kist receipt joint Patta No.4963 is mentioned. The same Patta No. is found in Ex.A2 kist receipt also. He also referred to the last few lines of written statement that if re-partition is allowed, he be allotted northern share, which would show that the defendant is not sure about his stand. To buttress his arguments, the following Judgments were referred to.

(i) The Judgment of the Honourable Supreme Court in the case of *Vasantiben Prahladi Nayak and others vs. Somnath*



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*Muljibhai Nayak and others reported in (2004) 3 SCC 376* was referred to in order to contend that partition is really a process by which joint enjoyment of the property is transformed into an enjoyment severally.

(ii) The Judgment of the Principal Bench of this Court in the case of *Guruvammal and another vs. Subbiah Naicker and 5 others reported in 2000 1 LW 488* was referred to in order to contend that the relevant persons and relations with the estate must be taken into consideration in determining the issue.

16. The following substantial question of law arise for consideration.

"(i) Whether the first Appellate Court is correct in holding that the oral partition has to be further proved by document, and that there must be a document for partition by metes and bounds even though the suit property has been divided orally."



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17. The relationship details are not in dispute. The two sons of Ayyakutti have sought for partition of 1/2 share against the sole defendant. The defendant would stoutly claim that oral partition had taken place between the plaintiffs' father and defendant's father and northern 25 cents was allotted to his father. Oral partition is a permitted mode of partition. As per Section 101 of the Indian Evidence Act, one who avers has to prove. Therefore, heavy burden casts upon the defendant to prove that the oral partition taken place between his father and plaintiffs' father.

18. The concept of partition was dealt with by the Honourable Supreme Court in *Shub Karan Bubna vs. Sita Saran Bubna reported in (2009) 9 SCC 689*, wherein, it is observed that 'Partition' is a redistribution or adjustment of pre-existing right, among co-owners/coparceners resulting in a division of lands or other properties jointly held by them into different lots or portion and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.



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19. The learned counsel appearing for the respondents / plaintiffs drew the attention of this Court by referring to the observations made by the Honourable Supreme Court in the case of *Vasantiben Prahladji Nayak and others vs. Somnath Muljibhai Nayak and others (cited supra)*, wherein, in paragraph no.6 it is observed that partition is really a process by which a joint enjoyment of the property is transformed into an enjoyment severally. Therefore, as per the contention of the defendant, the joint enjoyment of the property is transformed into an enjoyment severally. To assert this, on a specific date, oral partition should have taken place. It is pertinent to note that the defendant's father Ponnaiyan has examined himself as DW2. At the time of filing written statement by the defendant Sundar Raj, his father Ponnaiyan was very much alive. While so, he should have mentioned the date of oral partition much less atleast in which year, the oral partition taken place. Non-mentioning of day or year affects the case of the defendant. Of course, the plaintiffs have to prove their case. They cannot pick holes on the case of the



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defendant. It is a well established principle of law. The plaintiffs have demanded for partition. Whereas, the sole defendant denies the same and claims that his father and plaintiffs' father have orally partitioned the suit property and northern 25 cents fell to the share of the defendant's father Ponnaiyan. Except the Gift Deed executed by defendant's father in favour of the defendant, no other revenue document is filed to prove the oral partition.

20. It is pertinent to note that in Exs.A2 and B2 kist receipts same patta number 4963 is mentioned. Ex.A2 receipt stands in the name of the plaintiffs. Ex.B2 kist receipt stands in the name of the defendant's father Ponnaiyan. In Ex.B1, Gift Deed also there is no whisper about the oral partition that is said to have taken place between Ponnaiyan and Ayyakutti. Therefore, the irresistible conclusion is that there is no partition meets and bounds taken place as alleged by the defendant and the first Appellate Court has rightly granted decree in favour of the plaintiffs and the well reasoned finding needs no interference by this Court. Based on the aforesaid findings, the substantial question of law is answered



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against the appellant / defendant and in favour of the respondents / plaintiffs.

21. In the result, the Second Appeal stands dismissed. The Judgment and Decree dated 01.12.2003 in A.S.No.38 of 2003 on the file of the District Judge, Kanyakumari at Nagercoil is confirmed. Considering the relationship between the parties there is no order as to costs.

15.12.2023

NCC:Yes/No  
Index:Yes/No  
Speaking/Non-speaking order

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To

- 1.The District Judge, Kanyakumari at Nagercoil
- 2.The Subordinate Judge, Padmanabapuram
- 3.The Section Officer,  
Vernacular Records Section,  
Madurai Bench of Madras High Court,  
Madurai.



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R.KALAIMATHI, J.

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