



A.S.No.576 of 2016 and 15 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 26.02.2024

Delivered On: 05.06.2024

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

A.S.No.576 of 2016 and 15 of 2017

In A.S.No.576 of 2016

1.B.Kamesh @ Kameswar
2.B.Gokulnathan

...Appellants

Vs.

1.Mrs.B.Santhanalakshmi
2.B.Vijayakrishnan
3.Mrs.B.Durgambika
...Respondents

PRAYER in A.S.No.576 of 2016:- First Appeal filed under Section 96 of the Civil Procedure Code, to set aside the judgment and decree dated 06.04.2016 made in O.S.No.12844 of 2010 on the file of the learned XVII Additional Judge, City Civil Court, Chennai .

For Appellants : Mr.S.Kamadevan
For Respondents 1 &2 : No appearance
For Respondents 3 : Mr..T.Paranthaman

In A.S.No.15 of 2017

1.Mrs.B.Durgambika

...Appellant

Vs.

1.Mrs.B.Santhanalakshmi
2.B.Kamesh @ Kameswar
3.B.Gokulnathan



A.S.No.576 of 2016 and 15 of 2017

4.B.Vijayakrishnan

...Respondents

PRAYER in A.S.No.15 of 2017:- First Appeal filed under Order XLI Rule 1 r/w Section 96 of the Civil Procedure Code, to set aside the judgment and decree dated 06.04.2016 made in O.S.No.12844 of 2010 on the file of the learned XVII Additional Judge, City Civil Court, Chennai and pass a decree granting 1/5th share to the appellant.

For Appellant : Mr..T.Paranthaman

For Respondents 1 and 4 : No appearance

For Respondents 2 & 3 : Mr.S.Kamadevan

COMMON JUDGEMENT

For the sake of convenience, the parties are referred as per their ranking in O.S.No. 12844 of 2010.

2(a). The 1st and 2nd defendants in O.S.No.12844 of 2010 filed the appeal suit in A.S.No.576 of 2016. The 4th defendant in O.S.No.12844 of 2010 filed the appeal suit in A.S.No.15 of 2017. The plaintiff, who filed the original suit in O.S.No.12844 of 2010 for partition claiming 1/5th share in the suit property is the first respondent in both appeals.

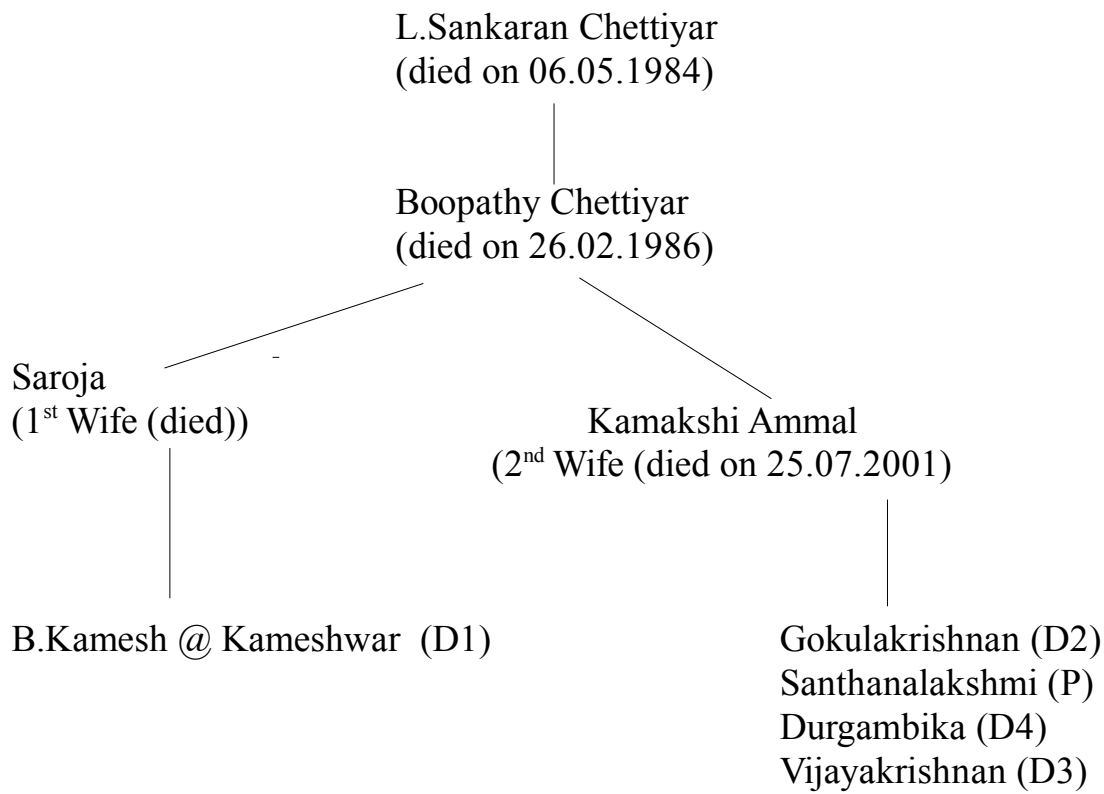
2(b). The suit property is situated in Door No.4, previous No.5, old door No.39 and the new door No.20, Rosary Church Road, 1st lane, Santhome, Mylapore, Chennai, ad-measuring 1230 sq.ft with building.



A.S.No.576 of 2016 and 15 of 2017

3. The plaint proceeded on the basis that the suit property was originally owned by one Late.Sankaran Chettiyar having purchased it under Ex.A1/Sale deed, dated 03.10.1973. He had only son by name, Boopathy Chettiyar. The said Boopathy Chettiyar married one Kamakshiammal only after the death of his first wife namely Saroja. For better clarification, the family genealogy is extracted hereunder:-

Genealogy





A.S.No.576 of 2016 and 15 of 2017

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4. In the suit filed by the plaintiff for partition, the third defendant was set *ex-parte*.

5. The 1st and 2nd defendants have filed a written statement denying the rights of partition and the 4th defendant filed a written statement stating that she is the sister of the plaintiff and also paid separate Court fee.

6(a). Admittedly, the factual matrix of the case is that the said Bhoopathy Chettiar was the only son of Late Sankaran Chettiar. The Late Bhoopathy Chettiar married one Kamakshi Ammal, only after the death of his first wife Saroja, through her, the plaintiff and defendants 2 to 4 were born. The 1st defendant is the only son born out of his first wife.

6(b). The plaintiff originally filed a suit for partition against the defendants before this Court on 06.09.2008 and the same was taken on file as C.S.No.859 of 2008. Later on, due to pecuniary jurisdiction, the said suit was transferred to the Trial Court and re-numbered as O.S.No.12844 of 2010, on 01.11.2010.



A.S.No.576 of 2016 and 15 of 2017

6(c).The plaintiff is the sister of the defendants and legal heir of the deceased Boopathy Chettiyar. The said Sankaran Chettiyar purchased the suit property through registered sale deed dated 03.10.1973 which was marked as Ex.A1. The admitted fact is that the said Sankaran Chettiyar died intestate leaving behind his only son Late. Boopathy Chettiyar, father of the plaintiff and the defendants. The 3rd defendant remained *ex-parte* and the 1st and 2nd defendants had resisted the claim of the plaintiff.

6(d).The 4th defendant, being the sister of the plaintiff, sailed along with the plaintiff and paid separate Court fee towards her claim for 1/5th share in the suit property, wherein, the 4th defendant claimed that 1st defendant is the only son of Late.Boopathy Chettiyar through his 1st wife. Thereafter, the said Late.Boopathy Chettiyar married one Kamatchi Ammal as his 2nd wife and through her, the plaintiff and the defendants 2 to 4 were born. The original owner of the suit property, as per Ex.A1/Sale deed, dated 03.10.197, is Sankaran Chettiyar who died in the year 1984. Thereafter, his only son Boopathy Chettiyar, father of the plaintiff and the defendants, died on 26.02.1986. Therefore, the partition in respect of the ancestral property among the male members have already opened and as such, the plaintiff cannot now accelerate



A.S.No.576 of 2016 and 15 of 2017

her claim of partition in respect of the ancestral co-parcenary property.

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7. The 1st defendant filed a written statement and additional written statement *interalia* contending that the claim for partition made by the plaintiff was an ancestral property and the parties were governed by the Hindu Succession Act, 1955 and hence, the claim for partition by a female cannot be maintained and on this ground alone the suit was liable to be dismissed. The amendment to the Hindu Succession Act, which was introduced by the Amending Act, 2005 cannot have retrospective effect. That being the position, the claim made by the plaintiff seeking partition was untenable and the suit was not maintainable. It was averred that as far as the execution of release deed dated 12.06.2008 is concerned, the plaintiff executed the same on her own volition. It was also averred that the suit for partial partition is not maintainable and liable to be dismissed as the plaintiff failed to include all the properties. Hence, the suit was liable to be dismissed.

8. The Written statement was filed raising the plea that the suit is bad for partial partition.

9. It is submitted by the respective counsels that another application



A.S.No.576 of 2016 and 15 of 2017

has been filed in I.A.No.146 of 2015 to withdraw the suit with liberty to file fresh comprehensive suit and the same was dismissed on 26.02.2015.

10. The 4th defendant filed a separate written statement and also paid an additional Court fee. The Trial Court formulated the following issues :-

“ 1. Whether the plaintiff is entitled to 1/5th share in the suit property?

2. Whether the release deed dated 12.06.2008 executed by the plaintiff and the defendants 3 and 4 was obtained by the 2nd defendant by exercising force and coercion without the free and genuine consent of the plaintiff and the defendants 3 and 4?

3. Whether the second defendant is liable to render accounts for the income from the joint family property from the year 2001 onwards?

4. Whether the plaintiff is entitled for the surrender of her 1/5th share from the second defendant?

5. To what relief the plaintiff is entitled for ?

Additional Issues framed on 01.10.2015:-

1) Whether the suit is bad and not maintainable on the ground of partial partition?

2) Whether the D4 is entitled for partition and separate possession of 1/5th share in the suit property?”

11. Before the Trial Court, the plaintiff's husband was examined as P.W.1



A.S.No.576 of 2016 and 15 of 2017

and marked the documents as Ex.A1 to Ex.A10. On the side of the defendants, D.W.1 & D.W.2 were examined and the documents were marked as Exs.B1 to B7.

12. The Trial Court, based on the oral and documentary evidence available on record, came to the conclusion that the plaintiff and the 4th defendant have the right of partition over the suit property and entitled to get 1/20th share each in the 1/4th share of their father late Bhoopathy Chettiar. Aggrieved by the said findings of the Trial Court, the 1st and 2nd defendants preferred an appeal in A.S.No.576 of 2016 and the 4th defendant preferred an appeal in A.S.No.15 of 2017.

13. The learned counsel appearing for the appellants in A.S.No.576 of 2016 would contend that there is a specific plea on partial partition and the Trial Court ought to have dismissed the suit.

14. The learned counsel appearing for the appellant in A.S.No.15 of 2017 would contend that the findings rendered by the Trial Court with regard to the suit property being treated as an ancestral property is not correct and that as the facts and circumstances of the case and as per Section 8 of the Hindu



A.S.No.576 of 2016 and 15 of 2017

Succession Act, 1956, the only legal heir of the suit property is late Boopathy Chettiyar, S/o. Late. Sankaran Chettiyar. After the death of late Sankaran Chettiyar, the said Boopathy Chettiyar inherited the suit property and thus, it was not a purchased property. Therefore, the plaintiff and the defendants are entitled to 1/5th share and also contended that in respect of the another finding rendered by the Trial Court in paragraph No.11 that the suit property was an ancestral property is incorrect and with regard to the same, he relied upon the judgment of this Court, in the case of **Alli Sekar alias Sekar Vs. Ramu and 5 Ors.**, in S.A.No.60 of 2014, dated 29.11.2019.

15. After hearing the rival submissions on either side and after perusing the documents available on record, the following points arise for consideration in this First Appeal.

- 1. Whether the suit is bad and not maintainable on the ground of partial partition?*
- 2. Whether the release deed dated 12.06.2008 executed by the plaintiff and defendants 3 and 4 in favour of the 2nd defendant was by force and cohesion without free consent and whether binding upon the plaintiff?*
- 3. Whether the plaintiff is entitled to 1/5th share in the suit property as claimed ?*



A.S.No.576 of 2016 and 15 of 2017

4. Whether the 4th defendant is also entitled for

partition?

16. On perusal of the typed set of papers, this Court finds that both the plaintiff and defendants' family also owns another fifty one more properties situated in and around Chennai city. The said properties were the absolute properties of late Sankaran Chettiyar, the grandfather of the plaintiff and defendants. It was averred by the plaintiff that her father late Boopathy Chettiar became the absolute owner of the said properties vide judgment and decree passed in O.S.No.669 of 1992 and subsequent E.P.No.9 of 1967 on the file of District Munsif Court, Poonamallee.

17. On perusal of the lower Court records, it reveals that the plaintiff wanted to rectify the defect pointed out by the appellants and therefore, filed I.A.No.13132 of 2011 seeking amendment of the prayer to include all the properties but the same was dismissed and no appeal or revision has been preferred against the said order. Further, this Court also noticed that another application in I.A.No.146 of 2015 was filed seeking permission of the Court to withdraw the suit with liberty to file fresh suit was also dismissed by order dated 26.02.2015 and no appeal appears to have been filed. The Trial Court has



A.S.No.576 of 2016 and 15 of 2017

decreed the suit and passed preliminary decree by holding that the suit property is an ancestral property. The Trial Court negated the case of the plaintiff and on the factual position available on record has held that father of the plaintiff and defendants died on 26.02.1986. The marriage of the plaintiff took place in the year 1993. The marriage of the 4th defendant took place in the year 2006. The father of the plaintiff and the defendants, namely Boopathy Chettiar died on 26.02.1986 prior to 25.03.1989, the date on which the Tamil Nadu Amendment Act came into force. The plaintiff is not entitled for any relief under the Tamil Nadu Amendment Act since the two pre-conditions stipulated in the Tamil Nadu Amendment Act that on the date, the plaintiff should not have been married and the father should be alive. However, proceeded to give the relief under the Central Act treating the property as an ancestral property. At this juncture, it remains to be stated that in the written statement, it is specifically stated that release deed dated 12.06.2008 marked as Ex.A3 is true and valid.

18. On perusal of the prayer in the suit, this Court finds that there is no relief sought for by the plaintiff challenging Ex.A3, release deed as stated supra. The application appears to have been filed before the Trial Court for amendment of the prayer and it also appears to have been dismissed. Apart from the above



A.S.No.576 of 2016 and 15 of 2017

pleadings, there are 50 other properties available in the family but they are not added as list of properties. On perusal of Ex.A7, Ex.A8 and Ex.A9, this Court finds that so many properties appears to be the family properties and 1st defendant has filed a suit for partition O.S.No.7728 of 1998. In the said suit, under Ex.A8, written statement was filed by the very same plaintiff and defendants 2 to 4 stating that partition had already taken place.

19(a). A close perusal of Ex.A8, dated 15.07.2003, the written statement filed by the plaintiff and the defendants 2 to 4 in O.S.No.7728 of 1998, it is made clear that during the lifetime of late Bhoopathi Chettiar, an oral partition appears to be held between plaintiff and defendants 1 to 5, in which, it was unanimously agreed that suit Schedule "A" (house property) were allotted to defendants 1 to 5 and the landed properties situated at Adambakkam viz., Schedule "B" properties were allotted to the plaintiff. In view of the above said oral partition held during the life time of Bhoopathi Chettiyar, the plaintiff himself has sold various items of lands situated in and around Alandur, which proves that the said oral partition assumes significance.

19(b). The suit in O.S.No.7728 of 1998 is filed for partition in respect of



A.S.No.576 of 2016 and 15 of 2017

a property in Door No.39, Rosary Church Road, 1st lane, Santhome, Mylapore, Chennai and the said suit appears to have been dismissed for default as would be seen from Ex.A9. Now, the 1st defendant has taken a different stand in the present suit. Be that as it may, even in the written statement under Ex.A8 in O.S.No.7728 of 1998, list of various properties has also been mentioned as family property. However, for the reasons best known, the plaintiff had picked and chose one property and filed the present suit for partition and hence, this Court finds that on the above factual background, the suit is clearly bad for partial partition.

20. This Court, in the case of ***Govindan and others Vs Revathi and Others*** reported in ***2019 5 LW 289*** dated 25.10.2019, held that it is clear that a property that is inherited by a Hindu on the death of his father after 1956, will not partake the character of coparcenary property qua his children. He will be the absolute owner of the property and have absolute power of alienation over the property and hence, this Court finds that in the absence of any prayer to challenge Ex.A3, release deed dated 12.06.2008, the interlocutory application filed by the party seeking amendment of the prayer has been dismissed and in the absence of further appeal or revision, the same has become final. This Court



A.S.No.576 of 2016 and 15 of 2017

also noticed the inconsistency in the stand of the plaintiff herein, who is the defendant in the earlier proceedings, as to the nature and character of the suit property being an ancestral property. The very same party has admitted in the written statement that already a partition has been effected assumes significance.

21. The Hon'ble Supreme Court in the case of ***Thimmappa Rai Vs Ramanna Rai and others*** reported in ***2007 14 SCC 63***, held that under Section 58 of the Evidence Act, an admission made by a party to the suit in an earlier proceedings and its effect that the said admission is admissible against the party who made the admission. Furthermore, this Court in S.A.No.60 of 2019 dated 29.11.2019 has held as follows:-

*“In the case of **Gandhi Vs Saminatha Gounder and another** reported in **2006 (1) CTC 267**, this Court had held that the suit for partition must include the whole estate which is available. The plaintiff cannot be allowed to omit properties at his discretion and seek partition of one portion of the properties. While doing so, this Court had relied upon the judgment of the Hon'ble Supreme Court in **Kenchegowda (since deceased) by legal representatives Vs***



A.S.No.576 of 2016 and 15 of 2017

Sri Siddegowda @ Motegowda reported in JT 1994 (4) SC

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125. In view of the aforesaid pronouncement of this Court, I am constrained to answer the second question of law in favour of the appellant”.

22. In fine, the suit in O.S.No.189 of 2005 is held to be bad for partial partition and hence, I have no hesitation to hold that the present appeal suit is bad for partial partition and the same cannot be allowed on the basis of the admitted position by the plaintiff and defendants in the earlier round of litigation and accordingly, both the first appeals are allowed and the judgment and decree dated 06.04.2016 passed in O.S.No.12844 of 2010 on the file of the learned XVII Additional Judge, City Civil Court, Chennai are hereby set aside. No costs.

05.06.2024

Index : Yes/No
Internet : Yes/No
Neutral Citation Case : Yes/No
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To
The XVII Additional Judge, City Civil Court, Chennai

RMT.TEEKAA RAMAN, J.



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A.S.No.576 of 2016 and 15 of 2017

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Pre-delivery order made in
A.S.No.576 of 2016 and 15 of 2017

05.06.2024