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S.A.NO.201 OF 2021**IN THE HIGH COURT OF JUDICATURE AT MADRAS****DATED : 28.10.2024****CORAM:****THE HON'BLE MR.JUSTICE R.SAKTHIVEL****S.A.NO.201 OF 2021****AND****CMP NO.4098 OF 2021**

1.Karuppannan
2.Lakshmi
3.Chinnammal (Died)

... Appellants/Appellants /
Defendant

4.K.Palaniappan
5.S.Janaki
6.Premkumari

... Appellants

(Appellant No. 3 passed away.
Appellant Nos. 4 to 6 and
Respondent Nos. 2 & 3 are brought
on record as Legal Representatives
of the deceased - Appellant No.3
vide this Court's Order dated
January 19, 2024 made in CMP
No.1102 of 2024 in S.A.No.201of
2021)

Versus

1.Palaniappan

... Respondent/Respondent
/ Plaintiff

2.B.Rajeshwari

3.Pavunaampal

... Respondents

(Appellant No.3 passed away.



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Appellant Nos. 4 to 6 and Respondent No.2 & 3 are brought on record as Legal Representatives of the deceased - Appellant No.3 vide this Court's Order dated January 19, 2024 made in CMP No.1102 of 2024 in S.A.No.201 of 2021)

PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure, 1908 praying to set aside the Judgment and Decree dated November 23, 2020 made in A.S.No.21 of 2020 on the file of the Principal District Court, Namakkal, modifying the operative portion of the Judgment and Decree dated December 20, 2019 made in O.S.No.67 of 2019 on the file of the Sub Court, Paramathi.

For Appellants	:	Mr.N.S.Suganthan for Mr.E.Mohammed Abbas
For Respondent-1	:	Mr.T.Dhanya Kumar
For Respondents 2&3	:	No appearance

J U D G M E N T

This Second Appeal is directed against the Judgment and Decree dated November 23, 2020 passed in A.S.No.21 of 2020 by the 'learned Principal District Judge, Namakkal' [henceforth 'First Appellate Court' for brevity and convenience] confirming the Judgment and Decree dated December 20, 2019 passed in O.S.No.67 of 2019 by the 'learned Subordinate Judge, Paramathi' [henceforth 'Trial Court' for brevity and



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convenience].

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2. For the sake of convenience, hereinafter, the parties will be referred to as per their array in the Original Suit.

PLAINTIFF'S CASE:

3. The Suit Properties originally belonged to one Palaniammal and her sister - Chinnammal. Item No.1 of Suit Properties totally consists of 4 Acres 9 Cents in the Survey Nos. 23 & 24. Item No.2 of Suit Properties consists of the entire extent of 85 Cents in the Survey No.22/1. Totally, an extent of 4 Acres 94 Cents constitutes the Suit Properties.

3.1. The plaintiff is the son of Palaniammal. Palaniammal executed Settlement Deed dated January 25, 1996, in favour of the plaintiff in respect of extents of 79 ½ Cents in Survey No. 23/1, 1 Acre 66 Cents in Survey No.24/1A, ½ Cent in Survey No. 24/1B and 1 Cent in Survey No. 24/1C, totaling 2 Acres 47 Cents. They constitute a part of Item No.1 of Suit Properties. Thereafter, in respect of the properties settled upon her, the plaintiff executed a Sale Deed in favour of one V.Palaniappan vide Sale



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Deed dated October 23, 1996. After that, the plaintiff purchased the same properties from V.Palaniappan vide Sale Deed dated December 15, 2004 for valid consideration.

3.2. Meanwhile, Palaniammal's sister - Chinnammal (third defendant) executed a Sale Deed dated March 29, 1990, in favour of her daughter-Lakshmi (second defendant) and said Lakshmi's husband – Karuppannan (first defendant), in respect of an extent of 1 Acre 53 Cents in common in Survey Nos. 22/1 & 23/1 and an extent of 80 Cents in Survey No.24/1A, totaling 2 Acres 33 Cents land. Therefore, the defendants are entitled to an extent of 2 Acres 33 Cents in the Suit Properties while the plaintiff is entitled to an extent of 2 Acres 47 Cents in Item No.1 thereof. Item No.2 absolutely belongs to the defendants. The plaintiff and the defendants are relatives and were enjoying the Suit Properties without any partition. The plaintiff issued Notice to the defendants on April 8, 2011 for partition. The defendants refused to accede to the request of the plaintiff. Hence, the Suit for partition of Item No.1 of the Suit Properties and allotment of 2 Acre 47 Cents thereof in favour of the plaintiff.



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CASE OF DEFENDANT NOS.1 AND 2:

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4. The first defendant filed Written Statement and the same was adopted by second defendant. It is averred therein that, in the second week of January 1991, first day of *Thai* month (தை மாதம்), an Oral Partition took place between the plaintiff's predecessor - Palaniammal and the defendants, whereby entire extent of 2 Acres 47 Cents in Survey No.24/1-A was totally allotted to the defendants while the plaintiff's mother – Palaniammal was allotted an extent of 85 Cents in Survey No.22/1 (which forms the entirety of Item No.2) as well as an extent of 1.58 Acres in Survey No.23/1, totaling 2 Acres 43 Cents. Possession was taken over on the same day. It was also agreed that soon a formal partition deed shall be effected between the parties. As per the Oral Partition held in the year 1991, the defendants have been in possession and enjoyment of the Survey No. 24/1A for the past 22 years, openly and continuously. The defendants have spent several lakhs of rupees on developing the land in Survey No.24/1-A. Defendants planted coconut trees, raised sugarcane and also got Cauvery Water Irrigation Scheme. Whereas the plaintiff had left the land allotted to him without any cultivation for the past ten years leading to extensive growth of thorny bushes there. Accordingly, the first



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defendant and second defendant prayed to dismiss the Suit.

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CASE OF DEFENDANT No.3:

5. The third defendant, who was subsequently impleaded as a necessary party, filed Written Statement wherein it is averred that the Suit Properties along with other properties were enjoyed in common by Palaniammal and third defendant. Thereafter, third defendant executed a Sale Deed in favour of first defendant and second defendant in respect of an extent of 2 Acre 33 Cents of the Suit Properties in common. Thereafter, an Oral Partition took place in January 1991, whereby entire extents of Survey Nos.22/1 and 23/1 were allotted to Palaniammal, and entire of extents of Survey Nos.24/1A, 24/1B and 24/1C were allotted to the Defendant Nos.1 to 3. The defendants developed the lands allotted to them after the said Oral Partition. Hence, the claim made by the plaintiff that he is entitled to an extent of 2 Acre 47 Cents in Item No.1 is not correct and is made with an ulterior motive to defeat and defraud the legitimate rights of the defendants over Item No.1. Accordingly, she prayed to dismiss the Suit.



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TRIAL COURT

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6. At trial, the plaintiff was examined as P.W.1 and Ex-A.1 to Ex-A.17 were marked on the side of the plaintiff. On the side of the defendants, D.W.1 to D.W.4 were examined and no document was marked.

7. The Trial Court, after considering the documents and evidence, concluded that Patta pertaining to the Suit Properties stands jointly in the name of the plaintiff and the defendants. Further, the defendants failed to establish their plea of Oral Partition. Therefore, the plaintiff is entitled to partition as per Ex-A.15 - Settlement Deed. Accordingly, the Trial Court passed a Preliminary Decree holding that the plaintiff is entitled to partition as per Ex-A.15 – Settlement Deed.

FIRST APPELLATE COURT

8. Dissatisfied with the Judgment and Decree of Trial Court, the defendants preferred an appeal in A.S.No.21 of 2020 before the First Appellate Court, which held that the defendants failed to prove the Oral Partition alleged by them and that the plaintiff is entitled to an extent of 2



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Acres 47 Cents in Item No.1 of the Suit Properties. Accordingly, the First Appellate Court dismissed the appeal but slightly modified the Trial Court's Judgment to the effect that the Item No.1 of Suit Properties has to be divided by metes and bounds and the plaintiff has to be allotted 2 Acres 47 Cents. To that effect, the First Appellate Court passed a Preliminary Decree.

SUBSTANTIAL QUESTIONS OF LAW:

9. Feeling aggrieved, the defendants preferred this Second Appeal and the same admitted on March 8, 2021 on the following substantial questions of law:

- "a) *Whether the Courts below have not committed an error in granting preliminary decree for partition without giving credibility to the oral partition made between the plaintiff's mother palaniammal and the defendants in the 1st of Thai month, 1991?*
- b) *Whether the Courts below have not committed error in upholding the Settlement Deed (Ex.A15) dated 25.01.1996 and Sale Deed (EX.A1), dated 15.12.2004, when it was explicit that the suit properties are undivided share of ancestral properties?*
- c) *Whether the Courts below have not committed any error*



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in granting preliminary decree for partition without considering the facts that the plaintiffs were in possession and enjoyment of 0.85 Acres in S.No.22/1, 1.58 Acres in S.No.23/1, which comes to a total of 2.43 Acres and defendants were in possession and enjoyment of 2.47 Acres in S.No.24/1A, which has been proved by way of PW.1 and DW.1 to DW.4?"

ARGUMENTS:

10. Mr.N.S.Suganthan, the learned Counsel for the appellants/ defendants submits that 3rd defendant executed Ex-A.2 - Sale Deed dated March 29, 1990, in favour of 1st and 2nd defendants. After execution of Ex-A.2 – Sale Deed, Oral Partition took place between Palaniammal and third defendant in the year 1991, whereby an extent of 2 Acres 47 Cents in Survey No.24/1-A was allotted to the defendants and the entire extents of Survey No.22/1 (0.85 Acre) and S.No.23/1 (1.58 Acres) were allotted to the plaintiff's mother - Palaniammal. Survey Nos.24/1-B and 24/1-C form a common pathway to both the plaintiff's and defendants' lands. After the said Oral Partition, the defendants spent huge amount in planting Coconut saplings and extending water facilities from Cauvery Water Irrigation Scheme. On the other hand, the plaintiff left his land



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uncultivated. Merely because the revenue records are jointly standing in

the names of the plaintiff and the defendants, it cannot be construed that

the properties are in joint enjoyment. The Trial Court and the First

Appellate Court miserably failed to consider the said fact and erroneously

negated the defendants' case. Even according to the plaintiff, the Suit

Properties are undivided properties and hence, the plaintiff's mother -

Palaniammal has no power or authority to execute any Gift Settlement

Deed in favour of the plaintiff in respect of it. The Gift Settlement Deed

and pursuant Sale Deed executed by the plaintiff in favour of

V.Palaniappan are all fabricated ones, made to give colour to the plaintiff's

case. The Trial Court as well as the First Appellate Court erroneously

granted decree in favour of the plaintiff and thereby, ordered to divide the

property as per Section 15-1 (a) of the Hindu Succession Act, 1956.

Accordingly, he prays to allow the Second Appeal and set aside the

Judgment and Decree of the Trial Court as well as the First Appellate

Court.

11. Per contra, Mr.T.Dhanya Kumar, learned Counsel for the first respondent / plaintiff submits that in Ex-A.2 – Sale Deed, the defendants themselves admitted that they are entitled only to an extent of 2



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Acres 33 Cents in the Suit Properties. Hence, the defendants are estopped

from claiming more extent than that mentioned in the Sale Deed – Ex-A.2.

As regards the Oral Partition, the burden is upon the defendants to prove the same. But the defendants failed to prove the oral partition. Further, the parties are enjoying the properties merely as per convenience without partition. The Trial Court as well as the First Appellate Court rightly granted a preliminary decree as prayed for, in which, there is no warrant to interfere. Accordingly, he prays to dismiss the Second Appeal.

DISCUSSION AND DECISION

12. This Court has considered both sides' submissions and perused the materials available on record in light of the Substantial Questions of Law.

13. Before embarking on the analysis part, this Court deems fit cite here the decision of this Court in ***P.Kaliappa Gounder and others -vs- Muthuswami Mudaliar***, reported in ***1985 SCC OnLine Mad 89 : (1985) 98 LW 773 : AIR 1987 Mad 24***, wherein this Court considered what amounts to partition. Relevant extract runs thus:



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“7.Before we do the analysis of factual materials, we would like to recapitulate the concept of 'partition' of a joint family. The joint ownership of a thing is the right of two or more persons to possess and use it to the exclusion of others; and the thing, with regard to which there is the joint ownership, is called 'the joint property'. In this joint property, the joint owners do not own anything in specie and every joint owner has got right, title and interest over every piece and parcel of the joint property, subject to the qualification that the quantum of his share in the whole property stands defined in theory and not on ground. Though joint owners may be content with owning lands in common, yet subsequently one joint owner or some joint owners may conceive the idea of owning the property referable to his or their share for himself or for themselves to the exclusion of the other or the others. This is the reason which motivates the move to get joint property partitioned. The legal term 'partition' is applied to the division of lands or properties belonging to joint owners and the allotments amongst them of the parts referable to their shares so as to put an end to community ownership or joint ownership. Mayne says:

“In England ownership as a rule is single, independent and unrestricted. In India on the contrary, joint ownership is the rule and will be presumed to exist until the contrary is proved.” While individual property appears to be the rule in the West, corporate property appears to be the rule in the East. Though passage of time and change of notions have shaken up this concept both in theory and in practice, yet, in our country and in particular in rural areas, joint ownership is allowed to persist by sufferance of custom and convenience until the bone of contention crops on.”



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8. Partition is the intentional severance of the joint ownership by an unequivocal expression of an intention to bring out severance in the eye of law and further implementing it by actual division by metes and bounds. What was held in common as a single property gets converted into a holding in severalty and in specie. Joint ownership turns into ownership in severalty and in specie. It is true that 'partition' is not a transfer. But there must be the element of conversion as the joint ownership into ownership in severalty and in specie. Therefore, the essence of partition is that the joint ownership is put an end to and the joint owners come to hold the property in severalty and each in his own individual right. In this country, it is common that not only coparceners of a joint Hindu family but also individuals join or continue together to own property in common. If this common ownership is to be put an end to not only in theory but also in practice, there must be primarily severance of the joint ownership in the eye of law, followed up by actual physical division. We make it clear that in the present case, we are not concerned with the concept of a bare unequivocal expression of an intention to separate to bring about a division in status in a joint Hindu family. It is not unusual for parties holding properties jointly or in common to have separate enjoyment of portions for the sake of sheer convenience. But such separate enjoyment of convenience cannot be equated to partition in the eye of law and in fact, so as to say that the joint ownership has been put an end to and in its place ownership in severalty or in specie has come into existence. Separate enjoyment for the sake of convenience is one thing and partition in the eye of law is another. The latter carried with it the legal incidents of mutating the joint



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ownership. The latter has to pass through and satisfy a more rigorous test in law and on facts.”

(Emphasis supplied by this Court)

14. This Court will now analyze the facts of this Case through the lens of *Kaliappa Gounder’s Case (supra)*. It is settled law that Oral Partition is valid in law and a person who pleads Oral Partition has to prove the same. In this case, the defendants pleaded that in the year 1991, Oral Partition took place between third defendant - Chinnammal and Palaniammal, whereby entire extent of 2 Acres 47 Cents in Survey No.24/1-A was allotted to the defendants and the entire extents of Survey Nos.22/1 and 23/1 were allotted to Palaniammal. If it is so, the burden is upon the defendants to establish the Oral Partition. The defendants have failed to satisfactorily establish their plea of Oral Partition. Had there been proof of separate enjoyment; separate payment of Kist; sub-divisions and pursuant activities & transactions thereof such as mortgaging, clear ridges, and fencings, *etc.*, inference in favour of Oral Partition could have been drawn. But in this case, there is no such evidence. In fact, the revenue records stand jointly in the name of the parties. Hence, the plea of Oral Partition must fail.

15. At the same time, as narrated above, since there is no



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partition between Palaniammal and third defendant - Chinnammal, the said

Palaniammal had no right to execute the Gift Settlement Deed dated January 25, 1996 in respect of specific portions of the Suit Properties in favour of the plaintiff. Needless to mention that she can settle or bequeath 'her right of ½ share' in the Suit Properties. Hence, the recitals of the Gift Settlement Deed dated January 25, 1996 as well as the pursuant Sale Deeds dated October 23, 1996 and December 15, 2004, are not binding on the defendants. Since the properties originally were owned by Palaniammal and her sister – Chinnammal as co-owners, after the demise of Palaniammal, the plaintiff and Chinnammal are co-owners and entitled to equal share in the Suit Properties. That is to say, the plaintiff is entitled to ½ share in the Suit Properties and the defendants are jointly entitled to ½ share in the Suit Properties.

16. The Trial Court's decision that the plaintiff is entitled to partition the Suit Properties as per Ex-A.15 – Settlement Deed dated January 25, 1996, reflects an erroneous approach. The First Appellate Court's finding that the plaintiff is entitled to an extent of 2 Acres 47 Cents in Item No.1 of Suit Properties is equally an erroneous, mirroring the flawed approach of the Trial Court. When the Trial Court as well as the



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First Appellate Court concurrently found that there was no Oral Partition as alleged, they ought to have passed preliminary Decree partitioning the entire Suit Properties equally between the plaintiff on one side and the defendants collectively on the other side. The contra findings are not in accordance with law and hence, liable to be set aside. The Substantial Questions of Law are answered accordingly.

17. Before parting with this Judgment, this Court would like to note that the learned Counsel defendants submits that the defendants reclaimed the land in Survey No.24/1A by spending huge amounts for planting coconut trees as well as for developing irrigation facilities and hence, he prays that the defendants may be allotted the portion which they are enjoying viz., 2 Acre 47 Cents in Survey No.24/1A. This Court is of the view that the prayer cannot be considered at this stage viz., Preliminary Decree Stage and that the defendants can very well pray the Trial Court at the time of final Decree proceedings for equitable division seeking to allot them the portion in their possession and enjoyment. Needless to mention that, if such a prayer is made, the Trial Court will adjudicate the same as per law based on the principles of equity.



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18. In the result, the Second Appeal is partly allowed, and the Judgment and Decree passed by the First Appellate Court and the Trial Court are modified as hereunder:

- (i) The Suit Properties (both Item Nos.1 & 2) shall be divided into two equal shares and one such share shall be allotted to the plaintiff. To that extent, Preliminary Decree is passed;
- (ii) Considering the relationship between the parties as well as the facts and circumstances of the case, there shall be no Order as to costs;
- (iii) Consequently, connected Civil Miscellaneous Petition is closed.

28.10.2024

Index : Yes
Neutral Citation : Yes
Speaking Order : Yes
TK

R. SAKTHIVEL, J.

TK

To



S.A.NO.201 OF 2021

1.The Principal District Judge
Principal District Court
Namakkal.

2.The Subordinate Judge
Subordinate Court
Paramathi.

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