



S.A.No.683 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 12.01.2024

Delivered on: 31.01.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.B.BALAJI

S.A.No.683 of 2017
and CMP. Nos.10714 of 2010, 9855 of 2021
and 17576 of 2017

A.Subramani

...Appellant

Vs.

1.Palaniammal

2.P.Mohanraj

3.P.Sivakumar

4.N.Rangasamy

5.R.Anbu

6.R.Subramani

7.A.Ranganathan

(R7 is impleaded vide Court order

dated 16.10.2023 made in CMP.No.9857

of 2021 in S.A. No.687 of 2017)

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 15.02.2017 made



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in A.S. No.48 of 2013 on the file of the learned Third Additional District Court, Salem, reversing the judgment and decree dated 06.10.2012 made in O.S. No.112 of 2008 on the file of the learned Sub Court, Sankari by allowing this Second Appeal.

For Appellant : Mr.N.Manoharan

For Respondents : Mr.T.L.Thirumalaisamy
for R1 to 3 & 7
Mr.R.Poornima for R4 to 6

JUDGMENT

The unsuccessful 1st defendant in a Suit for partition is the appellant.

2. The Suit in O.S.No.112 of 2008 came to be filed by the respondents 1 to 3 in the Second Appeal, seeking a preliminary decree of 2/6 in favour of the plaintiffs in respect of the suit properties and for a permanent injunction.

3. The case of the plaintiffs before the Trial Court was that the property originally belonged to Nachi Gounder who died leaving behind three sons



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viz., Palani, Arumugam, and Kanthaswami. The wife of the said Arumugam is the 1st plaintiff and the grand children of Arumugam and the 1st plaintiff viz., Palaniammal born to their daughter Kamala are the plaintiffs 2 and 3. The 1st defendant is the brother of Kamala, i.e., the son of Arumugam. The 2nd defendant is the 3rd son of Nachi Gounder, viz., Kanthaswami and defendants 3 and 4 are the sons of the said 2nd defendant, Kanthaswami. The defendants 2 to 4 did not choose to contest the suit and it was only the 1st defendant who filed a written statement and contested the suit for partition. The defence set up by the 1st defendant was that the suit for partition was bad for partial partition and for mis description of the suit properties also for non-joinder of necessary and proper parties.

4. The Trial Court dismissed the suit, accepting the contentions of the 1st defendant. However, on appeal, the First Appellate Court has reversed the findings of the Trial Court and allowed the First appeal in A.S.48 of 2013, granting a decree for partition.



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5. At the time of admission on 19.11.2020, this Court has framed the following two substantial questions of law:

“i. Whether the appellate Court was right in granting 2/6th share to the respondents, when it is conceded that the properties are ancestral properties in the hands of Arumugham?

ii. Whether the appellate Court was right in concluding that the other joint owners of the properties are not necessary parties to the suit and the suit is not bad for partial partition?

6. Heard Mr.N.Manokaran, learned counsel for the appellant, Mr.T.L.Thriumalaisamy, learned counsel for the respondents 1 to 3 ad 7 and Mrs.R.Poornima, learned counsel for the respondents 4 to 6. The respondents 4 to 6 are defendants 2 to 4 in the suit, who did not choose to contest the suit. However, the learned counsel for the respondents 4 to 6 would submit that her clients support the case of the plaintiffs viz., the respondents 1 to 3 in this Second Appeal.



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7. Learned counsel for the appellant would take me through the relevant pleadings and portions of evidence to show that there was a total misdescription of the suit properties, including survey numbers and extent. Further, he would also state that item No.1 comprised in S.No.683/1 was purchased in Ex.A2 by Nachi Goundar and properties comprising in S.Nos. 575/1, 579/6 and 584/1 were subject matter of partition deed in Ex.A1.

8. According to the learned counsel for the appellant, there is total mismatch of the suit schedule with Ex.A1-partition deed schedule, in respect all four items. More over, he would also state that admittedly the properties were purchased in common and other sharers have not been joined and therefore the suit has to be fail for misdescription of property, non-joinder of proper necessary parties. That apart, he would also take me through the pleadings and evidence with regard to non inclusion of certain items of properties which were available for partition and therefore rest his case for allowing the Appeal even on the ground of partial partition.



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9. Per contra, the learned counsel for the respondents 1 to 3 as well as 4 to 6 would take me through the admissions of the 1st defendant in evidence that the properties were being enjoyed by their branch and not by anybody else and therefore the findings of the First Appellate Court reversing the judgment of the Trial Court were proper and did not require any interference in Second Appeal. Further, the counsel would also state that the Courts have rightly rejected the plea of oral relinquishment by Kamala as the same was not proved by the 1st defendant and the counsel would also state that all co-pattadhars need not be arrayed as parties to the suit and state that only the co-owners alone were required to be parties in the partition suit and in the instant case, the necessary parties were impleaded and therefore the question of dismissal of the suit and the ground of non-joinder would not arise. Further, the learned counsel would also state that mismatch and description of properties was only as a result of lands being acquired and therefore the same cannot be held to be fatal to the plaintiffs' case seeking partition.



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10. On the ground of mis-description of properties, I find from evidence of P.W.1 and P.W.2 that both of them have categorically admitted that the description of the properties as set out in the plaint were not matching or corroborating the schedules to Ex.A1 partition. Further the plaintiffs have not even whispered about the effect of Ex.A2 under which S.No.683/1 was purchased by Nachi Goundar. It has also come out in evidence, especially cross examination of the plaintiffs' witnesses themselves that certain items of properties like well etc., have not been included in the suit for partition, even though very much available for partition. The Trial Court has elaborately discussed all these omissions and the effect of non-joinder of proper and necessary parties viz., the other pattadhars in the same survey number of properties and came to the conclusion that suit as framed is not maintainable in law.

11. The First Appellate Court rightly rejected the plea of oral relinquishment as the 1st defendant did not lead any oral or documentary



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evidence sufficient to establish the said factum of oral relinquishment by Kanthaswamy. However, the First Appellate Court has proceeded to reverse the finding of the Trial Court on the ground that co-pattadhars were not necessary parties to the partition suit amongst co-owners and also found that since D.W.1 had admitted that the properties were being enjoyed by convenience mode, the plaintiffs cannot be non-suited on the ground of partial partition or misdescription of the properties.

12. As rightly contented by the learned counsel for the appellant, the First Appellate Court has not addressed the material and substantial issue before it in the light of categorical admissions by both P.W.1 and P.W.2 that the suit properties in the plaint were clearly in mismatch with the registered Ex.A1-partition deed and also in the light of no whisper in the plaint regarding the purchase of property in S.No.683/1 by Nachi Gounder himself under Ex.A2, a preliminary decree cannot be passed and effectively put in execution by way of a final decree in order to place the parties in physical and separate possession of their respective shares. Merely because D.W.1 had



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admitted that the parties were enjoying the properties separately, in the absence of a registered partition deed or atleast an oral partition which had been acted upon by mutation of records in individual names and separate possession of the divided properties, there cannot be a valid partition in law. No doubt, the 1st defendant's plea that Kamala, his sister had relinquished her share in his favour was not proved or established at trial. In Ex.A1-partition deed between Nachi Gounder and his three sons, 'B' schedule property to the said partition deed in Ex.A1 was jointly allotted to his two sons, Arumugam and Kandaswamy. The said partition deed in Ex.A1 did not cover the subject property comprised in Ex.A2 sale deed. However, the property in Ex.A2 sale deed is also the subject matter of the partition suit. However, the branch of Palani, one of the sons of Nachi is not even arrayed as a party in the partition suit. Further, the plaintiffs had categorically admitted to omission of certain items of property available for partition.

13. The Trial court had rightly discussed these aspects and proceeded to dismiss the suit. However, the First Appellate Court has merely placed



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reliance on the evidence of D.W.1 which neither in anyway belittle his defence nor amount to admission of the plaintiffs' case and proceeded to reverse the findings of the Trial Court and decreed the suit, granting a preliminary decree, as prayed for by the plaintiffs.

14. As rightly argued by the learned counsel for the appellant, unless all proper and necessary parties are before the Court and the description of properties is spelt out clearly and correctly in the preliminary decree, the parties cannot effectively have a final decree passed and such a preliminary decree **bristling** with incorrect particulars would result in serious injustice to the parties, including the plaintiffs themselves. In this connection, the case of the appellant is further strengthened by the fact that pending the suit, pursuant to the defence taken by the 1st defendant and pending the First Appeal, the plaintiffs sought for amending the plaint in I.A.No.105 of 2015. However, the First Appellate Court dismissed the said application. The plaintiffs have not challenged the order by way of revision. The very fact that the plaintiffs, after having suffered a decree of dismissal of the partition suit,

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realized their folly in not properly describing the properties, came forward with the said application for amendment in order to set right the misdescription of the properties. Despite the said application being dismissed, they have chosen to accept the decision of the First Appellate Court by not challenging the same before this Court by way of revision. This only goes to show that the plaintiffs themselves were conscious of the fact that the properties were not properly described in the suit and an amendment was necessitated. Thus, even from this angle it can be safely concluded that the description of properties in the suit schedules would certainly cause prejudice and inconvenience to all the parties.

15. In view of the above, I am constrained to set aside the judgment and decree dated 15.02.2017 made in A.S.No.48 of 2013 on the file of the learned III Additional District Court, Salem. In fine, Second Appeal is allowed and the substantial questions of law is answered in favour of the appellant. The suit in O.S.No.112 of 2008 dated 06.10.2012 on the file of the learned Sub Judge, Sankari stands dismissed. However, in view of the suit being

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dismissed only on the grounds of misdescription of properties as well as non-joinder and partial partition, the plaintiffs and/or defendants, are at liberty to approach the jurisdictional Court with a properly framed suit for partition. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

31.01.2024.

Index : Yes/No
Internet : Yes/No
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To

1. The Third Additional District Judge, Salem
2. The Sub Judge, Sankari.



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P.B.BALAJI, J.,
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Pre-delivery Judgment in
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