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S.A.No.664 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.03.2024

PRONOUNCED ON : 08.03.2024

CORAM

THE HONOURABLE MR. JUSTICE P.B. BALAJI

S. A.No.664 of 2018
and CMP.No.20349 of 2018

S. Ekambaram

... Appellant

Vs.

K.Nallathambi

... Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Additional District & Sessions Judge at Ariyalur dated 07.06.2018 in A.S.No.3 of 2013 confirming the judgment and decree of the Subordinate Judge's Court at Ariyalur dated 08.12.2009 in O.S.No.123 of 2007.

For Appellant

: Mr.Mr.P.Valliappan
for M/s.P.V.Law Associates

For Respondent

: Mr.M.Kavikannan

JUDGMENT

The plaintiff, in this second appeal, has challenged the judgment and decree of the Additional District & Sessions Judge at Ariyalur dated 07.06.2018 in A.S.No.3 of 2013, confirming the judgment and decree of the Subordinate



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Judge's Court at Ariyalur dated 08.12.2009 in O.S.No.123 of 2007.

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2. The defendant in a suit for partition, having suffered concurrent findings before the Courts below is the appellant herein.

3. The parties are described as per their litigative status before the trial Court.

4. It is the case of the plaintiff that he is the son of Kandasamy Mudaliar who had nine sons and three daughters and out of the said three daughters one of the daughters died. According to the plaintiff, the suit property is an ancestral property belonging to his grand father Palani Mudaliar who had only one son, Kandasamy Mudaliar, that is father of the plaintiff. The plaintiff claims that he is entitled to half share in the suit property and the suit property being ancestral property, his sisters would not be entitled to any share.

5. The defendant is the purchaser of the suit property from the father of the plaintiff. The defendant filed a written statement contending that he is a bonafide purchaser of the entire suit property from the father of the plaintiff who had absolute right to deal with the property and therefore the plaintiff is not entitled to seek the relief of partition. The defendant also contended that the suit



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property is not an ancestral property as alleged by the plaintiff and even otherwise, the defendant has been in absolute physical possession and enjoyment of the entire property and therefore the plaintiff's claim of being in joint possession was also not factually true and consequently he sought for dismissal of the suit. The defendant also raised the plea of non joinder of the sisters of the plaintiff as parties to the suit.

6. The trial Court finding that the property was an ancestral property at the hands of the father of the plaintiff, held that the plaintiff is entitled to one $\frac{1}{2}$ share. The first appellate Court, on appeal by the defendant concurred with the findings of the trial Court and dismissed the appeal.

7. Aggrieved by the concurrent findings rendered by the Courts below, the defendant has come up by way of filing the present Second Appeal. On 30.11.2018, this Court admitted the Second Appeal on the following three questions of law.

'(a) when admittedly the respondent was not born in the year 1948 when his grand father Palani Mudaliar has passed away and the respondent's father Kandasamy Mudaliar had sold the suit property under Exhibit B1 to discharge family debts and payout his medical expenses, whether the Courts below are correct in law in holding that the suit property is coparcenary property in which the respondent is entitled to $\frac{1}{2}$ share?

(b) when the respondent examined as PW1 categorically admitted that he was not born when his grand father Palani Mudaliar died in the year 1948 and even as per the case set up by him, the property was absolutely



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taken by Kandasamy Mudaliar, are the Courts below correct in law in holding that the respondent is a sharer entitled to ½ share?

(c) when the boundary recital in a document not inter parties cannot be relied upon to uphold title, whether the Courts below are correct in law in placing reliance upon the boundary recital contained Exhibit A7 Sale deed to hold that the suit property is ancestral property?'

8. I have heard Mr.P.Valliappan, learned Senior Counsel appearing for M/s.P.V.Law Associates, counsel for the appellant and Mr.M.Kavikannan, learned counsel appearing for the respondents.

9. Mr.P.Valliappan, learned Senior Counsel submitted that the suit property was situated in Sengunthapuram village and the defendant has brought out vital admission in cross examination of PW1 to establish that originally the family was residing elsewhere and the father of the plaintiff shifted to Sengunthapuram. He would also state that the plaintiff was admittedly married in the year 1971 and he settled down at his wife's village at Variyangaval where he was carrying on his avocation as weaver, like his father. The plaintiff also states that the father and mother were residing in a thatched house constructed in the suit property and according to the plaintiff, the property being an ancestral property, the suit was filed. The contention of the learned Senior Counsel is that even on the strength of the evidence adduced by the plaintiff, it is clear that the suit property cannot be ancestral in nature since the plaintiff admitted that his father shifted to Sengunthapuram from his native village at



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Elaiyur, where alone his grand father ,Palani Mudaliar had ancestral property.

PW1 has admitted that when there were floods in the ancestral village, Elaiyur, his father shifted to Sengunthapuram and that he was born only in Sengunthapuram. He would further state that the appellant purchased the property on 20.06.1997 and admittedly after more than a decade, the plaintiff issued a lawyer notice on 11.09.2007, knowing fully well that he had no right in the suit property.

10. The learned Senior Counsel would also state that the Courts below have erroneously relied on Ex.A6 and Ex.A7 to hold that the property is an ancestral property and was available for partition at the hands of the plaintiff. In so far as Ex.A6 revenue records, the learned Senior Counsel's argument is that revenue records would not confer title and admittedly the plaintiff has not produced any sale deed or any other registered document to establish his contention that the property was purchased by Palani Mudaliar. He would also state that no reliance would be placed on the Patta which was obtained just prior to filing of the suit, that too after issuance of the lawyer's notice for partition. Regarding Ex.A7, the learned Senior Counsel's contention is that in a document, registered between third parties, the boundary recitals mentioned in such a document would not bind the party to the lis in a different case. He



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would place reliance on decisions of the Hon'ble Division Bench of this Court in

the case of *V.A.Amiappa Nainar (died) and others Vs N.Annamalai Chettiar*

(died) and others reported in AIR 1972 Madras 154, which has been followed

by this Court in the following cases:-

(i) *Ponnusamy and others Vs Annamalai Chettiar and another* reported in 1999 MLJ (Supp.) 456

(ii) *Balamani and another Vs S.Balasundaram* reported in 2010 – 1 LW 601

(iii) *Sadhurajan Vs Sriramulu Naidu and others* reported in AIR 1999 Mad 377

(iv) *Karpaagammal and others Vs Suseela and others* reported in (2022) 3 MLJ 599.

The consistent view taken by this Court following the ratio laid down by the Hon'ble Division Bench of this Court in the case of *V.A.Amiappa Nainar (died) and others Vs N.Annamalai Chettiar* is that when recitals in a document not inter parties has to be admitted in evidence, the only course open is to examine the executant of the documents in which such recitals as to boundaries are found. Here admittedly the plaintiff having not examined the executant, the learned Senior counsel would impress upon this Court that no reliance can be placed on Ex.A7.



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11. The learned Senior Counsel would also draw the attention of this Court to the cross examination of PW1, where he has categorically admitted that the defendant is in absolute physical possession of the suit property. He would therefore pray for the second appeal being allowed on all the three substantial questions of law.

12. Per contra, the learned counsel for the respondent submitted that being concurrent findings, no interference is warranted under Section 100 of C.P.C. The learned counsel drew the attention of this Court to the judgment of the First Appellate Court as well as the trial Court to contend that the findings arrived at by the Courts below are very reasoned, based on the oral and documentary evidence adduced by the parties. He would also further state that being ancestral property and the sisters having been married well before the Hindu Succession (Tamil Nadu Amendment) Act, 1989, coming into force, they were not proper and necessary parties to the suit for partition. He would also state that the Courts below have rightly concurred in holding that the suit property is an ancestral property, available for partition at the hands of the plaintiff. Therefore, he prayed for dismissal of the second appeal.

13. The short question that needs to be decided in the present Second



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Appeal is as to whether the suit property is an ancestral property of the father of the plaintiff, Kandasamy Mudaliar or his separate property. Admittedly, even according to the plaintiff, the ancestral village is Elaiyur and not Sengunthapuram. The plaintiff, in cross examination, has categorically admitted that when Elaiyur was affected by floods, his father shifted to Sengunthapuram. It is also the specific case of the plaintiff that his father was also a weaver by profession and he was carrying on weaving business in Sengunthapuram. Excepting Ex.A2, A6 & A7, the plaintiff was not able to produce any document what so ever to establish that the suit property is an ancestral property. The defendant has specifically denied the nature and character of the suit property, especially to be an ancestral property. Therefore, the burden would be only upon the plaintiff to show that the suit property was indeed an ancestral property in which the plaintiff would also get a share on his birth. Ex.A2 admittedly, as rightly contended by the learned Senior Counsel appearing for the appellant, was just prior to the filing of the suit and in any event it is a revenue record which will not confer title on the plaintiff's father. In fact, Ex.A6 is the register extract of House tax for the year 1997 – 1999. The said extract indicates that the municipality has recognised the right of the grand father, Palani Mudaliar. More over, Ex.A6 has been issued pending the suit on 27.05.2008 only. I find that it is any way pertaining to payment of property Tax for the



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building and does not in any way establish title to the suit land. However, I find

that the said Ex.A6 has been procured after filing of the suit, therefore much evidentiary value cannot be attached to Ex.A6. In so far as the Ex.A7 sale deed pertaining to the year 1947, where one of the boundaries mentioned to the property covered under the document is Palani Mudaliar's property, as laid down by the Hon'ble Division Bench of this Court and also discussed earlier, unless the executant to the said document has been examined, the recital regarding the boundary cannot be imposed upon the defendant in the present suit. Admittedly, in Ex.A7, neither the plaintiff's father nor his grand father, Palani Mudaliar were parties to the said document. Admittedly, the defendant has purchased the property from the plaintiff's father, Kandasamy Mudaliar. Therefore, Ex.A7 is not an inter party document which would have binding force on the defendant.

14. I have no difficulty in following the ratio laid down by the Hon'ble Division Bench of this Court which has been subsequently followed by this Court in several other cases as well. Apart from the above referred and discussed documents, the plaintiff has not been able to establish that the suit property is an ancestral property at the hands of the plaintiff's father. In fact, the cross examination of PW1 virtually gives up the plaintiff's case. He has admitted



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that ancestral property was owned by Palani Mudaliar only at Elaiyur village and further when Palani Mudaliar was residing there, floods affected the village and therefore the plaintiff's father, Kandasamy moved to Sengunthapuram village and that the plaintiff was also born only in Sengunthapuram. The plaintiff also admits that the suit property is situated only in Sengunthapuram and it is not the case that the suit property is situated at Elaiyur. He has also admitted he was not able to substantiate his claim that the suit property was purchased by his grand father, Palani Mudaliar, by producing a sale deed in his favour. The plaintiff also states that when his grand father died, he was one year old and at the time of giving evidence in the year 2009, the plaintiff was 62 years and that he had never seen his grand father, Palani Mudaliar. He has also admitted that he has not been able to produce any document to show that the Palani Mudaliar also shifted to Sengunthapuram. That apart, the plaintiff has also admitted that the defendant has purchased the suit property in entirety from his father and constructed a compound wall on all four sides and he has been in physical possession of the suit property. In fact, it is also seen from Ex.A2 that even the patta issued is only in the name of plaintiff's father Kandasamy Mudaliar and not in the name of Palani Mudaliar, which only aligns with the defendant's version that the suit property was purchased by Kandasamy Mudaliar, out of his own earnings, accruing from weaving business and not



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from any joint family nucleus or funds. Further, the defendant has also filed substantive documents to establish his title and possession, right from the sale deed under which the property was purchased, viz., patta in the name of the defendant and patta in the name of his vendor and this coupled with the admission of the plaintiff that the defendant is in absolute possession, only clearly goes to show that the plaintiff never challenged the sale executed by his father, Kandasamy Mudaliar in the year 1997. Even after the death of Kandasamy Mudaliar, the plaintiff has chosen to remain in deep slumber for more than 10 years before he chose to issue notice under Ex.A3 on 11.09.2007.

15. Even otherwise as rightly contended by Mr.P.Valliappan, learned Senior Counsel, having filed the suit for partition, the plaintiff ought to have impleaded his sisters. Admittedly, the suit has been filed only in the year 2007 after issuing of pre suit notice on 11.09.2007 under Ex.A3. On the said date, the Hindu Succession (Amendment) Act, Act 39 of 2005 had come into force, giving equal right to daughters in coparcenary property treating them on an equal footing with sons. That being the position, the non joinder of the sisters of the plaintiff is clearly fatal to the suit for partition. Therefore, even on the ground of non joinder of proper and necessary parties, namely the sisters of the plaintiff, the suit has to necessarily fail.



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16. Even with regard to the contention regarding valuation and improper Court fee being paid, I am in agreement with the submission of the learned Senior Counsel appearing for the appellant. In a suit for partition, the plaintiff shall be entitled to pay the fixed Court fee under Section 37 (2) of the Tamil Nadu Court fees and Suits Valuation Act, 1955 only if he is in joint possession of the property. It is settled law that the such a plaintiff need not be in actual physical possession and as long as his share in the suit property is definite and subsisting, he is deemed to be in constructive possession of the suit property, jointly along with other co-owners who may be actually in physical possession of the suit property. Even in such cases, the plaintiff who seeks partition can take advantage of the fixed Court fee payable under Sub Section (2) of Section 37 of the Tamil Nadu Court Fees and Suits Valuation Act, 1955. However, here admittedly the property has been sold even by the father of the plaintiff in the year 1997 and right from that date, the defendant has been in physical possession of the entire suit property to the exclusion of any of the family members of the plaintiff. Therefore, in such a case, the plaintiff cannot claim to be in joint possession and he ought to have valued the suit under Section 37 (1) and not under Section 37(2) of the Tamil Nadu Court Fees and Valuation Act, 1965. Even viewed from this angle the suit for partition is liable



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to fail.

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17. Viewed from any angle, having held that the property is not established to be an ancestral property of the father of the plaintiff, the sale executed by father of the plaintiff, Kandasamy Mudaliar in favour of the defendant is legal, valid and also binding on the plaintiff and the plaintiff is not entitled to seek any relief by way of partition of the suit property that has already been alienated, even during the life time of their father. Thus, I am constrained to interfere with the concurrent findings of the Courts below, especially when they have failed to appreciate the vital admission of PW1, plaintiff during cross examination regarding the character of the suit property and also with regard to absolute possession and enjoyment of the appellant, right from the date of purchase that is on 20.06.1997. Thus, under Section 100 of CPC, the High Court is entitled to interfere with such concurrent findings when the Courts have ignored material evidence available on record, apart from relying on the documents exhibited which were not germane to the facts in issue.

18. Accordingly, the substantial questions of law framed in the second appeal are answered in favour of the appellant.



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19. In conclusion, the Judgment and decree of the Courts below are hereby set aside. Resultantly, the suit for partition filed by the plaintiff is dismissed. Accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

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Index : Yes/No
Internet : Yes/No
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Speaking order/Non-speaking order
dpq

To

1. The Additional District & Sessions Judge at Ariyalur
2. The Subordinate Judge's Court at Ariyalur.

P.B. BALAJI,J.



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Pre-delivery judgment made
in S. A.No.664 of 2018
and CMP.No.20349 of 2018

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