



A.S.No.149 of 2019

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.07.2024

CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR JUSTICE R.SAKTHIVEL

A.S.No.149 of 2019

and

C.M.P.Nos.6220, 6222 of 2019 & 12662 of 2024

Kandasamy (Died)

1.Thamizharasi

2.K.Sakthivel

3.Selvi

4.Rajeswari

5.Paramasivam

6.K.Palaniammal (Died)

[6th appellant died, appellants 1 to 5 who were already on record are recorded as legal representatives of deceased 1st appellant, vide order dated 03.07.2024 made in A.S.No.149 of 2019 and CMP.Nos.6220, 6222 of 2019 and 12662 of 2024.]

...Appellants

Vs.



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1.Thangavel

2.Shanthamani

3.Subramaniam

...Respondents

Prayer: Appeal filed under Section 96 of the Code of Civil Procedure read with Order XLI Rule 1 of the Code of Civil Procedure, to set aside the judgment and decree dated 11.01.2018 made in O.S.No.40 of 2012 on the file of the Court of the Second Additional District and Sessions Court, Tirupur.

For Appellants : Mr.R.Agilesh

For Respondents : Mr.S.Kousik
for M/s.V.Anandhamurthy
for R1 & R2

R3- No appearance

J U D G M E N T

(Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)

The defendants in O.S.No.40 of 2012 are on appeal aggrieved by the preliminary decree for partition granted in O.S.No.40 of 2012.



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2. For the sake of convenience the parties are referred to as per their rank in the suit.

3. The suit was filed by the plaintiffs contending that the suit properties were allotted to Karuppana Nadar, their maternal grandfather at a partition that took place on 06.06.1969 between Karuppana Nadar and his brothers' children. According to the plaintiffs, the suit 'A' Schedule properties were allotted to Karuppana Nadar along with a common interest in certain properties with third parties. It is also claimed that the said Karuppana Nadar had orally partitioned the common properties with the third parties and was in exclusive possession and enjoyment of the suit properties. Contending that the 1st defendant and the mother of the plaintiffs Marayal @ Ammaniammal are entitled to $\frac{1}{2}$ share each in the properties which were allotted to Karuppana Nadar in the partition of the year 1969, the plaintiffs who are the children of Ammaniammal, the daughter of Karuppana Nadar sued for partition and separate possession.



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4. The suit was resisted by the defendants contending that the plaintiffs were ousted from enjoyment of the property for more than 12 years and therefore they cannot seek partition. It was also contended that there was a partition between the defendants themselves on 12.03.2012 in which specific properties were allotted to Kandasamy and on his death they were to be taken by his minor grand-children and the minor grand-children having not been made parties to the suit, the suit is bad for non-joinder of necessary parties.

5. At trial the 1st plaintiff Thangavel was examined as PW1 and Exs.A1 to A10 were marked. The 3rd defendant Sakthivel was examined as DW1 and a third party by name Ravichandran was examined as DW2. Exs.B1 to B6 were marked.

6. The learned trial Judge on a consideration of the evidence on record concluded that one of the sons of Ammaniammal, the brother of the plaintiffs was added as 7th defendant since he had attested the partition



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document of the year 2012. The trial Court on a consideration of the evidence on record rejected the defence and granted a decree declaring 3/12th share of the plaintiffs and the 7th defendant. It also declared the partition deed as null and void.

7. The trial Court though rejected the defence, applied the law as it stood prior to the pronouncement of the Hon'ble Supreme Court in *Vineeta Sharma Vs. Rakesh Sharma and others* reported in (2020) 9 SCC 1 and concluded that Ammaniammal would be entitled to only 1/4th share in the suit properties and Kandasamy, the son would be entitled to 3/4th share. On the said finding, the learned trial Judge held that the plaintiffs 1 and 2 and the 7th defendant who are the children of Ammaniammal will be entitled to 3/12th share and the defendants being son and grandchildren of deceased Karuppana Nadar would be entitled to 9/12th share. Aggrieved the defendants are on appeal.

8. We have heard Mr.R.Agilesh, learned counsel appearing for the appellants and Mr.S.Kousik, learned counsel appearing for the respondents.



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9. Mr.R.Agilesh, learned counsel appearing for the appellants would vehemently contend that in view of the fact that mutation of the revenue records was effected even in the year 1983, the plaintiffs were ousted from enjoyment of the property and therefore the suit filed in the year 2012 is clearly hit by the doctrine of ouster and the plaintiffs have lost their right to sue. He would also invite our attention to the judgment of the Division Bench of this Court in ***R.Rayappan (Died) and others Vs. Rajammal (Died) and others***, dated **21.12.2023** made in ***A.S.No.189 of 2017***, wherein, it was held that if a partition document is entered into and it is registered it will be notice of exclusion to the other co-owners and the said act by itself would amount to ouster. He would also contend that since under the partition deed dated 12.03.2012 specific share has been allotted to Kandasamy and on his death it is to vest in his grand sons. His grandsons are necessary parties to the suit.

10. Contending contra Mr.S.Kousik, learned counsel appearing for the respondents would submit that the question of ouster will not arise at all in



the case on hand. He would submit that Ammaniammal being the daughter of Karuppana Nadar did not get any right to sue for partition prior to the enactment of the Hindu Succession (Amendment) Act (39 of 2005) i.e., on 09.09.2005. He would also point out that Ammaniammal having died in 2009 her legal heirs viz., the plaintiffs have instituted the suit in 2012 i.e., within 7 years from the date of the enactment of the Hindu Succession Amendment Act, 2005 which recognised the rights of the daughters as coparceners to inherit the ancestral properties of their father.

11. He would further point out that Ammaniammal having got married prior to 1989 would not get any right under the Hindu Succession (Tamil Nadu Amendment) Act 1 of 1990, since daughters who were married prior to enactment of that Act has an exclusion from the sweep of Section 29-A introduced by the said enactment. On the question of non-joinder the learned counsel would submit that on the date when the suit was filed Kandasamy was very much alive and the partition itself was entered into a month prior to the filing of the suit. The plaintiffs were not parties to the document, therefore it was open to them to ignore the document and sue for



partition. The partition document would not be binding on the plaintiffs, therefore seeking the relief of declaration as to the nullity of the document or impleading of the beneficiaries under the document does not arise at all.

12. We have considered the rival submissions.

13. The petition in C.M.P.No.12662 of 2024 has been filed seeking to produce the following documents to show the exclusive enjoyment of Kandasamy since 1981.

1) Photocopy of the petition for electricity connection for petitioner's house in S.F.No.2/1 to the Junior Executive Engineer, O & M., T.N.E.B. Kunnathur by petitioner's father dated 22.07.1981

2) Photocopy of the Patta Pass Book issued by the Government of Tamil Nadu to petitioner's father dated 30.01.1986.

3) Photocopy of the Patta No.39 issued to petitioner's father.

4) Photocopy of the series of Kist Receipts for the lands paid by the petitioner's father.



14. Even if such enjoyment is acknowledged it cannot be said that either Ammaniammal or her heirs have lost their right to the property. We therefore find that these documents will not be of any help to us in deciding the appeal. Therefore, this petition in **C.M.P.No.12662 of 2024** stands **dismissed**.

15. On the contention of the learned counsel on either side, the following questions arise for determination in this appeal:-

- 1. Whether the defendants could plead ouster in the case on hand?*
- 2. Whether non-joinder of grand-children of Kandasamy is fatal to the suit?*
- 3. What will be a just share that the plaintiffs will be entitled to?*

Point No.1:-

16. Karuppana Nadar, the father of the 1st defendant and Ammaniammal admittedly died in the year 1975. He had only one son and one daughter viz., Kandasamy and Ammaniammal. There is no dispute regarding the character of the property as ancestral as they were allotted to



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Karuppana Nadar at the partition that took place between him and other heirs of Kaliappa Nadar in the year on 06.06.1969. Thereafter, the son Kandasamy was in exclusive possession of the properties in question. On the enactment of the Hindu Succession (Amendment) Act (39 of 2005) on 09.09.2005, the daughter Ammaniammal in her own right became a coparcener entitled to equal right with that of the son over the properties of their father.

17. In *Vineeta Sharma Vs. Rakesh Sharma and others* reported in (2020) 9 SCC 1, the Hon'ble Supreme Court has declared the law to the effect that immaterial of the date of death of the father, the Hindu daughter would become a coparcener along with her father from the date of enactment of the Hindu Succession (Amendment) Act, 2005 (39 of 2005) ie., 09.09.2005. Therefore, Ammaniammal acquired the right to sue only on and from 09.09.2005. Ammaniammal died in the year 2009 and her children, the plaitniffs 1 and 2 have instituted the suit immediately thereafter in the year 2012. Therefore, there is no question of ouster, since the right to sue accrued on Ammaniammal only on and from 09.09.2005 and the present



suit for partition was filed on 26.04.2012, within 12 years from the date of conferment of the right.

18. The judgment relied upon in *R.Rayappan (Died) and others Vs. Rajammal (Died) and others*, dated **21.12.2023** made in *A.S.No.189 of 2017* is on a tottly different set of facts. There the father himself had entered into a partition. There the partition was entered into in 1995 aserting exclusive title to the properties and the suit came to be filed only in the year 2012 after at least 17 years. In the case on hand, the partition was effected only on 12.03.2012 and the suit came to be filed within a month thereafter on 26.04.2012. Therefore, we do not think that the ratio of decision in *R.Rayappan (Died) and others Vs. Rajammal (Died) and others (supra)* could be applied to the case on hand. Hence, this point is answered against the appellants.

Point No.2:-

19. On the question of non-joinder of necessary parties, we are unable to accept the contention of the learned counsel for the appellants for the simple reason that any partition entered into between Kandasamy and his



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children would be binding only on them and it will not bind the shares of the plaintiffs. This being the legal position, conferment of some right under the document which is not binding on the plaintiffs will not drive the plaintiffs to seek a declaration that the document is invalid. The plaintiffs can very well ignore the document and file a suit for partition. Therefore, this plea of non-joinder is not available to the defendants. Hence, the second point is also answered against the appellants.

Point No.3:-

20. What remains is the share that the plaintiffs will be entitled to. The judgment of the trial Court was rendered prior to the judgment of the Hon'ble Supreme Court in *Vineeta Sharma Vs. Rakesh Sharma and others (supra)*. Therefore, the trial Court had gone through the law that had then stood and granted a share in favour of the plaintiffs only in respect of the share of the Karuppana Nadar, applying the theory of notional partition as per the un-amended Section 6 of the Hindu Succession Act.



21. After the judgment of the Hon'ble Supreme Court in *Vineeta Sharma Vs. Rakesh Sharma and others* (*supra*) there is a change in the position of law. The Hon'ble Supreme Court has held that irrespective of the date of death of the father, the daughter will have equal right as that of the son in the ancestral properties of the father. Therefore, Ammaniammal will be entitled to 1/3rd share in the properties allotted to Karuppana Nadar, where Karuppana Nadar and Kandasamy will be entitled to 1/3rd share. The 1/3rd share of Karuppana Nadar upon his death would devolve on his two children viz., Ammaniammal and Kandasamy. Therefore, Kandasamy and Ammaniammal would each be entitled to 1/2 share in the suit properties.

22. Hence, we find that the plaintiffs and the 7th defendant would be entitled to 1/2 share in the suit properties and the plaintiffs themselves would be entitled to 2/3rd of the 1/2 share which will be 4/12th share in the suit properties. The 7th defendant will be entitled to 2/12th share.



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23. Having answered all the points for determination as above, while dismissing the appeal, we modify the decree of the trial Court granting 4/12th share together to the plaintiffs. There will be a preliminary decree in O.S.No.40 of 2012 declaring 4/12th share of the plaintiffs in the suit properties. The other parts of the decree will remain confirmed. Considering the relationship between the parties we make no order as to costs. Consequently, the connected miscellaneous petitions in C.M.P.Nos.6220 and 6222 of 2019 are closed.

(R.SUBRAMANIAN, J.)

(R.SAKTHIVEL, J.)

09.07.2024

dsa

Index : No

Internet : Yes

Neutral Citation : No

Speaking order



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The Second Additional District and Sessions Judge,
Tirupur.



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R.SUBRAMANIAN, J.
and
R.SAKTHIVEL, J.

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