



A.S(MD)No.58 of 2023

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Dated: 20.02.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD)No.58 of 2023
and
C.M.P(MD) No.3642 of 2023

1. Mala
2. Mayilthayammal

..Appellants/Plaintiffs

Vs.

1. Kannammal
2. M.R.Rani
3. G.Palanivel
4. P.Kasiammal

...Respondents/Defendants

Prayer : This Appeal Suit has been filed under Section 96 of C.P.C., to set aside the decree and judgment dated 31.10.2018 passed in O.S. No.36 of 2009 by the learned Additional District Judge(FTC) Theni.

For Appellant	: Mr. K.R.Laxman
For R1 & R2	:Mr.N.Dilip Kumar
For R3 & R4	: Mr.George Raja for M/s. Ajmal Associates

JUDGMENT

This Appeal Suit has been filed as against the judgment and decree passed in O.S. No.36 of 2009 on the file of the learned



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Additional District Judge(FTC) Theni, wherein the appellants herein have filed a suit for partition and the same was dismissed by the trial Court. Aggrieved by the decree and judgment of the trial Court, the present appeal has been filed by the plaintiffs.

2. For the sake of convenience and brevity, the parties herein after will be referred to as per their status/ranking in the Trial Court.

3. The brief facts of averments of the plaint are as follows:

Originally the suit properties belonged to one late V.P.A. Marichamy Pillai and he died on 18.07.1989 intestate. He had two wives. The first wife/second plaintiff is Mayilthammal and second wife is Vijaya. Mayilthammal had three daughters namely Kannammal, Rani and mala. The second wife Vijaya had four daughters namely Kumutha, Vasanthi, Indra and Sugathi . The second wife Vijaya is no more. The daughter of Mayilthammal was given in marriage and they are residing separately. The properties were jointly enjoyed by the daughters of V.P.A.Marichamy Pillai born through second wife. On 15.09.1998 the daughter of V.P.A.Marichamy Pillai born through his first wife Mayilthammal



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and second wife Vijaya had partitioned the properties. Northern side was allotted to daughters of Mayilthaimmal and the southern side was allotted to the daughters of Vijaya. the plaintiff and the second defendant are in possession in the plaint scheduled house and the first defendant is residing in another place. So far as other landed properties are concerned already they partitioned the properties and thereby there is no dispute in respect of those properties. Now the second defendant at the instigation of her husband claiming that the property is exclusively belongs to her and she is trying to demolish the suit house and attempting to alienate the balance portion and attempting to sell remaining portion. Thereafter the plaintiff is not willing to be in joint possession and enjoyment of the property along with the defendants. When the plaintiff requested the defendants for amicable partition they refused, therefore the plaintiffs issued notice dated 19.10.2007 and the defendants 1 and 2 without the knowledge of the plaintiff they entered into partition dated 03.03.2009. When they questioned about the defendants they came to know that they attempted to sell the property to the third parties. Therefore they filed suit for partition over their 1/4 share. The defendants also attempted to evict the plaintiff by demolishing the buildings. Since the plaintiffs are not parties to the partition deed dated 03.03.2009 they need not



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cancel the partition deed and the partition deed will not bind the share of the plaintiffs. Since the defendants are attempting to create encumbrance over the properties the plaintiffs also sought for the relief of permanent injunction.

4. The brief averments of the written statement and additional written statement are as follows:

The suit is not maintainable either in law or on facts. The averments made in paras 3,4,5 are admitted. The averments made in para 6 in respect of partition dated 15.09.1998 are all false. In the property situated at ranger road the entire northern portion was allotted to the first plaintiff and the defendants 1 and 2. Since the mother of the plaintiff and the defendants were sick person and unable to move, share was not allotted to her and she was asked to reside in any one of the house of her daughters. Further in the agricultural lands out of 18 kullies four kullies were allotted to the second plaintiff but for others only two kullies were allotted. Apart from that after selling the cardamom garden after settling the debts the remaining amount of Rs.2,10,000/- was given to the second plaintiff, when other sharers were already allotted Rs.70,000/- towards their share. Apart from that 40 sovereigns of gold jewels were also given to the second plaintiff. The plaintiffs have issued



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notice dated 19.10.2007 with false averments and the same was suitably replied by these defendants but the said reply notice was suppressed by the plaintiffs.

4.1.The plaint schedule property was also partitioned between the parties and as per the partition the first plaintiff is enjoying the eastern side and the vacant site and the second defendant is enjoying the remaining portion of the property and the northern vacant site. The first defendant is enjoying the vacant lands which is situated in the western side of the main building. The second respondent had made alterations in his share and also renovated the building. The above said alteration and renovation also well known to the plaintiff. Both the plaintiffs are under the control of the first plaintiff's husband. Whiles the daughter of Vijaya and the defendants asked the plaintiff for registering the partition deed in respect of house but the first plaintiff refused for the same, thereby the defendants and the daughters of Marichamy born through the second wife entered into agreement dated 03.03.2009 and in that deed the share of all the plaintiffs was mentioned as one of the boundary. So far as other agricultural properties are concerned on 03.08.2009 the plaintiffs have sold their share to one Palanivel and his wife Kasiammal.



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4.2. In that document the excess share was allotted to the second plaintiff is also mentioned. Therefore the defendants already partitioned the properties and based on that partition they are enjoying the properties separately. Therefore the plaintiffs cannot question the enjoyment of the defendants. At the time of partition the properties in the year 1998, the first floor of the house worth about Rs. 15,00,000/- was not partitioned and the said first floor is under the possession and enjoyment of the plaintiff. The said first floor was not shown in the plaint schedule, where the plaintiffs have not admitted the partition made in the year 1998 and then have to include all the properties of V.P.A.Marichamy Pillai and also they have not included all the legal heirs of V.P.A.Marichamy Pillai therefore the suit is barred for non joinder of necessary parties. Further 40 sovereigns of gold jewels allotted to the second plaintiff was also not included in the schedule of property. Therefore the suit is bad for partial partition and non joinder of necessary parties. Apart from that V.P.A.Marichamy Pillai has so many shares worth about Rs.10,00,000/- and the same also not included in the suit properties. Thereafter the defendants 3 and 4 have purchased the properties of undivided 2.44 cents from the second plaintiff. The plaintiff has not included all the family properties and the sale deed



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executed by the plaintiff in favour of the defendants 3 and 4 are fraudulently created. The properties sold by the plaintiffs to the defendants 3 and 4 were not included in the suit. The plaintiffs have not sought for any relief as against the defendants 3 and 4, therefore the suit is liable to be dismissed

5. Based on the above said pleadings and hearing both sides, the trial Court has framed the following issues:

- 1) Whether the first plaintiff is entitled to 1/3 share in the suit properties?
- 2) Whether the partition deed dated 03.03.2009 is a valid document and binding upon the plaintiffs?
- 3) Whether the first plaintiff is entitled to the relief of permanent injunction?
- 4) To what costs and other reliefs the first plaintiff is entitled to?

Additional Issues

- 1) Whether the suit is bad by partial partition?
- 2) Whether the suit is barred by law of limitation?
- 3) Whether the suit bad for non joinder of necessary parties?



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6. Before the trial Court on the side of plaintiff, they have examined P.W.1 and P.W.2 and documents Ex.A1 to A.7 were marked. On the side of the defendant D.W.1 was examined and documents were marked as Ex.B.1 to B.3. The commissioner report and plan series were marked as court documents.

7. After considering the evidences adduced on both sides the trial Court has dismissed the suit. As against the decree and judgement the plaintiffs have preferred this appeal on the following grounds.

Grounds of Appeal

1) The decree and judgment passed by the trial Court is highly improper, untenable, non.est in both law and facts and the same are liable to be set aside.

2) The decree and judgment of the trial Court is contrary to law, probabilities of case and weight of evidence.

3) The trial Court has erred in holding that Ex.A1 family agreement has not come into effect by hastily relying on the version of the additional written statement filed subsequently by respondents 1 and 2



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4) The respondents 1 and 2 have categorically admitted that Ex.A.1 was effected on the date of its execution and was given effect by enjoying separate portion by the parties to the said document, they are estopped from denying the said fact and estopped from doing so

5) The trial Court has erred in holding that Ex.A.1 family arrangement is unregistered document and hence it cannot be looked into

6) The respondents 1 and 2 have not denied the genuineness of the Ex.A.1, family arrangement and admitted that family arrangement has come into force on the date of execution and was given effect by enjoying separate possession by the parties through their additional statement .

7) The appellants are not parties to the partition deed dated 03.03.2009 and the same is not binding on the plaintiffs. While so there is no question of challenging the partition deed would arise

8) The trial Court erred in holding that the suit is bad for non joinder of necessary parties since the daughters of V.P.A. Marichamy Pillai born through second wife were not added to parties to the suit.

8. The learned counsel appearing for the appellant would contend that the first appellant and the defendants 1 and 2 are



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daughters of V.P.A.Marichamy Pillai born through first wife i.e., second plaintiff . Originally the suit properties belonged to one late V.P.A. Marichamy Pillai and he died on 18.07.1989 intestate. He had two wives. The first wife/second plaintiff is Mayilthammal and second wife is Vijaya. Mayilthammal had three daughters namely Kannammal, Rani and mala. The second wife Vijaya had four daughters namely Kumutha, Vasanthi, Indra and Sugathi .In the year 1998 the daughter of Mayilthaimmal born through second wife have entered into family agreement and they enjoyed the properties for their convenience and southern portion was allotted to the plaintiffs and northern portion was allotted to the first plaintiff and defendants 1 and 2. No share was allotted to the second plaintiff. The daughters born through the second wife were allotted properties in the agricultural lands. There is no dispute in respect of agricultural lands. The second defendant is claiming that the property exclusively belongs to him and the first defendant also supported to him. In fact there is no any actual portion was took place but they only for their convenience enjoyed the properties separately. Therefore the plaintiffs filed suit for partition. The trial Court failed to consider that there is no dispute in respect of other agricultural properties and the dispute is in respect of un-divided house property and the house was not partitioned and only for their



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convenience they enjoyed the properties. Therefore the plaintiff is entitled to 1/3 share over the suit property. The trial Court failed to consider that Ex.A.1 family arrangement was acted upon thereby they enjoyed their share separately. The defendants also admitted the said Ex.A.1 and the same was effected on the date of its execution. Therefore they are estopped from denying the said document. The trial Court erroneously held that Ex.A.1 family agreement is unregistered and the same cannot be looked into. Once the appellants are not parties to the document dated 03.03.2009, there is no question of non joinder of necessary parties would arise. The above said aspects have not been considered by the trial Court, thereby the decree and judgment passed by the trial Court are liable to be set aside.

9. The learned counsel appearing for the respondent would contend that the properties were already partitioned between the daughter of Mayilthayammal and the daughters of first wife were given the suit properties. Northern side was allotted to the first plaintiff and no properties were allotted to the second plaintiff as she lived with her daughters. Since no share was allotted in the house the second wife was allotted excess two kullies land in the agricultural properties and to that effect they entered into family



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arrangement in the year 1998. The daughter of V.P.A. Marichamy Pillai born through second wife was allotted share in the agricultural lands. Based on the above said family arrangement they are enjoying the properties separately. The plaintiffs 1 and 2 have sold their share, where the plaintiff denied the family agreement they ought to have included all the properties of the V.P.A. Marichamy Pillai and all the legal heirs of V.P.A. Marichamy Pillai but the plaintiffs have not included all the properties of V.P.A. Marichamy Pillai and all the legal heirs of V.P.A. Marichamy Pillai . Therefore the trial Court after analysing the evidences adduced on both sides correctly dismissed the suit, therefore the present appeal is liable to be dismissed.

10. This Court heard both sides and upon hearing both sides and perusing the records and the judgment of the trial Court, the points for determination in this appeal is

- 1) Whether the family arrangement was effected between the parties and the same was acted upon?
- 2) Whether the partition deed dated 03.03.2009 is binding upon the plaintiff?
- 3) Whether the suit is bad for partial partition?
- 4) Whether the suit is bad for non joinder of necessary parties?



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5) Whether is suit is barred by law of limitation?

6) Whether the appellants/ plaintiffs are entitled for partition over the suit properties?

7) Whether the plaintiff is entitled for the relief of permanent injunction as prayed for in the plaint ?

8) Whether the judgement and decree of the trial court is sustainable either in law and on facts?

9) Whether the appeal is liable to be allowed or not?

10) To what relief ?

Point No.1

11. According to the plaintiff on 15.09.1998 the daughter of V.P.A. Marichamy Pillai born through first wife and the second wife have partitioned the properties. The suit property allotted to the daughters of Marichamy Pillai through his first wife and her heirs and they are commonly enjoying the properties. Therefore the properties was not partitioned between the daughter of V.P.A. Marichamy Pillai born through first wife. In respect of other agricultural properties the properties were partitioned through partition dated 15.09.1998. The defendants also admitted the above said partition but the schedule property was already partitioned between the daughters of V.P.A. Marichamy Pillai born through first wife and northern side was allotted to the first plaintiff and the



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defendants 1 and 2. The southern side was allotted to daughters of V.P.A. Marichamy Pillai born through second wife. At the same time northern side was allotted between the first plaintiff and the defendants 1 and 2. Therefore both the parties admitted the family arrangement and the said family arrangement has been marked as Ex.A.1. The said Ex.A.1 was unregistered document since the document is a family settlement agreement by dividing shares of the properties it should be registered but the said document has not been registered. Since Ex.A.1 is the family settlement arrangement in respect of partition dividing the shares of the parties it should be registered.

12. In this context it is relevant to refer the judgment of this Court in the case of ***B. Rajappa And Anr. vs The Special Deputy Collector (Stamps)*** reported in (2001) 1 MLJ HC, Madras, wherein this Court has held that document unstamped and unregistered cannot be looked into by court for any purpose and no oral evidence can be let in to prove the contents of the documents, therefore the said document cannot be looked into. Further P.W.1 also admitted that as per Ex.A.1 the second plaintiff is entitled to 2/9 share over the agricultural lands. Further as per Ex.A.1 there is a recital that all the heirs of V.P.A. Marichamy Pillai have to share the income of



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the properties . Further P.W.1 in her evidence stated that she along with her mother sold the properties on 03.08.2009 to one Palanivel and Kasiammal, where they stated that the properties were allotted to them to oral partition and there is no recital in the said document about the Ex.A.1. In Ex.A.1 also there is no reference about the survey number 1017/2. Though both parties referred Ex.A.1 it is admitted by both parties there was no partition took place based on the above said family arrangement and thereby it cannot be taken as acted upon and the family arrangement is registered document and therefore it cannot be looked into as documents in the eye of law. If Ex.A1 has referred about the earlier oral partition and oral partition also subsequently reduced into writing it need not be registered, but A1 as family arrangement by dividing the suit properties between the legal heirs of Marichamy Pillai, it should be registered and thereby it cannot be taken as document for proving the partition between the parties. More over All the legal heirs of V.P.A. Marichamy Pillai except the plaintiffs all other daughters have entered into partition deed dated 03.03.2009, thereby the parties have not accepted the family arrangement dated 15.09.1998 and the family arrangement was not acted upon. If any family arrangement was made in the year 1998, there is no need to divide the properties once again in the year 2009, but the properties were divided



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between the parties through partition deed dated 03.03.2009.

Therefore from the above discussion it is clear that the so called family arrangement dated 15.09.1998 has not been acted upon. Thus the point is answered.

Point No.2

13. According to the plaintiff the legal heir of V.P.A. Marichamy Pillai except the plaintiff entered into partitioned deed dated 03.03.2009. The defendants also admitted the above said partition deed and the said deed has been marked as Ex.A.6 by the plaintiff. The defendants have not produced the said partition deed. In the partition deed the plaintiffs are not parties to the documents. The defendants also in the written statement categorically admitted that on 03.03.2009 they entered into partition deed and the same is valid. In the said partition deed the entire family properties were included but the plaintiff have not included all the properties in the suit, since the plaintiffs are not parties to the document and they also one of the legal heirs of the deceased Marichamy Pillai the partition deed is not binding upon the plaintiff. Thus the point is answered.

Point No.3 and 4

14. According to the defendants the plaintiffs filed suit for the relief of partition over the suit properties. All the properties of V.P.A.



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Marichamy Pillai have not been included in the suit. Other agricultural lands and jewels which were also given to the second plaintiff at the common enjoyment and the said jewels also have not been included in the suit properties. According to the plaintiff already the suit property was partitioned between the first wife daughter and the second wife daughter of Marichamy Pillai and southern portion was allotted to the second wife daughters, northern side was allotted to the first wife daughters. The northern side allotted to the first wife daughter was not partitioned between the daughters of first wife of Marichamy Pillai. But this Court in the previous point already decided that the said family arrangement was not acted upon and the same was not proved in accordance with law. Therefore all the legal heirs of V.P.A. Marichamy Pillai are to be impleaded as parties and all the properties are to be included.

15. In this case the plaintiffs have not included all the properties of V.P.A. Marichamy Pillai and all the legal heirs were also not included. The plaintiffs have included the defendants 3 and 4 as parties and the defendants 3 and 4 are purchasers of the properties from the plaintiff over the agricultural properties but the plaintiffs have not included the properties purchased by the third and fourth defendant. Similarly the plaintiffs have failed to include



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all the legal heirs of the V.P.A. Marichamy Pillai i.e. daughters born through second wife. This Court in the previous point decided that the family arrangement was not proved and it was not acted upon whileso the plaintiffs ought to have impleaded all the legalheirs of Marichamy Pillai and included all the properties. Even according to the plaintiffs the agricultural properties were partitioned but the house property alone was not partitioned is unbelievable and no evidence adduced to prove the said contention of the plaintiff. Even assuming that there was oral partition between the daughters as mentioned in Ex.B.1 and B.2 sale deed there is no any pleadings by the parties in respect of the oral partition.

16. This Court in the previous point decided that the family arrangement was not proved and it was not acted upon. Whileso, the plaintiffs ought to have impleaded all the legal heirs of the deceased Marichamy Pillai and include all the properties of the deceased. Even according to the plaintiff the agricultural properties were partitioned but the house property alone was not partitioned is unbelievable and no evidence adduced to prove the said contention of the plaintiff. Even assuming that there was an oral partition according to the plaintiff they are in joint possession, whileso why they are in joint possession along with the defendants



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has to be explained by the plaintiffs. It is admitted that all the properties of Marichamy Pillai were not included and daughters of Marichamy Pillai born through first wife also not impleaded as parties. All the properties of the V.P.A. Marichamy Pillai have to be impleaded and all the legal heirs of V.P.A. Marichamy Pillai have to be impleaded. Without including all the properties of Marichamy Piali the suit for partition cannot be decided effectively. Therefore the suit is bad for partial partition as well as barred for non joinder of necessary parties.

Point No.5

17.The defendants have taken plea that the father of the plaintiffs and the defendants 1 and 2 died on 18.07.1989 and the suit is filed only on 2009. Therefore the suit is barred by limitation. According to the plaintiffs they are in joint possession of the properties and the defendants also admitted that the properties were partitioned through family arrangement on 15.09.1998. Therefore even according to the defendants till 1998 the properties were under the joint enjoyment and possession of the plaintiffs and the defendants. The suit is filed in the year 2009, therefore the suit is not barred by limitation.

Point No.6

18.The plaintiffs have filed suit for the relief of partition of 1/4



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share over the suit properties and this Court also already in the previous points decided that the suit is bad for non joinder of necessary parties and the bad for partial partition, thereby the suit cannot be decided without impleading all the legal heirs of the deceased V.P.A. Marichamy Pillai and all the properties have to be included. In view of the above discussion it is not appropriate to decide the claim of the partition of the plaintiffs without impleading all the heirs of the deceased Marichamy Pillai and without including all the properties of Marichamy Pillai. Thus the point is answered.

Point No.7

19. The plaintiffs have sought for the relief of permanent injunction restraining the defendants 1 and 2 from demolishing or creating encumbrance over the suit properties. Aready this Court decided in previous points that without impleading all the legal heirs of the deceased and without including all the parties the suit cannot be decided, therefore the plaintiff is not entilted to any relief of permanent injunction as against the defendants. Thus the point is answered.

Point No.8

20. The plaintiff has filed the suit for partition and also for permanent injunction. On the side of the plaintiff they have



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examined P.W.1 and P.W.2 and documents Ex.A1 to A.7 were marked.

On the side of the defendant D.W.1 was examined and documents were marked as Ex.B.1 to B.3. The trial Court after considering the evidences adduced on both sides dismissed the suit by holding that all the properties are family properties and Ex.A.1 family arrangement has not been acted upon and the same is an unregistered document and it cannot be looked into. Further held that all the legal heirs of the deceased/ V.P.A. Marichamy Pillai and all the properties of V.P.A. Marichamy Pillai have not been included in the suit, thereby the suit is bad for non joinder of necessary parties. The trial Court also relied the commissioner report and based on the Commissioner report held that properties were enjoyed by the parties separately. It is well settled that to ascertain the possession of the parties, the Commissioner cannot be appointed and the advocate commissioner report cannot be taken into account to decide the possession of parties. But the trial Court relied the commissioner report to ascertain the possession of the plaintiffs. Therefore the findings of the trial Court in respect of separate possession of parties through commissioner report are unacceptable. However the trial Court correctly held that all the properties were not included, thereby the suit is bad for partial partition and all the legal heirs of V.P.A. Marichamy Pillai were not included and thereby



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the suit is bad for non joinder of necessary parties. Therefore the trial Court has correctly applied the law and dismissed the suit and does not warrant interference and the appeal has no merits and deserves to be dismissed. Thus the point is answered.

Point No.9

21. This Court in previous points has decided that the suit is bad for partial partition and non joinder of necessary parties, thereby the suit was dismissed by the trial Court. In view of the said discussions, the appellants/plaintiffs are not entitled to any relief through this appeal.

22. In the result, this appeal is dismissed confirming the decree and judgment of the trial Court. No cost. Consequently connected miscellaneous petition is closed.

20.02.2024

NCC : Yes/No
Index : Yes/No
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To:

1. The Additional District Judge(FTC) Theni.
2. The Record Keeper,
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Madurai Bench of Madras High Court,
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