
(2013) 09 MAD CK 0033
In the Madras High Court
Case No : A.S. No. 766 of 1995

Anthonisamy Nadar and Anna Marry APPELLANT
Vs
Kanikkai Marry and Others RESPONDENT

Date of Decision : 06-09-2013

Acts Referred:

Citation : (2014) 1 MLJ 19

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : M. Sivavardhanan for Mr. V. Ramajegadeesan, for the Appellant; R. Subramanian for Mr. K. Ramu, for R1, 2 and 4 to 8 and Mr. K. Sathiyamurthy for R10, for the Respondent

Final Decision : Partly Allowed

Judgement

R.S. Ramanathan, J.—Defendants 1 and 3 in O.S. No. 199 of 1986 on the file of the Sub Court, Nagapattinam are the appellants.

Respondents 1 to 8 filed the suit for partition of their 1/2 share in the suit properties and the suit was partly decreed and preliminary decree was

passed in respect of A schedule and B schedule items 1 to 4 and 7 to 10 and in respect of loans, the plaintiffs/respondents 1 to 8 were held liable

to pay half the amount and in respect of "D" and "E" schedules, the suit was dismissed. Aggrieved by the same, defendants 1 and 3 filed the

present appeal.

2. The case of the plaintiffs is as follows:-

The first plaintiff is the mother and plaintiffs 2 to 8 are her children. The first plaintiff's husband Arulanandasamy Nadar and the first defendant/first

appellant herein are brothers and the second defendant is their sister. Siluvai Muthu Nadar was the father of the first defendant and the mother was

Sebasthi Ammal. The second defendant, the daughter of Siluvai Muthu Nadar got properties towards her share and therefore, she is not entitled to make any claim over the suit properties. The third defendant is the wife of the first defendant and she also claimed right over A schedule property and therefore, filed O.S. No. 91 of 1986 on the file of the District Munsif Court, Thiruthuraipoondi. Therefore, she was impleaded as third defendant. After the death of Siluvai Muthu Nadar, the brothers viz., the first defendant and the husband of the first plaintiff viz., Arulanandasamy Nadar jointly did business and purchased properties in their individual names. The first defendant was employed as Driver in Government Transport Corporation and therefore, he purchased the properties in the name of his brother Arulanandasamy and they also purchased properties in the name of their mother Sebasthi Ammal. Thereafter, dispute arose between the parties and on 14.10.1979, a panchayat was held and a partition deed was effected between Arulanandasamy and the first defendant and the properties were agreed to be divided and it was also agreed that the parties would enter into a registered partition deed as per the agreement and thereafter, no steps were taken by the first defendant for registering the partition deed. In the year 1983, Arulanandasamy died and A schedule property was the joint property of Arulanandasamy and his brother the first defendant and B schedule first item also belonged to them jointly. B schedule items 2 to 10 were purchased out of the joint income earned by the two brothers and purchased in the names of Arulanandasamy and Anthonisamy and items 2 to 6 are in the possession of the first defendant and he sold some of the properties to the fourth defendant and items 7 to 10 are in possession of the plaintiffs. The brothers also purchased two lorries and were earning income and one lorry was purchased in the name of the third defendant and another lorry was purchased in the name of Arulanandasamy and in both the lorries, the brothers were having equal share. The first defendant availed loan from the Co-operative Societies and he also pledged 7-1/2 sovereigns of jewels belonging to Arulanandasamy and some of the loans were obtained in the name of Arulanandasamy and in the loans, both the parties are liable to pay equally and as the parties were not able to enjoy the properties amicably, notices were issued and the suit was filed for partition of A to C schedule properties claiming half share in those properties and for recovery of D

schedule property from the first defendant/first appellant and to make provision for the loans mentioned in E schedule.

3. The first defendant contested the suit stating that the plaintiffs are not entitled to any relief prayed for. A schedule property belongs to

Thiyagarajaswamy Devasthanam and out of the total extent of 59 cents, the third defendant was given patta in respect of 9 cents by the

Government and defendants 1 and 3 also put up construction in that property and the house tax assessment is also made in the name of the first

defendant. The third defendant is the owner of 9 cents and has taken the remaining 50 cents from the Devasthanam and therefore, the first item of

the suit properties is not available for partition and the plaintiffs cannot claim any right over the same. He also denied the allegation that he and his

brother Arulanandasamy jointly did business and purchased the properties in the name of Arulanandasamy and also incurred debts for the business

run by them jointly. It is contended by the first defendant that he was employed abroad and he sent money and with that money, the properties

were purchased in the name of their mother Sebasthi Ammal and she was only a benamidar and in those properties, the plaintiffs cannot claim any

share. A schedule property belongs to defendants 1 and 3 and in the same village, in S. No. 141/21, the first plaintiff's husband constructed a

house and that house is assessed as Door No. 134/A and that property belongs to the joint family and that property was not included in the suit

schedule. Further, "B" schedule first item belonged to the grandfather Arokiasamy Nadar and two years prior to his death, he orally gifted the said

property to the first defendant and from the year 1963, the first defendant is enjoying that property as absolute owner and he also perfected title by

adverse possession against the plaintiffs. Therefore, in respect of item 1 of B schedule, the plaintiffs cannot claim any share. Items 2 to 10 of B

schedule also belongs to the first defendant and item 2 was purchased by the first defendant under sale deed dated 15.8.1974 and third item was

purchased under the sale deed dated 7.1.1970 and those properties were sold to one Velavan under a registered sale deed dated 5.4.1987. B

schedule 5th item and 6th item were purchased by the first defendant under registered sale deed dated 7.1.1970 and under a registered sale deed

dated 11.6.1978, those items viz., 5 and 6 of B schedule were sold to one Panneerselvam and therefore, the plaintiffs are not entitled to claim any

share in respect of items 2, 3, 5 and 6 of B schedule and they are the separate properties of the first defendant. Items 4, 8 and 10 of B schedule

were purchased in the name of the mother Sebasthi Ammal and she was holding the property as benami for the first defendant and item 4 of B

schedule was settled on the first defendant by the mother and items 8 and 10 were settled by the mother in favour of Arulanandasamy and the

plaintiffs admitted in O.S. No. 353 of 1983 that the settlement executed by the mother did not come into effect and the first defendant did not

admit the panchayat agreement of the year 1979 and items 7 and 9 were purchased in the name of the first defendant under two sale deeds dated

18.5.1974 and 12.10.1970 and at the request of Arulanandasamy, he was allowed to enjoy those properties during his lifetime and those

properties viz., items 7 and 9 of B schedule are the separate properties of the first defendant and the plaintiffs cannot claim any right over the same.

It is further contended that "C" schedule lorry bearing registration No. TNO 9942 absolutely belonged to the first defendant. It is the separate

property and after selling the lorry bearing registration No. MDG 4014, this lorry was purchased on hire purchase and that lorry was also seized

by the financier for non-payment of dues. He also denied the allegation that he pledged 7-1/2 sovereigns of gold jewels belonging to

Arulanandasamy and contended that Arulanandasamy pledged a necklace weighing 3 sovereigns, bangles weighing 2 sovereigns and ear ring

belonging to the first defendant and did not redeem the same. He particularly denied the liability to pay the loan amount and contended that that

were not incurred by Arulanandasamy for family benefit and defendants 1 and 3 are not liable to repay any loans. The partition agreement dated

14.10.1979 was not acted upon and it was obtained by coercion and therefore, the suit is liable to be dismissed. He further contended that the

plaintiffs are in enjoyment of S. No. 134/A and the house constructed in S. No. 141/21 and that property belonged to the two brothers and those

properties are liable for partition.

4. The fourth defendant filed statement stating that items 5 and 6 of B schedule were purchased by the first defendant out of his separate income

and in those properties, Arulanandasamy, the husband of the first plaintiff cannot claim any share and the fourth defendant purchased those

properties under the registered sale deed dated 11.6.1978 and therefore, the properties mentioned as items 5 and 6 of B schedule are his separate properties.

5. On the basis of the above pleadings, the following issues were framed:-

- 1) Whether the suit schedule properties are common family properties?
- 2) Whether the panchayat held on 14.10.1979 alleged by the plaintiffs is true or it was obtained by force as alleged by the first defendant?
- 3) Whether the plaintiffs are entitled to 1/2 share in the suit properties or in which properties, they are entitled to 1/2 share?
- 4) Which properties are separate properties of the first defendant?
- 5) Whether B schedule items 5 and 6 were the separate properties of the first defendant and the same were purchased by the fourth defendant?
- 6) Whether the loans were family loans?
- 7) Whether the first defendant is liable to share the loan amount?
- 8) Whether the first defendant is liable to render accounts?
- 9) To what relief, the plaintiffs are entitled?

6. The additional issue framed was whether the sale deed in favour of the fourth defendant is binding on the plaintiffs.

7. On the side of the plaintiffs, 27 exhibits were marked and the power agent of the first plaintiff was examined as PW1 and another witness was

examined as PW2. On the side of the defendants, 36 exhibits were marked and the first defendant was examined as DW1 and four more

witnesses were examined as D.Ws.2 to 5 and through D.Ws.2 and 3, ten exhibits were marked.

8. The Trial Court tried issues 1, 3 and 5 together and held that A schedule property and item 1 of B schedule are the common properties of the

first defendant and his brother and therefore, the plaintiffs are entitled to 1/2 share and items 2 to 4 and 7 to 10 are the joint family properties of the

first defendant and his brother Arulanandasamy and in those properties also, the plaintiffs are entitled to 1/2 share. The Trial Court answered issue

No. 2 in favour of the plaintiffs holding that Ex. A3, the panchayat agreement was true and was not obtained by force as alleged by the first

defendant. Issues 6 and 7 were answered in favour of the plaintiff holding that those loans have to be repaid equally as mentioned in "E" schedule

and in respect of the jewels mentioned in D schedule, the suit was dismissed as no evidence was let in by the plaintiffs. The Trial Court also held

that the first defendant is not liable to render account in respect of the lorry. The additional issue No. 1 was answered in favour of the first

defendant and the fourth defendant holding that those properties were sold under Ex. B36 dated 11.6.1978 by the first defendant to the fourth

defendant and the suit was filed in the year 1996 and at the same time, Arulanandasamy was alive but, without praying for setting aside the sale, the

plaintiffs are not entitled to claim partition and the sale under Ex. B36 by the first defendant is binding upon the plaintiffs and the suit was dismissed

in respect of items 5 and 6 of B schedule properties. In the result, the Trial Court passed the preliminary decree in respect of A and B schedule

items 1 to 4 and 7 to 10 holding that those properties are the common properties of Arulanandasamy and the first defendant and the plaintiffs are

entitled to half share and the suit was dismissed in respect of C and D schedule and E schedule was held to be family loans and both the parties are

liable to repay the loans equally.

9. It is submitted by the learned counsel for the appellants that the Trial Court, without properly appreciating the pleadings and evidence, erred in

entertaining the suit for partition and ought to have dismissed the suit as the plaintiffs themselves alleged that there was a panchayat evidenced by

Ex. A3 in which the properties were divided and therefore, ought to have held that there was a division of properties between the brothers under

Ex. A3 and therefore, the suit for partition was not maintainable and ought to have dismissed the suit. He further submitted that the Trial Court

ought to have dismissed the suit for partial partition. According to the learned counsel, as per Ex. A6, the settlement deed executed by the mother,

the property in S. No. 130/3C of an extent of 76 cents in Nalanallur Village belonged to the mother and that was allotted to the husband of the first

defendant viz., Arulanandasamy and that property was not included in the suit schedule. He further submitted that no evidence was let in by the

plaintiffs to the effect that loans mentioned in B schedule were incurred for the welfare of the family and therefore, the court below ought not to

have directed the appellants to pay 50% of the loan amount. The learned counsel further submitted that the Trial Court erred in holding that items 1

to 4 and 7 to 10 of B schedule properties are the joint properties of the two brothers in which the plaintiffs are entitled to half share. Admittedly, items 4, 8 and 10 were purchased in the name of the mother and in Ex. A6, the settlement deed executed by the mother in favour of her two sons, she also admitted that those properties were purchased by the sons in her name and under Ex. A6, item 4 of B schedule property was given to the plaintiffs and items 7 to 10 were given to the husband of the first plaintiff Arulanandasamy and therefore, having regard to Ex. A6, those properties cannot be divided. He further submitted that under Ex. B14, item 2 was purchased by the first defendant and under Ex. B15, items 3, 5 and 6 were purchased by the first defendant and those properties are the separate properties of the first defendant and therefore, the plaintiffs cannot claim any share. It was also not proved by the plaintiffs that those properties were purchased by the first defendant out of the joint family earning by the first defendant and his brother Arulanandasamy and therefore, items 2, 3, 5 and 6 are to be excluded from partition and items 4, 8 and 10 were also to be excluded on the basis of Ex. A6. He further submitted that the preliminary decree passed by the Trial Court in respect of B schedule items 1 to 4 and 7 to 10 is liable to be set aside.

10. On the other hand, the learned counsel for respondents 1 to 8/plaintiffs submitted that A schedule and the first item of B schedule properties were purchased with the joint family income of Arulanandasamy and the first defendant and that was also admitted by the first defendant in reply notice and therefore, it cannot be contended by the first defendant that those properties are not available for partition. The learned counsel further submitted that though under Ex. A3, there was an agreement to divide the properties as stated therein, the first defendant also admitted that that document was not brought into effect and even as per Ex. A3, a partition deed has to be executed and registered by the parties and therefore, though the parties agreed to divide the properties under Ex. A3, it was not brought into effect by executing registered partition deed and therefore, the suit is not bad by reason of Ex. A3. The learned counsel further submitted that in respect of items 7 and 9 are concerned, it is the specific case of the first plaintiff that those properties are joint family properties of Arulanandasamy and Anthonisamy, the first defendant and though the first

defendant claims that those properties were purchased under Exs. B14 and B15, the schedules mentioned in Exs. B14 and B15 would prove that

only items 2, 3, 5 and 6 of B schedule were purchased in the name of the first defendant under those two documents, viz., Exs. B14 and B15 and

items 7 and 9 were not purchased in the name of the first defendant and therefore, items 7 and 10 are liable for partition among the parties. It is

further contended by the learned counsel that items 5, 6 and 7 were purchased under Exs. B14 and B15 the first defendant has not adduced any

proof to show that he was having income and it is the specific case of the plaintiffs that both the brothers were doing business and admittedly, the

lorries were purchased in the name of brothers from and out of the income of the parties and the properties were purchased in the name of the first

defendant and therefore, the plaintiffs claim right over the same and therefore, the Trial Court has rightly decreed the suit and there is no need to

interfere with the decree.

11. On the basis of the above submissions, the following points for consideration arises in this appeal:-

1) Whether the suit for partition filed by respondents 1 to 8 is maintainable having regard to Ex. A3?

2) Whether the Trial Court was right in granting the preliminary decree in respect of A schedule and B schedule items 1 to 4 and 7 to 10 declaring

half share to the plaintiffs/respondents 1 to 8?

3) Whether the Trial Court was right in holding that the debts were incurred for the family and therefore, the appellants are liable to contribute half

share in respect of E schedule debts?

12. Ex. A3 is the agreement entered into before the panchayatdars by Anthonisamy and Arulanandasamy. It is seen from the allegations made in

the plaint that in the presence of panchayatdars, the two brothers agreed to divide the properties and they also agreed to enter into a registered

partition deed and the first defendant failed to act as per the agreement dated 14.10.1979 and therefore, the suit for partition was filed. The first

defendant, in the written statement, stated that Ex. A3 was obtained by force and denied the allegations that the brothers agreed to divide the

properties as stated in Ex. A3. Though respondents 1 to 8 pleaded that there was an agreement between the parties by which they agreed to

divide the properties, no relief was claimed by respondents 1 to 8 on the basis of partition agreement, ex. A3 and they also admitted that it was not

a complete document and as per the document, the parties agreed to enter into a registered partition deed and as the parties failed to enter into the

registered partition deed, no one can claim any right under Ex. A3 and filed the suit for partition. Though the first appellant contended that his

signature was obtained by force in Ex. A3, no evidence was let in and the Trial Court was also right in holding that Ex. A3 is a true document.

13. According to me, it is one thing to say that Ex. A3 was executed by the parties and another thing to say that there was a division under Ex. A8.

Unless it is admitted by the parties that under Ex. A3, the joint properties were divided between them, it cannot be stated that the suit for partition

is not maintainable having regard to Ex. A3. Further, in Ex. A3, no schedule has been given and reference was made to A schedule property and

the first item of B schedule property and it is only stated that properties having an extent of 4 acres 15 cents of nanja and 5 cents of punja in

Chidambaram Kothamangalam Village are to be taken by the first plaintiff's husband Arulanandasamy and survey numbers were not mentioned

and according to the parties, D schedule properties are having an extent of 7.68 acres and therefore, it cannot be stated that under Ex. A3, the

parties agreed to divide the properties. Therefore, having regard to the recital in Ex. A3 that a deed of partition was to be executed and registered

and also the fact that the entire properties were not mentioned and both the parties did not claim any right under Ex. A3, I hold that though Ex. A3

was entered into between the brothers, it was not brought into effect and the parties agreed to have a registered partition and therefore, the present

suit for partition filed by respondents 1 to 8 is maintainable and it is not affected by Ex. A3 and point for consideration No. 1 is answered in favour

of respondents 1 to 8.

14. It is seen from Exs. B14 and B15 that items 2, 3, 5 and 6 of B schedule properties were purchased in the name of the first defendant.

Admittedly, the parties are Christians and therefore, there is no question of joint family properties and at the most, the parties can claim that the

properties are joint properties of the two brothers. Further, the concept of Hindu Law that the family was having some nucleus and some

properties were purchased in the name of senior member and therefore, the properties purchased in the name of senior member must be deemed

to be the properties of the joint family, cannot be applied to the Christian family. It is the specific case of the first appellant that he was employed as

Driver and was also doing business and from out of such income, he purchased lorries and the properties in items 2, 3, 5 and 6 of B schedule

under Exs. B14 and B15 and it is also admitted by the plaintiffs that lorry business was run by the brothers. Though it is alleged by the plaintiffs that

the properties were acquired out of joint exertion of the two brothers, no evidence worthy the name was let in to prove the same. Therefore,

having regard to the fact that items 2, 3, 5 and 6 of B schedule were purchased under Exs. B14 and B15 in the name of the first appellant and even

in Ex. A3, there was no reference to those properties, I hold that those properties are the separate properties of the first appellant and the plaintiffs

cannot claim any share in those properties and the preliminary decree passed in respect of those properties by the Trial Court is liable to be set

aside.

15. Further, it is seen from Ex. A6 that items 4, 8 and 10 were purchased in the name of the mother and she also admitted in the settlement that

those properties were purchased by her sons out of their income in her name. Nevertheless, she settled item 4 in favour of the first appellant and

items 8 and 10 in favour of Arulanandasamy, the husband of the first respondent under Ex. A6. Ex. A6 is dated 6.2.1972 and Arulanandasamy,

the husband of the first respondent died in 1993 and no attempt was made by him to set aside the settlement deed and he also did not challenge

the settlement deed. Therefore, as per Ex. A6, the fourth item was allotted to the first appellant and items 8 and 10 were given to the husband of

the first plaintiff/first respondent and therefore, those properties cannot also be available for partition. Therefore, I hold that B schedule properties

items 2, 3, 4, 5, and 6 belong to the first appellant and items 8 and 10 belonged to respondents 1 to 8 and those properties cannot be brought

under partition.

16. "A" schedule property and the first item of B schedule properties are admitted as common properties of the two brothers and the Trial Court

discussed the evidence regarding A schedule and first item of B schedule and

held that Ex. A16 Family Ration Card proves that Arulanandasamy lived with his wife in A schedule property. Similarly, Exs. A19 and A21, the Voters List would also prove that the first plaintiff and her husband lived in A schedule property and therefore, the Trial Court rightly rejected the contention of the appellants that A schedule property belonged to the third defendant/second appellant and the plaintiffs/respondents 1 to 8 are having property in another survey number and door No. 134/A and they have no right in A schedule property.

17. Further, the first defendant, in his reply notice Ex. A1, admitted that A schedule property and first item of B schedule property belonged to the family. The first defendant, in his reply statement alleged that B schedule first item belonged to the grandfather and he died in the year 1965 and two years prior to his death, he orally gifted B schedule first item to him and therefore, he became the owner of B schedule first item and also perfected title, but, the first appellant failed to prove the oral gift or his exclusive possession. Therefore, having regard to the admission of the first appellant/first defendant that A schedule and B schedule first item are the common properties of himself and his brother Arulanandasamy, respondents 1 to 8 are entitled to half share in those properties and the Trial Court has rightly held that those properties are liable for partition.

18. The learned Trial Judge held that item Nos. 7 and 9 were also purchased in the name of Arulanandasamy and also held that under Ex. B14, the first appellant Anthonisamy purchased 76 cents in S. No. 284/1 and that was divided into two items viz., items 2 and 7 and therefore, the plaintiffs are entitled to half share in those items also. It is seen from Ex. A6 that in S. No. 284/1, Arulanandasamy purchased only 38 cents and that is mentioned as item 2. Therefore, there is no evidence that the remaining 38 cents belonged to the two brothers and therefore, item 7 is also not available for partition. Similarly, the Trial Court also held that item 9 was purchased in the name of Arulanandasamy under Ex. A6 and as stated supra, Ex. A6 is the settlement deed executed by the mother in favour of the two brothers in respect of items 4, 8 and 10 and no evidence was produced by the plaintiffs that items 7 and 9 were purchased in the name of Arulanandasamy or in the name of Anthonisamy and therefore, they are also liable for partition. Nevertheless, the plaintiffs claimed that they are

entitled to half share and the appellants claim that items 7 and 9 belong to them. Therefore, in the absence of any proof that those items viz., 7 and 9 of B schedule properties were purchased in the name of the brothers or they are the joint properties of the brothers, the plaintiffs cannot claim any share in those properties and the finding of the Trial Court in that regard is liable to be set aside. Accordingly, point No. 2 is answered holding that the properties in A schedule and B schedule item 1 alone are liable for partition and items 2 to 6 belong to the first appellant and items 8 and 10 belong to the plaintiffs and the plaintiffs cannot claim partition in those properties and as far as items 7 and 9 are concerned, the suit is liable to be dismissed as the parties failed to prove that those properties were purchased either in the name of the plaintiffs or in the name of the first defendant. The Trial Court held that the debts were incurred for the benefit of the family and therefore, both the parties are liable to share the liability. According to me, the Trial Court, without any basis, held that the loans were incurred for the family. Ex. A23 is a certified copy filed in O.S. No. 356 of 1983 on the file of the District Munsif, Thiruthuraipoondi wherein full satisfaction was recorded after accepting Rs. 12,000/= from the defendants in the suit viz., Sebasthi Ammal and others. Exs. A24 and A25 are the auction notices for bringing the properties mentioned therein to satisfy the decree passed in O.S. No. 900 of 1979. The properties mentioned in that notices are items 4, 7, 9 and 10 of B schedule. The judgment debtor in that case was Arulanandasamy and on his death, the first plaintiff/first respondent was impleaded in his place. As that suit was filed against the husband of the first respondent, it cannot be stated that the loan was incurred for the benefit of the family. As no evidence was let in by respondents 1 to 8 to the effect that loans mentioned in schedule E were incurred for the family, I hold that the appellants are not liable to share the liability. Therefore, the finding of the Trial Court with respect to E schedule is set aside and I hold that E schedule loans were not incurred for the family and therefore, the appellants are not liable to share the liability and point No. 3 is answered accordingly.

In the result, the appeal is partly allowed and preliminary decree passed by the Trial Court is modified to the effect that A schedule and B schedule item 1 are liable for partition and in respect of other properties, the suit is

dismissed. No costs.