

**(2011) 10 MAD CK 0104**

**Madras High Court**

**Case No:** Second Appeal No. 800 of 2011 and M.P. No. 1 of 2011

Nalliappan

APPELLANT

Vs

S. Subramaniam, Perumayi and  
Rama Gounder @ Ramasamy  
Gounder

RESPONDENT

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**Date of Decision:** Oct. 31, 2011

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

**Bench:** Single Bench

**Advocate:** N. Ishiaq Ahmed, for the Appellant; P. Valliappan for R1, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

1. The third defendant is the appellant.

2. The first respondent/plaintiff filed the suit for division of suit properties into four equal shares and allot one share to him. The case of the first respondent was that the plaintiff and the defendants are co-owners of the suit properties and the plaintiff/first respondent is entitled to 1/4 share and defendants 1 and 2 viz., respondents 2 and 3 are entitled to 1/4 share and the appellant/third defendant is entitled to the remaining half share in the suit properties and the suit properties are in joint possession and enjoyment of the parties and only for convenient enjoyment and cultivation, the suit properties have been divided into number of fields and parties are cultivating their portions separately and the defendants are enjoying their extent disproportionate to their actual shares and therefore, the plaintiff demanded partition and the same was refused and hence, the suit was filed for partition.

3. The third defendant contested the suit stating that the properties were partitioned long back and having regard to the presence of a rock in the middle of the property, the property was divided into eastern and western parts and defendants 1 and 2, predecessors in title were allotted the eastern part and

thereafter, defendants 1 and 2 and the plaintiffs are enjoying the eastern part and the western part was allotted to the third defendant and his predecessor in title and they are enjoying the western half share and therefore, the suit for partition is not maintainable. It was further stated that originally the properties belonged to Kanda Mooppan and Muthan Mooppan and having regard to the natural boundary, which divides the property as eastern and western share, Muthan Mooppan family was allotted eastern portion and Kanda Mooppan family was allotted the western portion which includes the rock area and as per the earlier partition, 6.90 acre was allotted in the eastern side to Muthan Mooppan and 10.20 acres which includes the rock area was allotted to Kanda Mooppan on the western side and they are enjoying the property and Muthan Mooppan sold the eastern half to Periyakounder, the predecessor in title of defendants 1 and 2 and after him, his wife Devakkal was enjoying the property and she executed a Will in favour of her maternal grandson Sukiramani and Sukiramani was the husband of the first defendant and father of the second defendant and he sold half of his property to his brother Nalliappan and therefore, the eastern half is in enjoyment of defendants 1 and 2 and Kalanidhi, the brother "s son of Sukiramanian Gounder and the plaintiff has no right to claim any property on the western side and Kanda Mooppan vagaiara to whom the western possession was allotted, sold 5 acre 90 cents on the western to one Mangadu Gounder and sold 4 acre 30 cents on the southern side to the third defendant"s predecessor-in-title and the southern 4 acre 30 cents on the western side is in possession and enjoyment of the third defendant and the northern 5 acre 90 cents was also purchased by the brother of the third defendant in the year 1965 and that land was also entrusted to the third defendant and the third defendant is in enjoyment of 10 acre 20 cents which includes rock and therefore, the plaintiffs and defendants 1 and 2 are not entitled to any share in the suit properties.

4. The Trial Court dismissed the suit holding that the commissioner"s report also probablises the case of the third defendant as the suit property was divided into eastern and western half by the rock area that is found in the middle of the property and in Exs.B2 and B3, it was only stated that the land conveyed was undivided half on the eastern side of the property and therefore, the plaintiff failed to prove that there was no partition and admittedly, the plaintiff is in enjoyment of the property and he has also stated that they are enjoying the property for more than 50 years and therefore, the case of the third defendant that there was a partition can be accepted having regard to the commissioner"s report and the recitals in Exs.B2 and B3 and dismissed the suit.

5. The first appellate court reversed the findings of the Trial Court and held that there was no partition between the parties as alleged by the appellant/third defendant and in the document of the year 1965 and the additional evidence filed in the first appeal viz., Exs.A5 and A6 dated 14.2.1939 and 4.7.1940, it was only stated that the undivided 1/4 share was conveyed and therefore, there was no partition between the families and they were in joint enjoyment and only for convenient

purpose, each party was allowed to enjoy specific portion and that will not amount to actual division and allowed the appeal and decreed the suit. Hence, the second appeal.

6. Learned counsel for the appellant submitted that the lower appellate court failed to appreciate the admission of the respondents that the properties are enjoyed by the parties for more than 50 years and according to them, without any division, they are enjoying the properties with specific extent and considering the fact that the parties are not related, and the enjoyment of the property was for more than 50 years, it will only lead to the presumption that the properties must have been divided by the original owners and that was the reason for the enjoyment of the specific portion of the properties by the parties. He further submitted that the lower appellate court, without properly appreciating the contents of the sale deed, Ex.B1 dated 2.2.1914 and Exs.B2 and B3 dated 24.8.1928 and 14.9.1955, erred in holding that there was no partition among the owners and they were enjoying the properties in common. The learned counsel for the appellant submitted that in the plaint, the first respondent/plaintiff did not trace his title to the suit property and he relied upon Ex.A1 sale deed dated 9.6.1997 and as per Ex.A1 sale deed, the first respondent purchased the property from the legal heirs of Nalliappa Gounder and the said Nalliappa Gounder purchased the property under the sale deed dated 14.9.1955 under Ex.B3 and the said Nalliappa Gounder conveyed the property he purchased under Ex.B3 to the plaintiff/first respondent under Ex.A1. In Ex.B3, the sale deed in favour of Nalliappa Gounder, it is specifically stated that the property conveyed is situate in Survey No.26 Punjai 17.10 acres on the eastern half undivided share (ngh; ghjp fpHg[u ghj;jpaj;jpy; bghJtpy; ngh;ghjp). Further, under Ex.B2, document dated 24.8.1928, it is stated that @ghjp fpHg[ughfj;jpy; bghJtpy; ghjp@ in S.No.26 out of total extent of 17.10 acres and under Ex.B2, Sukiramani Gounder got the property under release by Chellayi. Under Ex.B3, Sukiramani Gounder and his sons sold the property to Nalliappa Gounder and that was purchased by the plaintiff under Ex.A1. Therefore, the plaintiff/first respondent traced his title to the document under Exs.B2 and B3 and even in the year 1914, in the sale deed in favour of Periya Gounder, who was the predecessor in title of the plaintiff's vendors, it was stated that the undivided eastern half share was sold to Periya Gounder by Munia Moopan and therefore, it was contended by the learned counsel for the appellant that the properties were divided as eastern and western half and the eastern half was enjoyed by Muthu Gounder and the western half was enjoyed by Kanda Gounder and without appreciating these aspects, the lower appellate court allowed the appeal.

7. On the other hand, Mr.P.Valliappan, learned counsel for the first respondent submitted that in the first appeal, the sale deeds dated 14.2.1939 and 4.7.1940 were marked and in those documents, it was clearly stated that the undivided 1/4 share was conveyed to the purchaser and considering those sale deeds, the lower appellate court has rightly held that the properties were not partitioned and in a suit

for partition, all parties are considered as plaintiffs and therefore, there is no question of applying general principle that the plaintiff has to prove his case and the third defendant came forward with the specific plea that there was a partition in the family and the properties were divided as eastern and western half and therefore, he has to prove the same and without proving the partition as stated by the third defendant, the courts ought to have accepted the case of the plaintiff and also relied upon the judgment reported in [M. George Vs. M. Albert and Others](#), Leelavathi, P.K. and 8 Others v. Guru Vittal & 2 Others 1997 3 LW 807, Kasinathan, C. v. N. Athiappan Servai 1997 (II) CTC 717 and Lateef, K.S. v. S. Ansari 2006 (2) CTC 548 in support of his contention.

8. Heard both sides. Having regard to the contention of both the parties, the following substantial questions of law were framed for consideration:-

Whether the lower appellate court was right in decreeing the suit without any reference to Exs.A1, A2 and A3 and the admission of the respondents that the properties are enjoyed by the respective parties for more than 50 years?

2. Whether the lower appellate court was right in holding that there was no division of properties between the original owners as alleged by the appellant on the basis of Exs.B5 and B6?

9. As stated supra, both the counsel advanced their arguments on the above substantial questions of law. As rightly contended by the learned counsel for the first respondent, in a suit for partition, there is no question of applying the general principle that the plaintiff has to prove his case and the defendant need not prove his case. Further, when the plaintiff filed the suit for partition stating that there was no partition in respect of the suit properties and the defendant contended that there was a partition and under the earlier partition, the properties were divided, the burden is on the defendant, who pleaded earlier partition, to prove the same. Therefore, we will have to see whether the third defendant/appellant who pleaded partition of the properties has proved his case as stated in the written statement.

10. As stated supra, in the plaint, the plaintiff/first respondent did not trace his title to the suit property and it was only pleaded that he purchased the undivided 1/4 share under a registered sale deed dated 9.6.1997. It is further alleged that the plaintiff and the defendants are in joint possession and enjoyment of the suit property without partition by metes and bounds and only for convenient cultivation, the suit properties have been divided into number of fields and the parties are cultivating their extent separately. Therefore, the first respondent though pleaded that there was no partition, admitted that the parties are in enjoyment of specific extent of properties. Therefore, we will have to see whether the parties who are not related to each other and who are subsequent purchasers can be said to be in separate possession and enjoyment of specific portions of properties in the absence of any partition between them. The case of the third defendant was that originally

the properties belonged to Muthan Mooppan and Kanda Mooppan and the family of Muthan Mooppan was allotted 6.90 acres on the eastern side and there is a natural division of properties by the position of rock in the middle which divides the property as eastern and western half and the western portion including the rock on the northern side to an extent of 10.20 acres was allotted to Kanda Mooppan vagaiyara and from Kanda Mooppan Vagayara, the appellant's predecessor-in-title purchased the properties and they are in enjoyment of the suit property.

11. As stated supra, the first respondent claimed title under Ex.A1 and the vendor under Ex.A1 traced title under Ex.B3. In Ex.B3, it was clearly stated that out of the property on the eastern side half share was sold. Further, the vendor under Ex.B3 got the property from Sukiramaniam Gounder and he has also stated in Ex.B2 dated 24.8.1928 that the undivided half share on the eastern half in Survey No.26, out of the total extent of 17.10 acres was sold. Therefore, having regard to the specific recitals in the earlier sale deeds of the plaintiff's predecessor in title document, it can be safely concluded that the properties were divided even in the year 1928 and the parties were in separate possession and enjoyment of the specific extent as per the division made earlier. This is also confirmed by the recital in Ex.B1 dated 2.2.1914. Though the first appellate court raised a doubt regarding the recital in Ex.B1, a reading of the recital in Ex.B1 would make it clear that there is no room for any doubt in the recital and in Ex.B1, it has been specifically stated that the property conveyed was eastern half in Survey No.26. Under Ex.B1, Munia Mooppan son of Muthan Mooppan sold the eastern half share to Periya Gounder and the wife of Periya Gounder released the property to Sukiramaniam Gounder under Ex.B2 and Sukiramaniam Gounder sold the property to Nalliappa Gounder under Ex.B3 and in all the three documents, it was specifically stated that the eastern half share was conveyed. Therefore, the plaintiff's predecessors-in-title accepted that eastern half share was purchased by them and the commissioner's report also probalised the case of the appellant and the commissioner also found that the properties are enjoyed in different portion by different parties and there is a natural division of property by the formation of rock which divides the property into eastern and western half.

12. Though under Ex.A4, the document in favour of the appellant, it was stated that the undivided 1/4 share in the total extent of 17.10 acres in Survey No.26 was conveyed to the defendants predecessor in title, having regard to the specific recitals in Exs.B1 to B3 which are of the years 1914 and 1928 and the admission of the plaintiff that the properties were in the enjoyment of the parties with specific extent, the trial court rightly held that there was a partition among the owners of the property and the eastern portion was allotted to the predecessor-in-title of the plaintiff and the western portion was allotted to the predecessor-in-title of the third defendant and therefore, the suit for partition by the plaintiff/first respondent is not maintainable.

13. Further, as rightly pointed out by the learned counsel for the appellant, having regard to the averments in the plaint by the first respondent/plaintiff that the parties are in the enjoyment of the specific extent of the property for convenient sake, and as the parties are not related and are subsequent purchasers, in the absence of any partition, the parties would not have accepted the enjoyment of specific portion of properties for more than 50 years. Without considering all these aspects, the lower appellate court erroneously set aside the judgment and decree of the Trial Court and the findings of the lower appellate court that there was no partition without any reference to Exs.B1 to B3 is erroneous and the lower appellate court ought not to have relied upon Exs.A4 to A6 which are of later origin and ought to have held that the documents relied upon by the plaintiff would prove that there was a partition and therefore, the plaintiff/first respondent is not entitled to decree of partition. Hence, the substantial questions of law are answered in favour of the appellant and I hold that the lower appellate court ought to have held that there was a partition among the members of the family and that is evidenced by Exs.B1 to B3 and also the fact that the parties are in enjoyment of the properties with specific extent for more than 50 years would also probablises the case of partition.

14. In the result, The second appeal is allowed and the judgment and decree of the lower appellate court is set aside and the judgment and decree of the Trial Court is restored. No costs. The connected miscellaneous petition is closed.