



S.A. Nos.838 & 839 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.03.2024

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

S.A. Nos.838 & 839 of 2015

and

M.P.Nos. 1 and 1 of 2015

S.A.No.838 of 2015

1. V.Kamalam
2. R.Vengudupathi

... Appellants

Vs.

1. S.Bakkiam
2. V.Sundarraaj
3. Kavitha

.. Respondents

PRAYER : Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the judgment and decree dated 31.03.2015 made in A.S.No.2 of 2014 on the file of Sub-Court, Udumalpet confirming the common judgment and decree dated 11.02.2014 made in O.S.No.165 of 2008 on the file of District Munsif Court, Udumalpet.



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S.A.No.839 of 2015

1. V.Kamalam
2. R.Vengudupathi

... Appellants

Vs.

V.Sundarraaj

.. Respondent

PRAYER : Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the judgment and decree dated 31.03.2015 made in A.S.No.3 of 2014 on the file of Sub-Court, Udumalpet confirming the common judgment and decree dated 11.02.2014 made in O.S.No.176 of 2008 on the file of District Munsif Court, Udumalpet.

For Appellants in
both S.A.s : Ms.R.Gouri

For Respondents in
both S.A.s : Mr.J.Pothiraj

COMMON JUDGMENT

The appellants in S.A.No.838 of 2015 are the plaintiffs in the suit in O.S. No. 165 of 2008 and the appellants in S.A.No.839 of 2015 are the defendants in the suit in O.S.No.176 of 2008.



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2. For the sake of convenience, the parties are referred as per the ranking in the suit in O.S.No.165 of 2008.

3. Before the trial court, as the plaintiffs, the appellants filed a suit in O.S.No.165 of 2008 for the relief of partition with the consequential relief in respect of an extent of 7.38 cents in Survey No.201 of Anthiyur Village, Udumalpet panchayat, Tiruppur against the defendants, who are 1st plaintiff's sister, sister's husband and sister's daughter-in-law. The suit in O.S.No.176 of 2008 was filed by the 2nd defendant herein against the appellants herein for the relief of permanent injunction in respect of suit property with an extent of 2.84 cents of punjai land in S.F.No. 201/2 with four boundaries (eastern portion).

4. Both suits were jointly tried before the trial court and on considering the oral and documentary evidence, the trial judge dismissed the suit. Against which, the plaintiffs preferred an appeal and the lower appellate court allowed the injunction suit filed by the defendants. Aggrieved that, they preferred an appeal in A.S.No.2 of 2014 by



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challenging the common judgment dated 11.02.2014 passed by District Munsif Court, Udumalpet. By analysing the facts and evidence independently, finally, the first appellate judge also concludes that the findings rendered by the court below is confirmed. Accordingly, both the appeals filed by the plaintiffs were dismissed.

5. Challenging the findings of first appellate judge, the plaintiffs have preferred this Second Appeal and the same was admitted on the following substantial question of law :-

“1) Whether the courts below are right in concluding a finding conveying right over the property to an extent of 2.00 of land in favour of defendants 1 and 2 more particularly, when admittedly the so called settlement deed dated 23.05.1981 through which the property right is claimed has not even been marked as a documentary evidence before the court below?

2) As regard the remaining portion of the suit property measuring an extent of 5.38 of land is concerned, whether the courts below are right in rejecting the prayer of the appellants for partition rendering a finding that the said property has already been subjected to oral partition between the parties



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way back during the year 2002 and thereby cannot be subjected to partition once again more particularly when the alleged factum of oral partition has not been proved by the defendants and the defendants have not discharged their burden of proof?

3) As per Sections 101 to 103 of Evidence Act, the burden of proof in suit for partition of family property when defence of defendant is that properties have been already divided on basis of family arrangement is concerned, the person who pleads that family arrangement whereby all properties were divided should begin and prove the same. Failure to apply the said dictum by the courts whether deserved interference?

4) Whether the courts below have erred in not considering the dictum of law that the person who pleads family arrangement whereby all properties were divided should prove the same – defendant having pleaded so should prove – and that the plaintiff cannot be expected to prove negative as matter not covered by any documentary evidence and based on oral arrangement followed by conduct of parties?



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6. Brief facts of the case is as follows :-

The 1st plaintiff Kamalam and 1st defendant Bakkiam are the daughters of one Palanisamy naicker and Ranganayaki Ammal. The 2nd plaintiff and 2nd defendant are their respective husband and 3rd defendant is the daughter-in-law of 1st defendant. By way of purchase through sale deeds, Palanisamy and his wife Ranganayaki, totally they have purchased 8 acres 73 cents. During his life time, Palanisamy sold 1 acre 20 cents to third party and the remaining extent of 7 acres 53 cents was enjoyed by him. Further, on 02.04.1979 an extent of 15 cents was sold to his son-in-law/2nd plaintiff, in which they have constructed a house and living there. The remaining extent of 7 acres 38 cents was enjoyed by the said Palanisamy naicker. While so, on 23.05.1983 out of 7 acres 38 cents, he executed a settlement deed to an extent of one acre in favour of his daughter/1st defendant and another one acre in favour of 2nd defendant. But, the contention of plaintiffs that those settlement deeds were not acted upon and the suit property was enjoyed by the plaintiffs, since the defendants are residing far away from the suit property. Moreover, the contention of



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plaintiffs is that she brought up defendants family and thereafter, felt inconvenience in common enjoyment, in the presence of elders, in the year of 2000, a oral partition was effected, in which Palanisamy naicker's daughters as well as his son-in-laws each allotted 1/4th share in the said 7 acres 38 cents and in the well also, they are having 1/4th share. To obtain a service connection, no objection was also given by the 1st and 2nd defendants and E.B. service connection No.161 was transferred in the name of 1st plaintiff. Thereafter, the defendants refused to execute the document by affirming oral partition. Hence, the present suit was filed claiming half share in the suit property measuring to an extent of 7 acres 38 cents.

7. The defendants admits the relationship between them as well as purchase made by Palanisamy Naicker. They have also admitted that after selling the property to a third party, Palanisamy naicker enjoyed 7 acres 38 cents, but they have contended that in respect of 2 acres, a settlement deed was executed in favour of 1st and 2nd defendants in the year of 1981. Thereafter, the said two acres was under their enjoyment. In respect of remaining 5 acres 38 cents alone was available for partition. Therefore, in



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the year of 2006, in the month of January, a oral partition was effected in respect of 5 acres 38 cents. Accordingly, 2 acres 44 cents, eastern portion was allotted to 1st defendant. As the share allotted to 1st plaintiff was allotted with well, coconut trees and other amenities, an additional extent was allotted to the share of 1st defendant. Thereafter, the properties were enjoyed by them accordingly. Suppressing that fact, now the plaintiffs came forward with the present suit for partition, which is not acceptable one and also caused interference. Therefore, they prayed to dismiss the suit for partition and prayed to allow their suit for bare injunction.

8. All these facts clearly reveals that Palanisamy naicker purchased 7 acres 38 cents and during his life time, according to the plaintiffs, though Palanisamy naicker executed a settlement deed in favour of defendants 1 and 2 in respect of one acre, but it was not acted upon. It was strongly denied by the defendants. But, there was an objection raised on the side of plaintiffs is that since the gift deed has not been marked on the side of defendants, which itself shows that settlement deed was not acted upon. Therefore, an extent of 2 acres claimed by defendants 1 and 2 also has not



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been acceptable. But, the courts below failed to accept the said proposition and erroneously gave a finding that the gift deed was acted upon, as such is unjust and liable to be set aside.

9. By way of reply, the learned counsel for defendants would submit that though those two settlement deeds have not been produced, the plaintiffs themselves admits that there were settlement deeds executed by Palanisamy naicker. Therefore, even though the documents were not produced, the admission made by the plaintiffs on their part as such is sufficient to conclude that the settlement deeds were proved. It is true, the pleadings of plaintiffs clearly denote that the plaintiffs have admitted the execution of settlement deeds by Palanisamy naicker. Their contention that the said deeds were not acted upon and till his life time, Palanisami naicker alone enjoyed the property. To disprove the same, the defendants relied on the evidence of P.W.1, who deposed as follows :-

“பழனிச்சாமி நாயக்கர் முதல் மற்றும் 2ஆம் பிரதிவாதிகளுக்கு தாவாச் சொத்தை பொறுத்து எழுதி வைத்த செட்டில்மெண்ட் ஆவணங்களை இறக்கும் வரை ரத்து செய்யவில்லை. அந்த செட்டில்மெண்ட் ஆவணங்களில் அதற்கு கட்டுப்பட்ட சொத்துக்களின் சுவாதீனம் அவை எழுதப்பட்ட தேதியிலேயே 1 மற்றும் 2ஆம்



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பிரதிவாதிகளுக்கு ஒப்படைக்கப்பட்டுள்ளதாக வாசகம் கண்டுள்ளது. செட்டில்மெண்ட் ஆவணம் நிறைவேற்றப்பட்ட பிறகு முதல் மற்றும் 2ஆம் பிரதிவாதிகளின் பெயர்கள் கூட்டாக வருவாய் ஆவணத்தில் பதிவு செய்யப்பட்டது.”

Therefore, the plaintiffs themselves admits that the settlement deeds were not cancelled by the Settlor till his life time. It is settled proposition that once the settlement deed is executed, it gives absolute right to the beneficiary unless the contrary is proved by the person, who is disputing the settlement deed. In the instant case, the plaintiffs contention that the settlement deeds were not acted upon, but there is no evidence on their side to prove this aspect. But, however, P.W.1 himself admits that till the life time of Settlor Palanisamy naicker, those settlement deeds were not cancelled. Therefore, the settlement deeds were in force and based on that, the 2nd defendant transferred the patta in his name and the same also marked on the side of defendants as Ex.P4. Accordingly, the names were mutated in the records, which would clearly establish that the settlement deeds were acted upon and the same was rightly observed by the courts below, which needs no interference by this court. As the plaintiffs themselves admits that Gift deeds were executed by their father, the non-production of settlement



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deeds is not fatal to the proceedings. Accordingly, the question of law No.1 is answered.

10. As on date, the remaining extent of 5 acres 38 cents of land alone is claimed for partition. As per the plaintiffs contention that in the year of 2000, oral partition was effected for an extent of 7 acres 38 cents. But, the contention of defendants that in the year of 2006, an oral partition was effected for an extent of 5 acres 38 cents, in which the daughters of Palanisamy naicker, each allotted $1/4^{\text{th}}$ share and their husband also allotted with $1/4^{\text{th}}$ share. Admittedly, in the absolute properties of Palanisamy naicker, the alleged allotment of $1/4^{\text{th}}$ share for his son-in-laws is not acceptable one and the same rightly observed by the trial judge, which needs no interference.

11. Furthermore, there is no material evidence on the side of plaintiffs to establish that the oral partition was effected in the year of 2000 through independent witness. But the defendants plead that during the month of January 2006, a oral partition was effected for the said extent of 5 acres 38



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cents. Accordingly, an extent of 2 acres 44 cents on the eastern side was allotted to the plaintiffs, as it is a land with well, coconut trees along with other amenities, the western portion of 2 acres 84 cents was allotted to the share of 1st defendant as it is a land with less fertile, an additional extent was allotted to the 1st defendant. So, the burden is casted upon the 1st defendant to prove the oral partition. To prove the same, the Commissioner's report in Ex.C1 was relied on by the defendants. It is a settled proposition that Commissioner report cannot be relied on to prove possession of property. Indeed, in respect of physical features, it can be considered. As per the commissioner's report, he has noted down the existence of boundaries of north and south as well as Well and coconut trees in and around the suit property. While dividing the property into eastern and western portion, there was a Well along with coconut trees existed as per the report of commissioner. So, the physical features clearly reveal that the properties were divided on the eastern and western portion in between there is north to south median and on the eastern portion well and coconut trees existed. Furthermore, the 1st defendant executed a settlement deed in favour of 3rd defendant, which is marked as Ex.B3 for an extent of 2 acres 84 cents and



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the said document was executed on 20.02.2008 before filing of the suit.

Therefore, by relying the said document as well as the report of commissioner, the courts below rightly concludes that already a oral partition was effected and the properties are also enjoyed as per the oral partition in the year of 2006, which needs no interference by this court. Therefore, the defendants able to establish through the commissioner's report as well as gift deed as per the oral partition of the year 2006, the properties were divided and enjoyed by them, thereby, they have discharged the burden of proof and the same was rightly appreciated by the trial judge, which needs no interference of this court. Accordingly, the question of law No.3 is answered.

12. Now the learned counsel for plaintiffs argue that the courts below erroneously conclude that as already partition was effected, the same cannot be claimed by the plaintiffs by filing a suit for partition. But in respect of an extent of 5 acres 38 cents of land is concerned, though there was oral division made among the family members, the same can be considered for the relief of partition, but the courts below erroneously dismissed the suit



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filed by the plaintiffs for partition, as such is erroneous one and the same is liable to be set aside. But, as discussed above, the division of property as per the panchayat held in the family may be considered as a family arrangement and the same was proved by the defendants, however, there is no registered partition effected by affirming the said oral division. Therefore, though the plaintiffs claimed the relief of partition in a suit in O.S.No.165 of 2008 for an extent of 7 acres 38 cents, as discussed above, 2 acres of land belong to defendants 1 and 2 and the remaining 5 acres 38 cents, the plaintiffs are entitled for the relief of partition. But however, the report of commissioner as well as physical features would clearly indicates that eastern portion of Survey No.201/2 was under enjoyment of plaintiffs and the same is reflected on the north to south varappu eastern portion and the western portion of north to south varappu was under the enjoyment of defendants. Therefore, already the family arrangement was made in the year of 2006. Accordingly, the division made by plaintiffs and defendants was proved by Ex.C1 as well as Ex.D3. Therefore, in respect of 5 acres 85 cents, the plaintiffs are allotted with 2 acres 44 cents on the eastern portion, which is under their enjoyment and the land with less fertile western portion of 2



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acres 84 cents was allotted to defendants share by way of preliminary decree. Now, as per the gift deed, it belong to 3rd defendant. Accordingly, question of law No.2 is answered. The findings rendered by the courts below in respect of declining the relief of partition in toto is set aside. In respect of 5 acres 38 cents of land in Survey No.201/2, a preliminary decree is passed, in which the 1st plaintiff is entitled for an extent of 2 acres 44 cents on the eastern portion and the 1st defendant is entitled for 2 acres 83 cents on the western portion by affirming a family arrangement held in the year of 2006. Accordingly, the question of law No.2 is answered. Therefore, the Second Appeal in S.A.No. 838 of 2015 is partly allowed.

13. In respect of Second Appeal in S.A.No.839 of 2015 is concerned, an order of permanent injunction was granted in favour of defendants in the suit by holding that they are in possession of the property as per oral partition. As discussed above, the defendants established that by way of family arrangement held in the year of 2006, the western portion was under their enjoyment and the same was now allotted to their share. As they are in possession of property and house, they are entitled for the relief of



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injunction granted by the trial court in O.S.No. 176 of 2008, which needs no interference. Therefore, the Second Appeal in S.A.No. 839 of 2015 is dismissed. The suit is decreed in respect of 5 acres 38 cents in Survey No.201/2, in which the 1st plaintiff is allotted with an extent of 2 acres 44 cents on the eastern portion and the western portion to an extent of 2 acres 84 cents is allotted to the share of 1st defendant. Accordingly, a preliminary decree is passed. No costs. Consequently, connected Miscellaneous Petition is closed.

20.03.2024

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

The Sub-Judge, Udumalpet.



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T.V.THAMILSELVI, J.

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Pre-delivery judgment in
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