

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: .01.2015

CORAM

THE HON'BLE MR.JUSTICE R.MAHADEVAN

S.A.No.1403 of 1996

1. Shanmugha Mudaliar (died)

2. S.Jothi

3. J.Lalitha

4. K.Thilakavathi

5. M.Kalaiselvi

6. S.Damodaran

....Appellants/Defendants

(Appellants 2 to 6 have been impleaded
vide order dated 21.04.07 made in
C.M.P.No.6769 of 2006)

vs.

1. Krishnasamy Mudaliar (Died)

2. Arumuga Mudaliar

3. Renugambal

4. Yoga Lakshmi

5. Dhakshinamoorthy

6. Ganesan

7. T.K.Anandi

8. T.K.Jayanthi

....Respondents/Plaintiffs

(Respondents 3 to 8 have been
impleaded vide order dated 08.12.2011
in C.M.P.No.1169 of 2008)

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 30.04.1996 made in A.S.No.36 of 1994 on the file of the Subordinate Judge, Ranipet, North Arcot, confirming the judgment and decree dated 15.12.1993 in O.S.No.316 of 1990 on the file of the District Munsif Court, Ranipet, North Arcot.

For appellants : Mr.S.Parthasarathy,
Senior Counsel
for Mr.P.Srinivas

For respondents: Mr.K.Thangavelu

JUDGMENT RESERVED ON : 21.11.2014

JUDGMENT

Shanmugha Mudaliar, who is the defendant in the suit, filed this Second appeal against the Judgment and decree dated 30.04.1996 made in A.S.No.36 of 1994 on the file of the Subordinate Judge, Ranipet, North Arcot, confirming the judgment and decree dated 15.12.1993 in O.S.No.316 of 1990 on the file of the District Munsif Court, Ranipet, North Arcot. During the pendency of this second appeal, Shanmugha Mudaliar died and hence, his legal heirs were brought on record as Appellants 2 to 6. Krishnasamy Mudaliar and Arumuga Mudaliar are the plaintiffs in the suit. During the pendency of this second appeal, Krishnasamy Mudaliar died and his legal heirs were brought on records as respondents 3 to 8.

2. The case of the plaintiffs before the Trial Court is as follows:

(i) One Kuppusamy Madaliar, who is the father of the defendant herein and the grand father of the plaintiffs, had originally purchased the suit schedule property by a registered sale deed dated 06.08.1913 from one Duraisamy Mudaliar for a sum of Rs.265/- as a vacant site and he was in possession and enjoyment of the same as absolute owner of the property and in the year 1940, the said Kuppusamy Madaliar died leaving behind the defendant and one Annamalai Mudaliar, who is the father of the plaintiffs herein, as his legal heirs. Thereafter, the defendant and the said Annamalai Mudaliar were in possession and enjoyment of the property jointly as Members of Hindu Joint Family by constructing a building therein and the said Annamalai Mudaliar was the Manager of the aforesaid Hindu Joint Family. The said Annamalai Mudaliar died on 01.12.1960, leaving behind the plaintiffs and also one Kailasa Mudaliar, who are the sons of the said Annamalai Mudaliar.

(ii) After the death of Annamalai Mudaliar, the defendant became the Manager of the Hindu Joint Family. In the year 1975, Kailasa Mudaliar died as unmarried person, intestate, leaving behind the plaintiffs, who are his brothers as his sole legal heirs. Thereafter, the suit schedule property was mortgated on 05.03.1961 in favour of one Kondammal for a sum of Rs.2,995/-. At that time, the second plaintiff, namely, Arumuga Mudaliar, was a minor. Thereafter, the said mortgage was duly discharged out of the Hindu Joint Family Funds and then, the plaintiffs and the defendant are in possession and enjoyment of the property.

(iii) It is further contended that the defendant attempted to prevent the plaintiffs from enjoying the suit schedule property jointly and denied to give the plaintiffs' share over the suit schedule property from 10.02.1990 onwards, with an intention to grab

the whole suit schedule property. As the plaintiffs are the sons of the deceased Annamalai Mudaliar, who is the brother of the defendant, they are entitled to half share in the suit schedule property. It is also stated that the plaintiffs issued a registered notice through their lawyer on 19.02.1990 calling upon the defendant herein to divide the suit schedule property into two equal shares by metes and bounds and allot one equal share to the plaintiffs. Even though the defendant received the said notice, he did not comply with the demand of the plaintiffs and he also gave vexatious reply notice giving false statement. Therefore, the plaintiffs filed the suit for partition and separate possession of the schedule property

3. The suit was resisted by the defendant contending that the suit schedule property was already divided nearly 20 years ago and the plaintiffs got Southern side portion of the property and the defendant got Northern side portion of the property. It is further contended that the defendant has been paying tax to the northern side of the property for more than 20 years in his individual capacity and the plaintiffs have also been paying tax for their respective portions of the property. The defendant built shops in the poromboke land of 90 feet length, 10 feet breadth, which is not the ancestral property and hence, the plaintiffs are not entitled for any relief over the same. After the death of plaintiffs' father, the mortgage was created for the benefit of the plaintiffs. It is further contended that the defendant is not the joint family Manager and denied the Joint Family Theory mentioned in the plaint and the plaintiffs are not enjoining the suit property jointly. It is also contended that the suit property is not properly valued and the market value of the property given is also incorrect. Since the partition has already been taken place, the question of re-opening the partition does not arise and the plaintiffs are estopped by their own conduct claiming for second partition. Hence, the defendant prayed for dismissal of the suit.

4. The Trial Judge framed the following issues:-

(i) Whether the plaintiffs are entitled to half share of the suit schedule property?

(ii) Is it true the sister of the plaintiffs, namely, Kamala, was not included as a party to the suit?

(iii) Is it true that the partition was already made between the plaintiffs and the defendant nearly 20 years ago?

(iv) Whether this Court has pecuniary jurisdiction to entertain the suit as the value of the property is more?

(v) To what other reliefs, the parties are entitled to?

5. Before the Trial Court, on the side of plaintiffs, the first plaintiff was examined as PW1 and one Vasudeva Mudaliar was examined as P.W.2 and Exs.P1 to P13 were marked. The defendant examined himself as DW1 and marked documents as Exs.D1 to D223 on his side. The Trial Court, on analysis of the oral and documentary evidence, decreed the suit as prayed for. On appeal, the first appellate court, confirmed the finding of the Trial Court and dismissed the appeal. Aggrieved against the judgment and decree of the first appellate court, the present second appeal has been filed.

6. The second appeal has been admitted identifying the following questions to be the substantial questions of law involved in the second appeal:

- i) Whether the courts below did not consider the separate enjoyment of the southern portion of the suit property by the plaintiffs and their father for more than 30 years? and
- ii) Whether the courts below were correct in giving a finding that there was no prior oral partition between the plaintiff and the defendant?

7. The arguments advanced by Mr.S.Parthasarathy, learned Senior Counsel for the appellants and by Mr.K.Thangavelu, learned counsel appearing on behalf of the respondents are heard in detail. The materials available on record are also perused.

8. The learned senior counsel for the appellants has submitted that though it is the fact that the plaintiffs are in enjoyment of the suit property on the southern side with a separate entrance being their half share for more than 30 years and the defendant is in enjoyment of his half share on the northern side with a separate entrance for more than 30 years and they are also paying house tax and property tax in respect of their respective shares, the finding of the courts below that there was no partition between the plaintiffs and the defendants is perverse.

9. Further, the learned senior counsel has submitted that P.W.1 had admitted in his evidence that water connection in respect of half of the suit property on the southern side stands in his name for more than 25 years, which would prove that the oral partition was effected 30 years ago between the father of the plaintiffs and the defendant. The father of the plaintiffs was allotted the suit property bearing Door No.3, Pichai Ramaswamy

Street and the defendant was allotted his half share bearing Door No.7/6 Javuli Kadai Street and these facts would clearly prove that there was oral partition. However, the courts below did not consider these facts in a proper perspective.

10. The learned senior counsel has contended that relying on the mortgage deed, which was executed on behalf of the plaintiffs by the defendant, the courts below erred in holding that there was no earlier partition.

11. In support of his contentions, the learned senior counsel for the appellants has relied on the following decision:-

a. Pavayammal vs. Devanna Gounder (1988 (2) MLJ 162) so as to prove the claim of the appellant.

12. On the other hand, the learned counsel for the respondents has submitted that as no partition was effected by the defendant being the kartha of the joint family, the plaintiffs demanded partition. Had there been any partition, there is no need for claiming any partition by the plaintiffs and this fact has been proved by examining P.W.2. Even in the evidence of D.W.1, there is contradictory evidence with regard to partition and therefore, the courts below came to the correct conclusion that there was no partition and hence, decreed the suit as prayed for. Under these circumstances, there is no necessity for this Court to interfere with the findings and conclusion of the courts below.

13. In support of his contentions, the learned counsel for the respondents has relied on the following decisions:-

a. P. Arumugham and another vs. P. Balasubramaniam and others (2008 (7) MLJ 1210). The relevant portions are as follows:-

"38. It is therefore clear that the Full Bench of this Court, advertent to the Honourable Apex Court's judgements, categorically set out that if material particulars are missing in the pleadings, then oral evidence cannot be entertained. It is also worthy and significant to note that even before the institution of the suit, in the reply notice the defendants have chosen to come forward with the plea of oral partition and the plaintiff in the plaint contended that such plea of oral partition was false and despite that in the written statement there found no details set out. The learned counsel for the defendants placing reliance on the deposition of P.W.1 (P1-Balasubramaniam) during his cross-examination, has advanced his argument that P.W.1 candidly and categorically admitted that there had been an oral

partition. No doubt the perusal of the deposition would evince that there is one sentence found in the cross-examination as under:-

கு,,,,,,,,,,,,, தனிப்பட்ட பாகம் பிரித்த பிறகு வாங்கியதில் அது தனிப்பட்ட சொத்து"

46. The said decision would highlight the law point that merely because coparceners live separately, there is no presumption that there was division of status relating to coparcenary properties. There is also one another dictum found set out in the said precedent that simply because some members managed some properties there could be any presumption that there had been division in status. "

b. Kesavan Janardhanan Plappalli and others vs. Narayanan Janardhanana Plappalli and others (AIR 1953 TC 118). The relevant portion is as follows:-

"28. Mr.Varadaraja Iyengar, learned counsel for the plaintiff-responent, also stated in the course of the argument that if our view be that the two houses of Pozhisseril and Pathiyil are undivded, then no other questions would arise for consideration in this case. The judgments, Exs.P and XXV, and Exs.XXVIII and R are not liable to be set aside in the above view. We reverse the judgment of the Court below and hold that those judgments and documents are not liable to be set aside because the Pozhisseril and Pathiyil houses are joint and have been joint throughout. The result is that the suit must be dismissed and the appeal allowed with costs here and below."

c. P. Kaliappa Gounder and others vs. Muthuswami Mudaliar (AIR 1987 Madras 24). The relevant portion is as follows:-

"11. The plaintiff was examined as P. W. I and he has stated that until the demise of his father, Anngappa, the joint owners were giving the lands on lease jointly and were dividing the income as beteen themselves and only recently separate service connections for the wells have been obtained both by himself -the plaintiff as well as by defendants 1 and 2. Raising of loans on the basis of certificates of ownership for deepening the well is of no legal consequence at

all because admittedly the parties are owners - not individual and separate owners in specie, but joint owners in the enjoyment of specified portions. The defendants could not even give the time at which the alleged partition took place. The fact of enjoyment of specified portions of making improvements over such portions and of obtaining loans will not lead to the inference that there was a severance of the joint ownership and it was converted into ownership in severalty and in specie in the eye of law. Significantly the defendants did not care to examine, for reasons best known to them, any of their other vendors to prove the factum of division. Their vendor as per Ex. B-7, has been examined on the side of the plaintiff as P. W. 2, and he has deposed against the theory of division. "

14. Now, the only question to be decided in this case, whether any partition was effected between the plaintiffs and the defendant.

15. One Kuppusamy Mudaliar had purchased the suit property from one Duraisamy Mudaliar on 6.8.1913 and he died in the year 1940 leaving behind the defendant Shanmuga Mudaliar and his brother Annamalai Mudaliar, who is the father of the plaintiffs, as his legal heirs.

16. On 1.12.1960 the said Annamalai Mudaliar had died leaving behind the plaintiffs as his legal heirs and thereafter, the defendant had maintained the joint family as the kartha of the family. The suit property was mortgaged to one Kondammal and thereafter it was redeemed. These are all the admitted facts.

17. Since the plaintiffs could not continue in the joint family, they insisted the defendant for partition.

18. It is the case of the defendant that 20 years prior to the filing of the suit, the suit properties were divided and the southern portion was allotted to the plaintiffs and the northern portion was allotted to the defendant and four shops were constructed by the defendant in his property by spending a sum of Rs.7500/- and therefore, no partition can be done again.

19. D.W.1 has deposed in his chief examination that before 50 years, oral partition was effected between the defendant and the father of the plaintiffs, in which southern portion was allotted to the father of the plaintiffs and the northern portion was allotted to the defendant.

20. In contra, in the written statement filed by the defendant, it is stated that the plaintiffs and the defendant got divided nearly 20 years back and the plaintiffs got the southern portion of the property having their own entrance through Pichai Ramasamy Street with new door number 3 separately. The defendant got the northern portion with an entrance through old Bazaar Javuli Kadai Street with the Door No.7/6.

21. Further, one Vasudeva Mudaliar has been examined as P.W.2 on the side of the plaintiffs. He has deposed in his evidence that there are 11 Heads (Nattanmaikarar) and he is one of them in his village and he knows the grandfather of the plaintiffs and the father of the plaintiffs. The plaintiffs and the defendant are brothers and they are living in joint family.

22. Further, he has deposed that seven years prior to the date of his examination, there was a panchayat with regard to partition, and he was present in the panchayat and in that panchayat, it was decided that the house could be divided east west, for which though the plaintiffs have agreed, the defendant did not agree for the same, but on the other hand, the defendant insisted for partition on north west and therefore, the panchayatadars instructed the parties to approach the court of law for partition. He has also stated that the plaintiffs and the defendant were in joint possession and enjoyment of the suit property.

23. Further, in the written statement filed by the defendant, in paragraph No.2, it is stated that the plaintiffs have got a sister by name Kamala, who is residing in Bombay along with her husband and she is not added as a party in the suit. These averments clearly show that had there been any partition, such kind of averments would not have been made. Since no partition was effected between the plaintiffs and the defendant and to get the suit dismissed, such kind of contention was raised. Even from this, it could be concluded that there was no partition between the plaintiffs and the defendant.

24. On the other hand, the plaintiffs have proved their case by examining P.W.2 Vasudeva Mudaliar that no partition was effected between the plaintiffs and the defendant. P.W.2's categorical evidence with regard to partition was not rebutted by the defendant by any oral or documentary evidence.

25. Further, in the cross examination of D.W.1 by the learned counsel for the plaintiffs, D.W.1 has admitted that there was no previous enmity between P.W.2 and the defendant and therefore, it could be concluded that the evidence of P.W.2 is true and natural.

26. On the other hand, neither D.W.1 proved through his oral evidence or documentary evidence nor an independent witness was examined on the side of the defendant to rebut the evidence of P.W.2.

27. To prove the case of the plaintiffs, the plaintiffs had marked the copy of the mortgage deed as Ex.P.3. The said mortgage deed was executed by the plaintiffs and the defendant and also on behalf of one deceased Kailasam, who was the brother the plaintiffs. Though the plaintiffs have stated that since they are in joint family the defendant had executed the mortgage deed along with the plaintiffs and as guardian on behalf of the deceased Kailasam, the defendant has stated that because of the mortgagee Kondammal insisted to execute the mortgage deed by the elder of the family, he has signed in the mortgage deed.

28. Even assuming for the sake of argument, if there had been any division between the plaintiffs and the defendant, the defendant would not have executed the mortgage deed for himself and on behalf of the deceased Kailasam as guardian, instead, he would have signed as witness, even if the mortgagee had insisted him to sign in the deed being the elder of the family. Further, when the mortgage was discharged, the defendant himself alone had discharged the mortgage and the mortgage deed was marked on the side of the defendant. Here a doubt is arising that when the defendant had signed in the deed at the request of the mortgagee, why he discharged the mortgage and how he could produce and mark the mortgage deed on his side. So, it is clear that even in the year 1961 at the time of the execution of mortgage deed, there was no partition between the plaintiffs and the defendant.

29. Considering the totality of the facts and circumstances of the case and also the decisions relied on by both sides, this Court finds that the plaintiffs have proved their case through oral and documentary evidence, categorically that no partition was effected between the plaintiffs and the defendant, whereas the defendant has not proved his case that the partition was already effected between the plaintiffs and the defendant and therefore, this Court does not find any infirmity with the findings and conclusions of the courts below.

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30. Accordingly, the second appeal fails and the same is dismissed without costs confirming the judgments and decrees of the courts below.

mra

-s/d-
Assistant Registrar(J)
Dt:2/3/2015

True Copy

Sub-Assistant Registrar

To

1. The Subordinate Judge,
Ranipet, North Arcot.

2. The District Munsif,
Ranipet, North Arcot

3. The Section Officer,
V.R. Section,
High Court,
Madras.

+ 1 cc to Mr.P.Srinivas, Advocate SR 3891

+ 1 cc to Mr.K.Thangavelu, Advocate SR 4145

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S.A.No.1403 of 1996

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