

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.06.2015

CORAM

THE HONOURABLE MS. JUSTICE R.MALA

S.A.No.1939 of 2000

Judgment reserved on 23.06.2015	Judgment pronounced on 26.06.2015
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1.Chinnaswamy

2.Pushpathal .. Appellants/Appellants/Defendants 3 & 4

Vs

1.Natarajan .. 1st respondent/1st respondent/Plaintiff

2.Nachimuthu Gounder (Deceased)

3.Subramani

4.Tahsildar,

Perundurai Taluk,

Having Office at

Perundurai Town.

.. Defendants 1, 2 & 5/Respondents 2, 3 & 4/
Respondents

5.Nachammal

6.Subramanian

7.Saraswathi

.. Respondents

(R5 to R7 brought on record as LR's of the deceased R2
vide order dated 23.06.2015 in C.M.P.Nos.85 to 87 of 2015)

Prayer: Second appeal filed under Section 100 of CPC against the
Judgment and Decree dated 26.10.1999 in A.S.No.77 of 1999 on the
file of the II Additional District Court, Erode, confirming the
Judgment and Decree dated 08.02.1999 in O.S.No.469 of 1996 on the
file of the District Munsif cum Judicial Magistrate, Perundurai.

For Appellants : Mr.M.Narayanaswamy

For Respondents

R3, R5 to R7 : Mr.N.Manokaran

R1 & R4 : No appearance

R2 : Died. Steps taken (C.M.P.Nos.85 to
87/2015)

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 26.10.1999 in A.S.No.77 of 1999 on the file of the II Additional District Court, Erode, confirming the Judgment and Decree dated 08.02.1999 in O.S.No.469 of 1996 on the file of the District Munsif cum Judicial Magistrate, Perundurai.

2.The averments made in the plaint are as follows:-

The suit property originally belonged to one Marappa Gounder and Pattaya Gounder and they are having $\frac{1}{2}$ share each in the suit property and were enjoying the suit property in common. The said Marappa Gounder died leaving behind his two sons, namely, Chennimalai Gounder and Nachimuthu Gounder/first defendant. The said Chennimalai Gounder died leaving behind his son, namely, Natarajan/the plaintiff and hence the plaintiff is entitled to $\frac{1}{4}$ share in the suit property. The second defendant is the only son of Nachimuthu Gounder and hence the defendants 1 and 2 are having $\frac{1}{8}$ th share in the suit property. The defendants 3 and 4 are the subsequent purchasers of the share belonging to Pattaya Gounder and they purchased the same from the legal heir of the said Pattaya Gounder after his demise. The plaintiffs and the defendants 1 to 4 are enjoying the suit property in common without any permanent division.

(ii)While so, the defendants 3 and 4 have been making attempts to alienate the suit property with specific boundaries as if partition is effected and for which the plaintiff have made his objections. Thereafter, the plaintiff came to know that the vendors of defendants 3 and 4 have sold the property with specific boundaries to these defendants. It is further submitted no part of the property which is being in possession and enjoyment of the co-sharers in common can be sold with specific boundaries.

(iii)In fact, the 5th defendant made an attempt to measure the suit property and sub divide the same at the instigation of the defendants 3 and 4 and hence, the plaintiff sent a legal notice through his counsel objection the same and the same was stopped at once.

(iv)The plaintiff demanded the defendants 1 to 4 for amicable partition. But the defendants refused to come for it. Hence, the plaintiff filed a suit for directing the division of the suit property into a four equal shares by metes and bounds with reference to good and bad soil and allot plaintiff one such share in the suit property and put him in possession.

3.The gist and essence of written statement filed by the defendants 1 and 2 is as follows:

It is true that the defendants 1 and 2 and the plaintiff are entitled to common 1/4th share each in the suit properties and the defendants 3 and 4 are joint entitled to ½ share in the suit properties. It is also admitted that the plaintiff and the defendants are in joint possession and enjoyment of the suit properties without any permanent division. The defendants 1 and 2 are amenable for partition out of Court but the defendants 3 and 4 alone are not amenable for permanent partition and they are trying to drag on the matter. It is further submitted that the lands situated immediately on the South of the suit properties are called as Pothiya Kadu and it belong to the plaintiff and the defendants. The suit properties are called as Velikkadu. There is a cart track running from north to south and the same is branching from east to west panchayat road run towards Pothiya Kadu over the suit properties. The cart track is in existence from time immemorial. The defendants 1 and 2 are entitled to take their cart, men, cattle through the cart track which is running on the eastern of the suit properties. Hence, the defendants 1 and 2 submit that they are willing for partition of the suit properties and also prayed to provide a cart track, during partition of the suit properties, to reach Pothiya Kadu.

4.The gist and essence of written statement filed by the 3rd defendant is as follows:

Originally the land in S.F.Nos.153, 154, 155 and 156 of Chinnampalayam Village to an extent of 21.59 acres was originally belonged to one Marappa Gounder and Karuppa Gounder in common. Marappa Gounder owned ¾ share and Karuppa Gounder owned ¼ share in the said lands. Subsequently the said Karuppa Gounder sold his ¼ share to Pattaya Gounder. Thereafter in the year 1945, the said Pattaya Gounder and Marrapa Gounder orally partitioned the said lands. As the share of the Marappa Gounder fell back of the share of the Pattaya Gounder, a cart track was also provided. After that, on the basis of the oral partition and enjoyment, the said Pattaya Gounder and his sold their specific plot to the defendants 3 and 4. It is also submitted that from the date of purchase, the defendants 3 and 4 have been in possession and enjoyment of the specific plot. Hence, he prayed for dismissal of the suit.

5.The gist and essence of written statement filed by the 5th defendant is as follows:

The defendants 3 and 4 are the subsequent purchasers of the share belonging to Pattaya Gounder. The plaintiff and the defendants 1 to 4 were enjoying the suit properties in common without permanent division is false. The plaintiff and the defendants 1 to 4 were enjoying the suit properties on the basis of the oral partition. The 5th defendant never attempted to measure the suit property and sub divide the same at the instigation of the defendants 3 and 4 and he has not received legal notice of the plaintiff through his counsel.

He further submitted that the suit is bad for misjoinder of this defendant who is an unnecessary party to the proceedings. He would also submitted that on 25.03.1996, the 3rd defendant had given a petition before the 5th defendant demanding to sub division of the lands purchased in R.S.No.128/1 and 128/2 admeasuring an extent of 5.38 acres with specified boundaries. On receipt of the petition, proper enquiry was conductd and lands were measured as per the sale deeds and sub division was effected and new survey number was assigned to the defendants 3 and 4 as 128/1A and 128/2A in respect of the properties purchased by them. He further submitted that while effecting sub division, the property was measured in front of all the parties and after holding proper enquiry and scrutinizing the records only, sub-division was effected. Hence, he prayed for dismissal of the suit.

6.The gist and essence of additional written statement filed by the 4th defendant is as follows:

It is submitted that ever since the date of purchased, the defendants 3 and 4 have been in possession and enjoyment of the specific plot. After purchased, the defendants 3 and 4 have made improvements in the land to the tune of Rs.1,00,000/- and the improvements were done to the knowledge of plaintiff and the defendants 1 and 2. it is further submitted that as the defendants 3 and 4 have spent huge amount in making their plot fit for cultivation, in the event of partition, the defendants 3 and 4 may be allotted the same plot which they are in possession and enjoyment on the basis of equity.

7.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, P.W.2, D.W.1 to D.W.4 and Exs.A1 to A7 and Exs.B1 to B31, decreed the suit. Aggrieved against the judgment and decree of the trial court, the defendants 3 and 4 preferred an appeal in A.S.No.77 of 1999 on the file of the learned II Additional District Judge, Erode.

8.The learned First Appellate Court has considered the argument advanced on either side and framed necessary point for consideration and confirmed the Judgment and Decree passed by the Trial Court and dismissed the appeal. Against the Decree and Judgment of the first Appellate Court, the present second appeal has been preferred by the defendants 3 and 4.

9.At the time of admission of the above second appeal, the following substantial questions of law were framed for consideration.

"Whether the findings of the Court below that the appellants are not entitled to allotment of properties by equity are vitiated by perversity?

10. Challenging the concurrent finding of both the Courts below, the learned counsel appearing for the appellants/defendants 3 and 4 would submit that originally the suit properties belonged to one Marappa Gounder and Pattaya Gounder. There was an oral partition between them in the year 1945. The appellants have purchased the property from Pattaya Gounder and his son Nagappan under Exs.B21 and B22. Now, the grandson of the said Marappa Gounder filed a suit. The said Marappa Gounder had two sons Chennimalai Gounder and Nachimuthu Gounder. The said Chennimalai Gounder's son Natarajan filed a suit for partition and separate possession. Admittedly, the appellants are entitled to $\frac{1}{2}$ share and the first respondent/plaintiff is entitled to $\frac{1}{4}$ share and respondents 2 and 3/defendants 1 and 2 are entitled to $\frac{1}{4}$ share i.e. each $\frac{1}{8}$ share. The total extent of land is 11 acres and 06 cents and there is no dispute in respect of the extent. In view of the oral partition taken place in the year 1945 between the Marappa Gounder and Pattaya Gounder, the appellants purchased the property with the specified boundary in Exs.B21 and B22 from the said Pattaya Gounder and his son. But the Trial Court has not accepted the oral partition and it was given equity. He further submitted that since the appellants are stepped into the shoes of Pattaya Gounder, they are entitled to the property of the Pattaya Gounder abutting the road. But the Trial Court and the First Appellate Court has not considered the fact. Hence, he pray for allotment of property in the boundaries mentioned in Exs.B21 and B22 and also pray for setting aside the judgment and decree of both the Courts below.

11. Resisting the same, the learned counsel appearing for the respondents would submit that it is true that the total extent of land is 11 acres and 06 cents in S.Nos.153 and 154 belonging to both Marappa Gounder and Pattaya Gounder and each entitled to $\frac{1}{2}$ share. The appellants purchased the property from Pattaya Gounder and hence, they are entitled to $\frac{1}{2}$ share of the property. But there is no oral partition and hence, a suit has been filed for partition and separate possession. All the parties to the proceedings paid the Court fee for passing preliminary decree. Since, there is no oral partition, the appellants are not entitled to the property mentioned in Exs.B21 and B22, which is abutting the road and fetch higher value. Therefore, the Trial Court and the First Appellate Court has considered all the aspects in property perspective and came to the correct conclusion that oral partition has not been proved. He would further submit that separate enjoyment for the sake of convenience is not partition. To substantiate his argument, the learned counsel appearing for the respondents relied upon the following decisions:

1. AIR 1987 Madras 24 (P.Kaliappa Gounder and others vs. Muthuswami Mudaliar)
2. 2000 (1) LW 488 (Guruvammal and another vs. Subbiah Naicker and 5 others)

Hence, the learned counsel appearing for the respondents prayed for dismissal of the appeal.

12.Considered the rival submissions carefully made on both sides and perused the material records and both oral and documentary evidence.

13.Admittedly, the entire extent of the suit properties were owned by Marappa Gounder and Pattaya Gounder and the same was obtained by Exchange Deeds and Sale Deeds, namely, Exs.A6, A7, B5, B30 and B31. The total extent of land is 11 acres and 06 cents. Both Marappa Gounder and Pattaya Gounder are entitled to $\frac{1}{2}$ share each. The son of Pattaya Gounder is Nagappan. Marappa Gounder had two sons, namely, Nachimuthu Gounder/first defendant and Chennimalai Gounder. The second defendant/Subramani is the son of Nachimuthu Gounder. The said Chennimalai Gounder died intestate leaving behind his son, Natarajan/the plaintiff and he has filed a suit for partition and separate possession of his $\frac{1}{4}$ share in the suit properties. The plaintiff is entitled to $\frac{1}{4}$ share and the defendants 1 and 2 are entitled to $\frac{1}{8}$ share each. The appellants/defendants 3 and 4 have purchased $\frac{1}{2}$ share of the suit properties from Pattaya Gounder and his son under Exs.B21 and B22 respectively. So, the quantum of share in respect of each party entitled is not in dispute.

14.The case of the appellants/defendants 3 and 4, who are the spouses, is that they are entitled to the property which is in their possession as per Exs.B21 and B22. They submitted that there was an oral partition between Marappa Gounder and Pattaya Gounder in the year 1945, wherein, Northern 5.39 acres has been allotted to Pattaya Gounder and Southern 5.39 acres has been allotted to Marappa Gounder. The appellants purchased the property from Pattaya Gounder and his son Nagappan, who was examined as D.W.3 under Exs.B21 and B22 respectively.

15.Now, this Court has to decide whether both the Courts below are correct in rejecting the oral partition alleged by the appellants? As per the evidence of the appellants, there was an oral partition in the year 1945 between Marappa Gounder and Pattaya Gounder wherein northern portion has been allotted to Pattaya Gounder and from whom, the appellants purchased the property. So, it is the duty of the person who pleaded oral partition to prove the same. But admittedly the appellants herein have not proved the same. Because the document by the appellants/defendants 3 and 4 under Ex.B31 shows that on 27.06.19962 the said Pattaya Gounder purchased the $\frac{1}{4}$ share of the suit properties. In such circumstances, in the year 1945 the said Marappa Gounder and Pattaya Gounder has not owned the entire extent of land i.e. 11 acres and 06 cents in the said Survey Number. So, both the Courts below have rightly held that there is no oral partition in the year 1945 since on that day, the said Marappa Gounder and Pattaya Gounder are not the owner of the entire extent of 11 acres and 06 cents. Furthermore, the kist receipts and most of

the documents filed by the appellants are dated after filing of the suit. So, the Trial Court and the First Appellate Court has rightly rejected the plea of oral partition and equity for allotting the property because the property adjacent to the road will fetch higher value.

16.The learned counsel appearing for the respondents relied upon the decision reported in AIR 1987 Madras 24 (P.Kaliappa Gounder and others vs. Muthuswami Mudaliar), wherein it was held that separate enjoyment for the sake of convenience is not partition in law. It is appropriate to incorporate paragraph No.7, which reads as follows:

"7.Before we do the analysis of factual materials, we would like to recapitulate the concept of 'partition' of a joint family. The joint ownership of a thing is the right of two or more persons to possess and use it to the exclusion of others; and the thing, with regard to which there is the joint ownership, is called 'the joint property'. In this joint property, the joint owners do not own anything in specie and every joint owner has got right, title and interest over every piece and parcel of the joint property, subject to the qualification that the quantum of his share in the whole property stands defined in theory and not on ground. Though joint owners may be content with owning lands in common, yet, subsequently one joint owner or some joint owners may conceive the idea of owning the property referable to his or their share for himself or for themselves to the exclusion of the other or the others. This is the reason which motivates the move to get joint property partitioned. The legal term 'partition' is applied to the division of lands or properties belonging to joint owners and the allotments amongst them of the parts referable to their shares so as to put an end to community ownership or joint ownership. Mayne says-

"In England ownership as a rule is single, independent and unrestricted. In India on the contrary, joint ownership is the rule and will be presumed to exist until the contrary is proved."

While individual property appears to be the rule in the West, corporate property appears to be the rule in the East. Though passage of time and change of notions have shaken up this concept both in theory and in practice, yet, in our country and in particular in rural areas, joint ownership is allowed to persist by sufferance of custom and convenience until the bone of contention crops on."

17. For the same proposition, the learned counsel appearing for the respondents also relied upon the decision reported in 2000 (1) LW 488 (Guruvammal and another vs. Subbiah Naicker and 5 others), wherein it was held that mere convenience in enjoyment will not be sufficient to prove partition and mutation of name in the revenue records is not evidence of title. It is appropriate to incorporate paragraph Nos. 26, 27 and 28, which reads as follows:

"26. Thus the position on this aspect is well settled, it has not been shown by the appellants that dehors Exs. A-64 and A-65 there is any material available to substantiate their case of partition between Krishnaswamy Naicker and Subbiah Naicker.

27. Conceding that there was a separate enjoyment by the brothers, that will not by itself show that there was any completed partition between the brothers. The legal aspect is well settled. In Appavu @ Lakshmanan Pillai and another vs. Manikkam Pillai and four others ILR 1946 Mad 557 it has been held as follows:

"The fact that the members of a Hindu joint family divide among themselves some of the family assets, such as income from agricultural lands, outstandings and other movable property, does not in itself mean a division in status. In deciding whether a joint family has become divided the Court must have regard to the terms of any instrument bearing on the question and the subsequent conduct of the parties. Statements made by members of the family on certain occasions for certain purposes that they are joint or divided in status are not of much consequence. It is not their statements but their relations with the estate that must be taken into consideration in determining the issue."

28. In P. Kaliappa Gounder and others v. Muthuswami Mudaliar (AIR 1987 Madras 24 = (1985) 98 LW.773), it has been held by a Bench of this Court that, separate possession for the sake of convenience is no partition. The fact of separate enjoyment of specified portions for making improvements over such portions and of obtaining loans will not turn joint ownership into ownership is severally and in specie in the eye of law."

18. Considering the above citations along with the facts of the present case and Ex. B31, the oral partition pleaded by the appellants is unacceptable because during the alleged oral partition in the year 1945, the family was not in possession of the entire extent of the suit properties. Hence, both the Courts below have considered all the aspects in proper perspective and came to the correct conclusion. Further, both the Courts below on the basis of the Commissioner

report have rightly held that improvements made by the appellants pleaded in the additional written statement was only an after thought. In such circumstances, I do not find any reason for interfering with the judgment and decree passed by both the Courts below and the same are hereby confirmed. The second appeal is liable to be dismissed and it is hereby dismissed.

19. In fine,

- Second appeal is dismissed with costs.
- The decree and judgment passed by both the Courts below are hereby confirmed.

cse

s/d-

Assistant Registrar (CS-III)

True Copy

Sub-Assistant Registrar

To

1. The II Additional District Judge,
Erode.

2. The District Munsif cum Judicial Magistrate, Perundurai.

Copy to:

The Section Officer,
V.R. Section, High Court, Chennai.

+ 1 cc to Mr. M. Manokaran, Advocate SR 31860

+ 1 cc to Mr. M. Narayanaswamy, Advocagt SR 31771

jsv(co)
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