

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.01.2015

CORAM:

THE HONOURABLE MS.JUSTICE K.B.K.VASUKI

S.A.No.1916 OF 2000

1. Pappapiah
2. Marappa(Minor)
3. Chandrappa (Minor)
Minors 2 and 3 rep. By
father first appellant as guardian
- 4.Shantamma
- 5.Muniraj
- 6.Peddha Muniammal ... Appellants/Defendants

Vs.

Venkataramiah ... Respondent/Plaintiff

PRYER : This second appeal filed under Section 100 C.P.C. against the judgment and decree dated 27.07.2000 passed in A.S.No.25 of 1999 on the file of the Subordinate Judge, Hosur, reversing the judgment and decree dated 16.08.1999 passed in O.S.No.357 of 1996 on the file of the District Munsif Court, Husur.

For Appellants : Mr.Abrar Md. Abdullah for
Mr.R.Subramanian

For Respondent : Mr.D.Shivakumaran for
M/s.M.R.Muralidharan

JUDGMENT

The defendants are the appellants herein. The second appeal is arising out of the decree granted in O.S.No.357 of 1996 which was filed by the plaintiff/respondent for declaration of his title in respect of the suit property and for directing the defendants to deliver the vacant possession of the suit property measuring 0.12.5 ares (equivalent to 32 cents) S.No.204/1A morefully described in the suit schedule.

2.The facts that the plaintiff and first defendant by name Papaiah are brothers and owned joint family properties and the joint family properties were by way of oral partition divided among brothers are not denied. As far as the suit property is concerned, the same stands in the name of the plaintiff having purchased under a sale deed dated 07.01.1960 from one Veerappa of Bairamangalam Village. The plaintiff has come forward with the suit for the relief as stated supra on the ground that the joint family properties were divided among the brothers, during 1958, while the father was alive under oral partition and the brothers were allotted specific extent in specific Survey Numbers and after the oral partition, the plaintiff and the defendants have been in possession and enjoyment of

their respective shares and the suit property was purchased by the plaintiff from his own funds and earnings and the plaintiff has been in possession and enjoyment of the property from the date of purchase. Whereas, the first defendant, has without notice to and without knowledge of the plaintiff, obtained patta in UDR Scheme for the suit extent and the same compelled the plaintiff to make a representation to the concerned Tahsildar against change of patta and pending the same, the first defendant sold the property to the defendants 5 and 6. The plaintiff in support of his claim also relied on the finding rendered in O.S.No.265 of 1993 filed by the mother and sisters against the brothers for partition and separate possession of the joint family properties and the finding was to the effect that there was oral partition of the joint family properties between brothers by their father in 1958 and separate properties were allotted to the brothers towards their respective shares.

3.The suit was resisted by the defendants, according to whom, the properties remained to be joint family properties till oral partition which took place during 1970 and the property purchased in the name of the plaintiff during 1960 was from and out of joint family funds and had been treated as joint family property and the first defendant has been in possession and enjoyment of the same and the first defendant has dealt with the property in his own right, as such, the claim of the plaintiff for exclusive right over the suit property is not maintainable.

4.However, the trial Court dismissed the suit on the basis of the finding that the oral partition was effected only during 1970 and the property purchased in 1960 was from the income from joint family property. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No.25 of 1999. The lower appellate Court mainly by relying on the finding of the earlier suit regarding the factum of oral partition and the period of such oral partition, reversed the finding of the trial Court regarding the nature of the suit property. It is held by the lower Appellate Court that the property purchased in 1960 by the plaintiff was out of his own earnings after the oral partition in 1958 and having found so, the lower Appellate Court decreed the suit in favour of the plaintiff. Hence, this Second Appeal by the defendants before this Court.

5.The Second Appeal is admitted on the following Substantial Questions of Law:

a) In the absence of pleadings of the suit O.S.No.265 of 1993 and any issue framed whether the learned Subordinate Judge was justified in considering the question of res judicata and allowing the appeal on that ground?

b) Having regard to the fact that the first appellant and respondent were co-defendants in O.S.No.265 of 1993 having obtained a decision in their favour who could not have preferred an appeal whether the learned Subordinate Judge was justified in holding that the suit is barred by res judicata especially against co-defendants?

c) When once it is found that the main issue related to the year of partition between first appellant and the respondent which was not decided in O.S.No.265/1993 whether the learned Subordinate Judge was justified in holding that the suit is barred by res judicata?

d) Having regard to the fact that the suit was instituted by the respondent, the learned Subordinate Judge having found that the suit is barred by res judicata should have dismissed the suit?

e) Whether the learned Subordinate Judge was justified in rejecting the plea of adverse possession raised by the appellants?

6. Heard the rival submissions on either side and perused the records.

7. Here the main controversy in issue is as to whether the suit property is the joint family property or acquired separately by the plaintiff. The plaintiff in support of his claim that he has acquired the property on his own produced the sale deed under Ex.A1, dated 07.01.1960. It is the case of the defendants that the same is the jointly family property having purchased from out of joint family income. The issue relating to the nature of the property rests on the fact as to whether the oral partition took place in 1958 as contended by the plaintiff or in 1970 as contended by the defendants. Admittedly, the issue regarding the oral partition viz., the period during which the partition took place is also one of the issues involved in the earlier partition suit O.S.No.265 of 1993 filed by mother and sisters against the brothers for partition of the joint family properties. The mother and sisters, after the death of the father, claimed that the property remained joint without any partition till 1992 and the brothers partitioned the same in 1992 and the same is not binding on the mother and they are also entitled to get share in the property as per law. The present suit property is also one of the properties shown as joint family properties in the plaint schedule in the earlier suit. The suit is mainly resisted by the plaintiff herein as the first defendant therein and he had in his written statement specifically denied the joint family nature of the properties. Though it is the specific case of the defendants that the joint family properties were divided among sons orally by their father in 1958 and from the date of partition, the plaintiff has been in possession and enjoyment of the property comprised in S.No.204/1, according to the plaintiff, it is the self-acquired property of the plaintiff having purchased in 1960 from and out of his own funds.

8. The first defendant herein, as the second defendant therein did not file vakalat and written statement, whereas he appeared as PW3, one of the witnesses on the plaintiffs' side. The first defendant herein as the second defendant therein without filing any written statement supported the claim of the mother and sisters as made in the plaint as if there is no partition of the suit properties. In the earlier suit, the mother and one of the sisters and DW3 were examined as PW1 to PW3. The mother and one of the sisters as PW1 and PW2, admitted in the witness box the factum of partition during the life time of father in 1958 and that the family properties were

divided orally among sons by their father whereas the first defendant, PW3 in the earlier suit denied the partition. It is his specific case that there is no partition till date and mother and sisters are also entitled to get share their shares in the joint family properties whereas the plaintiff as the first defendant therein examined himself as DW1 in support of his claim as raised, in the written statement and it is stated by him that the father did not retain any property and as per oral partition, father divided the family properties among sons in equal shares. One of the issues framed by the trial Court in the earlier suit as seen from Exs.A6 to A10 judgment and depositions of PW1 to PW3 is that there was a oral partition in 1958. The trial Court, while answering the issue relating to the oral partition rendered a specific finding that the oral partition took place in 1958 and the father did not retain any property. The trial Court dismissed the earlier suit filed by the mother and sisters on the basis of such finding. No appeal is filed against the same by the plaintiffs. As the suit is based on partition and the second defendant is treated as one of the parties in the suit, the finding so rendered in the earlier suit thus become final and binding on all the parties to the partition suit. i.e. the plaintiff and defendants 1 and 2.

9.The issue relating to oral partition, is also one of the issues raised herein, based on which, the nature of the suit property is to be decided. While the plaintiff is relying on the finding in the earlier suit, the defendants herein, who did not file any written statement in the earlier suit and who deposed as a witness that no partition took place till 1992 has come forward with a different plea herein as if the oral partition was effected during 1970. The first defendant was also examined as DW1 along with additional witnesses who were examined as DW2 to DW4, in support of such contention that there was oral partition during the lifetime of the father, who died in 1975. While the trial court did not place any reliance on the finding in the earlier suit, the lower Appellate Court relied on the earlier finding rendered therein regarding the partition of the year 1958 and decreed the suit in favour of the plaintiff.

10. The learned counsel for the appellants/defendants would seriously argue before this Court that the finding so rendered in the earlier suit cannot act as res judicata and no principle of estoppel is applicable herein. The learned counsel for the respondent/plaintiff seriously refuted such stand taken by the defendants. According to the learned counsel for the plaintiff, the finding rendered in the earlier suit regarding the factum of oral partition on the basis of the defence raised by the defendants would invoke the principles of res judicata insofar as the claim made herein.

11.In support of their contention, the learned counsel for the plaintiff and the defendants have also relied on the following decisions:

- 1.S.KRISHNA GOUNDER (DIED) AND OTHERS V. JANAKIAMMAL (DIED) AND OTHERS. (MANU/TN/1020/1997)
- 2.ISHER SINGH V. SARWAN SINGH AND OTHERS, (AIR 1965 SC 948(1))
- 3.SHEHAMMAL V. HASAN KHANI RAWTHER & OTHERS, (2011-4-L.W.341) .

12.As rightly argued by the learned counsel for the respondent/plaintiff, the plea relating to oral partition is one of the material and substantial issues in the earlier suit and the decision made in the earlier suit is to greater extent binding on the parties herein and is essential to decide the issue and to grant relief in the present suit, as such, the ingredients necessary for applying Section 11 of the Code of Civil Procedure are satisfied and the principle of res judicata is hence squarely applicable to the facts of the present case and is rightly applied by the lower Appellate Court. It is true that in the judgment cited on the side of the appellants, the learned brother Judge was not inclined to apply the principles of res judicata mainly on the ground that the issue involved in both the cases is not one and the same, but the same is not the situation in the present case. As such, the judgment cited on the side of the appellants is not applicable to the facts of the present case. Whereas, the Hon'ble Apex Court on more or less identical facts, made an observation in the Authority reported in ISHER SINGH V. SARWAN SINGH AND OTHERS (AIR 1965 SC 948(1), which reads as follows:

"11. We thus reach the position that in the former suit the heirship of the respondents to Jati deceased (a) was in terms raised by the pleadings, (b) that an issue was framed in regard to it by the trial Judge, (c) that evidence was led by the parties on that point directed towards this issue, (d) a finding was recorded on it by the appellate Court, and (e) that on the proper construction of the pleadings it would have been necessary to decide the issue in order to properly and completely decide all the points arising in the case to grant relief to the plaintiff. We thus find that every one of the conditions necessary to satisfy the test as to the applicability of S.11 Civil Procedure Code is satisfied.

13.As far as the plea of estoppel is concerned, the first defendant herein, as the second defendant/PW3 therein having denied any partition till 1992, is estopped from raising a different plea as if the partition was effected in 1970. He is also bound by the finding regarding the partition in 1958. As such, the lower appellate Court, applying the principles of res judicata and estoppel, has rightly negatived the plea raised on the side of the defendants regarding partition of the year 1970. When the partition took place in 1958, there was no joint family status during 1960. If that is so, the property purchased in the name of the plaintiff much after the partition in 1960, cannot be treated as the joint family property. As such, the claim that it is the self-acquired property of the plaintiff is to be necessarily and rightly upheld by the lower appellate Court and no legal ground is made out warranting interference of the same.

14. Regarding the relief of recovery of possession, the plaintiff produced Exs.A2 and A3 representations given to the officials concerned for issuance of patta in respect of the suit property and Ex.A4 kist receipts relating to 1988 - 86. It may be true that the defendants also produced Ex.B2-Patta and B3 kist receipts in respect of the suit property and other properties, but the same are of the year 1984. The plaintiff has admittedly filed representation to the officials concerned for change of patta from the name of the

defendants. As such, the defendants cannot be permitted to take advantage of patta in their name which was issued without any notice to the plaintiff and without any enquiry. The property being dry land, the principle applicable is possession follows title. Even otherwise, the plaintiff having established his title and defendants having failed to establish better title to the suit property, the lower appellate Court has rightly granted the relief sought for by the plaintiff. The defendants cannot also raise any plea for adverse possession having regard to the pendency of civil suits and the same is, hence, rightly negatived by the lower appellate Court and the same warrants no interference by this Court. The Substantial Questions of law are accordingly answered in favour of the respondent.

15. In the result, the Second Appeal is dismissed. No order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge, Hosur.
2. The District Munsif Court, Husur.

Copy to: The Section Officer V.R. Section,
High Court, Madras.

+ 1 cc to Mr. D. Shivakumaran, Advocate Sr.4725

KSJ(CO)
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