

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.01.2015

CORAM

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.245 of 2012 and
M.P.No.1 of 2015

Subramaniya Udayar (died)

- 1.Kanaga
- 2.Murthy
- 3.Babu
- 4.Ganesan
- 5.Ilango
- 6.Gowri

.... Appellants/ Defendants

vs.

Masilamani Udayar

... Respondent/ Plaitniff

Prayer:- This appeal has been filed under Section 100 C.P.C., against the judgement and decree dated 30.09.2011 made in A.S.No.28 of 2008 on the file of the learned Subordinate Judge, Gingee reversing the judgement and decree dated 30.04.2008 made in O.S.No.21 of 1999 on the file of the learned Principal District Munsif, Gingee.

For Appellants : Mr.S.Nagarajan

For Respondent : Mrs.N.Mala

JUDGEMENT

सत्यमेव जयते

The suit in O.S.No.21 of 1999 on the file of the learned Principal District Munsif, Gingee was filed by the respondent herein. One Mr.Subramaniya Udayar was the sole defendant in the suit. The said suit was filed for declaration of title and for recovery of possession of "B" schedule property. The learned Principal District Munsif by decree and judgement dated 30.04.2008 dismissed the suit. As against the same, the respondent herein filed an appeal in A.S.No.28 of 2008 before the learned Subordinate Judge, Gingee. During the pendency of the said appeal, the sole defendant Mr.Subramaniya Udayar passed away and therefore, the appellants 1 to 6 herein were brought on record as the legal representatives of Mr.Subramaniya Udayar. The First Appellate Court by decree and judgement dated 30.09.2011 allowed the appeal thereby setting aside the decree and judgement of the trial Court and decreed the suit as prayed for. Challenging the same, the appellants are before this Court with this second appeal.

2.This appeal has come up today for admission after repeated adjournments. I have heard the learned counsel for the appellants and the learned counsel for the respondent and I have also perused the records carefully.

3.The case of the plaintiff/respondent is as follows:-

There are three items of properties described as "A" schedule properties in the suit. All the three items of properties are comprised in S.No.29/57 at Melmalayanur Village. The second item of "A" schedule property is again separately described as "B" schedule property. The dispute in the suit is in only in respect of "B" schedule property namely, the second item of "A" schedule property. The "B" schedule property is the land measuring North South 5 Gajam, East West 22 Gajam and old house situated thereon. It is the admitted case of the parties that all the three items in "A" schedule property including the "B" schedule property were owned by the father of one Mr.Kandasamy and Mr.Kadhirvel. They inherited the said property after the demise of their father. During the life time of Mr.Kandasamy and Mr.Kadhirvel they did not partition the said properties as well as the other joint family properties. Mr.Kandasamy died intestate leaving behind two sons and daughters. The plaintiff is one of the sons of Mr.Kandasamy. The other son is one Mr.Sundaramurthy. Mr.Kadhirvel also died intestate leaving behind his son who is the sole defendant in the suit. After the demise of Mr.Kandasamy and Mr.Kadhirvel, the plaintiff, Mr.Subramaniya Udayar (deceased) and Mr.Sundaramurthy were enjoying the suit properties as well as the other joint family properties together. Thereafter, there was an oral partition between the plaintiff, the defendant, Mr.Subramaniya Udayar and Mr.Sundaramurthy on 07.03.1959. Thus, from the date of oral partition, according to the plaintiff, he has got absolute title for the second item of "A" schedule property which is the "B" schedule property herein.

4.Subsequent to the partition, the defendant requested the plaintiff to allow him to reside in the house in the "B" schedule property. Accordingly, the defendant was allowed and he become permissive occupier. Now, the sole defendant disputes the title of the plaintiff and also declines to hand over vacant possession of "B" schedule property to the plaintiff. With these allegations, the respondent/ plaintiff filed the suit against Mr.Subramaniya Udayar, the sole defendant.

5.Mr.Subramaniya Udayar, the sole defendant in the suit, in his written statement has admitted that the entire "A" schedule property is the ancestral property, in which, Mr.Sundaramurthy, the plaintiff and the defendant himself have got undivided shares. It is a specific case that there was no partition effected between them. It is also his case that since, some dispute arose between them, the panchayatdars asked the defendant to occupy a portion of the "A" schedule properties and accordingly, he has been in occupation of

the third item of the "A" schedule property. But, the specific case of the defendant is that, since, there was no partition effected, the plaintiff cannot claim title over the "B" schedule property and on that basis, he cannot claim recovery of possession. So far as the partition deed is concerned, it is a case of the defendant that it is not admissible in evidence for want of registration.

6. Appropriate issues were framed on the basis of the above pleadings and the trial Court called upon the parties to let in evidence. On the side of the plaintiff, as many as 13 documents were exhibited and 3 witnesses were examined. On the side of the defendant, one document was exhibited and the sole defendant himself was examined as D.W.1.

7. Having considered the above, the trial Court found that there was no partition and therefore, the plaintiff is not entitled for the decree as prayed for. Accordingly, the trial Court dismissed the suit. But, the First Appellate Court has found that the oral partition is true and that the partition deed dated 07.03.1959 (Ex.A.1) is admissible in evidence. It is on these findings, the First Appellate Court has reversed the decree and judgement of the trial Court. That is how the appellants are before this Court with this second appeal.

8. The learned counsel for the appellants would submit that Ex.A.1, Partition deed is not admissible in evidence. He has further submitted that there was no oral partition at all between the parties preceding Ex.A.1. He would further submit that if Ex.A.1 is eschewed from consideration, absolutely, there is no evidence to prove the partition. Therefore, according to him, the claim of absolute title by the plaintiff is not sustainable and therefore, the First Appellate Court ought not to have reversed the decree and judgement of the trial Court.

9. From the above submissions of the learned counsel for the appellants and on perusal of the records, I am of the view that the following substantial question of law arises for consideration:-

"Whether the First Appellate Court was right in holding that Ex.A.1 is admissible in evidence and then to act upon the same?"

10. The learned counsel for the respondent would submit that even during evidence, Mr. Subramaniya Udayar, the sole defendant had admitted during cross examination that Ex.A.1 bears his signature. The First Appellate Court has found that there was oral partition preceding Ex.A.1. The learned counsel would submit that Ex.A.1 did not divide the properties and it was only a subsequent document after the oral partition and thus, according to the learned counsel, Ex.A.1 is admissible in evidence.

11. I have considered the above submissions.

12.The First Appellate Court has referred to the admission made by the sole defendant Mr.Subramaniya Udayar wherein, he has admitted the execution of Ex.A.1. He has further admitted that partition was effected by the Panchayatdars and the same was accepted by the parties. He has further stated that as per the division effected by the Panchayatdars, the respective parties have been enjoying the properties. This positive admission made by the defendant would go to show that there was oral partition effected at the instance of the panchayatdars, in which, "B" schedule property was allotted to the plaintiff.

13.Though, it is true that Ex.A.1 was also executed on the same day, a reading of Ex.A.1, the evidence and the admission made by the defendant would go to show that Ex.A.1 did not divide the property at all. If it is found that the division took place by virtue of Ex.A.1, certainly, for want of registration, the said document cannot be received in evidence except for collateral purpose. But, here, in this case, factually, the First Appellate Court has rightly held that division of properties was not effected by Ex.A.1 which was effected by oral partition preceding to Ex.A.1 and therefore, I hold that Ex.A.1 is admissible in evidence which clearly evidence the earlier partition. As per the partition, "B" Schedule property which is the second item of "A" schedule property was allotted only to the plaintiff. Thus, the plaintiff has clearly established his independent title for "B" schedule property.

14.Now, turning to the other documents, the learned counsel for the appellants would submit that joint patta was issued to the "B" schedule property under "Natham Settlement Scheme" this was done only because the property was jointly owned by all the sharers. But, Ex.A.1 shows that on a protest made, the name of the defendant was removed from joint patta and the patta was independently issued to the plaintiff. Ex.A.4 also would go to prove the same.

15.Apart from the above, the oral evidence of P.Ws.1 to 3 also would go to prove the oral partition. Thus, from the evidences of P.Ws.1 to 3 and the admission made by the sole defendant and the conduct of the parties and all the other attending circumstances, the First Appellate Court has rightly come to the conclusion that there was oral partition preceding to Ex.A.1 and thus, the plaintiff has proved his independent title for the "B" schedule property. Unless the said finding which is based on fact, I do not find any infirmity as I have already concluded that the only substantial question of law raised which has arisen for consideration is to be answered only in favour of the respondent/ plaintiff. In such view of the matter, I do not find any merit at all in this appeal.

16.In the result, the second appeal fails and accordingly, the same is dismissed. The respective parties shall bear their own costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Asst.Registrar (Records)

/true copy/

Sub Asst. Registrar

jbm

To

1.The Subordinate Judge,
Gingee.

2.The Principal District Munsif,
Gingee.

Copy to

The Section Officer
VR Section,
High Court, Madras

1 cc to Mr.S. Nagarajan, Advocate, sR. 3521

1 cc to Mrs.N. Mala, Advocate, sr. 3308

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S.A.No.245 of 2012

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