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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.03.2015

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.60 of 2011

1.Anthoni
2.Xavier
3.Thomas

... Appellants/Defendant

-Versus-

Santhappan

... Respondent/Plaintiff

This second appeal is filed against the judgment and decree dated 27.11.2009 made in A.S.No.18 of 2009 by the learned District Judge, Thiruvannamalai, reversing the judgement and decree dated 08.07.2009 made in O.S.No.88 of 2001 by the learned Subordinate Judge, Cheyyar, Thiruvannamalai District.

For Appellants : Mr.K.Muthamil Raja

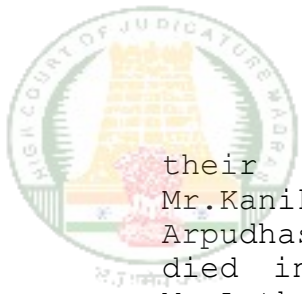
For Respondent : Mr.K.G.Senthilkumar

JUDGMENT

The defendants in O.S.No.88 of 2003 on the file of the learned Subordinate Judge, Cheyyar, Thiruvannamalai District, are the appellants and the respondent herein is the sole plaintiff in the suit. The said suit was filed for a partition and for separate possession of half share in the suit property. The trial court by decree and judgement dated 08.07.2009 dismissed the suit. As against the same, the respondents filed an appeal in A.S.No.18 of 2009 on the file of the learned District Judge, Thiruvannamalai. The first appellate court, by decree and judgement dated 27.11.2009, allowed the appeal, set aside the decree and judgement of the trial and decreed the suit as prayed for. As against the same, the defendants are, now, before this court with this second appeal.

2. This appeal has come up today for admission. On notice of motion, the respondent has made appearance through counsel. I have heard the learned counsel for the appellants and the learned counsel for the respondent. I have also perused the records carefully.

3. The case of the plaintiffs in brief is as follows:- The suit properties were originally owned by two brothers by name Kanikkam and Selvam. Mr.Kanikkam and Selvam did not effect any partition during



their life time and they enjoyed the suit property jointly. Mr.Kanikkam died intestate leaving behind his two sons by name Arpudhasamy and Santhappan - the plaintiff herein. Mr.Selvam also died intestate leaving behind his only son, the 1st defendant - Mr.Anthony. The defendants 2 and 3 are the children of the 1st defendant. According to the plaintiff, as set out in paragraphs 4 & 5 of the plaint, there was an oral partition between Arpudhasamy, the plaintiff and the 1st defendant and in the said oral partition, some properties were allotted towards half share of Arpudhasamy and the plaintiff together and the rest of the half share was allotted to the 1st defendant. As per the said oral partition, the sharers have enjoyed the their respective properties. While so, on 05.04.2004, the plaintiff purchased the property allotted to the share of Arpudhasamy from him by means of a registered sale deed. So far as the property allotted towards the share of the 1st defendant is concerned, he enjoyed the same and he has settled the suit property in the name of the defendants 2 and 3. According to the plaintiff, the said partition is not binding as it was only with a view to to have convenient enjoyment. Thus, according to the plaintiff, he is entitled for half share.

4. In the written statement filed by the defendants, the oral partition is admitted and the allotment of the respective share to the plaintiff is also admitted. It is further stated that the oral partition is valid and by virtue of the same, there was division effected and as a result the properties were enjoyed separately by the individual sharers. Therefore, according to the defendants, the suit properties were not available for partition. It is the further case of the defendants that the properties allotted to the share of the 1st defendant were also subsequently settled in favour of the defendants 2 and 3. Therefore, according to the defendants, the suit is liable to be dismissed.

5. Based on the above pleadings, the trial court framed appropriate issues . On the side of the plaintiff, he was examined as P.W.1 and as many as 5 documents were exhibited and on the side of the defendants, 3 witness were examined and 3 documents were exhibited.

6. Having considered all the above, the trial court dismissed the suit, which was reversed by the first appellate court. That is how, the appellants/defendants are now before this court with this second appeal.

7. From the records and from the grounds raised in this second appeal, I find that the following substantial questions of law have arisen for consideration:-



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[1] Whether the first appellate court was right in reversing the decree and judgement of the trial court by taking the view that there was no oral partition effected and that the joint family status continued?

[2] Whether the first appellate court was right in holding that the suit properties were enjoyed separately by the plaintiff, Arpudhasamy, and the 1st defendant only by way of convenient enjoyment?

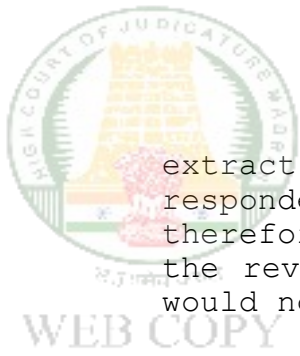
[3] Whether the first appellate court was right in ignoring the recitals of Ex.A.1 under which the plaintiff has purchased the property allotted to the share of Arpudhasamy from him?

[4] Whether the first appellate court was right in relying on the settlement deed executed by the 1st defendant to hold that there was joint family status?

8. The learned counsel on either side argued the case at length taking me through the records both in support as well as against the substantial questions of law framed in the second appeal.

9. At the outset, I should say that no party could let in evidence or make an attempt to make out a case quite contrary to the pleadings. In the instant case, in paragraphs 4 & 5 of the plaint, the plaintiff has categorically, tacitly and in an unambiguous manner admitted that there was oral partition between him, Arpudhasamy and the 1st defendant. He has also taken a very categorical stand that the sharers enjoyed their respective properties allotted in the oral partition. Therefore, it is not available for the plaintiff, now, to contend that there was no oral partition and it was only for convenience the said arrangement was made.

10. Next, the conduct of the parties subsequent to the oral partition also assumes importance. Ex.A.1 is the sale deed under which the plaintiff has purchased the property which was allotted to the share of Arpudhasamy. A perusal of the recitals of the said document would go to show that the plaintiff has purchased the property from Arpudhasamy, who had described himself as the owner of the same. Apart from that, in the description of the property under Ex.A.1, it is stated that the property covered under the deed is bounded on the East and West by the land allotted to the share of the plaintiff and on the South of it, the land allotted to the defendant. This recital would also clearly go to show that the respective parties had enjoyed their properties after the allotment in the oral partition. The revenue records produced like chitta and adangal



extract would also go to show the same. The learned counsel for the respondent would submit that the patta issued is a joint patta, and therefore, there was no partition. It may be a mistake on the part of the revenue authorities not to have issued separate patta. But, that would not go to prove that there was joint family status.

11. The learned counsel for the respondent would further submit that in the settlement deed executed by the 1st defendant, in favour of the defendants 2 and 3, the property has been mentioned as undivided share. It may be true that the 1st defendant has described the same as undivided share between him and his sons, but, it does not mean that the property was not divided between him and the plaintiff. Thus, in my considered opinion, the first appellate court has overlooked all these tangible evidence available as well as the pleadings of the respective parties and, thus, erred in revering the well considered judgement of the trial court. Thus, all the substantial questions of law framed in this second appeal are answered against the respondent and in favour of the appellants and the second appeal deserves to be allowed.

12. In the result, this second appeal is allowed; the decree and judgement dated 27.11.2009 made in A.S.No.18 of 2009 by the learned District Judge, Thiruvannamalai, are hereby set aside and that the judgement and decree dated 08.07.2009 made in O.S.No.88 of 2001 by the learned Subordinate Judge, Cheyyar, Thiruvannamalai District are hereby restored. Considering the facts and circumstances of the case, both parties shall bear their respective costs. Consequently, connected MP is closed.

Sd/-
Assistant Registrar

//True Copy//
Sub Assistant Registrar

kmk

To

- 1.The District Judge, Thiruvannamalai,
Thiruvannamalai District.
- 2.The Subordinate Judge, Cheyyar,
Thiruvannamalai District.

+ 1 cc to M/S/K.Muthamil Raja, 12791 Advocate SR.

Copy to: The Section Officer, VR Section, High Court, Madras..

SAI (CO)
EU 17.04.2015

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