

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.10.2016

PRONOUNCED ON : 25.10.2016

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1475 of 1998

Muthusamy Gounder

... Appellant

Vs

- 1.Ammasai Gounder (died)
- 2.Sellappan @ Thambi
- 3.Marikkannan
- 4.Krishnaswamy
- 5.Ramathal
- 6.Palaniammal @ Pappathi
- 7.Subbulakshmi
- 8.Lathamani

... Respondents

(R4 - Exparte in the Lower Court below
and hence given up)

(R2 and R3 recorded as LRS of the deceased
R1 and R5 to R8 brought as record as LRS
of the deceased R1 vide Order of Court
dated 15.09.2011 made in CMP.1269 of 2007
in S.A.No.1475 of 1998)

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree of the learned Subordinate Judge, Gobichettipalayam in A.S.No.67/1996 dated 19.08.1997 reversing the judgment and decree of the learned District Munsif, Sathyamangalam in O.S.No.72/1993 dated 12.12.1995.

For Appellants : Mr.A.K.Kumaraswamy

For R.1 : Died

For RR2 & 3 : Mr.P.V.Ramachandran

For R.4 : Given up

For RR5 to 8 : S.Kamadevan

JUDGMENT

The appellant herein who is the plaintiff in the suit for declaration and injunction though succeeded before the trial Court lost his case before the First Appellate Court in the first appeal and hence, preferred the second appeal, questioning the legality of the judgment passed by the First Appellate Court on the following substantial questions of law:-

"1. Whether the lower appellate court is justified in rejecting the oral partition pleaded by plaintiff overlooking the various admissions made by D.W.1 admitting the partition among the family members ?

2. Whether the lower appellate Court is right in not advertg to and discussing the evidence of P.W.2, an independent witness overlooking that it is a final Court of fact?"

2. The case of the plaintiff is that, his father Mr. Chellappa Gounder during his life time divided his properties among his three sons through oral partition some 17 years before the date of filing of the suit. Based on the said oral partition, the brothers have accepted their respective allotted shares and ever since enjoying their respective properties exclusively and absolutely. The suit land is the portion allotted to the plaintiff. He has improved the land by putting up separate well and installing pumpset. He had laid pipeline to take water to his land from the well. While the first defendant being one of his brother was allotted land and the house, wanted to share the pipeline laid by the plaintiff jointly with others to bring Bhavani river water to irrigate his land. When the plaintiff refused to share the pipeline with the first defendant, the first defendant caused notice demanding partition of the family properties, as if, it has not been partitioned. The plaintiff tried to settle the dispute amicably through the panchayatdars but, the first defendant did not co-operate. Taking advantage of the non registration of the partition, the defendants coercing the plaintiff to concede their demand and further, interfered with the exclusive possession and enjoyment of the of the plaintiff over the pumpset and crops raised by him, in the suit land. Hence, the suit for declaration of the plaintiff title over the suit property and perpetual injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the suit property was filed by the plaintiff.

3. The first defendant filed written statement denying the allegations made by the plaintiff regarding the oral partition.

However, admits the fact that the family properties were divided for convenient sake into three shares, about 11 years ago and the brothers have been enjoying one share each, as per the division of convenience only. There is no permanent partition between the family members as claimed by the plaintiff. The suit property was allotted to the plaintiff for enjoying it and not permanently based on the oral partition, as averred. In fact, Mr.Chellappa Gounder, the father of the plaintiff and the defendants sold one acre of land in S.No.105 Akarai Thathapalli Village on 12.06.1978. If the allegation of oral partition took place 17 years ago, in respect of the properties owned by Mr.Chellappa Gounder, then Mr.Chellappa Gounder could not have sold one acre of the family property in the year 1978. Therefore, the suit property being the family property held jointly by the family members, neither declaration of title nor injunction could be granted against the co-owner. The first defendant also denied the allegations that in respect of improvement of the land made by the plaintiff and laying pipeline for drawing water to the suit property. It is also stated in the written statement that the first defendant has resorted to a civil suit for permanent injunction against the plaintiff regarding usage of the pipeline for drawing water from Bhavani river in O.S.No.206/1993 and the same is pending.

4.The written statement of the first defendant has been adopted by the second and third defendants. Whereas, the fourth defendant has remained exparte. The trial Court based on the pleadings, has formulated the following issues:-

"(i)Whether the plaintiff is entitled for declaration and for permanent injunction

(ii)What other reliefs the plaintiff is entitled for ?"

5.In support of his case, the plaintiff has deposed as P.W.1 and examined his paternal uncle Mr.Avinasi Gounder as P.W.2. 11 exhibits were marked on behalf of the plaintiff. In support of the defendants' case, the first defendant has been examined as D.W.1 and one exhibit was marked in support of the defendants. The trial Court accepting the evidences let in by the plaintiff has held that there was an oral partition in respect of the joint family properties of Mr.Chellappa Gounder, long back and the same has been acted upon.

6.The trial Court held that the suit properties were allotted to the plaintiff and the plaintiff is in continuous possession and enjoyment of the same by paying kist and tax for the properties, is entitled for the relief sought for.

7. Aggrieved by the judgment and decree, the defendants 1 to 3 have preferred an appeal before the Subordinate Court, Gopichettipalayam, the First Appellate Court reversed the trial Court judgment, holding that Mr. Chellappa Gounder, father of the plaintiff and the first defendant, had sold one acre of land during his life time, which could not have been possible had the family properties being divided among the sons through an oral partition. Further, the First Appellate Court relying upon Ex.B.1, which is a carbon copy of an undertaking alleged to have been given by the plaintiff to the Bhavanisagar Police, in connection with the complaint regarding the enjoyment of the pipeline has held that Ex.B.1 is an admission of the plaintiff that there was no partition effected between the sons of Mr. Chellappa Gounder, by metes and bounds, till that date.

8. Aggrieved by the reversing judgment of the First Appellate Court, the plaintiff is before this Court with the present second appeal.

9. This Court is conscious of the fact that the second appellate Court under Section 100 C.P.C., cannot go beyond the scope of Section 100 C.P.C. Unless there is substantial question of law, involved in the case, the scope of entertaining the second appeal is very limited. However, when there is a perversity in the finding of the courts below, the second appellate Court cannot turn a Nelson eye and deprive the genuine right of the party leading to miscarriage of justice. This Court is of the opinion that this is one such case.

10. The First Appellate Court finding is without any adequate application of mind and proper appreciation of the evidence let in by the parties. More particularly, the admission of the defendants regarding division of properties among the family members long back and exclusive enjoyment of the properties by the sons of Mr. Chellappa Gounder has not at all been given adequate consideration while reversing the well found judgment of the trial Court.

11. The First Appellate Court has mainly relied upon the fact that Mr. Chellappa Gounder in the year 1978 has sold one acre of land and has concluded that this is not possible had there been any oral partition of entire joint family properties in the light of the averment of the plaintiff that Mr. Chellappa Gounder had not retained any property thereafter. The First Appellate Court has not understood the facts of the case. It is specifically averred by the plaintiff that the joint family properties were divided among the sons of Mr. Chellappa Gounder through oral partition and it is not the case of the plaintiff that mutation of revenue records have been effected in respect of all the joint family properties. While so, alienation of one

acre of land by Mr.Chellappa Gounder in the year 1978 has been properly explained by the evidence of P.W.1 that one acre of land belonging to the first defendant was sold by his father Mr.Chellappa Gounder since, the property stood in the name of Mr.Chellappa Gounde. His father executed the sale deed and the sale proceed was utilised by the first defendant to purchase five acres of land in his name. This fact elucidated from the plaintiff/P.W.1 by the defendants counsel himself in the cross examination has not at all been considered by the First Appellate Court. Had it been properly considered this, the First Appellate Court would not have arrived at the conclusion that alienation of one acre of land by Mr.Chellappa Gounder in the year 1978 renders the averment of oral partition unbelievable.

12.Similarly, the evidence of P.W.2 the paternal uncle of the parties and younger brother of Mr.Chellappa Gounder which categorically speaks about the oral partition and exclusive enjoyment of the properties by the respective parties has not at all been taken note by the First Appellate Court while reversing the judgment of the trial Court.

13.P.W.2 is the elderly person of the family. There must be some strong reason for disbelieving his version. There is no suggestion to that effect put forth by the defendants to that witness. In fact, the defendants themselves have clearly admitted that there was division of property among the family members and for more than 20 years, they are all enjoying their respectively properties and they have improved the properties. In fact, one of the defendant has also alienated the property given to him and each one of them have purchased properties in their individual name, from and out of the income arrived at from the properties got by them through the division. While so, the First Appellate Court, for the sake of reversing the finding of the trial Court, has observed that the division among the sons of Mr.Chellappa Gounder was not proportionate and therefore, it could not be considered as a permanent partition. The First Appellate Court has miserably failed to note that the dwelling house of joint family has been allotted to the first defendant and admittedly, he is in exclusive possession and enjoyment of that ever since his marriage which was celebrated some 30 years ago. Further, it is pertinent to note that the defendants themselves have resort to legal remedy by way of injunction suit in O.S.No.206/1993 in respect of usage of pipe line and never sought for partition. This crucial fact has been totally overlooked by the First Appellate Court while rendering a reversal judgment.

14.The Hon'ble Supreme Court has discussed the term "effect and value of family arrangements entered into between the parties" in Kale v. Dy. Director of Consolidation (AIR 1976 SC

807) and the relevant paragraph No.9 is extracted below:-

"Before dealing with the respective contentions put forward by the parties, we would like to discuss in general the effect and value of family arrangements entered into between the parties with a view to resolving disputes once for all. By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made. In this connection, Kerr in his valuable treatise "Kerr on Fraud" at p. 364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus;

"The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honesty made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to that their rights actually are, or of the points on which their rights actually depend."

The object of the arrangement is to protect the family from long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and, therefore, of the entire country, is the prime need of the hour. A

family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administrating of social justice. That is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successions so that future disputes are sealed for ever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The Courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the Courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. The law in England on this point is almost the same. In Halsbury's Laws of England, Vol. 17, Third Edition, at pp. 215-216, the following apt observations regarding the essentials of the family settlement and the principles governing the existence of the same are made:

"A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving-its honour.

The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied.

Family arrangements are governed by principles which are not applicable to dealings between strangers. The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections- to the binding effect of family arrangements".

15.While it is well settled law and recognised by the Courts in India that a complete and effective partition of movable or immovable property may be made by oral agreement and as such an agreement leading to partition among the members of the joint family does not require a written registered document. The First Appellate Court oblivious of the said settled legal position has reversed the judgment of the trial Court.

16.It is also pertinent to note that the First Appellate Court has given an undue importance to Ex.B.1 which is a carbon copy of the statement alleged to have been given by the plaintiff to the Police. This document has been marked through the defendants, on objection. The defendants are not a party to this document. Admittedly, the document has been executed by the plaintiff in the police station to the police while he was facing a criminal complaint initiated by the defendants. A complete reading of this Exhibit (Ex.B.1) even if it is to be construed to be an admission it mainly refers to the dispute regarding the drawing of river water through a common pipeline to irrigate his land and not in respect of the partition of the entire family property. Being so, it is unfortunate that the First Appellate Court has read between the lines of the document marked as Ex.B.1 which itself has doubtful evidentiary value being executed by the plaintiff to the police under the fear of complaint.

17.When there is overwhelming evidence, both ocular and documents, that the suit property has been in exclusive

enjoyment of the plaintiff for more than 20 years, as a result of oral partition and when the substantial part of the averments been admitted by the first defendant just because the arrangement between the family members was oral and no written document substantiating oral partition was produced, the First Appellate Court has de-suited the plaintiff quite contrary to the proven facts.

18.For the aforesaid reasons, both the substantial questions of law are held in favour of the appellant and the second appeal is liable to be allowed and the judgment and decree of the First Appellate Court is liable to be set aside.

19.In the result, the second appeal is allowed with costs and the judgment and decree of the First Appellate Court is set aside and the judgment and decree of the trial Court is restored.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

jbm

To

1.The Subordinate Judge,
Gobichettipalayam.

2.The District Munsif,
Sathyamangalam.

+1cc to Mr.A.K.Kumaraswamy, Advocate, S.R.No.61210

Second Appeal No.1475 of 1998

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