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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.09.2016

C O R A M

THE HONOURABLE MR. JUSTICE S.S.SUNDAR

Second Appeal (MD) No.136 of 2016

and

C.M.P(MD)No.2468 of 2016

1.Nambirajan
2.Rajan
3.Ponnuthai
4.Subbulakshmi
5.Ponmalar
6.Radhika
7.Sudghagar

... Appellants/Respondents 1 to 7/
Defendants 1 to 7

Vs.

1.Muthukumar
2.Mohan
3.Amirtharaj
4.Selvi
5.Malathi
6.Manohar
7.Rani
8.Kala

... 1st Respondent/Appellant/Plaintiff

... Respondents 2 to 8/Respondents 8 to 14/
Defendants 8 to 14

Prayer: - Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908, to set aside the Judgment and Decree dated 24.02.2014 made in A.S.No.8 of 2012 on the file of the Principal District Judge Court, Tirunelveli, reversing the Decree and Judgment in O.S.No.131 of 2007 dated 30.08.2010 on the file of the Subordinate Judge, Valliyoor.

For Appellants : Mr.S.R.Anbarasu

For Respondents : Mr.H.Arumugam for R1

: Mr.T.S.R.Venkataramana for R2 to R8

J U D G M E N T

The defendants 1 to 7 in the suit in O.S.No.131 of 2007 on the file of the Subordinate Judge, Valliyoor, are the appellants in the above second appeal.



2. The first respondent in the appeal filed a suit for partition of his 1/4th share in the suit schedule properties. The suit properties are described in two items. The first item is having an extent of 99 cents of lands in Survey No.852/19 in Ervadi Village, Nanguneri Taluk, Tirunelveli District. The second item is also a land measuring an extent of 1 Acre 74 cents in Survey in 854/2B in Ervadi Village, Nanguneri Taluk, Tirunelveli District.

3. The case of the plaintiffs, as set out in the plaint, are as follows:

3.1. The suit first item, originally, belong to one Sudalaimuthu, who died in 1959 without any issues. The said Sudalaimuthu had his only brother, by name Arumugam (Senior) who predeceased him. The said Arumugam had a son by name, Arumugam (Junior) who died in the year 1954 and predeceased the said Sudalaimuthu. The suit 2nd item belonged to Arumugam (Junior). After the death of Suddalaimuthu and Arumugam (Junior) it was contented by the plaintiff that the suit property devolved upon the sons of the said Arumugam (Junior), namely, Ponnusamy, Selva Sundaram, Rajesh and Muthukumar, the plaintiff in the suit.

3.2. The eldest brother Ponnusamy died on 04.11.1990 leaving the defendants 1 to 3 and one Anandarajan. The said Anandarajan died in the year 2001 leaving his wife the 4th defendant and his daughters, namely, the defendants 5 and 6 and a son, namely, the 7th defendant herein.

3.3. The second brother of the plaintiff died leaving the defendants 8 to 11 as his legal heirs. The third brother of the plaintiff - Rajaiah died on 23.12.2002 leaving the defendants 12 to 14 as his legal heirs and they are also entitled to undivided 1/4th share in the plaint schedule properties. Similarly, the defendants 8 to 11 and 12 to 14 are entitled to 1/4th share each being the legal representatives of two other brothers of the plaintiffs. A portion of the suit property, namely, an extent of 5 cents of lands in Survey No.852/1B was sold to the United Volunteers Service Society in the year 1999 by the plaintiff for himself and on behalf of the other members of the family. The said 5 cents of land was sold so as to get access to the said property from the main road. The suit properties are the joint family properties and jointly enjoyed by the plaintiffs and the defendants since defendants were not agreeable for partition, despite a request by the plaintiffs for the same the suit came to be filed. The suit was contested by the defendants 1 to 7, the appellants herein. The defendants 1 to 7 admitted in their written statement that the suit property originally belongs to Sudalamithu in the year 1959 without leaving any legal heirs. The appellants also admitted the relationship of the plaintiffs and other defendants.



3.4. However, it is the specific case of the defendants that one of the sons of Arumugam (Junior), by name, Ponnusamy, father of the defendants 1 to 3 alone was enjoying the suit property even during the life time of the said Sudalaimuthu.

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3.5. The appellants obtained separate patta in the year 1983 with the knowledge of the other brothers. The appellants also pleaded that they have prescribed title by ouster. The appellants have also attacked the sale deed that was executed by the plaintiff in favour of the United Volunteers Service Society in respect of the 5 cents of lands in the year 1999. Hence, they also preferred a counter claim for declaration that the sale deed executed by the plaintiff on 20.12.1999, is invalid. The appellants have further pleaded that there was a partition among the defendants 1 to 7 on 14.05.2007 and that they are enjoying the properties as per the partition effected among themselves from the date of partition. The defendants 9 to 11 filed a written statement supporting the case of the plaintiffs. They have also preferred a counter claim for allotment of their share in the suit properties by paying separate Court fee.

3.6. The suit was dismissed by the trial Court after holding that the plaintiff admitted an earlier partition in the family in the sale deed Ex.B1 executed by him on 20.12.1999, in respect of 5 cents of lands. Though the trial Court framed several issues, all the issues relate only to the entitlement of 1/4th share for each branch. The only issue with regard to the dispute is whether the sale deed dated 20.12.1999, is liable to be declared as invalid and hence, the trial Court has not framed the real issues that arise for consideration between the parties in the suit having regard to the specific pleadings. After framing all the issues with regard to the entitlement of specific shares to the four branches of the family, the trial Court answered by saying that the plaintiff is not entitled to succeed in the suit for partition after admitting the oral partition in the sale deed dated 20.12.1999. It is pertinent to mention that it was nobody's case that there was an oral partition in the family. Even the defendants 1 to 7/ appellants have not pleaded that there was oral partition. Though the defendants 8 to 11 and 12 to 14 representing the other branches have not pleaded oral partition, the trial Court dismissed the suit and rejected the counter claim of the defendants 8 to 11 simply on the ground that the plaintiffs are not entitled to seek partition after admitting the oral partition in the family as per the witness document Ex.A1. It is also pertinent to mention that the trial Court has also rejected the counter claim of the appellants.

<https://hcservices.ecourts.gov.in/hcservices/> 3.7. In addition to the judgment and decree of the trial Court, three appeals have been filed. A.S.No.8 of 2012 was filed by the plaintiffs, A.S.No.43 of 2013 was filed by the defendants 9 to 11

and A.S.No.44 of 2013 was filed by the defendants 12 to 14.

3.8. The first appellate Court after framing necessary issues found that the plaintiffs are entitled to 1/4th share and the defendants 8 to 11 and the defendants 12 to 14 are also entitled to their 1/4th share along with the appellants who were also entitled to 1/4th share. Since it was nobody's case that there was earlier partition in the family, the lower appellate Court ignored the recital of the documents as an admission of earlier partition. But regarding the question of ouster, the lower appellate Court considered all the documents filed by the appellants and held that the appellants have not established their case of ouster. Considering the fact that the document in Ex.B7 namely, the partition deed dated 14.05.2007, is not binding on the other co-owners, the lower appellate Court rendered a specific finding that the revenue records produced by the appellants were not sufficient to hold that the defendants 1 to 7 namely the appellants were in exclusive possession of the joint family properties so as to prove ouster. Aggrieved by the judgment and decree of the lower appellate Court, the defendants 1 to 7 have filed the above second appeal.

4. First of all, it is to be noted that the appellants have filed the present second appeal only against the judgment and decree in A.S.No.8 of 2012 on the file of the Principal District Judge, Tirunelveli. Despite the fact that the appeals filed by the other set of defendants claiming 1/4th share are also allowed, the appellants have not filed any separate appeal as against the decree in the other two appeals, namely, A.S.Nos.43 and 44 of 2013.

5. The main argument advanced by the learned Counsel for the appellants is that the document under Ex.X1, clearly shows that the plaintiff has admitted the earlier partition in the family and that the suit for partition filed by the plaintiffs cannot be entertained. Further, the learned Counsel submitted that the questions of law raised by the appellants should be addressed before deciding the second appeal.

6. Having regard to the sincere efforts of the learned Counsel for the appellants in arguing each point as a question of law, this Court finds it appropriate to deal with the issues and answer the following questions of law which were also framed by this Court at the time of admission:

"1) Whether the 1st Appellate Court is right in reversing the judgment of the lower Court while earlier partition of the same property is admitted by the plaintiff through Ex.X1?

2) Whether law permits two partitions for the same

3) Whether the 1st appellate Court is right in not



considering the non-joinder of necessary party?

4) Whether partial partition is permissible?

5) Whether the plaintiff is entitled to file the suit U/s 37(2) of Act 14 of 1995, when there is no joint possession?

6) Whether the 1st appellate Court is right in deciding that the plaintiff is entitled to partition?

7) Whether 1st appellate Court has failed in framing proper points for consideration under Order 41 Rule 31 C.P.C?"

7. It is not in dispute that the sale deed under Ex.X1 was executed by the plaintiff in the year 1999 and from the recitals of Ex.X1, it can be seen that the plaintiff himself has stated in the said document about the earlier partition in the family and allotment of the property to the plaintiff in the said partition. Though this is a piece of evidence in the present suit, it cannot be taken as an admission binding on all parties who are also seeking partition. It is nobody's case that there was an earlier partition in the family. Neither the plaintiff nor any of the defendants have pleaded about a partition in the family at any point of time. It is the specific case of the appellants that the suit properties were in the exclusive possession and enjoyment of Ponnusamy even from the year 1951 during the life time of Sudalaimuthu. In a suit for partition, the defendants are also entitled to get their share declared by payment of Court fee. In this case, defendants 8 to 11 have made a counter claim seeking partition.

8. In such circumstances, even an admission of the plaintiff is not binding on other sharers and the Court is expected to decide the rights of other parties as well. Further admission in pleadings is different from a statement in a document which can only be taken as a piece of evidence. While admission in pleading is binding, the statement in a document can be explained or controverted. In this case, the defendants 8 to 9 and 12 to 14 have also pleaded that they are entitled to 1/4th share in the suit properties as co-sharers. Their claim is independent and the Court, cannot merely on the basis of the recital of Ex.A1, deny the right of other sharers as they are not bound by the recitals of Ex.X1.

9. The lower appellate Court is therefore expected to give a finding as to whether the partition, in fact, happened at any earlier. It is not as though the trial Court has given a findings that there was a partition in the family earlier. Since, the plaintiff has admitted the partition under Ex.X1, the



trial Court found that the plaintiff is not entitled to seek partition after admitting the partition. That is not a correct approach. In the absence of any pleadings by anyone about the partition in the family, the trial Court has committed a grave error in accepting the partition on the basis of Ex.X1. The lower appellate Court has come to the conclusion that there was no actual partition in the family, since there was no pleading by anyone of the parties in the suit about this partition. When it is not even the case of appellant that there was a partition in the family, the appellant is not entitled to canvass this point any further.

10. Secondly, merely on the basis of recitals under Ex.X1, it is not proper to deny the rights of other sharers to seek partition, on the true interpretation of the Doctrine of Estoppel. The first appellate Court is, therefore, right in holding that there was no partition and such partition cannot be presumed or accepted merely on the basis of recitals under Ex.X1. The judgment of the lower appellate Court is, therefore, perfectly valid and does not suffer from any legal infirmity while holding that there was no earlier partition.

11 The second question of law does not arise as the lower appellate Court has categorically found that there was no partition in the family and hence, the suit for partition by the plaintiff cannot be dismissed on that ground.

12. Regarding the third and fourth questions of law, the argument of the learned Counsel for the appellant is that the purchaser of a small extent of property under Ex.X1 is a necessary party and that the suit without impleading the proper party is bad. First of all, the appellants, who have filed a counter claim seeking for declaration to declare the sale deed under Ex.X1 as invalid, have not preferred any independent appeal against the decree of the trial Court though their counter claim was rejected. Technically, the appellants are not justified in raising the issue. Since the property sold under Ex.X1 is not included in the suit, the appellants without challenging the decree rejecting their counter claim cannot be permitted to raise this issue. Since the plaintiff claim only his share less the five cents, no prejudice is caused to the other sharers.

13. However, it is to be noted that the sale deed under Ex.X1 was executed by the plaintiff in the year 1999. It is specifically alleged by the plaintiff that the said sale deed was executed only for the benefit of the family and that he acted only for himself and on behalf of the other members of the family. When those properties were specifically excluded for the reasons stated in the sale deed, it is open to the appellants as well as other parties to the suit to include even the properties which were sold away under Ex.X1 and to seek impleadment of the purchaser under



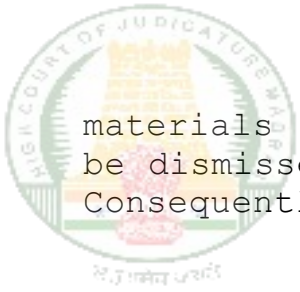
Ex.X1 as a party, because in a suit for partition, both the plaintiff and the defendants have the same obligation unlike in other cases. When the appellants and other defendants have not chosen to include the said property and the plaintiff has excluded the property on the ground that the sale is beneficial to the family and that it was on behalf of the members of the family, the appellants as well as other members of the family are having different options. Having failed to seek appropriate relief at the earliest point of time, it is not open to the appellants to raise the issue as a questions of law at this stage. It is found that the small extent of land conveyed to the third party under Ex.X1 should be deducted from the share of plaintiff and no other sharers should be denied their right of 1/4th share. Hence, the plaintiff was given only 1/4th share less 5 cents of lands. This arrangement would meet the grievance of the appellants and hence, these questions are also answered against the appellant. This Court does not find any justification to interfere with the findings of the trial Court.

14. Regarding the fifth question of law, it is true that in a suit for partition by one member of the family against the other members of the family, the plaintiff has to prove that he is in joint possession of the properties, if he wants to pay fixed Court fees under Section 37(2) of the Tamil Nadu Court Fee and Suit Valuation Act. The lower appellate Court has categorically found that the appellants' possession cannot be treated as adverse and the question of ouster is also answered against the appellants by the lower appellate Court. In a joint family, possession by a member of the family would be considered and regarded as on behalf of all unless plea of ouster is established or the suit is against a stranger to the family. In view of the specific findings of the appellate Court, this Court cannot entertain the plea of the appellants that the plaintiff is not in joint possession.

15. Regarding the sixth question of law, this Court find no merit and is not a question of law to be considered by this Court for entertaining the second appeal.

16. Regarding the seventh question of law, this Court find no legal basis. First of all, the appellate Court in this case has framed all the necessary issues and unlike the trial Court, considered the pleadings and oral and documentary evidence in extenso. When the issues that arise for consideration have been specifically addressed by the trial Court and the independent application of mind is explicit, the appellants cannot complain non-compliance of Order 41, Rule 31 of Code of Civil Procedure.

17. For all the above reasons, this Court finds that the decree of the lower appellate Court is perfectly in order and there is no legal infirmity in the same. The findings rendered by the first appellate Court was supported by the



materials evidence. Accordingly, the second appeal is liable to be dismissed and hence, the second appeal is dismissed. No costs. Consequently, connected Miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar(Crl)

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Sub Assistant Registrar

To

1. The Principal District Judge,
Tirunelveli.

2. The Subordinate Judge,
Valliyoor.

+1 cc to M/s.S.R.Anbarasu, Advocate in SR.No.54556

+1 cc to M/s.H.Arumugam, Advocate in SR.No.54530

+1 cc to M/s.T.S.R.Venkat Ramana, Advocate in SR.No.54414

gsr

CSL/PV/17.11.2016 :8P/6C

Second Appeal (MD) No.136 of 2016

21.09.2016