

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 15.02.2017
PRONOUNCED ON : 03.03.2017
CORAM
THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S. A.Nos.780 & 781 of 2014
and
M.P.No.1 of 2015

Kandan ... Appellant in
both second appeals/Plaintiff/
defendant

Vs.

1. Rajendran ... Respondent in
S.A.No.780 of 2014 and
first respondent in
S.A.No.781 of 2014/2nd Respondent/
Plaintiff

2. Madaiyan ... 2nd respondent in
S.A.No.781 of 2014/1st Defendant

PRAYER IN S.A.No.780 of 2014: Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 10.10.2013 passed in A.S.No. 23 of 2012 on the file of the Subordinate Court, Dharmapuri reversing the judgment and decree dated 29.10.2011 passed in O.S.No.212 of 2009 on the file of the District Munsif Court, Dharmapuri.

PRAYER IN S.A.No.781 of 2014: Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 10.10.2013 passed in A.S.No. 24 of 2012 on the file of the Subordinate Court, Dharmapuri, reversing the judgment and decree dated 29.10.2011 passed in O.S.No.26 of 2009 on the file of the District Munsif Court, Dharmapuri.

For Appellant : Mr.V.R. Rajaramani
in both SAs for Mr.V.R.Annagandhi

For Respondent : Mr.S.Pushpakaran
in S.A.780/2011
and first respondent
in S.A.No.781 of 2011

COMMON JUDGMENT

S.A.No.780 of 2014

Challenge in this second appeal is made by the defendant against the judgment and decree dated 10.10.2013 passed in A.S.No. 23 of 2012 on the file of the Sub Court, Dharmapuri, reversing the judgment and decree dated 29.10.2011 passed in O.S.No.212 of 2009 on the file of the District Munsif Court, Dharmapuri.

S.A.No.781 of 2014

Challenge in this second appeal is made by the plaintiff against the judgment and decree dated 10.10.2013 passed in A.S.No. 24 of 2012 on the file of the Sub Court, Dharmapuri, reversing the judgment and decree dated 29.10.2011 passed in O.S.No.26 of 2009 on the file of the District Munsif Court, Dharmapuri.

2. The second appeals have been admitted and the following substantial questions of law are formulated for consideration in these second appeals:-

(i) Whether the alleged oral partition could be presumed on the basis of the revenue records only, especially when the patta is not a document of title?

(ii) Whether the court below was correct in holding that the burden of proving the alleged oral partition that took place between the appellant and his brother, the vendor of the respondents, was on the appellant who denies the same?

(iii) Whether the trial Court is empowered to decide the question of the alleged oral partition in a suit for declaration of the title especially when the suit property was jointly purchased by the appellant and his brother/the vendor of the respondent?" सत्यमेव जयते

3. O.S.No.26 of 2009 has been laid by the appellant for declaration and permanent injunction.

4. O.S.No.212 of 2009 has been laid by the respondent in S.A.No.780 of 2014/ first respondent in S.No.781 of 2014 for declaration and permanent injunction.

5. The appellant and Madaiyan, the first defendant in O.S.No.26 of 2009 are brothers. It is found that the suit property had been jointly acquired by the appellant and Madaiyan under the sale deed dated 22.04.1971 marked as Ex.B1. Thus, according to the appellant, he and his brother Madaiyan are the

joint owners of the suit property and the same is in their joint possession and enjoyment. It is the further case of the appellant that neither of them has ownership of any particular extent in the suit property. While so, according to the appellant, despite the public notice about the joint ownership of the suit property by the appellant and Madaiyan, it is stated that Madaiyan had alienated the entire suit property in favour of the respondent under a sale deed dated 22.11.2007 marked as Ex.A1 and basing upon the same, inasmuch as the respondent had attempted to interfere with the possession and enjoyment of the appellant in respect of the suit property, he has been necessitated to lay the suit in O.S.No.26 of 2009 for appropriate reliefs.

6. Per contra, the respondent has taken a plea that the suit property had been allotted to the share of Madaiyan and accordingly, patta had been mutated in favour of Madaiyan and accordingly, he had been in exclusive possession and enjoyment of the suit property and further plea has been taken that the respondent he had purchased the suit property from Madaiyan and following the same, it is only the respondent, who is in possession and enjoyment of the suit property by obtaining the patta and paying kist and inasmuch as the appellant had attempted to interfere with his possession and enjoyment in respect of the suit property, he has been necessitated to lay the suit in O.S.No.212 of 2009 for appropriate reliefs.

7. As seen from the evidence adduced in the matter, it is not in dispute that the suit property had come to be owned by the appellant and his brother Madaiyan under the sale deed dated 22.04.1971 marked as Ex.B1. Now, according to the appellant, the suit property remains joint and thus, it is contended that Madaiyan is not entitled to alienate the entire property in faovur of the respondent as the appellant is also entitled to ½ share in the suit property. Per contra, the respondent has taken a plea that in the partition, the suit property fell to the share of Madaiyan and accordingly, Madaiyan had alienated the suit property in favour of the respondent under the sale deed dated 22.11.2007.

8. Having admitted that the suit property was derived by the appellant and his brother Madaiyan under Ex.B1 and the respondent having taken a plea that the suit property fell to the share of Madaiyan in the partition, as rightly found by the trial Court, it is for the respondent to establish that the suit property fell to the share of Madaiyan in the partition and accordingly, Madaiyan had absolute ownership over the suit property at the time of the execution of Ex.A1 sale transaction. Even though the respondent has pleaded that the suit property fell to the share of Madaiyan either in the written pleas or

during the course of evidence, the respondent has not expatiated or established the oral partition put forth by him. It has not been pleaded or established as to on what date the partition took place between the appellant and his brother Madaiyan, whether the same had been effected through a written instrument or orally and in whose presence, the partition had been effected and what where the properties involved in the partition. In this connection, as rightly found by the trial Court, the respondent has not made specific pleas nor adduced acceptable evidence to establish that the suit property had been allotted to the share of Madaiyan. If that be so, the appellant would have been allotted other properties at the time of partition. But, when the case of partition itself has not been established by the respondent by adducing acceptable evidence, his case that the suit property, as such, had been allotted to the share of Madaiyan cannot be accepted in any manner.

9. It is found that the respondent placed reliance upon the patta said to have been issued in his favour in respect of the suit property marked as Ex.A2 and the copy of "A" Register marked as Ex.X1. Other than Exs.A2 and X1, there is no other material placed by the respondent to show that the suit property, as such, had been allotted to the share of Madaiyan during the alleged partition. When the factum of partition itself has not been established as above mentioned by giving the full particulars with reference to the same and also through reliable evidence, merely on the basis of the patta entries found in Exs.X1 and A2, we cannot presume the plea of partition raised by the respondent. Therefore, it is found that the trial court has correctly analysed the evidence adduced in the matter and found that no safe reliance could be attached to Exs.A2 and X1 to accept the plea of partition put forth by the respondent.

10. In the absence of the establishment of the plea of partition put forth by the respondent, it could be seen that the property having been jointly acquired under Ex.B1 by the appellant and his brother, it is found that the property remains in the joint ownership, possession and enjoyment of the appellant and his brother and in such view of the matter, it is obvious that the appellant's brother viz., Madaiyan is not entitled to convey the entire suit property in favour of the respondent under Ex.A1.

11. In the light of the above position, it is found that the first appellate Court has erred in placing the burden of proof on the appellant to establish that the plea of partition, when the appellant has specifically denied the same.

12. It is also found that the first appellate Court has also placed reliance upon certain additional documents projected by

the respondent during the course of appeal proceedings. As rightly put forth by the appellant's counsel, when the receipt of the additional evidence is not based upon any application with reference to the same and also not in conformity with the provisions of law pertaining to the same, it could be seen that the first appellate Court has erred in law in placing reliance upon the additional evidence projected by the respondent during the course of arguments before the first appellate Court. Hence, the additional evidence, on which, the first appellate Court has placed reliance, have to be eschewed from the zone of consideration and not to be relied upon for deciding the issues involved between the parties in the present lis.

13. M.P.No.1 of 2015 has been laid for the reception of the copy of the plaint in O.S.No.137 of 2014 as an additional evidence in second appeal No.781 of 2014.

14.The suit in O.S.No.137 of 2014, according to the petitioner/first respondent, has been laid by the daughters of the second respondent herein for partition and other reliefs. However, a reading of the plaint would also go to show that the plaintiffs therein i.e. the daughters of the second respondent herein has sought for partition contending that the suit property involved in the present appeals has not been divided amongst the brothers viz., Kandan and Madaiyan. In such circumstances, it does not stand to reason as to how the copy of the plaint in O.S.No.137 of 2014 would be helpful to advance the case of the petitioner/first respondent herein. In any event, it is found that the above suit in O.S.No.137 of 2014 has been laid only during the pendency of the second appeal and in such view of the matter, when it is found that the plaintiffs in the above said suit are not parties to the present lis and also the said suit had been laid on a different set of cause of action, even though the suit property is involved in the said suit, it is found that the copy of the plaint of the said suit would not in any manner be helpful to decide the issues involved in the present appeals. In such view of the matter, the petition for reception of additional evidence is found to be devoid of merits and unacceptable and accordingly, the same is rejected.

15. In the light of the above discussions, it is found that the first appellate Court has erred in accepting the plea of oral partition, based upon the revenue records, which cannot be construed as documents of title and further, it is also found that the first appellate Court has erred in placing the burden of proof about the alleged oral partition between the plaintiff and his brother, on the appellant particularly when the appellant has denied the same. Both parties having claimed title on different set of facts, the Courts below are empowered to decide the said pleas including the plea of partition for

deciding the question of title raised by the parties. The substantial questions of law formulated for consideration in these second appeals are accordingly answered.

In conclusion, the judgment and decree dated 10.10.2013 passed in A.S.No. 23 and 24 of 2012 on the file of the Sub Court, Dharmapuri, are set aside and the judgment and decree dated 29.10.2011 passed in O.S.No.212 of 2009 and 26 of 2009 on the file of the District Munsif Court, Dharmapuri, are confirmed. Accordingly, the second appeals are allowed. No costs. Consequently, connected miscellaneous petition is dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sms

To

1. The Sub Court, Dharmapuri.
2. The District Munsif Court, Dharmapuri.

+2cc to Mr.V.R. Annagandhi, Advocate, S.R.No.13911,13912
+1cc to Mr.S. Pushpakaran, Advocate, S.R.No.13922

RJ(CO)
md(04/04/2017)

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M.P.No.1 of 2015

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