

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 14.03.2017

PRONOUNCED ON : 03.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.1299 of 1998

1.Perumal Padayachi (deceased)
2.Selvambal
3.Annal Thangam
4.Pachayammal
4th appellant is brought on record as
legal representatives of the deceased
1st appellant vide order court dt.23.11.11
made in CMP.Nos.3527/2007 and 1128 of 2011
(by MSNJ) ...Plaintiffs/Respondents/Appellants

-vs-

1.Alagudurai Padayachi (deceased)
2.S.Anbuselvi
R2 is brought on record as legal representatives
of the deceased sole respondent vide order of
Court dated 23.11.11 made in CMP.Nos.3527 of 2007
and 1128 of 2011 MSNJ

PRAYER: Appeal is filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 29.08.1997 made in A.S.No.152 of 1992 on the file of the Subordinate Judge's Court Ariyalur reversing the Judgment and decree dated 28.09.1992 made in O.S.No.149 of 1991 on the file of the District Munsif Court, Ariyalur.

For Appellants : Mr.R.Krishna Prasad
for M/s.Sarvabhauman Associates

For Respondent 2: Mr.M.V.Krishnan

J U D G M E N T

The unsuccessful plaintiff is the appellant herein.

2. For the sake of convenience, the parties are referred to as per the ranking before the Trial Court.

3.The appellant/plaintiff filed a suit for declaration of the title in respect of the suit property and for injunction against the defendant from interfering with the peaceful possession and enjoyment of the suit property.

4.The plaint proceeds on the basis that the suit property is described in the plaint as 'A','B','C','D'. The first plaintiff is the father and the plaintiffs 2 and 3 are son,daughters of the first plaintiff. While, the first defendant is the brother of the first plaintiff. Both the plaintiff and the first defendant are lived as a joint family property and there was a partition of the joint family property in the year 1961 and the suit property is the self-acquired property of the plaintiff having purchased under a sale deed dated 29.07.1963. Further, the wife of the first plaintiff is the only daughter for her father and for him, the plaintiff 2 and 3 alone are the daughters and hence, on the death of his father-in-law of the first plaintiff, by selling the movable and immovable property of his father-in-law, he had purchased the site. In the site of the suit property and thereafter, put up the construction and he is in possession and enjoyment of the property. Since, both the plaintiffs 2 and 3 are already got married and the plaintiff has no sons. On 14.08.1991, he had executed a settlement deed in favour of plaintiffs 2 and 3 and the settlement deed is also came into force. While so, the first defendant who had retired from Railways has started to encroach upon the suit property by putting up fencing along on 'A' and 'B' lines in the land and hence, prayed for declaration of plaintiff and for permanent injunction.

5.The claim of the plaintiff was resisted by the respondent/defendant by filing written statement inter-alia contended that the relationship between the parties are admitted and the employment of the first defendant in the railways is also admitted. In view of the employment in various places as the first defendant was moving around in different places, both the families of the plaintiff as well as the defendant were lived together. In the year 1972, there was a oral partition between the first plaintiff and defendant and till such time, though some of the properties were purchased in the name of the first plaintiff and that of the first defendant, they have been settled in respect of each other in the oral partition taken place in the year 1973.

6.To substantiate the pleadings, the trial Court has formulated as many as 4 issues and Exhibits A1 and A2 were marked and P.W.1 and P.W.2 were examined and D.W.1 to D.W.3 were examined and Exhibits.B1 to B3 were marked and an Advocate Commissioner was appointed to inspect the suit property and he has filed Exhibits C1 and C2 viz.,report and sketch.

7. Based upon the both oral and documentary evidence, the trial Court has held that the plaintiff is entitled the suit for declaration and permanent injunction and accordingly, decreed the suit.

8. Aggrieved against the said judgment and decree, the defendant have preferred in A.S.No.152 of 1992 before the Sub-Court, Ariyalur. The lower Appellate Court after framing necessary point for determination in the appeal and also allowed the I.A., to receive the additional evidence and marked it as Exhibits.B4 to Ex.B6 on the side of the defendant, and on re-appreciation of the evidence have come to the conclusion that the plea of oral partition as pleaded by the plaintiff is disbelieved in view of the presence of the documentary evidence. While, the plea of oral partition in the year 1973 as pleaded by the defendant is so upheld and further held that the suit property is allotted to the share of the defendant and also relying upon the new documents marked in the appellate stage has held that the settlement deed executed by the first plaintiff in favour of his daughter. Plaintiffs 2 and 3, is pending the suit and does not have bearing in and accordingly, allowed the appeal and dismissed the suit in entirety.

9. At the time of admission, the following substantial questions of law were framed for consideration:

- (i) Whether the lower appellate Court committed an error in law by holding that the suit property was a joint family property especially in the absence of any pleading or evidence as to the existence of any joint family nucleus?
- (ii) Whether the lower Appellate Court is correct in law in holding that the suit property was a joint family property and whether the suit property was allotted to the respondent/defendant in an oral partition of the year 1961?

10. The crux of the dispute between the first plaintiff and first defendant:

Is it true that the oral partition taken place during the year 1963 as pleaded by the plaintiff or oral partition 1973 as pleaded by the defendant?

11. The plaintiff has come forward with specific case that there was a oral partition of the joint family property in the year 1961 and the subsequent to thereon on 29.07.1963 under Ex.A1, sale deed, he had purchased the suit property basing upon

the sale proceeds of sale of movable and immovable properties on death of his father-in-law and thereafter he has put up the construction. While so, the P.W.1, in his witness box as stated that during the lifetime of his father-in-law, his wife being the only daughter he gave money to purchase the property and accordingly, he has purchased the property in his name in the year 1963 which was commented upon by the lower Appellate Court as a contradiction as to the source of income for the purchase of the suit property under Ex.A1 is found to be valid have force.

12. According to the defendant only in the year 1973, there was a oral partition and till such time while the first defendant was serving in the railways and hence, the plaintiff who was acting as a Manager of the joint family property and administered the joint family properties and both the families were looked by the first plaintiff.

13. It remains to be stated that to substantiate the oral partition pleaded by the first defendant to the effect that the said oral partition was only during the year 1973. The defendant are marked Ex.B1, sale deed dated 14.08.1972 wherein, both the first plaintiff and the defendant have purchased the property jointly and joint patta was issued and in the oral partition taken place in the year 1973. In the cross-examination of P.W.1, he has categorically admitted that the property purchased under Ex.B1 in joint name was allotted to him, lends full support of case of the defendant i.e., the same property which was jointly purchased was totally allotted to the first plaintiff. Further, in lieu of the share of the first defendant in the above said property, another property purchased in the name of the plaintiff was allotted to the defendant. The second portion of the said finding was clearly admitted by the P.W.1 in the cross-examination goes to show that even after the year 1961, both the plaintiff and the defendant have jointly purchased the property and there was subsequent exchange of property between the parties runs in contra to the plea of the plaintiff that the oral partition has taken place in the year 1961 and on the other hand, the same support of the plea of the defendant that the oral partition have taken place only in the year 1973.

14. Though, the P.W.1 had deposed that in view of a smaller share being allotted to the defendant. Another land measuring 24 cents was allotted to the defendant was not proved by the plaintiff in the manner known to law. Accordingly, the lower Appellate Court has rightly come to the conclusion that the plea advanced by the plaintiff was negatived. It is further remains to be stated that on perusal of Ex.B2, sale deed and Ex.B5 settlement deed, it is seen that the Ex.B2 is a sale deed, dated 19.06.1967 in favour of the defendant for a land measuring 50 cents, out of 97 cents in Survey No.11/1 was purchased in the

name of the second defendant and the said land was settled by 1st plaintiff in favour of the 2nd plaintiff under Ex.B5 and the factum of purchase of Ex.B2, sale deed in favour of the defendant and subsequent settlement of the property by 1st plaintiff in favour of the 2nd plaintiff has been admitted by the plaintiff in the cross-examination assumes significance.

15. So, also under Ex.B4, dated 24.6.1968 sale deed, in favour of the plaintiff and the lands covered in the Ex.B4 along with land measuring 45 cents in Survey No.2/6 has been settled by 1st plaintiff in favour of the third plaintiff under Ex.B6 assumes significance.

16. Thus, on combined reading of the Ex.B2 and Ex.B5 in one hand and Ex.B4 and Ex.B6 on the other hand which goes to show that the properties that are purchased in the name of the defendant were subsequently settled by first plaintiff in favour of the second plaintiff and third plaintiff, as if, it is his property goes to show that even after 1961 alleged oral partition, the properties that are jointly purchased in the name of the plaintiff and defendant under Ex.B1 and the said property was re-allotted to first plaintiff in the 1973 coupled with a fact that properties purchased exclusively in the name of the first defendant under Ex.B2 and Ex.B4 in the year 1967 and 1968 were gifted by the first plaintiff, as if, it is the his property in favour of his daughters viz., Plaintiffs 2 and 3 goes to show that the plea of oral partition was during the year 1961 raised by the plaintiff cannot be accepted. Besides, the plea of oral partition between the contesting parties was in the year 1973 has projected by the defendant appears to be substantiated by documentary evidence, as referred supra.

17. In view of the fact that a property purchased in the year 1972 under Ex.B1 in the joint name and property purchased in the year 1967 in the individual name of the defendant under Ex.B2 were settled by the first plaintiff as that of his own property and in favour of the other plaintiffs and also the portion of the property purchased by the defendant in the year 1968 under Ex.B4 was settled by the plaintiff as of his property towards the third plaintiff under Ex.B6 demonstrated the fact that properties purchased in the name of the defendant in the year 1967, 1968 where been dealt with by the plaintiff as that of his property this could be possible only if there is a oral partition in the year 1973 has projected by the defendant. Had there been a oral partition in the year 1961 as claimed by the plaintiff, there can be no reason as to why under Ex.B1 the plaintiff and defendant go for a joint purchase of the property in the year 1972 and hence, viewing from any angle the oral partition as pleaded by the plaintiff in the year 1961 is only to suit is convenient to exclude the suit property from the

purview of the joint family property and the plea of oral partition in the year 1973 as pleaded by the defendant has been stands duly corroborated by the documentary evidence Ex.B1,Ex.B2,Ex.B4,Ex.B5 and Ex.B6.

18. Accordingly, this Court holds that all the properties are joint family property and oral partition in the year 1961 as pleaded by the plaintiff falls to ground since the plaintiff has come forward with specific plea that the suit property is self-acquired property having purchased from the sale proceeds of sale of movable properties and immovable properties, after the death of the father-in-law in the plaint. While the said plea in the pleading is found to be in contra with the evidence of the P.W.1, the lower Appellate Court has rightly rejected the version of the P.W.1 that the suit property is a self-acquired property and hence, this Court holds that in the absence of any positive legally acceptable evidence to demonstrate the suit property is a self-acquired property and in view of the fact that the defendant have successfully demonstrated the existence of the joint family property and the said joint family property as sufficient income and with the said income only the Ex.A1 suit property was purchased in the name of the first plaintiff is found to have force and accordingly, held that suit property is a joint family property and in view of the finding with the preceding paragraphs that the plea of oral partition in the year 1961 has come forward by the plaintiff has been stand negatived and accordingly, both the parties are entitled to $\frac{1}{2}$ share in each and hence, the judgment and lower Appellate Court is hereby confirmed, for different reasoning, as stated supra and the trial Court has committed in error in taking the finding of the Advocate Commissioner in the Advocate Commissioner's report C1 and C2. It is settled preposition of law that Advocate Commissioner cannot render a finding as to which of the parties are in possession of the suit property which is against the scope and the role of the Advocate Commissioner.

19. In this view of the matter, the finding rendered by the trial Court is hereby stands vacated and viewing from any angle, this Court is of the considered view that the plaintiff is not proved his pleadings that Ex.A1 is a self-acquired property and on the contrary, the defendant has proved that the suit property is a joint family property and the plaintiff having failed to prove his pleadings as to his independent title to the suit property and in the absence of any revenue document to show that he is in possession and enjoyment of the full extent of the property as described in the plaint schedule. The plaintiff / appellant is not entitled to, the relief of declaration and permanent injunction as prayed for and in this view of the matter, both the substantial question of law stands negatived against the plaintiff and the judgment and decree of the lower

Appellate Court is hereby confirmed, on different reasoning, as stated supra.

20. In the result,

i) this Second Appeal is dismissed without costs.

ii) Judgment and Decree of the Subordinate Court , Ariyalur, in A.S.No.152 of 1992, dated 29.08.1997, reversing the Judgement and Decree of the District Munsif, Ariyalur in O.S.No.149 of 1991, dated 28.09.1992 is hereby confirmed. Consequently, connected Miscellaneous Petition is also closed.

s/d-

Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

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To:

1.The Subordinate Court , Ariyalur

2.The District Munsif, Ariyalur

+1 CC to Mr.M.V. Krishnan, Advocate sr 78568.

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The Section officer

VR Section, High Court, Madras(2 Copies)

S.A.No.1299 of 1998

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SP(15/12/2017)

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