

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 25.01.2017

Pronounced on:06.02.2017

CORAM

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

SECOND APPEAL NO.323 OF 2007

P.K.Selvaraj

..Appellant/plaintiff

/versus/

1.K.Kannan(died)

2.Ceceli

3.K.Unnitham

4.Santhanam

5.Selvam

6.Chinnappan @ Kalavi

7.Baskar

8.Chinnadurai

(RR4 to 8 brought on record as LRs
of the deceased R1 vide order of
Court dated 20.03.2014 made in
M.P.nos.1 to 3 of 2013 in S.A.No.323 of 2007)

..Respondents/defendants

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 19.06.2006 and made in A.S.No.22 of 2005 on the file of the Sub Court, Arni reversing the judgment and decree dated 17.01.2005 and made in O.S.No.339 of 1998 on the file of the District Munsif Court, Polur.

For Appellant :Mr.R.Subramanian for
Mr.T.R.Rajaraman
For Respondents :Mr.P.Sivamani for R4 to R8
R1-died
R2 and R3-No appearance

J U D G M E N T

This Second Appeal filed against the judgment and decree dated 19.06.2006 and made in A.S.No.22 of 2005 on the file of the Sub Court, Arni reversing the judgment and decree dated 17.01.2005 and made in O.S.No.339 of 1998 on the file of the District Munsif Court, Polur.

2. For the sake of convenience, the parties are described as per their rank and status shown in the original suit.

3. The appellant herein is the plaintiff in O.S.339/1988 filed for partition and separte possession. The respondents are his brother's

legal heirs and sisters. The suit filed on the averment that the suit properties are the separate and self-acquired properties of one Kulanthaisamy, who is the father of sparing parties. Kulanthaisamy died in the year 1990 leaving behind two sons and two daughters. The plaintiff and first defendant are his sons. The second and third defendants are his daughters. The properties are in joint possession and the first defendant being the elder member of the joint family is taking care of the properties. The plaintiff have 1/4 share in the properties, however the defendants ignoring his share are trying to alienate the property. Hence, the suit for division and separate possession.

4. The first defendant contented that, already the suit regarding the certain properties left behind by Kulandaisamy is pending before the District Court in A.S.No.53/2000 against O.S.No.269/1991. Therefore, the suit for partition without including all the properties of joint family is bad for partial partition. The suit properties are already settled in favour of his wife Sampoorana ammal and son. They are in possession of the suit properties. Hence, they are necessary parties. The possession is with them, so, the court fees under section 37 (2) is not correct. Kulanthaisamy has settled certain properties, which are the

subject matter of the suit in O.S.No.269/91. Through oral partition and in lieu of their share in the present suit properties, the plaintiff's son and the third defendant Unnitham were given properties under the settlement deeds separately. The plaintiff is vigorously claiming double share from the Kulandaisamy estate one for himself and another for his son. In the oral partition, his father has given the house bearing door No. 25/B, Pope Andavar Street, Chetpet, Polur Taluk towards his share.

5. The trial Court, after considering the evidences placed before it by the respective parties held that the suit properties are the self-acquired properties of Kulandaisamy. He died intestate in respect of his properties. The first defendant has failed to prove oral partition, which he claims to have taken place in the year 1972. He also failed to prove his assertion that the properties settled in favour of the plaintiff's son and the 3rd defendants are in lieu of their respective shares in the suit properties. The possession of one co-owner is the possession of other co-owners. Therefore, no plea of adverse possession could be raised by the defendants. The parties belong to Christianity, so under section 37 of the Indian Succession Act, they all are entitled to get equal share in the properties left intestate by their father Kulandaisamy.

In so far as the plea of court fees and suit valuation, the trial Court held that the plaintiff being a co-share in the property cannot be excluded from possession. Therefore, court fee paid under Section 37(2) is appropriate. Accordingly, allowed the suit and passed preliminary decree for partition.

6. Aggrieved by the trial Court judgment, the first defendant K.Kannan preferred appeal and in the appeal, the lower appellate Court had formulated the following point for determination:-

- 1) Whether the judgment and decree of the trial court is correct ?
- 2) Whether the appellant is entitle for the relief sought ?

7. The First Appellate Court relying upon the kist receipts and tax demands, which stands in the name of the appellant held that, the oral partition of the year 1972 is spoken by D.W-2. The plaintiff in the witness box has admitted that during the life of his father, he told him and his brother to take some share in his property and enjoy. Accordingly, he and the first defendant are separately enjoying 1.33

acres of land independantly. Therefore, reversed the trial Court judgment and dismissed the suit.

8. Aggreived by the reversal of the trial Court judgment, the plaintiff has preferred the second appeal. This Court at the time of admission, has folumated the following Substantial Questions of Law for consideration:

1.Is the learned Appellate Judge right in holding that there was a partition in the year 1972 when the same was not supported by any pleadings in the written submissions?

2.Is the learned Appellate Judge right in looking into the evidence of D.Ws1 and 2 when the same is not supported by the pleadings?

3.Is the learned Appellate Judge right in holding that there was a partition when the properties were enjoyed by the plaintiffs and the defendants to suit convenience and when there is no active evidence to show the factum of partition?

9. The learned counsel appearing for the appellant/plaintiff submitted that, the lower appellate Court has strangely given undue weightage to the kist receipts and house tax receipts and the alleged settlement made by the first defendant in the name of his wife and son. There is no proof for oral partition or exclusive right of the first defendant. The first appellate court completely ignored the fact that the first defendant being the elder member of the family was maintaining the properties left by their father, which has given opportunity to get receipts in his name. The arrangement between the sons for the convenient management and administration of the joint family properties had been mistook by the first appellate Court as if such an arrangement was in pursuant to partition.

10. Per contra, the learned counsel appearing for the respondents 4 to 8 after referring the portions of the judgments of the Court belows pointed out that the plaintiff himself has admitted the separate enjoyment of properties after demise of his father Kulandaisamy and the other circumstances and evidence of the independent witness D.W-2 prove earlier partition and enjoyment,

which debars subsequent partition.

11. The judgement of first appellate Court, which is impugned before this Court bristles with error and infirmities on all front. First on procedure, the judgement of the first appellate Court suffers grave error of non-compliance of Order 41, Rule 31 of the Civil Procedure Code. The learned first appellate Court's Judge has failed to frame the specific and correct point for determination before re-appropriating the facts and law. However, he had reversed the finding of the trial Court without proper discussion. On factual ground, he has failed to note that Kulandaisamy lived upto 1990. He settled some of the properties to the plaintiff's son on 15.03.1990. If the oral partition of the year 1972 is really true, then Kuladaisamy would have referred about the said oral partition in his settlement deed executed subsequently . At least the first defendant, who claims oral partition, would have in his own document namely, the settlement deed in favour of his wife, must have mentioned about the oral partition as his source of title. On appreciation of evidence also, the lower appellate Court has erred by heavily relying upon the ocular evidence of DW-2 for the proof of oral partition alleged to have taken place in the year 1972. In this aspect, it is seen that,

when the suit properties are six in number, the witness could able to say only about three items of suit properties and that too only indicates a separation for convenience, but, not a proper division of properties effecting true and valid partition.

12. For the above said reason, **the second appeal is allowed.** In the result, the judgment and decree of the first appellate Court rendered in A.S.No.22/2005 is set aside and the judgment and decree of the trial Court in O.S.No.339/1998 is restored. No order as to costs.

06.02.2017

Index:Yes/No
Internet:Yes/No
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To

The Subordinate Judge, Arni.

The District Munsif, Polur.

Dr.G.Jayachandran, J.

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Judgment made in
S.A.No.323 of 2007

06.02.2017

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