

Judgment Reserved on: 21.03.2017

Judgment Pronounced on : 04.04.1017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Coram:

The Hon'ble Mr.Justice N.SATHISHKUMAR

Appeal Suit No. 15 of 2012

T.B.Narasimhan .. Appellant

Versus

T.B.Jayaraman .. Respondent

Appeal Suit filed under Section 96 of Civil Procedure Code, against the Judgment and decree dated 25.04.2011 passed in O.S.No.3 of 2008 by the learned Principal District Judge, Krishnagiri.

For Appellant .. Ms.R.Sripriya for
Mr.V.Raghavachari
For Respondent .. Mr.J.Harihan for
Mr.V.Nicholas.

JUDGMENT

Aggrieved over the granting of preliminary decree in respect of item Nos. 1 to 8 the present appeal came to be filed by the defendant. The parties are arrayed as per their own ranking before the trial Court for the sake of convenience.

2. Brief facts are as follows:- The plaintiff and defendant are brothers and sons of Bairappa Gounder. The suit properties were originally owned by Muniappa Gounder, maternal grandfather of the plaintiff and defendant. The said Muniappa Gounder gifted the suit properties to the plaintiff and defendant and handed over the possession of the same. Ever since the date of gift, they have been in possession and enjoyment of the same. Joint patta was also issued in favour of the defendant in patta No.1128 in respect of the properties comprised in S.Nos. 1263, 1264, 1265 and 1284. But with some ulterior motive, behind the back of plaintiff, the defendant has obtained separate patta in patta No.522 in respect of properties in S.No.1486, 1488/1, 1488/2 and 1488/3 of Puligunda Village and also in patta No.581 for the properties in S.No.327 of Mahagevagoollahalli Village. The plaintiff came to know about the said pattas only 6 months prior to the filing of the suit. Similarly, joint patta was issued in respect of the properties in S.No.493/2E, 499/2 and 615/2 of Chinnamattrapalli Village. But the defendant has obtained separate patta for the property in S.No.574/6 of Chinnamattarapalli Village in patta No.352, behind the back of plaintiff, despite the fact that the properties are in joint possession and enjoyment of both of them. There was no partition effected between them till the date of filing of

the suit. Availing loan from the Krishnagiri Cooperative Housing Society in the year 1994, a new house was built in Thogarapalli Village for the plaintiff. The defendant by managing the land in S.No.1264, to an extent of 1.47.5 Hectare, asked the plaintiff to reside in the house comprised in the gift settlement deed and the defendant is residing in the said new house. Since there was no partition between the parties, the present suit is filed.

3. Admitting the relationship between the parties, it is the contention of the defendant that items 6 to 8 of the suit schedule properties do not belong to the family of the plaintiff and defendant, whereas the property belonged to one Koothappa Gounder and his children. Item No.10 of the suit property was absolute property of the defendant. It is the contention of the defendant that in the year 1981 there was a oral partition between the plaintiff and the defendant in and by which an extent of 1.86.0 Hectares of land in S.No.1263 situate in Pulikunda, 1.86.5 Hectares of land in S.No.327 situate in Mahadeva kollahapalli, 0.01.5 Hectares of land in S.No.493/E, 0.96.0 Hectares of land in S.No.499/2, 1.76.0 Hectares of land in S.No.615/2, 0.16.5 Hectares of land in S.No.574/6 situate at Chinnamattarapalli total extent of 6.62.5 Hectares of lands together with the ancestral house

situated at Thogarapalli, were allotted to the share of plaintiff. Likewise, the lands measuring to an extent of 1.47.5 Hectares in S.No.1264; 2.60.5 Hectares in S.No.1265; 0.59.5 Hectares in S.No.1284; 2.15.5 Hectares in S.No.1486, situate at Pulikunda, totalling 16.87 Acres of lands were allotted to the share of defendant which are shown as items 2, 3, 4 and 5 in the suit schedule. The 10th item in schedule 1 was purchased by the defendant out of his own income. Since the defendant was not given any house property, he has availed loan from the Krishnagiri Cooperative Housing Society and built house. At the time of availing loan the plaintiff has given a statement admitting the oral partition between the parties. In pursuant to the oral partition the plaintiff and defendant are enjoying the suit properties separately. When the matter stood thus, in the year 1994 there was a dispute between the plaintiff and his sons with regard to the sharing of the properties allotted to the plaintiff. The defendant being the elder member of the family compromised the above and it was decided that the plaintiff was entitled to use the income fetching from the coconut trees yieldings. Since the defendant has supported the sons of the plaintiff, the plaintiff has filed the present suit. Hence, prayed for dismissal of the suit.

4. On the basis of the pleadings the following issues are framed by the learned Principal District Judge, Krishnagiri:

1. Whether all the suit properties are belongs to Muniappa Gowdu son of Byappa Gowdu?
 2. Whether the properties items 6,7,8 of the suit are not belongs to the family of the plaintiff?
 3. Whether the partition in the year 1981 and the family arrangement in the year 1994 between the parties are true?
 4. Whether the plaintiff is entitled to the relief of partition as prayed for?
5. To what relief the parties are entitled?

5. On the side of the plaintiff, plaintiff examined himself as P.W.1 and marked Exhibits A1 to A7. On the side of the defendant, the defendant examined himself as D.W.1 and D.W.2 to D.W.10 were also examined and Exhibits B1 to B12 were marked.

6. On the basis of the oral and documentary evidence and materials, the learned trial Judge has granted preliminary decree in respect of items 1 to 8 of Suit Schedule-I and entire properties in Suit Schedule II and III, however dismissed the suit for partition in respect

of items 9 and 10 in Suit Schedule-I. Aggrieved over the same, the defendant has preferred this appeal challenging the preliminary decree granted by the trial Court.

7. Learned counsel appearing for the appellant submitted that except items 6 to 8 and 9 and 10, other suit properties originally belonged to the maternal grandfather of the plaintiff and defendant. The maternal grandfather had gifted the properties to both of them. Two brothers have partitioned the properties in the year 1981 and were enjoying the properties separately. Oral partition was effected in the presence of well wishers of the family. Ever since the date of the oral partition, both the brothers are enjoying the properties separately and also availed loan separately by mortgaging the properties. Exhibits filed on the side of the defendant would clinchingly establish the factum of oral partition. In fact the plaintiff himself has given in writing about the oral partition before the Cooperative Housing Society while the defendant availing loan. Further, the conduct of the parties in enjoying the properties separately and using the income and constructing separate houses and obtaining electricity connection separately, would clearly establish the oral partition. The evidence of P.W.1 itself clearly prove that the parties have divided the properties

orally in the year 1981. Hence, submitted that from the evidence and conduct of the parties the oral partition pleaded by the defendant has been clearly established. Hence, submitted that the judgment and decree of the trial Court disbelieving the oral partition cannot be sustained on appreciation of evidence and hence prayed for allowing the appeal.

8. Countering the arguments of the learned counsel for the appellant, the learned counsel for the respondent submitted that though the defendant claims to have obtained patta in respect of certain properties, the alleged oral partition pleaded by him cannot be true at all for the simple reason that the properties allegedly allotted to the defendant is still stand in the name of the plaintiff. It is further contention of the respondent that items 6 to 8 did not belong to family and they belonged to some third parties also not established. Whereas the above properties also gifted in favour of the plaintiff and defendant. It is further contention of the learned counsel that merely enjoying certain extent of lands individually for the convenience sake division in status cannot be inferred. The defendant being the elder member of the family having set up a plea of oral partition has failed to prove the same in convincing evidence. The properties have not

been subdivided and mutation also not been done in respect of individual names. All these facts clearly establish the fact that oral partition alleged by the defendant is not established. Hence, submitted that the judgment and decree of the trial Court is well balanced and does not require any interference.

9. In the light of the above submissions, now the points that arise for consideration are:-

1. Whether there was a oral partition between the plaintiff and defendant in the year 1981 in respect of the suit properties?
2. To what relief?

10. The points:- The relationship between the parties is not disputed. The suit properties except item 10 were originally subject matter of the gift settlement deed dated 22.6.1952 executed by one Muniappa Gounder-maternal grandfather, in favour of the plaintiff and the defendant is also not in dispute. It is also undisputed by both sides that the defendant was working as the Village Administrative Officer and retired from service and he has purchased item No.10 under Ex.B1 dated 14.7.1965. Though it is the contention of the defendant that item Nos. 6, 7 and 8 does not belong to the family and the same has been belonged to one Kuthappa Gounder, the above fact

has not been established by filing any document. Whereas the above item Nos. 6,7 and 8 were also subject matter of the gift settlement deed Ex.A1. In the above factor, now it has to be seen whether there was any oral partition between the parties dividing the suit properties in the year 1981 as specifically pleaded by the defendant.

11. Before dwelling upon the issue, Ex.A1 when carefully read gift deed dated 20.6.1952 executed by the maternal grandfather of the plaintiff and defendant, gifting the properties jointly to the plaintiff and defendant, would indicate that the plaintiff and defendant were not minor and they were major at the relevant time. However, the suit for partition was filed only in the year 2008, i.e. 56 years later. It is the specific case of the defendant that there was a oral partition between the two brothers in the year 1981 in the presence of well wishers in which 16.37 Acres of land and one ancestral house was allotted to the plaintiff and the defendant was allotted 16.87 Acres of land and no house was allotted to him.

12. It is well settled that the initial onus is always on the party who asserts that there was a oral partition. It is also well settled that oral partition is not alien to Hindu Undivided Family. The oral partition

is all along recognized in a Hindu Undivided Family system from time immemorial. But the onus on the party who pleads such oral partition to prove the same before the Court of law by a convincing evidence. For proving such oral partition the conduct of the parties also assume significance. Similarly, the pleadings and evidence of the party who asserts oral partition and the party who denies such oral partition also relevant to determine the issue. As stated above it is the specific case of the defendant that each parties were allotted more than 16 acres of land individually and they have been enjoying the properties separately from the year 1981 onwards. It is further case of the defendant that in the year 1994 there was some dispute between the plaintiff and his sons and the defendant involved in such dispute, as a result the present suit came to be filed. Whereas it is the case of the plaintiff that ever since the date of gift settlement, the suit properties were enjoyed jointly by both of them and further the plaintiff has also pleaded in para 6 of the plaint that they have also built a house in one of the survey Numbers by availing loan besides the income from the joint family properties.

13. In this regard the evidence of both the parties when carefully analyzed, P.W.1 in his chief examination stated that the property was

in joint possession of both of them and behind his back the defendant has obtained patta. Therefore, he has filed the present suit. P.W.1 in the chief examination itself admitted that he has built a separate house by availing loan from the Housing Society. In the cross-examination he has admitted that his two children were not doing any agricultural activities, he does not know what they are doing. The ignorance shown by P.W.1 about the avocation of his own sons though not relevant to decide the issue on the hand, test his veracity, the above answer in the cross-examination of P.W.1 assume some significance. The specific question was put to P.W.1 as to whether his sons have obtained separate electricity service connection for the motor pump set in their respective shares, P.W.1 has admitted that they have separate electricity service connection. Similarly, he has also admitted that defendant has also obtained separate electricity service connection for the motor pump set in his share. In the cross-examination, he has totally disowned his statement regarding the loan availed by him. But in fact it has been falsified by the documentary evidence. Whereas his specific admission in the cross-examination clearly show that he and the defendant were residing separately in separate house for more than 30 years and income from their respective fields have been utilized by them. He has also specifically admitted that he has been

enjoying the income from the portion enjoyed by him. Similarly, the defendant is also enjoying the income from the portion enjoyed by him. He has also admitted that both of them have separate electrical service connection for their respective pump sets. Page No.3 of his cross-examination he has also denied the purchase made by the defendant in respect of the house property. At the same time, he has also shown ignorance about the property purchased by the defendant out of his income. Similarly, he has also shown ignorance with regard to the letter given by him to the Cooperative Housing Society while the defendant availing the loan. The conduct of the plaintiff would clearly show that he has simply shown his ignorance about any such admission made by him about the oral partition.

14. Whereas it is the specific assertion of the defendant that at the time of availing loan the plaintiff himself admitted in writing about the oral partition. The evidence of P.W.1 when carefully read in its entirety he has shown ignorance not only about avocation of his children but also about the other document executed by him in the Cooperative Housing Society. But the fact remains that he has categorically admitted that he and his brother enjoying the properties separately and income derived from the properties were utilized by

them separately.

15. D.W.1 in his chief examination stated that there was a oral partition between the brothers in the year 1981 in the presence of well wishers in which 16.37 Acres of land and one ancestral house was allotted to the plaintiff and since no house was allotted to the defendant, he was allotted 16.87 Acres of land. Even since the date of such oral partition they were enjoying the properties separately and he has also obtained loan from the Cooperative Housing Society. The plaintiff also given undertaking in writing admitting the oral partition and also stating that the cause of action for filing the suit itself is there was dispute between the plaintiff and his sons and it was compromised by the defendant. When D.W.1 was cross-examined a specific suggestion was put to him to the effect that since the properties allotted to him would fetch more value than the properties allotted to the plaintiff, whether he is ready to exchange the properties allotted between himself and his brother. The very nature of the suggestion with regard to the escalation of value of the properties allotted to the defendant and also the proposal suggested for exchange of the properties allotted to each other, coupled with the evidence of P.W.1 that they were living separately and enjoying the properties allotted to them, in fact probalilize the oral partition. In fact it is further

probabilized from the delay in filing the suit. If really there was no partition from the very beginning, no prudent man would wait for more than 50 years for division of the properties gifted to them by their maternal grandfather in the year 1952. Furthermore, the plaintiff himself admitted that each of them have obtained separate electricity service connection in respect of their pump sets. All these facts clearly probabilize the oral partition.

16. D.W.2 in his evidence has stated that he used to purchase the coconut from each of the parties. D.W.3 was working as Secretary in Krishnagiri Primary Agricultural Co-operative Bank at Krishnagiri. His evidence also clearly show that on 29.12.1994 the defendant has obtained loan by mortgaging the property. He has also stated that the plaintiff has also obtained loan separately and he has discharged the loan in the year 2006 and got back all the documents. D.W.4 was also working as Secretary in the Krishnagiri Co-operative Housing Society at Krishnagiri. His evidence also shows that the defendant has availed loan from the society. Since the properties were jointly in the name of the plaintiff and the defendant at the relevant time, they sanctioned the loan on the basis of the statement given by the plaintiff that he has no objection and no right in the properties proposed to be mortgaged.

It is further evidence of D.W.4 that the plaintiff has given no objection at the time of availing loan by the defendant. D.W.5 and D.W.6 in their evidence has stated that both parties were enjoying the properties having in a partition. In the cross-examination in fact they admitted that there was some dispute between the parties. Therefore, their evidence cannot be given much importance to assess the oral partition.

17. D.W.7 is a cousin of the plaintiff and defendant. In his evidence, he has stated that after retirement of the defendant in the year 1980 in the presence of D.W.7 and other people the suit properties were divided into two portions and allotted one such portions to the plaintiff and the defendant equally. The cross-examination of D.W.7 shows that only 2 to 3 years back from the filing of the suit there was dispute arose between the plaintiff and the defendant. D.W.8 was working as Secretary of the Thokarapalli Primary Agricultural Cooperative Bank. His evidence also proves the fact that the plaintiff and defendant both of them availed agricultural loan separately. D.W.9 was working as District Collection Staff in the Tamil Nadu Housing Society at Chennai. His evidence also shows that the documents executed by the plaintiff and defendant were kept in

the custody of the Head Office. D.W.10 was working as Accountant in the Krishnagiri Taluk Cooperative Society. His evidence shows that in the year 1994-95 the defendant has availed loan mortgaging 3.60 Acres of land. Since it was shown as joint patta, the plaintiff gave no objection letter. In fact the letter was written by D.W.10 and signed by the plaintiff. His evidence clearly show that the plaintiff in fact given a no objection letter at the relevant time.

18. In the above background of oral evidence, the documentary evidence adduced by both the parties when carefully analysed, Ex.A2 is the joint patta in respect of item Nos. 1 to 4 of the suit properties. The patta stands in the name of the plaintiff and defendant. Similarly, under Ex.A3 is the patta in respect of items Nos. 5 to 8 of the suit properties, standing in the name of the defendant in patta No.522. Ex.A4 is the patta given to the defendant in patta No.581 in respect of Survey No.327. Ex.A5 is the joint patta standing in the name of the plaintiff and defendant in patta No.776. Ex.A6 is the patta in patta No.352 standing in the name of the defendant. It is pertinent to note that from issuing patta in the name of the individual will not either confer any title or extinguish any right of the parties. The patta and revenue records cannot be the document of title. Inclusion of name in

the patta and obtaining separate patta and subdividing the properties is always depending upon the interest of the individual. Therefore, merely because the patta stands in the name of the plaintiff and the defendant itself cannot be a ground to infer that there was no oral partition between them. But the fact remains that both parties have not taken any steps to make subdivision of the properties.

19. It is the specific evidence of D.W.1 that 16.37 Acres of land and ancestral house were allotted to the plaintiff in a oral partition the same was not specifically denied in the cross-examination. The factum of non-denial of the specific facts spoken in the evidence of D.W.1 coupled with the admission of P.W.1 himself that they were living separately in a separate house and they were enjoying their respective portions allotted to them by obtaining separate electricity service connections for the motor pump sets and utilizing the income from the properties and availing of the loan separately, would clearly probabalize the case of the defendant. Therefore, this Court is of the view that the revenue records alone is not a determinative factor to decide the oral partition. These probabilities further strengthened by the evidence of the employees of Krishnagiri Primary Agricultural Co-operative Bank and the employees of Krishnagiri Cooperative Housing Society who

were examined as D.W's 3, 4, 8 and 10. Ex.B5 loan ledger shows that the defendant has availed loan separately. Ex.B6 is the copy of registered mortgage deed, also establish the fact that the parties were enjoying the properties separately and mortgaged the properties separately. Ex.B7 is also the document relating to the loan. Ex.B8 is the legal opinion obtained at the relevant time, also shows that though patta stands in the name of the plaintiff and his brother, since there was a oral partition between the plaintiff and his brother, which is also admitted by the plaintiff and opinion was given. Similarly, in the year 2001-2002 also the defendant has availed loan by mortgaging the property which could be seen from Ex.B9 and B10.

20. Ex.B12 is the original documents produced by the defendant for the purpose of getting loan, in fact the same was in the custody of the Head Office at Chennai, which was produced during the trial and attested copies alone marked as Exhibit B12 and original documents retained by bynk. When reading the entire documents it is seen that in fact the properties have been mortgaged and separate FMB sketches were also prepared and legal opinion also obtained. Besides that the plaintiff has also admitted in writing stating that there was oral partition between himself and his brother 10 years back and he signed

the same and an attested copy of the letter also available in Ex.B12. In fact, P.W.1 in the cross-examination has not denied the suggestions in entirety, he has shown his ignorance about the letter given by him to the Cooperative Housing Society while the defendant availing the loan. The evidence of P.W.1 showing ignorance to letter given by him to Co-operative Bank, coupled with evidence of D.W.10 whose presence plaintiff admitted oral partition in writing and signed the same prove the oral partition. Therefore, plaintiff is now estopped from contending that there was no partition. When Ex.B12 in its entirety seen in fact the properties in particular Survey Numbers have been mortgaged, for which separate FMB sketches were also prepared.

21. Having admitted in writing about the oral partition at the time of his brother availing loan, now the plaintiff cannot take contrary stand then his own admission in writing made in the year 1994 and 1995. The admission made by the plaintiff in writing is the best piece of evidence as against him, of course it is not a conclusive proof. However, a particular piece of evidence when taken into consideration with regard to the admission made in the cross-examination about the separate possession of properties for more than 30 years and utilizing the income from the properties and also availing separate loans by

each of the parties coupled with his conduct in showing ignorance even about the avocation of his children, in fact clearly probabalize the oral partition pleaded by the defendant. All the probabilities in fact established the factum of oral partition. It is further strengthened by the delay in filing the suit also.

22. From the above discussion and overall analysis of the evidence, this Court finds that there was oral partition in the year 1981. Merely because some of the defendant's witnesses resiled from their chief examination in the cross-examination, that itself is not sufficient to disbelieve the oral partition. Whereas suggestion put to D.W.1 during the cross-examination and the documentary evidence clearly probabalize the oral partition. Therefore, this Court hold that the defendant is in fact discharged his burden in proving the oral partition. Accordingly, the points are answered against the plaintiff.

23. In the result, the appeal is allowed and the preliminary decree granted by the learned trial Court is set aside. Consequently, the suit stands dismissed. No costs.

04.04.2017

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N.SATHISHKUMAR, J

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**PRE DELIVERY JUDGMENT
IN A.S.No.15 of 2012**

04.04.2017

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