

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.03.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

S.A.No.184 of 2015
and M.P.No.1 of 2015

Chithra .. Appellant/Appellant/
Plaintiff

1.Saroja
2.Ravi .. Respondents/Respondents/
Defendants

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 28.10.2014 made in A.S.No.2 of 2013 on the file of the Principal District Judge at Dharmapuri, reversing the judgment and decree dated 18.07.2012 made in O.S.No.5 of 2009 on the file of the Subordinate Judge at Dharmapuri.

For Appellant : Mr.P.Valliappan

For Respondent : No appearance

J U D G M E N T

The plaintiff in O.S.No.5 of 2009 on the file of the Court of Subordinate Judge, Dharmapuri, which was filed for partition, separate possession, permanent injunction and other consequential reliefs, had succeeded before the Trial Court and in the appeal preferred by the defendants 1 and 3 in A.S.No.2 of 2013 on the file of the Principal District Judge, Dharmapuri, she lost it and hence, filed this Second Appeal, challenging the impugned judgment and decree dated 28.10.2014 made in A.S.No.2 of 2013 passed by the Lower Appellate Court.

2. Facts leading to the filing of this Second Appeal, briefly narrated, are as follow:

2.1. The plaintiff would aver that the Suit schedule Item Nos.1 and 2 properties belong to the plaintiff and the defendants. The plaintiff, defendants 2 and 3 and the deceased Meenakshi are the daughters and sons of one Manickam. The first defendant, namely Saroja is the wife of Manickam and one of the sisters of the plaintiff, namely Meenakshi died on 04.06.1980, leaving behind the defendants 4 to 6 as her legal heirs. The plaintiff would further aver that her father died

on 19.08.2002 and since the Suit Schedule Properties are joint family properties and that no partition took place among them and that the properties originally belong to grandfather of the plaintiff, namely Maadhusamy, she is entitled to claim partition.

2.2. It is also averred by the plaintiff that Manickam, father of the plaintiff and his brother had partitioned the property and the Suit Schedule mentioned property were allotted to the share of her father and though requests were made by the plaintiff to the defendants for partition and to give separate possession of the same, the defendants 2 and 3 were adopting dilatory tactics. It is also the case of the plaintiff that by virtue of the Hindu Succession Act, Central Amendment 2005, she is entitled to make the claim for partition and would further aver that the defendants 2 and 3 are taking steps to alienate the property and therefore, prayed for partition of the Suit Schedule mentioned property into 75 equal shares and allot 1/8th share to her and also for permanent injunction restraining the defendants 1 to 3 from alienating or encumbering the Suit Schedule property.

2.3. The second defendant remained absent and set exparte by the trial Court. The defendants 1 and 3 had filed a written statement reputing the averments made in the plaint and admitted that the properties are ancestral in nature and however, contended that the plaintiff and her sister, namely Meenakshi (since deceased) were given marriage about 35 years back with Sridhana and other articles and would further contend that the defendants 2 and 3, immediately after the demise of their father Manickam, had orally partitioned the properties about 25 years back and revenue records also stand in their name and also took a stand that there is no cause of action to prosecute the Suit and prayed for dismissal of the Suit.

2.4. The Trial Court, on consideration of the pleadings, framed the following issues:

1. Whether the oral partition between D2 and D3 some 25 years back with regard to the suit properties as alleged in the statement is true and valid ?
2. Whether the plaintiff is entitled to 18/25th share in the suit properties as alleged in the plaint ?
3. Whether the plaintiff is entitled to preliminary decree for partition as prayed for ?
4. Whether the plaintiff is entitled for permanent injunction as prayed for?
5. To what relief ?

During the course of trial, the plaintiff examined herself as PW1 and examined two other witnesses and marked Exs.A1 to A9.

The first defendant examined herself as DW1 and the third defendant examined himself as DW2 and one of the Panchayatdhar of the oral partition was examined as DW3 and Exs.B1 to B10 were marked.

2.5. The Trial Court, on consideration of the pleadings and on appreciation of oral and documentary evidence, had found that ancestral nature of the property is not in serious dispute and insofar as the testimony of DW3 is concerned, his presence in the Panchayat held for the purpose of effecting oral partition has not been stated in the reply to the legal notice under Ex.A8 and such a stand was also not taken in the written statement filed by the defendants 1 and 3 and as such, he would not have witnessed the oral partition. The Trial Court further found that DW2, namely Ravi, during the course of cross examination had stated that after the demise of his father in the year 2002, the properties were enjoyed by them in common. The Trial Court further recorded the finding that actual extent of properties allotted to them have not been specifically stated and though the defendants made a claim as to the proof of oral partition by marking pattas issued in their favour, it was found that patta marked as Ex.B2 has nothing to do with the suit schedule mentioned property and insofar as Ex.B3/patta is concerned, it also has nothing with the suit schedule mentioned property. The Trial Court further found that in respect of patta marked as Ex.B4, it pertains to Item No.1 of the suit schedule property and it was issued jointly in the name of the grandfather of the plaintiff, namely Maadhusamy, Thimmappan and Manickam and if there was a oral partition, then there would not have been a joint patta and it also came into being after the filing of the suit. The Trial Court has also taken into consideration Exs.B5 to B7-Pattas which stand in the name of the defendants 1 to 3 respectively and found that different extent of property has been incorporated in those documents. Insofar as Item No.2 of the plaintiff schedule property is concerned, except marking the revenue records, no other proof has been filed and the Trial Court, taking into consideration the judgment rendered by a Single Judge of this Court in Ramulu Ammal v. Ramachandra Reddy and Others [2009-3-L.W.622], found that on the basis of the revenue records, it cannot be held that a partition took place and therefore, decreed the Suit and granted a preliminary decree as well as the decree for permanent injunction, vide judgment and decree dated 18.07.2012.

2.6. The defendants 1 and 3, aggrieved by the preliminary decree as well as the decree for permanent injunction, filed an Appeal Suit in A.S.No.2 of 2013 on the file of the Principal District Court, Dharmapuri. The Lower Appellate Court, on going through the memorandum of grounds of appeal and materials placed before it, framed the following points for consideration?

1. Whether the partition took place in the family of Manickam 25 years back, as pleaded by the appellants, is sustainable ?
2. Whether the Preliminary Decree for partition granted by the Trial Court is sustainable or not ?
3. Whether the Appeal Suit is to be allowed?

2.7. The Lower Appellate Court, on going through the oral and documentary evidence, found that the testimonies of PWs.2 and 3 would disclose that they were not at all aware of the extent of the property and where those properties are situated and on legal plea, found that the person who plead partition has to sustain his case and also considering the testimonies of DWs.1 and 2, found that they have been issued with separate pattas and the said documents evidence the oral partition and separate possession. The Lower Appellate Court further found that in respect of share of property allotted to the mother of the plaintiff, namely DW1, the plaintiff cannot claim partition during her lifetime and she did not make any such claim and reversed the judgment and decree passed by the Trial Court, vide impugned judgment and decree dated 28.10.2014 and thereby dismissed the Suit.

3. The plaintiff, challenging the legality of the impugned judgment passed by the Lower Appellate Court, has filed this Second Appeal. The Second Appeal was admitted on 23.03.2015 and the following substantial questions of law are framed for adjudication:

1. Whether the Lower Appellate Court is correct in law in non-suiting the appellant on the ground that there was an oral partition twenty five years prior to the suit, without there being any evidence in that regard?
2. Whether the Lower Appellate Court is correct in law in not applying the benefit conferred under the Hindu Succession Amendment Act, 2005, to the facts of the present case?
3. Whether the Lower Appellate Court is correct in law in holding that mere entry in revenue record (Patta) will establish the factum of prior partition, contrary to the view expressed by this Court in 2009 (3) Law Weekly 622 that serious partition suits cannot be decided on the basis of mere revenue records?
4. Whether the Lower Appellate Court is correct in law in not granting any share to the appellant even in respect of her father Manickam's share?

5. Whether it is open to the respondents to challenge the decree passed by the Trial Court, especially when defendants 2 & 4 to 6 have not filed any appeal and accepted the said decree?

4. Mr.P.Valiappan, learned counsel appearing for the appellant/plaintiff has drawn the attention of this Court to the judgment rendered by the Trial Court as well as the Lower Appellate Court and would contend that it is an admitted fact that the properties are ancestral in nature and since the defendants 1 and 3 plead oral partition about 25 years back, burden lies heavily on them to prove and sustain the same and except filing revenue records, they did not adduce any tenable and credible evidence to sustain their case. It is further contended by the learned counsel appearing for the appellant/plaintiff that one witness, namely DW3 was examined to prove the oral partition and his participation as one of the panchayatdhars in the oral partition has not been stated in Ex.A5/legal notice issued and the said fact was also not pleaded in the written statement and therefore, the Trial Court has rightly rejected the testimony of DW3. Insofar as the revenue records are concerned, it is the submission of the learned counsel appearing for the appellant/plaintiff that Ex.B4/Patta pertains to some other property and insofar as Exs.B5 to B7 are concerned, different extent has been allotted to and in respect of Exs.B8 to B10 are concerned, it is only a land kist receipts and by applying the ratio laid down in the decision in Ramulu Ammal v. Ramachandra Reddy and Others [2009-3-L.W.622], based on mere revenue records, partition suit cannot be decided in favour of a person on the sole ground.

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5. The learned counsel appearing for the appellant/plaintiff has invited the attention of this Court to the findings rendered by the Lower Appellate Court and would submit that the Lower Appellate Court without properly appreciating the findings rendered by the Trial Court and merely went by the revenue records and held that there was a oral partition about 25 years back. The learned counsel appearing for the appellant/plaintiff has also drawn the attention of this Court to para 17 of the Lower Appellate Court judgment and would submit that it is not even the case of the defendants that Ex.B1 was the allotted share in the oral partition and the plaintiff did not make any claim in respect of the share given to her mother and without properly appreciating the pleadings, the Lower Appellate Court had erroneously came to a conclusion and reversed the well considered judgment rendered by the Trial Court and prays for

allowing of this appeal. The learned counsel appearing for the appellant/plaintiff finally submitted that it would be suffice for this Court to deal with the substantial questions of law Nos.1 and 3 alone.

6. The Second Appeal was listed for hearing and final disposal on 07.10.2016, 08.11.2016 and 14.11.2016 and on none of the occasions, the learned counsel for the respondents chose to be present and so also today. Therefore, this Court is constrained to dispose of the Second Appeal on merits.

Substantial Questions of Law No.1

7. Since the defendants pleaded oral partition 25 years back prior to the institution of the Suit, burden lies heavily on them to prove and substantiate the same and they have examined DW3/Panchayatdhar, who was said to be present at the time of effecting oral partition. A perusal of the written statement filed by the defendants 1 and 3 as well as the reply notice/Ex.A8, in response to the legal notice/Ex.A5, the said plea has not been taken note at all. DW3 also did not disclose the names of other panchayatdhars and so also DWs.1 and 2. Therefore, the Trial Court has rightly concluded that the testimony of DW3 cannot be believed. Except the interested testimonies, namely DWs.1 and 2, no other evidence has been made available before the Trial Court as to the sustainment of the claim made by the defendants 1 and 3 with regard to oral partition which took place about 25 years back.

8. In the considered opinion of the Court, the findings rendered by the Lower Appellate Court on that aspect is not correct in law and therefore, the substantial question of law No.1 is answered in affirmative in favour of the appellant/plaintiff.

Substantial Questions of Law No.3

9. It is the case of the defendants 1 and 3 that after oral partition took place about 25 years back, pattas have been issued in their favour, marked as Exs.B5 to B7 and the receipts were marked as Exs.B8 to B10. Insofar as Item No.1 of the suit schedule property is concerned, admittedly pattas stood in the name of grand father of the plaintiff and as well as Ex.B2/Joint Patta standing in the name of Maadhusamy Chetty and Manickam, father of the plaintiff and so also, Ex.B4/patta standing in the name of Maadhusamy Chetty, Thimmappan and Manickam. As regards, Item No.2 of the suit schedule property is concerned, the contesting defendants placed heavy reliance upon Exs.B7 to B10. DW1 - Saroja as well as DW2 - Ravi in their testimonies though reiterated their stand that by virtue of the oral partition took place about 25 years back, they have been given separate items of the properties, did not

specifically state about the survey number and extent of land allotted to them. The Trial Court has also recorded the fact that under Ex.A9/Sale Deed dated 27.01.2000, the father of the plaintiff, namely Manickam and the defendants 2 and 3 had conveyed certain items of properties, purported to be a joint family properties, which shows that oral partition pleaded cannot be sustained.

10. In Ramulu Ammal v. Ramachandra Reddy and Others [2009-3-L.W. 622], the plea with regard to oral partition by marking of revenue records to sustain the same came up for consideration and it is relevant to extract the following paragraphs of the said judgment:

"23. The onus of proof as well as the onus probandi is on the defendant to prove that there was oral partition before the panchayat. But it is clear that absolutely there is no evidence much less reliable evidence to uphold the alleged oral partition. No panchayat was examined on the side of the defendant to prove such panchayat was held and the oral partition took place. In a village, if really a partition had taken place in the presence of panchayats, certainly some evidence in that regard must be available and the same should have been adduced before the court. But, that was not done so.

24. The learned counsel for the plaintiffs appositely and appropriately would invite the attention of this Court to the indubitable fact that DW2 who was examined on the side of the defendant to prove oral partition admittedly was a small boy, aged about 5 years at the time of panchayat and he also during cross examination candidly admitted that since the deceased D1 told him about the oral partition, he came to know about it.

25. It is obvious and axiomatic, apparent and explicit that such sort of hearsay evidence in this sort of serious matters is totally not permissible legally. DW1, the widow of deceased D1 only relied on the evidence of DW2 to prove the alleged oral partition. Hence, the contention of the plaintiffs that there was no oral partition, is well founded."

In para 29 of the said judgment, the learned Single Judge of this Court has placed reliance upon the decisions in Girija Nandini Devi and Others v. Bijendra Narain Choudary [AIR 1967 SC 1124], Sawarni v. Inder Kaur and Others [1996 (6) SCC 223],

Kammavar Sangam through its Secretary R.Krishnasamy v. Mani Janagarajan [1999 (III) CTC 304 = 1999-3-L.W.727], Guruvammal and another v. Subbiah Naicker and Others [1999 (III) CTC 650 = 2000-1-L.W.488] and Gopaliappa v. Madanagiriappa and 3 others [(2008) 4 MLJ 781] and held that based on mere revenue records, serious partition suits relating to respective rights of parties of Hindu families, cannot be decided in favour of a person on the sole ground that patta stands in the name of such person. In the considered opinion of the Court, the ratio laid down in the said decision squarely applies to the facts of this case and except marking revenue records, namely Exs.B1 to B10, no other tenable evidence has been produced to sustain the case of the defendants.

11. The Trial Court, on a proper consideration and appreciation of oral and documentary evidence, has rightly reached the conclusion to grant a preliminary decree and also a decree for permanent injunction. In the considered opinion of the Court, the Lower Appellate Court, without properly appreciating the materials placed before it as well as the settled legal position, had erroneously reversed the well considered judgment passed by the Trial Court. Therefore, Substantial Question No.3 is also answered in affirmative in favour of the appellant/plaintiff.

12. In the result, this Second Appeal is allowed and the impugned judgment and decree dated 28.10.2014 made in A.S.No.2 of 2013 on the file of the Principal District Court, Dharmapuri is set aside and the Suit in O.S.No.5 of 2009 on the file of the Court of Subordinate Judge, Dharmapuri is decreed as prayed for. No costs.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

jvm

To

1. The Principal District Court, Dharmapuri.

2. The Sub-Court, Dhamapuri.

+1cc to M/s.P.Valliappu, Advocate sr.17904

S.A.No.184 of 2015

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