

In the High Court of Judicature at Madras

Reserved on : 20.12.2016

Pronounced on : 03.01.2017

Coram:

The Honourable Mr.Justice T.RAVINDRAN

Second Appeal No.501 of 2011

and

M.P.No.1 of 2011

1. Puthira Kounder
2. Elumalai

...Appellants 1 & 2/
Respondents 1 & 2/
Defendants 1 & 2

Versus

Krishnamoorthi Kounder

...Respondent/Appellant/
Plaintiff

Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 21.07.2009 made in A.S.No.37 of 2008 on the file of the Principal Subordinate Judge, Villupuram, reversing the judgment and decree dated 07.12.2007 made in O.S.No.778 of 2004 on the file of the Additional District Munsif, Villupuram.

For Appellants .. Mr.J.Lakshminarayanan
For Respondent .. Mrs.P.Kavitha Balakrishnan

JUDGMENT

Challenge in this appeal is made by the defendants against the judgment and decree dated 21.07.2009 made in A.S.No.37 of 2008 on the file of the Principal Subordinate Judge, Villupuram, reversing the judgment and decree dated 07.12.2007 made in O.S.No.778 of 2004 on the file of the Additional District Munsif Court, Villupuram.

2. The suit has been laid by the plaintiff for partition and mesne profits.

3. The Second Appeal has been admitted and the following substantial question of law is formulated for consideration in this Second Appeal :-

"Whether the judgment and decree of the first Appellate Court in decreeing the suit filed by the plaintiff are based upon the perverse findings and also misdirected

against the evidence on record ? "

4. The plaintiff and the first defendant Puthira Kounder are brothers and sons of Munusami Kounder. It is admitted that the suit properties are the joint family properties belonging to the plaintiff and the first defendant Puthira Kounder. It is also admitted that the first item of the suit properties had been purchased jointly in the name of the plaintiff and the first defendant under the sale deed dated 23.08.1980, which has been marked as Ex.A2 / Ex.B2. It is also admitted that item No.3 of the suit properties had been purchased by the father of the plaintiff and the first defendant Puthira Kounder under the registered sale deed dated 23.11.1944 and the certified copy of the same has been marked as Ex.A1. It could therefore be seen that as admitted by Puthira Kounder, examined as DW.1, all the suit properties are the joint family properties belonging to the plaintiff and the first defendant Puthira Kounder.

5. Now according to the plaintiff, inasmuch as the suit properties had not been divided between the above said two brothers by metes and bounds and inasmuch as the first defendant Puthira Kounder had been acting adverse to the interest of the plaintiff by making attempts to sell the suit properties in its entirety as if belonging to him, it is stated that the plaintiff demanded partition of the suit properties and also sent a legal notice calling upon the first defendant to effect partition, however as the first defendant repudiated the claim of the plaintiff by issuing a reply notice containing false allegations, according to the plaintiff, he has been necessitated to lay the suit for partition.

6. It is the case of the first defendant that even though the suit properties are the joint family properties of two brothers, according to him, on 30.06.2000, in the presence of the villagers, as regards the first item in lieu of the share of the plaintiff, the defendant had given the plaintiff Rs.1,00,000/- and accordingly, the plaintiff had also given his share to the defendant and it is stated that in evidence of the same, the plaintiff had executed a sale deed in favour of the plaintiff on 25.06.2001, which has been marked as Ex.B1 / Ex.A6 and therefore, according to the first defendant, the partition had been already effected between the plaintiff and the first defendant and in such view of the matter, the plaintiff is not entitled to seek the relief of partition and the suit is liable to be dismissed.

7. As rightly put forth by the plaintiff's counsel, normally presumption being that a Hindu family continues to be joint, the burden heavily lies on the defendant to prove the

antecedent partition set up by him. Inasmuch as the first defendant had set up the plea of partition, as rightly argued, the onus is heavily upon the first defendant to establish his claim of partition, as pleaded.

8. The contention of the first defendant is that the partition had been effected between the plaintiff and the defendant on 30.06.2000, in the presence of the villagers, where under he had paid a sum of Rs.1,00,000/- to the plaintiff in lieu of the plaintiff's share in the joint family properties. To establish the above said plea, the first defendant has not cared to place any material or proof to substantiate the same. If really, such a partition has been effected, as rightly contended, the first defendant would have endeavoured to prove the same by examining the mediators / villagers who had effected the above said partition. Further, to establish that the first defendant had paid Rs.1,00,000/- to the plaintiff as per the terms of the oral partition effected, the first defendant would have taken steps to obtain a suitable acknowledgement with reference to the same from the plaintiff or examined 3rd parties, viz., villagers who had participated in the partition for proving the same. On the other hand, other than the ipse-dixit testimony of DW.1, there is no material whatsoever placed by the first defendant to establish that the parties have already effected oral partition amongst themselves.

9. The main contention put forth by the defendants' counsel is that inasmuch as the parties had already effected partition, according to him, the plaintiff had alienated a portion of the suit property in favour of the defendant on 25.06.2001 by way of a sale deed, which had been marked as Ex.B1 / Ex.A6. However, as rightly argued by the plaintiff's counsel, under the said document, the plaintiff has not alienated the entire share of the first item of the suit properties, to which he is entitled to. On the other hand, it could be seen that out of 1.36 acres situated in S.No.109/1, an extent of 0.06 cents with 3 HP motor pumpset had been alienated under the above said sale transaction. Further, it is also admitted that the document marked as Ex.A6/B1 does not recite that the parties have already effected a partition amongst themselves. This has been admitted clearly by DW.1. Further, DW.1 has also admitted that in the above said document it has been only mentioned that the share in the undivided property has been alienated. Therefore, as rightly argued by the plaintiff's counsel, Ex.B1/A6 would not in any manner advance the case of the defendants as regards the plea of partition put forth by them. Other than Ex.B1/A6, no material is placed by the first defendant to establish the plea of partition pleaded by him.

10. The trial Court seems to have accepted the case of the first defendant on the basis that the plaintiff and the

first defendant Puthira Kounder had been living separately in the thatched houses in item No.3 of the suit properties and therefore, on that footing, proceeded to hold that as the parties had already divided amongst themselves, they are living separately and not living jointly. However, as rightly argued by the plaintiff's counsel, the mere fact that the brothers are living separately by itself would not be sufficient to hold that they had effected partition amongst themselves. It could be seen that as agreed to between themselves, they had been living in the thatched houses situate in Item No.3 of the suit properties separately and therefore, on the basis that they had established separate residence amongst themselves, the same by itself would not ipso-facto be the evidence of partition by metes and bounds amongst themselves. It could therefore be seen that the trial Court has proceeded on a wrong assumption as the brothers are living separately, they should have effected partition amongst themselves. The above approach of the trial Court is nothing but erroneous and also perverse.

11. In the light of the above discussions, it could be seen that the defendant has failed to discharge the onus of proof placed on him to show that the brothers had effected partition amongst themselves. The resultant position would be that the brothers are still joint without effecting any partition amongst themselves in respect of the suit properties.

12. As adverted to earlier, inasmuch as there is no dispute that the suit properties are the joint family properties, it could be seen that the plaintiff would be entitled to obtain half share in the suit properties as claimed. As rightly put forth by the plaintiff's counsel, if at all there had been any alienation amongst the brothers themselves, the equities / adjustments in respect of the same have to be worked out during the final decree proceedings.

13. The plaintiff's counsel in support of her case placed reliance upon the decisions reported in AIR 2005 Delhi 190 (Lala Om Prakash ..vs.. Hari Ram), 1985 (2) Karnataka Law Journal 312 (Fakirappa Bailappa Kambar .vs. Kristappa Bailappa Kambar), AIR 2005 Kant 393 (Hanumath Bheemappa Sanadi And vs. Rudrappa Thammanna Sanadi And ...) and the judgment of Patna High Court dated 13.07.2012 in First Appeal No.149 of 1992 (Aruna Rani .vs. Asha Gupta). The principles of law enunciated in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of case at hand.

14. For the reasons afore stated, I hold that the first Appellate Court has on the basis of the right appreciation of the evidence on record and also on an analysis of the contentions of the parties, viz-a-viz the materials produced in

the right angle has held that the defendants have failed to establish the plea of partition and accordingly, granted the relief sought for by the plaintiff. The findings of the first Appellate Court for upholding the claim of the plaintiff is found to be not erroneous either on facts or in law.

15. In view of the above discussions, the substantial question of law formulated in the Second Appeal is answered against the defendants and in favour of the plaintiff.

16. In conclusion, the Second Appeal fails and accordingly, dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Principal Subordinate Judge,
Villupuram.
2. The Additional District Munsif,
Villupuram.

+2 ccs to Mr.K.P.Palaniappan Advocate sr 256

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