

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 27.02.2017****PRONOUNCED ON : 09.03.2017****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN****S. A.No.629 of 2011****and****M.P.No.1 of 2011**

P.Palanichamy

...

Appellant

Vs.

1. S.Sellappan

2. Veluchamy

...

Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 28.02.2011 made in A.S.No.55 of 2009 on the file of the Sub Court, Namakkal, partly reversing the judgment and decree dated 03.04.2009 made in O.S.No.66 of 2005 on the file of the District Munsif Court, Paramathi.

For Appellant : Mr.P.Valliappan

For Respondents : Mr.C.Jagadish

JUDGMENT

Challenge in this second appeal is made by the plaintiff against the judgment and decree dated 28.02.2011 made in A.S.No.55 of 2009 on the file of the Sub Court, Namakkal, partly reversing the judgment and decree dated 03.04.2009 made in O.S.No.66 of 2005 on the file of the District Munsif Court, Paramathi.

2. The second appeal has been admitted and the following substantial questions of law are formulated for consideration in this second appeal.

" (a) Whether the lower appellate court is correct in law in non-suiting the appellant with respect to suit item No.1, after finding that the oral partition pleaded by the appellant stood proved and Ex.A1 partition deed was not controverted?

(b) Whether the courts below is correct inn law in not granting decree even with respect to the extent to which the appellant is admittedly entitled to in contravention of the provisions of Order VII, Rule 7 of the Code of Civil Procedure?"

3. The suit has been laid by the plaintiff for declaration and permanent injunction in respect of the first item of the suit properties and for the relief of permanent injunction as regards the second item of the suit properties.

4. As regards the relief sought for with reference to the second

item of the suit properties, the first appellate Court has accepted the case of the plaintiff. But, as regards the reliefs sought for by the plaintiff with reference to the first item of the suit properties, the first appellate Court has rejected the plaintiff's case and aggrieved over the same, the present second appeal has been preferred by the plaintiff.

5. The plaintiff claims title to the first item of the suit properties, on the basis of the partition deed dated 20.11.1981 effected amongst his family members and the above said partition deed has been marked as Ex.A1. It is found that as admitted by both parties, the first item of the suit properties situated in Survey No.148/1D measures 20 cents. Now, according to the plaintiff, his father Palaniandi Gounder and his paternal uncle Nallianna Gounder owned the first item of the suit properties and other properties ancestrally, having derived the same from their father viz., Marappa Gounder. It is admitted by both parties that Palaniandi Gounder and Nallianna Gounder had effected oral partition with reference to the properties belonging to them about 40 - 50 years back. According to the plaintiff, the entire extent in the first item of the suit properties in survey No.148/1D measuring 20 cents had been allotted to the share of Palaniandi Gounder. The further case of the plaintiff is that under

Ex.A1, Palaniandi Gounder and his family members including the plaintiff had partitioned the properties and it is the case of the plaintiff that he has been allotted the first item of the suit properties, which has been shown as 6th item in the "C" schedule of Ex.A1. Thus, the plaintiff claims title, possession and enjoyment of the first item of the suit properties and according to the plaintiff, inasmuch as the defendants, without any authority, attempted to interfere with his possession and enjoyment of the same, he has been necessitated to lay the suit against the defendants for appropriate reliefs.

6. Per contra, it is the case of the defendants that in the oral partition effected between Palaniandi Gounder and Nallianna Gounder as regards survey No.148/1D, Palaniandi Gounder was allotted only 15 cents and the remaining 5 cents was allotted to his brother Nallianna Gounder and further, the case of the defendants is that Nallianna Gounder had sold the 5 cents in Survey No.148/1D to the first defendant by way of a sale deed dated 31.01.2005 marked as Ex.B1 and thus, according to the defendants, the extent of 5 cents in survey No.148/1D belonged to the first defendant and the same is in his possession and enjoyment and hence, the plaintiff is not entitled to seek the reliefs against the defendants and therefore, the suit is liable to be dismissed.

7. As seen from the case of the parties and also the evidence adduced in the matter, it is found that as regards the properties belonging to Palaniandi Gounder and his brother Nallianna Gounder, they had orally partitioned the same about 40-50 years back. However, the case of the plaintiff that the first item of the suit properties, as such, had been allotted to his father Palaniandi Gounder in the said oral partition has been disputed by the defendants. In the light of the above position, it is for the plaintiff to establish that his father Palaniandi Gounder had been allotted the first item of the suit properties in the oral partition. However, as regards the above case of the plaintiff, as rightly found by the first appellate Court, there is no convincing material forthcoming on the part of the plaintiff. It has not been established by the plaintiff that pursuant to the oral partition, it is only Palaniandi Gounder, who had been in possession and enjoyment of the first item of the suit properties exclusively as absolute owner. Only on the establishment of the case of the plaintiff that the first item of the suit properties had been allotted to Palaniandi Gounder in the oral partition, the further case of the plaintiff that in the subsequent partition effected amongst the family members of Palaniandi Gounder with reference to the properties belonging to them and the said partition deed being marked as Ex.A1,

the first item of the suit properties had been allotted to the share of the plaintiff can be accepted. However, the case of the plaintiff that the first item of the suit properties had been allotted to the share of Palaniandi Gounder, as such, has not been established in any manner by adducing acceptable and reliable evidence. Hence, the case of the plaintiff that under Ex.A1, he had been allotted the first item of the suit properties cannot be countenanced in any manner. Before claiming title to the first item of the suit properties under Ex.A1, it is for the plaintiff to establish that the same belonged to his family. When that had not been established, as rightly found by the first appellate Court, the plaintiff's family as such is not entitled to assume that the first item of the suit properties belonged to them and accordingly, effect partition as regards the said item also under Ex.A1. Therefore, the case of the plaintiff that under Ex.A1, the first item of the suit properties had been allotted to his share cannot be accepted in any manner.

8. The plaintiff has placed reliance upon the patta marked as Ex.A2, it is dated 06.01.2005. However, as rightly found by the first appellate Court, patta cannot be the basis for upholding the plaintiff's title to the first item of the suit properties. Equally, the plaintiff has

also not established that he has been in possession and enjoyment of whole of the first item of the suit properties by adducing acceptable evidence. The kist receipts marked on the side of the plaintiff do not indicate that the entire extent in the first item of the suit properties is in the possession and enjoyment of the plaintiff. As rightly found by the first appellate Court, the plaintiff has not placed any Adangal extract to prove that he is in possession and enjoyment of the entire 20 cents in survey No.148/1D. In such view of the matter, it could be seen that the documents produced on the side of the plaintiff do not in any manner advance his case.

9. The plaintiff's counsel contended that the defendants have not established that the plaintiff's paternal uncle Nallianna Gounder had been allotted 5 cents in Survey No.148/1D and therefore, the Court should hold that the entire extent in Survey No.148/1D had been allotted to the share of Palaniandi Gounder in the oral partition. The weakness of the defendants' case cannot be taken advantage by the plaintiff to obtain the reliefs sought for by him without establishing his case. Having come forward with the suit seeking necessary reliefs it is for the plaintiff to establish his case and cannot take advantage of the loopholes in the defendants' case. Now, according to the defendants, Nallianna Gounder was allotted 5 cents

and the same had been sold by him to the first defendant under Ex.B1. Even Nallianna Gounder had been examined as DW3. Despite cross examination, nothing has been culled out from him, on the part of the plaintiff to establish that the entire first item of the suit properties had been allotted to Palaniandi Gounder in the oral partition. In such view of the matter, it could be seen that merely because the defendants have not established their case that would not be the basis for accepting the plaintiff's case sans proof.

10. The plaintiff's counsel contended that inasmuch as the defendants have admitted that the plaintiff's father had been allotted 15 cents in survey No.148/1D, the Court should mould the relief and accordingly, grant appropriate reliefs in favour of the plaintiff. In this connection, reliance is placed upon the decisions reported in **2011 (1) MWN (Civil) 529 (G.Murugan V.G.Thangaraj)**, **2001 (4) CTC 513 (Natarajan V.R.Muthukrishnan)**, and **2012 (1) MWN (Civil) 174 (Bagavathiappa Gounder @ Bavuthiyappa Gounder V. Karuppaiyan and two others)**. No doubt, the Court has got powers to mould the relief and grant appropriate relief on the establishment of the case by a party. In so far as this case is concerned, the plaintiff has come forward with the relief of declaration and permanent injunction as regards the first item of the suit properties

and he has described the first item of the suit properties with specific boundaries. No doubt, it has been admitted on the part of the defendants that the plaintiff's father had been allotted 15 cents in survey No.148/1D. However, where the said 15 cents is located in survey No.148/1D, there is no clear picture. Now, according to the defendants, 5 cents had been allotted to Nallianna Gounder and the same had been alienated to the first defendant under Ex.B1. However, Ex.B1 sale deed is not accepted by the plaintiff. In such view of the matter, when the 15 cents allotted to Palaniandi Gounder and the 5 cents allotted to Nallianna Gounder had not been clearly demarcated and identified and also not established in this case and when it is found that the entire extent of 20 cents in survey No.148/1D is yet to be divided by metes and bounds, in such view of the matter, the plaintiff cannot be granted the lesser relief sought for by him as regards the 15 cents in survey No.148/1D. Therefore, the authorities relied upon by the plaintiff above referred to, in my considered opinion, do not apply to the facts and circumstances of the present case.

11. The plaintiff's counsel, further, in support of his case placed reliance upon the authority reported in ***AIR 1999 SUPRME COURT 2216 (Arumughan (dead) by L.Rs. and others V. Sundarambal***

and another). This is, with reference to the question of burden of proof becoming insignificant on the parties adducing evidence in the case. The principles of law enunciated in the above said decision are not controverted by the defendants and the same is followed and applied as applicable to the facts and circumstances of the present case.

12. The plaintiff's counsel placed strong reliance upon the decision reported in **2011 (3) MWN (Civil) 149 (Jagannathan V. Ramachandran)** and contended that the plaintiff having established the partition effected under Ex.A1, following the above decision, this Court should accept the plaintiff's case. However, as discussed above, the plaintiff has not established his entitlement to include the first item of the suit properties in its entirety as a subject for partition under Ex.A1. He has not established that the same had been allotted to Palaniandi Gounder in the oral partition. In such view of the matter, when the basis, under which, the first item had been included as a subject in the partition under Ex.A1, goes, it could be seen that the further case of the plaintiff that it had been allotted to his share under Ex.A1 as such cannot be accepted. Therefore, it is found that the partition effected under Ex.A1 would not bind the defendants or the plaintiff's paternal uncle Nallianna Gounder in any manner. That

apart, in the above decision relied upon by the plaintiff, the case is laid simpliciter for permanent injunction. In such view of the matter, inasmuch as the plaintiff in that case had established his possession and also produced patta, the Court accepted the plaintiff's case and granted the relief of permanent injunction sought for. However, in so far as this case is concerned, the plaintiff has sought for the reliefs of declaration and permanent injunction. The plaintiff has not established that he has title to the first item of the suit properties as described in the plaint. The plaintiff has not demarcated and established as to where exactly the 15 cents, to which, his father is entitled to, is located in survey No.148/1D. The plaintiff has not established his possession and enjoyment the first item of the suit properties either as regards 20 cents or 15 cents clearly. In such view of the matter, in my considered opinion, the above decision relied upon by the plaintiff is not applicable to the facts and circumstances of the case at hand.

13. In the light of the above discussions, the substantial questions of law are formulated for consideration in this second appeal are answered against the plaintiff and in favour of the defendants.

In conclusion, the second appeal fails and accordingly, the same is dismissed. No costs. Consequently connected miscellaneous petition is closed.

Index : Yes/No
Internet: Yes/No
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09.03.2017

To

1. The Sub Court, Namakkal.
2. The District Munsif Court, Paramathi.

T.RAVINDRAN,J.

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Pre-delivery Judgment in
S. A.No.629 of 2011
and
M.P.No.1 of 2011

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