

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on
26.07.2017

Pronounced on
01.08.2017

Coram

The Honourable Dr.Justice G.JAYACHANDRAN

Second Appeal No.600 of 2001

Venkatasamy .. Appellant/Plaintiff

/versus/

1.Annamalai

2.Panneer

.. Respondents/1& 2 Defendants

Second Appeal is filed under Section 100 of Code of Civil Procedure against the judgment and decree dated 19.12.2000 made in A.S.No.48 of 2000 on the file of the Principal District Judge, Tiruvannamalai, reversing the judgment and decree dated 11.01.2000 made in O.S.No.91 of 1999 on the file of the file of the Principal District Munsif Court, Tiruvannamalai.

For Appellant :Mr.P.Dinesh kumar for
M/s Sarvabhuman Associate

For Respondents:Mr.R.Siddharth for
Mr.T.R.Rajaraman for R1
R2-No appearance

J U D G E M E N T

The plaintiff and the first defendant are sons of Venga Gounder. According to the plaintiff, the suit property was allotted to his share in the oral partition between the family members 40 years back. The plaintiff is, in open, uninterrupted possession and enjoyment of the property paying necessary kist. While so, when he leased out the suit property to one Anbu Gounder, the first defendant in collusion with his neighbour the second defendant disturbing the peaceful possession and preventing his leasee from putting up a thatched superstructure. Hence, suit for declaration and injunction.

2. Per contra, the defendant contended that no partition has effected in respect of the properties of Venga gounder. Till date, the properties are jointly enjoyed by the plaintiff and the first defendant. The properties are ancestral properties in which, the first defendant is a co-sharer. The plaintiff never been in exclusive possession or enjoyment. Venga Gounder died intestate leaving behind two sons, who are the plaintiff and the first defendant. All the properties are ancestral in nature and inheritance shall be in accordance with Act 30/1956. The suit property was purchased by Venga Gounder on 15.05.1957 from the surplus income derived out of the ancestral nucleus and blended into the hotchpot of the ancestral properties. As manager of the joint family, the plaintiff is paying kist in his name in his capacity as Kartha of the family. The suit is liable to be dismissed, since there is no cause of action to file the suit and the suit as framed is defective and relief claimed is misconceived.

3. The trial Court framed the following issues:

- "(1) whether the suit property is the joint family property of the plaintiff and the first defendant?
- (2) whether the plaintiff is entitled to the relief ask for?
- (3) to what relief?"

4. After analysing the evidence putforth by the respective parties, the trial Court held in favour of the plaintiff and allowed the suit as prayed for.

5. On appeal, the lower appellate Court reversed the judgment of the trial Court and dismissed the suit holding that the burden of proving the alleged oral partition is not properly discharged by the plaintiff. The lower appellate Court, considering the fact that patta for the property jointly stands in the name of plaintiff and the first defendant, except Ex.A2 kist receipt, no evidence to show the continuous and exclusive possession with the plaintiff. Further, the lower appellate Court, while discussing Ex.A8 a sale deed executed by the first defendant in favour of the plaintiff, has observed that the sale deed does not mention that the said property was allotted to him under oral partition. Therefore, merely because the first defendant sold a property to the plaintiff, it does not mean that oral partition took place between the plaintiff and the first defendant.

6. At the time of admitting the second appeal, this Court has formulated the following Substantial Question of Law for consideration:

"Whether on the pleadings and the material brought on record by the plaintiff the first appellate Court was right in holding that there was no oral partition as pleaded by the plaintiff and therefore, the suit filed by plaintiff was liable to be dismissed more so when such a finding was arrived at by misconstruing the recitals in Ex.A8?"

7. Head the learned counsel for the appellant and the learned counsel appearing for the respondent and perused the materials available on record.

8. On perusal of evidence both oral and document, it is crystal clear that the lower appellate Court has miserably failed to appreciate the evidence in a holistic manner. It has gone astray by looking into the materials placed before it in bits and pieces. Non framing of specific issue regarding the alleged oral partition has over weighed, the mind of the lower appellate Court leading to the perverse finding.

9. While the first defendant has admit the fact that Ex.A8 was executed by him. The property sold under Ex.A8 is the property which he got from his father Venga Gounder. He admits that the terrace house was given to the plaintiff and the thatched house was given to him. He also admits in his testimony that the plaintiff paid ovelty for the difference of costs. It is specifically elucidated in the cross-examination of the first defendant that he has sold some of property of his father independently and likewise, the plaintiff has also sold some properties. This will clearly indicate that the plaintiff and the first defendant had divided and been in separate possession and enjoyment of the property held by their father Venga Gounder and dealt them exclusively. This is a clear indication that even during the lifetime of Venga Gounder, due to arrangement between the sharers, the properties were divided and given to them for separate and exclusive enjoyment.

10. In the said circumstances, if one look into the recital of Ex.A8 dated 23.04.1968 could find out that the first defendant has sold the property to the plaintiff on his behalf and on behalf of his minor children. He has described the property as the property, which he is

entitled (எனக்கு பாத்தியமான சொத்தை) the very facts that, this property is an ancestral property and the first defendant claims that he is entitled for it and sold it to his brother show that there was division among the brothers. If no division of the family property effected earlier, there is no necessity for him to buy it from his brother. The lower appellate Court, while appreciating Ex.A8 has note taken note of the recital of Ex.A8 and the the testimony of DW1.

11. When oral partition of ancestral property is pleaded, its veracity could be tested by the subsequent conduct of the parties to the alleged partition. The acid test could be to find out, how the properties have been dealt by the parties, after the alleged partition. In this case, the plaintiff has already filed suit against the first defendant in respect of certain other properties, alleging the first defendant has tried to interfere. In that suit O.S.No.2012 of 1979 he has pleaded the factum of oral partition. In the pre-suit notice Ex.A8, the factum of oral partition was placed on record. As per Ex.A3, in O.S.No.2012 of 1979, the plaintiff has sought for declaration and injunction in respect of 12 items of properties, wherein the present suit property bearing S.No.39/11 is not included. It does not lead to inference that the said property was not the subject matter of oral partition. The non inclusion of the S.No.39/11 has to be seen on the facts of the earlier suit. If there was no rival claim of title or possession over the said property at that point of time, why should the Court expect the plaintiff to include that property also, were no dispute exist.

12. The lower appellate Court has misconstrued the fact that Ex.B1 patta for S.No.39/11 jointly held by Dharman, Arumugam(plaintiff) and Venga Gounder, S/O Raman. Since the S.No.39/11 has been subsequently subdivided in S.No.39/11A1A and 39/11B1B, the plaintiff cannot claim exclusive right over it. In this regard, the deposition of PW2, who sold the property to Venga Gounder is relevant. As per his testimony, out of total extend of 17 cents, 6 cents of land was sold to Venga Gounder, which is the subject matter of the suit, the remaining 11 cents is with him and Dharman. Hence, their names are shown as joint pattadars. The said reasoning of PW2 has not been taken note by the lower appellate Court.

13. For the aforesaid reasons, the Second Appeal is allowed. The judgment and decree of the lower appellate Court viz., the Principal District Court, Tiruvannamalai in A.S.No.48 of 2000, dated 19.12.2000 are set aside. The

judgment and decree of the trial Court viz., The District Munsif Court, Tiruvannamalai in O.S.No.91 of 1999, dated 11.01.2000 are restored. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

To

1.The Principal District Judge, Tiruvannamalai.

2.The Principal District Munsif, Tiruvannamalai.

+1cc to Mr.T.R.Rajaraman,Advocate sr.58374

+1cc to M/s.Sarvabhauman, Associates Advocate sr.54867

Judgment made in
S.A.No.600 of 2001

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ss(13/9/2017)



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