

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.10.2018

PRONOUNCED ON: 13.11.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.666 of 2015

and

M.P.No.1 of 2015

1.Palanivelu

2.Muthusamy

3.Chinnasamy

4.Kandasamy
S/o, Sengottaiyan

5.Kandasamy
S/o, Kavanna Gounder ...Appellants/Respondents/Defendants

Vs.

Muniappan ...Respondent/Appellant/Plaintiff

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree passed in A.S.No.45 of 2013 on the file of the Additional District Judge at Namakkal dated 31.10.2014 reversing the judgment and decree passed in O.S.No.58 of 2009 on the file of the Subordinate Court at Trichengode dated 30.01.2013 .

For Appellants : Mr.M.S.Krishnan, SC
for Mr. N.Senthil Kumar

For Respondent: Mr.N.Manokaran

J U D G M E N T

In this Second Appeal, challenge is made to the judgment and decree dated 31.10.2014 passed in A.S.No.45 of 2013 on the file of the Additional District Court, Namakkal reversing the

judgement and decree dated 30.01.2013 passed in O.S.No.58 of 2009 on the file of the Subordinate Court, Trichengode .

2. The parties are referred to as per the rankings in the trial court.

3. Suit for partition, separate possession and permanent injunction.

4. The case of the plaintiff in brief is that the plaintiff and the defendants are the Pangalees and their fathers were also Pangalees by relation and fathers of the parties intestate jointly owned the properties comprised in R.S.No.21 Hectares 2.47.0, R.S.No.22 Hectares 1.69.0, R.S.No.23 Hectares 1.06.0, R.S.No.24 Hectares 1.13.5 totally Hectares 6.35.5 [15.70 acres] and R.S.No.25 Hectares 1.94.5 [4.80 acres] of Modamangalam village by self acquisition and inheritance and accordingly R.S.Nos.21,22,23 and 24 jointly belonged to the plaintiff's father and the father of the defendants 1 to 4 and R.S.No.25 jointly belongs to the plaintiff and the 5th defendant alone. On 05.05.1967 in R.S.Nos.21,22,23 and 24, the plaintiff's father Kandhappa Gounder had purchased 0.78 $\frac{3}{4}$ acres with 1/16th share in the well in R.S.No.24/12 and the 3 Anganna house in R.S.No.22/01 of Modamangalam village by way of a sale deed and enjoyed it jointly with the fathers of the defendants 1 to 4 till his intestate death long back. On 30.05.1977, the plaintiff has purchased acres 3.83 $\frac{1}{2}$ in R.S.Nos.21,22,23,24 and 25 by way of a registered sale deed, again on 04.06.1977, the plaintiff has purchased 1/8th share out of 0.75 acres in R.S.No.24/12 by way of a registered sale deed and it is a well portion. Thus, the plaintiff is entitled to 3/16th share in the well in R.S.No.24/12. Upon the intestate deaths of the fathers of the parties inter-se the plaintiff and the defendants have all along been enjoying the suit properties in common without any valid, regular partition among them and enjoying their respective shares, which they have inherited and self acquired and by paying necessary Kists and the properties comprised in R.S.Nos.21,22,23 and 24 are described as item 1 of the suit properties and the property comprised in R.S.No.25 is described as item 2 of the suit properties. In item 1, the plaintiff is entitled to acres 4.71 $\frac{1}{4}$ with 3/16th share in the well in R.S.No.24/12 and 3 Anganna house by inheritance, self acquisition, the remainder belongs to the defendants 1 to 4. In item 2, the plaintiff and the fifth defendant each are entitled to half share. In the year 1994, the defendants 1 to 3 alone excluding the plaintiff had entered into a registered partition deed, the said document is void and unenforceable in law and cannot be acted upon. As the plaintiff is feeling inconvenient to be joint in status and accordingly requested the defendants for amicable partition of his share which he is entitled to as above stated. On the other hand, the defendants without

providing the plaintiff's share by way of a partition are attempting to alienate the suit properties including the plaintiff's share to the third parties and accordingly it is stated that the plaintiff has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants in brief is that the suit laid by the plaintiff is not maintainable either in law or on facts. After denying all the plaint averments, the defendants would contend that there are no properties exist on ground as described in the plaint schedule and the suit properties had been already partitioned orally very long back during the life time of the ancestors of the plaintiff and the defendants and accordingly, they were enjoying their respective properties without anyone interruption including the plaintiff's ancestors and the plaintiff upto the laying of the suit by the plaintiff and in accordance with the oral partition and the possession being enjoyed by the respective sharers, the properties had been subdivided and also revenue records had been changed long back and the plaintiff and his ancestors had accepted the oral partition and the subdivisions effected thereupon and the same could be evidenced from the revenue records and therefore the plaintiff is not entitled to seek partition, separate possession by way of the present suit and the plaintiff has not come forward with clean hands and therefore the suit laid by the plaintiff is not maintainable and the suit is liable to be dismissed on the ground of non-joinder of necessary parties and accordingly prayed for the dismissal of the plaintiff's suit.

6. In support of the plaintiff's case, P.Ws.1 to 2 were examined. Exs.A1 to A.16 were marked. On the side of the defendants, D.Ws.1 to 3 were examined. Exs.B1 to B16 were marked. Further, Ex.X1 has also been marked.

7. The trial court, on a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, was pleased to dismiss the suit laid by the plaintiff in respect of the first item of the suit properties and however decreed the suit in favour of the plaintiff in respect of the second item of the suit properties by declaring his share with reference to the same. As against the preliminary decree granted by the trial court in respect of the second item of the suit properties in favour of the plaintiff, it is seen that the defendants have not thrown any challenge. On the other hand, as against the dismissal of the plaintiff's suit in respect of the first item of the plaint schedule properties, aggrieved over the same, the plaintiff has preferred the first appeal. The first appellate court, on an appreciation of the materials placed on record and the submissions made was pleased to set aside the judgment and decree

of the trial court dismissing the suit laid by the plaintiff in respect of the first item of the plaint schedule properties and accordingly allowed the appeal preferred by the plaintiff. Challenging the same, the present Second Appeal has been preferred.

8. At the time of admission of the second appeal the following substantial question of law was formulated for consideration.

Whether the Lower Appellate Court is correct in not considering the fact that there has been an oral partition among the appellants and respondent?

9. The issue between the parties is only as regards the first item of the plaint schedule properties. As against the judgment and decree of the trial court granting the preliminary decree in favour of the plaintiff in respect of the second item of the plaint schedule properties as prayed for, it is seen that the same has become final.

10. As regards the case of the plaintiff in respect of the first item of the plaint schedule properties comprised in R.S.Nos.21,22,23 and 24, the plaintiff would claim title to the extent of 4.71 $\frac{1}{4}$ acres with 3/16th share in the well in R.S.No.24/12 and three Anganna house by inheritance and self acquisition. Now, according to the plaintiff, the abovesaid property to which he is entitled to in item one of the plaint schedule properties had been acquired by the father as well as him by way of the sale deeds dated 05.05.1967, 30.05.1977 and 04.06.1977 and the above said sale deeds had been marked as Exs.A1 to A3. According to the plaintiff, the abovesaid properties had been purchased as undivided shares in the concerned R.S.Nos and accordingly, the plaintiff's father and he had been enjoying the above said properties acquired by way of the above said sale deeds along with the defendants' ancestors and the defendants jointly and inasmuch as, according to the plaintiff, the defendants had started acting adverse to his interest by attempting to alienate the suit properties to the third parties including his share in respect of the same, it is the case of the plaintiff that he has been necessitated to lay the suit for partition and separate possession and permanent injunction.

11. The defendants in their written statement, had not disputed the entitlement of the plaintiff's share in respect of the suit properties particularly, in respect of the item one of the plaint schedule properties. All that, they would plead is that the suit properties had been already partitioned orally

even during the life time of the ancestors of the plaintiff and the defendants and accordingly, the parties had been enjoying their respective shares since then by paying Kists and accordingly it is their case that subdivisions had also been effected in respect of their respective shares and therefore it is their defence that the plaintiff cannot again claim partition of his share by laying the present suit and therefore the suit laid by the plaintiff is liable to be dismissed.

12. In the light of the above said defence projected by the defendants, it is seen that they having clearly admitted that the suit properties jointly belong to the plaintiff as well as the defendants and they had resisted the plaintiff's suit for partition only by alleging that the oral partition had already been effected in respect of the suit properties long back even during the days of their father, in such view of the matter, the onus is upon the defendants to establish that the oral partition had taken place in respect of the suit properties i.e., item 1 of the plaint schedule properties.

13. However, the defendants have not clearly averred in the written statement as regards their plea of oral partition. They have not averred that as to when the alleged oral partition took place and who were all present at the time of the oral partition, particularly as to who are all the sharers and who are all the Panchayatars/mediators who had effected the oral partition and what were the subject matter of the oral partition and what were the properties allotted to the respective sharers in the various survey numbers etc., In such view of the matter, as rightly put forth by the plaintiff's counsel, when the plea of oral partition projected by the defendants lacks particulars both by way of pleas as well as by way of evidence, it is seen that the case projected by the defendants that the parties had orally partitioned long back sans proof pointing to the same in any one of the aspects of the matter would only expose the falsity of the defence version.

14. The defendants mainly to establish their plea of oral partition would only contend that pursuant to the alleged oral partition, the properties allotted to the various sharers had been subdivided and accordingly, the parties had obtained separate patta and paying Kists in respect of their respective shares and therefore the plaintiff having suppressed the same, according to them, the plaintiff is not entitled to seek the relief of partition. The plaintiff has disputed that the subdivisions had been effected in respect of the alleged shares of the parties by way of the oral partition and according to him, no notice whatsoever has been served upon him as regards the alleged subdivisions effected and it is his further contention that the revenue records pertaining to the same by itself would not be useful to sustain the plea of oral partition, as such, therefore, it is his contention that the

plea of oral partition projected by the defendants is liable to be rejected.

15.As regards the reliance to be placed upon the revenue records for upholding the plea of oral partition, the plaintiff's counsel relied upon the decision of this Court reported in 2009 (3) Law weekly 622 [Ramulu Ammal Vs. Ramachandra Reddy and another] whereunder, it has been held that the onus of proof is upon the party pleading oral partition and when the said fact has not been established by the said party by examining the concerned persons who had been associated with the alleged oral partition, based on the revenue records projected, the plea of oral partition cannot be sustained and the above said decision has been subsequently followed in the decision reported in 2017 (2) MWN [Civil] 241 [Chithra Vs. Saroja and another] and the position of law has been culled out in the above said decision as follows:

HINDU LAW - Oral partition - proof of - Suit for partition resisted by the defendants on ground that there was earlier partition, 25 years prior to Suit - Burden lies on the defendants to prove that such Oral Partition took place - Except interested testimony, no other evidence let in to prove Oral Partition - Revenue records produced by Defendants - Partition Suit cannot be decided on basis of Revenue records - Defendants have not proved plea of Oral Partition - Plaintiff entitled to Preliminary Decree for Partition - Second Appeal Allowed.

10.In Ramulu Ammal Vs. Ramachandra Reddy and Others, 2009 (3) LW 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: सत्यमेव जयते

23." The onus of proof as well as the onus probandi is on the Defendant to prove that there was Oral partition before the Panchayatdhars. But, it is clear that absolutely there is no evidence much less reliable evidence to uphold the alleged Oral Partition. No Panchayatdhar 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 Panchayatdhars, 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 Plaintiff's appositely and appropriately would invite the attention of this Court to the indubitable fact that D.W.2 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 hear say evidence in this sort of serious matters is totally not permissible legally. D.W.1, 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 vs. 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 (3) CTC 304; 1999 (3) LW 727; *Guruvammal and another v. Subbiah Naicker and Others*, 1999 (3) CTC 650; 2000 (1) LW 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.

Further, the plaintiff's counsel also relied upon the decision reported in A.I.R 2017 Orissa 186 [*Damodar Naik Vs. Jogindra Patel and another*] for the proposition that the mutation of the revenue records in favour of the defendants would not be sufficient to prove the partition and separate possession. Similarly, he would also rely upon the decision reported in 2016 SCC Online Madras 8624 [*A.Krishnan Vs. A.Ponnaiyan and others*] whereunder also it has been held that the party who plead the

oral partition should establish the fact and based on the revenue records, the plea of oral partition cannot be sustained. As regards the subdivisions effected and the issuance of patta, the defendants mainly rely upon the evidence of D.W.3, the revenue official through whom Ex.X1 has been marked and on a perusal of his evidence as adduced during the cross examination, when it is found that he has not inspected the suit properties and does not know directly about in whose possession the suit properties are available and does not know whether the notices had been issued to all the parties concerned at the time of the subdivision proceedings and admitted that notice should be issued to all concern and does not know anything about the suit particulars and also does not know as to the subdivisions effected in respect of the suit properties, in such view of the matter, it is found that as rightly determined by the first appellate court, his evidence would be no use to sustain the plea of oral partition projected by the defendants.

16. When with reference to the plea of oral partition, the defendants have not spelt out the particulars in the written statement and also not placed any proof worth acceptance to sustain the same and with reference to the same, they would only rely upon the patta documents and the subdivisions effected thereby in respect of the suit properties, however, when the revenue records by themselves would not be sufficient to uphold the plea of oral partition, particularly, when the plaintiff has taken the stand that he has not been served with any notice as regards the subdivision proceeding, in the light of the abovesaid decisions relied upon by the plaintiff's counsel, it is seen that the plea of oral partition put forth by the defendants cannot be given credence to.

17.As regards the proposition of law that the subdivisions effected in respect of the suit properties without notice to the plaintiff as per law would not in any manner be binding upon the plaintiff, the plaintiff's counsel placed reliance upon the decisions reported in 1999 III CTC 650 Guruvammal and another Vs. Subbiah Naicker and others] and from 2008 (1) MLJ 200 [Vaikundam Agro Tech Limited, Trivandram rep. By General Manager Vs. State of Tamil Nadu rep. By District Collector, Kanyakumari District]. It could be thus seen that when there is lack of evidence that notice had been given to all the parties concerned before the subdivisions effected, the same would not be binding upon the parties who had not been served with the notice and the position of law being above, it is seen that the plea of partition projected by the defendants and sought to be established by them by way of the revenue documents cannot be accepted particularly, when there is no material placed on the part of the defendants that the plaintiff had been validly given notice with reference to the same. It is the specific case of

the plaintiff that till date, the parties had been jointly enjoying the suit properties without effecting division of the same by metes and bounds and in such view of the matter, it is seen that the defendants having taken the plea of oral partition and the defendants having failed to establish the same by giving particulars with reference to the same in the written statement as well as placing acceptable proof, both oral and documentary, evidencing the same and when the endeavors made by the defendants to sustain the plea of oral partition through revenue records cannot be given any legal sanctity, in all, it is seen that the defendants have miserably failed to establish their defence of oral partition.

18. The defendant's counsel contended that the plaintiff has not come forward with the partition suit tracing title to the share to which he is entitled to in respect of the suit properties on the basis of family tree, inter-se relationship of the family members and in such view of the matter, it is his contention that the plaintiff's suit is bereft of particulars and skeletal in the trace of the properties to which he is entitled to, and on that ground alone, it is his argument that the suit laid by the plaintiff should have been thrown out. In this connection, he placed reliance upon the decision reported in 2015 (11) SCC 269 [Shasidhar and others Vs. Ashwini Uma Mathad and another] and as regards the facts to be determined by the Courts for the proper disposal of the suit for partition, the Supreme Court has outlined the same in the following manner.

A. Family and Personal Laws- Hindu Law - Partition - Partition suits or suits by co-sharer, co-owner or joint owner for determination of share and possession thereof, etc. - Factors to be determined by courts, for proper disposal of such suits - Stated.

Held:

In a suit filed by a co-sharer, coparcener, co-owner or joint owner, as the case may be, for partition and separate possession of his/her share qua others, it is necessary for the court to examine, in the first instance, the nature and character of the properties in suit such as who was the original owner of the suit properties, how and by which source he/she acquired such properties, whether it was his/her self-acquired property or ancestral property, or joint property or coparcenary property in his/her hand and, if so, who are/were the coparceners or joint owners with him/ her as the case may be. Secondly, how the devolution of his/her interest in the property took

place consequent upon his/her death on surviving members of the family and in what proportion, whether he/she died intestate or left behind any testamentary succession in favour of any family member or outsider to inherit his/her share in properties and if so, its effect. Thirdly, whether the properties in suit are capable of being partitioned effectively and if so, in what manner? Lastly, whether all properties are included in the suit and all co-sharers, coparceners, co-owners or joint owners, as the case may be, are made parties to the suit? These issues, being material for proper disposal of the partition suit, have to be answered by the court on the basis of family tree, inter se relations of family members, evidence adduced and the principles of law applicable to the case.

Applying the same to the case at hand, it is seen that the plaintiff has vividly spelled out his trace of title to the suit properties by describing the sale transactions through which he seeks title to his shares in the properties and has also produced the said title documents and furthermore, when it is seen that the defendants have nowhere in the written statement disputed the entitlement of the plaintiff's share in respect of the suit properties, in such view of the matter, the argument projected by the defendants' counsel that the plaintiff's suit is lacking in particulars as to the trace of title to the suit properties from his ancestors and the joint enjoyment of the properties by the parties concerned etc.,

19. In this connection, the plaintiff's counsel would contend that as regards the pleading, the Court should adopt common sense approach and should not take technical defects in the pleadings for non-suiting the plaintiff and in this connection he placed reliance upon the decision reported in 1980 (1) SCC 52 [S.B.Noronah Vs. Prem Kumari Khanna] and also as regards the principles governing the partition, he relied upon the following passage detailed in the judgment reported in 1985 (98) MLW 773 [P.Kaliappa Gounder and others Vs. Muthuswami Mudaliar]

Hindu Law-Partition-Principles concerning-Separate enjoyment of property for the sake of convenience is no partition-constructing of well, laying underground pipes, getting loans on security of portion on one's share are not adequate proof of partition.

8. Partition is the intentional severance of the joint ownership by an unequivocal expression of an intention to bring out severance in the eye of law and further implementing it by actual division by metes and bounds. What was held in common as a single property gets converted into a holding in severalty and in specie. Joint ownership turns into ownership in severalty and in specie. It is true that 'partition' is not a transfer. But there must be the element of conversion as the joint ownership into ownership in severalty and in specie. Therefore, the essence of partition is that the joint ownership is put an end to and the joint owners come to hold the property in severalty and each in his own individual right. In this country, it is common that not only coparceners of a joint Hindu family but also individuals join or continue together to own property in common. If this common ownership is to be put an end to not only in theory but also in practice, there must be primarily severance of the joint ownership in the eye of law, followed up by actual physical division. We make it clear that in the present case, we are not concerned with the concept of a bare unequivocal expression of an intention to separate to bring about a division in status in a joint Hindu family. It is not unusual for parties holding properties jointly or in common to have separate enjoyment of portions for the sake of sheer convenience. But such separate enjoyment of convenience cannot be equated to partition in the eye of law and in fact, so as to say that the joint ownership has been put an end to and in its place ownership in severalty or in specie has come into existence. Separate enjoyment for the sake of convenience is one thing and partition in the eye of law is another. The latter carried with it the legal incidents of mutating the joint ownership. The latter has to pass through and satisfy a more rigorous test in law and on facts.

Furthermore, in so far as this case is concerned, as rightly put forth by the plaintiff's counsel, the defendants during the course of evidence has also not disputed the entitlement of the plaintiff's share in the suit properties as pleaded. In this connection, the first defendant examined as D.W.1 during the course of cross examination has clearly admitted that both the plaintiff as well as the defendants have shares in R.S.Nos.21 to 24 and they are enjoying the same separately and also further admitted that they had been enjoying separate portions in the above said R.S.Nos by obtaining separate pattas and accordingly, taken the plea that the parties had been enjoying the separate

shares by effecting partition. Thus, it is seen that the first defendant examined as D.W.1 has admitted the entitlement of the plaintiff's share in the suit survey numbers and all that he would plead is that the parties had already effected partition in respect of the same orally. Similarly, the 5th defendant examined as D.W.2 during the course of cross examination has also admitted the total extent of the properties available in survey Nos.21,22,23 and 24 and further admitted that in respect of the abovesaid R.S.Nos.21 to 24, the plaintiff is entitled to 1/4th share. Accordingly, when the plaintiff's share in respect of the R.S.Nos.21 to 24 has been clearly admitted by D.Ws.1 and 2 and the same has also not been controverted in the written statement, in such view of the matter, the argument put forth by the defendants' counsel that the plaintiff's suit is bereft of particulars as regards his trace of title to his share in the survey numbers by describing the Pangalees by names, as such, cannot be countenanced and particularly when the plaintiff's entitlement to his share in the suit properties as claimed in the plaint has not been controverted by the defendants either in the written statement or during the course of their evidence.

20. In the light of the above said factors, the plea of oral partition having not been established by the defendants, resultantly, it is seen that the plaintiff and the defendants are in the joint possession and enjoyment of the first item of the plaint schedule properties and accordingly, when as could be seen from Exs.A1 to A4, the plaintiff is entitled to his share in R.S.Nos.21 to 24 as detailed in the plaint, the first appellate court is wholly justified in granting the reliefs in favour of the plaintiff by setting aside the judgment and decree of the trial court.

21. The defendants' counsel also contended that plaintiff's suit is bad for non-joinder of necessary parties. In this connection, it is stated that the female members of the defendants' family, as admitted by the plaintiff during the course of his evidence, having not been made as parties to the suit, it is the contention of the defendants that the suit laid by the plaintiff is bad for non-joinder of the abovesaid female members. However, in the written statement the defendants have not taken a specific plea that the plaintiff's suit is bad for non-joinder of specific female members as now sought to be put forth. In the written statement, the defendants have very vaguely pleaded that the plaintiff's suit is bad for non-joinder of necessary parties without spelling out as to who are the necessary parties to the partition suit laid by the plaintiff. In such view of the matter, as rightly put forth by the plaintiff's counsel, the plea of non-joinder of necessary parties projected by the defendants in the written statement not taken in specific by giving out the particulars, in such view of

the matter, it is seen that the plaintiff would not be required to implead the so called necessary parties without the defendants detailing the same in their written pleas. That apart, the defendants have also not established that so called female members are also necessary parties to the plaintiff's suit. It is seen that the defendants 1 to 3 amongst themselves had effected partition of the suit properties without joining the plaintiff as well as the 4th defendant. If really, the so called female members are also entitled to any share in the suit properties, definitely the defendants would have endeavored to include the female members as parties to the partition effected by them by way of the partition deed marked as Ex.A4. On the other hand, the defendants 1 to 3 have conveniently excluded the female members and they alone had entered into the abovesaid partition and accordingly, as rightly put forth by the plaintiff's counsel, when the plaintiff has not been included therein and equally the 4th defendant is also not a party to the same, in such view of the matter, the partition effected amongst the defendants 1 to 3 by way of Ex.A4 deed would not in any manner affect the plaintiff's case or advance the defence version. Furthermore, in Ex.A4 partition deed, the defendants 1 to 3 have pleaded that upto that point of time they had been jointly enjoying the properties. If that be so, there is no explanation on their part as to how they have pleaded the suit properties had been divided long back, even during the life time of the father of the parties concerned. Therefore, it is found that the defendants had been taken inconsistent pleas as regards the partition projected by them and in that line to defeat the plaintiff's case one way or the other, it is found that they have also taken the vague plea that the plaintiff's suit is bad for non-joinder of necessary parties without specifying who are the necessary parties to be required to be impleaded by the plaintiff in the lis. When the so called female members are not shown to be entitled to the suit properties by the defendants and accordingly, the defendants having also not cared to include them in the partition effected amongst themselves under Ex.A4 and when the suit for partition cannot also be defeated merely on hazy plea of the non-joinder of necessary parties and furthermore, the defendants having failed to take the plea of non-joinder of necessary parties by giving out the details with reference to the same and accordingly when it is also noted that even the trial court had not framed any issue as regards the abovesaid plea of the defendants, in such view of the matter, it is found that the trial court has completely erred in nonsuiting the plaintiff on the abovesaid plea taken by the defendants. In this connection, a useful reference may be made to the decisions relied upon by the defendants' counsel reported in 2009 (3) CTC 760 [Balamani and another Vs. Balasundaram] and 2011 (3) Law Weekly 447 [M/s. Hindustan Petroleum Corporation Ltd., rep. By its Chief Regional Manager,

Vs. S.M.M. Mohideen Wakf-Alal - Aulad rep. By its Muthavalli, S.M.S. Abdu Khader] and 2008 (1) MLJ 200 [Vaikundam Agro Tech Limited, Trivandram rep. By General Manager Vs. State of Tamil Nadu rep. By District Collector, Kanyakumari District], and 2006 MLJ 423 [Lingappa Gounder Vs. Palanisamy Gounder and others]

Moreover, the trial court holding that the plaintiff's suit is also bad for non-joinder of necessary parties, at the same time, quite strangely granted the preliminary decree in favour of the plaintiff in respect of the second item of the suit properties.

22. Finally, the defendants' counsel would contend that the first appellate court has not formulated the points for determination for deciding the issues involved between the parties and on the above said ground alone, it is stated that the judgment and decree of the first appellate court is liable to be set aside and in this connection, he placed reliance upon the decisions reported in 2010 (13) SCC 530, 2006 (6) MHLJ 759, 2017 SCC Online SC 1009 and 2001 (3) SCC 179. However, on a reading of the judgment of the first appellate court, it is noted that the first appellate court has formulated the main point for determination as to whether the first appeal laid by the plaintiff is entitled for acceptance or not in respect of the first item of the plaint schedule properties and under the said point, it had, in detail, canvassed and discussed about the issues involved between the parties with reference to the subject matter by assessing and analysing the evidence adduced by the respective parties in toto as well as the pleadings projected by the parties with reference to the same plus the principles of law governing the same. In such view of the matter, when in all aspects, the first appellate court had gone into the entire gamut of the issues involved inter-se between the parties and accordingly consciously applied its mind and recorded its findings giving reasons thereof and when by way of the same, no serious prejudice is shown to be caused to the defendants in any manner, in such view of the matter, the contention of the defendants' counsel that the judgment and decree of the first appellate court requires to be reversed for not following the mandate of Order 41 Rule 31 CPC, as such, cannot be countenanced. On the other hand, it is seen that by the way in which the first appellate court had considered the issues involved in the matter under the main point formulated for determination and accordingly, for the reasons aforesaid, the judgment and decree of the trial court cannot be set aside by holding that it had not followed the mandate as provided under Order 41 Rule 31 and section 96 of CPC.

23. In the light of the above said reasonings, the first appellate court has rightly held that the defendants have failed to establish the plea of oral partition projected by them, based

on the appreciation of the pleadings and materials placed on record, both oral and documentary, as well as the principles of law governing the same and in such view of the matter, the substantial question of law formulated in the second appeal is accordingly answered against the defendants and in favour of the plaintiff.

24. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

mfa

Sd/-
Assistant Registrar (CS IV)

//True Copy//

Sub Assistant Registrar

To

1. The Additional District Judge at Namakkal.
2. The Subordinate Court at Trichengode.

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+1cc to Mr.N.Senthil Kumar, Advocate, S.R.No.77376/18

+1cc to Mr.N.Manokaran, Advocate, S.R.No.77515/18

सत्यमेव जयते

S.A.No.666 of 2015
and
M.P.No.1 of 2015

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