

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 24.08.2017

Judgment Pronounced on : 28.04.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.430 of 2010

1.P.Devaki
2.Sumathi @ Govindammal
3.Suguna @ Rajeshwari
4.Sulochana ... Appellants/Plaintiffs
2 to 5

Vs.

Anandan @ Rajagopal ... Respondents/Appellant/Defendant

This second appeal is filed under Section 100 of CPC, against the judgment and decree dated 16.12.2009 passed by the learned Second Additional District Judge, Pondicherry, in A.S.No.57 of 2007, reversing the Judgment and Decree dated 04.04.1994 passed by the learned Principal Sub Judge, Pondicherry in O.S.No.544 of 1986.

For Appellants : Mr.S.Balasubramaniam

For Respondents : Mr.T.Sai Krishnan for
M/s.Sai Bharath and Ilan

JUDGMENT

The above second appeal arises out of the Judgment and Decree dated 16.12.2009 passed by the learned II Additional District Judge, Pondicherry, in A.S.No.57 of 2007, reversing the Judgment and Decree dated 04.04.1994 passed by the learned Principal Sub Judge, Pondicherry in O.S.No.544 of 1986.

2. Brief facts of the plaintiff's case is as follows:-

The first plaintiff filed the suit for partition of 'A' schedule property by metes and bounds and for separate possession. During the pendency of the suit, the first plaintiff died. Hence, the legal representatives of the

first plaintiff were impleaded as plaintiffs 2 to 5. The defendant is the brother of the first plaintiff. According to the first plaintiff, the suit properties originally belonged to their father. After the demise of their father in 1950, both the first plaintiff and defendant were enjoying the same as the legal heirs. Subsequently, in the panchayat held on 14.03.1982, partition of suit property between the first plaintiff and defendant was allotted wherein the suit 'A' schedule property was allotted to the first plaintiff and the 'B' schedule property was allotted to the defendant. Then onwards they were enjoying their respective property separately. Despite the repeated demands made by the first plaintiff, the defendant was not willing to register the partition deed and evade to register the document. Hence, the first plaintiff came forward with the suit for partition seeking allotment of suit 'A' schedule property to him by metes and bounds and separate possession as per the oral partition already effected. Hence the suit.

3. According to the defendant, the suit properties has never been partitioned much less equally between them for the convenient enjoyment. It was tentatively decided that certain items of the property to be cultivated by the first plaintiff and certain items of the property to be cultivated by the defendant pending partition. It was also agreed that during the final partition, the properties is to be divided equally including the property covered under the donation deed which was executed by the father of the first plaintiff and defendant for the purpose of enabling the first plaintiff contest in Agricultural Co-Operative Society election. In the above said donation deed, 1 Kani 26 Kuzhis was donated to the plaintiff. Out of that property, the first plaintiff has sold 75 Kuzhis of the land to the third parties and the same has to be adjusted in the final partition. The defendant and the first plaintiff have also mortgaged the property covered by the donation deed jointly for the joint family necessity. There are joint family debts which have to be discharged, but the plaintiff deliberately not included the same in the partition deed. Hence, the suit is bad for non disclosure of the debts binding on the joint family property. The defendant is ready and willing for partition of joint family property including the property covered by the donation deed in to two equal shares seeking allotment of 1/2 share to himself. Hence, the suit has to be dismissed.

4. After contest, the trial Court decreed the suit as prayed for. Aggrieved upon that, the defendant preferred the first appeal and after contest, the first appellate

Court allowed the appeal and reversed the finding of the trial Court and dismissed the suit directing both parties to file a fresh suit for partition without considering Ex.A2 Partition Deed and Ex.B1 Donation deed produced by both sides in the suit. Aggrieved over the same, the plaintiffs have come forward with this Second Appeal.

5. The appellants herein raised the following substantial question of law in the second appeal.

1) Whether the finding of the lower appellate Court that Ex.A2 is an inadmissible document and the partition alleged by the plaintiff has not been proved is perverse?

2) Whether the lower appellate Court has erred in law in holding that the suit is bad for partial partition?

3) Whether the lower appellate Court has committed an error in dealing with the question of partial partition, when it is the plea of the plaintiff that there was an oral partition and the defendant has not chosen to seek a decree for partition of his share?

6. The learned counsel appearing for the appellants/plaintiffs would submit that the first plaintiff came forward with the suit for partition of 'A' schedule property by metes and bounds and for separate possession and the defendant has also agreed for partition with some modification. In such situation, the first appellate Court without considering the prayer of the both parties again directed the parties to re-agitate for partition by filing fresh suit which is unsustainable. The findings of the first appellate Court itself against law as well as the pleadings of the parties. It is further contended that the suit is based on oral partition and the plaintiff is entitled to partition. Even without proving Ex.A2, the lower appellate Court erred in concluding that there was no oral partition and Ex.A2 was not proved. The lower Court erred in concluding that the suit is based on Ex.A2 and the same is required to be registered under Section 17(1)(b) of the Registration Act. The suit is not maintainable. The lower Court failed to note that that long silence of the respondents/defendants in not challenging the donation made by his father will go against him and by his conduct, the defendant has relinquished in favour of his brother, the deceased plaintiff. Hence, the appellant contends that the appeal is to be entertained and the finding of the lower appellate Court is to be set aside.

7.Per contra, the learned counsel appearing for the respondent/defendant would submit that the defendant even though agreed for partition in the written statement, the same was made on condone that only if the plaintiff agreed for partition of all joint family properties. Hence, the first appellate Court directed the both parties to file fresh suit for partition issuing Ex.A2 and Ex.B1 documents. Thus, the appellant contended that there is no infirmity in the findings of the first appellate Court. This appeal has no merits. Hence, it is sought to be dismissed.

8.I have heard the rival submissions and also perused the materials available on record.

9.On perusal, it is clear that the plaintiff came forward with the suit for partition of 'A' schedule property alone by metes and bounds and for possession. According to the plaintiff, the suit properties are orally partitioned on 14.03.1982. However, the plaintiff has filed Ex.A2 partition deed before the trial Court. On the basis of Ex.A2, the plaintiff has obtained patta which is marked as Ex.A3. The plaintiff has also produced Ex.A4, which is patta standing jointly in the name of the first plaintiff and defendant. However, the defendant denied Ex.A2 on the ground that it was made only for the purpose of convenient enjoyment. Further, the defendant has stated that the allotment of share alleged partition under Ex.A2 is not equal. During the life time of the first plaintiff's father, he has donated 1 Kani and 25 Kuzhis in favour of the first plaintiff for the purpose of contesting the election. Thus, the defendant disputes the claim of the plaintiff and states that there was no oral partition of the property as alleged by the plaintiff and Ex.A2 was not executed as claimed by the plaintiff.

10. On the other hand, the defendant has opposed Ex.A2 on two grounds. The first one is the entire properties belonging to the joint family is not included in the partition suit. Hence, the claim of the partial partition is not tenable according to law. The second defence amount to denial of execution of Ex.A2 by stating that for the convenient enjoyment alone they have cultivated separately and not on the basis of any panchayat partition. The defendant went to the extent of saying that Ex.A2 document is put forth by the plaintiff only to cheat the defendant. Ex.A2 was executed on 14.03.1982 and at that item the defendant was 44 years old. The father of the defendants died in the year,1952. After 30 years from the

date of death of his father, Ex.A2 was executed. The defendant has not specifically mentioned in the written statement about the properties which were omitted to be included in Ex.A2 partition deed. If really the defendant is having an intention to effect partition he could have taken steps to include the properties in the schedule of properties for partition, but the defendant has not done so. Except the allegation made in the written statement, he has not come forward with the property left out. The defendant has not questioned Ex.A2 or has not taken any legal action challenging the same. He has not even the issue any legal notice to declare the Ex.A2 notice as null and void till the filing of his written statement. The written statement was filed by the defendant on 22.07.1992. It is stated that From 14.03.1983 onwards, the plaintiff is in possession and enjoyment of the 'A' schedule property without any registered document. The defendant questioned the same in the year,1992, but he has not taken any other steps. Further more, the plaintiff questioned the donation deed executed by the father of the defendant on 04.12.1964. Even at the time of execution of Ex.A2, the defendant has not raised his little finger and only 20 years latter, the defendant alleged that Ex.A2 was executed as formal document. Admittedly, the first plaintiff sold some of the donated properties to third parties. Even then, the defendant has not raised his voice against the sale made by the first plaintiff. All these years the defendant who claims that no partition took place simply kept quite without taking any action with regard to his share of the property.

11.Now, It is pointed out by the appellant/plaintiff that the defendant allegation of partial partition and invalidity of Ex.A2 document is not substantiated by the defendant with corroborative evidence. However, the first appellate Court relying upon the ruling reported in 2004 (2) MLJ 457, held that one of the Co-parcener without consent of other coparceners cannot execute a settlement deed in respect of the coparcenary property. To apply the said proposition of law, the defendant herein ought to have proved that the properties donated to the first plaintiff by his father belongs to the coparcenary. As the father of defendant himself donated property through the settlement deed, there is no proof available on record to show that the property covered under Ex.A2 is a joint family property. Hence, the said contention of the Courts below is not sustainable. The learned counsel for the defendant/respondent further contended that even though Ex.A2 partition deed was marked, the defendants is entitled to raise his objection on the question of admissibility even at a latter stage. In support of that he relied upon

the ruling reported in 2005(4) MLJ 590. Relying on the said ruling, the defendant contended that even though no objection was raised by him, while Ex.A2 was marked, the same is not fatal to his claim. It is pointed out that in the written statement itself execution of Ex.A2 is denied. It is further pointed out that the signature of the defendant found in Ex.A2 does not belong to him and as such Ex.A2 is inadmissible in evidence. However, the fact that the suit property is enjoyed separately as per the oral partition as alleged by the plaintiff is not denied by the defendant. It is only stated by the defendant that for convenient enjoyment, they are doing so. It is pointed out by the plaintiffs that the same impliedly reveals that Ex.A2 is acted upon and on that basis, the trial Court came to the conclusion after comparing the signature of the defendant in Ex.A2 which has admitted signature to hold the same is genuine one. On the other hand, the first appellate Court found that once the defendant denied her signature found in Ex.A2, it is the duty of the plaintiff to take steps to prove the same, but, the plaintiff failed to do so. Hence, lower appellate Court concluded that Ex.A2 is not admissible in evidence. However, with regard to Ex.A2, the trial Court has stated that after executing Ex.A2 before panchayat members upon own volition, the defendant ventured to say that his signature does not find place in Ex.A2. As stated above, the trial Court compared the signature of the defendant in Ex.A2 with his admitted signature and came to the conclusion that the signature found in Ex.A2 is that of the defendant only. Admittedly, the parties are in possession and enjoyment of the property as per Ex.A2. Hence, the claim of the plaintiffs that Ex.A2 was acted upon is to be accepted. Even otherwise, the plea of the plaintiffs is based on oral partition as per the pleadings and the same is found to be true. The subsequent events between the parties and delayed objection raised by the defendant were taken into account by the trial Court and it concluded that Ex.A2 is genuine and accepted. Ex.A2 is stated to be executed in the village in the presence of elders for the purpose of amicable settlement. From 1982 to till filing of the suit, the defendant has not taken any steps to question the same. Further more, the defendant has not paid court fee for partition. Even though he was willing to effect partition, failed to disclose the property which are omitted by the plaintiff in the suit and also failed to take steps to include the properties in the suit for partition and all these things paved way for the trial Court to come to the conclusion that the defendant objected the admissibility of Ex.A2 at the later stage for the sake of the case suit defence only. The trial Court considered the circumstances as well as the real intention between the parties to arrive

at the conclusion.

12. When there is overwhelming evidence both ocular and documentary to show that the suit property is in enjoyment from 1982, when oral partition took place, it is not proper for the lower appellate Court to die suit the plaintiffs. For the above said reasons, the substantial question of law is answered in favour of the appellants/plaintiffs and the second appeal is to be allowed. The point is answered accordingly.

13. In the result, the second appeal is allowed. The Judgment and Decree dated 16.12.2009 passed by the learned Second Additional District Judge, Pondicherry, in A.S.No.57 of 2007 is hereby set aside and the judgment and decree of the trial Court dated 04.04.1994 passed in O.S.No.544 of 1986 is restored. No costs.

Sd/-
Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

rrg
To

1. The II Additional District Judge,
Pondicherry.

2. The Principal Sub Judge,
Pondicherry.

3. The section officer,
VR Section,
High court
Madras

(2 Copies)

+2cc to M/s. Sai Bharath and Ilan, Advocate SR.No. 31956
+1cc to Mr. S. Balasubramaniam, Advocate SR.No. 31953

S.A.No.430 of 2010

ASK(04/01/2019)