

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 19.07.2017

Judgment Pronounced on : 07.06.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.727 of 2011
and M.P.1/2011 & 1/2012

Kuppusamy ... Appellant/1st Defendant

Vs.

1.Valliammal
2.Kandammal @ Pappathi
3.Saraswathi ... Respondents 1 to 3/Plaintiffs
4.Devaraj
5.Kandammal
6.Pooncholaiammal ... Respondents 4 to 6/Defendants 2 to 4

This second appeal is filed under Section 100 of CPC, against the judgment and decree dated 01.02.2011 passed by the learned Subordinate Judge, Dharmapuri, in A.S.No.11 of 2010, confirming the Judgment and Decree dated 07.01.2010 passed by the learned District Munsif Court, Dharmapuri, in O.S.No.196 of 2006.

For Appellants : Mr.P.Valliappan

For Respondents : M/s.P.Mani

JUDGMENT

The above second appeal arises out of the Judgment and Decree dated 01.02.2011 passed by the learned Subordinate Judge, Dharmapuri, in A.S.No.11 of 2010, confirming the Judgment and Decree dated 07.01.2010 passed by the learned District Munsif Court, Dharmapuri, in O.S.No.196 of 2006.

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

According to the plaintiffs the suit properties belonged to the joint family consisting of the plaintiffs and the defendants. The plaintiffs and the 3rd defendant are sisters and

defendants 1 and 2 are brothers and the 4th defendant is the mother of both parties and wife of the deceased Govinda Gounder. The father of the plaintiffs and defendants 1 to 3 and husband of the 4th defendant is one Govinda Gounder, who died nine years back from the date of plaint, leaving behind the plaintiffs and defendants as his legal heirs. After the death of the said Govinda Gounder both parties were in joint possession of the suit properties and when the plaintiffs demanded partition the defendants refused for the same. Hence the plaintiffs came forward with this suit for partition of the 3/21 shares by metes and bounds and for costs.

3. The 1st defendant denied the rights of the plaintiffs on the grounds that the suit properties were orally divided between the defendants 1 and 2 and their father Govinda Gounder in the year 1992 and the property purchased in the name of the 4th defendant was also divided into two portions and already one portion was with the 1st defendant and another portion with the father Govinda Gounder and all the three cultivated their respective shares separately. The rights of the plaintiffs are ousted as they got married even before 1989. Hence they are not entitled to seek any partition. Thus the first defendant sought for dismissal of the suit.

4. According to defendants 2 to 4, there is no cause of action against them and they are agreeing for partition and seeks to decree the suit granting the plaintiffs 3/7 shares and the second defendant 1/7th share in the suit property.

5. Before the trial Court, on the side of the plaintiff P.W.1 was examined and documents Ex.A1 to Ex.A6 was marked. The defendant examined D.W.1 and D.W.2 produced documents Ex.B1 to Ex.B5 to prove their contention. After contest, the trial court decreed the suit as prayed for. Aggrieved upon that the 1st defendant preferred 1st appeal and after contest the 1st appeal was also dismissed. Hence, this second appeal is preferred by the first defendant to the suit.

6. The learned counsel for the appellant has raised the following substantial question of law:

A) Whether the Courts below are correct in law in granting decree for partition in respect of the suit properties, which were already partitioned by the appellant, 4th respondent and their father Govindan, way back in the year, 1992, by disbelieving the oral partition, pleaded by the appellant?

B) When oral partition is permissible and recognized in Hindu law, whether the Courts below are correct in rejecting the oral partition pleaded and proved by the appellant?

C) Whether the Courts below and correct in law in their consideration of the earlier proceedings under Exhibits B2 to B5?

D) Whether the Courts below are correct in law in ignoring the admissions made by P.W.1., which will negate the case of the respondents 1 to 3 ?

E) Whether the Courts below are correct in law in holding that the respondents 1 to 3 have 1/21 share over the suit properties, in the absence of any evidence to prove their claim?

F) Whether the Courts below are correct in law in assuming that admittedly the suit properties are ancestral, on surmises and conjecture?

7. The learned counsel appearing for the appellant/1st defendant submitted that under Hindu Law oral Partition is recognized and permitted. There was a oral partition in the year 1992 in the family of the plaintiffs and defendants and as per the above said partition, the defendants 1 and 2 are in possession and enjoyment of their share of the suit properties separately and to prove the same the appellant has produced Ex.B1 to B5, but the courts below simply ignored the same. The cause of action for suit arose on the death of the father of the plaintiffs 10 years back. Moreover the plaintiffs got married before 1989. Hence the rights of the plaintiffs is ousted. But the courts below failed to consider the defence raised by the appellant. As the conclusion of both the Courts below is against law, interference of the same by this Court is necessary and thus seeks to allow the appeal and dismissed the suit filed by the plaintiffs/respondents.

8. Per contra, the learned counsel appearing for the respondents would submit that both the courts below elaborately discussed both oral and documentary evidences and arrived at a correct conclusion. Hence, there is no need or scope for interference. It is also pointed out that the alleged oral partition as claimed by the defendant is not proved and therefore the plaintiffs are entitled to seek partition in the suit property which is the ancestral property. Hence, the plaintiff/respondent seeks dismissal of the appeal.

9. I have considered the rival submissions and perused the materials available on record.

10. On perusal, it reveals that the suit properties belonged to Govinda Gounder who is the father of the plaintiffs and defendants 1 to 3 and husband of 4th defendant. Admittedly the said Govinda Gounder died 10 years back from the date of

plaint i.e.12.10.2006. The said Govinda Gounder Probably died in the year 1996. The fact that the plaintiffs got married before 1989 is also not disputed. Hence it is contended by the defendant is that the plaintiffs are not entitled to claim partition under Act 1/90 and Act 39/2005 of Hindu Succession Act. The plaintiffs claimed 3/21 shares only in the suit property. Whether the claim of plaintiffs is according to law is to be ascertained. The succession opened in the year 1996 i.e. on the date of death of father of the plaintiffs Govinda Gounder. At that time Act 1/90 was in force. To invoke Act 1/90 there are two disqualifications, first one is before 25.3.1989 if female has got married and the second one is before that date partition has took place in the family that female is not entitled for partition in the ancestral properties. In the case on hand admittedly before 1989 plaintiffs got married hence the plaintiffs are not entitled to invoke Act 1/90. So the plaintiffs are entitled to partition only under the Hindu Succession Act, 1956. As per this act, Section 6 will come into operation with regard to ancestral properties. The defendants 1 and 2 and their father Govinda Gounder are coparceners. They are equally entitled to 1/3 share each. On the death of Govinda Gounder notional partition has to be effected as per Section 6 and 1/3 share is to be allotted to the deceased Govinda Gounder. The said allotted 1/3 share shall devolve upon the legal heirs of the deceased Govinda Gounder as per Section 8 of Hindu Succession Act 1956. As per section 8 Class I heirs are namely son, daughter, wife and mother. Admittedly mother is not available. Defendants 1 and 2 are sons, plaintiffs and 3rd defendant are daughters, 4th defendant is the wife. So all the 7 class Ist heirs of deceased Govinda Gounder are equally entitled to 1/3 share of Govinda Gounder share of the property. Thus, the sons of Defendants 1 and 2 as coparcener and each entitled to 1/3 as per Section 6 and each class Ist heir is entitled to 1/7 of 1/3, as per Section 8. So the common shares arrived at $\frac{1}{3} + \frac{1}{7} = \frac{8}{21}$ each. The plaintiffs and defendants 3 and 4 entitled to each $\frac{1}{21}$. So the plaintiffs jointly entitled to claim for partition of $\frac{3}{21}$ shares. The plaintiffs claimed the same. Hence the claim of the plaintiffs as $\frac{3}{21}$ shares is correct and the same in according to law.

11. The only defence put forth by the 1st defendant is that in the year 1992 there was a oral partition between the defendants 1 and 2 and their father deceased Govinda Gounder. From the date of oral partition they are in possession and enjoyment of the suit properties of their respective share. To substantiate his claim, the first defendant examined himself as DW1 and produced Ex.B1 to B5. To corroborate his evidence the 1st defendant has not produced any other oral evidence. As per

the evidence of DW1, oral partition took place in the presence of panchayatars, but the said panchayatars have not been examined to prove the same. The 1st defendant has not let in any oral evidence with regard to Ex.B1 settlement deed. Moreover with regard to Ex.B1 no pleadings is available in his written statement. Ex.B2 to 5 relates to the suit proceedings in O.S.No.179/06. The above said suit relates to the property which stands in the name of 4th defendant. According to 1st defendant that property was purchased in the name of 4th defendant from the joint family funds. This is the defence of the 1st defendant in the above suit also. The above said suit is not yet disposed. The 1st defendant has not produced any documentary evidence to show that the property standing in the name of 4th defendant was purchased from the joint family funds. As per Hindu Law, the oral partition was permitted subject to proof that oral partition was acted upon and mutation entries were entered as per the oral partition and it should be proved through the oral evidence of participants of oral partition namely the panchayatars. But, in the case on hand is concerned, on the side of the 1st defendant neither independent oral evidence nor documentary evidence to prove his defence of oral partition is let in. In such circumstances, mere allegation of oral partition alone is not sufficient, unless and until it is to be proved. But the 1st defendant miserably failed to prove the same. Further nothing is stated about the persons who took partition the panchayatars. Hence, the Courts below rightly negated the claim of the 1st defendant as they failed to prove their contention with acceptable evidence.

12. From the above discussion, it is very clear that the 1st defendant failed to prove the alleged oral partition of 1992. The trial Court as well as the 1st appellate Court elaborately discussed both oral and documentary evidences and came to the correct conclusion that the plaintiff is entitled to get partition as prayed for in the suit. In view of the above said reasons, the substantial question of law are answered against the appellant and there is no need or necessary to interfere with the concurrent finding of the both the Courts below. The point is answered accordingly.

13. In the result, this Second Appeal is dismissed. No costs. The decree and judgment dated 01.02.2011 passed by the learned Subordinate Judge, Dharmapuri, in A.S.No.11 of 2010 is hereby confirmed. Consequently, connected MP's closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Subordinate Judge,
Dharmapuri.

2.The District Munsif Court,
Dharmapuri.

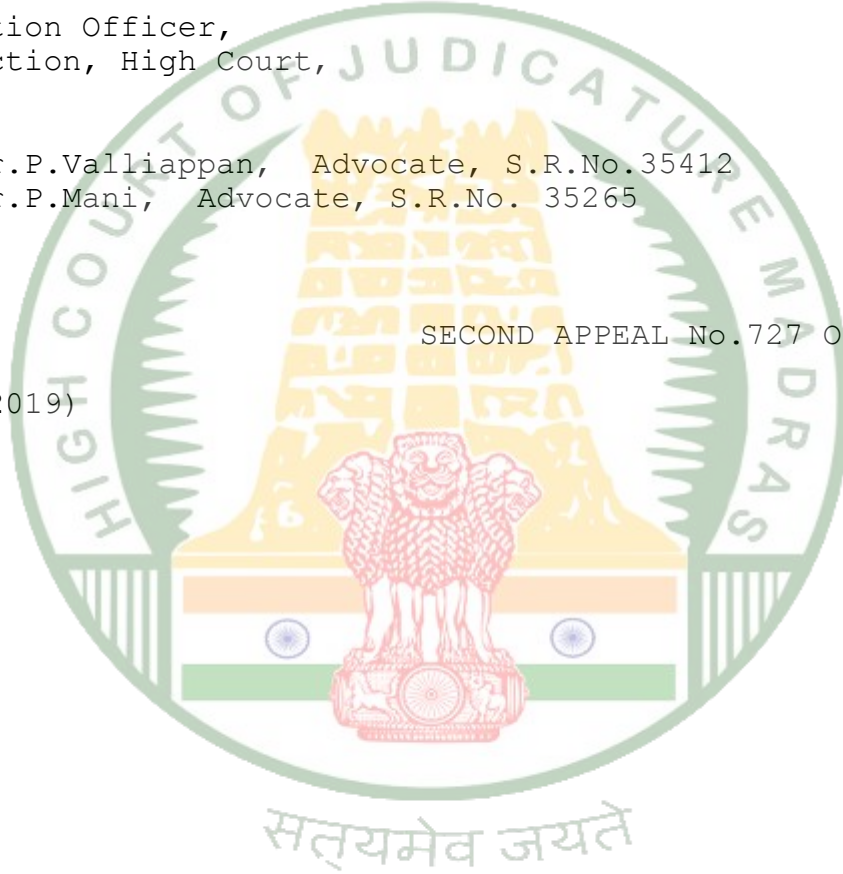
3.The Section Officer,
V.R. Section, High Court,
Madras.

+1cc to Mr.P.Valliappan, Advocate, S.R.No.35412

+1cc to Mr.P.Mani, Advocate, S.R.No. 35265

SECOND APPEAL No.727 OF 2011

RSI (CO)
GN(04/01/2019)



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