

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.03.2018

PRONOUNCED ON:28.03.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.2160 of 2003
and
C.M.P.No.20014 of 2003

1.Kamatchi Ammal
2.Rajendran
3.Chitra
4.Selvi
5.Kumari
6.Rajaram
7.Minor Geetha
(7th appellant rep.
by her mother guardian Kamatchi)

... Appellants 1 to 7/Defendants 2 to 8

Vs.

1.Vajravelu Gounder(deceased) ... 1st Respondent/Plaintiff
2.V.Lakshmi Ammal
3.V.Pattusamy ... Respondents 2 to 3
4.V.Ramalingam
5.V.Kamaraj
6.V.Ganesan
7.V.Palani
8.Mrs.Parvathi

[RR2 to R8 brought on record
as L.R's of the deceased sole
respondent vide order of the
Court dated 10.12.2014 made
in C.M.P.No.786 of 2010 in
S.A.No.2160 of 2003]

सत्यमेव जयते ... Respondents 4 to 8

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree of the District Judge's Court at Tiruvannamalai, dated 24.09.2003 in A.S.No.70 of 2003, reversing the Judgment and Decree of the Additional District Munsif No.1 at Thiruvannamalai, dated 20.03.2002 in O.S.No.258 of 1997.

For Appellants : Mr.P.Dinesh Kumar
M/s. Sarvabhauman Associates

For Respondents : Mr.P.Mani

J U D G M E N T

This second appeal is directed against the judgment and decree dated 24.09.2003 passed in A.S.No.70 of 2003 on the file of the District Court, Thiruvannamalai reversing the judgment and decree dated 20.03.2002 passed in O.S.No.258 of 1997 on the file of the Additional District Munsif Court No.I, Thiruvannamalai.

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

3. Suit for declaration and permanent injunction.

4.The suit property originally belonged to Kulla Gounder, who had three sons namely Pattusamy Gounder, Chinnaiya Gounder and Muthusamy Gounder and the three brothers abovestated divided, the properties by way of a registered partition deed dated 26.11.1923 and originally the suit property in suit survey number 29/2, 0.10 cents was kept in common. There was a partition of the abovesaid suit property between the brothers some 60 years ago and the suit property fell to the share of Pattusamy Gounder and he was in possession and enjoyment of the same, till his death and his two sons namely Ganesan and Nanda Gopala Krishnan divided the suit property and other properties by way of registered partition deed dated 07.09.1949 and the suit property fell to the share of Ganesa Gounder and Ganesa Gounder had two sons namely the plaintiff Sundaram and Mani and one daughter Parasakthi and in the oral partition effected amongst them, the suit property fell to the share of the plaintiff and the plaintiff has been in possession and enjoyment of the suit property, by putting up the thatched house and running a petty shop and firewood shop and and obtained electric service connection and the first defendant, who is the son of Muthusamy Gounder has no share in the suit property and while so, the first defendant claiming the right over the suit property, attempted to trespass into the suit property without any legal right and hence according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5.The case of the defendant in brief is that the suit laid by the plaintiff is not maintainable either in law or on facts. It is true that the sons of Kulla Gounder partitioned their properties, by way of a partition deed dated 26.11.1923 and it is false to state that subsequently the suit property fell to

the share of Pattusamy Gounder and the defendants are not aware of the partition effected amongst the sons of Pattusamy Gounder and the plaintiffs are put to strict proof of the partition deed dated 07.09.1949. According to the defendants, the first defendant is the exclusive owner of the suit property and in possession and enjoyment of the same and the suit property has not been properly described. The suit survey number 29/2 had been sub divided as 29/2A to 29/2F and the plaintiff has not given the subdivision number in the plaint schedule. Ganesa Gounder, Chinnaiya Gounder, and the mother of the first defendant namely Valliammal partitioned the suit property and other properties by the virtue of the partition deed dated 26.07.1954, by way of which, the suit property was allotted to the share of the first defendant's mother and since then, it is only Valliammal, who had been in possession and enjoyment of the suit property and the first defendant being her sole legal heir is entitled to the same and the first defendant had dealt with the suit property for obtaining loan etc., and it is only the first defendant, who has been in possession and enjoyment of the suit property, by putting up a flour and oil mill and therefore, the plaintiffs are entitled to the reliefs sought for.

6. In support of the plaintiff's case, P.Ws.1 and 2 were examined. Exs.A1 to A15 were marked. On the side of the defendant, D.W.1 was examined. Exs.B1 to B5 were marked. Exs.C1 and C2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to dismiss the suit. On appeal, on an appreciation of the materials placed on record, the first appellate court was pleased to set aside the judgment and decree of the trial court and by way of allowing the appeal preferred by the plaintiff, decreed the suit as prayed for. Impugning the same, the present second appeal has been laid.

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

When Ex.B1 shows that there could not have been in oral partition prior to 1949 in respect of the 10 cents of land left to be enjoyed in common in the partition deed dated 16.11.1923 has not the lower appellate court committed an error of law in not evaluating Ex.B1, the registered partition deed, to hold that there could not have been an oral partition prior to 07.04.1949?

9.The suit property has been described as situated in dry S.No.29/2, 2.76 acres in this 0.10 cents, out of this, 0.03 cents within specific boundaries in the suit village. Materials placed on record would go to show that survey number 29/2 has been sub divided into various sub divisions and it is thus found that despite the same, the plaintiff has not given the clear description as to in which subdivision of the survey number 29/2, the suit property consisting of 0.03 cents is located. It is thus found that very vaguely the suit property has been stated to be located in suit survey number 29/2 without specifying the subdivision number as above stated.

10.There is no dispute between the parties that the property in survey number 29/2, 0.10 cents as well as the other properties originally belonged to Kulla Gounder and the three sons of Kulla Gounder namely Pattusamy Gounder, Chinnaiya Gounder and Muthusamy Gounder divided the properties amongst themselves, by way of a partition deed dated 26.11.1923, the copy of which has come to be marked as Ex.A1. It is also not in dispute that under the said partition deed, the property in suit survey number 29/2 0.10 cents has been left in common to the sharers and it is thus evident that the abovesaid, property has not been divided amongst the three sons of Kulla Gounder and the same had been earmarked to be enjoyed by all the sons in common. From the materials placed, it is found that the abovesaid property has been described in the "E" schedule of the partition deed Ex.A1.

12.It is the case of the plaintiff that the property comprising in suit survey number 29/2 0.10 cents kept in common under Ex.A1 was subsequently divided amongst the three sons of Kulla Gounder about 60 years ago and it is the further case of the plaintiff that the suit property had been allotted to the share of Pattusamy Gounder in the said partition. The suit has come to be laid by the plaintiff in the year 1997. Taking cue from the same, it could be seen that the above said partition projected by the plaintiff would have taken place during 1937. The plaintiff has not whispered that the above said partition has been effected by a registered instrument. It is therefore seen that the partition pleaded by the plaintiff 60 years ago, when only be, assuming the same to be a true oral partition. No valid proof has been placed by the plaintiff to show such an oral partition took place amongst the three brothers during 1937 and that in the said partition, the suit property had been allotted to Pattusamy Gounder and thereafter, it is only Pattusamy Gounder, who has been in possession and enjoyment of the suit property as the absolute owner thereof. It is therefore seen that, absolutely no material worth acceptance has been projected by the plaintiff to show that the suit property had come to be allotted to Pattusamy Gounder in the alleged oral

partition which took place during 1937 amongst the sons of Kulla Gounder.

13. Further according to the plaintiff, after the demise of Pattusamy Gounder, his two sons namely Ganesa Gounder and Nanda Gopala Krishnan divided the properties belonging to Pattusamy Gounder including the suit property and it is stated that the suit property fell to the share of Ganesa Gounder and that he has been in possession and enjoyment of the same. The above said partition between Ganesa Gounder and Nandha Gopala Krishnan is stated to have taken place by way of a registered partition deed dated 07.09.1949 and the said document has been marked as Ex.A2. On a perusal of Ex.A2, as rightly found by the trial court, nothing has been whispered in the said document that the suit property, in particular had been allotted to Pattusamy Gounder in the alleged oral partition effected amongst the three sons of Kulla Gounder during 1937. If there had been an oral partition amongst the three sons of Kulla Gounder as regards the left out common property i.e., survey number 29/2 0.10 cents during 1937, definitely a reference about the same would have incorporated in Ex.A2. On the other hand, the source of title of Pattusamy Gounder to the suit property in particular, has not been disclosed in Ex.A2. This itself would go to show that inasmuch as the left out common property i.e., survey number 29/2 0.10 cents had not been subsequently orally divided amongst the sons of Kulla Gounder during 1937 as put forth by the plaintiff, no reference about the same has been made in Ex.A2. As above mentioned, the plaintiff has failed to establish by placing reliable and acceptable materials that since 1937, it is only Pattusamy Gounder, who has been in possession and enjoyment of the suit property as the absolute owner thereof.

14. According to the defendants, the suit property continued to remain joint, till the death of Muthusamy Gounder and it is the case that only after the death of Muthusamy Gounder, the plaintiff's father namely Ganesa Gounder, Chinnaiya Gounder, S/o Kulla Gounder Valliammal W/o of Muthu samy Gounder partitioned the suit property and other properties, by virtue of a registered partition deed dated 26.07.1954, by way of which, according to the defendants, the suit property was allotted to the share of the first defendant's mother Valliammal and it is found that, it is the case of the defendants that Valliammal, thereafter the first defendant alone are entitled to the suit property and accordingly the same is in their possession and enjoyment absolutely and therefore, the plaintiff cannot lay any claim of title in respect of the suit property. The partition deed dated 26.07.1954 has come to be marked Ex.B1 and the copy of the same has been marked as Ex.A15. A perusal of Ex.B1/A15 would go to show that there are clear recitals contained therein pointing out that the left out common property

that is survey number 29/2 0.10 cents, had been enjoyed till date in common, by all the three sons or three branches of Kulla Gounder. Ex.B1 as above seen is dated 26.07.1954. Kulla Gounder had three sons namely Pattusamy Gounder, Chinnaiya Gounder and Muthusamy Gounder. In the partition deed Ex.B1, the three branches are represented namely Ganesa Gounder, the plaintiff's father represented Pattussamy Gounder's branch, Chinnaiya Gounder is the son of Kulla Gounder and Valliammal, Wife of Muthusamy Gounder represented the branch of Muthusamy Gounder. When they had clearly recited in Ex.B1 that till the date of Ex.B1, the left out common property i.e., survey number 29/2 0.10 cents had been enjoyed in common by all the branches and there are also recital that after the partition effected during 1923, the left common properties had not been subjected to any encumbrance by way of alienation as such., the case of the plaintiff that there had been a oral partition amongst the three sons of Kulla Gounder during 1937, in respect of the left out common property i.e., survey number 29/2 0.10 cents is found to be false and unacceptable. If really, the oral partition pleaded by the plaintiff alleged to be effected during 1937 is true, and if really the suit property was also the subject matter of the partition dated 07.09.1949 marked as Ex.A2 legally and if really the suit property had been allotted to Ganesa Gounder, by way of the said partition deed Ex.A2, Ganesa Gounder would not have been a party to Ex.B1/A15 partition deed and would also not have accepted the recitals as to the three branches of Kulla Gounder enjoying the left out common property i.e., survey number 29/2 0.10 cents, in common till the date of Ex.B1/A15, and on the other hand, when it is found that Ganesa Gounder is admittedly a party to Ex.B1/A15 and when there are clear recitals in Ex.B1/A15 that the left out common property has been enjoyed in common till date, the case of the plaintiff that the same had been the subject of the oral partition effected during 1937 amongst the sons of Kulla Gounder and the further case of the plaintiff that the suit property had come to be allotted to Pattusamy Gounder in the alleged oral partition is preposterous and unacceptable and cannot be countenanced in any manner.

15.Unable to conceal the abovesaid facts starring at the face, the plaintiff during the course of his evidence has admitted that after Ex.A1 partition deed, the three sons of Kulla Gounder did not effect any partition till the demise of Muthusamy Gounder and only after the death of Muthusamy Gounder during 1954, they had chosen to effect the partition and it is correct to state that the partition effected amongst the three branches after Ex.A1 is only by way of Ex.A15 and there had been no partition or division during the interrugnum period. Thus from the above said evidence of the plaintiff as well as the details noted supra, it is clearly understood that after the partition effected by way of Ex.A1 on 26.01.1923, as regards the

left out common properties, there had been no division amongst the three sons of Kulla Gounder till Ex.A15 and accordingly, it is found that clear recitals are incorporated in Ex.B1/A15 as to the common enjoyment of the left out properties, by all the three branches and also the recital that there had been no encumbrance effected in respect of the left out properties by way of alienation etc., Hence the plaintiffs' case that the suit property had come to be allotted to his grandfather Pattusamy Gounder as such cannot be accepted in any manner.

16.However, it is argued by the plaintiff's counsel that the boundary recitals found in Ex.A2 and Ex.B1/A15 would go to show that there had been partition amongst the three sons of Kulla Gounder prior to 1949 i.e. Ex.A2 partition deed and therefore on that basis the Court should hold that the oral partition pleaded by the plaintiff during 1937 is true and that in the said oral partition, the suit property had been allotted to Pattusamy Gounder. However, when with reference to the said oral partition, there is no material worth acceptance has been placed by the plaintiff and on the other hand, the materials placed on record proves otherwise as above discussed, the plaintiff cannot assume that as described in Ex.A2 partition deed, the suit property had been allotted to the grandfather Pattusamy in the alleged 1937 oral partition and that the same had been the subject matter of Ex.A2 partition deed. Only when the plaintiff establishes the oral partition effected during 1937 and also further establishes that Pattusamy Gounder had been allotted the suit property as described in the plaint, merely from the boundary recitals contained in Ex.A2 as well as in Ex.B1/A15, we cannot come to the conclusion that, an oral partition took place amongst the three sons of Kulla Gounder in respect of the left out common property during 1937 and that the suit property had been allotted to the share of Pattusamy Gounder in the alleged oral partition.

17.As rightly noted by the trial court, the materials placed on record particularly, the documents placed by the plaintiff would only go to show that the plaintiff has been paying charges only in respect of the Poramboke land in his possession and enjoyment and the license projected by him also projects only to the Poramboke lands and such being the position, the plaintiff having failed to place any acceptable and reliable materials to evidence that the suit property has been in his possession and enjoyment legally, it is found that as rightly determined by the trial court, the plaintiff has failed to establish the possession and enjoyment of the suit property as described in the plaint and accordingly no clear reference about the suit property are found in the documents projected by the plaintiff and thus it is found that the trial court has rightly come to the conclusion that the suit property is not in the possession and enjoyment of the plaintiff, as the plaintiff has no valid title to the same

and on the other hand, it is found that by virtue of the partition effected under Ex.B1/A15, the suit property had been allotted only to the first defendant's mother and the first defendant is in possession and enjoyment of the suit property and thus it is found that the plaintiff's father being a party to Ex.B1/A15 is bound by the recitals contained therein and the plaintiff cannot wriggle out of the effect of the recitals contained in Ex.B1/A15 and thereby project a case as if the suit property had been allotted to his father's share by way of Ex.A2 partition deed. As rightly determined by the trial court when the plaintiff has failed to establish that the suit property had been allotted to his grandfather Pattusamy Gounder during the alleged oral partition 1937, the partition projected by the plaintiff marked as Ex.A2 is found to be invalid as far as the suit property is concerned and it is thus found that the plaintiff's title to the suit property cannot be declared on the basis of Ex.A2 partition deed.

18.In the light of the abovesaid reasonings, the first appellate court had failed to consider that Ex.B1/A15 partition deed disclose that there could not have been an oral partition prior to 1949 in respect of the left out common property i.e. survey number 29/2 0.10 cents, by not appreciating the materials placed on record in the correct perceptive and accordingly committed a serious error, which had resulted in a miscarriage of justice and thereby further erred in upholding the plaintiff's case as if, the suit property had been allotted to Pattusamy Gounder during the 1937 oral partition and thereafter, the same had come to be allotted to the plaintiff's father by way of Ex.A2 partition deed. The substantial question of law formulated in the second appeal is thus answered against the plaintiff in favour of the defendants.

19.The counsel for the appellant in support of his contentions placed reliance upon the decisions reported in 2012 (8) SCC 516 [Ahmedsaheb (dead) by Lrs. Vs. Sayed Ismail], 2017 (2) CTC 678 [Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar Vs. Chandran and others, 2018 (1) Law weekly 62 [Manickammal (deceased) and others Vs.R.Jayaraman (died) and others], 1999(1) MLJ 769 and 2014 (2) SCC 269[Union of India and others Vs. Vasavi Cooperative Housing Society Limited and Others] The principles of law outlined in the above said decisions are taken into consideration as followed as applicable to the case at hand.

20.In conclusion, the judgment and decree dated 24.09.2003 passed in A.S.No.70 of 2003 on the file of the District Court, Thiruvannamalai are set aside and the judgment and decree dated 20.03.2002 passed in O.S.No.258 of 1997 on the file of the

Additional District Munsif Court No.I, Thiruvannamalai are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1. The District Judge,
Tiruvannamalai.

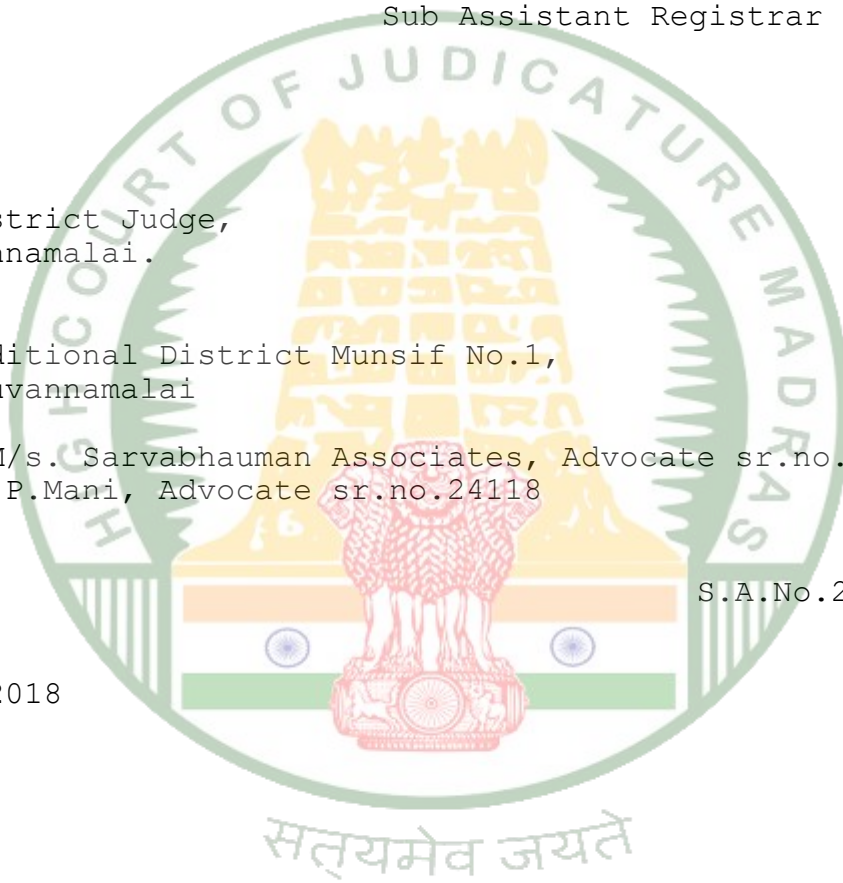
2.The Additional District Munsif No.1,
Tiruvannamalai

+1cc to M/s. Sarvabhauman Associates, Advocate sr.no.24436

+1cc to M.P.Mani, Advocate sr.no.24118

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