

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 14.02.2019

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.667 of 2008 &
M.P.No.1 of 2008

Mr.Balarama Gounder

...Appellant

Vs

1. Mr.Murugesu Gounder

2. Mr.Kuppusamy

...Respondents

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 18.12.2007 in A.S.No.29 of 2006 on the file of the Principal Subordinate Court, Thiruvannamalai modifying the judgment and decree dated 27.12.2005 in O.S.No.429 of 2003 on the file of the Principal District Munsif, Thiruvannamalai.

For Appellant : Mr.R.Rajarajan
for M/s.G.Rajan
For Respondents : Mr.K.Goviganesan - R1
No appearance - R2

JUDGMENT

This second appeal has been filed as against the decree of the first appellate Court granting partition for dividing the suit property in to two equal shares in respect of Item No.1 and 2.

2. This Second Appeal has been admitted on the following substantial questions of law :

1. Is not the first appellate Court wrong in law by drawing the decree not in agreement with the judgment as against the mandatory provision of Order 20 R.6 of CPC.

2. Is not the first appellate Court erred in law by not invoking its power under Order 41 R.33 to render substantial justice among parties.

3. The respondent is the plaintiff before the trial Court and he is the elder brother of the appellant. The plaintiff has filed the suit claiming declaration in respect of item Nos.1 and 3 and for partition in respect of Item No.2. The trial Court decreed the suit for declaration in respect of Item Nos.2 and 3. However, granted partition in respect of item No.1. As against which the plaintiff has filed the first appeal. The first appellate Court partly allowed the appeal and dismissed the suit in respect of Item No.3. However, granted partition dividing the suit property in respect of Item 1 and 2 into two equal shares and as against which the present appeal has been filed the defendant.

4. The main contention of the appellant before this Court is that though the first appellate Court has confirmed the decree of the trial Court as far as the Item No.1 and 2 are concerned, the first appellate Court has specifically found that there was an oral partition already took place between the parties in respect of Item No.1 and they are in possession of the property as per their oral partition. Once, the partition is complete by metes and bound, again granting a decree for dividing the property does not arise at all. Only for limited purpose, this Second Appeal has been filed.

5. The learned counsel appearing for the respondent has also not disputed the fact that the earlier partition has already taken place in respect of Item No.1 of the suit property. The Courts below have confirmed the oral partition and granted a decree for equal share in respect of Item Nos.1 and 2. Therefore, it is the contention of the respondent that there is no legality in the decree passed by the first appellate Court.

6. A perusal of the records, particularly, the evidence of the parties and the findings of the first appellate Court reveals that the first item of the property has already been orally partitioned between themselves and sub divided as 4A and 4B and the appellant is in possession of 2/4B and the respondent is in possession of 2/4A and the item has been sub divided among themselves and pattas have already been granted and the properties have been divided by metes and bounds. The learned counsel for the respondent has also admitted the above fact. The possession of the respective properties is also not in dispute as far as the division took place in the oral partition.

7. In view of the fact that an oral partition has already took place and the parties were enjoying the properties by metes and bounds, this Court is of the view that again directing the parties to divide the properties, particularly, Item No.1, by metes and bounds does not arise at all. That will have serious

impact. Therefore, once partition is agreed and settled between the parties, the same cannot be reopened once again. The first appellate Court having found that the first item of the property has already been divided between the parties and patta also stands in their name, ought not to have granted decree once again to divide the property into two equal shares in respect of Item No.1. Therefore, the decree of the first appellate Court dividing the property, namely the first item of the suit property in to two equal shares is liable to be set aside. It is admitted by the appellant that he is in possession of Survey No2/4B after sub division. Similarly, the respondent is in possession of the property in Survey No.2/4A with specific boundaries. The substantial questions of law is answered accordingly.

8. Accordingly, this Second Appeal is partly allowed and the decree of the first appellate Court dividing the first item of the suit property is hereby set aside. In other aspects, the judgment and decree of the first appellate Court is confirmed. Consequently, the connected miscellaneous petition is closed. No cost.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

vrc

Sub Assistant Registrar

To

1. The Principal Subordinate Judge,
Thiruvannamalai.
2. The Principal District Munsif,
Thiruvannamalai.

copy to: The Section Officer,
VR Section, High Court, Madras.

+1 cc to Mr.K.Govi Ganesan, Advocate, S.R.No.13695

+1 cc to Mr.G.Rajan, Advocate, S.R.No.13384

Second Appeal No.667 of 2008

SSV(CO)
SSM(06/05/2019) .