



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 21.03.2019

Delivered on: 22.05.2019

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THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.25 of 2013

and

M.P. No.1 of 2013

1.Annamalai
S/o.Subban

2.Annamalai
S/o.Annamalai

... Appellants

Vs.

1.Unnamalai

2.Vibushanan

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 27.02.2012 in A.S.No.7 of 2011 on the file of the Sub-Court, Tirupattur, Vellore District, confirming the decree and judgment dated 28.09.2010 in O.S.No.38 of 2007 on the file of the District Munsif Court, Tirupattur, Vellore District.

For Appellants : Mr.K.Ashok Kumar
for Mr.V.Jeevagiridharan

For Respondents : Mrs.Elizabeth Ravi
for Mr.P.Raja for R1

: R2- Set exparte

JUDGMENT

This Second Appeal has been filed by the defendants 1 and 2 against the judgment and decree passed by the Sub-Judge, Tirupattur, Vellore District in A.S.No.7 of 2011 dated 27.02.2012 confirming the judgment and decree passed by the District Munsif, Tirupattur, Vellore District in O.S.No.38 of 2007 dated 28.09.2010.



2. The first respondent herein had filed a suit in O.S.No.38 of 2004 on the file of the District Munsif, Tirupattur, Vellore District, to declare her title over the suit properties and for permanent injunction restraining the defendants, their men, etc., from committing trespass into the suit properties. The learned District Munsif, Tirupattur by the judgment dated 28.09.2010 had decreed the suit as prayed for. Aggrieved by the same, the defendants 1, 2 and 5 had filed an appeal in A.S.No.7 of 2011 on the file of the Sub-Judge, Tirupattur, Vellore District. The learned Sub-Judge, by the judgment dated 27.02.2012 had dismissed the said appeal confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the defendants 1 and 2 have filed the present Second Appeal.

3. For the sake of convenience, the parties are referred to as described before the trial Court.

4. The averments made in the plaint are, in brief, as follows:-

The suit properties originally belonged to the plaintiff's father Subramani. The patta was standing in his name and he was paying kist to the Government. The said Subramani had a wife Thikkiammal, and three daughters namely, Unnamalai, (plaintiff), Inbavalli and Sakthi. There was an oral partition in the family in which 1/4th share was allotted to plaintiff, the remaining 3/4th shares were allotted to Thikkiammal, Inbavalli and Sakthi. The said Subramani died leaving behind him, his wife and daughters as his legal heirs. Patta was transferred in favour of Thikkiammal, Unnamalai, Inbavalli and Sakthi on 12.10.2006. Subsequently, on 19.10.2006, the said Thikkiammal, Inbavalli and Sakthi had executed a settlement deed in favour of the plaintiff in respect of 3/4th share in the suit properties and from that date onwards, the plaintiff is in possession and enjoyment of the suit properties as absolute owner. The defendants have no right, title or interest in the suit properties. They attempted to trespass and take forcible possession of the suit properties on 30.10.2006 and hence, the plaintiff was constrained to file the above suit for declaration and permanent injunction.

5. The averments made in the written statement filed by the defendants 1 and 2 and adopted by the 5th defendant are in brief as follows:-

(a) The allegation that the suit properties originally belonged to one Subramani and the patta was standing in his name and after his death, his wife Thikkiammal and three daughters including the plaintiff had orally divided the suit properties and one 1/4th share was allotted to the plaintiff and in respect of the remaining shares, the said Thikkiammal and her other two daughters had executed a registered settlement deed in favour of the plaintiff and from that date onwards she is in exclusive possession and enjoyment of the suit properties are all false.



The suit properties are ancestral properties of the first defendant's grand father.

(b) In the partition took place 40 years ago, the suit properties were allotted to the share of the first defendant's grandfather Thukkan. The first defendant's father Suban died 15 years ago. The said Suban got two sons namely, 1) Subramani and 2) Annamalai (first defendant) and two daughters namely 1) Unnamalai and 2) Thikkiammal. After the death of the said Suban, his sons, namely, the said Subramani and the first defendant had enjoyed the suit properties commonly. There was no partition between the said Subramani and the first defendant. Till the death of the said Subramani, both the families had lived jointly by having common food and common accounts. The said Subramani is a handicap. He lost his left hand in his young age in an accident. Hence, the first defendant alone looking after the agricultural work. Since the said Subramani was an elder member in the family, the patta and kist receipt was standing on his name. The said Subramani had no male issues and as per the customs prevailing in Scheduled Tribes, after giving the three daughters to marriage, Subramani left the suit properties with the first defendant and he can get entire properties and enjoy the same.

(c) Accordingly, the suit properties are in exclusive possession of the first defendant. After the death of the said Subramani, with a view to grab the entire property, by taking advantage of the fact that the patta stands in the name of Subramani, the plaintiff and her mother and their sisters created a settlement deed falsely and attempted to trespass into the suit properties and the same has been prevented by the defendants with the help of police. Enraged by the same, the plaintiff had filed the above suit for getting wrongful gain. The allegation that on 30.10.2006, the defendants attempted to trespass into the suit property is false. The plaintiff has filed the above suit by suppressing the facts and hence, the defendants 1, 2 and 5 prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif, Tirupattur, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined herself as PW1 and also examined two more witnesses as PW2 and PW3. She had marked Exs.A1 to Ex.A3 as exhibits. On the side of the defendants, 1, 2 and 5, the first defendant was examined as DW1 and also examined one more witness as DW2. They had marked Ex.B1 to Ex.B4 as exhibits on their side.

7. The learned District Munsif, after considering the materials placed before her, found that there was an oral partition between the first defendant and his brother Subramani and in the said partition, the suit properties were allotted to the share of the said Subramani and after his death, his wife



and three daughters including the plaintiff succeeded to the suit properties and by virtue of settlement deed dated 19.10.2006 executed by the plaintiff's mother and her two sisters, the plaintiff has become absolute owner of the suit properties and she is in exclusive possession and enjoyment of the suit properties. Accordingly, she decreed the suit as prayed for. Aggrieved by the same, the defendants 1, 2 and 5 had filed an appeal in A.S.No.7 of 2011 on the file of the Sub-Judge, Tirupattur, Vellore District. The learned Sub-Judge, had dismissed the said appeal confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the defendants 1 and 2 have filed the present Second Appeal.

8. This Court, at the time of admitting the second appeal, has formulated the following substantial questions of law:-

"1. Whether the Courts below have committed an error in holding that the plaintiff is the absolute owner of the suit property when the plaintiff has not proved any partition between the father of the plaintiff and his brother?

2. Whether the finding of the Courts below that the plaintiff is in possession of the suit property is perverse especially in the light of the admission made by PW2?

3. Whether the Courts below have committed an error in granting the relief of injunction against the co-owners?"

9. Heard, Mr.K.Ashok Kumar for Mr.V.Jeevagiridharan, the learned counsel for the appellants and Mrs.Elizabeth Ravi and P.Raja learned counsel for the first respondent.

10. Substantial Questions of law 1 to 3 :

The learned counsel for the appellants has submitted that the Courts below failed to see that there is no evidence to prove that there was a partition effected between the first appellant and his brother Subramani. He further submitted that the Courts below failed to see that PW1 has categorically admitted that the total extent of the suit properties is 5 acres and the same was originally owned by her grand father Suban, but the suit is also for the same extent of 5 acres which would show that there was no partition between her father and the first appellant/first defendant.



11. He further submitted that PW1 had admitted in her evidence that she had no knowledge about the details of any partition after the death of her grand father. He further submitted that though PW1 has deposed that only her mother knows about the details of partition, her mother who was examined as PW2 did not give any details in her deposition. He further submitted that PW1 and PW2 have categorically admitted that there was a custom prevailing in the Tribal Community that the female members are not entitled for any share in the family property and that would show that the plaintiff's father Subramani had orally relinquished his rights over the suit property in favour of the first defendant. He further submitted that the evidence of PW2 would show that the first defendant alone is in exclusive possession of the suit property and that being so, the suit for declaration and permanent injunction is not maintainable.

12. He further submitted that the Courts below failed to consider that since the plaintiff's father Subramani is an elder member of the family, the patta for the entire property stands in his name. He further submitted that before transferring patta in the name of the plaintiff and her mother and sisters no notice was issued to the first defendant and hence, no reliance can be placed upon Ex.A2 patta. He further submitted that the trial court without considering the aforesaid facts had decreed the suit as prayed for and the first Appellate Court also confirmed the same mechanically and therefore, he prayed to allow the Second Appeal and set aside the judgments and decrees passed by the Courts below.

13. The learned counsel for the appellants in support of the aforesaid contentions, relied upon the following decisions:-

1) In Guruvammal and another Vs. Subbaiah Naicker and others, 1999 (III) CTC 650.

2) In K.Thirunavukkarasu and another Vs. Loganathan (deceased) and others, 2018 (5) CTC 883.

3) In Union of India and others Vs. Vasavi Cooperative Housing Society Limited and others, (2014) 2 SCC 269.

4). In Chinthamani Ammal Vs. Nandagopal Gounder and another, (2007) 4 SCC 163.

5) In Adiveppa and others Vs. Bhimappa and another, (2017) 9 SCC 586.

14. Per contra, the learned counsel for the first respondent has submitted that the defendants 1 and 2 in their written statement have not stated that the family was not having any



other property other than the suit properties. She further submitted that the first defendant while examining himself as DW1 has categorically admitted that his property is situated on the north of the suit properties and that itself would show that already partition took place between the plaintiff's father Subramani and the first defendant. She further submitted that DW1 has admitted in his evidence in the year 2003, that while applying for family card, he had included the name of the plaintiff also in the said application and that would show that the name of the plaintiff has been mentioned in the family card only at the instance of the first defendant. She further submitted that DW1 has admitted that the female members are not entitled to get any share in the family properties and since his brother is not having male issues, he is trying to enjoy the entire properties.

15. The learned counsel for the first respondent further submitted that DW1 has admitted in his cross examination that since his brother Subramani was enjoying the property separately, revenue records came in his name and taking into consideration of the aforesaid facts, the Courts below have concurrently found that the properties were already orally partitioned between the plaintiff's father Subramani and the first defendant and in the said oral partition, the suit properties were allotted to the share of the plaintiff's father and after the death of the said Subramani, the other legal heirs of the said Subramani had executed a registered settlement deed in favour of the plaintiff and hence, she is entitled for the relief of declaration and permanent injunction and in the said concurrent factual findings, this Court cannot interfere. Therefore, she prayed to dismiss the Second Appeal.

16. It is not disputed that the plaintiff's father Subramani and the first defendant are brothers. It is also not disputed that the suit properties originally belonged to father of the said Subramani and the first defendant namely, Suban, ancestrally. It is also not disputed that the said Suban died leaving behind the said Subramani and the first defendant as his legal heirs.

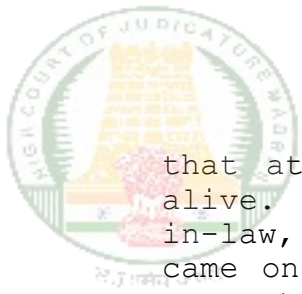
17. According to the plaintiff, in the oral partition which took place between her father Subramani and the first defendant, the suit properties were allotted to the share of Subramani and after his death, she and her mother Thikkiammal and her sisters Inbavalli and Sakthi succeeded to the suit properties. The case of the first defendant is that the suit properties originally belonged to his father Suban and after his death, he and his



brother Subramani succeeded to the same. His further case is that since his brother Subramani lost his left hand in an accident in his childhood, he is only looking after the agricultural activities. His further case is that since the said Subramani is an elder member of the family, patta for the family properties stood in his name and kist also paid only in his name. His further case is that till the death of Subramani, both the families lived together, food was common and accounts also commonly maintained. His further case is that only after the death of the Subramani, the plaintiff and her sisters and her mother have colluded together and created a false document in favour of the plaintiff and trying to take the entire properties.

18. The plaintiff, while examining herself as PW1, during cross examination, she has deposed that her father and the first defendant were residing in separate houses and ration cards were separately issued and she had produced her father's ration card before the Court. But actually, she has not produced any ration card to show that her father is residing in a separate house. On the contrary, the first defendant had produced a ration card and marked as Ex.B4 which shows that the said Subramani and his wife were residing along with the first defendant's family. PW2, who is the mother of the plaintiff has admitted in her evidence that after the death of her husband, both the families were living jointly. She further admitted that cooking and other good and bad events were looked after by her only. Further, she admitted that a common ration card issued for her family and the first defendant family. So if really during the life time of Subramani properties were divided, they would not have lived in a single house by having common cooking activities.

19. PW1 has stated that she does not know when the partition took place between her father Subramani and the first defendant. She further deposed that her mother only knows as to when the partition took place. Whereas, her mother while examining herself as PW2 has deposed that the suit properties originally belonged to her husband's grand father and thereafter her husband got the said properties. She has not stated when the first defendant who is the brother of her husband and her husband partitioned the entire suit properties. Further, she has not deposed what was the extent of the land possessed by her father-in-law. In her cross examination she has stated that the partition took place between her husband and the first defendant 20 years ago. She deposed before the Court on 18.01.2010, if it is calculated from that date, according to her, the partition between her husband and the first defendant would have taken place in or about 1990. Further she deposed

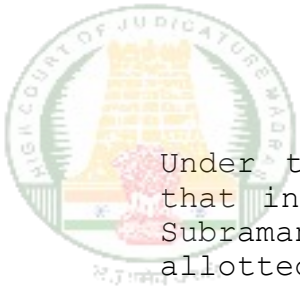


that at the time of the said partition, her father-in-law was alive. She further deposed that till the death of her father-in-law, the patta was in his name and after his death, the patta came only in the name of her husband Subramani under Ex.B2. The properties which are mentioned in Ex.B2 are shown as suit properties. The plaintiff has not produced any document to show that the family got any other property other than the suit properties. Under the said circumstances, it has to be presumed that the family got only the suit properties and if the entire properties were allotted to the share of the plaintiff's father then, the plaintiff has to prove what was the property allotted to the first defendant.

20. The plaintiff (PW1) in her cross examination has stated that the extent of the suit properties is 5 acres and she further stated that she does not know the survey number for the suit properties. She further stated that the suit property is on the east of one Annamalai's land, on the west of one Arunachalam's land, on the south of one Pathra's land and on the north of one Neelavathi's land. She further deposed that she does not know where the land of the first defendant is situated and its extent. She further deposed that her grand father Suban got 5 acres and for entire 5 acres patta stood in the name of her grand father Suban and thereafter, it came into her father's name.

21. A perusal of Ex.B1 shows that the patta was issued on 01.01.1974 in the name of the plaintiff's grand father Suban and four others in respect of 19.78 acres. There is no evidence that out of 19.78 acres, how much land was allotted to the said Suban. Since Ex.B.1 was issued jointly in the name of five persons, normally, each would get approximately 3.95 acres. But both the parties admitted that 5 acres were allotted to Suban. So, after the death of the said Suban, his two sons viz., Subramani and the first defendant would get 2 1/2 acres each. But the plaintiff claims that her father Subramani was allotted 5 acres. If 5 acres were allotted to the plaintiff's father alone, then the first defendant also entitled to the same extent or equivalent thereof, but there is no evidence that the family got any other properties. If the entire 5 acres were allotted to the share of the plaintiff's father, then the first defendant would not have any property at all.

22. When the plaintiff claimed that in the oral partition, the suit properties were allotted to the share of her father, she is bound to prove that the family got some other properties also apart from, the suit properties and the said properties were allotted to the share of the first defendant. But in this case, PW1 and PW2 not able to say where the properties of the first defendant are situated, what is the survey number and what is the extent of the said property. Further, admittedly both the family lived together with a common cooking and common accounts.



Under the said circumstances, the contention of the plaintiff that in the oral partition which took place between her father Subramani and the first defendant the suit properties were allotted to her father cannot be accepted.

23. PW2 has admitted in her cross examination that her husband had lost his left hand even during his childhood and both the families lived together in a common house with common cooking. The aforesaid facts also would probabalize the case of the first defendant that he only looked after the agricultural activities. Further the plaintiff has not produced any documentary evidence to show that the first defendant is having any separate property. It is the common knowledge that the patta would stand in the name of elder member of the family. Therefore, merely because the patta stands in the name of the plaintiff's father, it cannot be presumed that the entire properties were allotted to his share.

24. The Courts below taking into consideration of the evidence of DW1 that he is refusing to give the property of the plaintiff because, the plaintiff and her sisters are female members. Merely, because he is denying the right of the plaintiff and her sisters, it cannot be presumed that there was an oral partition between the plaintiff and the first defendant and in the said partition, the entire suit properties were allotted to the plaintiff's father.

25. DW1, thorough out his evidence has denied the fact that there was an oral partition and in pursuance of the said partition, the plaintiff's father was in exclusive possession of the suit properties and only by recognizing his exclusive possession patta was issued but, in his cross examination in one place it has been recorded that "இன்றைக்கு வழக்கு சொத்தை தனித் தனியாக அனுபவித்து வருவதினால் தனித் தனியாக வருவாய் துறை ஆவணங்கள் வழங்கப்பட்டுள்ளது என்றால் ஆமாம்."

From the aforesaid answer alone, it cannot be presumed that DW1 has admitted that the properties were divided and they were in separate enjoyment.

26. At this juncture, it would be relevant to refer to the decision in Boramma Vs. Krishna Gauda and others, (2000) 3MLJ 199 SC wherein, the Hon'ble Supreme Court in para-10 has observed as follows:-

"10.In our view it will not be a sound rule of appreciation of evidence to pickup an answer from the cross-examination of a witness and draw inference taking it in isolation. The court must see as to how consistent the testimony of the witness is and as to how that answer fits in with the rest of the evidence and probabilities of the case...."



27. In this case, the evidence was not recorded in the question and answer form. Under the said circumstances, taking into consideration of the aforesaid sentence recorded in the cross-examination alone, it would not be proper to come to the conclusion that the first defendant has admitted that the suit properties are in exclusive possession of the plaintiff. It is also to be pointed out that PW1 and PW2 have categorically admitted in their evidence that the first defendant prevented them to enjoy their properties. Further, PW2 admitted in her evidence that since the first defendant is denying their right, they have executed a settlement deed in favour of the plaintiff and based on the said document, they are claiming separate possession. Therefore, it is clear that the plaintiff failed to prove that she is in exclusive possession of the suit properties.

28. In Guruvammal and another Vs. Subbiah Naicker and others, (cited supra) this Court has held that it is settled law that mutation entires are only to enable the State to collect revenues from the person in possession and enjoyment of the property and that the right, title and interest to the property should be established dehors the entires made in the revenue records.

29. In K.Thirunavukkarasu and another Vs. Loganathan (deceased) and others, (cited supra) this Court has held that the settled principle is that revenue documents cannot be construed as document of title. Further it was held that chitta extract by itself is not proof of plaintiff's title.

30. In Union of India and others Vs. Vasavi Cooperative Housing Society Limited and others, (cited supra) the Hon'ble Supreme Court has held that it is trite law that in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff. It was further held that an entry in the revenue records by no stretch of imagination can form the basis for declaration of title in favour of the plaintiffs.

31. In Chinthamani Ammal Vs. Nandagopal Gounder and another, (cited supra) the Hon'ble Supreme Court has held that the party raising a plea of partition has to independently prove since in law there is presumption in regard to continuance of a joint family.

32. In Adiveppa and another Vs. Bhimappa and another, (cited supra) the Hon'ble Supreme Court has held that there lies a legal presumption that every Hindu family is joint in food, worship and estate and in the absence of any proof of division, such legal presumption continues to operate in the family.



33. In this case, dehors Ex.A2 patta, the plaintiff has not placed any material evidence to establish her case of partition between her father Subramani and the first defendant. Further, there is no evidence as to how, an order came to be passed by a Thasildar with regard to transfer of patta.

34. DW1 in his cross examination has stated that " கிழக்கு பக்கம் கிரண்ணன் நிலமும், மேற்குபக்கம் துக்கன் நிலமும், தெற்கு பக்கம் அருணாச்சலம் நிலமும், வடக்கு பக்கம் எனக்கு பாத்தியப்பட்ட சொத்தும் இருக்கின்றது, இது தான் சொத்திற்கு நான்குபுற எல்லையாகும்."

The learned counsel for the first respondent/plaintiff by referring to the aforesaid statement contended that the first defendant (DW1) has clearly admitted that on the north of the suit properties, his property is situated and that it would show that already properties were divided and in the said partition, the suit properties were allotted to the share of the plaintiff's father. The aforesaid statement also not recorded in question and answer form. In the aforesaid answer, it is not specifically recorded that the aforesaid boundaries are referring to the suit properties. Further, if the first defendant's property is situated as one of the boundaries to the suit properties, P.W.s 1 and 2 would have stated the said fact in their evidence, but they are not able to say where the first defendant's property is situated. Under the said circumstances, it cannot be presumed that the aforesaid boundaries referred to the suit properties.

35. As already pointed out that the evidence of PW1 and PW2 would show that the family got only 5 acres and if the said 5 acres were allotted to the father of the plaintiff, then the plaintiff should give an explanation as to whether, any other property was allotted to the first defendant and if so, where the said properties are situated but she has not given any explanation to that effect. She has not stated that the first defendant's property is situated on the north of the suit properties. On the contrary, she has stated that she does not know where his properties are situated. Without taking into consideration of all the aforesaid facts, the trial Court has erroneously found that there was an oral partition between the plaintiff's father and the first defendant and in the said partition, the suit properties were allotted to the share of the plaintiff's father and the same has been mechanically confirmed by the first Appellate Court. Hence, this Court is of the view that the oral partition pleaded by the plaintiff has not been proved and in such circumstances, the plaintiff is not entitled to ask for the relief of declaration and permanent injunction. Accordingly, the substantial questions of law are answered in favour of the appellants/defendants 1 and 2.



36. In the result, the Second Appeal is allowed. The judgments and decrees passed by the Courts below are set aside. The suit in O.S.No.38 of 2007 on the file of the District Munsif, Tirupattur, Vellore District is dismissed. It is open to the parties to file a suit for partition and separate possession including all the properties. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

dna

To

1.The Sub-Judge,
Tirupattur, Vellore District.

2.The District Munsif,
Tirupattur, Vellore District.

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

+1 cc to M/s.V.Jeevagiridharan, Advocate, S.R.No.44137

+1 cc to M/s.Elizabeth Ravi, Advocate, S.R.No.44135

S.A.No.25 of 2013

RP(CO)
SSM(01/10/2019).
SSM(10/10/2019).