

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.07.2019

PRONOUNCED ON : 09.08.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A. No. of 138 of 2016

Rajagopal

... Appellant/Plaintiff

Vs.

1. Rajkumar

2. Anbalagan

3. Kaliyamoorthi

4. Pannerselvam

... Respondents/Defendants 1,3 to 5

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.6 of 2015, on the file of the Court of the Additional Subordinate Judge, Mayladuthurai dated 03.12.2015, in reversing the judgment and decree passed in O.S.No.161 of 2012, on the file of the Court of District Munsif, Sirkali, dated 16.07.2014.

For Appellant : Mr.A.Muthukumar

For R1 : No appearance Set ex-parte
vide order dated 19.07.2019

For R2 to R4 : Mr.S.Sounthar

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 03.12.2015, passed in A.S.No.6 of 2015, on the file of the Additional Subordinate Court, Mayladuthurai reversing the judgment and decree dated 16.07.2014, passed in O.S.No.161 of 2012, on the file of the District Munsif Court, Sirkali.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. Suit for partition.

4. The case of the plaintiff, in brief, is that the suit property described in the plaint belong to Arulmigu Swedharanya Swamy temple and Chinnathambi, the father of the plaintiff and the first defendant and Munusamy, the husband of the second defendant and the father of the defendants 3 to 5, had taken the suit property on lease from the temple and enjoying the same and

accordingly, as regards the leasehold right, both Chinnathambi and Munusamy had equal right in respect of the suit property and Chinnathambi died in 1987, leaving behind his sons, namely, the plaintiff and the first defendant and his daughters namely, Mallika, Selvi and Banumathi and his wife has passed away and inasmuch as the suit property is the lease hold right, the daughters of Chinnathambi are not entitled to claim any share. Further, their marriages had been celebrated by affording adequate seervarisai and therefore, they are not entitled to any share in the suit property and they are also not claiming any share in the suit property and hence, they are not added as parties to the suit.

5. With reference to the right of Chinnathambi in respect of the suit property, both the first defendant and the plaintiff are entitled to equal share. The defendants 2 to 5 are the legal heirs of the deceased Munusamy and accordingly, they are entitled to obtain the leasehold right in respect of the suit property enjoyed by Munusamy and further, according to the plaintiff, he had already levied the suit against the defendants 4 and 5 in O.S.No.35/2008 on his behalf and on behalf of the first defendant seeking permanent injunction in respect of the eastern 0.73 ½ cents of the suit property, on the footing that the total extent of 1 acre and 47 cents had been divided between Chinnathambi and Munusamy during their life time orally and that Chinnathambi had been allotted eastern share of 0.73 ½ cents and western share of 0.73 ½ cents of area was allotted to Munusamy and accordingly, after their life time, their successors in interest had been accordingly enjoying their respective shares and contended that the defendants 4 and 5 are not entitled to interfere with the enjoyment of the plaintiff and the first defendant in respect of the eastern 0.73 ½ cents and hence the suit in O.S. No.35 of 2008 has been levied by the plaintiff against them for the relief of permanent injunction. In the said suit, the defendants 4 and 5 had put forth the defence admitting the oral partition pleaded by the plaintiff. According to them, the suit property had not been divided as eastern and western share and on the other hand, put forth the case that the western share was allotted to Munusamy and the next eastern share was allotted to Chinnathambi and the next share was allotted to Munusamy and accordingly, put forth the defence that both Munusamy and Chinnathambi had divided the suit property alternatively (Thattu mari) and the trial Court had dismissed the plaintiff's suit by way of the judgment and decree dated 30.08.2011 and in that suit, the Court had held that the plaintiff had miserably failed to establish that by way of the oral partition the eastern share had been allotted to Chinnathambi and the same is in his possession and enjoyment and accordingly, the plaintiff had obtained legal advice and has come forward with the present suit seeking the relief of

partition to which he is entitled to in respect of the suit property.

6. The defendants resisted the plaintiff's suit contending that the suit property belongs to Arulmigu Swedharanya Swamy temple and also admitted that the suit property was divided orally during the life time of Chinnathambi and Munusamy and contended that the plaintiff had levied the suit in O.S.No.35 of 2008 contending that in the oral partition, eastern portion of 0.73½ cent was allotted to Chinnathambi and the defendants 4 and 5 resisted the abovesaid suit contending that the suit property had not been divided as per the division mode put forth by the plaintiff and on the other hand, they putforth the case that the suit property had been divided between Munusamy and Chinnathambi and they had been allotted different shares in the same alternatively one after the other and the abovesaid suit after contest, ended in dismissal and therefore, the present suit laid by the plaintiff as if the suit property had not been divided is not maintainable in law and therefore, it is stated that the plaintiff is estopped from laying the present suit and also the suit is barred by the principle of resjudicata and also under Order 2, Rule 2 of C.P.C. and the plaintiff has no cause of action to lay the suit and the cause of action pleaded is also false and the suit laid by the plaintiff also has to fail as the plaintiff has also failed to implead Mallika, Selvi and Banumathi as parties and they are necessary parties to the suit and sought for the dismissal of the plaintiff's suit.

7. In support of the plaintiff's case PW1 was examined, Exs.A1 to A13 were marked. On the side of the defendants, DW1 was examined, no document was marked.

8. On an appreciation of the materials placed on record by the respective parties, both oral and documentary, the trial Court was pleased to grant the relief of partition as prayed for and accordingly, proceeded to pass the preliminary decree in favour of the plaintiff. Impugning the same, defendants 3 to 5 have preferred the first appeal and the first appellate Court, on an appreciation of the materials available on record and the submissions made, was pleased to set aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the defendants 3 to 5, dismissed the suit laid by the plaintiff. Impugning the same, the present second appeal has been preferred.

9. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

(a) Whether the lower appellate Court erred in law in holding that the plaintiff is estopped from filing the suit for partition despite his case of prior partition in the earlier suit for permanent injunction in O.S.No.35 of 2008, was negatived?

(b) Whether the lower appellate Court erred in law in ignoring the well settled law namely the cause of action for a partition suit is a continuing cause of action?

(c) When the plea of the defendants 2 to 5 with regard to their case or prior partition was not upheld in O.S. No.35 of 2008 and the lower appellate Court having held that the judgment in O.S. No.35 of 2008 would not operate as Res Judicata, whether the lower appellate Court erred in law in dismissing the suit on the ground of prior partition?

(d) When the defendants 2 to 5 were failed to produce any evidence for the alleged portion of the property allotted to their share such as Tax receipts, Patta, Chitta, Adangal or Kist Receipts, whether the lower appellate Court erred in law in upholding their plea of prior partition?

10. It is not in dispute that the suit property belongs to Arulmigu Swedharanya Swamy temple. It is also not in dispute that the suit property was enjoyed by the predecessors of the plaintiff and the defendants, namely, Chinnathambi and Munusamy on lease basis under the temple. It is found that the plaintiff had levied the suit against the defendants 4 and 5 in O.S. No.35/2008 for the relief of permanent injunction by contending that during the life time of Chinnathambi and Munusamy, they had orally decided to divide the leasehold the right in respect of the suit property and accordingly, stated that Chinnathambi had been allotted eastern 0.73 ½ cents, Munusamy had been allotted western 0.73 ½ cents and enjoying the same and after their demise, their legal heirs had been enjoying their respective shares and put forth the case that the defendants 4 and 5 had attempted to interfere with his possession and enjoyment of the eastern 0.73 ½ cents and the plaintiff therefore has prayed for the relief of permanent injunction against the defendants 4 and 5 in the said suit.

11. The defendants 4 and 5 contested the abovesaid suit of the plaintiff and raised the defence that though Chinnathambi and Munusamy had orally divided their leasehold right in the suit property but dispute that they had equally divided their right in the suit property and challenged the mode of division put forth by the plaintiff and according to them, they had divided their rights in the suit property alternatively, one share allotted to Munusamy and next share allotted to Chinnathambi and so on and therefore, contended that the plaintiff is not in the possession and enjoyment of the eastern 0.73 ½ cents in the suit property as claimed by him and prayed for the dismissal of the plaintiff's suit.

12. The Court, after analysing the materials available on record and the appreciation of the same, proceeded to dismiss the abovesaid suit laid by the plaintiff. After the same, the present suit has come to be laid by the plaintiff seeking for the partition of the suit property by metes and bounds.

13. No doubt the plaintiff has pleaded oral partition in the earlier suit laid by him in O.S.No.35/2008. As regards the plea of oral partition put forth by the plaintiff in the said suit, the same has not been challenged by the defendants 4 and 5 in the said suit. They had also admitted the oral partition qua the leasehold right in respect of the suit property. However, the parties were at loggerheads only as regards the mode of division with reference to the suit property between Chinnathambi and Munusamy qua the suit property. According to the plaintiff, in the abovesaid suit, Chinnathambi and Munusamy had divided the suit property into eastern and western half and contended that Chinnathambi had been allotted the eastern share of 0.73 ½ cents and western share of 0.73 ½ cents was allotted to Munusamy. Per contra, according to the defendants 4 and 5, the suit property had been divided alternatively between Munusamy and Chinnathambi into various shares and contented that one share was allotted to Munusamy and next share was allotted to Chinnathambi and so on and it is thus found that it is only as regards the mode of division, the parties were in dispute in the earlier suit. As abovenoted, O.S.No.35 of 2008 has been laid simplicitor for the relief of permanent injunction. The plaintiff has laid the said suit claiming that eastern 0.73 ½ cent in the suit property has been in the possession and enjoyment of the plaintiff and the defendants 4 and 5 are attempting to disturb his possession and enjoyment with reference to the same and hence had come forward with the abovesaid suit seeking the relief of permanent injunction against the defendants.

14. The abovesaid suit having been laid simplicitor for the relief of permanent injunction, it is seen that as regards the plea of partition put forth by the respective parties, no specific issue had been formulated by the Court concerned and accordingly, the main issue that has been formulated is whether the plaintiff is entitled to seek the relief of permanent injunction as claimed by him. However, on that issue, the Court has gone in extenso as regards the mode of division between the parties and considering the prevaricative evidence of PW1 in the said suit as well as the evidence of PW2, in particular, supporting the defence version and the division of the suit property alternatively between Munusamy and Chinnathambi and also considering the evidence of the other witness examined on behalf of the plaintiff and further, considering the evidence of the witness examined on behalf of the defendants 4 and 5, proceeded to determine that the plaintiff has miserably failed to establish the mode of division of the suit property as projected by him in the said suit and also further proceeded to determine that consequently, the plaintiff has miserably failed to establish his possession and enjoyment of the eastern 0.73 ½ cent in the suit property and on that determination chose to dismiss the plaintiff's suit.

15. As rightly put forth by the plaintiff's counsel, in the abovesaid suit, no specific issue has been formulated by the trial Court with reference to the mode of division as put forth by the contesting parties qua the suit property. Though the Court concerned had not accepted the mode of division projected by the plaintiff in the said suit, equally, it is found that it had not given any finding in the abovesaid suit upholding the mode of division projected by the defendants qua the suit property. On the other hand, the Court concerned had dismissed the abovesaid suit levied by the plaintiff only on the footing that the oral partition as pleaded by the plaintiff having not been established by him and accordingly, further holding that the plaintiff has failed to establish that he has been in the possession and enjoyment of the eastern 0.73 ½ cents in the suit property, had chosen to dismiss the plaintiff's suit. Therefore, it is found that in the abovesaid suit, though the factum of oral partition is not an issue between the parties concerned, however, when the parties were at loggerheads as regards the mode of division and with reference to their abovesaid respective contentions, neither the plaintiff nor the defendants have placed any acceptable materials for determining that the suit property had been divided as projected by them respectively and that they are in the possession and enjoyment of the shares as per the mode of division suggested by them respectively, in particular, in the abovesaid case, the defendants 4 and 5, other than examining DWs 1 and 2, had not projected any material to hold that their predecessor in

interest Munusamy and after his demise, they had been in the possession and enjoyment of the suit properties as per the mode of division projected by them, i.e, alternative division (Thattu mari). In such view of the matter, it is to be noted that in the abovesaid case, as regards the case of possession and enjoyment of the shares qua the suit property as projected by the contesting parties having not been established in any manner and the plaintiff, in particular, being the suitor, having not established his claim, consequently, left with no other alternative, the Court concerned proceeded to dismiss the plaintiff's suit. By way of the same, it cannot be inferred or concluded that the Court concerned had accepted the mode of division projected by the defendants qua the suit property. If really, the suit property had been divided in the mode as projected by the defendants, as rightly contended by the plaintiff's counsel, acceptable materials pointing to the same would have been projected by the contesting defendants in the abovesaid suit. Not only that, even in the present suit, the defendants have not placed any material whatsoever that the suit property had been divided between Munusamy and Chinnathambi alternatively into various shares as put forth by them. If that be so, necessary materials pointing to the enjoyment of the various shares by the respective parties, particularly, the defendants, would have endeavoured to place acceptable and reliable materials pointing to the same. However, there is no material other than the oral evidence of the 4th defendant, examined as DW1. In such view of the matter, no proof has been placed by the defendants to hold that they are in the possession and enjoyment of the various shares as claimed to have been allotted to their predecessor in interest by dividing alternatively and the position being above, in such view of the matter, it is to be held that the mode of division projected by the defendants also remains not established.

16. In the light of the abovesaid position, when the mode of division has not been formulated as an issue in the earlier suit and the Courts below having held that the present suit is not hit by the principles of resjudicata, the abovesaid decision rightly made by the Courts below, when both the parties had pleaded oral partition during the life time of Munusamy and Chinnathambi and they had projected only different mode of division and both parties having failed to establish their respective claim of mode of division as projected by them, in such view of the matter, there is no question of estoppel on the part of the plaintiff in laying the present suit for partition of the suit property by metes and bounds as per the lawful share of the parties to which they are entitled to.

17. In the light of the abovesaid facts and circumstances, when the Court in O.S.No.35 of 2008 has not in particular upheld the mode of division put forth by the defendants, in such view

of the matter, the dismissal of the said suit by the Court concerned could not be construed as upholding the mode of division projected by the defendants 4 and 5. Therefore, the argument put forth that by way of the dismissal of the plaintiff's suit in O.S. No.35 of 2008, the Court concerned had constructively upheld the mode of division as put forth by the defendants, as such, cannot be countenanced. As above discussed, if the abovesaid mode of division as projected by the defendants had been acted upon, naturally, the defendants predecessor in interest and after his demise, the defendants would have been in possession and enjoyment of the various shares in the suit property as per the mode of division suggested by them and accordingly, they would have placed acceptable materials pointing to the same, particularly, for evidencing the enjoyment of their respective shares. That apart, when in the earlier suit and also in the present suit, the defendants having not placed any materials to establish and prove their claim of division of the suit property into various shares alternatively and enjoyment of the various shares so allotted, in such view of the matter, as rightly contested by the plaintiff's counsel, the first appellate Court is found to have erred in holding that the plaintiff has been estopped from filing the regular suit for partition on account of the dismissal of the suit in O.S. No.35 of 2008. When the defendants have not been found to have been misguided or misdirected qua the enjoyment of the suit property based on the case projected by the plaintiff in O.S. No.35 of 2008 and on the other hand, when both the parties have pleaded the oral partition even during the life time of Chinnathambi and Munusamy and only the mode of division had been differently put forth by the respective parties, in such view of the matter, there is no question of estoppel for the plaintiff in preferring the present suit against the defendants, particularly, when the defendants have not been misled to believe the oral partition as put forth by the plaintiff in the earlier suit, particularly, when the defendants themselves have admitted the oral partition qua the suit property between Chinnathambi and Munusamy. Therefore, in my considered opinion, there is no question of estoppel on the part of the plaintiff in laying the present suit for partition.

18. Though in the earlier suit, both parties had pleaded partition between their respective predecessors in interest, however, when both the plaintiff and the defendants had failed to produce materials worth acceptance to establish the division of the respective shares in the suit property as per the mode of division put forth by them and with reference to the allotment of the respective shares, as per the mode of division projected, neither of them had produced any tax receipts, patta, chitta, adangal or kist receipts and accordingly, when the oral partition pleaded by the respective parties having not been

established so as to enable the parties to proceed further in the convenient enjoyment of the suit property as per law and as per the convenience of the respective parties, in such view of the matter, as put forth by the plaintiff's counsel, considering the facts and circumstances that the suit property is found to have been not divided between the parties concerned by metes and bounds qua their leasehold right, with reference to the same, when it is seen that the plaintiff is entitled to seek partition of the suit property qua the leasehold right by metes and bounds according to his entitlement, in such view of the matter, the first appellate Court is not justified in dismissing the plaintiff's suit by holding that the plaintiff has been estopped from laying the present suit for partition in view of the dismissal of the plaintiff's suit in O.S. No.35 of 2008.

19. As regards the plea of non joinder of the plaintiff's sisters in the present suit, it is seen that when the suit has come to be laid only for the division of the leasehold right and the plaintiff's sisters being female members and not entitled to the same and the defendants having also admitted that they are not entitled to the leasehold right, in such view of the matter, the argument put forth by the defendants that the plaintiff's suit has to be dismissed on the footing that the sisters had not been impleaded as parties, as such, cannot be countenanced and the same has also been considered by the Courts below and were right in holding that the sisters are not necessary parties to the suit laid by the plaintiff.

20. In the light of the abovesaid discussions, the first appellate Court has erred in holding that the plaintiff is estopped from preferring the present suit, particularly failing to note that the defendants have also failed to establish the division of the suit property as projected by them and therefore, it is found that the plaintiff is justified in laying the present suit for partition for dividing the suit property by metes and bounds with reference to the entitlement of the parties qua the same as per law. Accordingly, the substantial questions of law formulated in the second appeal are answered in favour of the plaintiff and against the defendants.

21. For the reasons aforesaid, the judgment and decree dated 03.12.2015, passed in A.S.No.6 of 2015, on the file of the Additional Subordinate Court, Mayladuthurai are set aside and the judgment and decree dated 16.07.2014, passed in O.S.No.161 of 2012, on the file of the District Munsif Court, Sirkali are confirmed. Accordingly, the second appeal is allowed.

Considering the facts and circumstances of the case, there is no order as to costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Asst.Registrar (CS V)

/true copy/
Sub Asst. Registrar

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To

1. The Additional Subordinate Court,
Mayladuthurai.

2. The District Munsif Court,
Sirkali.

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

+1 cc to Mr.A.Muthukumar Advocate sr68358

+1 cc to Mr.S.Sounthar Advocate sr68693

S.A. No. of 138 of 2016

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