

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.07.2019

PRONOUNCED ON : 13.08.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A. No.22 of 2016

Venu pillai

... Appellant

Vs.

1. Arjuna pillai
2. Poongavanammal
3. A.Kumaravel
4. Indira

... Respondents

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 04.02.2011, passed by the First Appellate Court in A.S.No.141 of 2005, on the file of the Additional District Judge (FTC-I), Chengalpattu, confirming the judgment and decree dated 31.03.2005, passed by the Trial Court in O.S.No.88 of 2003 on the file of the Subordinate-Judge, Madurantagam.

For Appellant : Mr. J.Thilagaraj

For Respondents: Mr.M.Arumugam

JUDGMENT

In this second appeal, challenge is made to the judgment and decree dated 04.02.2011, passed in A.S.No.141 of 2005, on the file of the Additional District Judge (FTC-I), Chengalpattu, confirming the judgment and decree dated 31.03.2005, passed in O.S.No.88 of 2003, on the file of the Subordinate Court, Madurantagam.

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 plaintiff is the younger brother of the first defendant and both are the sons of Adimoola Pillai and Adimoola Pillai had no ancestral properties and by cultivation of the lands on his own exertions and from the monies received from Venkata Perumal Reddiar and Neelamangalam, whose lands he had been cultivating, he had purchased the suit properties described in the plaint schedule and installed motor pumpsets and obtained service connections. By way of the various sale deeds dated 27.05.1964,

05.06.1968 and 05.02.1975 the properties described in the plaint A schedule were acquired and the plaint B schedule properties were purchased by Adimoola pillai out of the income derived from the plaint A schedule properties by way of the sale deeds dated 02.05.1983 and the same had been acquired in the name of the first defendant and the first defendant had no independent means to purchase the same and thus, it is put forth that the plaint A and B schedule properties were enjoyed by Adimoola Pillai, the plaintiff and the first defendant, jointly as joint family properties. Further, it is stated that the suit item no.10 in C schedule was owned by Ramanji ammal, wife of Adimoola Pillai and item No.11 of C schedule properties are also the joint family properties of the parties and it is put forth that for the sake of convenience, the plaintiff and the first defendant are in the possession and enjoyment of the various shares of the suit properties as set out in the plaint and despite the same, the suit properties had not been divided amongst themselves by metes and bounds. Whiles, the plaintiff came to know that the first defendant had brought about a sale deed dated 04.04.2003, in respect of the item 2 of the plaint A schedule in favour of his wife Poongavanammal, the second defendant and Poongavanammal had no means to purchase the same and therefore, the abovesaid sale deed is neither true nor valid and it will not bind the $\frac{1}{2}$ share of the plaintiff and furthermore, the plaintiff also came to know that the first defendant had brought about the settlement deed dated 01.04.2003, in favour of his children, namely, the defendants 3 and 4 in respect of the plaint A schedule and B schedule properties as set out in the plaint. However, the abovesaid settlement deeds are ineffective and void and by way of the same, the defendants 3 and 4 cannot claim any share in the said properties and therefore, in view of the hostile attitude of the first defendant, the plaintiff demanded partition by way of a legal notice dated 07.07.2003 and to the same, a false reply had been sent by the first defendant and the plea of partition put forth by the first defendant in the reply notice is false and the parties had been enjoying the plaint schedule properties by ear-marking the various shares by way of convenience and enjoying the same separately and the plaintiff is in the joint possession of the suit properties along with the first defendant and hence, according to the plaintiff he has been necessitated to lay the suit for partition.

5. The first defendant had put forth the plea contending that the suit item No.1 to 9 were allotted to his share in the oral partition in the year 1987, during the life time of Adimoola Pillai and the plaintiff was allotted an extent of 0.09 acres in R.S.No.151/1, 0.16 in dry S.No.151/1E2, 0.31 in dry S.No.150/1E3 and 0.03 out of 0.16 along with the $\frac{1}{2}$ share in the well, motor pumpsets and service connection and $\frac{1}{2}$ share in the dry S.No.150/3D and 0.15 acre in dry S.No.150/2 and the said

properties are still in the possession and enjoyment of the plaintiff and put forth the case that the item Nos. 6 to 9 were purchased by way of the sale deed dated 02.05.93 and the other properties purchased in the name of Adimoola Pillai i.e., 1 to 5 were allotted to the share of the first defendant and the plaintiff has failed to include all the properties in the suit and accordingly, the first defendant has settled the share allotted to him in favour of his children by way of a settlement deed and also alienated item No.2 in favour of the second defendant and the defendants 2 to 4 are in the possession and enjoyment of the respective properties and the plaintiff has failed to include the properties standing in his name and owing to misunderstanding, the plaintiff has come forward with the present suit falsely and the defendant has been enjoying his share by mortgaging the same and furthermore, the plaintiff has also not objected to the alienation/dispossession of the properties by the first defendant and accordingly, prayed for the dismissal of the plaintiff's suit.

6. The defendants 2 to 4 had put forth the case that they had been enjoying the properties respectively purchased/settled in their favour by the first defendant under the sale deed dated 04.04.2003 and the settlement deed dated 01.4.2003 and obtained patta, paying kist etc., and therefore, according to them, the plaintiff is not entitled to claim any share in the said suit properties and prayed for the dismissal of the plaintiff's suit.

7. In support of the plaintiff's case, PWs 1 and 2 were examined, Exs.A1 to A14 were marked. On the side of the defendants, DWS 1 to 4 were examined, Exs.B1 to B21 were marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to dismiss the plaintiff's suit. Impugning the same, the present second appeal has been laid.

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

(i) Whether the Courts below were right in dismissing the suit acting on the oral evidence of the defendants that there was an oral partition in the year 1987, when the details of the oral partition have not been properly stated in the written statement?

(ii) Whether the Courts below were right in holding that there was such an oral partition in the year 1987 based on the sole admission made by the plaintiff in the cross

examination, which was immediately retracted by him?

10. The relationship between the parties is not in dispute. The plaintiff and the first defendant are the sons of Adimoola Pillai. The second defendant is the wife and the defendants 3 and 4 are the children of the first defendant. Claiming that the suit properties are the joint family properties belonging to the plaintiff and the first defendant and no partition had been effected in respect of the same and putting forth the case that the parties had been enjoying their different shares in the suit properties only on account of the convenience and no division had been effected between them by metes and bounds and accordingly, claiming his share in the suit properties, the plaintiff has come forward with the suit.

11. The defendants mainly resisted the plaintiff's suit contending that the suit properties had been orally divided even during the life time of Adimoola Pillai and accordingly, put forth the case that both the plaintiff and the first defendant had been allotted various shares in the oral partition and following the same, it is contended that the plaintiff and the first defendant are in the possession and enjoyment of their respective shares allotted to them by obtaining patta, paying kist etc., and accordingly, the first defendant had contended that he had alienated the property belonging to him in favour of his wife and settled the share allotted to him in favour of his children, namely, the defendants 3 and 4 and accordingly, it is put forth that the defendants are in the possession and enjoyment of their properties by obtaining patta and paying kist etc., to the knowledge of the plaintiff and therefore, prayed for the dismissal of the plaintiff's suit.

12. As far as the oral partition put forth by the defendants, according to the plaintiff, he has averred in the plaint as well as adduced in the course of evidence that over a period of time, both he and the first defendant had been in the possession and enjoyment of the various shares of the joint family properties separately. However, according to the plaintiff, the said enjoyment had been on the basis of the convenience of the parties and not by way of actually dividing the same. However, the Courts below, considering the materials placed on record, both oral and documentary, has found that the plaintiff has clearly admitted the oral partition put forth by the defendants. In this connection, the plaintiff examined as PW1, during the course of cross examination has clearly stated that they had orally divided the properties during 1986 and subsequently stated that no oral partition had been effected, however, would proceed to state that he does not know whether the first defendant had a separate ration card even during the life time of Adimoola Pillai and further admitted that from 1986

onwards he and the first defendant were having separate mess and the plaintiff and his family were living separately from 1986 onwards and similarly, the first defendant along with his family members had been residing separately and further admitted that he and the first defendant are not jointly engaged in the enjoyment of the suit properties and they had been separately cultivating from 1986 onwards and also admitted that he does not know whether separate pattas were issued for the suit properties in 1987 and he would go to state that he had been separately paying kist from 1986 onwards and he had not filed the kist receipts and also admitted that in the well portion he and his brother have half share each and also admitted that the patta had been changed in favour of the defendants 2 to 4 and he has not preferred any appeal challenging the mutation of the patta in their names in respect of the abovesaid suit properties and would state that during 1983, he and the first defendant had acquired properties in their names and further stated that he had only included the properties in the name of the first defendant in the suit filed by him and not included the properties purchased in his name and also admitted that his brother had settled the properties purchased in his name in favour of his children and that he had not prevented the same and also admitted that his brother had mortgaged the properties and despite having knowledge of the same, he had not objected to the same and also feigned ignorance whether the patta had been changed in the name of the first defendant during 1987 and that he had not enquired about the same and also clearly further admitted that from 1986 onwards he and the first defendant had been enjoying the suit house site separately and according to the plaintiff, as adduced by him, during the course of his evidence as the extent of the house site enjoyed by his brother is more than the site enjoyed by him, it is stated that only due to the same, dispute arose between them and therefore, he has come forward with the suit against his brother and family in respect of the entire suit properties. Therefore, when it is seen that the plaintiff, during the course of his evidence, has clearly deposed about the oral partition of the joint family properties between him and the first defendant even during the life time of Adimoola Pillai and accordingly, they had been enjoying their separate shares as allotted to them by obtaining patta, paying kist etc., and also aware of further disposition of the properties by the first defendant in favour of the defendants 2 to 4 and the enjoyment of the defendants 2 to 4 of the various properties by obtaining patta, paying kist as well as the enjoyment of the first defendant of his share in the suit properties separately by obtaining patta, paying kist etc., and also by mortgaging the same and when the plaintiff has not even put forth any response or resistance qua the same in any manner, in such view of the matter, the Courts below are found to be justified in holding that the properties belonging to Adimoola

Pillai's family had been orally divided between the plaintiff and the first defendant during the life time of Adimoola Pillai and separate shares had been allotted to them and accordingly, it is found that right from the date of the oral partition, both the plaintiff and the first defendant had been enjoying their separate shares independently and therefore to say that the parties had been enjoying the various shares belonging to the family only for the sake of convenience and benefit, as such, cannot be believed and accepted and on the other hand, when right from the day of the oral partition effected during 1986/1987, the plaintiff and the first defendant had not been enjoying the properties jointly in any manner and on the other hand, only found to be enjoying the properties independently in their own right qua the respective shares allotted to them and furthermore, when the parties are found to be not only enjoying the suit properties separately and on the other hand, when they are found to have separate mess and residence from 1986 onwards, in such view of the matter, to say that the suit properties had not been divided between them and that they are enjoying the various shares based on convenience as put forth by the plaintiff, as such, cannot be accepted and the same has been rightly rejected by the Courts below. On the other hand, as found by the Courts below, the dispute had arisen between the parties owing to the enjoyment of the house site belonging to the them. Accordingly, it is found that the plaintiff has chosen to come forward with the suit as if the suit properties had not been divided in any manner and prayed for the division of the same. However, when as per the determination of the Courts below, the oral partition effected between the plaintiff and the first defendant could be gathered from the abovesaid plaint averments and the evidence of the plaintiff and the admission of the plaintiff is without any ambiguity and clear and the same cannot be termed as isolated or truncated and on the other hand, the admission of the plaintiff qua the partition being found to be total and complete in all aspects, both as regards the mess, residence and the enjoyment of the properties right from 1986 onwards, the arguments of the plaintiff's counsel that the Courts below had accepted the defendants version without any material as such, cannot be countenanced.

13. Not only that PW2, examined on behalf of the plaintiff also during the course of cross examination, has clearly admitted that even during the life time of Adimoola Pillai both the plaintiff and the first defendant had been residing separately and both the plaintiff and the first defendant had been enjoying the properties separately and the first defendant had alienated the properties enjoyed by him to the second defendant and also settled the properties in favour of his children, the 3rd and 4th defendants and also reiterated rightly that from 1986 onwards both the plaintiff and the first

defendant had been cultivating the properties separately and would also state further that the plaintiff is enjoying the properties acquired in his name and the patta had been issued in favour of the defendants in respect of the properties enjoyed by them and so being the evidence of PW2, it is seen that the Courts below are found to be right in determining that there had been a valid partition between the plaintiff and the first defendant even during the life time of Adimoola Pillai and accordingly, it is seen that the parties are enjoying their respective shares so allotted to them. Therefore the plea of convenience put forth by the plaintiff for the separate enjoyment of the various properties has been rightly rejected by the Courts below.

14. In addition to that, DW4 examined on behalf of the defendant has also clearly averred that the oral partition had been effected between the parties during the life time of Adimoola Pillai and accordingly, he has stated that they had divided the properties during 1987 in the presence of village elders and thereafter living separately and the plaintiff was given the properties acquired in his name and the first defendant was given the properties acquired in the name of Adimoola Pillai. When nothing has been culled out during the course of cross examination of DW4, to disbelieve his version, in any manner, the Courts below had also derived support to accept the case of the defendants based on the evidence of DW4 who is the relative of the plaintiff and the defendants. The oral partition has also been spoken to by the first defendant examined as DW1 and he has also clearly averred about the partition effected between them in the year 1987 and the enjoyment of the separate shares by obtaining patta, by effecting alienation with reference to the same to the defendants 2 to 4 and when he has withstood the cross examination of the plaintiff firmly and his evidence has not been shaken in any manner by the plaintiff by way of the cross examination and considering the documents projected by the plaintiff, in toto, when it is seen that the first defendant had been enjoying the properties alienated to him separately by obtaining the patta, paying kist and also further proceeded to alienate/settle the properties belonging to him in his own right to the knowledge of the plaintiff and the plaintiff, despite having knowledge about the same, having not put forth any response or challenge and as abovenoted, the plaintiff having not put forth any objections to the mutation of the patta in favour of the first defendant and the other defendants qua the suit properties in the manner known to law, in such view of the matter, the plaintiff is found to have no basis or cause of action for laying the present suit seeking partition of the suit properties once again when the materials placed on record go to show that the parties had already divided the properties

belonging to them during the life time of their father Adimoola Pillai.

15. The plaintiff is found to have conveniently suppressed the properties acquired in his name and had laid the suit only as regards the properties belonging to the joint family and the properties standing in the name of the first defendant and with reference to the non inclusion of the properties standing in the present suit, there is no proper explanation offered on the part of the plaintiff. Further, the plaintiff has miserably failed to establish that the properties standing in his name had been acquired in his name and had been secured by his independent income at the relevant point of time and in such view of the matter, it is evident that as determined by the Courts below, the plaintiff has not come forward with the suit with clean hands and therefore, the case projected by the plaintiff that the suit properties are still not divided, as such, cannot be accepted.

16. Similarly, the contention has been put forth that in the sale deed/settlement deed effected by the first defendant in favour of the defendants 2 to 4, there is no reference about the oral partition in some of the abovesaid deeds and that alone by itself would lead to the conclusion that the plea of oral partition put forth by the defendants is false. However, when considering the materials available on record as above pointed out and determined by the Courts below, when the parties are found to be in the separate possession and enjoyment of the various shares belonging to the family right from 1986 onwards and also maintaining separate mess, separate enjoyment of the shares allotted to them and thereafter, there is no material to hold that they had remained jointly at any point of time, in such view of the matter, it is found that the Courts below are totally justified in not accepting the plaintiff's case and in such view of the matter, when the reasonings and conclusions of the Courts below are found to be based on the proper appreciation of the materials on record, both oral and documentary and not suffering from any perversity or irrationality in any manner and also not warranting any interference and when it is seen that the issues involved between the parties are only centering on the factual matrix and the same had been correctly adjudicated as pointed out, in my considered opinion, no substantial question of law is found to be involved in the second appeal. Be that as it may, the substantial questions of law formulated in the second appeal are accordingly answered in favour of the defendant and against the plaintiff.

17. In support of his contentions, the plaintiff's counsel placed reliance upon the decisions reported in (2007) 4 SCC 163 (Chinthamani ammal Vs. Nandagopal gounder and another), 2003 (2) CTC 551 (Damodara Naicker (died) and 10 others Vs. Collector of Chengalpattu District at Kanchipuram and 7 others), 2005-2-LW 196 (M.E.A.Mohamed Ali and 6 others Vs. The District Revenue Officer, Ramnad Collectorate, Ramanathapuram and 2 others), (2000) 9 SCC 214 (Boramma Vs. Krishna Gowda and others) and 2008-3-LW 205 (Sreeranga Nachiar (deceased) & 7 others Vs. Athi Chettiar). The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

18. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

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To

1. The Additional District Judge (FTC-I),
Chengalpattu
2. The Subordinate Judge, Madurantagam.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+2 ccs to Mr.J.Thilagaraj Advocate sr68720
+1 cc to Mr.M.Arumugam Advocate sr69595

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