



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 08.04.2019

PRONOUNCED ON : 30.07.2019

CORAM

THE HONOURABLE MRS. JUSTICE J.NISHA BANU

SECOND APPEAL (MD) No.24 of 2019

and

C.M.P. (MD) .No.1344 of 2019

P.Gnanaraj ... Appellant/ Appellant / 1st defendant
Vs.

1.P.Jebaraj ...1st respondent/1st respondent/Plaintiff

2.P.Rachel Sugirtharaj

3.P.Esthar Rajan

4.P.Ebzi Rajkumar

5.P.Jeya Singh

6.P.Alice Victor ... Respondents 2 to 6/Respondents 2 to 6 /
Defendants 2 to 6

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 25.02.2015, passed in A.S.No.38 of 2013 by the II-Additional District and Sessions Judge, Tuticorin, confirming the judgment and decree, dated 18.06.2012, passed in O.S.No.74 of 2007 by the Subordinate Court, Tuticorin.

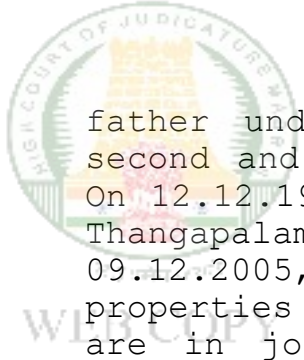
For appellant : Mr.S.Muthal Raj
For 1st respondent : Mr.T.R.Jeyapalam
For 3rd respondent : No appearance

JUDGMENT

This second appeal has been filed by the appellant/first defendant in the suit against the concurrent judgment passed by the Courts below.

2. For better appreciation and understanding, the parties are referred to as per their in rank in the suit.

3. The plaintiff had filed the suit in O.S.No.74 of 2007 for partition claiming 1/7 share in the suit schedule properties. The plaintiff, 1st defendant, 5th defendant are sons and the defendants 2 to 4 & 6 are daughters of one Pitchai Nadar. According to the plaintiff, the suit first schedule property was purchased by his



father under a registered sale deed on 28.08.1958 and the suit second and third schedule properties are his ancestral properties. On 12.12.1999, Pitchai Nadar died intestate leaving behind his wife Thangapalam, plaintiff and defendants as his legal heirs. On 09.12.2005, Thangapalam also died. Therefore, the schedule properties devolved on the plaintiff and the defendants, and they are in joint possession and enjoyment of the same. Hence, the plaintiff is entitled to 1/7th share in the suit schedule properties. The suit first item is a house and the plaintiff is in possession of eastern portion of the house and the first defendant is in possession of remaining portion. When the plaintiff asked the first defendant to come for an amicable partition, he refused to do so. Hence, he filed the suit for partition claiming 1/7th share in the suit schedule properties.

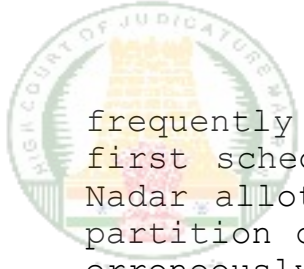
4. According to the first defendant, he being eldest son had been taking care of his father and mother till their life time and out of his own income, he spent money for their medical expenses and he redeemed the first schedule property, which was mortgaged by their father, on several times. In the year 1998, their father ie., Pitchai Nadar had settled the suit properties by way of executing a partition deed in favour of his three sons viz., the plaintiff, first defendant and 5th defendant, as per which the suit 1st schedule properties was allotted to his share and since then, he has been in exclusive possession and enjoyment of the same and the other properties were allotted to the plaintiff and 5th defendant. The plaintiff is not residing in the suit first schedule property. The plaintiff has taken away the original partition deed from his custody, without his knowledge.

5. The 4th defendant filed his written statement accepting the averments of the plaintiff.

6. Before the trial Court, on the side of the plaintiff, the plaintiff himself was examined as PW1 and Exs.A1 to A9 were marked and on the side of the defendants, the first defendant himself was examined as DW1 and no documentary evidence was marked.

7. The trial Court has decreed the suit holding that the first defendant did not produce any oral and documentary evidence to prove the factum of partition effected by Pitchai Nadar. Aggrieved by the same, the first defendant filed appeal. The first appellate Court, after hearing both sides, confirmed the judgment and decree passed by the trial Court, thereby dismissed the appeal. Challenging the said concurrent judgment passed by the Courts below, the first defendant has filed this second appeal.

8. The learned counsel appearing for the first defendant submitted that the first defendant being eldest son of the deceased Pitchai Nadar has arranged the marriage of his sisters by spending his own hard-earned money and the first defendant had spent a lot of money for treatment of his father as well as mother, and he also



frequently redeemed the mortgage created by his father over the suit first schedule property. Considering the same, his father Pitchai Nadar allotted the suit first schedule property in his name in the partition deed. He would further submit that the Courts below have erroneously allowed the suit holding that the first defendant did not prove his case by way of any documents. In fact, the plaintiff should have proved his case by way of documents and disprove the contention of the first defendant. He would further submit that the first defendant has a Xerox copy of the partition deed effected by his father and therefore, by considering the same, the first appellate Court ought to have remanded the matter to the trial Court to give an opportunity to the first defendant to adduce additional evidences. But, the first appellate Court has failed to do so. Thus, he prayed to allow this second appeal.

9. The learned counsel appearing for the plaintiff submitted that before the Court below, the plaintiff has produced the original sale deed relating to the suit first schedule properties and also other documents, whereas the first defendant did not produce any oral and documentary evidence in order to prove his case that there was a partition effected by their father, and therefore, the trial Court has rightly decreed the suit and the first appellate has also confirmed the same. He would further submit that the first defendant has not taken any steps to mark any document before the Courts below and therefore, the question of granting an opportunity to adduce additional evidence does not arise. Even otherwise, the Xerox copy of the alleged unregistered partition deed cannot be taken into consideration even for collateral purpose and under Sections 63 and 65 of the Indian Evidence Act, the said document cannot be relied upon. Thus, he prayed to dismiss the second appeal.

10. Heard the learned counsel appearing for the first defendant / appellant and the learned counsel appearing for the plaintiff / first respondent and perused the records carefully.

11. Admittedly, there is no dispute with regard to the relationship of the parties. It is also equally not in dispute that the suit first schedule property was purchased by their father and the suit second and third schedule properties are the ancestral properties of their father. The plaintiff has produced the original sale deed, dated 20.08.1958, in respect of the suit first schedule property. The plaintiff has also produced certain documents relating to the suit properties. The case of the plaintiff is also supported by the 4th defendant.

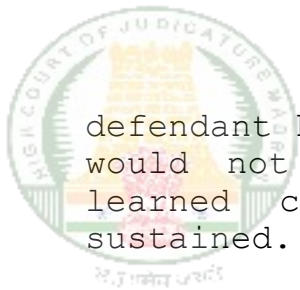
12. Though the first defendant has stated that he had spent his hard earned money for the marriage of his sisters and for medical expenses of their parents, and that on several times, their father had created mortgage over the suit first schedule property and he redeemed the same by spending his own money, he has not proved the same by producing any oral and documentary evidence. The statement



of the first defendant that he had spent his own money for joint family welfare would not affect the unfettered right of the co-sharers to get their respective share.

13. It is the main defence of the first defendant that there was a partition among himself, the plaintiff and the 5th defendant in the year 1998 and the same was effected by their father Pitchai Nadar during his life time and that in the partition, the first schedule property was allotted to his share. Admittedly, as stated earlier, the first defendant did not produce any oral and documentary evidence substantiating the same. It is seen that though the first defendant has stated that as per the alleged partition deed, the suit first schedule property was allotted to his share, he does not even say in his written statement as to which property was allotted to the plaintiff and the fifth defendant as per the alleged partition deed. The first defendant himself admitted in his cross examination that till the death of their father, the suit properties had been in their joint possession and enjoyment. Admittedly, Pitchai Nadar died on 12.12.1999. If really the partition was effected in the year 1998 itself, the first defendant would not have stated so. Therefore, the partition alleged to have been effected cannot be believed. Though the first defendant has stated in his written statement that he has been in exclusive possession and enjoyment of the suit first schedule property after partition, in the chief examination, he himself admitted that he is residing on the right side of the suit first schedule property, which would show that he has not been in exclusive possession and enjoyment of the suit first schedule property and the version of the plaintiff that he has been in possession of a portion of the suit first schedule property is true. Since the first defendant has failed to prove his case by producing any oral and documentary evidence, the Courts below have rightly held that the plaintiff is entitled to 1/7 share in the suit schedule properties.

14. It is the contention of the first defendant that he has Xerox copy of the unregistered partition deed, as the original partition deed has been taken away by the plaintiff without his knowledge and therefore, he has to be given an opportunity to produce the same. It is seen that the first defendant has not lodged any complaint with regard to missing of unregistered partition deed. He has also not made any attempt to produce the same before the Courts below. One of the circumstances under which Section 65 allows the secondary evidence is as to when the original has been destroyed or lost. But, to admit the secondary evidence, it is not sufficient to show merely that the original document is lost or taken away. There must be a sufficient proof of the search for the original to tender the secondary evidence admissible and must be established that the party has exhausted all resources and means in search of the document. In this case, as stated earlier, the first defendant, he has not taken any steps to recover the same and he has also not even made any attempt to produce the same before the Courts below and this Court. Even assuming that the first



defendant has a Xerox copy of the unregistered partition deed, that would not serve any purpose. Therefore, the submission of the learned counsel for the first defendant/appellant cannot be sustained.

15. This Court does not find any reason to interfere with the concurrent judgment passed by the Courts below. There is no question of law especially substantial question of law arising for consideration. In view of the above, this Court is inclined to dismiss this appeal at the stage of admission itself.

16. In the result, this second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar (CS)

To

1.The II-Additional District and Sessions Judge,
Tuticorin.

2.The Subordinate Judge, Tuticorin.

3.The Record Keeper,
V.R. Section, (2 copies)
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.T.R.JEYAPALAM, Advocate (SR-78641[F] dated 30/07/2019)
+1 CC to Mr.S.MUTHALRAJ, Advocate (SR-79138[F] dated 01/08/2019)

judgment made in
S.A.(MD) No.24 of 2019
30.07.2019

gcg

MK (27.08.2019) 5P 7C