



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :01.12.2020

Pronounced on :07.12.2020

CORAM:

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.1517 of 2010

and

M.P.No.1 of 2010

1.Palanisamy gounder(died) ..1st Appeal/Plaintiff

2.Valliammal

3.Nallammal

4.Vasanthamani

5.Deivathal

6.P.Arumugam

(Appellants 2 to 6 brought on record
as Lrs of the deceased sole appellant

viz., Palanisamy Gounder vide

Court order dated 01.12.2020 made in

M.P.No.1 of 2011 in S.A.No.1517 of 2010

(GJJ))

.. Appellants

/versus/

1.Chenniappan

2.Moorthy

3.Rangasamy

4.Chelayal(Died)

5.Krishnasamy

6.Rasayal

7.Kolandayal

8.Chenniappan

9.Nachimuthu

10.Kolandasamy

11.Rangasamy

12.Subramani

13.Thangaraj

.. Respondents

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 16.09.2009 made in A.S.No.58 of 2004 on the file of the First Additional Sub-Court, Erode confirming the judgment and decree dated 18.02.2004 made in O.S.No.114 of 2000 on the file of the District Munsif-cum-Judicial Magistrate, Perundurai.

For Appellants

:Mr.N.Manokaran



For Respondents :Mr.V.S.Kesavan for R1
Not ready notice for R2,R3,R5 to R13

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J U D G M E N T

(The case has been heard through Video Conferencing)

The suit filed for partition dismissed by the trial Court and the same confirmed by the first appellate Court. Against the concurrent finding, the appellant has filed the second appeal.

2.The case of the plaintiff is that, his father Sengoda gounder purchased 1/72 share in the suit property on 03.09.1962 from one Chennimalai gounder and another, purchased another 1/72 share in the suit property from one Chinnappa gounder and another and also purchased 1/72 share in the suit property from one Sellaiya gounder and two others. Thus, out of total extent of 3.46 acres, he became title holder for 3/72 shares. On the death of his father, the plaintiff succeeded to the property and he is in possession and enjoyment of the same.

3.Earlier, Chenniappan the first defendant herein filed a suit in O.S.No.202 of 1997 for permanent injunction in respect of 1.20 acres of land in the suit property. The trial Court granted injunction on 18.11.1998 and allowed the suit. Appeal in A.S.No.64 of 1999 filed by the plaintiff and others was dismissed. Against which, second appeal in S.A.No.99 of 2000 filed by the plaintiff and others and the same was dismissed on 25.08.2008 with an observation that if the defendants so advised, they are at liberty to file a separate suit either for partition or for declaration of title, if they are legally entitled to do so. Before disposal of this second appeal, the present suit in O.S.No.114 of 2000 is filed for partition directing to divide the suit properties into 72 equal shares and allot 3 contiguous shares to the plaintiff.

4. The first defendant Chenniappan filed written statement stating that in the earlier proceedings, the Courts have upheld that there was re-survey of the suit property and injunction relief in respect of 1.20 acres, which form part of Old S.F.No.155, R.S.F.No.469/1 has been granted and the matter has been reached finality. The issue of oral partition and re-survey of the subsequent to the partition was subject matter of the earlier suit and therefore, the present suit is barred by principle of res judicata. Old S.F.No.155 and Old S.F.No.142 are two consecutive survey fields. One on the north and another on the south. The plaintiff as well as the defendants have respective shares both the survey fields. The partition of land in S.F.No.155 is bad for partial partition. Further, one of the



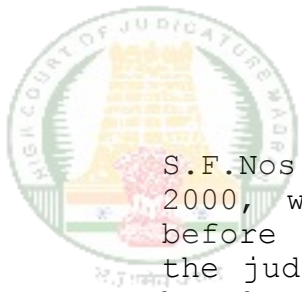
sharers Arumayammal, wife of Muthusamy is a necessary party to the suit and for non-joinder of necessary party the suit has to be dismissed. After oral partition is taken place more than 30 years ago, separate patta was issued. After the re-survey proceedings, the first defendant is in possession of 0.46.0 hectare in R.S.F.No.469/1. Reading of the oral partition, the parties have exchanged certain plots in old S.F.No.142 and 155. The plaintiff's vendor has been in possession and enjoyment of a plot in S.F.No.142. While so, without any right or title the vendor of the plaintiff has sold the property in S.F.No.155 contrary to the oral partition which has taken effect.

5.The trial Court framed the following issues:-

- 1.Whether the plaintiff is entitled to partition by appointment of a Court Commissioner and division of the suit property into 72 equal shares, with reference to good and bad soil and allotment of 3 contiguous shares and separate possession?
- 2.Whether the plaintiff is entitled to the relief sought for along with the cost of the suit?
- 3.Whether the suit is barred by res judicata?
- 4.Whether the suit is bad for non-joinder of the necessary Arymaiymmal, W/o Muthusamy, who has 3/72 shares in the property s contended by the defendants?
- 5.Whether the contention of the defendants that neither the plaintiff, nor his predecessors in titled had any right in old S.F.No.155 and as per the oral partition in the land allotted to them, the defendants 2 and 3 have construction houses is correct?
- 6.To what other relief?

6.Two witnesses on behalf of the plaintiff and four exhibits were marked. On behalf of the defendants two witnesses were examined and seven exhibits were marked.

7.Ex.B4 and Ex.B6 which are decree and judgment copy of O.S.No.202 of 1997 and Ex.B5 and Ex.B7, which are decree and judgment copy of A.S.No.64 of 1999 were considered by the trial Court for deciding the issue of re-judicata and held against the plaintiff. The oral partition pleaded by the defendants was also accepted by the trial Court and held against the plaintiff. Regarding non-joinder of necessary party namely, the mother and sister of the plaintiff in the partition suit, the trial Court rejected the plea of relinquishment, even though the plaintiff has pleaded the mother alone in the pending suit but not his sister. The trial Court also held that the suit is bad for partial partition and non-including the other properties in



S.F.Nos.142 and 145 and dismissed the suit in O.S.No.114 of 2000, when the second appeal in S.A.No.99 of 2000 is pending before the High Court filed by the plaintiff and others against the judgment and decree passed in O.S.No.202 of 1997. Aggrieved by that, the plaintiff filed appeal suit in A.S.No.58 of 2004 as against the judgment and decree passed in O.S.No.114 of 2000. When the first appeal was taken up for final hearing, the High Court has disposed of the second appeal in S.A.No.99 of 2000 on 25.08.2000 confirming the judgment and decree of the Courts below with liberty to the defendants (appellants herein) to file separate suit either for partition or declaration of title if so advised.

8.Taking note of the subsequent development and the finding of the High Court in S.A.No.99 of 2000, the trial Court finding that the suit is barred by res- judicata, was reversed by the first appellate Court. However, on other points such as the partial partition, non-joinder of necessary party and the proof of oral partition effected between the parties, the first appellate Court taking note of the finding in the earlier proceedings and the evidence of the parties, held that the re-survey proceedings after oral partition never been questioned by the appellants herein and it has to be presumed under Section 114 of the Evidence Act that survey proceedings rightly done. Even, in the earlier proceedings, the appellants have not questioned the re-survey. So, the first appellate Court concluded that the acting upon the oral partition, the defendants have constructed their own buildings in the suit properties and enjoying separate possession of their respective parties.

9.Taking note of the admission of the plaintiff/appellant herein that his sister Theivathal died 30 years ago and her son has right over the suit property, the first appellate Court held that the legal heirs of his sister are necessary party in the partition suit and without impleading the necessary party, the request of the appellants' counsel to remand the matter back for fresh trial to implead the necessary parties was also declined by the first appellate Court on the ground that when the plea of oral partition pleaded by the defendants is upheld, the plaintiffs are not entitled for the relief of partition.

10.When the matter came up for admission, after hearing the parties, this Court has formulated the following Substantial Questions of Law for consideration:

(a)Whether the suit is bad for non-joinder of co-sharers especially when the Court is empowered to implead the parties at any stage of the proceedings in a partition suit under Order 1 Rule 10(2) C.P.C.?

(b)Whether the Courts below have committed



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an error in law in dismissing the suit on the ground of "oral partition" especially when the defendants have not discharged the burden of proof by producing the legal evidence in support of their plea of oral partition"?

11.The learned counsel appearing for the appellants submitted that the observations made in the previous suit regarding the re-survey or oral partition, cannot be held to be heard and decided finally, since the issue in that earlier suit was whether the first defendant is entitled for injunction by incidental observation, without framing issues shall not be considered as res-judicata. The alleged oral partition and exchange the properties between the parties in the plots in S.F.No.142 and 155 have not been proved. The non-joinder of the legal heirs of the 1st appellant's sister cannot be fatal to the partition suit, since as the legal heirs of Sengoda gounder, it is the between the legal heirs of the Sengoda gounder apportioning the 3/72 shares among themselves. The respondent, who is the third party cannot defeat the appellants right on this ground.

12.The learned counsel appearing for the appellants referring the judgment of this Court reported in [2009(3) LW 622 - Ramulu Ammal v. Ramachandra Reddy and others] submitted that, any amount of evidence, without the back up of the pleadings, has to be eschewed and a person to pleads oral partition should certainly have some evidence in this regard and the same should be adduced before the Court.

13.The learned counsel appearing for the 1st respondent submitted that the suit for partition laid, when the second appeal was pending before the High Court itself is bad and premature. Even before the High Court granted liberty to the plaintiff to file suit for partition or declaration of title, the present suit for partition was laid before the District Munsif-cum-Judicial Magistrate Court, Perundurai in O.S.No.114 of 2000 dated 21.07.2000.

14.In the light of the submissions made by the respective counsels, it is essential to consider the dispute between the parties in the earlier proceedings and the findings. It is sufficient to extract certain observation made by the High Court in respect of the suit property while disposing the second appeal in S.A.No.99 of 2000:

"7.Of course it is true that when the Commissioner visited the suit property there were traces of a cart track on the suit property. But it cannot be said that the cart track was used by the defendants.

8.Thus, the defendants have failed to



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prove that the suit property is being used by them as cart track.

9....

10. The next contention of the learned counsel for the appellants is that the Courts below are wrong in granting the decree based only on the survey proceedings in the absence of any oral or documentary evidence regarding title. In my considered opinion, this argument is liable to be rejected. If it is the case of the defendants that the survey proceedings were erroneously done and patta was erroneously given to the plaintiff for a larger extent, the defendants would have approached the authorities with necessary objections to correct the same. Having failed to do so, it is not open for the defendants to question the correctness of the survey proceedings for the first time before the Civil Court. Under Section 114 of the Evidence Act it can be presumed that the survey proceedings were rightly done by the Government. Of course, it is a rebuttable presumption, but the defendants have not placed any material to rebut. Thus the said presumption also weigh in favour of the plaintiff."

15. No doubt, the earlier suit in O.S.No.202 of 1997 is for permanent injunction. But the suit was laid not just based on possession and enjoyment but based on the title documents, which have also been marked as exhibits and considered for collateral purpose. The leave granted by the High Court subsequent to institute a suit, is the ground and the reason for the first appellate Court to reverse the finding of the trial Court regarding res judicata. But all the other reasons for dismissing the partition suit holds intact. There is no explanation for not including the properties in S.F.No.142. The explanation given for not impleading the legal heirs of his sister not acceptable. The oral partition plea between the parties has been looked and examined by the Courts below in the earlier proceedings which has been reflected in the re-survey register. This Court in the earlier proceedings has presumed against the appellants herein for not contesting the entries made in the re-survey and patta issued in respect of 1.20 acres of land.

16. In the above background facts and cumulative assessment of the evidence, this Court holds that the second appeal is bound to fail for non-joinder of necessary parties and partial partition. The Courts below cannot be held to have committed error in law by dismissing the suit, since it is not only the



oral partition, which has been accepted and weighed in the minds of the Courts below, but also the other facts including the findings of the Courts in the earlier suit. Hence, the questions of law are answered accordingly.

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17. In the result, the second appeal is dismissed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To:

1. The Judge, I Additional Sub Court, Erode.
2. The District Munsif cum Judicial Magistrate, Perundurai.

+1cc to Mr.N.Manohar, Advocate SR.No. 39360

S.A.No.1517 of 2010

and

M.P.No.1 of 2010

A.SK(16.08.2021)