

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Reserved on: 22.01.2020

Delivered on: 29.01.2020

Coram:

THE HONOURABLE MR. JUSTICE V.PARTHIBAN

S.A.No.1228 of 2013

and

M.P.No.1 of 2013

1.Krishnappa
2.Sampangiappa
3.Venkatesappa
4.Nagarajappa
5.Annaiyappa alias Sampangiappa
6.Srinivas
7.Lakshamma
8.Premilamma
9.Venkatalakshiamma
Thimmamma (died)
Nanjammal (died)
10.Lakshamma
11.Minor Mala
rep.by Guardian and
next friend Lakshmanamma
12.Gopalappa ... Appellants/Respondents/Defendants

1.Govindappa
2.Venkatesappa
3.Gowramma
Thimmarayappa (died)
Narayanappa (died)
4.Aswathamma
5.N.Venkatesh
6.N.Ratnamma
7.N.Nagamani
8.N.Hemavathy
9.Chandrappa
10.Saroja
11.Narayanamma

... Respondents/Appellants/Plaintiff

Second Appeal is filed against the judgement and decree dated 27.03.2013 passed by the Additional District Court, Krishnagiri, in A.S.No.6 of 2006, reversing the judgement and decree, dated 27.07.2005, passed by the Subordinate Judge,

Hosur, in O.S.No.322 of 1996.

For appellants :: Mr.S.Mukunth for
M/s.Sarvabhauman Associates
For Respondents :: Mr.M.V.Krishnan for R1, R2, &
R4 to R10
Mr.M.Selvam for R3
R11 given up

JUDGEMENT

This second appeal is filed by the defendants in the suit as against the judgement and decree, dated 27.03.2013, passed by the Additional District Court, Krishnagiri, in A.S.No.6 of 2006, reversing the judgement and decree dated 27.07.2005, passed by the Subordinate Judge, Hosur, in O.S.No.322 of 1996, which was one for partition and separate possession.

2.The parties, for the sake of convenience, are referred to hereunder, according to their litigative status and ranking before the trial Court.

3.The appellants herein are the defendants and the respondents are the plaintiffs in the suit. The plaintiffs have approached the trial Court by filing O.S.No.322 of 1996, seeking partition, in respect of various items of properties mentioned in the suit schedules, among them and the defendants, who are the legal heirs of Marappa and Venkataramanappa. On behalf of the plaintiffs, several documents were marked and evidence were let in.

4.The defendants, who happened to be the legal heirs of Venkataramanappa resisted the suit on the ground that during the life time of Marappa and Venkataramanappa, an oral partition had taken place between them some 65 years ago and the same was acted upon and on the basis of the oral partition, the parties have been enjoying the properties apportioned to them and therefore, there was no question of partition at all among the legal heirs of the said Marappa and Venkataramanappa.

5.The trial Court, which extensively went into the evidence and pleadings placed on record, had rendered a categorical finding that the suit was not maintainable at the instance of the plaintiffs, since the defendants had proved their case of oral partition and the same was also acted upon by the parties. The trial Court has accepted the case of the defendants that 65 years before an oral partition had taken place between the said Marappa and Venkataramanappa and to that effect, there were clear and unambiguous evidence let in on behalf of the defendants and on the basis of the said oral

partition, mutation was also effected in the Revenue records and various deeds also emerged in the names of individual legal heirs and hence, the trial Court held that the partition suit laid by the plaintiffs was not maintainable. Moreover, the trial Court has also held that the oral partition had taken place before 1958 and the same was established by material evidence and therefore, the second partition, now claimed by the plaintiffs, was hit by law of limitation. According to the trial Court, the plaintiffs failed to establish that certain items of the properties, which were mentioned in the suit schedules, were excluded from oral partition and further, if it is the case of the plaintiffs that fraud being played in the oral partition, they should have challenged the same within the period of limitation. The trial Court has given extensive finding in regard to each one of the pleas raised on behalf of the plaintiffs and discountenanced all the pleas and found that in all fours the claim of partition was unsustainable both in law and on facts. As against the said dismissal of the suit, the aggrieved plaintiffs filed an appeal, in A.S.No.6 of 2006, before the Additional District Court, Krishnagiri.

6.The lower appellate Court, which dealt with the appeal, has by and large confirmed the factum of oral partition during the life time of Marappa and Venkataramanappa. But, in the operative portion of the judgement, the lower appellate Court has held that some items of the properties, described in the suit schedules, were not part of the oral partition and held that those properties, which were not part of the oral partition, are still open to either partition among the legal heirs or to be held as joint family properties. In the said circumstances, the lower appellate Court has modified the judgement and decree of the trial Court to the extent indicated in the operative portion of the judgement in the appeal. Aggrieved by the modification of the judgement and decree of the trial Court, the defendants are before this Court with this Second Appeal.

7.The Second Appeal was admitted by this Court on the following substantial questions of law.

"1.Whether the learned appellate Court is correct in law in granting a decree for partition in respect of a few items of property after rendering a finding that Marappa and Venkataramanappa had orally partitioned the property and when the plaintiffs were claiming under Venkataramanappa?

2.Whether the learned Appellate Court is correct in law in holding that the defence of ouster is not available between co-owners especially when the appellants have proved

their open, continuous and hostile possession of the properties falling to their share for well over a period of 50 years?

3. Whether the learned Appellate Court is correct in law in partially decreeing the suit for partition in the absence of proof of existence of the joint family by the respondents/plaintiffs and the availability of joint properties?"

8. Shri. Mukunth, the learned counsel appearing for the appellants/defendants would submit that the lower appellate Court has completely erred in coming to the conclusion that some items of the suit schedule properties were not part of the oral partition, which had taken place 65 years before, and therefore, the finding of the lower appellate Court that those excluded properties are open to partition or to be held as joint family properties, is not supported by any material evidence at all. The learned counsel would submit that in fact, the plaintiffs' case itself was not to the effect that certain properties were excluded from oral partition and on the other hand, the claim of the plaintiffs before the trial Court was total partition of all the properties belonging to Marappa and Venkataramanappa and their legal heirs and the lower appellate Court has in fact exceeded its jurisdiction by granting a prayer, which was not even asked for by the plaintiffs.

9. Shri. Mukunth, the learned counsel appearing for the appellants would further submit that in the teeth of the unambiguous findings given by the trial Court, while dismissing the suit filed by the plaintiffs, the finding rendered by the lower appellate Court that some of the properties, particularly two items of the properties, did not form part of the oral partition, was contrary to facts and documents. In fact, the conclusion reached by the lower appellate Court for varying the judgement and decree of the trial Court was on the basis of presumption and not supported by any material evidence. The learned counsel would draw the attention of this Court to various portions of the judgement of the lower appellate Court and would submit that the discussion in the judgement had ultimately no nexus with the final decree passed by the lower appellate Court. The learned counsel would also submit that when a partition takes place in a family there will be a presumption that all properties stood partitioned. The burden of proof of exclusion of certain property from partition would be on the party, who asserts the same. In this regard, the learned counsel would rely on the decision of the Hon'ble Supreme Court of India in the case of Kesharbai alias Pushpabai Eknathrao Nalawade (dead) by Lrs. And another vs. Tarabai Prabhakar Rao Nalawade and Others [(2014) 4 Supreme Court Cases 707].

10. In the above case, the Hon'ble Supreme Court of India has held that the burden is on the party who asserts to prove that some properties were excluded from partition. In this case, the learned counsel for the appellants/defendants would submit that the plaintiffs, who were appellants in the lower appellate Court, did not let in any evidence that the properties, which according to the lower appellate Court, excluded from the oral partition, were not part of the partition. In the absence of any evidence on the side of the plaintiffs, the judgement of the appellate Court stood vitiated both in terms of law and facts. Therefore, the learned counsel would submit that the Substantial Questions of Law framed in the second appeal are to be answered in favour of the appellants/defendants.

11. Per contra, Mr. M.V. Krishnan, the learned counsel appearing for the respondents/plaintiffs would submit that though the lower appellate Court has observed that two items of the suit schedule properties were not subjected to oral partition, such conclusion was reached by the lower appellate Court on the basis of the materials made available for consideration before it. In fact, in respect of the decision cited on behalf of the appellants, the learned counsel would submit that it is always possible to raise a plea of partition stating that separate possession of a portion of the property by co-sharers itself would not lead to presumption of partition. He would submit that it is always open to the parties to raise the plea of partition and the parties cannot be shut out from raising such a plea merely because some of the properties have been partitioned. He would rely on the decision of the Hon'ble Supreme Court of India in the case of Chinthamani Ammal vs. Nandagopal Gounder and another [(2007) 4 Supreme Court Cases 163] in support of the above submission.

12. The learned counsel would also submit that mere mutation in the Revenue records and some subsequent transfers would not establish the factum of partition. He would rely on the decision of the learned single Judge of this Court in the case of Guruvammal and another vs. Subbiah Naicker and Others [1999(III) CTC 650], in support of the said contention. The learned counsel would, therefore, submit that merely because of the fact that some changes have been effected in the Revenue records and merely because some properties were partitioned, assuming so, the plaintiffs cannot be precluded from claiming further partition in regard to the properties which were not subjected to partition earlier. He would, therefore, submit that there was nothing wrong in the lower appellate Court modifying the judgement and decree of the trial Court by setting aside the same to the extent indicated in the judgement passed in the appeal.

13. Considered the submissions of the learned counsels

appearing for the parties and also perused the materials and pleadings placed on record.

14.As could be seen from the judgement and decree of the trial Court, there was an extensive evidence let in on behalf of the parties both documentary and oral and on the basis of conclusive materials, which were made available for consideration before the trial Court, the trial Court had come to a definite conclusion that there was indeed an oral partition which happened several decades before and the oral partition was also acted upon by the parties concerned. The trial Court has also given extensive reasons in support of its conclusion and also held that even in law, the plaintiffs were barred from filing a suit for partition, since their claim was barred by law of limitation. The trial Court has given a categorical finding in regard to the factum of oral partition taking effect and such clear finding cannot be a subject matter of interference in the Second Appeal, as this Court is not called upon to re-appreciate evidence, unless the evidence is perverse or legally unacceptable.

15.Moreover, when the lower appellate Court itself has accepted the factum of oral partition taking effect among the parties, the finding of the trial Court gets further strengthened on this aspect. Further, what went wrong with the appellate Court is that it held that certain items of properties were not part of the oral partition without any supportive evidence in concluding so. In fact, as rightly contended by the learned counsel for the appellants/defendants, it was not the case of the respondents/plaintiffs that the so called properties stood excluded by the lower appellate Court were not part of the oral partition. In the absence of such a plea nor evidence to that effect, this Court is unable to see as to how the lower appellate Court could come to such a conclusion and held that two items of the suit schedule properties were not subjected to oral partition and also some properties are to be held as joint family properties. This Court is of the view that the lower appellate Court has completely misdirected itself in coming to such a conclusion, which warrants interference at the hands of this Court.

16.As regards the reliance placed by the learned counsel for the appellants/defendants on the decision of the Hon'ble Supreme Court of India in the case of Kesharbai Alias Pushpabai Eknathrao Nalawade, referred to supra, — the same would be squarely applicable to the case on hand. Once the trial Court has held that all the suit schedule properties were subjected to oral partition and was acted upon, the burden of proof of exclusion of certain items of the properties was cast upon the party who asserts the same. In this case, such burden was never discharged by the respondents/plaintiffs. In fact, it was not even pleaded by them, much less proving their assertion, if at

all there was any. Unfortunately, the lower appellate Court has assumed the role of contesting respondents therein and rendered the judgement unsupported by any materials. The decisions relied on by the learned counsel for the respondents/plaintiffs would be of no avail to them, since those decisions cannot be applied to the factual matrix of the present case, particularly, with reference to the categoric finding rendered by the trial Court against the plaintiffs.

17. In the above circumstances, this Court has no hesitation in coming to a conclusion that the judgement and decree, dated 27.3.2013, passed in A.S.No.6 of 2006, needs to be interfered with and accordingly, the same are set aside by answering the Substantial Questions of Law framed in favour of the appellants/defendants.

In the result, the Second Appeal stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

Msk

To

1. The Additional District Court,
Krishnagiri.

2. The Subordinate Judge, Hosur.

+1cc to Mr. Sarvabhauman Associates, Advocate, S.R.No. 6485

+1cc to Mr. V. Krishnan, Advocate, S.R.No. 6387

+1cc to Mr. M. Selvam, Advocate, S.R.No. 7124

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S.A.No.1228 of 2013

KJ (CO)

GN (17/03/2020)

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