



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.07.2021

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.1061 of 2009

and

M.P. (MD) .No.1 of 2015

V.Arumugam

... Appellant/Appellant/Plaintiff

Vs.

1. Thanuskodi

2. Kallivanathan

3. Mrs.Thiruvengkatam

4. Mrs.Meenakshi ... Respondents/Respondents/Defendants

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the Judgment and Decree made in A.S.No.39 of 2007 dated 17.04.2009 on the file of the Ist Additional Subordinate Judge, Nagercoil confirming the Judgment and Decree in O.S.No.5 of 2005 dated 28.03.2006 on the file of the IInd Additional District Munsif, Nagercoil.

For Appellant : M/s.S.Vinoth Sathayalazer.

For Respondents: Mr.A.Arumugam,
For Mr.C.Christopher, for R2 and R4.
R1-Exparte
R3 - No appearance.

JUDGMENT

The plaintiff in O.S.No.5 of 2004 on the file of II Additional District Munsif at Nagercoil is the appellant in this second appeal.

2.The suit was for partition. According to the plaintiff, the suit properties are the ancestral properties of the plaintiff and the defendants. They stood in the name of Vairavanathan who is the father of the parties herein. Vairavanathan died in the year 1971. He left behind 3 sons and 2 daughters. The case of the plaintiffs is that he is entitled to 6/20th share in the suit items. In other words, DW1 and DW2 / brothers will get 6/20th share while sisters / D3 and D4 are entitled to 1/20th share. At the instance of the first and third defendants, the second defendant put forth a plea that



partition had taken place among the family members way back in the year 1980 itself and that the plaintiff was allotted seven cents in the 4th item of the suit property.

3. Based on the rival pleadings, the trial Court framed the necessary issues. One of the defendants was examined as DW.1 and Exs.B1 & B2 were marked. After considering the evidence on record, the suit was dismissed by judgment and decree dated 26.03.2006. Questioning the same, the plaintiff filed A.S.No.39 of 2001. The appeal was also dismissed by the impugned judgment and decree dated 17.04.2009. Challenging the same, this Second Appeal came to be filed.

4. The Second Appeal was admitted on the following substantial questions of law :

"i) Whether the Courts below are right in dismissing the suit holding that there was oral partition in 1980?

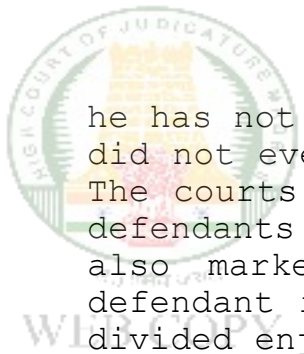
ii) Whether the Courts below are right in believing the oral partition on the basis of recitals in Ex.B1 and B2?

5. The learned counsel appearing for the appellant/plaintiff reiterated the contentions set out in the memorandum of grounds of appeal and called upon this Court to answer the substantial questions of law in favour of the appellant and grant preliminary decree as prayed for. Per contra, the learned counsel for the contesting respondents submitted that the impugned judgment does not call for any interference.

6. I carefully considered the rival considerations and went through the evidence on record.

7. The learned counsel for the contesting respondents submitted that the plaintiff, who has already been allotted 7 cents of land in Item No.4 of suit schedule property, can also be allotted with item no.2 of suit schedule property. This concession made by the learned counsel for the respondents, based on instructions from his clients is recorded.

8. The contesting respondents who have pleaded oral partition are obliged to prove the same. The second defendant examined himself as a defense witness and deposed regarding the oral partition said to have taken place in December 1980. In Ex.B1 sale deed dated 21.03.2003, the land allotted to the plaintiff has been mentioned with boundaries. The property of the first defendant was mentioned as the southern boundary. Thus by examining himself and by marking Ex.B1, the second defendant had discharged his burden. Thereafter, the onus shifted to the plaintiff. The plaintiff made an assertion that the suit properties are in joint possession. But



he has not filed any document to establish the same. The plaintiff did not even enter the witness box. No document was marked by him. The courts below have concurrently rendered a finding that when the defendants have adduced evidence that there was oral partition and also marked sale deed dated 27.01.1995 executed by the second defendant in favour of the fourth defendant indicating separate and divided enjoyment of the parties, the plaintiff was obliged to prove his case and that he failed to do so. It is true that in a suit for partition, all the parties are in the same position. That would be so only when joint possession is established. Where there is specific plea that the joint status has been disrupted in a oral partition and the contestants have led evidence in support of the said plea, the burden is very much on the plaintiff. In this case, he has miserably failed to discharge the same. Therefore, the concurrent findings of the courts below that there was oral partition cannot be interfered with. The substantial questions of law are answered against the appellants. However, in view of the concession made by the contesting respondents, the entitlement of the plaintiff over the suit items is declared as follows :

"The plaintiff is entitled to Item No.2 and 7 cents of land in Item No.4 in the suit schedule."

9. With this declaration regarding the entitlement of the plaintiff, the impugned judgment and decree is modified. The second appeal is disposed of. Connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(Records)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

skm

Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The II-Additional District Munsif, Nagercoil.
2. The I-Additional Subordinate Judge, Nagercoil.



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

+1 CC to M/s.C.CHRISTOPHER, Advocate (SR-24298[F] dated
29/07/2021)

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TR(30.03.2022) 4P 6C