



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE **G.R.SWAMINATHAN**

S.A.(MD)No.730 of 2007

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Arumugam (Died)

2.Marudhammal

3.Revathi ... Appellant / Respondent / Plaintiff

(AA2 & 3 are brought on record as LRS of the deceased A1, vide Court Order dated 06/08/2019 made in CMP 4051 to 4053/19 in SA.730 of 2007)

-Vs-

1.Paneer Selvam

2.Selladurai ... Respondents/ Appellants / Defendants

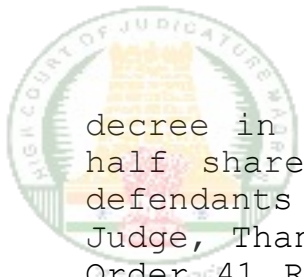
PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree in A.S.No.30 of 2006, dated 04.01.2007 on the file of the Principal District Judge, Thanjavur, reversing the decree and judgment of the sub-ordinate Judge, Pattukottai passed in O.S.No.67 of 2003 dated 29.12.2006.

For Appellants : Mr.R.P.Ramachandran
For Respondents : Mr.V.K.Vijayaraghavan

JUDGMENT

This second appeal arises out of a partition suit proceedings. The plaintiff in O.S.No.67 of 2003 on the file of the Sub Court, Pattukottai is the original appellant. During the pendency of this proceedings, he passed away and daughters have come on record.

2. The case of the plaintiff Arumugam is that the suit properties have not been divided and that he is entitled to half share therein. The defendants / respondents herein contended that there was an oral partition in the family some 30 years prior to the institution of the suit and that there has been severance of status and that the properties are being enjoyed separately. Their defence was that the suit for partition was not maintainable. Based on the divergent pleadings, the learned Judge framed the necessary issues. The plaintiff examined himself as P.W.1 and marked Ex.A1 to Ex.A5. The first defendant examined himself as D.W.1 and marked Ex.B1 to Ex.B10. After consideration of the evidence on record, the trial Court vide judgment and decree dated 27.12.2005 granted preliminary



decree in favour of the plaintiff declaring that he is entitled to half share in the suit properties. Aggrieved by the same, the defendants filed A.S.No.30 of 2006 before the Principal District Judge, Thanjore. The defendants also filed I.A.No.170 of 2006 under Order 41 Rule 21 of C.P.C for adducing additional evidence. The defendants were permitted to adduce additional evidence and Ex.B11 and Ex.B12 were marked. The first appellate Court, by impugned judgment and decree dated 04.01.2007, set aside the judgment and decree passed by the trial Court and allowed the appeal and dismissed the suit. Aggrieved by the same, this second appeal came to be filed.

3. The second appeal was admitted on the following substantial questions of law:-

"Whether the findings of the first appellate Court with regard to oral partition about 30 years prior to the suit is perverse on account of wrong interpretation of the evidence adduced on the side of the respondents?"

4. The learned counsel appearing for the appellants reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial question of law in favour of the appellants and restore the decision of the trial Court.

5. Per contra, the learned counsel appearing for the respondents contended that the impugned judgment and decree does not call for any interference.

6. I carefully considered the rival contentions and went through the evidence on record. The relationship between the parties is not in dispute. The original plaintiff Arumugam was none other than the paternal uncle of the defendants. The father of the defendants died prior to the institution of the suit. The other brother of the plaintiff namely Chinnathambi also died long back and he was issueless. The father of the plaintiff and grand father of the defendants Thiru.Periyathambi also died long time back.

7. The case projected by the plaintiff was that the suit properties have not been divided and that he is entitled to half share therein. The suit items are 14 in number. It has been brought out in evidence and it was conceded by the plaintiff also that there was a partition among the father and three sons namely Chinna Thambi, Vadivelu and Arumugam on 21.03.1960 and that the same was also registered. The certified copy of the partition deed was marked as Ex.A1 and the original document was marked as Ex.A5 by the plaintiff himself. It can be seen therefrom that the plaintiff Arumugam was allotted D schedule property. Vadivelu the father of the defendants was allotted C schedule property. Chinnathambi the first son was allotted B schedule property and father Periyathambi took A schedule property. The first wife of Arumugam was allotted E schedule property. There is no dispute that the suit items figured as A schedule in Ex.A1/Ex.A5.



8. The facts being thus, the plaintiff Arumugam ought to have made full disclosure in the plaint itself. That is why, the first appellate sharply commented on Arumugam's failure to come out with full disclosure of the antecedent facts. I wanted to know if A schedule items that were allotted to Periyathambi were divided equitably between Arumugam and Vadivelu.

9. The learned counsel appearing for the respondents took me through the evidence of P.W.1. P.W.1 had admitted that in Survey No.8/4 which corresponds to suit items 4, 5, 6 & 7, he is in occupation of 62 cents out of 72 cents. There is a house in the said survey number and the plaintiff is residing therein. Survey No.6/4 corresponding to the suit item 8 measuring 38 cents was also admitted to be with the plaintiff. Another property in survey No.445 which has not been included in the suit schedule was sold by both the parties through independent sale deeds. Ex.B11 and Ex.B12 which were marked by way of additional evidence are sale deeds executed by Vadivelu and Arumugam. It is also seen therefrom that the appellant Arumugam had attested in Ex.B11 dated 20.10.1986. Vide Ex.B11, Vadivelu father of the defendants had sold a portion of the property in survey No.448 in favour of one Indrani. When the other portion was sold by Arumugam vide Ex.B12, dated_12.01.1995, the property of Indrani purchaser vide Ex.B11 was described as one of the four boundaries.

10. The learned counsel appearing for the respondents also pointed out that P.W.1 in his cross examination had admitted that suit items belonged commonly to all the three brothers and that they had divided the same in the year 1960 itself. He also admitted that they were enjoying it separately. He claimed that since the defendants interfered with his possession and enjoyment, he was constrained to institute the partition suit. He also admitted that some of the items which were enjoyed separately were sold by them. He also admitted that the property allotted in favour of his wife as E schedule was sold by him to one Sheik Abdullah.

11. In view of these admissions, the first appellate Court rightly came to the conclusion that the joint status got severed several years prior to the institution of the suit. Therefore, the substantial question of law will have to be answered against the appellants. Of-course, I have to deal with one contention of the appellant's counsel that the first appellate Court had admitted additional evidence without following the procedure laid down under Order 41 Rule 27&28 of C.P.C. Normally, in such circumstances, this Court would set aside the judgment of the appellate Court and remand the matter with a mandate to follow the procedure set out in Order 41 Rule 28 of C.P.C. But in the case on hand, I need not adopt such a course of action. As rightly pointed out by the learned counsel appearing for the respondents, the factum of execution of Ex.B11 and Ex.B12 has been admitted by P.W.1 during the course of his cross examination. Therefore, even though there is a technical



infraction of the procedure under Order 41 Rule 28 of C.P.C, I am of the view that interest of justice do not require on this ground that there should be an interference. The judgment and decree passed by the first appellate Court is confirmed. The second appeal stands dismissed. No costs.

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Sd/-

Assistant Registrar (CS I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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To

1.The Principal District Judge, Thanjavur.

2.The sub-ordinate Judge,Pattukottai

3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.V.K.VIJAYA RAGHAVAN, Advocate (SR-22594[F] dated 14/07/2021)

+1 CC to M/s.R.P.RAMACHANDRAN, Advocate (SR-22811[F] dated 16/07/2021)

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MGJ(24.01.2022) 4P 7C