



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 09.07.2021

CORAM:

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

S.A.(MD)No.976 of 2007

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Ayinan (died)

... 1st Defendant / 1st Respondent /
Appellant

2.A.Santhakumar

3.Natarajan

4.P.Selvarani

5.A.Rajesh

... Appellants

(legal heirs of the appellllant
are brought on record vide
order dated 09.07.2021 in
C.M.P. (MD)Nos.5613,5615 & 5616 of 2021)

-Vs-

1.Irulan

... Plaintiff / Appellant / 1st Respondent

2.The Superintending Engineer,
T.N.E.B. Mannarpuram,
Tiruchirappalli.

3.The Assistant Engineer, (O&M), TNEB
Somararasampettai,
Tiruchirappalli.

4.Angammal

5.Karupayee Ammal

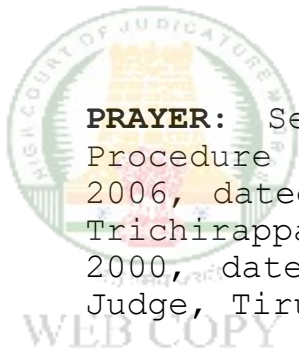
6.Santhanammal

Annavi (died)

7.Nallammal

8.Rajathi

... Defendants 2 to 6 & 8 to 10 /
Respondents 2 to 6 8& 9 /
Respondent 2 to 8



PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree in A.S.No.172 of 2006, dated 31.01.2007 on the file of the Principal District Judge, Trichirappalli, reversing the decree and judgment in O.S.No.597 of 2000, dated 05.10.2005 on the file of the second Additional Sub Judge, Tiruchirappalli.

For Appellants : Mr.H.Lakshmi Shankar

For R1 : Mr.S.Vinayak
for Mr.P.Jeyaprakash Narayanan

For R2 to R4 : No appearance

For R5 to R8 : Mr.P.Radhakrishnan

JUDGMENT

The contesting defendant in O.S.No.597 of 2000 on the file of the second Additional Sub Judge, Tiruchirappalli, is the appellant in this second appeal.

2. The original appellant had passed away and his legal heirs have come on record. The first respondent herein Thiru.Irulan filed the said suit seeking partition of 1/2 share in the suit properties. The original appellant Ayinan who was shown as the first defendant, was the younger brother of the plaintiff.

3.The case of the first defendant was that the partition had already taken place some 40 years prior to the institution of the suit and that therefore, the suit was not maintainable. The first defendant specifically contended that out of the labour put in by him, income was generated from the lands and with those funds, the first defendant had put up a house and also obtained service connection for the suit well in his name. The revenue records have also been accordingly mutated and he also pointed out that some of the properties purchased by him out of his own income and funds have also been maliciously included in the suit schedule. Based on the divergent pleadings, the Court below framed the following issues:-

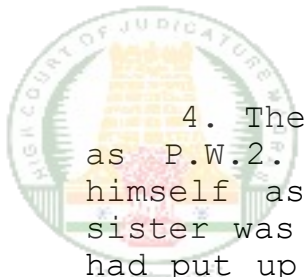
"1.Whether the suit properties are the joint family properties of the plaintiff and the first defendant?

2.Whether an oral partition took place in the family and the first defendant got his share is true?

3. Whether the plaintiff is entitled to half share in the suit property ?

4. Whether the plaintiff is entitled for mandatory injunction against the first defendant for disconnection of the service connection to the electric motor fixed in the common well?

5. To what relief, the plaintiff is entitled to ?"



4. The plaintiff examined himself as P.W.1 and one Balakrishnan as P.W.2. Ex.A1 to Ex.A5 were marked. The defendant examined himself as D.W.1. The 6th defendant Santhanammal who was their sister was examined as D.W.2. A villager who is a relative and who had put up the houses was examined as D.W.3. After considering the evidence on record, the learned trial Judge, by judgment and decree dated 05.10.2005, dismissed the suit. Aggrieved by the same, the plaintiff filed A.S.No.172 of 2006 before the Principal District Judge, Tiruchirappalli. By the impugned judgment and decree dated 31.01.2007, the judgment and decree passed by the trial Court was set aside and the plaintiff was held entitled to partition of his 1/2 share in the suit properties by metes and bounds. A further direction was given to disconnect the electricity service connection obtained by the first defendant in his name. Since it was also found that the first defendant was enjoying in excess of 1/2 share in the suit properties, he was ordered to render accounts in a separate proceedings under Order 20 Rule 12 of C.P.C. Aggrieved by the judgment and decree passed by the first Appellate Court, the first defendant has filed this second appeal. The second appeal was admitted on the following substantial questions of law:-

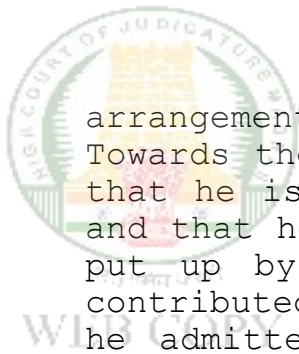
"(i) Whether the lower appellate Court has committed an error in law in decreeing the suit contrary to the admissions made by the plaintiff as P.W.1?

(II) Whether the lower Appellate Court is right in holding that the plaintiff shall be entitled to a decree for partition in respect of all the suit properties, despite the fact that the plaintiff had admitted that a partition had taken place long prior to the filing of the suit and that he did not seek the relief of partition in respect of all other properties excepting one? And

(III) Whether the lower Appellate Court has committed an error in reversing the well considered finding of the trial Court regarding the alleged payment of Rs.2,00,000/- by the plaintiff for the construction of the house?"

5.The learned counsel appearing for the appellants / legal heirs of the first defendant submitted that the specific plea put forth by the first defendant was that the suit properties were already partitioned orally several years ago. He would point out that Kuppandi/father of the plaintiff and the first defendant had passed away some 19 years prior to the institution of the suit. The plaintiff had got married against the wishes of the family and therefore, separation had taken place some 40 years back. The primary contention urged by the learned counsel for the appellant is that the oral partition in the very nature of things can be established only by the attendant and subsequent circumstances. It is futile to expect documentary proof for the same, in which case, it would not be oral partition at all.

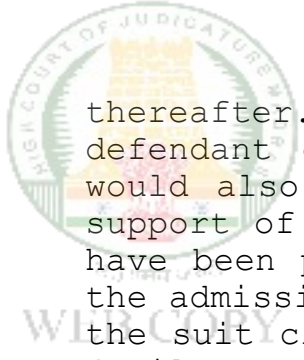
6.The learned counsel took me through the evidence of P.W.1/
<https://hcservicesretail.gov.in/hcservices/> had categorically admitted that there was a family



arrangement and that the properties were being enjoyed separately. Towards the end of his deposition, the plaintiff virtually conceded that he is not asking for any partition of the lands in question and that he is only pressing for allotment of one of the two houses put up by the defendant. Though the plaintiff claimed that he contributed a sum of Rs.2,00,000 for the construction of two houses, he admitted that he is not having any receipt to establish his claim. The plaintiff also admitted that he had put up another house in which he is residing. He conceded that the said house was not included in the schedule. The learned counsel for the appellant pointed out that the plaintiff is not having any other avocation other than the agriculture. If according to him, he had put up a house out of his agriculture earnings, that clearly indicated that the suit items had been partitioned long back.

7. The learned counsel for the appellant placed reliance on the decision reported in **1988 (2) MLJ 162 (Pavayammal Vs. Devanna Gounder) and AIR 1938 Mad 133 (Panyam Thirumalappa Vs. Alasyam Ramappa)**. His next contention is that the first Appellate Court had failed to consider the evidential value of Ex.B1-patta passbook. The patta passbook might have come into existence after filing of the suit. But then, it only indicated the state of affairs that had prevailed earlier. As per Section 6 of Tamil Nadu Patta Passbook Act, 1983, entries in the patta pass book shall be prima facie evidence of title of the person in whose name the patta pass book has been issued. He also would point out that when the plaintiff had made certain admissions in his testimony, it is for him to explain the same. In this case, strangely, the first Appellate Court had come out with an explanation. He would also submit that the suit itself was barred by limitation in view of the acceptance of the plaintiff that the family arrangement had taken place more than 35 years ago. According to him, the trial Court had correctly appreciated the facts and rightly non-suited the plaintiff. The first Appellate Court had gone wrong in reversing the well considered decision of the trial Court. He called upon this Court to answer the substantial questions of law in favour of the appellant and restore the decision of the trial Court.

8. Per contra, the learned counsel appearing for the respondent submitted that 'A' schedule property is admittedly an ancestral property, while the 'B' schedule items stood in favour of Kuppandi, while the 'C' schedule property were jointly in the name of the plaintiff and the first defendant. The plaintiff had not included any item which stood in the individual name of the first defendant. He would point out that the suit well also stood only in the 'C' schedule land and without getting consent from the plaintiff, the first defendant could not have obtained an electricity connection in his name. If as claimed by the first defendant, the partition had taken place some 40 years ago, nothing stopped the first defendant from effecting mutation in the revenue records immediately

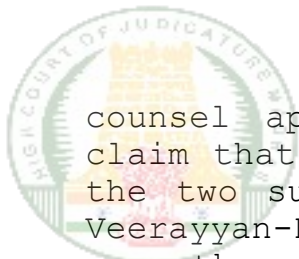


thereafter. Almost all the revenue documents relied on by the first defendant came into existence only after filing of the suit. He would also point out that even though their sister had deposed in support of the first defendant, she had stated that the suit houses have been put up only in the joint family site. According to him, the admissions made by the plaintiff could not be grounds to reject the suit claim. When the suit houses had been put up on the joint family property, it is only just and proper that they are divided and one house is allotted to the plaintiff. He would submit that no substantial question of law has really been arisen for consideration.

9. I carefully considered the rival contentions and went through the evidence on record. There cannot be any dispute about the fact that the suit schedule items had to be partitioned. This is because, "A" schedule items are ancestral properties. "B" Schedule items stood in the name of the father Kuppandi. "C" schedule items stood in the joint names of the plaintiff and the first defendant. The only question is whether the partition had already taken place or not.

10. The stand of the first defendant is that the oral partition had taken place some 40 years back. If that be so, the burden to prove the oral partition definitely lay only on the first defendant. Of-course, the plaintiff in his testimony had conceded that there was a family arrangement and that some of the lands are being separately enjoyed. It appears that trigger for filing the partition suit appears to be putting up of the two houses by the first defendant. That is why, the plaintiff went to the extent of stating that the very purpose and object of filing the suit was only to obtain allotment of one house. I wanted to know if the first defendant had furnished precise particulars regarding the exact enjoyment of the suit items which are 31 in number. I regret to note that both the parties have not placed the relevant materials. It is conceded that the properties are being enjoyed separately by way of a tentative arrangement. If really an oral partition had taken place 40 years ago, nothing stopped the first defendant from effecting mutation in the revenue records. Therefore, the first Appellate Court was justified in refusing to pay much value to the post suit documents including Ex.B1-patta pass book. At the same time, the admissions made by the plaintiff cannot be ignored. When by an informal arrangement, the plaintiff and the first defendant have been allowed to enjoy certain pieces of land and out of the income generated by their individual labour, properties were purchased and constructions were put up, then, obviously, one cannot have any claim on the same.

11. The plaintiff would claim that he had put up a house out of his own earnings. Likewise, the first defendant / original appellant had also claimed that he had put up the two suit houses



counsel appearing for the appellant, though the plaintiff would claim that he advanced a sum of Rs.2,00,000/-, towards constructing the two suit houses, there is absolutely no proof for the same. Veerayyan-D.W.3 who helped in the construction had stated that it was the first defendant who funded the entire construction. Therefore, I have to sustain the claim of the appellant that the plaintiff cannot have any claim over the two suit houses. Likewise, the appellant also cannot have any claim over the houses said to have been put up by the plaintiff.

12. But in all other respects, the plaintiff as well as the first defendant will have $\frac{1}{2}$ share in all the 31 suit items. Of course, in the final decree proceedings, evidence can be adduced by both the parties to show which portion of the each item is being enjoyed separately over these years. The Court passing the final decree will have due regard to the ground reality while dividing the property by metes and bounds. The question of the first defendant having to account does not arise at all. When the plaintiff had admitted that the parties were permitted to enjoy the lands separately, the defendant alone cannot be called upon to account. The trial Court erred in completely non-suiting the plaintiff. When the suit was filed seeking $\frac{1}{2}$ share in all the 31 items and when admittedly all the 31 items are amenable to partition, the trial Court ought to have spelt out which item was being enjoyed by the plaintiff and which was being enjoyed by the first defendant.

13. There could not have been a wholesale dismissal. The trial Court was utterly wrong in having done so. Likewise, the first Appellate Court also erred in accepting the case of the plaintiff as gospel truth and directing $\frac{1}{2}$ share in all the suit items and also calling upon the first defendant to account. I answer the substantial questions of law in favour of the appellant to the extent mentioned alone. At the same time, the result cannot be restoration of the trial Court's decision. The impugned judgment and decree passed by the first Appellate Court is modified in the following terms:-

(I) The plaintiff will be entitled to $\frac{1}{2}$ share in all the 31 items.

(ii) The plaintiff will not have any claim over the two suit houses put up by the first defendant.

(III) The mandatory injunction for effecting disconnection of the service connection to the common well is set aside. It will stand in the common names of the plaintiff and legal heirs of the appellant.

(IV) The oil motor that is said to be operated by the plaintiff will be dismantled.

(V) In the final decree proceedings, the parties are at liberty to adduce evidence to indicate the nature of the enjoyment of the various suit properties. The equities will be appropriately



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presently standing, are allotted to the share of the appellants.
The second appeal is partly allowed. No costs.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To

1.The Principal District Judge, Trichirappalli.

2.The second Additional Sub Judge, Tiruchirappalli

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

+1 CC to M/s.H.LAKSHMI SHANKAR, Advocate (SR-21867[F] dated
09/07/2021)

S.A.(MD)No.976 of 2007

09.07.2021

RK (28.09.2021) 7P 6C