



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.02.2021

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A.(MD)No.246 of 2013

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Ayyarsamy Servai

... Appellant/Petitioner/Defendant
Vs.

1.A.S.Chinnayan (Died)

2.Mrs.Suseela

3.Muthukumar

4.Indirani

5.Bhuvaneshwari

6.Malarkodi

... Respondents/Appellant/Plaintiff

(R4 to R6 are brought on record as LRs of the deceased 1st respondent vide Court order dated 05.01.2021 made in C.M.P.(MD)No.6552 of 2020 in S.A.(MD)No.246/2013)

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree, dated 10.11.2012 in A.S.No.11 of 2012 on the file of the Principal Sub-Court, Dindigul, reversing the judgment and decree, dated 30.10.2010 in O.S.No.173 of 2008, on the file of the Principal District Munsif Court, Dindigul.

For Appellant : Mr.H.Lakshmi Shankar

For Respondents : No Appearance

2 & 3

JUDGMENT

Aggrieved over the reversal finding of the first appellate Court, the present Second Appeal is filed.

2.The parties are referred to as per their rank before the trial Court.

3. The brief facts, leading to the filing of this Second Appeal, are as follows:-

The suit properties and other properties are originally owned by one Sathan Servai. He had two sons viz., Chinnaiyan and Ramasamy. The said Chinnaiyan had four sons. The first plaintiff is one of the sons of the said Chinnaiyan. The defendant is the son of Ramasamy, who is the one of the sons of the original owner Sathan Servai. On 18.01.1980, an oral partition was effected between the branches of the first plaintiff and the defendant. The suit property and other properties were allotted to the first plaintiff and his brothers. In the said partition, the defendant was also allotted some other properties and the defendant has enjoyed his share individually and sold some of the properties to the third



parties. The defendant had also sold one of his property to the second plaintiff's husband A.S.Ramasamy. Thereafter, the first plaintiff and his brothers have entered into a partition deed, dated 07.07.2003. In pursuance of the partition, the plaintiffs are in possession and enjoyment of the suit property. The revenue records also stands in their name. Previously, there was a thatched shed in the suit property. The plaintiffs are raising a terraced house in the suit property. The defendant approached the plaintiffs to sell the suit property to them, however, the same was refused by the plaintiffs. Thereafter, in the third week of January 2008, when the first plaintiff attempted to start earth work for the proposed construction, the defendant made an attempt to prevent the first defendant and his men from doing earth work in the suit property. Hence, the suit.

4. Denying the oral partition deed, dated 18.01.1980, it is the contention of the defendant in the written statement that the partition deed, dated 07.07.2003 is not maintainable. It is the further contention that the defendant's branch is also entitled to have a half share in the suit property. Hence, prays for dismissal of the suit.

5. Based on the above pleadings, the trial Court has framed the following two issues:

- 1) *Whether the plaintiffs are entitled to get the relief of permanent injunction, as prayed for?*
- 2) *To what other reliefs, the plaintiffs are entitled?*

6. Before the trial Court, on the side of the plaintiffs, first plaintiff was examined as P.W.1 and Exs.A1 to A6 were marked. On the side of the defendant, he himself was examined as D.W.1 and Exs.B1 and B7 were marked.

7. Based on the evidence and materials, the trial Court had dismissed the suit. However, the first appellate Court had reversed the finding merely on the ground that under Ex.A4, the property was dealt with by the defendant in favour of the second plaintiff's husband. Therefore, the same probablise the oral partition and granted permanent injunction. As against the above finding, this Second Appeal is filed.

8. While admitting the Second Appeal, the following substantial question of law have been framed:

- i) *Whether the first appellate Court is justified in decreeing the suit without any positive finding that the plaintiffs have proved oral partition on 18.01.1980 and by wrongly relying upon Ex.A4, contrary to the case of the plaintiffs and admission of P.W.1?*



ii) As the findings and conclusions of the first appellate Court regarding oral partition sustainable in law and based on legal evidence, especially when Ex.A.4, Ex.A.5 or any of the documents relied upon by the plaintiffs do not prove it?

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9. The learned counsel for the appellant contended that the suit property is originally an ancestral property. The alleged oral partition as pleaded by the plaintiffs has been established. As long as the oral partition is not established, merely on the basis of some sales made by both sides, the oral partition cannot be presumed. Ex.A4 sale is in respect of a separate property of the defendant, which was purchased under Ex.B3. The first appellate Court has not taken note of these documents and simply drawn an inference. Such a finding is not based on proper appreciation. Hence, prays for allowing the appeal.

10. Though the respondents have entered appearance through a counsel and the name of the counsel has also been printed in the cause-list, there is no representation on behalf of them.

11. The suit has been laid for permanent injunction. It is not in dispute that originally the suit property was owned by one Sathan Servai. He had two sons viz., chinnaian and Ramasamy. The said Chinnaian had four sons. The plaintiff is the one of the sons of the said Chinnaian. The first defendant is the son of Ramasamy. The relationship pleaded in the plaint is not disputed and the character of the parties were also not disputed. The main contention of the plaintiffs is that on 18.01.1980, there was a oral partition between the two branches viz., the plaintiff's branch and the defendants' branch. From the date of the said oral partition, the plaintiffs are in possession of the property.

12. It is to be noted that to substantiate the plea of oral partition, no evidence is available on record. The Patta-Ex.A6 relied upon by the plaintiffs indicates that the same has been issued only in respect of four cents, whereas, the suit property is about 9 cents and Exs.A1 to A3 - Sale Deeds makes it very clear that all the co-owners joined together and dealt with the properties. The first appellate Court has given much emphasis to Ex.A4-Sale Deed executed by the defendant in favour of the second plaintiff's husband and came to the conclusion that since the defendant himself dealt the property, it is more probable that there was an oral partition. As rightly pointed out by the learned counsel for the appellant that what was dealt with under Ex.A4 is a property, which was the subject matter of Ex.B3 purchased by the defendant. The same makes it very clear that only the self acquired property of the defendant under Ex.B3 was sold under Ex.A4. and P.W.1 also admitted this fact in his evidence. Merely on the basis of such purchase, one cannot presume that all the ancestral properties were



partitioned orally. Though Ex.A5-Partition Deed came to be executed among the plaintiffs, there is no whisper in the above documents as to the previous allotment as per the oral partition allegedly took place in the year 1980.

13. Therefore, this Court is of the view that in the absence of proof of oral partition, merely on the basis of Ex.A5, where the defendant's branch was not a party, the same cannot be a ground to hold that there was an oral partition. The Patta-Ex.A6 relates only to four cents. If really there was an oral partition and the entire properties were allotted to the plaintiffs, there was no reason whatsoever as to why patta was issued only in respect of four cents. Therefore, to show that the plaintiffs are in exclusive possession of the property as on the date of the suit, there was no other documents filed except Ex.A6-Patta. Patta has also been issued only in respect of four cents, which was obtained only in the year 2007, which is prior to the filing of the suit. No other documents was filed to show that the property was in exclusive possession of the plaintiffs and other co-sharer has totally been excluded.

14. In such view of the matter, when the property appears to be an ancestral property and the oral partition as pleaded by the plaintiffs has not been established, the other co-sharers have a right in every inch of the ancestral property. In such view of the matter, there cannot be any permanent injunction as against the other co-sharers. Accordingly, all these points are answered in favour of the appellant.

15. In the result, this Second Appeal is allowed and the decree and judgment of the first appellate Court is set aside and the decree and judgment of the trial Court is restored. No costs.

Sd/-

Assistant Registrar (CSII)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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 Principal Subordinate Judge, Dindigul.

2.The Principal District Munsif, Dindigul.

<https://hcservices.ecourts.gov.in/hcservices/>



3.The Section Officer, (2C)
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

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+1 CC to M/s.H.LAKSHMI SHANKAR, Advocate (SR-6104[F] dated
19/02/2021)

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KB (26.03.2021) 5P 6C