



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 30.11.2021

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THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A(MD)No.742 of 2021

Sesunathan ... Appellant/Appellant/Plaintiff

Vs.

1.John Mariya Joseph
2.Chandrasekar
3.Santhiyagu

... Respondents/Respondents/
Defendants

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 16.04.2019 passed in A.S.No.17 of 2017, on the file of the Principal Subordinate Court, Dindigul, confirming the judgment and decree dated 21.06.2016 passed in O.S.No.80 of 2013 on the file of the Additional District Munsif Court, Dindigul.

For Appellant : Mr.S.Sarvagan Prabhu
For Respondents : Mr.M.Lakshmi Shankar

JUDGMENT

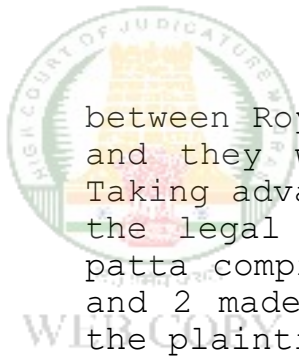
The concurrent Judgments and decrees passed in O.S. No.80 of 2013 by the Additional District Munsif Court, Dindigul and in A.S.No.17 of 2017, by the Principal Subordinate Court, Dindigul, are being challenged in the present second appeal.

2. The appellant / plaintiff has instituted a suit in O.S. No.80 of 2013, on the file of the trial Court for the relief of partition, wherein, the present respondents have been shown as the defendants.

3. For the sake of convenience, the parties are referred to, as described before the trial Court.

4.The case of the plaintiff is as follows :

Originally, the suit property belongs to one Anthony Muthu Servai and Adaikalam Servai and on partition, Anthony Muthu Servai was allotted 2 acre and 56 cents and Adaikalam Servai was allotted 2 acre and 56 cents and they were in separate possession and enjoyment of the same. Adaikalam Servai has two sons, namely, Royappan and Chinnappan. The said 2 acre and 56 cents was orally partitioned

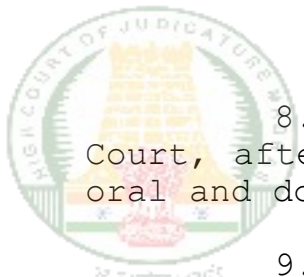


between Royappan and Chinnappan and each has got 1 acre and 28 cents and they were in separate possession and enjoyment of the same. Taking advantage of the oral partition between the sons of Royappan, the legal heirs of Rathinam and the third defendant has obtained patta comprising the lands of the plaintiff. When the defendants 1 and 2 made an attempt to construct a complex building and factory, the plaintiff objected and stopped the same with the help of others.

5. Further, the plaintiff came to know that since the plaintiff's share has not been properly partitioned and that the third defendant has also not demarcated his portion of land, the third defendant has tried to settle those properties in favour of his daughter. It is further stated that the aforesaid settlement does not have any right over the plaintiff's share in the property. In this regard, the plaintiff had sent a legal notice on 24.12.2012 and in reply to the same, the defendants have sent a reply with false statements. Hence, the plaintiff filed the above suit praying for a preliminary decree for the 1/3rd share belonging to the plaintiff and also for final decree by appointing an Advocate Commissioner to demarcate his property and hand over the possession to the plaintiff.

6. In the written statement filed on the side of the defendants, it is stated that the except the statement accepted by them, all the other averments are denied. According to them, Adaikalam Servai has two sons, namely, Royappan and Chinnappan. Royappan has three sons namely, the third defendant, plaintiff and one Rathinam. The said Rathinam has two sons, namely, the defendants 1 and 2 herein. When the said Royappan was alive, his portion of property was partitioned among his three sons and portion of the third defendant's property was allotted with patta No.670, portion of the plaintiff's property was allotted with patta Nos.1150 and 1151 and portion of the property of Rathinam, who is the father of the defendants 1 and 2 was allotted with patta No.2147 and they were in separate possession and enjoyment of their respective properties. The defendants 1 and 2 put up construction of shops, five years prior to the date of filing of the suit and they have rented it to third parties and enjoying the same. It is false to state that the defendants 1 and 2 have now only try to put up constructions in the said property. The third defendant has not executed any settlement deed in favour of his daughter and for doing so, the third defendant need not get any prior permission or signature from the plaintiff. The plaintiff has no cause of action to file the suit and hence, the suit has to be dismissed with costs.

7. Before the trial Court, on the side of the plaintiff, the plaintiff examined himself as P.W.1 and one S.Santhiyagu was examined as P.W.2 and Exs.A1 to A10 were marked. On the side of the defendants, the third defendant examined himself as D.W.1 and Exs.B.1 to B.6 were marked.



8. On the basis of the pleadings on either side, the trial Court, after framing necessary issues and after evaluating both the oral and documentary evidence, has dismissed the suit.

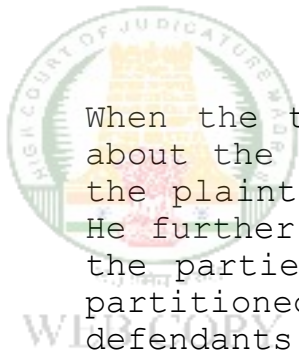
9. Aggrieved by the Judgment and decree passed by the trial Court, the plaintiff, as appellant, had filed an Appeal Suit in A.S. No.17 of 2017. The first appellate Court, after hearing both sides and upon reappraising the evidence available on record, has dismissed the appeal and confirmed the Judgment and decree passed by the trial Court. Challenging the said concurrent Judgments and decrees passed by the Courts below, the present second appeal has been preferred at the instance of the plaintiff, as appellant.

10. Heard the learned counsel for the appellant and the learned counsel for the respondents and also perused the materials available on record.

11. The learned counsel appearing for the appellant submits that the Courts below ought to have decreed the suit when the extent of family share was not disputed and the Courts below had failed to take into consideration that the demarcation could be finalized in a final decree proceedings in a suit for partition and there is no piece of evidence on the part of the respondents to establish that there was partition, which was legally enforced and the Courts below have committed an error in dismissing the suit, when the respective shares of the parties are admitted and till date, the partition among themselves has not been legally enforced and hence, prayed to allow the second appeal.

12. As per the case of the plaintiff, he has claimed that the defendants 1 and 2 are one of his deceased brother, namely, Rathinam's children and the third defendant is also another brother and he seeks for 1/3rd share belonging to his father Royappan. He further submitted that there was no proper survey made regarding the suit properties and the father of the defendants 1 and 2, the third defendant and between the plaintiff, there is no such proper partition. It is only an oral partition. Hence, the other two persons are having more extent of properties and they have also encroached upon the plaintiff's property and prayed for partitioning the properties into three parts.

13. The plaintiff has not produced any document to prove his enjoyment and the defendants have filed documents Exs.B.1 to B.3 and it is found from the said exhibits, patta No.1151 stands in the name of the plaintiff and the patta No.3293 stands in the name of the plaintiff and his brothers jointly. Regarding the total extent of 5 acres and 12 cents, 1 acre and 28 cents alone has been mentioned by the plaintiff, for which, there was no four boundaries and there are lot of sub-divisions made in Survey Nos.1703 and 1704.



When the total extent is more than 5 acres, there was no mention about the extent of 1 acre 28 cents allotted to Royappan and hence, the plaintiff is not entitled for any relief as sought for by him. He further stated that it is an oral partition entered into between the parties. During their life time, the property has been orally partitioned between them and a building was constructed by the defendants 1 and 2, when their father Royappan was alive. During the relevant point of time, the plaintiff has not raised any objection regarding the construction of the said building. When his father was alive, the same has been partitioned orally and after 20 years from the date of oral partition, the plaintiff has raised this issue and they have had a panchayat and in the said panchayat, agreed that they are in enjoyment of the respective properties and they have also obtained patta as per their allotment and at this juncture, the plaintiff only due to vengeance has stated that they have to divide the 1 acre 28 cents and the oral partition between the parties, which was done earlier, cannot be accepted and the plaintiff has not given any valid reason for seeking for such partition.

14. Further, the plaintiff has not proved his case that whether the defendant has executed a settlement deed in favour of his daughter. When they have tried to construct a house, objection was raised by the plaintiff and the same has not been proved by him. It is seen that the said partition has been effected 45 years back which has also been admitted by the plaintiff and now, he cannot come to this Court seeking for partitioning the property. The partition has already been effected and acted upon by the parties and disbelieving the same, the plaintiff's case was dismissed by the appellate Court.

15. It is further seen that when there is no cause of action arisen at that juncture, the appellate Court has come to the conclusion that when Rathinam has executed the property by way of a settlement deed in favour of his daughter and the said Rathinam's daughter was not made as a party to the *lis* and also come to the conclusion that there is no proper reason warranting interference and the appellate Court has dismissed the same. It is made clear that the plaintiff himself has not proved that the plaintiff has got patta in his favour and failed to establish the identification and the extent of the suit property in a suit for partition and the plaintiff cannot now come and say that the Court has erroneously held against him.

16. At this juncture, it is worthwhile to refer to Section 49 of the Indian Succession Act, which reads as follows :

49. Children's advancements not brought into hotchpot. -Where a distributive share in the property of a person who has died intestate is claimed by a child, or any descendant of a child, of such person, no money or other property which



the intestate may, during his life, have paid, given or settled to, or for the advancement of, the child by whom or by whose descendant the claim is made shall be taken into account in estimating such distributive share.

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17.The claim of the plaintiff is definitely barred under Limitation Act, when the plaintiff has accepted the oral partition, which has been held 45 years back and now, he cannot raise the same. When he has already accepted that there was an oral partition, the fact that the defendants have encroached upon the property has not been proved by the plaintiff in the manner known to law. This Court finds no perversity or illegality in the concurrent judgments of the trial court as well as the appellate Court warranting interference at the hands of this Court and also there is no question of law much less substantial question of law is involved in this appeal and thus, the second appeal fails.

18.Accordingly, the Second Appeal is dismissed. No costs.

Sd/-

Assistant Registrar (Cs-II)

// True Copy //

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Sub Assistant Registrar(CS)

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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 Additional District Munsif,
Dindigul.
- 3.The Record Keeper, (2C)
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.S. SARVAGANPRABHU, Advocate (SR-36618[F] dated 30/11/2021)



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+1 CC to M/s.H.LAKSHMI SHANKAR, Advocate (SR-36702[F] dated
01/12/2021)

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KB(12.01.2022) 6P 7C