



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.03.2021

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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A. (MD)No.43 of 2015

V.Gopalakrishnan

.. Appellant/1st Respondent/
1st Defendant

Vs.

1.V.Murugiah Nadar

..1st Respondent/Appellant/
Plaintiff

2.S.Nagammal

..2nd Respondent/2nd Respondent/
2nd Defendant

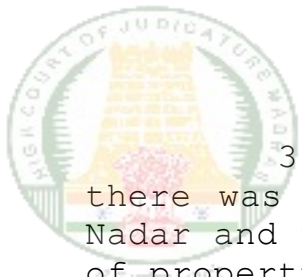
PRAYER:- Second Appeal filed under Section 100 of Code of Civil Procedure, against the decree and judgment dated 16.06.2009 made in A.S.No.32 of 2006, on the file of the Subordinate Judge, Padmanabhapuram, reversing the decree and judgment dated 09.09.2005 made in O.S.No.386 of 2001, on the file of the Additional District Munsif, Padmanabhapuram.

For Appellant : Mr.P.Thiagarajan
For R1 : Mr.R.Vijayakumar
For R2 : No appearance

J U D G M E N T

The first defendant in O.S.No.386 of 2001, on the file of the District Munsif, Padmanabapuram, is on appeal against the judgment and decree of the Appellate Court in A.S.No.32 of 2006, reversing that of the trial Court and decreeing the suit for injunction filed by the plaintiff/first respondent.

2.The suit was laid by the plaintiff claiming that the suit property belonged to Velayudhan Nadar, the father of the plaintiff, the first & second defendants and the husband of the third defendant. At a oral partition that took place on 06.08.1976, an extent of 12 ½ cents on the north western corner of total extent of 70 cents in Survey No.452/20 was allotted to the first defendant, remaining 57 ½ cents was allotted to the plaintiff. Claiming that the first defendant attempted to lay a pathway in the property that was allotted to the plaintiff to reach the 12 ½ cents, that was allotted to him, the plaintiff filed a suit seeking an injunction, restraining the defendant from forming any pathway in the suit schedule property.



3.The suit was resisted by the defendant contending that there was no partition of properties that belonged to Veluyudhan Nadar and the parties have been in enjoyment of different portions of property for convenient enjoyment. It was also claimed that the wife and daughter of Velayudhan Nadar are necessary parties to the suit. Upon such plea being taken, the defendants 2 & 3 namely, the daughter and the wife of Velayudhan Nadar were impleaded as parties to the suit. The third defendant took a plea that she is entitled to a life estate in the property. The sister, namely the second defendant supported the case of the plaintiff.

4.At trial, the plaintiff examined himself as PW 1 and the second defendant was examined as PW 2. The first defendant examined himself as DW 1. Exs.A1 to A9 were marked on the side of the plaintiff and Exs.B1 to B4 were marked on the side of the defendant. A Commissioner was appointed and his report and plans were marked as Exs.C1 to C3.

5.The third defendant Chellammal died pending appeal and other defendants were recorded as the legal representatives.

6.The learned trial judge upon consideration of the evidence on record, concluded that the plaintiff has not established the oral partition as pleaded by him. The learned trial judge rejected Ex.A9, which according to the plaintiff was the memorandum of oral partition. The learned trial judge based the recitals in the instrument, concluded that the instrument is a document, which effects partition in presenti, therefore the same cannot be received in evidence for want of registration and stamp duty. The trial Court initially refused to receive the instrument in evidence. The said order of refusal was challenged before this Court in Civil Revision Petition and this Court directed the trial Court to receive the document in evidence, subject to proof and admissibility. The above conclusion of the trial Court on the nature of the document was arrived at the time of the disposal of the suit, after the receipt of the instrument. After having concluded that Ex.A9 cannot be looked into to establish the partition between the parties, the learned trial judge found that the plaintiff has not proved the partition and therefore he cannot seek injunction against the defendant, who is the co-owner of the property. On the above conclusion, the learned trial Judge dismissed the suit.

7.Aggrieved, the plaintiff preferred an appeal in A.S.No.32 of 2006. The learned Appellate Judge upon reconsideration of the evidence, particularly, the recitals contained in Ex.A9, concluded that Ex.A9 could be looked into for collateral purposes. He also found that Ex.A9 is a record of the



past oral partition. Having accepted Ex.A9, the learned Appellate judge concluded that the defendant, who has no right over the property, situate on the south and east of 12 ½ cents, which was allotted to him under Ex.A9, cannot lay pathway and disturb the possession of the plaintiff. On the aforesaid findings, the learned Appellate Judge reversed the findings of the trial Court and decreed the suit as prayed for. Hence, this Second Appeal.

8.I have heard Mr.P.Thiyagarajan, the learned counsel appearing for the appellant and Mr.R.Vijayakumar, the learned counsel appearing for the respondents.

9.Mr.P.Thiyagarajan, the learned counsel appearing for the appellant would vehemently contend that the Appellate Court was wrong in concluding that Ex.A9 is a record of the past oral partition. Drawing my attention to the recitals of the document, Mr.Thiyagarajan, would contend that the document effects a partition in itself and therefore it requires stamping and registration, in accordance with law. He would fault the lower Appellate Court for having concluded that the document is a record of past oral transaction. Once Ex.A9 goes, according to Mr.P.Thiyagarajan, entire case of the plaintiff built on Ex.A9 has to be rejected. He would also point out that the physical features noted by the Commissioner would show that the defendant is in possession of something more than what was allotted to him according to the plaintiff. Mr.P.Thiyagarajan, would therefore contend the fact that there was a partition and the north western corner 12 ½ cents was allotted to the defendant, while the remaining 57 ½ cents was allotted to the plaintiff has not been established. Therefore, the defendant who is a co-owner along with the plaintiff cannot be injuncted from enjoying the property.

10.Contending contra, Mr.R.Vijayakumar, the learned counsel appearing for the respondent would submit that *de hors* Ex.A9, the plaintiff would be able to demonstrate that there had been a partition in the family. He would point out that the parties had dealt with different portions of separate property independently without reference to each other and the documents of alienation were attested by other brother. Relying upon the recitals in Exs.A2,A3, A4, A5, A6, A8 and A9, which are the sale deeds executed by the brothers i.e namely the plaintiff and the first defendant in favour of the third parties, Mr.R.Vijayakumar, would contend that *de hors* Ex.A9, the plaintiff had established that there was a partition in the family of the plaintiff and the defendants. Mr.R.Vijayakumar, would also buttress his submissions by citing the fact that the daughter of Velayudhan Nadar, the second defendant has accepted the oral partition.

<https://hcservices.ecourts.gov.in/hcservices/> 11.I have considered the rival submissions.



12.The plaintiff has come to the Court with the specific plea that there was a oral partition, which was evidenced by Ex.A9. A reading of Ex.A9, would show that it is the partition in presenti and is not a record of past oral partition. Once it is found that the document effects a partition in presenti, the same cannot be looked into for want of stamping and registration. The Appellate Court, in my opinion was not right in concluding that Ex.A9 is a record of past oral partition and therefore, it does not require either stamping or registration. In view of the above, the questions of law 1 & 2 are answered infavour of the appellant. However, the contention of the learned counsel for the respondents should also be considered. The recitals in Exs.A2, A3,A4, A5, A6, A8 and A9 clearly indicate that there was a oral partition in the family. Both the plaintiff as well as the first defendant have alienated the specific portions of property, relying upon the oral partition that had taken place in the family, the second defendant/the sister of the plaintiff has also affirmed such partition. The defendant cannot be permitted to lead evidence against the recitals in the Sale Deeds, executed by him, regarding the oral partition, in view of the bar enacted under Section 92 of the Evidence Act. The Commissioner's Report also shows that there is compound wall and the portion of the compound wall was demolished for the purpose of the providing ramp for the defendant to take his cattle to his house property situated from the north western corner of the entire survey number. In the light of these physical features, one cannot completely rule out the oral partition having taken place in the family. It is also seen from the Commissioner's Report that the plaintiff has put up the compound wall in his house and there is also a waterkal which runs from north to south to reach the property allotted to the defendant in oral partition. Suggestions have been made in the cross examination of DW 1 that the pathway has been used to reach the property situated on the south eastern side. In the light of the said evidence, I am unable to concur with the contentions of Mr.P.Thiyagarajan that the property remains undivided.

13.After all, civil cases will have to be decided by preponderance of probabilities, conduct of the parties. Existing physical features will have to be necessarily looked into in the absence of direct evidence. In the case on hand, the conduct of the parties clearly shows that there was a partition and the physical features noted by the Commissioner, particularly the existence of compound wall and the gate also would show that the case of the plaintiff is more probable and acceptable. No doubt, the lower Appellate Court has based its conclusion in the recitals found in Ex.A9. I am of the considered opinion that *de hors* Ex.A9, the plaintiff has established the partition. Mr.P.Thiyagarajan, would contend that while the plaintiff claims entire extent of 70



cents is available, the Commissioner has found only 60 cents was available in the suit survey number. But it is the specific case of the plaintiff that the defendant was allotted 12 ½ cents on the north western corner and the plaintiff has not claimed any right over the said 12 ½ cents. Therefore, reduction in the area that was allotted to the plaintiff cannot be a ground to disbelieve his case. I therefore conclude that the plaintiff has established the oral partition and existing physical features would also justify the claim of the plaintiff that what was allotted to the defendant is 12 ½ cents situate north western corner of the suit survey number. Once such conclusion is reached, the question of law 3,4 & 5 will have to be answered against the appellant. In fine, the appeal fails and it is accordingly dismissed. No costs.

Sd/-

Assistant Registrar (CS-III)

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/ /2021

Sub Assistant Registrar (CS)

vrn

To

1.The Subordinate Judge, Padmanabhapuram.

2.The Additional District Munsif, Padmanabhapuram.

Copy to

The Section Officer, VR Section-2 copies
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.P.THIYAGARAJAN, Advocate (SR-13130[F] dated 23/03/2021)

+1 CC to Mr.R.VIJAYAKUMAR, Advocate (SR-13466[F] dated 24/03/2021)

Judgment made in
S.A.(MD)No.43 of 2015
Dated 23.03.2021

KM(19.05.2021) 5P 7C