



A.S. No.756 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.10.2022

CORAM

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY, J.

A.S. No.756 of 2012

A.Perumal (died)

1. P. Vasudevan

2. P. Ramesh

...Appellants/ Defendants

(Cause title accepted vide order of this Court dated 14.06.2012 made in M.P.No.1 of 2012 in A.S.SR.No.13880/12)

Vs.

1.Suresh

2.Poongodi

3.Hema (given up)

4.Manivel (given up)

...Respondents/ Plaintiffs

(R3 and R4 given up as per order dated 05.09.2022 in A.S.No.756 of 2012 by DBCJ)

PRAYER: First Appeal filed under Section 96 of Civil Procedure Code to set aside the judgment and decree dated 29.08.2011 on the file of the Principal District Judge, Dharmapuri passed in O.S.No.50 of 2009.

For Appellants : Mrs.Sasikala Ramadoss

For Respondent : Served (R1 and R2)
Given up (R3 and R4)



A.S. No.756 of 2012

JUDGMENT

The second and the third defendants in O.S.No.50 of 2009 on the file of Principal District Judge, Dharmapuri has laid this Appeal Suit aggrieved by the judgment and decree in the said Suit dated 29.08.2011 in and by which the prayer for partition of the suit properties made by the plaintiffs/respondents 1 and 2 herein was decreed by the Trial Court. In this judgment, the parties are referred to in the same ranking as before the Trial Court.

2. The case of the plaintiffs is that the first defendant Perumal is the father and the first plaintiff Suresh, the second plaintiff Poongodi, the second defendant Vasudevan, the third defendant Ramesh and one deceased Jayamala (represented by her legal heirs, the defendants 4 and 5 in the Suit) are the children of Perumal.

3. The Suit schedule properties are the ancestral properties of the said Perumal. The first defendant namely, the father-Perumal, had become unwell at the time of filing of this Suit and therefore the plaintiff felt that the other defendants are acting in a manner so as to cause loss to the plaintiffs and to deprive them of their lawful share in the suit schedule properties and therefore they issued a legal notice requesting the defendants including the



A.S. No.756 of 2012

father, for partition and separate possession of the suit properties on 29.10.2009. For the said legal notice, the second defendant Vasudevan, the third defendant Ramesh and the minor 4th defendant representing the deceased Jayamala issued a reply notice dated 06.11.2009 stating as if there is an oral partition already made, which is factually incorrect. Hence, the Suit for partition and separate possession of 2/6 th share to the plaintiffs and for mesne profits and costs.

4. The Suit was resisted by the second defendant by filing a detailed written statement. It is the case of the second defendant that in the year 1999, the first defendant himself, after all the children got married, partitioned all the properties belonging to the joint family since it became impossible to carry on with the joint family. Thereafter each of the 5 children were allotted specific properties as mentioned in paragraph 5 of the written statement.

5. As far as the first defendant is concerned, he did not take any share in any of the suit properties. On the other hand, cash of Rs.1,50,000/- and the family jewels of 30 sovereigns were left with him as his share. This



apart, all the three sons were required to give a sum of Rs.200/- per week which was being given by all the sons thereafter. As a matter of fact, subsequent to the oral partition, nobody took care of the mother and it is only the second defendant Vasudevan, who took care of the mother, namely Devagi and treated her for Brain tumour by spending more than Rs.2 lakhs. Even thereafter, she has lost her vision and her limbs and legs have become disabled and she has become bedridden and it is only the second defendant who is taking care of her. Therefore, the suit filed as if no partition had taken place is liable to be dismissed. The first defendant also filed a separate written statement and the first defendant supported the plaintiff and denied any oral partition had taken place.

6. On the strength of the said pleadings, the Trial court framed the following issues:

1. Whether the plaintiffs are entitled to get 2/6th shares in suit properties as prayed for?
2. Whether the suit is bad for non-joinder of necessary party?
3. Is it true to say that oral partition has already been effected?
4. To what any relief the plaintiff is entitled to?



A.S. No.756 of 2012

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7. On the said issues, the first plaintiff examined himself as P.W.1 and Ex.A1 to A3 were marked on the side of the plaintiffs. The first defendant examined himself as D.W.1. The second defendant examined himself as D.W.2 and one Viswanathan, father-in-law of the second defendant who is said to have been present during the oral partition was examined as D.W.3 and one Arumugam, brother of the first defendant who is also said to have been present during the oral partition is examined as D.W.4. On the side of the defendants, Ex.B1 to B10 were marked.

8. The Trial Court thereafter proceeded to consider the issue and by a judgment dated 29.08.2011, found that the first defendant, the father himself, had denied such an oral partition. The defendants 2 to 5 are asserting such an oral partition. When the Suit for partition is resisted by the defendants 2 to 5 by claiming oral partition, it is their bounden duty to prove such oral partition. The Trial Court thereafter by relying on the admission of D.W.2 in the cross-examination that after the oral partition in the year 1999, there was no document in writing including Panchayat Muchalika and that no steps were taken either by the second defendant or by any other brother



A.S. No.756 of 2012

or sister to carry out any mutation in the revenue records or effect change of patta etc., in favour of the concerned allottee of the oral partition and held that there is absolutely no evidence at all for such oral partition. The Trial Court found that D.W.4 who is the witness examined in support of the case of the second defendant that there was an oral partition, actually in the cross-examination, admitted that it was only the sons who were conveniently enjoying the properties as per their avocation and actually no partition took place. On the strength of the said findings, the Trial Court answered the issues in favour of the plaintiffs and held that the suit schedule property is liable for partition. Aggrieved by the same, the defendants 2 and 3 are before this Court.

9. Mrs.Sasikala Ramadoss, learned counsel appearing on behalf of the appellants taking this Court through the pleadings and the evidence on record and the grounds of appeal would submit that in this case, the Trial Court ought to have considered that the properties are distributed equally among all the children. The said fact is the first and foremost supporting circumstance that there was an oral partition which had taken place. Secondly, she would submit that in support of the contention of the second



defendant, the second defendant had let in oral evidence in which he had clearly stated about the oral partition. This apart, D.W.3 and 4 who are the relatives, who were present during such oral partition have also been examined and have also deposed in support of the second defendant. As a matter of fact, the brother of the second defendant and the legal heirs of the deceased Jayamala also supported this fact. It is only the first defendant who had joined hands along with the plaintiffs, since the first defendant was living with the plaintiffs. The learned counsel for the appellants would submit that the careful perusal of the Suit Schedule Properties as contended by the defendants in Paragraph 5 of the written statement would show that Survey Nos.73 and 74 were left out in common, to be used as a common pathway which also clearly demonstrates that the oral partition has taken place. The Trial Court even though had answered the issues, did not take into consideration that Survey Nos. 73 and 74 were to be left in common. Therefore, she would submit that the Trial Court erred in passing a preliminary decree. Even though notices were served through substituted service on the respondents, they have not appeared before this Court.

10. I have considered the submissions made by the learned counsel



appearing on behalf of the appellants and perused the material records of the case.

11. On a consideration of the case of the respective parties, it is clear that suit properties are joint family properties. There is no dispute that the first plaintiff, the second plaintiff, the first defendant, the second defendant and the third defendant and the 4th and 5th defendants jointly are entitled to 1/6th of the share. However, the only contention that is raised on behalf of the appellants is that already the exercise has been carried out in the year 1999 and accordingly properties are being enjoyed by the respective brothers and sisters. Therefore, if the suit for partition is resisted on the plea of an oral partition, it is the bounden duty of defendants 2 to 5 who have raised such a contention to prove the same.

12. In the instant case, admittedly there is no other document to prove such an oral partition. There was neither any Panchayat Muchalika or revenue records pursuant to the oral partition. It is also to be considered that the oral partition is claimed to be in the year 1999 and the Suit was filed only in the year 2009. For 10 long years, no steps were taken by even one of



the brother or sister to mutate the revenue records or create any communication / document in writing. This apart, the oral partition was sought to be proved by oral evidence who are the relatives, who are said to have been present during the partition. Of the two witnesses, D.W.3 is the father-in-law of the second defendant himself. The only other independent witness is D.W.4. Even though D.W.4 supported the case of the defendants 2 to 5 in the chief examination, in the cross-examination, he has gone back and he has admitted as follows:

"....1999ம் வருடத்தில் பாகப்பிரிவினை எதுவும் ஏற்படவில்லை என்றாலும் நாளது தேதிவரையில் தாவா சொத்துக்களில் எவ்வித பாகப்பிரிவினையும் ஏற்படாமல் அவரவர்கள் செய்கின்ற தொழிலில் உள்ள இடத்தை அனுசரித்து அனுபவித்து வருகின்றனார்கள் என்றால் சரிதான்..."

13. Therefore in that view of the matter, I hold that the appellants herein have not discharged their onus to prove that there was an oral partition/ family arrangement in the year 1999. That being so, the Trial Court is right in answering the issues in favour of the plaintiffs and passing a preliminary decree. The only other contention of the learned counsel for the

9/12



A.S. No.756 of 2012

appellants is that there are two Survey Nos.73 and 74 which have been left out as common pathway. The Trial Court ought to have left out Survey Nos.73 and 74 as common pathway, as otherwise the convenient enjoyment or partition of any of the properties will not be possible. Therefore, the Trial Court erred in ordering partition and separate possession of the said Survey Numbers also.

14. In my considered view, merely because the Trial Court has held those Survey Numbers also to be available for partition, that will not in any manner foreclose the above said contentions of the learned counsel for the appellants that those Survey Nos.73 and 74 have to be left as common pathway for the convenient enjoyment of the parties and such a contention shall very well be raised during the final decree proceedings and the said question is expressly left open during the final decree proceedings to be considered by the Trial Court. The said contention will not in any manner affect the preliminary decree passed by the Trial Court. Therefore, I am of the view that this Appeal Suit is without any merits. I accordingly confirm the finding of the Trial Court in respect of Issues 1 to 4 in favour of the plaintiffs and against the defendants.

10/12



A.S. No.756 of 2012

15. In the result:

i) This Appeal Suit in A.S.No.756 of 2012 stands dismissed.

ii) In view of the judgment of the Hon'ble Supreme Court of India in the case of ***Kattukandi Edathil Krishnan and other vs. Kattukandi Edathil Valsan and others*** reported in ***2022 SCC Online SC 737***, the matter is posted for hearing before the Trial Court on 24.11.2022, and the Trial Court shall continue the proceedings irrespective of whether any application for final decree is filed by the parties. It is made clear that the parties shall appear before the Trial Court without any further service of notice and the Trial Court will proceed with the final decree.

iii) There shall be no order as to costs.

Consequently, connected miscellaneous petitions, if any, are closed.

26.10.2022

Speaking (or) Non Speaking Order
Index : Yes/ No
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A.S. No.756 of 2012

D. BHARATHA CHAKRAVARTHY, J.

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To:
The Principal District Judge,
Dharmapuri.

A.S. No.756 of 2012

26.10.2022