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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 20.01.2022

PRONOUNCED ON : 28.01.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.1067 of 2010
and M.P.No.1 of 2010

Murugesan ... Appellant/Respondent/Plaintiff
Vs.

1. Chakrapani
2. Thirugnanam
3. Sundaram
4. Ramachandran ... Respondents/Appellants/Defendants

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 22.12.2009 made in A.S.No.39 of 2007 on the file of the learned Subordinate Judge, Chidambaram, reversing the judgment and decree dated 28.12.2006 made in O.S.No.437 of 2000 on the file of the District Munsif cum Judicial Magistrate, Kattumannarkoil.

For Appellant : Mr.R.Selvakumar

For Respondents : Mr.V.Ayyadurai [for R1 to R4]
Senior Advocate

J U D G M E N T

The Second Appeal is focused as against the judgment and decree dated 22.12.2009 passed in A.S.No.39 of 2007 by the learned Subordinate Judge, Chidambaram, in reversing the judgment and decree dated 28.12.2006, made in O.S.No.437 of 2000 by the learned District Munsif cum Judicial Magistrate, Kattumannarkoil. The suit is for the relief of partition and separate possession.

2. For the sake of convenience, hereinafter the parties are referred to, as per their litigative status before the trial Court.

3. The laconic averments made in the plaint, are as follows:



(i) The plaintiff and defendants 1 & 2 are brothers, born to one Govindasamy Padayachi, through his wife Thilaiammal. The said Govindasamy Padayachi is the kartha of the family. In earlier, the said Govindasamy Padayachi purchased the suit 'B' schedule property and enjoyed the same. After the death of said Govindasamy Padayachi and his wife Thilaiammal, both the plaintiff and defendants 1 & 2 are entitled to 1/3 share in suit 'B' schedule property.

(ii) Item Nos.1 and 2 of the 'B' schedule property has been purchased by the said Govindasamy Padayachi through the sale deeds dated 05.05.1948 and 23.09.1948 respectively. Both the properties are situated in Mazhavarayannallur village. The total extent of the said property is 1 acre and 31 cents. From the income realised from the suit property, the said Govindasamy Padayachi purchased Item Nos.3 to 5 of the 'B' schedule property. The sale deed pertains to the said purchase is in the custody of the 1st defendant.

(iii) From the income realised from Item Nos.1 to 5 of the 'B' schedule property, the said Govindasamy Padayachi purchased the 6th Item of the suit schedule property, in the name of the 2nd defendant. Now the plaintiff came to know that the 2nd defendant sold the 6th Item to the 4th defendant. In the sale deed executed by the 2nd defendant either of the plaintiff or the 1st defendant had not signed as a party to the document.

(iv) Since the said sale is against the wishes of the plaintiff, on 01.07.1999, the plaintiff issued a legal notice to the defendants 1 & 2, wherein he demanded partition in the suit schedule property. Now, the 2nd defendant attempted to alienate the suit schedule property in favour of third parties. Hence, the suit.

4. The averments found in the written statement filed by the 1st defendant, are as follows:

(i) The genealogy tree submitted by the plaintiff is found correct. After purchasing the 1st and 2nd item of the suit schedule property, the father of the plaintiff, Govindasamy Padayachi divided the same into two parts i.e., North and South and cultivated the same. After the demise of the Govindasamy Padayachi, in the oral partition held in the year of 1986, at Kumarakudi, the properties mentioned in Item Nos. 1 and 2, measuring a total extent of 1.31 acres was divided into two and later, the northern portion was allotted to the 2nd defendant and the southern portion was allotted to the plaintiff.

(ii) In the said oral partition, Item Nos.3 to 5 of the



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suit schedule property was allotted to the 1st defendant and afterwards the plaintiff and the defendants 1 and 2 are enjoying their respective shares. The said partition was effected in the presence of Ramachandra Konar, Ramamoorthy Pillai, Potturajan, Ramasamy and Kurinjipadi Poorasamy.

(iii) After the partition, since the 1st defendant was residing in Virudachalam, he leased out the property, which was allotted to him, to the plaintiff and received the lease amount. However, for the past three years, the plaintiff has not paid any lease amount. Item No.6 of the suit schedule property is the absolute property of the 2nd defendant. The house situated at Kumarakudi Village in S.No.53/1, measuring an extent of 34 x 112 feet is not included in the earlier partition. In the said property, both the plaintiff and the defendants 1 & 2, are having 1/3rd share. The present suit has been filed by the plaintiff without including the said property. Since already partition had been effected between the plaintiff and the defendants 1 & 2, the suit filed by the plaintiff, is not maintainable.

5. The averments found in the written statement filed by the defendants 2 and 3, are as follows:

(i) Vide sale deed dated 28.03.1983, the 2nd defendant purchased the 6th item of the suit schedule property and mortgaged the same with the 4th defendant. Lateron, vide sale deed dated 04.07.1998, he sold the suit property to the 4th defendant. The said property has been purchased by the 2nd defendant, by utilising his personal earnings.

(ii) The alleged oral partition averred in the written statement filed by the 1st defendant, is found correct. On 20.04.1989, the 2nd defendant executed a mortgage deed for Rs.7,500/- in favour of one Saroja Ammal in respect to 0.65 ½ cents, which was allotted to him in the oral partition. Afterwards, the said loan availed through the mortgage was settled by him. After the redemption of mortgage, on 09.08.1999, the 2nd defendant executed a sale deed in favour of the 3rd defendant in respect of 0.65½ cents and thereafter, the 3rd defendant is in the possession and enjoyment of the said property.

(iii) A portion of the property i.e. 0.50 cents in SF No.88/6, which was allotted in favour of the 2nd defendant, was purchased by the plaintiff himself. Even after knowing the same, excluding the house in Kumarakuddi village, the plaintiff has filed the present suit and hence, the same is liable for dismissal.



6. The averments found in the written statement filed by the 4th defendant, are as follows:

(i) The defendant No.4 is concerned only with Item No.6 of the suit schedule property. The said property originally belonged to Vellayasamy, Govindasamy, Chinnathambi, Kaliyaperumal and Alagappan. They have sold the suit property to the 2nd defendant vide sale deed dated 28.03.1983.

(ii) The 2nd defendant purchased the same by utilising his own earnings and therefore, Item No.6 is the separate property of the 2nd defendant. The 4th defendant purchased the same on 14.07.1998 for a sum of Rs.27,000/-. Before made purchase, the 2nd defendant mortgaged the same with the 4th defendant for a sum of Rs.7,000/-. Ever since the date of purchase, the 4th defendant is in the possession and enjoyment of Item No.6 of suit schedule property. Hence, the prayer sought by the plaintiff, cannot be entertained.

7. Based on the above said averments, the trial Court framed necessary issues and tried the suit. On the side of the plaintiff, PW1 and PW2, were examined and eleven documents were marked as Ex.A1 to Ex.A11. On the side of the defendants, DW1 to DW5 were examined and eighteen documents were marked as Ex.B1 to Ex.B18.

8. Having considered the materials placed before him, the learned District Munsif cum Judicial Magistrate, Kattumannarkoil, by judgment and decree dated 28.12.2006, came to the conclusion that the plaintiff is entitled to the relief of partition as prayed for and decreed the suit.

9. In the appeal filed by the defendants in A.S.No.39 of 2007, the learned Subordinate Judge, Chidambaram, by judgment and decree dated 22.12.2009, set aside the findings rendered by the trial Court and allowed the appeal.

10. Feeling aggrieved over the findings arrived at by the lower appellate Court, the plaintiff has filed the present Second Appeal. When the second appeal is taken up for admission, this Court formulated the following substantial questions of law.

"1. Whether the lower appellate Court is right in fixing the burden of proof of negating the oral partition plea taken by the defendants, on the plaintiff, when the suit properties (if not all,



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atleast item 1 to 5 excluding item No.6) are admittedly jointly family properties, originally owned by the father of the plaintiff and the defendants 1 and 2?

2. Whether the lower appellate Court is right in refusing to consider the joint patta over the suit properties, to prove the joint family nature of the properties, when the defendants plead that the oral partition had already taken place and that they are all in separate possession, paying separate kist etc.,?

3. Whether the lower appellate Court is right in relying on various mortgage deeds, mortgage receipts to prove oral partition, on the ground that those mortgages have not been agitated at all, by the plaintiff?"

11. Heard Mr.R.Selvakumar, the learned counsel appearing on behalf of the appellant/plaintiff and Mr.V.Ayyadurai, the learned Senior Counsel appearing on behalf of the respondents/defendants and perused the materials available on record.

12. Admittedly, Item Nos.1 to 5 of the suit schedule property have been purchased by one Govindasamy Padayachi vide Ex.A1 to Ex.A3 [Sale Deeds] dated 05.05.1948, 23.09.1948 and 15.05.1967, respectively. The said Govindasamy Padayachi, who is the father of the plaintiff and defendants 1 & 2 died intestate on 29.09.1984. After his demise, his wife Thillaiammal, who is the mother of plaintiff and defendants 1 & 2, had also passed away. Therefore, after the death of Thillaiammal, under Section 6 of the Hindu Succession Act, both the plaintiff and the defendants 1 to 3, being the Class-1 legal heirs of the deceased Govindasamy Padayachi, are entitled to 1/3rd share in Item Nos. 1 to 5 of the suit schedule property. Further, it is not in dispute that during the life time of Govindasamy Padayachi, on 28.03.1983, the 6th item of the suit schedule property had been purchased in the name of 2nd defendant.

13. In this occasion, it is the case of the plaintiff that the 6th item of the suit schedule property had been purchased by utilising the income realised from Item Nos.1 to 5 of the suit schedule property. In this context, it is the case of the 2nd defendant that the 6th item of the property has been purchased in his name by utilising his sole earnings. Therefore, since the contention raised by the defendant is denied by the plaintiff in respect to the 6th item of the suit schedule property, it is for



the plaintiff to prove that the 6th item of the property has been purchased only by utilising the income derived from Item Nos.1 to 5 of the suit schedule property. In this regard, the plaintiff, has not produced any relevant document to show that there was some income derived from Item Nos.1 to 5 of suit schedule property.

14. On the other hand, the plaintiff, while at the time of giving evidence as PW1, gave evidence as during the time his parents were alive, the 2nd defendant was separately doing milk business and received separate income from it. Therefore, the plaintiff himself has admitted that the 2nd defendant is having separate income. Hence, in the absence of any evidence in respect to the income derived from Item Nos.1 to 5 of the suit schedule property, it would be necessary to uphold the contention raised by the 2nd defendant that the 6th item of the suit schedule property has been purchased by utilising the income derived from his milk business.

15. In this regard, one another aspect, which is necessary to be decided is that, PW1 in his cross examination gave evidence as the 2nd defendant after purchasing the 6th item of the property, he himself mortgaged the same to one Ramachandran on 05.08.1991 and subsequently on 14.07.1998, vide Ex.A5 sold the said property to the said Ramachandran, the 4th defendant. Therefore, the said sale effected by the 2nd defendant was done after 15 years from the date of purchase. More than that in respect to the mortgage deed executed by the 2nd defendant, the plaintiff has admitted in his evidence that he knows the said transaction. Therefore, if really, the plaintiff claims that the suit 6th item of the property is a joint family property, he should not have permitted the 2nd defendant to execute the mortgage deed in favour of the 4th defendant.

16. Accordingly, in the absence of any evidence to prove that Item No.6 of the suit schedule property has been purchased from utilising the income derived from item Nos. 1 to 5 of the suit schedule property, this Court cannot conclude that the suit 6th Item of the property is a joint family property.

17. In this aspect, it is the contention raised by the learned counsel for the appellant/plaintiff that the first appellate Court without framing any issue in respect to the 6th item of the suit schedule property as to whether the same is a self acquired property of the 2nd defendant or the joint family property of the plaintiff and the defendants 1 & 2, decided the suit, which is erroneous in law.



18. Now, on considering the said submission with the relevant records, it is true the trial court has not framed any specific issue in this regard. On the other hand, during the time of first appeal, the first appellate Court, framed the specific issue in respect to the same and answered as Item No.6 of the suit schedule property is a self acquired property of the 2nd defendant. Being the reason that the first appeal is continuation of suit, it cannot be said that the Court below committed an error in this aspect. Therefore, in respect to Item No.6 of the suit schedule property, the plaintiff is not entitled to any relief.

19. In respect to other properties, as already observed that the same is a joint family property of plaintiff and defendants 1 & 2, being the legal heirs of the deceased Govindasamy Padayachi, plaintiff is entitled to 1/3rd share in the said property. On the other hand, it is the stand taken by the defendants 1 and 2 that after the demise of their parents, there was an oral partition held in Kumarakudi, in the presence of Ramachandra Konar, Ramamoorthy Pillai, Potturajan, Ramasamy and Kurinjipadi Poorasamy.

20. In respect to the said oral partition, it was the contention raised by the plaintiff that the said alleged oral partition has not come to an end. In support of his contention, one Ramasamy, son of Sivakolundu, who is the resident of Kumarakudi Village, was examined as PW2. He filed a proof affidavit wherein he has stated that when at the time the Panchayat was conducted, the plaintiff demanded to partition the Item No.6 of the suit schedule property, for which the defendants refused and therefore, the partition has not been concluded. The said evidence given by PW2 is quite clear for accepting the case of the defendants, that there was a panchayat held for partitioning the property after the demise of their parents.

21. Though PW2 gave evidence as oral partition has not been concluded, as per the case of the defendants 1 and 2, that during oral partition, Item Nos.1 and 2 of suit schedule property was divided into two and northern 0.65½ cents was allotted to the 2nd defendant and the southern 0.65½ cents was allotted to the plaintiff. Further, Item Nos.3 to 5 were allotted to 1st defendant.

22. In this regard, the said evidence given by DW1 was denied by the plaintiff. Therefore, it is for the defendant to



prove that there was an oral partition wherein Item Nos.1 to 5 of the suit schedule property was divided as above. The first appellate Court while at the time of deciding the said issue shifted the burden on the plaintiff and came to the conclusion that the plaintiff has not proved the oral partition.

23. Under Section 101 of the Indian Evidence Act, being the reason that the said plea has been taken by the defendants, it is for the defendants, to prove their stand.

24. Before the trial court, in order to prove his case, particularly, for proving the panchayat held, the plaintiff examined one Poorasamy as DW5. In fact the said Poorasamy, is the brother-in-law to the plaintiff as well as defendants 1 and 2. He married one Saroja, who is the sister of the plaintiff and defendants 1 and 2. In his evidence, he has categorically stated that a oral partition was held in the family of the plaintiff, wherein the plaintiff and the defendants 1 and 2 were allotted with respective shares. In order to prove the oral partition, except the said oral evidence, defendants have not produced any written document. Further DW5 being the close relative of plaintiff as well as defendants, this Court cannot easily throw out the evidence given by PW5 as the said evidence is not supported through the documents. Considering the relationship between the party to the suit and DW5, it is obvious the evidence given by DW5 is having much significance, since he a person interested in the welfare of the plaintiff's and defendants' family.

25. Apart from that, in his cross examination, PW1 gave evidence as in respect to 2nd item of the property, on 11.05.2004 he executed a mortgage deed in favour of 4th defendant Ramachandran. Now, on considering the said evidence with the stand taken by the defendants, if the oral partition has not been effected, the plaintiff could not execute a mortgage deed in favour of the 4th defendant, particularly in respect to the 2nd item of the suit schedule property alleged to be allotted in his favour in the oral partition, that too after mentioning the south boundary, as the same belongs to the 2nd defendant.

26. Therefore, the said evidence given by plaintiff itself is sufficient to accept the case of the defendants that there was an oral partition effected in the family of the plaintiff. In otherwise only because of the reason that the names of the plaintiff and defendants are found in the patta, the same is not sufficient to confirm the case of the plaintiff that there was no partition has been effected. Accordingly, the defendants have



proved their case as after the demise of their parents, there was an oral partition effected in the family of the plaintiff.

27. One another aspect which is necessary to decide in this appeal is that, PW1 in his cross examination gave evidence as there was a house situated at Kumarakudi wherein he was residing. Further in respect to the said house, he gave evidence as the same belongs to himself and the defendants 1 and 2. In this occasion, the present suit has been filed after leaving out the said property. The plaintiff himself admitted that the said property is not included in the present suit. Though he had given evidence as he is ready for partitioning the said property, without including the said property, he has filed the suit for partial partitioning and the same is nothing but fatal to his case.

28. The another one aspect, which is to be decided in this appeal is that the evidence let in by either side would reveal the fact that apart from three sons, the deceased Govindasamy Padayachi and Thillaiammal, were blessed with two daughters. If really the said Govindasamy Padayachi died intestate, it is for the plaintiff to implead his sisters also as a party to the proceedings. But herein it is a case, the plaintiff without impleading his sisters as party to the proceedings, filed the present suit and therefore, in view of the same also, it is apparent, that the present suit is bad for non-joinder of necessary parties.

29. So, in all aspects, the plaintiff has not proved his case, lower appellate Court also traversed in the same lines and came to the conclusion that the plaintiff is not entitled to the relief of partition. Therefore, the judgment and decree passed by the first appellate Court, do not warrant any interference and the same is confirmed. The substantial questions of law framed, are answered as above.

30. In the result, the second appeal fails and the same is dismissed. No Costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

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Sub Assistant Registrar

Ars



To

1. The Subordinate Judge,
Chidambaram.

2. The District Munsif cum Judicial Magistrate,
Kattumannarkoil.

3. The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.R.Selvakumaran, Advocate SR.No.5076

+2cc to Mr.G.Gokul, Advocate SR.No.5325

S.A.No.1067 of 2010

SJ(CO)
GN(21/02/2022)