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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.02.2022

C O R A M

THE HONOURABLE Mrs. JUSTICE J.NISHA BANU

Second Appeal No.983 of 2009
and
M.P.No.1 of 2009

Manickam .. 2nd Defendant/ Appellant

Vs

1.Rathinam (died) .. Plaintiff/respondent

2.Govindasamy

3.Sundari

4.Pachiammal

... Defendants 1,3&4/Respondents 2 to 4

5.Ashokan

6.Baskar

7.Ambiga

8.Saradha

9.Thenmozhi

...Plaintiff/respondents

(R5 to R9 have been brought on record as
Legal Heirs of the deceased R1 vide order of the Court
dated 03.09.2021 made in CMP No.9525 & 9526/2009)

Prayer: Second Appeal is filed against the judgment and decree dated 30.06.2008 made in A.S.No.4 of 2008, on the file of the Subordinate Judge, at Mettur, confirming the Judgment and Decree dated 04.07.2007 made in O.S.No.1 of 2004, on the file of the District Munsif Court at Mettur.

For Appellant : Mr.P.Tamilavel

For Respondents : Mr.P.Kannan for R5 to R9
R1 - died
No appearance for R2 and R4

J U D G M E N T

The second appeal is preferred against the judgment and decree 30.06.2008 made in A.S.No.4 of 2008, on the file of the Subordinate Judge, at Mettur, confirming the Judgment and Decree dated 04.07.2007 made in O.S.No.1 of 2004, on the file of the District Munsif Court at Mettur.

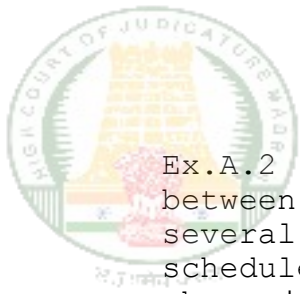


2. The appellant herein is the second defendant in the suit in O.S.No.1 of 2004 filed by the 1st respondent/plaintiff deceased Rathinam. The 1st respondent/plaintiff filed the said suit for a direction to the defendants to divide the suit properties into 5 equal shares and allot one such share to the plaintiff and put him in separate possession and for passing a decree of permanent injunction restraining the defendants and their men from in any way alienating or encumbering the share of the plaintiff to anybody.

3. The averments in the plaint filed by the plaintiff/1st respondent herein is that the defendants 1 and 2 are the brothers of the plaintiff. The suit properties are absolutely belonging to the father of the plaintiff and defendants by name Kuppusamy Udaiyar by virtue of a partition. From the date of partition, the father of the plaintiff and defendants enjoyed as an absolute owner. After the demise of Kuppasamy Udaiyar, the plaintiff and defendants 1 and 2 divided the properties orally and enjoying their separate shares peacefully. The allegation of the plaintiff is that the 2nd defendant tried to dispossess the plaintiff from his share and attempted to trespass and destroyed the crops on 11.11.1996, so the plaintiff filed a suit for permanent injunction on the file of District Munsif Court, in O.S.No.724 of 1996 against the 2nd defendant. The first defendant filed suit in O.S.No.120 of 1998 on the file of District Munsif, Mettur, against the plaintiff and the 2nd defendant. In the suit filed by the plaintiff in O.S.No.724 of 1996, the District Munsif decided that the plaintiff is not entitled to bare injunction against a co-sharer, viz., the 2nd defendant. Against the dismissal of the suit, the plaintiff filed an appeal against the decree and judgment in O.S.No.724 of 1996 before the Sub Court, Mettur in A.S.No.7 of 2002. The said appeal was also dismissed with an observation that the parties are all co-sharers having joint interest in the suit property. The suit in O.S.No.724 of 1996 was decided on 02.11.2001. Thereafter, the 1st defendant filed a memo stating that he is not pressing the suit in O.S.No.120 of 1998 and it was dismissed on 22.07.2002. In such circumstances, since the defendants denied to divide the suit properties, plaintiff filed the suit in O.S.No.1 of 2004.

4. In the written statement filed by the 1st defendant, stating that the 1st defendant is ready and willing to divide the suit property of the legitimate share of the plaintiff. But no injunction can be granted against this defendant.

5. In the written statement filed by the 2nd defendant, in the suit in O.S.No.724 of 1996, the plaintiff was examined as P.W.1, Manickam was examined as P.W.2. Ex.A.1 kist receipt,



Ex.A.2 Panchayat page Muchalika dated 23.04.1981 executed between the plaintiff and defendants 1 and 2 and attested by several witnesses were marked. As per the partition, 'A' schedule property was allotted to the plaintiff including half share in the north portion of teraced house bearing D.No.9 - 32 and the 'B' Schedule property and other property was allotted to the 2nd defendant. From the date of partition, the plaintiff and defendants 1 and 2 were enjoying the properties as per Panchayat Muchalika. The District Munsif held that suit property of 20 cents belongs to the 2nd defendant and refused to grant permanent injunction. The plaintiff's appeal was also dismissed. Therefore, this suit will not lie and it is barred by res judicata.

6. It is further submitted that the first defendant filed a suit in O.S.No.120 of 1998 on the file of District Munsif, Metur for partition against this defendant and the plaintiff. The plaintiff filed written statement in the said O.S., that their family property had been divided and partitioned between the plaintiff and the defendants 1 and 2 in the presence of the respectable persons of the village on 23.04.1981 and a Panchayat Muchalika was written before the plaintiff and the defendants 1 and 2 and attested by respectable persons of the village. As per partition, 'A' schedule property was allotted to the plaintiff and the 'B' schedule property was allotted to the 1st defendant and the 'C' schedule property was allotted to this defendant. Defendants 3 and 4 did not obtain any share since no property was allotted to them by the plaintiff and the defendants 1 and 2. But the plaintiff filed the suit adding defendants 3 and 4 and allotting the share to them. It is also submitted in the written statement that without adding entire ancestral joint family properties the plaintiff is asking only S.No.202/BC and 1/5th share which is not maintainable.

7. The trial court framed 3 issues and 2 additional issues. The trial court in respect of the contention raised by the 2nd defendant regarding res judicata, decided that in the earlier suit, the appellate court has held that the suit property extending 20 cents was not at all partitioned and the issue of partition can be decided only in the partition suit. So the substantial issue in O.S.No.724 of 1996 and the present suit is not one and the same. The issue of partition in respect of suit property is not finally decided in O.S.No.724 of 1996. So the plaintiff seeking the relief of partition in the present suit is not hit by res judicata.



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8. The trial court further held that the suit property is not an absolute property of the appellant/2nd defendant and it is only an undivided joint family property of all the co-sharers and the 1st respondent/plaintiff herein is entitled for 1/5th shares in the suit property.

9. The trial court also gave a finding that defendants 3 and 4 even though as per the contention of the 2nd defendant that they have given up their shares, the same has not been proved before the court. Ex.B.2 executed between plaintiff and defendants 1 and 2. The defendants 3 and 4 are also having equal right to the family property. Further the 2nd defendant has not produced any material documents to show that the suit property is ancestral property of Kuppusamy Udayar. After the death of Kuppusamy Udayar, as per Section 8 of the Hindu Succession Act, 1956, the plaintiff is entitled to 1/5th share in the suit property. Since in Ex.B.2, the suit property was not added, the suit is maintainable and the plaintiff is entitled to 1/5th share in the suit property.

10. The trial court however rejected the prayer with regard to injunction holding that the plaintiff has not proved by any evidence that the defendants have alienated or encumbered the share of the plaintiff to anybody.

11. The trial court, thus partly allowed and decreed the suit in respect of 1/5th share for the plaintiff in the suit property, however, rejected the prayer with regard to injunction.

12. Manickam/2nd defendant filed A.S.No.4 of 2008 before the lower appellate court [Subordinate Judge, Mettur]. The grounds raised before the lower appellate court is that the suit property and other properties belonged to his father Kuppusamy Udayar and the suit for partition filed by the plaintiff/1st respondent in the A.S.4/2008 without incorporating other properties of their family is hit by partial partition.

13. The Lower Appellate Court analyzed the oral evidence adduced on behalf of the parties, scrutinized and examined the documentary evidence on record and found that the appellant/2nd defendant admitted in his written statement that the entire property was already partitioned and there was no other property



for partition. It was not the case of the 2nd defendant that the remaining properties were not at all divided. The lower appellate court given a finding that since it was not the case of the appellant/2nd defendant that other properties are also available for partition, the theory of partial partition is not at all sustainable and the claim of the appellant is negated.

14. The other point raised before the lower appellate court was that the previous suit filed in O.S.No.724 of 1996 and the present suit filed for partition are one and the same and hence hit by res judicata. The said contention was also rejected by the lower appellate court finding that in Ex.A.12 judgment of the appellate court in A.S.No.7 of 2002 which arose out of O.S.No.724 of 1996, it has been held that the suit property extending 20 cents was not at all partitioned and the issue of partition can be decided only in the partition suit filed by Govindasamy (first defendant in in O.S.No.1/2004). So the substantial issue in O.S.No.724 of 1996 and the suit in O.S.No.1 of 2004 are not one and the same and also held that the issue of partition in respect of suit property is not finally decided in O.S.No.724 of 1996.

15. The Lower Appellate court also held that in the suit in O.S.No.724 of 1996 filed by Govindasamy was dismissed as not pressed and so there is no possibility for the plaintiff in O.S.No.1 of 2004 to seek a relief of partition in respect of the suit property. So the suit is hit by res judicata is not acceptable.

16. In respect of the other contention of the appellant/2nd defendant that the suit property absolutely belongs to the appellant, both the courts below pointed out that the plaintiff also admitted that only the appellant/2nd defendant has been enjoying the suit property of 20 cents. The lower appellate court clearly given a finding that P.W.1 in his proof affidavit stated that the suit property was not partitioned by the Panchayat Muchalika and it is the joint family property of the plaintiff and defendants 2 to 4. D.W.1 in his proof affidavit has stated that he is prepared to divide the suit property and he is entitled for 1/3rd share in the suit property. During the cross examination, P.W.1 admitted that in O.S.No.724 of 1996, suit property was allotted to Manickam. Ex.B.2 is the Panchayat Muchalika executed on 28.04.1981 between the appellant, 1st and 2nd respondent also shows that the present suit property was not allotted to the appellant or the respondents 1 and 2. D.W.2 also categorically stated that the present suit property



extending 20 cents was not partitioned between the co sharers and it continues to be in joint family property. So the lower appellate court concluded that even admitting that the suit property is in possession of the appellant it has to be presumed that all the co-sharers are deemed to be in possession of the said property. The lower appellate court categorically held that the exhibits relied on by the appellant are in the name of appellant, but these documents are not sufficient to hold that the appellant is in exclusive possession of the suit property by partition. The lower appellate court concluded that suit property is not an absolute property of the appellant and it is only an undivided joint family properties of all the co-sharers and the 1st respondent/plaintiff is entitled for 1/5th share in the suit property. The lower appellate thus dismissed the Appeal suit.

17. Aggrieved by the dismissal of the A.S.No.4 of 2008, this second appeal has been filed by the appellant/2nd defendant. This court admitted the second appeal on the following substantial questions of law.

“(i) Whether the Courts below are justified in directing partition of suit properties more particularly when the subject matter was already decided in the previous suit in O.S.No.724 of 1996 and confirmed in A.S.No.7 of 2002 and it is hit by doctrine of res judicata?

(ii) Whether the Courts below are justified in decreeing the suit for partition more particularly when the first respondent has admitted during cross examination as P.W.1 in O.S.No.724 of 1996 as to the fact that the suit property was already partitioned and allotted to the appellant exclusively and he is in possession of the same?”

18. It is argued by the learned counsel for the appellant that partition taken place between the appellant, 1st and 2nd respondents after demise of Kuppusamy Udayar who is the father of the appellant and respondents 1 to 3. As per the Panchayat Muchalika dated 23.04.1981, 'A' Schedule property was allotted to 1st respondent/plaintiff. 'B' Schedule property was allotted to 2nd respondent/1st defendant and 'C' schedule property was allotted to appellant/2nd defendant. The subject suit schedule property was allotted to appellant and he is in possession of property by paying tax to the Government. The tax receipts were marked as Ex.B.23 to Ex.B.30. The trial court vide judgment in



O.S.No.724 of 1996 categorically stated even though the appellant is in possession and the property was allotted to the appellant and he is paying taxes, the plaintiff's plea for partition is sustainable and the plaintiff is entitled for 1/5th share in the suit property.

19. The next contention of the appellant is that the 1st defendant/plaintiff did not accept the earlier partition dated 23.04.1981 and the plaintiff sought to divide the properties to all legal heirs and in such circumstances, the plaintiff would have brought all the properties of the Kuppusamy Udayar in O.S.1 of 2004 and sought partition. However, they did not do so and it is a suit for partial partition and it is not maintainable. The suit filed by the plaintiff is liable to be dismissed since the coparceners ie., female members were not included in the suit and the other family properties also were not included. The learned counsel for the appellant relied on the decision reported in 2006 (1) CTC 267 wherein it is held that all joint family properties have to be set out in suit and made subject matter of suit for partition. The learned counsel contended that as per the said judgment, without giving share in respect of the other property and without adding coparceners, seeking partial partition is not maintainable.

20. On the other hand, learned counsel for the respondents would contend that the suit property extending 20 cents was not partitioned between the co-sharers and in continuous to be joint family property, since the suit property is in possession of the appellant, it has to be presumed that all the co sharers are deemed to be in possession of the property. The exhibits relied on by the learned counsel for the appellant are not sufficient to hold that the appellant is in exclusive possession of the suit property by partition. Since Ex.B.2 executed between plaintiff and defendants 1 and 2, the same was binding to 3rd and 4th defendants and no equal right to family property does not arise. In view of Section 29(A) of the Hindu Succession Act as introduced by Hindu Succession (Amendment Act) 1 of 1990 with effect from 1991 only 3rd and 4th defendant got equal right to property in respect of Ex.B.2 property. In view of Section 6 of Hindu Succession Act, the partition should be assumed and the plaintiff and defendants 1 to 4 each entitled to 1/5th share in the Schedule properties.

21. It is seen that the trial Court has observed that since the father of the plaintiff and the defendants is the absolute owner of the property by virtue of partition, as per Ex.A.14,



25. For the reasons discussed above, the second appeal is dismissed. The judgment passed in A.S.No.4 of 2008 is confirmed. No costs. Consequently connected Miscellaneous Petition is closed.

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Sd/-
Assistant Registrar (CS-VII)

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Sub Assistant Registrar

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To

1. The Subordinate Judge,
Mettur.
2. The District Munsif,
Mettur.

Copy to:

The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to Mr.P.Tamilavel, Advocate, S.R.No.5909

+1cc to Mr.P.Kannan, Advocate, S.R.No.6298

S.A.No.983 of 2009

SKM(CO)
UMA(13/06/2022)