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A.S.No.516 of 2006

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.02.2023

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE A.A.NAKKIRAN

A.S.No.516 of 2006

and

M.P.No.1 of 2006 & 1 of 2012 &

C.M.P.No.23140 of 2022

- 1.Nallamuthu Gounder
- 2.Subramaniam (Died)
- 3.S.Dhanalakshmi
- 4.R.Sasikala
- 5.S.Shanthi
- 6.Karunakaramoorthy

... Appellants

[A2 died, A3 to A6 are brought on record as LR's of deceased 2nd appellant, viz., Subramaniam, vide order of Court dated 17.11.2022 in C.M.P.Nos.19854, 19856 & 19857 of 2022 in A.S.No.516 of 2006]

Vs.

- 1.Balakrishnamurthy
- 2.Pavayammal
- 3.Valliammal (deceased)
- 4.Kolandaiammal
- 5.S.Venkitammal
- 6.K.Pappayammal

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- 7.Samiyathal
- 8.Soundaram
- 9.Thulasimmal
- 10.Palaniswamy
- 11.Thulasimani
- 12.V.Pappayeeammal
- 13.R.Venkitammal
- 14.Guruswamy Gounder
- 15.K.Vadivel
- 16.Shanmugam
- 17.Samidurai
- 18.Nachammal
- 19.Lakshmi
- 20.Valliammal
- 21.Thangavelu
- 22.Devaraj
- 23.Pongiana Gounder
- 24.Duraisamy
- 25.Easwaramoorthi
- 26.Rudhramurthi
- 27.Periaswamy
- 28.C.Thulasimani
- 29.T.Selvaraj
- 30.Duraisamy

... Respondents

[R28 to R30 are brought on record as LR's of the deceased R3 vide order of this Court dated 10.04.2018 made in C.M.P.No.1847 of 2018 in A.S.No.516 of 2006]

Prayer : Appeal Suit filed under Section 96 of Code of Civil Procedure against the judgment and decree dated 21.09.2005 in O.S.No.46 of 2002 on the file of the Additional District Court-cum-Fast Track Court No.1 at Erode.



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For Appellants : Mr.V.Kadhirvelu

For R1, R2, R4 & R5 : Mr.V.P.Sengottuvel
Senior Counsel
for Mr.D.Selvaraju

For R28, R29 & R30 : Mr.T.Gowthaman
Senior Counsel
for Mr.K.N.Arun Prasad

R6 to R9 & R11 to R27 : Given up

R3 : Died (Steps taken)

R10 : Died (Steps due)

J U D G M E N T

(Judgment was delivered by **S.S. SUNDAR, J.**)

Defendants 1 and 2 in the suit in O.S.No.46 of 2002 on the file of the Additional District Court (Fast Track Court No.1), Erode, are the appellants in the above appeal.

2.Respondents 1 to 5 in this appeal filed the suit in O.S.No.46 of 2002 for partition and separate possession of their 1/3 share in all the suit properties. Suit properties are described as three Schedules comprising in



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different Survey Fields in Puthurpudupalayam Village, Erode Taluk, Erode.

It is the case of the plaintiffs that the entire suit properties originally belonged to three brothers, namely, Kaliappa Gounder, Palanimalai Gounder and Chinnappa Gounder, who are the sons of one Ramana Gounder of Vannankattuvalasu.

3.The appellants and respondents have no issue regarding the genealogy. It will be useful to refer to the genealogy to avoid any confusion. Kaliappa Gounder, Palanimalai Gounder and Chinnappa Gounder are the three sons of Ramana Gounder. It is admitted that Kaliappa Gounder died in the year 1984, leaving behind defendants 1 to 6. Palanimalai Gounder died in the year 1972, leaving behind defendants 7 to 10. Chinnappa Gounder died in the year 1977, leaving behind his wife, the 2nd plaintiff by name Pavayammal, and one son, the 1st plaintiff by name Balakrishnamurthi, and three daughters, who are plaintiffs 3 to 5. It is admitted that 3rd plaintiff, who is 3rd respondent in the above appeal, died during the pendency of this appeal and hence, respondents 28 to 30 were impleaded. Similarly, 2nd defendant, who is 2nd appellant in this appeal, died



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during the pendency of this appeal and hence, appellants 3 to 6 were impleaded as legal heirs of the deceased 2nd appellant. Respondents 6 to 27 are defendants 3 to 24 in the suit.

4.The case of the plaintiffs in the plaint is that the suit properties are the ancestral and joint family properties of three brothers and they were in possession and enjoyment of the properties jointly all along. It is admitted in the plaint itself that the brothers were in possession of separate plots of land for the sake of convenient cultivation without effecting any permanent partition. The plaint also refers to sub-division of some of the properties based on convenient cultivation, but it is stated that individual separate cultivation was not pursuant to any permanent partition. It is further stated in the plaint that there are no separate pathways to reach the shares of parties and no separate channel course is earmarked for each parcel of land, since all the plots of land were possessed and enjoyed separately only for the sake of convenient enjoyment and not with an intention to extinguish the rights of other co-owners. The plaint also refers to the suit notice and the reply by the contesting defendants. Since a plea was raised by the



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defendants 1 and 2 in their reply notice about a oral partition, the plaintiffs repudiated the allegations in the reply notice and contended that there was no oral partition as alleged. Since there is a reference to separate samathi for the three brothers, the plaintiffs, though admit that the cremation of corpses were in different lands, denied that it was due to the oral partition.

5.The suit was contested by the 1st defendant by a detailed written statement. It is stated that there was a oral partition in the 1st week of 1975 and that such oral partition was initiated and completed by one Chellamuthu Gounder and Chenniappan, who acted as panchayatars. Stating that the properties were divided by metes and bounds with reference to good and bad soil in 1975 and that the parties are in enjoyment of the respective shares allotted to them, the 1st defendant contended that the suit for partition is not maintainable. To be precise, the appellants have referred to the following facts to prove their case that there was a oral partition in 1975 :

- a) A-Schedule properties described in the reply notice were allotted to defendants 1 and 2 and their father, and properties which are shown as B-Schedule in the reply notice were allotted to the share of



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defendants 7 and 8, and the properties set out in the C-Schedule in the reply notice were allotted to the share of plaintiffs' father.

- b) Ever since the oral partition, the parties are in possession of the respective properties allotted to them and they have also made substantial improvements to the properties.
- c) The plaintiffs and defendants have dug several wells and installed motor pumpsets attached to each well in their separate names, indicating that there was a oral partition by metes and bounds.
- d) The three brothers were cremated in different lands that were allotted to the parties in the oral partition.
- e) Plaintiffs and defendants 1 to 10 are living separately, having separate houses establishing their separate enjoyment.
- f) Plaintiffs and defendants have obtained crop loans in their individual names. The plaintiff themselves have obtained a tractor loan from Karur Vysya Bank on the security of the property allotted to them.
- g) Each land allotted to the parties has separate pathway for convenient enjoyment of the respective parties and the Revenue records were mutated in favour of respective sharers as per the allotment in the oral



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partition.

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6.Before the trial Court, 1st plaintiff was examined as P.W.1. On behalf of the plaintiffs, Exs.A1 to A8 were marked. 2nd defendant was examined as D.W.1. Defendants also examined D.W.2 and D.W.3. On behalf of defendants, Exs.B1 to B10 were marked. Bank Pass Book was marked as Ex.C1.

7.The trial Court, after framing an issue whether the oral partition as pleaded in the written statement is true and valid, held that defendants have not proved the oral partition, after considering the entire pleadings and evidence. Since the trial Court specifically held that there was no prior partition as pleaded in the written statement filed by the appellants, it was held that the plaintiffs were entitled to 1/3 share in all the suit properties.

8.Aggrieved by the judgment and decree of the trial Court granting preliminary decree, the above appeal is preferred by defendants 1 and 2.



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WEB COPY 9.Learned counsel appearing for the appellants reiterated the following submissions :

- a) There was mutation of names in Revenue records.
- b) Parties have dug bore wells and obtained electricity service connections in their names.
- c) Admittedly, samathi of the three brothers are in different places as per the allotment to respective parties.
- d) Plaintiffs obtained Bank loan over the properties allotted to Chinnappa Gounder in the oral partition.
- e) The trial Court considered the judgment which is marked as Ex.A8, which is in respect of a different property and the said judgment has been wrongly relied upon by the trial Court to hold that the defendants/appellants have not proved the oral partition.

10.This Court, having regard to the specific pleadings in the plaint and the written statement, finds that the only issue that arises for consideration is whether there was a oral partition between the parties, as



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pleaded by the appellants in the written statement.

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11.It is not in dispute that the entire properties belonged to the three brothers and that they are the joint family properties. It is admitted that defendants 3 to 6, who are also the sisters of appellants, have not filed any written statement nor have they contested the suit disputing the case of plaintiffs. Defendants 7 to 10, who are the legal heirs of Palanimalai Gounder, have supported the case of plaintiffs as have not opposed the plaintiffs' suit for partition and they remained *ex parte*. The suit was contested only by appellants 1 and 2, who are defendants 1 and 2.

12.Since the only defence raised by the appellants is that there was a oral partition between the three brothers in the 1st week of January, 1975, this Court has to examine the evidence. Though it is admitted that there was mutation in Revenue records sub-division in respect of some of the properties, the mutation of names cannot be a conclusive evidence of oral partition. In the present case, the plaintiffs admit that there was mutation of names in respect of some of the properties based on enjoyment. There is no



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document produced before this Court to prove that there was mutation in respect of the entire suit properties. The law is well settled that mutation of Revenue records alone will not prove oral partition. It is to be seen that the appellants have not produced any Revenue proceedings acknowledging the oral partition or a statement or acknowledgment of any other members of family about partition before Revenue officials. If mutation had taken place on any joint application or on the individual application admitting oral partition, it may be relevant to the Court to decide whether there was a oral partition or not. In the present case, except kist receipts, no other document is produced by the appellants to prove that there was already a oral partition. Under Tamil Nadu Patta Pass Book Act, 1983, the Revenue authorities can deal with modification of Revenue records either by reason of death of any person or by a reason of transfer of interest in the land or by reason of any other subsequent change in circumstances. In the present case, this Court finds no evidence to show that the mutation was by reporting transfer of interest by way of such oral partition.



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13. Secondly, it is well settled that mere physical possession of any one of the co-owners cannot defeat the rights of other co-owners, if it is proved that there is no partition by metes and bounds. In the present case, no acceptable evidence is let in by the appellants to prove that there was a oral partition. Even though it is stated by the appellants in the written statement that the partition was effected in the presence of two panchayatars, it is on record that the appellants have examined only one of the panchayatars, who is none other than his own brother-in-law. The trial Court, after considering the evidence of D.W.2, found that he is an interested witness and that the Court cannot rely upon his evidence to accept the case of defendants that there was a oral partition.

14. The presence of samdis of three brothers in different parcels of land is accepted even in the plaint. However, that cannot be accepted as a relevant circumstance to indicate that there was oral partition. The family was in possession of vast extent of lands and no specific land is earmarked as a burial ground for the members of the family. In such circumstances,



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mere fact that three brothers were buried in three different places may not be conclusive for accepting oral partition. It is to be noted that the appellants have pleaded the manner of partition in the reply notice as well in the written statement. The appellants have not produced atleast Revenue documents to show that the division of properties as indicated in the reply notice is proved by Revenue documents showing separate patta as per the division for all the family properties.

15.The appellants then contended that the plaintiffs have obtained Bank loan over the property allotted to Chinnappa Gounder. The plaintiffs have admitted that they borrowed money from Agricultural Co-operative Bank for cultivation of the lands in one of the suit properties. However, there is no document or oral evidence to prove that any of the plaintiffs had borrowed any money by pledging or mortgaging the joint family properties by claiming exclusive title to any one of the family properties. The document which is marked as Ex.C1, though refers to the crop loan for cultivation in two survey fields, there is no proof to show that the property which is under the cultivation of the 1st plaintiff, was mortgaged by him in



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his individual capacity. Merely because the 1st plaintiff has obtained a crop loan by showing cultivation in one of the properties of family, this Court is unable to conclude that there was oral partition in the family.

16.Since the alleged oral partition was in 1975, several documents could have been produced to show how the appellants were in enjoyment of the properties allotted to them as exclusive owners. When the appellants have not produced any such document to show that they have dealt with the property as exclusive owners, this Court is unable to rely upon Ex.A1 or the kist receipts for the purpose of holding that the suit properties had been divided orally among the sharers.

17.In the course of arguments, learned counsel for the appellants referred to the Liability Register, which is also marked as one of the documents in support of the case of the appellants. The Register refers to the details of the loan obtained by individual members and the details of members who stood as guarantor for the loan extended to the members. Though the Register refers to the loan obtained by the 1st plaintiff, a member



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of Perundurai R.S. Agricultural Co-operative Bank, the Register does not indicate creation of mortgage for the purpose of any loan availed by the individual member.

18.The learned counsel for the appellants also relied upon a portion of evidence of P.W.1 with regard to the enjoyment by rotation at periodical intervals. Pointing out that the 1st plaintiff has admitted that there was no evidence with regard to enjoyment by rotation, the learned counsel contended that the case of the plaintiffs should be disbelieved. When the appellants pleaded oral partition, the burden lies on them. They cannot succeed merely by pointing out the loopholes in the plaintiffs' case. When the appellants have not discharged their burden, this Court is unable to render a finding on the basis of mere inability of the respondents to prove their case that the respective parties used to exchange their possession and enjoyment at regular intervals.

19.One of the documents relied upon by the plaintiffs is the judgment in O.S.No.2302 of 1978 on the file of District Munsif Court, Erode. The



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plaintiffs and defendants have filed the suit jointly in respect of a mamool pathway, claiming common enjoyment against third parties. Had there been partition in the family, the parties who got allotment would have filed the suit, instead of impleading all the members from all the branches. However, in the absence of a specific pleading as to the subject matter of the *lis*, the trial Court ought not to have considered the said judgment as a document to show that there was no partition in the family. However, that does not help the appellants to prove their case especially where this Court has found no other document to prove oral partition pleaded by the appellants. If there had been a oral partition in 1975 and the same was acted upon by parties, there must be substantial evidence clinching the issue. D.W.1 admits digging of well and laying of underground pipelines jointly with plaintiff. 2nd defendant admits joint acquisition in 1976. D.W.1 (2nd defendant) admits that he was in service as Village Administrative Officer from 1982 to 2001. Therefore, it is possible for 2nd defendant to change Revenue records without the knowledge of other co-owners.



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20.Learned counsel appearing for the appellants submitted that the trial Court failed to appreciate the admission that electricity service connections were obtained in the individual names in respect of specific fields and that the case of plaintiffs that there was no partition cannot be accepted in the wake of several documents proving separate possession and enjoyment of bore wells by individually obtaining separate electricity service connections. The learned counsel also relied upon Exs.B7 to B10 to show that the parties have obtained separate service connections. In all the correspondences and the documents relied upon by the appellants, there is no reference to any partition. Even before the Electricity Board, it is not the case of the appellants that the plaintiffs or any one of the co-owners have approached Electricity Board claiming that there was actual partition by metes and bounds. Even the Indemnity Bond produced as one of the documents clearly indicates that the applicant has admitted that he has a right to share the use of water in the well in the survey fields. If there was a oral partition, there would be reference to partition. The oral partition pleaded by the appellants was in 1975.



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21.From the entire evidence adduced by appellants, this Court does not find any support to the arguments of learned counsel for the appellants. Though four witnesses have been examined and D.W.1 to D.W.3 were examined on behalf of the appellants, the learned counsel appearing for the appellants is unable to rely upon any such evidence to support the case of the appellants regarding oral partition. 2nd defendant, who was examined as D.W.1, though speaks about oral partition, he admits that the partition is not supported by any other document. Though the 2nd defendant/2nd appellant had opportunity to lead substantial evidence, and produce documents to prove oral partition, in the absence of any acceptable evidence or statement from any independent witness about the oral partition, this Court is unable to interfere with the findings on facts by the trial Court. This Court, therefore, finds no merit in the appeal.



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WEB COPY 22. Accordingly, the appeal is dismissed. However, considering the relationship between the parties, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

(S.S.S.R., J.) (A.A.N., J.)
02.02.2023

mkn

Internet : Yes

Index : Yes / No

To

1. The Additional District Judge,
Fast Track Court No.1,
Erode.

2. The Section Officer,
VR Section, High Court,
Chennai.



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