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S.A. No. 682 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.04.2023

CORAM

THE HONOURABLE MRS. JUSTICE T.V.THAMILSELVI

S.A. No.682 of 2017

1. A.Varadappa Gounder,
S/o Appavu Gounder

2. Anand @ P.Vivekanandan,
S/o. Palanivelu

... Appellants

Versus

1. V.Palaniappan,
S/o. Velappa Gounder

2. V.Parvathi,
W/o. Velappa Gounder

... Respondents

Prayer:- Second Appeal filed under Section 100 C.P.C., against the judgment and decree of the learned 4th Addl. District Judge, Erode District at Bhavani in A.S.No. 17 of 2014 dated 19.11.2015 reversing the judgment and decree of the learned Subordinate Judge, Bhavani in O.S.No.19 of 2001 dated 11.10.2013.



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For Appellants : Mr.T.Murugamanickam,
Senior Advocate for
Mr.S.Kaithamalai Kumaran

For Respondents : Mr.AR.L.Sundaresan,
Senior Advocate for
Mr.I.C.Vasudevan for R1

JUDGEMENT

The 1st appellant herein is the plaintiff in the suit in O.S.No.19 of 2001 on the file of Sub-Court, Bhavani. He filed a suit for partition claiming 12 equal share in the suit property against the defendants. The 1st defendant filed a written statement and thereafter he died and his legal heirs were impleaded as parties in the suit. Subsequently, they have filed their written statement. Before the trial court, issues were framed and evidences were adduced on both sides. Considering both oral and documentary evidence, the trial judge decreed the suit in favour of plaintiff allotting 6/12 share by way of preliminary decree. Challenging the said findings, the defendants 1 to 5 preferred an appeal in A.S.No.17 of 2014 on th file of learned IV Addl. District Judge, Bhavani, wherein the first appellate judge independently



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analysed the facts and evidence and finally held that already the properties were enjoyed by the plaintiff and the defendants by metes and bounds as per the oral partition arrived between them. Accordingly, the suit was dismissed as there is no necessity for dividing the property. Challenging the said findings, the 1st plaintiff preferred this Second Appeal.

2. For the sake of convenience, the parties are referred as per the ranking in the suit.

3. The learned counsel for appellants argued that the first appellate court failed to appreciate the fact that the plaintiff purchased an undivided land to an extent of 4.36 acres in three survey numbers and the deceased 1st defendant purchased undivided 1/3 share and the parties are in possession of the portion for their convenient enjoyment, but there was no partition with metes and bounds, as such, is unfair and liable to be set aside. Further, the first appellate court wrongly observed that since because the parties are enjoying the separate possession for a long period, there might have been oral partition between themselves, as such, is totally unsustainable, because



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such presumption should not be drawn with regard to the claim of oral partition. Hence, he prayed to set aside the findings of the lower appellate court.

4. Challenging the findings of the lower appellate court, the plaintiff preferred this Second Appeal and the same was admitted on the following questions of law :-

- a) When both the parties plead that they have purchased undivided share and were enjoying specific portions for convenient enjoyment, is the lower appellate court justified in holding that there should have been an oral partition among them without any basis and whether the said findings is legally sustainable?
- b) Whether the findings of the lower appellate court are justified in law when the same are not based on evidence on record?



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5. Brief facts of the case :-

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According to the plaintiff, he purchased 6/12 share in the suit property through two sale deeds Ex.A1 and A2 dated 10.08.1959 and 03.03.1962 respectively. Thereafter, the 1st defendant purchased 4/12 share in the year of 1964 through the sale deed Ex.A8 and the defendants 2 and 3 purchased 1/12 share each in common. Subsequently, all the parties have enjoyed their share in the suit property without any division with specific boundaries. There is a common well enjoyed by them and all the sharers are cultivating the lands and they are irrigating water from the well as per their shares. As they find inconvenience in the common enjoyment, the plaintiff approached the court seeking for a partition with metes and bounds. The 1st defendant admits that the plaintiff purchased 6/12 share in the suit property and he purchased 4/12 share and defendants 2 and 3 purchased 1/12 share each in the suit property. But, he denied the fact that the suit property is in joint possession and enjoyment without metes and bounds. According to him, he is in separate possession and enjoyment of the property from the date of purchase of the year 1964 onwards. So also, the plaintiff has enjoyed the property in separate possession from the year of 1959 onwards. As there



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was a misunderstanding arose between them with regard to the enjoyment of cart-track, the plaintiff filed this vexatious suit, thereby he claims that already the properties are orally divided and they are in separate possession and enjoyment of the property. The sale deeds produced on the side of plaintiff Ex.A1 and A2 would reveal that 6/12 share of property was purchased in the year of 1959 and 1962 in common in various suit survey numbers. So also, as per the sale deed Ex.A8, the 1st defendant also purchased 4/12 share in the suit survey numbers in common. Therefore, the sale deeds relied by both parties Ex.A1, A2 and A8 clearly reveal that at the time of purchase, the property was purchased in common without metes and bounds with specific boundaries. So, the trial court rightly appreciated the said facts and decreed the suit in favour of plaintiff. However, the lower appellate court drawn a presumption that ever since 1959 onwards, the plaintiff enjoyed portion of the property as per his purchase and for more than 49 years, he enjoyed the property without raising any objection itself proves that there was a oral arrangement between the parties, thereby separate portion was enjoyed by him. Accordingly, the appeal was allowed and the suit was dismissed.



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6. As rightly pointed out by the learned counsel for Appellant, the trial court ought not to have drawn such a presumption about the oral partition, because as per oral partition, it needs sufficient material evidence, without which, it cannot be presumed. It is a settled proposition, if the parties are enjoying the property for the convenient sake beyond the portion, it cannot be presumed that already properties were orally divided among themselves. Furthermore, enjoyment for the sake of convenience does not amount to valid partition. To support his contentions, the learned counsel for appellant relied on the ratio laid down by this court in the case of ***P.Kalliappa Gounder and others vs. Muthuswami Mudaliar dated 02.04.1985 in App. No. 516 of 1978***, wherein it has been held in case note and para 8 as follows :-

“Case note :- Property – partition – Hindu Law – whether plaintiff entitled to claim partition on basis of co-ownership of properties – defendants-appellants contended that there was in fact partition arrangement several years back – defendants failed to prove that there was in fact partition or division of common properties between parties – there was division and separate ownership long prior to alienations as claimed by defendants – there was no mutation and no separate payments



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of instalments – present case do not face any other circumstance concurring with and supporting theory of ouster on basis of exclusive possession for considerable length of time – appeal dismissed.”

8. *Partition is the intentional severance of the joint ownership by an intention to bring out severance in the eye of law and further implementing it by actual division by metes and bounds. What was held in common as a single property gets converted into a holding in severalty and in specie. Joint ownership turns into ownership in severalty and in specie. It is true that 'partition' is not a transfer. But, there must be the element of conversion as the joint ownership into ownership in severalty and in specie. Therefore, the essence of partition is that the joint ownership is put an end to and the joint owners come to hold the property in severalty and each in his own individual right. In this country, it is common that not only coparceners of a joint Hindu family but also individuals join or continue together to own property in common. If this common ownership is to be put an end to not only in theory but also in practice, there must be primarily severance of the joint ownership in the eye of law, followed up by actual physical division. We make it clear that in the present case, we are not concerned with the concept of a bare unequivocal expression of an intention to separate to bring about a division in status in a*



joint Hindu family. It is not unusual for parties holding properties jointly or in common to have separate enjoyment of portions for the sake of sheer convenience. But such separate enjoyment of convenience cannot be equated to partition in the eye of law and in fact, so as to say that the joint ownership has been put an end to and in its place ownership in severalty or in specie has come into existence. Separate enjoyment for the sake of convenience is one thing and partition in the eye of law is another. The latter carried with it the legal incidents of mutating the joint ownership. The latter has to pass through and satisfy a more rigorous test in law and on facts.”

7. Furthermore, the trial judge also observed that for more than 40 years, they are enjoying the property without any division and the plaintiff filed a suit after such an inordinate delay, as such is not acceptable and it is totally erroneous one for the reason that the relief of partition can be raised at any point of time if the person concerned felt inconvenience and there is no prescription of time to claim partition according to their shares. Therefore, the reasons assigned by the lower appellate court for dismissing the claim of plaintiff, as such is totally unfair and the same is liable to be set aside.



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8. The defendants also relied on the boundary recitals of the settlement deed, which shows one of the boundary of the plaintiff and on relying the same, he contended that already the properties were divided and enjoyed by the plaintiff, so that only this property was shown as one of the boundary. But, the said Gift deed was executed in the year of 2009 during the pendency of the suit proceedings among the defendants family, as such is not acceptable one for the reason that it is a document executed between the inter-parties are inadmissible. To that effect, the appellant relied on the ratio laid down by this court by this court in the case of ***V.A.Amiappa Nainar and others vs. N. Annamalai Chettiar and others dated 05.02.1971 in S.A. Nos. 1157 of 1963 and 19 of 1964***, wherein it has been held in para 13 as follows :-

“13. On a consideration of the aforesaid decisions, we hold that the decision of the Division Bench of this Court in 1914 MWN 779 : AIR Mad 746 is in accordance with preponderance of authorities in various High Courts that recitals as to boundaries in documents not inter parties are inadmissible in evidence under Sections 11, 13(a), 32(3) and 32(7). As pointed out by Wadsworth, J. in MANU/TN/0406/1939 : AIR 1940 Mad 450, the only method



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by which recitals in a document not inter parties could be admitted in evidence is by examinations of the executant of the document are found. In this view, we hold that judgment of Ramaswami, J. in AIR 1956 Mad 226 is wrongly decided. The result is that Ex.A2 to A6 in the present case are inadmissible in evidence.”

Therefore, the findings of the lower appellate judge that already oral partition was entered between the parties and they are enjoying the same for more than 40 years, as such is totally erroneous one and the same is liable to be set aside. Accordingly, this Second Appeal is allowed and the findings of trial judge is confirmed and the Suit is decreed as prayed for. No costs.

25.04.2023

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To

Sub-Judge,
Bhavani.

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T.V.THAMILSELVI, J.

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Pre-delivery judgment in
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