



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 18.03.2024	Pronounced on: 28.03.2024
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THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.163 of 2018

and

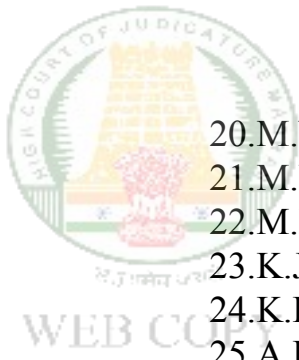
C.M.P.No.4250 of 2018

1.A.Samiappan (Died)
2.Shanthi
3.Aswath
(Appellants 2 and 3 are brought on record as
Legal Representative of the deceased
sole appellant vide order dated 31.01.2024)

...Appellants

Vs.

1.S.Kandasamy
2.P.Kuppammal
3.C.Selvarajan
4.K.Arulmurugan
5.A.Sengotuvelu
6.A.Balakrishnan
7.A.Natarajan
8.K.Ganesan
9.K.Subramanian
10.K.Raja
11.K.Govindammal
12.C.Ranjani
13.K.Kalaiselvi
14.K.Rajeswari
15.K.Sampathkumari
16.K.Azahuraj
17.K.Krishnan
18.K.Mani
19.K.Poongothai



20.M.Neelambal
21.M.Umamaheswari
22.M.Ramesh
23.K.Jothi
24.K.Duraisamy
25.A.Kamala

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 24.08.2017 made in A.S. No.14 of 2016 on the file of the Third Additional District Court, Salem reversing the judgment and decree dated 27.02.2013 made in O.S. No.106 of 2009 on the file of the Sub Court, Mettur.

For Appellants : Mr.N.Manokaran

For Respondents : Mrs.Sathya for
Mrs.Zeenath Begum for R1
Exparte – R2 to R25.

JUDGMENT

The 10th defendant in a suit for partition and separate possession having succeeded before the Trial Court but suffered reversal findings before the First Appellate Court is the appellant before me.

2. The parties are described as per the litigative status before the Trial Court.

3. The material facts that are necessary for deciding the present



Second Appeal are as hereunder:

3.1. The plaintiff states that the suit property originally belonged to one Chellappa Gounder. Through the first wife of Chellappa Gounder, he had 2 sons by name Karumalai Gounder and Sidha Gounder; through second wife he had one daughter by the name, Sembayee and one son by the name Arjuna Gounder; through his third wife he had two sons, Kulanthaipaiyan and Nachiappan.

3.2. According to the plaintiff, on 12.12.1940, there was a partition between Chellappa Gounder and his legal heirs and under the said partition Chellappa Gounder was allotted 'A' schedule property, Karumalai Gounder was allotted 'B' schedule property, Sidha Gounder was allotted 'C' schedule property, Arjuna Gounder was allotted 'D' schedule property, Kulanthaipaiyan and Nachiappan were allotted 'E' schedule property. According to the plaintiff, the said partition deed was acted upon and these respective portions took possession of the allotted partition and were in possession and enjoyment of the same. It is also stated by the plaintiff that the 'A' schedule property allotted to Chellappa Gounder was to be enjoyed by him and his second wife Chellammal during their lifetime and thereafter, the same was to be divided between Karumalai Gounder, Sidha Gounder and Arjuna Gounder. Subsequent to the demise of Chellappa Gounder, his second wife Chellammal was cultivating the suit property alone leaving the



property situated in Survey No. 117/2, of an extent of 7.77 acres out of the total extent of 12.03 acres.

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3.3. The plaintiff also contended that Chellammal died in 1984. The extent of 7.77 acres out of the total extent of 12.03 acres was orally partitioned amongst Karumalai Gounder, Sidha Gounder and Arjuna Gounder even during the lifetime of Chellammal and subsequent to the lifetime of Chellappa Gounder, the plaintiff contends that the suit property was kept for common enjoyment between the plaintiff and the defendants 1 to 9. As the defendants 1 to 9 were evading partition, the plaintiff issued a notice calling upon the defendant, claiming a $1/6^{\text{th}}$ equal share and to put the plaintiff in separate possession and enjoyment of the said $1/6^{\text{th}}$ share. The defendants 1 to 5 sent a reply notice on 25.06.2009 with false averments. The defendants 4 to 6, without notice to the plaintiff, sold 1.01 acres in S.No 29/2 and 41.½ cents in S.No 29/3 and $1/9^{\text{th}}$ share in S.No 29/4 to the 10th defendant by way of a sale deed dated 16.09.2009, without specific boundaries and without a partition by metes and bounds. The plaintiff contends that the said sale deed dated 16.09.2009 executed in favour of the 10th defendant, namely A. Samiappan is not binding on him. The plaintiff, therefore filed a suit seeking separate possession and enjoyment of his $1/6^{\text{th}}$ share in the suit property and also prayed for a relief of permanent injunction, restraining the defendants from alienating, altering the nature or



from making any further development in the suit property.

4. The 5th defendant filed a written statement which was adopted by the defendants 1 to 4 and 6. According to these defendants, Chellapa Gounder's 2nd wife was Chellammal alias Sellayeammal; subsequent to the demise of alleged Sellayeammal, in 1984, the suit property was not in common enjoyment as alleged; there is no demand for partition as mentioned in the plaint; the sale by defendants 4 to 6, conveying 1.24 acres was with specific boundaries and as per the oral partition effected between the plaintiff and the defendants; plaintiff has no right to seek for a partition and there was no severance in status even on 12.12.1940 and therefore, defendants sought for the dismissal of the suit, further, contending that the defendants were in separate possession and enjoyment in view of the oral partition.

5. The 10th defendant, the purchaser, filed a separate written statement stating that, though it was correct to state that as per the partition deed dated 12.12.1940, Chellapa Gounder was allotted the 'A' schedule property with a condition that subsequent to the demise of Chellapa Gounder and Chellammal, the 'A' schedule property will be shared amongst Karumalai Gounder, Sidha Gounder and Arjuna Gounder equally, after the death of Chellapa Gounder in 1964, the 'A' schedule property was orally partitioned between Karumalai Gounder, Sidha Gounder and the legal heirs of Arjuna



Gounder and ever since the said oral partition, the parties are in possession and enjoyment of the property exclusively, in their own right. The 10th defendant claims that his purchase is valid and the plaintiff has no right to seek partition. The 10th defendant also filed an additional written statement contending that he is a bonafide purchaser for a valuable consideration and the plaintiff is well aware of his purchase.

6. The Trial Court, dismissed the suit holding that the property was not available for partition in view of the oral partition already having been given effect to. However, the First Appellate Court reversed the judgment and decree of the Trial Court, holding that there was no evidence of the oral partition. Therefore, aggrieved by the reversal findings of the First Appellate Court, the 10th defendant prefers the above Second Appeal.

7. On 07.03.2018, the above second appeal was admitted on the following substantial questions of law:

- a) Whether the first appellate Court is right in overlooking the admission made by P.W.1 in respect of the division of status in the joint family property by ignoring Sections 17, 21 & 58 of the Evidence Act, 1872?*
- b) Whether the first appellate Court is correct in disbelieving the defence plea of oral partition especially when the plaintiff himself admits the oral partition in respect of 7.77 acres bearing S.F.No.117/2 and disputes oral partition in respect of the suit property, even though both the items are part of 'A' schedule in the partition deed dated 12.12.1940 (?x.?1)?*
- c) Whether the judgment of the first appellate Court is perverse for the*



failure to follow the procedure prescribed for receiving the additional evidence in I.A.No.339 of 2017 filed in the appeal suit for not following Order 41 Rules 27 and 28 C.P.C?

8. I have heard Mr. N.Manokaran, counsel for the appellant and Mrs. D.Sathya, for Mrs. Zeenath Begum, counsel for the respondent. The respondents 2 to 25 have chosen to remain exparte.

9. Apart from the arguments advanced by the learned counsel on either side, I have also perused the pleadings, oral and documentary evidence advanced by both parties and also the judgment and decree passed by the Trial Court and the First Appellate Court.

10. The learned counsel for the appellant would submit that the First Appellate Court has erroneously reversed the findings of the Trial Court when the parties have clearly admitted the oral partition. He would refer to the plaint, where the plaintiff himself speaks about an oral partition amongst Karumalai Gounder, Sidha Gounder and Arjuna Gounder. The learned counsel for the appellant would however state that firstly, the claim of such oral partition in respect of 7.77 acres is wholly unsustainable stating that there cannot be an oral partition, leaving out a portion of the property in 12.03 acres in Survey No. 117/2, amounting to a partial partition and secondly, if really there was a partition with regard to 7.77 acres alone, then parties would have not remained silent for decades together, without



affecting partition for the remaining lands.

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11. The learned counsel for the appellant would submit that the plaintiff has not established that the joint family was in possession and enjoyment of the suit property to even stake a claim for partition. He would also refer to the Cross Examination of P.W.1. He would also state that the appellant was only a 3rd party purchaser and a stranger to the family and it was for the plaintiff to examine other family members to establish that the oral partition was only for 7.77 acres and not the entire lands. The learned counsel for appellant would submit that the First Appellate Court received additional documents under Exhibits A19 and A20 in I.A.No 339 of 2017 and has chosen to mark the said documents without giving an opportunity for parties to lead oral evidence, especially for the appellant, to cross examine the plaintiff regarding the said additional documents. He would therefore, contend that no reliance could be placed on Exhibits A19 and A20, received by the First Appellate Court without following the mandate of Order 41 Rules 27 and 28 of Code of Civil Procedure, 1908.

12. Per contra, the learned counsel for the first respondent, Mrs. D.Sathya, would submit that, even in the sale deed in which the appellant purchased the property, it is totally silent as to title of the suit property. She would state that there was no mention of any oral partition in



Exhibit A2 sale deed, under which the appellant purchased the suit property.

She would also refer to the Advocate Commissioner's report and state that subsequent to partition in the year 1940, there has been no partition in the family and placed reliance on the decision of the Hon'ble Supreme Court in the case of *Vineeta Sharma vs Rakesh Sharma and others* reported in 2020 9 SCC 1, where the Hon'ble Supreme Court held that evidentiary value of an oral partition is weak and the same ought to be proved by strong evidence.

13. The learned counsel for the respondent would submit that the oral partition has not been proved and consequently, the appellant had no right to claim to be a bonafide purchaser for valuable consideration.

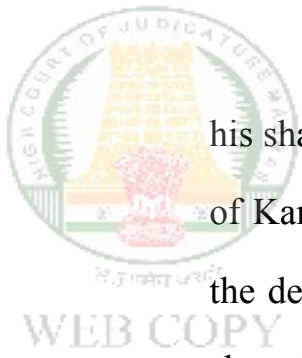
14. I have focussed my attention and careful consideration to the rival submissions advanced by the learned counsel on either side.

15. It is an admitted fact that, originally the property belonged to Chellapa Gounder and after his demise and even during his lifetime, on 12.12.1940, there was a partition of the 'A' schedule property with a condition that, subsequent to the demise of Chellapa Gounder and Chellammal, the property has to be settled to Karumalai Gounder, Sidha Gounder and Arjuna Gounder. It is the case of the plaintiff that, even though



there was an oral partition, it was only for an extent of 7.77 acres between Karumalai Gounder, Sidha Gounder and Arjuna Gounder. According to the plaintiff, the remaining 4.26 acres was in common enjoyment and possession of the joint family. Admittedly, Chellapa Gounder died in 1964 and his 2nd wife died in 1984. The suit was filed only on 19.09.2009, within a month after the 10th defendant purchased the suit property under Exhibit A2 sale deed. The plaintiff was not able to produce any evidence as to common enjoyment of suit property, right from Chellapa Gounder's death in 1964 till Chellammal's death in 1984 i.e. from 1984 to 2009, till such time the suit came to filed.

16. Though the plaintiff pleads that there has been an oral partition after the death of Chellappa Gounder, he disowns the oral partition in respect of allotment of suit property as claimed by the defendants. It is the specific case of the defendants that, even after the demise of Arjuna Gounder in 1953, shares were allotted to his wife and his sons and there has been severance of status. Insofar as the property allotted to Chellappa Gounder in 'A' schedule, along with the property allotted to Karumalai Gounder in 'B' schedule and his 1/3rd share in the 'A' schedule property, his legal representatives have partitioned the same equally amongst themselves. After the death of the 1st son of Karumalai Gounder, his share was enjoyed by the first defendant. After the death of the 2nd son of Karumalai Gounder,



his share was enjoyed by the second defendant. After the death of the 3rd son of Karumalai Gounder, his share was enjoyed by the third defendant. After the death of Arjuna Gounder's wife, the 'D' schedule property and his 1/3rd share in the A schedule property, as per the partition deed dated 12.12.1940, was partitioned amongst his 3 sons, who are defendants 4 to 6.

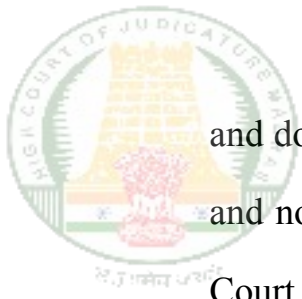
17. The defendants have also contended that, after the demise of Sidha Gounder, the 'C' schedule property and his 1/3rd share in 'A' schedule property, as per the partition deed dated 12.12.1940, was divided equally between his two sons Kailasam and Kandasamy. The said Kandasamy has filed the suit for partition. The defendants 7 to 9 are the sons of late Kailasam, brother of the plaintiff, who are in possession and enjoyment of their respective shares.

18. From the above, it can be seen that the plaintiff admits to the oral partition and according to the plaintiff, the extent is only 7.77 acres and according to the defendants, it is the entire 12.03 acres. From the cross examination, it is seen that the plaintiff who was examined as P.W.1 has admitted to the contentions put forth in the written statement and discussed herein above. The plaintiff categorically admits that the suit property has been partitioned. Moreover, as rightly contended by the learned counsel for the appellant, according to the plaintiff, if only an extent of 7.77 acres has



been partitioned, leaving behind 4.26 acres, the plaintiff would not have remaining silent for decades together, without seeking a partition of the suit property. The plaintiff has not produced a shred of evidence to show that the property is in the common enjoyment of the joint family. The plaintiff has not chosen to question the divisions effected in the other branches of the families, and only after the sale of the suit property, the plaintiff has woken up from deep slumber and rushed to the court to claim that after the death of Chellapa Gounder, the suit property was enjoyed by defendants 1 to 9. The plaintiff has not chosen to examine defendants 1 to 6 or any of the family members to establish the contention that an extent of 4.26 acres was in enjoyment of the joint family after the demise of Chellapa Gounder and Chellammal.

19. Further, having admitted that there was a partition, during the lifetime of Chellammal, it is for the plaintiff to establish that there was an oral partition only to an extent of 7.77 acres and not the entire 12.03 acres. The First Appellate Court ought to have seen that the plaintiff had admitted to the oral partition and presumption was to the entire property being partitioned and not 7.77 acres. The burden of proof is on the plaintiff to show that the partition was partial and limited to 7.77 acres. However, the plaintiff has miserably failed to prove the same and discharge the burden cast upon him. The Trial Court has rightly considered the pleadings, oral



and documentary evidence stating that the suit property has been partitioned and nothing remained for the plaintiff to seek partition. The First Appellate Court has misread the evidence and has ignored vital admissions made by P.W.1 in cross examination, accepting subsequent partitions amongst the other divisions of family members.

20. Therefore, the Judgement of the First Appellate Court suffers from perversity and warrants interference under Section 100 of Code of Civil Procedure, 1908. In fine, the substantial questions of law are answered in favour of the appellant. The judgment and decree dated 24.08.2017 made in A.S. No.14 of 2016 on the file of the Third Additional District Court, Salem is set aside and judgment and decree dated 27.02.2013 made in O.S. No.106 of 2009 on the file of the Sub Court, Mettur is confirmed. Consequently, connected Miscellaneous Petition is closed. Accordingly, the Second Appeal is allowed. There shall be no order as to costs.

28.03.2024

Index : Yes/No
Internet : Yes/No
Neutral Citation : Yes/No.
Speaking order/Non-speaking order
rkp
To
1.The Third Additional District Judge, Salem
2.The Sub Judge, Mettur



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S.A.No.163 of 2



P.B.BALAJI, J,

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S.A.No.163 of 2018
and
C.M.P.No.4250 of 2018

28.03.2024



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S.A.No.163 of 2

