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S.A. No.369 of 2



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 25.03.2024

Pronounced on: 05.04.2024

CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.369 of 2018

and

CMP. No.10249 of 2018

1.Rangasamy
2.Mallakkal (Died)
3.Subramaniam
4.Ravi
5.Baby
(Appellants 3 to 5 are bring on rcord as
LRs of deceased second appellant vide
order dated 28.02.2024)

...Appellants

Vs.

1.Somasundaram
2.Thimmakkal
3.Shanmugam
4.Duraisamy

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 22.02.2018 made in A.S. No.30 of 2017 on the file of the learned Principal District Court, Erode confirming the judgment and decree dated 15.11.2016 made in O.S. No.116 of 2010 on the file of the learned Sub Court, Perundurai by allowing this Second Appeal.



For Appellant : Mr.N.Manokaran

For Respondents : Mr.A.Sundaravadhanan
for R2 to R4
R1 – Served – No Appearance.

JUDGMENT

The unsuccessful plaintiffs before the Courts below are the appellants in the present Second Appeal.

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

3. The material particulars that are necessary for adjudicating the present Second Appeal are as hereunder:

3.1. The plaintiffs claiming that the suit properties originally belonged to one Chenna Naicker and others, contend that the said Chenna Naicker on 15.05.1958, sold Item 1 of the suit property to the plaintiffs and Chenni Naicker. Further, the first defendant's father Muthusamy Gounder, purchased 1/4th share from the plaintiff's brother, Chenni Naicker and similarly the husband of 2nd defendant and father of defendants 3 and 4,



Palanisamy Naicker, purchased the 1/4th share in Item 1 of the suit property, and the plaintiffs are entitled to half share in the suit property. Insofar as Item 2 of the suit property, the plaintiffs contend that the first plaintiff purchased 1/4th share on 16.12.1968 and another 1/4th share on 27.05.1970 from Chenni Naicker, the husband of 2nd defendant and father of defendants 3 and 4 and Palanisamy Naicker purchased the remaining 2/4th shares.

3.2. According to the plaintiffs, the plaintiffs and the defendants 2 to 4 were enjoying the 2nd Item of the suit property in common, without any partition. The first plaintiff constructed a dwelling house from and out of his separate income and the same was never objected to by the defendants. In April 2010, the plaintiff demanded partition of the suit properties. However the same was evaded by the defendants and hence the suit came to be instituted.

3.3. The 4th defendant filed a written statement resisting the suit claim and his written statement was adopted by defendants 2 and 3. According to the defendants, even in 1976, a panchayat was convened and the first plaintiff, Chinna Chenni Naicker was allotted lands in R.S.No.649/2, 4 in Item 1 of suit property and in R.S.No.654/1 in Item 2 of the suit property.



The parties are in possession and enjoyment as per the panchayat partition which has become final. The suit was therefore, sought to be dismissed.

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3.4. The plaintiff filed a reply statement denying the oral partition in the year 1976.

4. The Trial Court dismissed the suit and aggrieved by the same the plaintiffs preferred the First Appeal. Before the First Appellate Court, an application was filed in I.A.No.248 of 2017 under Order 41 Rule 27 of Civil Procedure Code, 1908 by the defendants 2 to 4, to mark a mortgage deed dated 04.02.2014 and sale deed dated 01.02.2017. The First Appellate Court held that both the documents cannot be marked at the appellate stage, however, the First Appellate Court took judicial notice of the documents that were sought to be marked by way of additional evidence. On the merits of the appeal, the First Appellate Court held that oral partition pleaded by the defendants was proved and therefore, no interference was warranted with the findings of the Trial Court and proceeded to dismiss the appeal.

5. Aggrieved by the concurrent findings rendered by the Courts below, the plaintiffs have come up by way of the present Second Appeal. On



03.08.2018, the above Second Appeal was admitted on the following three substantial questions of law:-

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“a) Have not the Courts below committed an error in dismissing the suit by accepting the defence plea of oral partition, though the defendants have failed to examine the panchayatdars and to produce the revenue records to substantiate such defence?

b) Whether the conclusion of the Courts below with regard to the defence plea of oral partition is perverse, particularly in the absence of any legal evidence to prove the plea of oral partition which allegedly held in the year 1976?

c) Whether the First Appellate Court is right in law to rely upon the additional documents by way of judicial notice, unmindful of the mandate of Order 41 Rules 27 and 28 C.P.C?”

6. I have heard Mr.N.Manokaran, learned counsel for the appellants and Mr.A.Sundaravadhanan, learned counsel for respondents 2 to 4. The first respondent has been served, but however, has not chosen to enter appearance.

7. The learned counsel for the appellants, Mr.N.Manokaran would attack the concurrent findings of the Courts below on the ground that the reliance placed on the Courts on the evidence of D.W.1, was wholly unsustainable for the reason that D.W.1, namely the 4th defendant was admittedly four years old in the year 1976, when the alleged oral partition



took place and the learned counsel would point out inconsistencies in the evidence of D.W.1 and D.W.2 regarding the presence of D.W.1 at the time of panchayat. The learned counsel would also refer to the evidence of D.W.1 that D.W.1 has admitted that both the plaintiffs and defendants were doing cultivation and that there is no mutation of records in individual names.

8. The learned counsel for the appellants would also attack the patta produced by the defendants in Ex.B6 and B7, which are only of the year 1990 and not being contemporaneous to the alleged partition and therefore, the said mutation of revenue records would not establish the oral partition. He would also further attack the judgement of the First Appellate Court for taking judicial notice of the additional documents, having rejected the application to receive additional documents. According to the learned counsel for the appellants, the First Appellate Court ought not to have placed any reliance on the documents sought to be filed by way of additional documents, that too taking judicial notice. The learned counsel would therefore, pray for the second appeal to be allowed.

9. Per contra, the learned counsel for respondents 2 to 4,



Mr.A.Sundaravadhanan would submit that the suit was filed in June, 2010 and even according to the plaintiffs, oral partition is said to have taken place on 13.07.2010, after the filing of the suit. He would also point out to the fact that in proof affidavit of P.W.1, the plaintiff having filed the alleged family arrangement dated 13.07.2010, has struck off the same, which clearly falsifies the alleged oral partition, subsequent to the filing of the suit. The learned counsel would also invite my attention to Ex.B8, which is a separate patta issued in the name of the plaintiff himself and when the plaintiff had not denied the same, the logical conclusion is only that there was an oral partition which has been acted upon. He would also contend that the pattas viz., Ex.B6 and B7 were not prior to filing of the suit in the year 2010 but way back in the year 1990 and in order to establish that the oral partition has been acted upon in Ex.B4 and B5 had been exhibited, which were dated 27.03.1991 and 04.09.2000 respectively, being mortgage deeds which would also go to show that the parties have already divided the suit properties orally. The learned counsel would therefore, pray for dismissal of the Second Appeal.

10. I have carefully considered the rival submissions advanced by the learned counsel on either side.



11. With regard to the additional documents sought to be produced by the defendants before the First Appellate Court, having rejected the application, the First Appellate Court clearly erred in taking judicial notice of the said documents which were sought to be produced by way of additional documents. Hence, no reliance can be placed on the said additional documents that are being produced by the defendants before the First Appellate Court.

12. However, I am proceeding to decide the Second Appeal based on the available material evidence excluding the additional documents, regarding which judicial notice had been taken by the First Appellate Court. The short question that needs to be decided in the above Second Appeal is as to whether the defendants have established the plea of oral partition. Though DW1 claims to have witnessed the oral partition, he was aged only four years and hence his evidence regarding the oral partition is unreliable and untrustworthy. The only other evidence available is the evidence of D.W.2. D.W.2 has stated in her chief examination that in the 1st week of Tamil month Chithirai in the year 1976, in a panchayat, the parties had orally divided the suit properties. In her cross examination, she has stated that the 4th defendant Duraisamy, that is D.W.1, is her maternal uncle's grandson.



She has stated that she was present at the panchayat that took place in the year 1976 and that she was aged 30 years at that point of time. She has also stated that both the plaintiffs and the defendants are related to her. Moreover, by production of Ex. B6 to B8, pattas, it is seen that the parties have already partitioned the suit properties. Even though a separate patta with specific boundaries has been issued under Ex.B8 to the plaintiff, the plaintiff has not chosen to disclose the same in the plaint. I do not find the inconsistencies in the evidence of D.W.1 and D.W.2 to be fatal to the plea of oral partition. Evidence of D.W.2 with regard to oral partition in the year 1976 appears to be natural and in the light of mutation of the records in the year 1990, it only probablizes the plea of oral partition. The suit has been filed only in the year 2010 and therefore I do not also find that the mutation not being immediately after the oral partition to be fatal to the case of the defendants.

13. Both the Courts have concurrently and in my opinion rightly held that the plea of oral partition has been established and thereby, the plaintiff was not entitled to seek for partition. The Courts have also concurrently found that the plaintiffs have not established joint and common possession of the suit properties. I do not find any material irregularity or perversity in



the findings rendered by the First Appellate Court, save for the taking of judicial notice of the First Appellate Court with regard to the additional documents which were declined to be received. However, as already stated, de hors the said additional documents, the defendants have been able to establish their plea of oral partition.

14. In view of the same, I do not find the substantial questions of law to be answered in favour of the appellants, excepting the third substantial question of law. However, in respect of the appellants failing on the first two substantial questions of law, the Second Appeal is dismissed. Consequently, connected Miscellaneous Petition is also dismissed. No costs.

.04.2024

Index :Yes/No
Internet : Yes/No
Neutral Citation :Yes/No
Speaking order/Non-speaking order
rkp

To

1. The Principal District Judge, Erode.
2. The Sub Judge, Perundurai.



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P.B.BALAJI, J,

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Pre-delivery Judgment in
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