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S.A.No.1105 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 07.03.2024

CORAM

THE HON'BLE MR. JUSTICE **G.ARUL MURUGAN**

S.A.No.1105 of 2012
and MP.No.1 of 2012

1.N.Pandarinathan
2.P.Selva Kumar

... Appellants

Vs.

M.Murugan

... Respondent

PRAYER: Second Appeal filed under Section 100 of C.P.C. against the decree and judgment dated 28.06.2012 made in AS.No.35 of 2011 on the file of the District Judge, Thiruvannamalai, Thiruvannamalai District, confirming the judgment and decree dated 13.10.2011 made in O.S.No.138 of 2009 on the file



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of the Principal Subordinate Judge, Thiruvannamalai.

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For Appellants : Mr.R.Krishna Prasad

For Respondent : No Appearance



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JUDGMENT

The defendants in the suit are the appellants herein. The Second Appeal is filed challenging the judgment and decree dated 28.06.2012 passed in AS.No.35 of 2011 on the file of District Judge, Thiruvannamalai, confirming the judgment and decree dated 13.10.2011 passed in OS.No.138 of 2009 on the file of Principal Subordinate Judge, Tiruvannamalai.

2. For the sake of convenience, the parties are referred to as per their ranking before the Trial Court.

The brief facts in the plaint:

3. According to the plaintiff, the suit property along with other properties originally belonged to Narasimma Naidu and his wife. Narasimma Naidu had three sons, namely Pandarinathan, Ethiraj and Vasudevan and two daughters namely Kasthuri and Kumari. Both Narasimma Naidu and his wife



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died intestate, and the five children had inherited the suit properties. According to the plaintiff, the five children have already divided all the suit properties about 10 years ago, and they are also in separate possession in their respective shares.

4. According to the plaintiff, the first defendant was allotted lands and a double storied RCC building house. The other brothers Ethiraj and Vasudevan were allotted 0.03 cents each and the two daughters were jointly allotted 0.01 cents totally 0.07 cents which is the suit property. The two brothers and two daughters who were allotted the suit property measuring about 0.07 cents, under a registered sale deed dated 21.06.2005 in Ex.A.1 had conveyed the suit property in favour of the plaintiff. The first defendant was bargaining with the vendors of the plaintiff for a long time for conveyance of suit properties and was not successful. Since the plaintiff had purchased the suit property, he started to give troubles. The plaintiff had put up a tea shop and a thatched house and is residing there carrying on business, by paying the house tax and the business



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tax. The patta no. 382 was also issued for the suit property in favour of the plaintiff. However, on 14.10.2009, the defendants attempted to forcibly dispossess the plaintiff. As such, the plaintiff has filed the suit for declaration and permanent injunction.

5. The defendants resisted the suit by filing the written statement. The defendants had admitted that the suit property along with other properties belonged to Narasimma Naidu and his wife and after the demise of Narasimma Naidu, it was inherited by the five children. According to the defendants though they admitted that there was a partition in the family by which the properties were divided among the five legal heirs, the suit property alone was not included in the oral partition. Further, according to the defendants, after the properties were orally divided in the year 1990, Vasudevan, his brother, had alienated the house allotted to him under the oral partition to Sheik Kamal through a registered sale deed dated 10.11.1998. Similarly, another brother,



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Ethiraj, had alienated his vacant site by demolishing the house and conveying it to the first defendant under a registered sale deed dated 20.09.1995. According to the first defendant in the vacant site allotted to him in the oral partition, he has constructed a two storied terraced house. However, according to the first defendant since the suit property alone was not included in the oral partition, he is entitled to 1/5th share in the suit property. It is the case of the defendants that the possession of the suit property was not handed over to the plaintiff. As such, the first defendant has the right in the suit property in respect of 1/5th share, the plaintiff is not entitled for the relief claimed and sought for dismissal of the suit.

Evidence and Documents:

6. During Trial, on the side of the plaintiff PW.1 to PW.3 were examined and Ex.A.1 to Ex.A8 were marked. On the side of the defendants, DW.1 and DW.2 were examined and Ex.B1 to Ex.B6 were marked.



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Findings of the Trial Court:

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7. After analysing the oral and documentary evidence, the Trial Court by judgment and decree dated 13.10.2011 decreed the suit. The Trial Court found that when the defendants had admitted oral partition in the family, the oral partition had been acted upon and whereby each sharer had taken their respective portion and also sold. In fact, one of the brother had sold the property allotted to him to the first defendant himself. It is for the defendant to establish his claim that in spite of partition in the family, the suit property alone was excluded from the partition. Aggrieved, the defendants filed AS.No.35 of 2011 on the file of District Judge, Tiruvannamalai, Tiruvannamalai District.

8. The Lower Appellate Court, after reappraising the evidence by judgment and decree dated 28.06.2012 dismissed the appeal. In fact, the Lower Appellate Court found that a legal notice in Ex.A.6 had been issued by one of the sister Kasthuri, just to divert the court and later it was found that the sister



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had not issued any such legal notice. It was also found that the plaintiff, after the purchase, had put up construction and started a business, and the defendants had never objected to the sale or construction for the business being carried on till the filing of the suit. Therefore, the Lower Appellate Court dismissed the appeal with costs. Aggrieved by the same, the defendants are before this Court on appeal.

Substantial Question of Law:

9. This Court by order dated 21.11.2012 admitted the second appeal and framed the following substantial question of law.

“1. Whether the Lower Appellate Court being the final Court of fact was correct in law in brushing aside the Ex.B4 and Ex.B.5 which goes a long way in substantiating the plea of oral partition raised by the appellants?

2. Whether the Courts below are correct in law in placing the onus upon the appellants who are the defendant in the suit to prove the case of the plaintiff?”



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Submission made by the learned counsel for the appellant:

10. The learned counsel appearing for the appellants argued that the courts below have relied on the admission of the defendant/DW.1 that there had been a partition in the family, without taking note of the fact that it is a specific case of the defendants that even though there was a oral partition, the suit property was not included in the partition and therefore it is available for partition among the legal heirs, and the first defendant, as a legal heir of Narasimma Naidu is entitled for 1/5th share of the property.

11. The learned counsel further contended that when the plaintiff has come up with the suit for declaration, the onus is on the plaintiff to establish his title and to prove that there was a partition among the co-sharers in respect of the suit property. The learned counsel further contended that the courts below have erroneously shifted the burden on to the defendants and have decreed the



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suit by holding that the defendants have not proved that the suit property was not included in the oral partition.

12. In support of his argument, the learned counsel for the appellant relied on the following decisions,

(I) **Rangammal vs. Kuppuswami and Another** reported in **(2011) 12 SCC 220**.

ii) **Saraswathy and two others vs. Tamizharasi and another** reported in **2003 (3) CTC 229**

(iii) **Ramulu Ammal vs. Ramachandra Reddy & others** reported in **2009 3 LW 622**.

13. The learned counsel further submitted that since the courts below have shifted the burden on to the defendants when the plaintiff has not proved the case, the findings of fact arrived by the courts below are perverse and sought for



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allowing this second appeal.

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14. Even though the names of the learned counsel are printed in the cause list, there is no appearance on the side of the respondent.

Analysis:

15. Admittedly, the suit property along with several other properties belonged to Narasimma Naidu. It is also an admitted case that Narasimma Naidu had three sons and two daughters, out of which, the first defendant is one of the sons. Narasimma Naidu died in the year 1985, and his wife also died, leaving behind the five children as legal heirs. Admittedly, the five children had also inherited the properties of Narasimma Naidu.

16. It is the case of the plaintiff that there was a oral partition in the family among the five children and in the partition, a two storied RCC building



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was allotted in favour of the first defendant with other extent of land and other two brothers were also allotted with 3 cents each out of 0.07 cents in the suit property and 2 daughters were allotted with half cents each and thereby the other two sons and two daughters were entitled for the 0.07 cents in the suit property. The two sons and two daughters to whom the suit property got vested in the oral partition, had conveyed the suit property in favour of plaintiff through the sale deed dated 21.06.2005 in Ex.A.1. Pursuant to the purchase of the suit property, he put up a terraced house and also a tea shop. Based on the purchase, the patta had been issued in favour of the plaintiff in Ex.A.3. The plaintiff had been paying the house tax and also obtained licence for running the tea shop in Exs.A4 and A5. From the documents filed in Ex.A.1 to Ex.A.5, the purchase of the property by the plaintiff, the possession and the business carried on him by him, all establishes his title to the suit property and possession.

17. It is the case of the defendants that even though he admits that there



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was an oral partition in the family, through which the properties in the family were partitioned among the legal heirs, and oral partition was acted upon, and each co-sharer had taken possession of their respective shares, the suit property alone was not included in the oral partition.

18. The defendants also admitted that pursuant to the shares taken over by the respective legal heirs, one of his brothers Vasudevan, had sold his share of property through sale deed in Ex.B.4 dated 10.11.1998 to one Sheik Kamal. Further, the other brother Ethiraj, had also sold his property allotted to him in oral partition in favour of the first defendant himself through the sale deed dated 20.09.1995 in Ex.B.5. The defendant also admits that in the property allotted in his favour in the oral partition, he had put up a two storied building. When the defendant admit that the oral partition took place in the family but however assert that the suit property alone was not included in the oral partition, then it is on the defendants to establish that in spite of oral partition in the family



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whereby all the properties are divided, the suit property alone was excluded.

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19. From the perusal of the sale deed executed in favour of the plaintiff in Ex.A.1, it could be seen that as per the oral partition, three cents were allotted to other two brothers of the first defendant and $\frac{1}{2}$ cents allotted to two sisters of first defendant. All four of them have jointly conveyed the entire cents of 0.07 cents allotted to them in favour of the plaintiff. It could also be seen that the plaintiff, after purchase in the year 2005, had put up a house and constructed a tea shop, obtained a license and has been residing and carrying on business. When the first defendant was allotted a share, he also put up the construction and purchased one of the share of the brother, and the first defendant never objected to the purchase made by the plaintiff or raised any objection in respect of the construction or business carried out by the plaintiff. All these factors shows that there was an oral partition in the family, which is admitted by the defendant, and pursuant to the oral partition, each co-sharer took possession of



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their respective share and the suit property which came to the share of the two brothers and two sisters of the first defendant have sold the same in favour of the plaintiff.

20. When the defendant has asserted that the suit property alone was not included in the partition after admitting the oral partition in respect of the other properties, the defendant had not taken any steps to examine the other two brothers or sisters in the suit to establish his claim that these properties were not included in the oral partition. One unsuccessful attempt has been made in the suit by sending a notice in the name of a sister to show that she had not joined as a party to the sale deed in Ex.A.1. From the evidence available, it came to light that the notice in Ex.A.6 was issued from the place where the first defendant is residing and when the sister was residing in Trichy, the legal notice was not signed by her, and that the legal notice in Ex.A.6 was issued only to divert the attention of the Court. Taking note of these facts, the Lower Appellate Court by



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dismissing the appeal had also imposed exemplary costs on the defendants / appellants.

21. The plaintiff was able to establish his title and also his possession through documents in Ex.A.1 to A.5 and the defendants while admitting the oral partition in the family, had only taken an exception that the suit property was not included in the partition, has not discharged his onus by establishing the assertion made by him. The decision relied on by the counsel is not relevant to the present facts of the case, especially when the oral partition is admitted and acted upon, and all other co sharers, in whose favour the property got vested, conveyed it in favour of the plaintiff.

22. In view of the above finding, the substantial questions of law are answered against the appellants and in favour of the respondent. The Courts below have arrived at the finding of fact which is based on the materials



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available on record and are not perverse.

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23. Therefore, the second appeal stands dismissed. However, there is no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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drl

Index : Yes / No

Speaking / Non-speaking

Neutral Citation : Yes / No

To

1.The District Judge, Thiruvannamalai,
Thiruvannamalai District.

2.The Principal Subordinate Judge, Thiruvannamalai.



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G.ARUL MURUGAN.,J.

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