



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **23.07.2024**

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)No.253 of 2006
and
C.M.P(MD)No.1910 of 2006

Muthulakshmi :Plaintiff/Respondent/Appellant

.VS.

Subbulakshmi :Defendant/Appellant/Respondent

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree made in A.S.No.126 of 2005, dated 22.11.2005, on the file of Second 'Additional Subordinate Judge, Tirunelveli reversing the judgment and decree made in O.S.No.597 of 2004, dated 13.09.2004, on the file of Second Additional District Munsif Court, Tirunelveli.

For Appellant :Mr.M.P.Senthil

For Respondent : Mr.H.Arumugam

JUDGMENT

The Second Appeal is directed against the judgment and decree made in A.S.No.126 of 2005, dated 22.11.2005, on the file of Second Additional Subordinate Judge, Tirunelveli reversing the



judgment and decree made in O.S.No.597 of 2004, dated 13.09.2004, on the file of Second Additional District Munsif Court, Tirunelveli.

2.The plaintiff in the suit for partition is the appellant. The trial Court granted the decree for partition. On appeal filed by the defendant, the First Appellate Court reversed the findings of the trial Court and dismissed the suit. Aggrieved by the same, the plaintiff is before this Court by filing this Second Appeal.

3.According to the Plaintiff, the suit property was purchased by the plaintiff and defendant under two sale deeds, dated 05.03.1990 marked as Ex.A1 and Ex.A2. It was asserted by the plaintiff that she had been in joint possession of the suit property along with the defendant. There was a misunderstanding between the plaintiff and defendant in December 1999 with regard to the joint enjoyment of the suit property. Therefore, the plaintiff demanded partition of her half share and the request of the plaintiff was not acceded to and therefore, she was constrained to file a suit for partition of her half share.

4.The defendant filed a written statement and raised the plea of oral partition. It was the case of the defendant that the northern



half of the suit property was allotted to her share and southern portion was allotted to the plaintiff and in order to have an equitable distribution of shares, the defendant was directed by the mediators to pay a sum of Rs.25,000/- to the plaintiff and the same was also paid by the defendant. It was claimed by defendant that Rs.40,000/- was spent to improve the portion allotted to her share. The plaintiff filed a reply statement denying the oral partition as pleaded by the defendant.

5.Before the trial Court, the plaintiff was examined as P.W.1 and on behalf of the defendant, she was examined as D.W.1 and three witnesses were examined on behalf of the defendant as D.W. 2 to D.W.4. The sale deeds in favour of the plaintiff and defendant were marked as EX.A1 and Ex.A2 and no other documents were marked on either side.

6.The trial Court, on appreciation of oral and documentary evidence, came to the conclusion that the oral partition pleaded by the defendant was not proved and hence granted the decree for partition as prayed for. Aggrieved by the same, the defendant preferred an appeal in A.S.No.126 of 2005, on the file of Second Additional Sub-Court, Tirunelveli and the First Appellate Court based on the evidence of D.W.2 to D.W.4, came to the conclusion



that the defendant proved the oral partition and dismissed the suit.

Aggrieved by the same, the plaintiff has come by way of this Second Appeal.

7. At the time of admission, the following substantial questions of law were formulated for consideration by order of this Court, dated 24.03.2006:

1. Whether the findings of the Lower Appellate Court are vitiated by its failure to consider the absence of any evidence on the side of the respondent regarding the alleged oral partition?

2. Whether the Lower Appellate Court is correct in casting the burden of proof on the appellant that there was no partition, especially, when the respondent failed to establish the alleged oral partition?

3. Whether the Lower Appellate Court is right in not framing the points for determination as contemplated under Order 41 Rule 31 of Civil Procedure Code which is held to be mandatory?

8. The learned counsel for the appellant submitted that the witnesses examined by the defendant to prove the oral partition pleaded by her are all close relatives of defendant and hence, the First Appellate ought not to have relied on the interested testimony of D.W.2 to D.W.4. The learned counsel further submitted that D.W.1



in her evidence speaks about one Gurusamy. D.W.2 also deposed that one Gurusamy, a close relative of both the parties, had also mediated the partition. However, the said Gurusamy has not been examined. The learned counsel further submitted that the defendant has not produced any documentary evidence to suggest that oral partition was acted upon.

9. The learned counsel for the respondent submitted that the plaintiff herself had admitted that there was no enmity between her and D.W.2 to D.W.4 and hence, there is nothing to discredit the evidence of D.W.2 to D.W.4 and the First Appellate Court was justified in upholding the plea of oral partition relying on their evidence.

10. It is seen from Ex.A1 and Ex.A2 that the suit property was purchased in the name of the plaintiff and defendant on 5.3.1990. Therefore the claim of the plaintiff over half share in the suit property is not disputed. The defendant raised a plea of oral partition and payment of Rs.25,000/- to the plaintiff as per the partition arrangement. In order to prove the payment of Rs. 25,000/- by the defendant to the plaintiff, she has not produced any documentary evidence. Though it was claimed by the defendant that the partition had taken place on 6.12.1999, there is no



evidence available on record to show that the said partition was acted upon and revenue documents were mutated in the name of the respective parties. The First Appellate Court relied on the oral evidence of D.W.2 to D.W.4 to uphold the plea of oral partition raised by the defendant. D.W.1 during the course of her cross examination clearly admitted that D.W.2 was her maternal uncle. She also admitted that D.W.3 was her sister's husband. She further deposed that one Gurusamy was a close relative of both the parties. However, the defendant has not chosen to examine the said Gurusamy, even though she pleaded in the written statement that the said Gurusamy was present at the time of partition. D.W.4 during the course of cross-examination admitted that he was the husband of defendants paternal aunt. Therefore, though in her written statement, the defendant mentioned the names of D.W.2 to D.W.4 and Gurusamy as the persons, who mediated the oral partition between the parties, she had chosen to examine only her close relatives and the said Gurusamy was not at all examined. It creates a serious doubt about the oral partition pleaded by the defendant. Further, to corroborate the oral evidence of D.W.2 to D.W.4, the defendant has not produced any documentary evidence like mutation of revenue records to show that the alleged partition was acted upon and the parties have been enjoying their respective shares. In such circumstances, the First Appellate Court is not



justified in upholding the plea of oral partition only based on the interested testimony of D.W.2 to D.W.4. Therefore the substantial questions of law framed at the time of admission are answered in favour of the appellant and against the defendant.

11.In the result, the Second Appeal is allowed by setting aside the judgement and decree passed by the First Appellate Court. As a consequence, the judgment and decree passed by the trial Court is restored. No costs. Consequently, connected Miscellaneous Petition is closed.

12.The learned counsel for the respondent submitted that the respondent had improved the northern portion by spending huge amount. It is needless to say that it is open to the respondent to work out equity in the final decree proceedings before the Court of first instance.

23.07.2024

Index:Yes/No

Internet:Yes/No

NCC:Yes/No

vsn



To

1. The Second Additional Subordinate Judge,
Tirunelveli.
2. The Second Additional District Munsif,
Tirunelveli.
3. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

vsn

JUDGMENT MADE IN
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