



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **28.06.2024**

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)NO.207 OF 2006

and

M.P(MD)No.1 of 2014

A.Bains

:/Appellant/Appellant/Plaintiff

.vs.

1.Daisy

2.A.Stephens

3.Selvabai

4.Selva Ruby

5.Selva Florence

:Respondents/Respondents/
Defendants

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree made in A.S.No.103 of 2004, dated 3.10.2005, on the file of Subordinate Judge, Padmanabhapuram confirming the judgment and decree made in O.S.No.64 of 1999, dated 15.07.2004 on the file of Principal District Munsif Court, Padmanabhapuram.

For Appellant

:Mr.P.Thiagarajan

Respondent-1

:Died

For Respondents
2 to 5

:Mr.K.N.Thampi

**JUDGMENT**

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The Second Appeal is directed against the judgment and decree made in A.S.No.103 of 2004, dated 3.10.2005, on the file of Subordinate Judge, Padmanabhapuram confirming the judgment and decree made in O.S.No.64 of 1999, dated 15.07.2004, on the file of Principal District Munsif Court, Padmanabhapuram.

2.The plaintiff in the suit is the appellant. The suit is for partition. The suit as well as the appeal filed by the plaintiff were dismissed by the Courts below. Aggrieved by the same, the plaintiff is before this Court.

3.According to the appellant/Plaintiff, the suit property originally belong to his father Appavu Nadar. The first defendant is the mother of the plaintiff. The second defendant is his brother. The defendants 3 to 5 are his sisters. The father of the parties Appavu Nadar died in the year 1963. According to the Plaintiff, after the death of Appavu Nadar, he is entitled to 1/3rd share in the suit property along with his brother and mother.

4.The defendants 1 and 2 filed a written statement and resisted the claim for partition on the ground that already the suit property was partitioned orally among the family members. It was



also claimed by the defendants that the defendants 3 to 5 released their share in the suit property in favour of first defendant and she sold her share in the property in favour of the second defendant. It was claimed by the defendants that for the share of the plaintiff in the suit property, he was allotted western portion of the shop with Door No.1/51 and 810 square links of the property on the northern side. Thus the plaintiff was allotted 1.122 cent in the total extent of 6 cents and rest of the property was allotted to the share of the defendants.

5.The defendants 3 to 5 filed a written statement and claimed that they released their share in the suit property in favour of the first defendant. They also pleaded that the western half of shop in Door No.1/51 was allotted to the share of plaintiff and the property on the northern side with tamarind tree was allotted to his share along with western half of the shop. Thus the defendants 3 to 5 also supported the plea of the defendants 1 and 3 that there was oral partition in the family and the plaintiff was allotted with specific property.

6.Before the trial Court, the Plaintiff was examined as PW.1 and an independent witness was examined as P.W.2. On behalf of the plaintiff, nine documents were marked as Ex.A1 to Ex.A9. The



second defendant was examined as D.W.1 and the first defendant was examined as D.W.2. On behalf of the defendants, eight documents were marked as Ex.B1 to Ex.B8. The trial Court appointed an Advocate Commissioner to note down the physical features and his report and plan were marked as Ex.C1 and Ex.C2.

7.The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the defendants proved the plea of oral partition and consequently, dismissed the suit. Aggrieved by the same, the plaintiff filed an appeal in A.S.No.103 of 2004, on the file of Sub-Court, Padmanabhapuram. The First Appellate Court affirmed the findings of the trial Court and dismissed the appeal. Aggrieved by the concurrent findings of the Courts below, the plaintiff has come forward by way of this Second Appeal.

8.At the time of admission, this Court has formulated the following substantial question of law, by order, dated 14.03.2006:

Whether the legal burden in proving the oral partition has been discharged effectively?

9.The learned counsel for the appellant vehemently contended that the plea of oral partition made by the defendants



was not at all proved by acceptable evidence. The learned counsel further submitted D.W.1 and D.W.2 are interested witnesses and based on their evidence, the Courts below came to the conclusion that the plea of oral partition was proved. The learned counsel by relying on the sale deed, dated 29.08.1985 executed by one Kochumani Nadar, Paternal Uncle of the parties, which was filed as additional document along with a petition to receive additional evidence in M.P(MD)No.1 of 2014, submitted that the shop said to have been allotted to the plaintiff in the alleged oral partition was purchased by him from Kochumani Nadar.

10.The learned counsel for the respondents 2 to 5 by taking this Court to the evidence of D.W.1 and D.W.2 and also the Advocate Commissioner's report and plan, submitted that the oral plea of partition made by the defendants have been proved by the evidence of D.Ws and physical features noted down by the Advocate Commissioner. The learned counsel submitted that the western shop portion allotted to the plaintiff was demolished by him and the northern plot allotted to the plaintiff has been in his exclusive possession as an access to his separate property on the further north. The said features have been noted down by the Advocate Commissioner in his report. Taking into consideration all these factors, both the Courts below rightly came to the conclusion that



the plea of oral partition has been proved and dismissed the suit.

The learned counsel further submitted that the factual conclusion reached by the Courts below need not be interfered with while exercising the jurisdiction under Section 100 of Civil Procedure Code.

11. The suit for partition filed by the plaintiff was mainly resisted on the ground that there was an oral partition among the family members. It is the case of the defendants that the defendants 3 to 5 released their share in the suit property in favour of the first defendant. However, when D.Ws were cross-examined in this aspect, they admitted that there was no document to show that the defendants 3 to 5, daughters of Appavu Nadar released their share in favour of the first defendant. In such circumstances, they are also entitled to have their share in the property left by their father. In order to prove the plea of oral partition, the defendants have examined the first and second defendant as their witnesses. They have not examined any independent witness to support the plea of oral partition. The learned counsel for the respondents 2 to 5 tried to sustain the findings made by the Courts below on the ground that the family arrangement may be made among the members of the family and third party may not have knowledge about the family arrangement. As per the plea made by



the defendants, the oral partition had taken place in the family at the time of marriage of their sisters. However, absolutely there is no evidence to show that the said oral partition was acted upon. If really oral partition had taken place and western half of the shop on the southern side of the suit property was allotted to the share of the plaintiff and eastern half was allotted to the share of the second defendant, there should have been mutation of name in the revenue records. The defendants have not produced any revenue records to show that in pursuance of the oral partition, parties have been enjoying their respective shares allotted to them and mutation of revenue records had taken place. In such circumstances, only based on interested testimony of the defendants 1 and 2, the Courts below ought not have come to the conclusion that the plea of oral partition made by them had been proved. The findings reached by the Courts below in this regard is not based on any legal evidence. On the side of the plaintiff, he deposed against oral partition. He also examined one independent witness D.W.2. He also gave evidence against oral partition. There is nothing on record to disbelieve the evidence of independent witness D.W.2. In such circumstances, the conclusion reached by the Courts below with regard to the plea of oral partition only based on interested testimony of D.W.1 and D.W.2 requires interference. The substantial question of law framed at the time of



admission is therefore answered in favour of the appellant and against the defendants.

12.This Court already came to the conclusion that there is no evidence available on record to support the plea that the defendants 3 to 5 have released their share in favour of the first defendant. Therefore, as per the provisions of Indian Succession Act, after the death of Appavu Nadar, first defendant/his wife entitled to 1/3rd share of his estate and his children namely, the plaintiff and defendants 2 to 5 are entitled to equal share in the remaining 2/3rd of his estate. Therefore the plaintiff is entitled only to 2/15th share in the estate of his father Appavu Nadar.

13.As far as M.P(MD)No.1 of 2014, Petition for receiving additional evidence is concerned, the document is of the year 1985. The suit has been filed in the year 1999. Therefore, the document sought to be produced by way of additional evidence was very well available with the plaintiff at the time of trial and at the time of hearing before the First Appellate Court. The Petitioner/appellant has not given any acceptable reason for his failure to produce the document before the trial Court or at least before the First Appellate Court and as such, the ingredients under Order 41 Rule 27 of Civil Procedure Code have not been satisfied. The reason



mentioned in the affidavit as if document was pledged with a Financier is not substantiated by any material. Further, the Petitioner/appellant could have filed certified copy of the same before the Courts below if the original was not within his power and control. Hence, the Petitioner has not made out any case for reception of additional evidence. Accordingly, the Petition for receiving additional evidence is dismissed.

14. In view of the discussion made earlier, the Second Appeal is partly allowed and a preliminary decree for partition is passed in favour of the appellant/plaintiff granting 2/15th share in the suit property. No costs. M.P(MD)No.1 of 2014 is dismissed.

28.06.2024

Index: Yes/No

Internet: Yes/No

NCC: Yes/No

vsn

Note to Registry: Registry is directed to return the original sale deed filed along with M.P(MD)No.1 of 2014 to receive as additional evidence. The appellant shall replace the same with certified copy of the document.



To

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



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S.SOUNTHAR, J.

vsn

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