**(2012) 11 MAD CK 0290**

**Madras High Court**

**Case No:** S.A. No. 281 of 2009 and M.P. No. 1 of 2009

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| P. Doraikannu | | APPELLANT |
| | Vs | |
| P. Istalingam | | RESPONDENT |

**Date of Decision:** Nov. 16, 2012

**Citation:** (2013) 28 MLJ 438

**Hon'ble Judges:** P.R. Shivakumar, J

**Bench:** Single Bench

**Advocate:** R. Singaravelan, for the Appellant; T. Sathiyamoorthy, for the Respondent

**Final Decision:** Dismissed

**Judgement**

P.R. Shivakumar, J.

The plaintiff in the original suit is the appellant in the present second appeal. The defendant in the original suit is the respondent in the second appeal. For the sake of convenience, the parties are referred to in accordance with their rankings in the suit. The plaintiff Doraikannu and the defendant Istalingam are brothers. Admittedly, they were the members of Undivided Hindu Joint family, which became disrupted in the year 1994. By a registered deed of Partition dated 12.9.1994, the plaintiff and the defendant effected a division of the properties, which they owned jointly as joint family properties. The said document was registered as document No. 643 of 1994 on the file of the Sub Registrar, Tamal. It is also an admitted fact that the mother and daughter of the parties relinquished their shares in the properties of the family. In the said partition, a house and vacant site appurtenant to the house in entirety were allotted to the share of the defendant. In addition, he was also allotted an equal share in the agriculture land belonging to the family. The total extent of agriculture land was 4.50 acres. The plaintiff was allotted 2.25 acres, whereas the defendant was allotted 2.25 acres in the said agriculture land. Their shares were clearly demarcated with boundaries. No share was allotted to the plaintiff in the house property, which included the appurtenant land. The partition deed itself recited the value of the share allotted to the defendant to be Rs. 7,18,810/- and the

value of the share allotted to the plaintiff to be Rs. 14,405/-. Apparently, in equal shares came to be allotted in the above said partition. The plaintiff, who has approached the Court, has not chosen to contend that the above said partition deed was brought into effect by fraud or other vitiating factors. On the other hand, the plaintiff chose to file the present suit for a bare injunction restraining the defendant from in any way selling or encumbering the suit properties, as if no division had taken place in respect of the suit properties. Both the house property and the landed properties, which were the subject matters of division under the above said partition, have been shown as items 1 and 2 respectively in the plaint schedule. The plaintiff has chosen to take a stand that though a division in respect of the properties came to be effected under the partition deed dated 12.9.1994, it was orally agreed between the parties that the defendant should pay half of the value of the house property to the plaintiff and till such payment was made, the plaintiff would be allowed to enjoy the entire agriculture land including the one allotted to the share of the defendant.

2. On the other hand, the defendant resisted the suit contending that, no doubt, there was an in equal division in the partition effected under the registered partition deed dated 12.9.1994, but reason had been assigned in the partition deed itself for such in equal division; that accepting such in equal division and the reason for such in equal division, the plaintiff signed the partition deed as a party to the same and that hence the present suit by the plaintiff was nothing but an attempt to indulge in frivolous litigations showing the in equal division made under the partition deed. The defendant has also taken a stand that the division was given effect to and in fact, the defendant put up a new construction with his own funds, after demolishing the dilapidated house allotted to him, whereas the plaintiff, after the filing of the suit, chose to transfer the share he got under the partition to a third party by way of an absolute sale.

3. In the trial Court, the following issues were framed, based on which, the parties went for trial:

1. Whether the partition effected between the plaintiff and defendant not properly done on the value basis?

2. Whether the plaintiff is entitled to permanent injunction as prayed for?

3. To what relief?

The plaintiff, besides figuring as P.W. 1, examined two other persons as P.Ws. 2 and 3 and marked six documents as Exhibits A-1 to A-6 on his side. The defendant figured as the sole witness (D.W. 1) and marked eleven documents as Exhibits B-1 to B-11 on his side. The learned trial judge, on an appreciation of evidence adduced on both sides, decided the issues against the plaintiff and non-suited the plaintiff for the reliefs sought for. As against the decree of the trial Court dismissing the suit, the plaintiff preferred an appeal on the file of the learned Subordinate Judge,

Kancheepuram in A.S. No. 29 of 2007. The learned appellate judge also, on a re-appreciation of evidence, concurred with the findings of the trial Court and dismissed the appeal thereby confirming the decree passed by the trial Court. As such, the plaintiff is before this Court in the present second appeal.

4. At the time of admission, the following questions were formulated as substantial questions of law:

1. Whether the Courts below have given importance to the admission made by the respondent in his evidence in respect of the appellant''s possession of the suit property, which itself would sufficiently prove that the partition is not acted upon and it is only tentative arrangement?

2. Whether the Courts below are right in dismissing the suit for permanent injunction when the possession of the suit properties by the plaintiff is admitted by the respondent/defendant in the absence of any discussion and finding on the partition deed?

5. The arguments advanced by Mr. R. Singaravelan, learned counsel for the appellant and by Mr. T. Sathiyamoorthy, learned counsel for the respondent were heard. This Court also perused the appeal memorandum, copies of judgments and decrees of the Courts below and other documents produced in the form of typed set of papers and also the records sent for from the Courts below:

6. It is an admitted fact that the properties described in the plaint schedule were the properties of the joint family, of which the plaintiff and the defendant were members. After the death of their father, the mother of the parties and the sisters of the parties relinquished their shares. Thereafter, by a registered Deed of Partition dated 12.9.1994, the plaintiff and the defendant effected a division of the said properties. The plaintiff has filed the suit contending that though such a division was made under the registered partition deed, there was a collateral oral agreement under which the plaintiff and the defendant mutually agreed that the defendant, who got the house property worth more than Rs. 6.00 Lakhs in addition to an equal share in the agriculture land, should pay half of the value of the house property as overtly and till then the plaintiff would be allowed to enjoy the agriculture land extending 4.50 acres in its entirety. A reading of the plaint averments would show that the plaintiff did not disown the transaction of partition effected under the Partition Deed dated 12.9.1994. On the other hand, what the plaintiff wanted to contend was that, till half of the value of the house property was given as ovalty to him, he should be allowed to enjoy the share of the defendant in the agricultural land allotted under the above said partition. In short, the plaintiff claimed a charge over the share of the defendant in the agriculture land, which was also divided under the above said partition deed, a copy of which has been produced as Exhibit A6. From the above said stand taken at the inception of the suit, there had been a paradigm shift in the case of the plaintiff. When the matter came up before this

Court by way of the present second appeal, the learned counsel for the plaintiff argued that the partition under the original of Exhibit A6 was not at all given effect to and the properties, which were described in the plaint schedule continued to remain joint without any division. Such a stand newly taken in the second appeal is nothing but an outcome of an afterthought and deliberation.

7. It has been argued that though a partition was effected in respect of the suit properties under the original of Exhibit A6-partition deed, actual possession of the second item of suit properties, namely 4.50 acres of agriculture land, continued to remain with the plaintiff and that the same had also been admitted by the defendant. Thus, the learned counsel for the appellant was able to persuade this Court to formulate the first substantial question of law, as if there had been an admission on the part of the defendant that the half share in the agriculture land allotted to the defendant also continued to be in the possession of the plaintiff. But, nowhere in the pleadings of the defendant, there is any admission that the share allotted to the defendant in the agriculture land under the original of Exhibit A-6 continued to be in the possession of the plaintiff even after such partition. Even in the evidence of D.W. 1, there is no such admission. On the other hand, clear plea had been made and clear evidence came to be adduced to the effect that, prior to partition, the suit properties were administered and the income derived from the properties was appropriated by the plaintiff, which prompted the parties to opt for the partition. It has been clearly averred, which is also supported by D.W. 1''s evidence, that in view of the fact that the plaintiff did not render account for the income derived from the family properties, there was an in equal division and the plaintiff knowing fully well that a more valuable share was allotted to the defendant, agreed for the same and undertook not to question the partition on the ground of in equality. Page 6 of the partition deed recites the reason for such in equal division. For better appreciation, the said portion in vernacular is extracted here under:
The above said recital found in the partition deed will clearly show that the parties took into account the previous management of the family properties by the plaintiff and his failure to render accounts for the income derived from them. The mere fact that the Deed does not contain a black and white recital that the plaintiff did not render account and that was the reason why he was allotted a minimum share compared with the share allotted to the defendant will not vitiate the partition effected therein.

8. As pointed out supra, it is not the case of the plaintiff that the partition deed was brought into existence by using vitiating factors like fraud, coercion or undue influence. On the other hand, the plaintiff had taken a stand that there was a collateral agreement, under which the defendant agreed to pay half of the value of the house property as ovalty and consented for the plaintiff''s retention of the defendant''s share in the agriculture property till payment of ovalty. The case of the plaintiff seems to be that for getting possession of the share allotted to the

defendant in the agriculture land as per the partition deed, a condition was attached by a separate oral agreement for payment of ovalty as indicated supra. Excepting the interested testimony of P.W. 1, there is no other reliable evidence to show that there exists such a separate oral agreement. Of course, the plaintiff has examined P.Ws. 2 and 3 in an attempt to show that even after the partition under the partition deed dated 12.9.1994, the agriculture land in its entirety happened to be in the possession and enjoyment of the plaintiff; that both the plaintiff and the defendant wanted to sell the property through P.W. 3 and that since the plaintiff demanded the ovalty out of the sale proceeds, the defendant refused to get on with the commitment to sell the land. But, a consideration of the evidence of those two persons will show that such evidence is not enough to prove the case of the plaintiff that the entire agriculture land of 4.50 acres continued to be in the possession of the plaintiff even after the partition. Especially P.W. 2, who has been projected as a person who cultivated the land as a tenant, admitted that there was a dispute regarding the use of pump-set, which led to the filing of the suit by the plaintiff. In addition, P.W. 2 would plead absence of knowledge of partition between the plaintiff and the defendant. When such is the tenor of the testimony of P.W. 2, we can''t find fault with the Courts below for rendering a finding that his evidence was not reliable. It is also pertinent to note that P.W. 2 himself admitted that the plaintiff, after the filing the suit, sold his share in the agriculture land to third party. He also admits that there is no document to show that he was cultivating the land as a tenant.

9. Similarly, P.W. 3, who was examined to show that both the plaintiff and the defendant wanted to sell their shares in the agriculture land to thirty party and that since the plaintiff demanded Rs. 3. Lakhs as ovalty, the defendant resiled from the commitment. But, the evidence of P.W. 3 itself will show that though the plaintiff had informed P.W. 3 that the defendant had to pay a sum of Rs. 3.00 Lakhs, when P.W. 3 conveyed the same to the defendant, the defendant denied such obligation. Though P.W. 3 has spoken about a move for selling the lands of the parties to third party and he mediated the same, he has not given the particulars as to the time when he arranged for the transaction. Hence, P.W. 3''s evidence is also not helpful to prove the case of the plaintiff. The trial Court, on proper appreciation of evidence and the lower appellate Court on re-appreciation of evidence, arrived at a concurrent and correct conclusion that the case of the plaintiff that the plaintiff continued to be in possession of the entire property shown as item 2 in the plaint schedule was not substantiated.

10. The attempt made by the appellant by advancing argument in the second appeal to show that the defendant has admitted that the plaintiff continued to be in possession of the entire extent of 4.50 acres of land described as second item in plaint schedule, even after the partition under the original of Exhibit A-6, proved to be an utter failure, as there is no such admission found anywhere in the pleadings or the evidence of the defendant. Learned counsel for the appellant/plaintiff made

an attempt to show that in a notice issued by the defendant, a copy of which was filed as a document in another suit O.S. No. 312 of 2001 filed by the respondent/defendant as Exhibit B-1, plaintiff''s possession of the entire extent of the item 2 of the suit properties was admitted. Learned counsel for the respondent/defendant has rightly pointed out the fact that the notice referred to by the counsel for the appellant/plaintiff was a notice demanding partition and the same came to be issued prior to the partition effected under the original of Exhibit A-6. It is the admitted case of both parties that the entire properties of the family were in the possession and enjoyment of the defendant before the said partition. Therefore, the alleged admission made in the notice, which was allegedly referred to in the judgment now sought to be relied on is not going to help the appellant/plaintiff in any way to substantiate the case that possession of the suit second item of properties in its entirety continued to be in possession and enjoyment of the plaintiff even after the partition.

11. Admittedly, the suit first item is in the possession and enjoyment of the defendant. He has also demolished the old structure and put up a new superstructure with his own funds. It is also not in dispute that after construction of the new building, the same is in the possession of the defendant and the mother of the parties is residing in one of the portions of the newly put up building with the permission of the defendant. Hence, this Court comes to the conclusion that the first substantial question of law formulated at the time of admission does not arise in this case and it has been formulated on an erroneous representation, as if there had been an admission on the part of the defendant.

12. The question framed as second substantial question of law seems to be a duplication of the first substantial question of law insofar as the contention of the plaintiff that the Courts below committed an error in dismissing the suit for permanent injunction, when the possession of the suit properties by the plaintiff was admitted by the defendant. The discussion made in respect of the first substantial question of law, in which it has been held that there is no such admission regarding possession of the suit properties. Excepting 2.25 acres of land in the second item of suit properties allotted to the plaintiff under the original of Exhibit A-6, which was admittedly in possession of the plaintiff, there is no other admission that the plaintiff was in possession and enjoyment of the other half of the agriculture land allotted to the defendant or the house property shown as item 1 in the plaint schedule. However, the question has been framed in such a manner that the Courts below had failed to consider the partition deed and give a finding on the partition. The same is also an improvement sought to be made in the second appeal. The Courts below have, on proper analysis, come to the conclusion that there was a partition, which was also acted upon. The plaintiff has not come forward with any plea that there was any vitiating factor based on which he can seek the cancellation of the partition. The in equal division was explained with reasons in the partition deed itself. Reason for the in equal division is found in the recital

incorporated in the partition. It is also apparent from the fact that the values of the shares have also been clearly given. The plaintiff, having volunteered to get a share of lesser value as his share in the partition, cannot now challenge the partition on the ground of in equal division in the absence of any other vitiating factor. It is also pertinent to note that the plaintiff, who, figured as P.W. 1, candidly admitted that after the filing of the suit, he sold the 2.25 acres of land allotted to him in the property shown as second item of the suit properties in the plaint schedule to one Prakash Rao. He has also admitted that the partition deed was referred to in the sale deed and that the sale deed was executed reciting the fact of his getting the property in the partition under the partition deed and thus tracing his absolute title to the partition deed,. The one admission pointed out supra shall be enough to show that the partition was given effect to and the plaintiff cannot successfully put-forth his case that the partition was not given effect to. The Courts below committed no defect or error in coming to the conclusion that the plaintiff was not entitled to any of the reliefs sought for in the plaint. The plaintiff''s case based on the projected second substantial question of law also deserves discountenance.

For all the reasons stated above, this Court comes to the conclusion that there is no merit in the second appeal and the same deserves dismissal. Accordingly, the second appeal is dismissed. However, there is no serious appeal for incorporating an order for cost. Hence, there shall be no order as to cost. Consequently, the connected miscellaneous petition is closed.