

(2009) 10 MAD CK 0248

Madras High Court

Case No: Appeal Suit No. 134 of 2004 and CMP. No. 4467 of 2004

Pichakarappillai

APPELLANT

Vs

Pachayapillai, Vijayakumar, Jothi
and Pachayee

RESPONDENT

Date of Decision: Oct. 28, 2009

Citation: (2010) 1 MLJ 1172

Hon'ble Judges: C. Nagappan, J

Bench: Single Bench

Advocate: Mythili Suresh for M/s. Sarvabhauman Associates, for the Appellant; E. Vedabagath Singh, for the Respondent

Final Decision: Allowed

Judgement

C. Nagappan, J.

The first defendant has preferred this appeal challenging the judgment and decree, dated 18.12.2002, made in O.S.No.1 of 2002 on the file of Additional District Judge (Fast Track Court) at Kallakurichi. The respondents 1 to 3 filed the suit seeking for a preliminary decree for partition and separate possession of their 4/9 share in the suit property and for costs of the suit.

2. The case of the plaintiffs is that the suit properties belonged to undivided Hindu joint family consisting of Natesappillai and his sons Pichakarappillai and Ramuppillai and Natesappillai died intestate 30 years ago and his wife predeceased him and the second defendant Pachayee is the daughter of Natesa Pillai and Ramuppillai died intestate on 3.7.1998 leaving the plaintiffs as legal heirs. It is further stated that first and second plaintiffs are his sons and third plaintiff is his wife and they are entitled to 4/9 share; first defendant is entitled to 4/9 share; second defendant is entitled to 1/9 share in the suit properties and the plaintiffs have demanded partition of 4/9 share in the suit properties but the defendants are evading the same inspite of receiving notice from the plaintiffs.

3. The first defendant in his written statement denied that the suit properties are undivided Hindu joint family properties and according to him during the life time of Ramuppillai, in the year 1984 in Tamil month "Thai", there was partition between the brothers in the presence of panchayatars and the landed properties known as Manakkadu in Somandarkudi in various survey numbers totaling 5.59.5 hectare and tiled roof shed in Vananjur village were allotted to the share of first defendant and the landed properties known as Irangadu situated in Somandarkudi village and the landed properties known as Ponnikkadu in Mokur village of a total extent of 4.62.0 hectares; terraced house, thatched shed and vacant site with haystack were allotted to Ramuppillai and the division came into effect and the sharers were in possession of their respective shares and enjoying the same. Evidencing the partition, a Partition deed dated 21.2.1984 was executed and both the brothers had affixed their signatures and the panchayatars signed the deed as witnesses. Since the terraced house, thatched shed and vacant site together with well irrigated fertile lands of an extent of 1.05.5 hectare in Mokur village were allotted to the share of Ramuppillai, the first defendant was given a larger extent of landed properties towards his share. It is further stated in the written statement that after partition, Ramuppillai and first defendant were independently enjoying their shares by paying kists.

4. The second defendant in her written statement has stated that the suit properties are joint family properties of Natesappillai and his sons Pichakarappillai and Ramuppillai and after the death of Natesappillai, the plaintiffs are entitled to 4/9 share and the second defendant being the daughter of Natesappillai is entitled to 1/9 share and the first defendant is entitled to 4/9 share in the suit properties. The second defendant has also sought for preliminary decree for partition and separate possession by paying the Court fee.

5. The trial Court framed five issues and the first plaintiff examined himself as PW. 1 examined PW.2 Narayanappillai and Exs.A1 and A2 were marked on their side. First defendant was examined as DW. 1 and the second defendant was examined as DW.3 and they examined DW.2 Arunachalampillai and marked Exs.B1 to B4 on their side. The trial Court, on a consideration of oral and documentary evidence, held that the partition agreement dated 21.2.1984 is not true and not acted upon and the plaintiffs are entitled to 4/9 share and the second defendant is entitled to 1/9 share in the suit properties and granted preliminary decree accordingly. Challenging the same, the first defendant has preferred the present appeal. For the sake of convenience, in this Judgment, the parties are referred to as arrayed in the suit.

6. The Points for determination in this appeal are:

1) Whether the suit properties are undivided joint family properties as stated by the plaintiffs.

2) Whether the suit properties were divided by Deed dated 21.2.1984 among the brothers as contended by the first defendant.

3) Whether the plaintiffs and the second defendant are entitled for the relief of partition and separate possession of their respective shares.

POINTS NOS. 1 AND 2

7. The learned counsel appearing for the appellant submits that the trial Court failed to appreciate that the first plaintiff as P.W.1 has admitted in the cross-examination that there was an earlier partition and he was not satisfied with the same and in the same way, PW.2 Narayanappillai has admitted in the cross-examination that Ramuppillai and his brother, the first defendant were independently cultivating their respective shares from the year 1984 onwards and after the death of Ramuppillai, the plaintiffs are cultivating their lands and on the basis of their admission the plaintiffs are not entitled for the relief of partition.

8. Per contra, the learned counsel for the respondents submits that the first plaintiff has not admitted the earlier partition and the finding of the trial Court that Ex.B1 Partition Agreement was not acted upon is sustainable.

9. In the plaint, the plaintiffs have stated that the suit properties belong to undivided Hindu joint family consisting of Natesappillai and his sons Pichakarappillai and Ramuppillai and Natesappillai died intestate and the second defendant Pachayee is the daughter of Natesappillai and Ramuppillai died intestate on 3.7.1998 leaving the plaintiffs as legal heirs and the plaintiffs and the first defendant are entitled to 4/9 share each and the second defendant is entitled to 1/9 share in the suit properties. The second defendant has filed independent written statement stating that the suit properties are joint family properties and she is entitled to 1/9 share in it and she has also sought for a decree for partition and separate possession of her 1/9 share.

10. The first plaintiff examined himself as PW. 1 and in the chief examination, he has stated that the suit properties are undivided joint family properties and in the cross-examination, he has in clear terms admitted that there was an earlier partition of the suit properties. For better appreciation, the relevant portion of the cross-examination is extracted below.

In the above testimony, the first plaintiff has admitted the earlier partition but has only complained that the allotted lands were not fertile.

11. The plaintiffs examined PW.2 Narayanappillai, who is aged 67 years and a resident of the same village. In the cross-examination, PW.2 Narayanappillai has stated that the first defendant and his deceased brother Ramu were residing separately and were cultivating their lands separately from the year 1984 and after the death of Ramu, his son is cultivating those lands. For better appreciation, the relevant portion of the testimony is extracted below.

PW.2 Narayanappillai, in the above testimony, has categorically stated that the first defendant and his deceased brother Ramu were in possession and enjoyment of their respective shares from the year 1984. In this context, it is relevant to note that the case of the first defendant is that there was partition in the year 1984 and PW.2 Narayanappillai has testified the same.

12. The first defendant in the written statement has stated that in the year 1984 in Tamil month "Thai", there was partition between him and his brother Ramuppillai in the presence of panchayatars and the landed properties known as Manakkadu in Somandarkudi comprised in various survey numbers totaling 5.59.5 hectares and tiled roof shed in Vananjur village were allotted to the share of the first defendant and the landed properties known as Irangadu situated in Somandarkudi village and the landed properties known as Ponnikkadu in Mokur village of a total extent of 4.62.0 hectares; terraced house, thatched shed and vacant site with haystack were allotted to Ramuppillai and the division came into effect and the sharers were enjoying their respective shares and a Partition Deed dated 21.2.1984 was entered into evidencing the partition and both the brothers affixed their signatures and the panchayatars attested the Deed. The first defendant examined himself as DW. 1 and in his testimony, he has testified about the partition that took place between him and his brother in the year 1984.

13. Ex.B1 is the unregistered Partition Agreement dated 21.2.1984 signed by the first defendant and his brother Ramuppillai. Three witnesses have attested the said deed and one of them by name Arunachalam Pillai was examined as DW.2. In the recitals in the deed, the share allotted to the first defendant and the share allotted to his brother Ramuppillai are separately mentioned and the details of the respective share with survey number, extent and kist payable are mentioned and the sharer has put his signature in it. DW.2 Arunachalam Pillai is aged 80 years on the date of his examination and he is the brother-in-law of both the first defendant and Ramuppillai. In his testimony, he has stated that in the year 1984, partition of properties took place in the presence of panchayatars and he was one among them and both the brothers affixed their signatures in Ex.B1 and he also attested the same as witness. It is no doubt true that DW. 1 Pichakkaran and DW.2 Arunachalam Pillai, in their cross-examination, have stated that Ex.B1 Deed was handwritten and not typed and the learned counsel for the respondents contends that Ex.B1 is typewritten and it is not the deed referred to by the witnesses during argument. Ex.B1 Partition Agreement is of the year 1984 and the witnesses have testified about the same in the year 2002. Merely because D.Ws.1 and 2 have stated that it was handwritten, the credibility of Ex.B1 Document is not affected in any way.

14. As already stated DW.2 Arunachalam Pillai is the brother-in-law of both the brothers viz. first defendant and Ramuppillai and there is no reason for him to falsely support the case of one of the parties. In fact, no suggestion of enmity was attributed to him in the cross-examination. Exs.B2 to B4 are the chitta extracts

relating to the suit properties for the Fasli Nos. 1394 to 1397. As per the entries therein, kists have been paid for the lands comprised in Patta Nos.90 and 120 situated in Somandarkudi village and for the lands in Patta No.356 situated in Mokkur village. In some of the entries, the first defendant is shown to have paid kist and in the other entries, Ramuppillai is shown to have paid kist for the very same patta number. The trial Court has referred to the above and observed that there are contradictions and it does not help the case of the first defendant. Though Exs.B2 to B4 do not entirely support the case of the first defendant with regard to the enjoyment of the properties, the testimonies of P.Ws.1 and 2, in the cross-examination as referred above, do corroborate the case of the first defendant that there was an earlier partition and the properties are in separate enjoyment of the parties.

15. The plaintiffs have not substantiated that the suit properties are undivided joint family properties by adducing any evidence and the first plaintiff Pachayapillai in his testimony has given a go by to the case pleaded in the plaint. The trial Court has failed to appreciate the evidence in proper perspective and the conclusion that the properties are joint family properties and they are liable for partition, is erroneous and cannot be sustained. The Point Nos.1 and 2 are answered accordingly.

POINT NO.3

16. In view of the conclusion reached, the plaintiffs and the second defendant are not entitled for the relief of partition and separate possession sought for by them. The Point No.3 is answered accordingly. In the result, the Appeal is allowed and the judgment and decree of the trial Court are set aside and the suit is dismissed. However, considering the relationship of the parties, there shall be no order as to costs. Connected CMP.No.4467 of 2004 is closed.