



S.A.No.719 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.10.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.719 of 2023

1.Gousbir
2.Rajendran
3.Marimuthu

... Appellants

Vs.

1.Selvaraj
2.Subbansayabu
3.Johirabi
4.Abithabi
5.Salimabi
6.Sharifabi
7.Noorunisha
8.Mubarakbi
9.Dilshadbi
10.Kathavarayan
11.Bharkathbi
12.Anar
13.Nazeem

... Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil



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Procedure Code to allow the appeal setting aside to the judgement and decree passed by the Additional District Court III, Kallakurichi in A.S.No.15 of 2018 dated 22.12.2021 confirming the judgment and decree rendered by the Sub Court, Kallakurichi in O.S.No.170 of 2012 dated 11.04.2018.

For Appellant : Mr. A.G.Rajan

For Respondent : No Appearance

JUDGMENT

The unsuccessful defendants 11,15 and 17 before the Courts below are the appellants herein.

2. The case, in brief, which has culminated in filing of this second appeal is hereinbelow set out and the parties are referred to in the same litigative status as before the Trial Court. This second appeal is filed only by the defendants 11,15 and 17.



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2.1. The plaintiff has filed a suit in O.S.No.170 of 2012 on the file of the Sub Court, Kallakurichi seeking a preliminary decree for his 11/24th share of the suit properties and for separate possession.

2.2. It is the case of the plaintiff that the suit properties situated in the Pavanthur Village limit, Sankarapuram Taluk, belonged to one Sheik Imam Sayabu. The first defendant is the son, the second defendant is the wife, the defendants 3 to 6 are the daughters of Sheik Imam Sayabu and the second defendant. The other son, Ahmed Basha also died and he is survived by three daughters through his first wife who have been arrayed as the defendants 7 to 9 and the 10th defendant is the second wife of Ahmed Basha. The defendants 11 to 14 are his heirs through the second wife. Ahmed Basha had died after the death of his father.

2.3. It is the contention of the plaintiff that as per Muslim law, the wife of Sheik Imam Sayabu had a 1/8th share, the two sons had 2/3rd share and four daughters together had 1/3rd share. The sharers continued to be



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in joint possession and enjoyment of the property.

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2.4. The first defendant attempted to alienate the property to the defendants 15 and 16 and attempted to deprive the defendants 2 to 6 of their shares. Therefore, the defendants 2, 5 and 6 had demanded partition of their shares and issued a legal notice dated 09.08.2010 to the defendants 1, 3, 4, 11 and 15 to 17.

2.5. The defendants 2 to 6 had sold their respective shares to the plaintiff herein and got the sale registered. Under the sale deed dated 25.01.2011, the defendants 2 to 5 had sold their shares and under the sale deed 31.05.2011, the sixth defendant had sold her share in the property. By reason of these sale deeds, the plaintiff has become a co-owner. On coming to know about the sale, the defendants 15 and 17 had issued notice dated 01.09.2012 which was replied to by the plaintiff and defendants 2 to 6 vide a reply notice dated 08.09.2012 demanding for partition and separate possession of his share.



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2.6. The plaintiff would submit that he has a $1/8^{\text{th}}$ share through the second defendant and $1/3^{\text{rd}}$ share through the defendants 2 to 5 and in all, he is entitled to $11/24^{\text{th}}$ share.

2.7. It was only the defendants 11 to 13, 15 to 17 who had contested the suit. The 11th defendant filed a written statement which was adopted by the defendants 12, 13, 15 to 17. The defendants would *inter alia* deny the claim of the plaintiff. The defendants have also pleaded partial partition. The defendants would contend that the suit properties did not yield any income and in order to meet the expenses of the wedding of the defendants 3 to 6, Sheik Imam Sayabu had to sell the properties. Sheik Imam Sayabu had passed away 15 years ago and prior to his death, a family arrangement had been entered into. In this family arrangement, the defendants 3 to 6 had given up their shares stating that they have received considerable dowry and also taking into account the expenses of the wedding. Thereafter, the defendants 3 to 6 have no right over the property



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and it was only the first defendant and Ahmed Basha, the deceased brother who were in enjoyment of the property.

2.8. It is their contention for the past 30 years, the property has been enjoyed by them to the exclusion of the sisters who have been ousted from the property. Therefore, they pray for the dismissal of the suit.

TRIAL COURT:

3. The learned Sub Court Judge, Kallakurichi, had framed the following issues:

- “1. தாவா சொத்துக்களில் வாதிக்கு 11/24 பாகம் கிடைக்கத்தக்கதா?
2. வாதியின் உரிமை உடமை நீக்கம் மூலம் பாதிக்கப்பட்டுள்ளதா?
3. தாவா பகுதி பாகப்பிரிவினை தோசத்தால் பாதிக்கப்பட்டுள்ளதா?
4. வாதிக்கு கிடைக்கக்கூடிய இதர பரிகாரம் என்ன?”

4. The plaintiff had examined two witnesses and marked Exs.A1 to A6. On the side of the defendants also, two witnesses were examined and Exs.B1 to B8 were marked.



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5. Ultimately, the learned Judge had observed that the suit would not be hit by partial partition since the plaintiff has only purchased a share in the suit property from the defendants 2 to 6 and the plaintiff had no interest in the other properties. The learned Judge also observed that the defendants had not proved ouster and since the defendants 2 to 6 are co-owners of the property, it is for the defendants to prove when they had started enjoying the property to the exclusion of the defendants 2 to 6.

6. Ultimately, the learned Judge decreed the suit for partition. This judgment and decree was taken up on appeal by the defendants 11-15 and 17 in A.S.No.15 of 2018 on the file of the III Additional District Court, Kallakurichi. The learned District Judge also confirmed the judgment and decree of the Trial Court, aggrieved by which, the defendants 11,15 and 17 are before this Court.



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7. Heard the learned counsel for the appellants and perused the materials available on record.

8. The learned counsel for the appellants would submit that Ex.B1-patta is over 30 years and the Courts below have totally ignored the same. He would also argue that the Courts below have ignored Ex.B3 and Ex.B4 - sale deeds and Ex.B1 and Ex.B2 - revenue records. Since the patta is over 30 years, there is a presumption that the same is true. Therefore, the learned counsel submitted that there are substantial questions of law to be urged in this appeal.

9. The suit is one for partition and the defence is that the plaintiff's vendors have already released their share in the properties in favour of the defendants 11,15 and 17. Further, the defendants who have taken out this plea would also submit that they have perfected title by ouster.

10. However, in the written statement and evidence, the defendants



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have not pleaded from which point in time they have kept the defendants 2 to 6, the vendors of the plaintiff away from the property and have openly asserted their title. Both the Courts below have held that the defendants have not proved ouster and I see no reason to disagree with that finding.

11. The defendants 11,15 and 17 seek to stake the claim on the basis of revenue entry. The plea of partial partition has also to be negatived since the plaintiff who is the third party has purchased a share only in the suit property and not in the other properties of the defendants. Further, the defendants 12 to 14 who had challenged the judgement and decree of the Sub Court, Kallakurichi in O.S.No.170 of 2012 have not challenged the judgement and decree in A.S.No.15 of 2018.

12. Therefore, I see no reason to interfere with the concurrent judgement and decree of the Courts below, particularly, when the appellant has not been able to substantiate any question of law, much less substantial question of law.



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In the result, this second appeal is dismissed. No costs.

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Index : Yes/No

Speaking order/non-speaking order
ssa/apd

To

1. The III Additional Judge,
Additional District Court, Kallakurichi.
- 2.The Sub Judge,
Sub Court, Kallakurichi.
2. The Section Officer, V.R.Section, High Court, Madras

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P.T.ASHA, J.,

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