



S.A.No.30 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.10.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

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&

C.M.P.No. 820 of 2021

1.T.Loganathan

2.S.Malathi

...Appellants

Vs

1.Suseela

2.Bhuvanesh

3.Gowtham

... Respondents

Prayer: The appeal is filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree dated 02.12.2019 made in A.S.No.42 of 2016 on the file of the Sub Court, Avinashi reversing the



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Judgement and Decree dated 20.10.2016 made in O.S.No.81 of 2013
on the file of the District Munsif Court, Avinashi.

For Appellants : Mr. A.K.Kumarasamy
Senior Counsel
For Mr. S.Kaithamalai Kumaran.

For Respondents : Mr. N.Manokaran
1 and 2

For Respondent 3: No Appearance.

JUDGEMENT

The defendants in the suit O.S.No.81 of 2013 on the file of the District Munsif, Avinashi has filed the above Second Appeal challenging the Judgement of the Sub Court, Avinashi in A.S.No.42 of 2016, in and by which the learned Sub Judge, Avinashi had reversed the Judgement and Decree passed by the District Munsif, Avinashi.

The facts are herein below set out briefly and for ease of understanding, the parties are referred to in the same rank as before the

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Trial Court.
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Plaintiffs' case:

2. The plaintiffs had filed the suit O.S.No.81 of 2013 seeking an injunction restraining the defendants, their men, agents, assignees etc., from in any way or in any manner trespassing into the property or disturbing the peaceful possession and enjoyment of the suit property by the plaintiffs till the final partition is effected by means of permanent injunction.

3. The plaintiffs would submit that the suit property was purchased by one K.M.Subramaniam under a registered sale deed dated 09.06.1982. The said Subramaniam is the husband of the 1st plaintiff and father of the plaintiffs 2 and 3. The said Subramaniam and his brother K.M.Kaithamalai were the children of one Marappa Mudaliar. The two brothers had originally negotiated the price for the purchase of



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the suit properties. However, the said Kaithamalai was not able to mobilise funds and therefore Subramaniam alone had contributed the entire funds and Kaithamalai agreed to pay his contribution as and when he mobilised the funds. The property was therefore purchased in the joint names of Kaithamalai and Subramaniam. However, Kaithamalai never got into possession of the suit property and that apart he did not pay any amounts to Subramaniam. It was Subramaniam who alone is enjoying the properties. The said Subramaniam died on 16.08.2000 leaving behind him surviving the plaintiffs herein as his legal representatives. On the death of the said Subramaniam, the plaintiffs have come into possession of the said properties and have been in possession and enjoyment of the same since then.

4. Meanwhile, the 1st defendant in collusion with the said Kaithamalai attempted to create records and therefore, the plaintiffs had



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issued a presuit notice dated 15.01.2013 to the 1st defendant calling upon him not to purchase the suit property since they alone are the absolute owners of the said property. A reply dated 19.01.2013 was issued by the 1st defendant inter alia contending that Kaithamalai had filed the suit O.S.No.499 of 2009 on the file of the Sub Court, Perundurai for partition and by Judgement dated 25.08.2011 a preliminary decree for partition has also been decreed. The defendants thereafter created some revenue records which prompted the plaintiffs to issue notice to the 1st defendant and the Village Administration Officer, Uthukuli and the Executive Officer of Uthukuli and they have not changed the revenue records.

5. The plaintiffs would submit that the said Kaithamalai and another had created a sale deed dated 23.01.2013 in favour of the defendants. The plaintiff would submit that the vendor of the defendants had no right or title to the property and consequently had no



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right to convey the suit property in favour of the defendants.

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6. The plaintiffs would further contend that the defendants have to file a suit for partition and separate possession to step into shoes of their vendor. Until such time, the defendants cannot take possession of the properties.

7. However, on 10.03.2013, the defendants attempted to trespass into the suit property which was successfully prevented by the plaintiffs. The plaintiffs would further submit that even assuming that the sale deed was genuine one, the defendants cannot take possession of the undivided property and since the defendants were attempting to enter into the possession, the plaintiffs have come forward with the suit in question.



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Defendants' case:

8. The 1st defendant had filed a written statement, which is adopted by the 2nd defendant who is none else than his wife. The defendants apart from denying the allegations contained in the plaint, would submit that the plaintiffs have come to the Court with unclean hands and by suppressing the true facts. The suit property has been purchased jointly by the defendants' vendor Kaithamalai and his brother Subramaniam and after the purchase both of them have been enjoying the property in common without effecting partition. After the demise of the said Subramaniam, Kaithamalai and the plaintiffs were residing in the suit property. During the lifetime of Subramaniam, he and Kaithamalai together had constructed six shops in the front portion of the property adjacent to the North South Main Road.



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9. The defendants would submit that out of the six shops constructed, the said Kaithamalai retained one shop and occupied the same for the purpose of running a grocery shop. The shop was bearing door No.87 and he was running a grocery shop therein in. In the year 1991 – 1992, the said Kaithamalai and Subramaniam had constructed a two storied building with each of them contributing equally. The said Kaithamalai has been paying property tax, electricity bill, licence fee, etc., for suit property all these years and therefore he has half share in the property and the plaintiffs put together were entitled to the remaining half share.

10. It appears that the relationship between Kaithamalai and the plaintiffs had become strained on account of the arrogant behaviour of the 1st plaintiff. The 1st plaintiff started acting against the interest of the the said Kaithamalai and was attempting to take possession of the entire suit property. To achieve this end, the 1st plaintiff had filed the



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suit O.S.No.34 of 2006 on the file of the District Munsif Cum Judicial Magistrate, Perundurai, for bare injunction contending that she was in possession of the entire property and denying Kaithamalai's share in the suit property. By reason of this, the said Kaithamalai had filed a suit for partition in O.S.No.139 of 2006 before the Sub Court, Erode. This was subsequently transferred to the file of the Sub Court, Perundurai and re-numbered as O.S.No.499 of 2009.

11. The plaintiffs who are the defendants in the said suit had entered appearance through counsel and ultimately a preliminary decree was passed on 25.08.2011. The suit O.S.No.34 of 2006 filed by the 1st plaintiffs was dismissed for default on 03.11.2006 and had not been restored. Consequently, the defendants' vendor's right to half share in the suit property had been confirmed.



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12. The defendants would submit that the said Kaithamalai and the plaintiffs were in joint possession of the suit property. The said Kaithamalai was running a grocery shop in Door No.87. Apart from the two houses situate in the suit property, the said Kaithamalai was residing in the house situate on the western side on the rear side of the six shops. On 23.01.2013, the said Kaithamalai had inducted defendants into possession and enjoyment of the specific portion of the suit property. Consequently, the defendants are conducting business in shop No.87.

13. The defendants would submit that out of six shops, three shops remain vacant and two shops occupied by tenants and one by the defendants. Therefore, the plaintiffs' contention that they are in exclusive possession and enjoyment of the suit property is absolutely false. Therefore, the defendants sought to have the suit dismissed.



Trial Court:

14. The learned District Munsif, Avinashi had framed the following issues:

“1.வாதிகள் தாவாவில் கோரியபடி நிரந்தர உறுத்துக்கட்டளைப் பரிகாரம் கிடைக்கத்தக்கதா?

2.பிரதிவாதிகளால் 23.01.2003 ஆம் தேதியன்று ஏற்படுத்தப்பட்ட கிரையப்பத்திரமானது வாதியை கட்டுப்படுத்துமா?

3.வாதிகளுக்கு கிடைக்கத்தக்க வேறு பரிகாரங்கள் என்ன?

15. The 1st plaintiff had examined herself as P.W.1 and one Subramanian as P.W.2 and she has marked Ex.A.1 to Ex.A.21. On the side of the defendants, the 1st defendant had examined himself as D.W.1 and marked Ex.B.1 to Ex.B.17.



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16. The learned District Munsif, Avinashi, on considering the evidence on record ultimately dismissed the suit. The learned Judge had proceeded to hold that the vendor of the defendants had obtained preliminary decree and it was only the final decree that had to be proceeded with.

Lower Appellate Court:

17. Challenging the same, the plaintiffs have filed A.S.No.42 of 2016 on the file of the Sub Court, Avinashi. The learned Sub Judge, Avinashi by Judgement dated 02.12.2019 was pleased to allow the appeal and decreed the suit. Challenging the same, the defendants are before this Court.

18. The Second Appeal has been admitted on the following Substantial Questions of Law:

“i. Whether the Lower Appellate Court is right in

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granting a decree for permanent injunction against a coowner especially when documents were produced to prove their separate possession?

ii. Whether the Lower Appellate Court is right in decreeing the suit on the ground that the defendants did not produce documents to support their case without following the established principle that the plaintiffs has to succeed on the strength of his case and not on the weakness of the defendants' case.”

Submissions:

19. Mr. A.K.Kumarasamy, learned senior counsel appearing on behalf of the appellants / defendants would submit that under Ex.A.1 sale deed dated 09.06.1982, both Subramaniam (under whom the plaintiffs claim right) and Kaithamalai (who is the vendor of the defendants) had jointly purchased the property. He would further



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submit that a perusal of Ex.B.3 to Ex.B.6, Ex.B.12, Ex.B.13 and Ex.B.14 would clearly prove that the defendants' predecessor in title as well as the defendants are also in possession of the property.

20. The learned senior counsel would further submit that the said Kaithamalai had initiated proceedings for partition in O.S.No.499 of 2009 and the suit had also been decreed. He would submit that now final decree proceedings have been initiated in I.A.Nos. 315 and 316 of 2021 on the file of the Sub Court, Avinashi. The learned senior counsel would therefore submit that the Lower Appellate Court had committed a grave error in reversing Judgement and Decree of the Trial Court particularly when the defendants have proved the joint possession of the property.

21. Per contra, Mr. N.Manokaran, learned counsel for the plaintiffs would make his submission stating that it is the plaintiffs who



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are in absolute possession and enjoyment of the suit schedule property.

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He would submit that though the property has been purchased in the joint names of Subramaniam and Kaithamalai, however, the entire contribution has been made only by Subramaniam as the said Kaithamalai did not have necessary wherewithal to purchase the suit schedule property.

22. The learned counsel would further argue that the defendants are third parties who have purchased the share of the co-owner and until their shares are allotted in the final decree proceedings, they cannot interfere with the possession and enjoyment of the property by the other co-owners, plaintiffs.

23. The learned counsel would further submit that the property in question is a dwelling house and therefore as per the provisions of Section 44 of the Transfer of Property Act, if a person is not a member



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of the family, he cannot seek to get right of joint possession or common enjoyment of the house. In this regard, the learned counsel would rely upon the following Judgements :

(i) 2009 (7) SCC 444 – Ramdas Vs. Sitabai and

Others :

(16) It is settled law under the [Transfer of Property Act](#), that a purchaser cannot have a better title than what his vender had. The possession which is claimed by the defendant 3 Ramdas (appellant herein) in respect of the entire land bearing Gat No. 19 area admeasuring 2.56 H of Mouza Padoli was also illegal and without proper sanction of law. So long as the property is joint and not-partitioned, the defendant no. 3 Ramdas (appellant herein) is not entitled to get possession of the said land. Even otherwise, the appellant herein having purchased the land from defendant No.1- Sudam could be entitled to



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be declared at the most to the extent of half share of the said piece of land having stepped into the shoes of his vendor and could not have asked for and claimed ownership and possession over the entire land of Gat No. 19 admeasuring 2.56 H.

17. Without there being any physical formal partition of an undivided landed property, a co-sharer cannot put a vendee in possession although such a co-sharer may have a right to transfer his undivided share. Reliance in this regard may be placed to a decision of this Court in M.V.S. Manikayala Rao Vs. M. Narasimhaswami & Ors., wherein this Court stated as follows:

"Now, it is well settled that the purchaser of a co-parcener's undivided interest in the joint family property is not entitled to possession of what he had purchased. His only right is to sue for partition of the property and



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ask for allotment to him of that which, on partition, might be found to fall to the share of the co- parcener whose share he had purchased."

(ii)2009 (10) SCC 654 – Gajara Vishnu Gosavi Vs. Prakash

Nanasaheb Kamble and others:

“Thus, in view of the above, the law emerges to the effect that in a given case an undivided share of a co- parcener can be a subject matter of sale/transfer, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds, either by the decree of a Court in a partition suit, or by settlement among the co-sharers.”

(iii) 2020 (2) MLJ 748 – T.P. Kathiresan Vs. R.Ramadas and

Others:



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27.From the above decisions, the position of law that emerges is that the purchaser of an undivided interest in coparcenery property cannot demand possession or retain possession against other sharers. His right is to sue for partition and seek allotment. To use the words of the Hon'ble Supreme Court his right to possession would date from the period when a specific allotment was made in his favour. Therefore, unless it is shown that allotment of a specific property was made in favour of the said purchaser of an undivided interest, he would not have the right to get possession of the property.

24. The learned counsel would submit that in the case of undivided share, possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds. He would therefore submit that no exception can be taken to the Judgement



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passed by the Lower Appellate Court and the same may be confirmed and consequently, the Second Appeal deserves to be dismissed.

25. Heard Mr. A.K.Kumarasamy, learned Senior Counsel appearing on behalf of the defendants and Mr. N.Manokaran, learned counsel for the plaintiffs and perused the records.

Discussions:

26. The facts that are admitted on both the sides are that the property in question had been purchased jointly in the names of Subramaniam and Kaithamalai under Ex.A.1, sale deed. No action has been taken by Subramaniam to have the property transferred in his name as the entire sale consideration according to the plaintiffs was paid by Subramaniam, till his death in the year 2000. That the said Kaithamalai has obtained a preliminary decree for partition in O.S.No.499 of 2009 before the Sub Court, Perundurai, which is now



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pending final decree proceedings in I.A.Nos.315 and 316 of 2021 on the file of the Sub Court, Avinashi.

27. The 1st plaintiff as P.W.1 in the cross examination would state as follows:

“அந்த வழக்கில் வாதி சொத்தில் இருந்த கடையில் தான் மளிகை கடை வைத்துள்ளதாகவும், இரண்டு வீடுகளில் மேல்புறம் உள்ள வீட்டில் நான் குடியிருந்து வருவதாகவும் அவர் கூறியிருந்தார் அந்த வழக்கில் இருவரும் தனித்தனியா அனுபவித்து வருவதாக சொல்லியிருக்கிறார் அதையெல்லாம் ஏற்றுக்கொண்டு அந்த வழக்கில் அவருக்கு சாதகமாக சொல்லியிருக்கிறார் என்று சொன்னால் எனக்குத் தெரியாது.



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28. Ex.B.8, is the written statement filed by the 1st plaintiff herein in the suit O.S.No.139 of 2006 which was the suit for partition filed by the defendants' vendor. A perusal of the same would show that the said Kaithamalai was in possession of the grocery shop No.87. In paragraph No.9 of the said written statement, the plaintiffs have stated as follows:

“Out of the 6 shops, the plaintiff occupied one shop for the purpose of running a maligai shop with a permission of the said K.M.Subramaniam. It is also true that the plaintiff has been running a Maligai shop bearing Door No.87.”

29. Therefore, the plaintiffs have categorically admitted the possession of Kaithamalai in the shop bearing door No.87. The said Kaithamalai has put the defendants in possession of the property in which he was in possession. No doubt, the defendants' vendor has got



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partition for half share in the suit properties and its building.

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Admittedly, the final decree proceedings are pending disposal and a preliminary decree for partition has been passed. Infact the relief claimed in the suit is for an injunction till the passing of the final decree which clearly proves that the plaintiff has accepted the preliminary decree.

30. Therefore, taking note of the admission of the plaintiffs that the predecessor in title of the defendants was in possession of door no.87, which has been now sold to the defendants, the contention of the learned counsel for the plaintiffs that the defendants cannot be put in possession till such time as the shares are defined cannot be countenanced, as admittedly the said Kaithamalai was in possession of one shop.

31. The defendants' vendor has obtained a preliminary decree for



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partition and as the application for final decree is pending disposal, the Second Appeal is partly allowed and the decree for injunction is modified as follows with the following direction:

“(a) There shall not be a decree for injunction with reference to the shop No.87 of the suit schedule properties.

“(b) The learned Sub Judge, Avinashi shall dispose of I.A.Nos. 315 and 316 of 2021, within a period of 3 months from the date of receipt of a copy of this order. The parties shall co-operate for the disposal of the final decree proceedings.”

33. With the above observations, the Second Appeal is partly allowed. Consequently, the connected miscellaneous petition is closed.

No costs.

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Index : Yes/No

Speaking order/non-speaking order

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To,

1.The Sub Court,
Avinashi.

2.The District Munsif Court,
Avinashi.



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