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S.A.No.392 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.11.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.392 of 2017
and
C.M.P.No.9109 of 2017

Dhavamurthy

...Appellant

Vs.

1.Gnanasoundari

2.Sankar

...Respondents

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree passed in O.S.No.93 of 2012 dated 03.11.2014 on the file of the Court of Principal Sub-Ordinate Judge, Mayiladuthurai and confirmed in A.S.No.2 of 2015 dated 07.09.2016 on the file of the Court of Principal District Judge, Nagapattinam.

For Appellant : Mr.A.Muthukumar

For Respondent 1 :M/s.A.Mohan



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JUDGMENT

The unsuccessful 1st defendant in the suit for partition is the appellant. The 1st respondent/sister of appellant filed a suit for partition claiming ½ share in the suit properties. The suit was decreed by the Trial Court granting ½ share in the suit properties excluding the houses constructed in item 1 of the suit property. Aggrieved by the same, the appellant herein preferred first appeal and the same was also dismissed by the First Appellate Court. Challenging the concurrent findings against him, the appellant/1st defendant has come up by way of second appeal.

2. According to the 1st respondent/plaintiff, the suit property originally belonged to father of the appellant and 1st respondent namely Velayutha Padayatchi. After death of father, the appellant and the 1st respondent entitled to ½ share in the suit properties. It was averred by the 1st respondent that the appellant had been residing in the house situated in the 1st item of the suit properties and he had been cultivating the nanja lands in 2nd item of the suit properties for himself and also for the benefit of 1st respondent. It was also averred by the 1st respondent that she issued a pre-suit notice on 15.10.2011



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demanding partition of the suit properties and the same was returned by the appellant. Hence, she was constrained to file a suit for partition claiming $\frac{1}{2}$ share in the suit properties.

3. The appellant herein filed written statement denying the right of the 1st respondent to maintain a suit for partition. According to him, the 2nd item of the suit properties belonged to a temple and after death of his father, he had become lessee of the temple directly and therefore, 1st respondent was not entitled to any share in the 2nd item. It was also pleaded by the appellant that after death of his father 30 years back, the 1st respondent herein never exercised any right in respect of the suit properties and he had been enjoying the same exclusively for more than 30 years and as a consequence, the 1st respondent is prevented from claiming partition by ouster.

4. Before the Trial Court, the 1st respondent was examined as P.W.1 and five documents were marked on her side as Ex.A1 to Ex.A5. The appellant was examined as D.W.1 and an independent witness was examined as D.W.2. Six documents were marked on behalf of the defendants as Ex.B1 to Ex.B6.



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5. The Trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that 1st respondent is entitled to decree for partition in respect of 15 cents of vacant site towards her $\frac{1}{2}$ share excluding the houses constructed in the 1st item of the suit properties. Aggrieved by the same, the appellant preferred an appeal in A.S.No.2 of 2015 on the file of Principal District Court, Nagapattinam. The First Appellate Court concurred with the findings of the Trial Court. Aggrieved by the same, the appellant has come up by way of second appeal.

6. The learned counsel for the appellant submitted that the First Appellate Court erred in granting a decree for partition in respect of item 2 of the suit properties which belonged to the temple and the appellant had been recognized as a lessee under temple. The learned counsel also submitted that appellant has been cultivating item 2 of the suit property by contributing his physical labour and as such as per the definition of term “cultivating tenant” under Tamil Nadu Cultivating Tenant Protection Act, the appellant alone should be recognized as cultivating tenant under temple. The learned counsel



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further submitted that after death of his father 30 years ago, the 1st respondent failed to assert her right over the suit properties. It was further submitted the appellant sold portion of the suit property to 2nd respondent without any objection from the 1st respondent and hence the plea of ouster pleaded by the appellant has been proved and the same has not been taken into consideration by the First Appellate Court.

7. The First Appellate Court, while considering the claim of the 1st respondent in 2nd item of the suit property extracted the admission of appellant as D.W.1. The relevant extracted portion reads as follows;

" தாவா 2 வது அயிட்டி சொத்து அதே கிராமத்தில் 165.3ல் 55 செண்ட் புஞ்சை நிலம் என்றால் சரிதான். 2வது அயிட்டி சொத்து மேலையூரில் உள்ள இராஜகோபால பெருமாள் என்ற கோவிலுக்கு சொந்தமானது என்றால் சரிதான். எனக்கு முன்னால் என் அப்பாதான் அதை குத்தகை சாகுபடி செய்து வந்தார் என்றால் சரிதான். அதன் அடிப்படையில்தான் நான் குத்தகை சாகுபடி செய்து வருகிறேன் என்றால் ஆம். நேரடியாக நான் கோவிலிடம் குத்தகைக்க ஒப்புக்கொண்டேன் என்றும், என் அப்பாவுக்கும் குத்தகைக்கும் சம்பந்தம் இல்லை



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என்றும் வழக்குரையில் கூறியிருந்தால் அது தவறு. தற்போது தாவா 2வது அயிட்டி சொத்தில் நெல், கடலை போட்டு பயிர் செய்து வருகிறேன் என்றால் சரிதான்."

8. A perusal of above said evidence of appellant would clearly establish that father of the parties was a original lessee under the temple in respect of 2nd item of the suit property. After death of father, being a male member of the family, the appellant got himself registered as a lessee with the temple. Therefore, the registration of his name as a lessee is not only for himself but also for the benefit of 1st respondent, in view of the clear admission by the appellant that his father was a lessee under temple in respect of the 2nd item of the suit property. The First Appellate Court is right in coming to the conclusion that 1st respondent is entitled to ½ share in respect of leasehold right in item 2 of the suit property.

9. The learned counsel for the appellant tried to assail the judgment of the Courts below on the ground that appellant alone is the cultivating tenant of the suit property as he was contributing his physical labour. Therefore, as per the definition of "Cultivating Tenants" under relevant Act, he alone should be treated as cultivating tenant under the temple. As far as contribution of



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physical labour is concerned, the appellant has not raised any plea in his written statement. Even in his evidence he has not stated anything regarding contribution of physical labour. He deposed that as his father was a lessee under the temple and after his death, he has been enjoying the 2nd item under temple. Therefore, the plea of cultivating tenancy cannot be raised by the appellant in the second appeal without foundation in the pleadings.

10. The learned counsel for the appellant also submitted that plea of ouster has been specifically raised by the appellant in his written statement, however, the Trial Court failed to frame an issue with regard to the ouster and consider the same in proper perspective. Ex.A1 is the sale deed in favour of the father of the parties namely Velayutha Padayatchi. Ex.A1 proves that the suit item 1 was purchased by Velayutha Padayatchi, father of the appellant and 1st respondent. Admittedly, the 1st respondent got married and residing outside. Merely because one of the co-sharer of the property is residing outside, the person who is residing in the property cannot claim that his possession is an exclusive one. It is settled law that possession of co-sharer is not only for himself and it is also for the benefit of other co-sharers. Therefore, after death of Velayutha Padayatchi both appellant and 1st respondent are entitled to $\frac{1}{2}$



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share each in the 1st item of suit properties. The Trial Court, by taking into consideration that portion of the 1st item was sold to 2nd respondent by the appellant and the appellant also put up a house in the 1st item out of his own funds, excluded portions of 1st item over which he had put up construction and granted partition decree in respect of rest of 1st item. The Trial Court observed that 1st respondent is entitled to $\frac{1}{2}$ share of 15 cents only in the vacant site of the 1st item excluding the constructed portion. It has been clearly observed that house constructed in the 1st item should be allotted to the share of the appellant. In the absence of any evidence to show that appellant enjoyed the 1st item of the suit properties with an intention to exclude the 1st respondent, the Courts below rightly negated the plea of ouster and granted decree for partition in respect of the 1st item of the suit property by making observation that portion of the 1st item in which the house of appellant is standing shall be allotted to the share of appellant. I do not see any perversity or illegality in the findings rendered by the Courts below enabling this Court to exercise its jurisdiction under Section 100 of CPC.



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11. Accordingly, the second appeal stands dismissed.

a) by affirming the judgment and decree dated 07.09.2016 passed by the learned Principal District Judge, Nagapattinam in A.S.No.2 of 2015 affirming the judgment and decree dated 03.11.2014 passed by the learned Principal Subordinate Judge, Mayiladuthurai in O.S.No.93 of 2012.

b) In the above facts and circumstances of the case, there will be no order as to costs.

c) Consequently, connected miscellaneous petition is closed.

01.11.2023

Index : Yes/No
Internet : Yes/No
Neutral Citation Case : Yes/No
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To

1. The learned Principal District Judge, Nagapattinam.
2. The learned Principal Subordinate Judge, Mayiladuthurai.



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S.SOUNTHAR, J.

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