



S.A.No.139 of 2021

WEB COPY **IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED: 01.02.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.139 of 2021

S.Palani Alias Palanisamy

... Appellant

Vs.

1.Rajendran

2.Mohan

. . . Respondents

Prayer:- Second Appeal is filed under Section 100 of C.P.C to set aside the Judgement and decree passed in A.S.No. 11/2017 dated 31/01/2020 on the file of the court of Addl.District Judge,



S.A.No.139 of 2021

Mayiladuthurai in reversing the Judgement and decree passed in O.S.No. 94/2014 dated 22/12/2016 on the file of the Court Principal Subordinate Judge, Mayiladuthurai and confirm the Judgement and decree of the Trial Court by allowing this Second Appeal.

For Appellant : M/s.A.Muthukumar

For Respondents : M/s.B.Jawahar [R.1]

: No appearance [R.2]

JUDGEMENT

The plaintiff is the appellant before this Court. This Second Appeal has been filed challenging the judgment and decree passed in A.S.No.11 of 2017 on the file of the Additional District Judge, Mayiladuthurai in and by which the learned Judge has reversed the judgement and decree in O.S.No.94 of 2014 on the file of the Principal Sub Judge, Mayiladuthurai.



S.A.No.139 of 2021

2. To appreciate the case on hand it is necessary to set out the respective pleadings of the parties and while referring to the parties they shall be referred to in the same ranking as before the Trial Court, namely, the Principal Sub Judge, Mayiladuthurai.

Plaintiff's case:-

3. The plaintiff has filed the suit O.S.No.94 of 2014 on the file of the Principal Sub Judge, Mayiladuthurai for a partition and separate possession of his 1/3rd share in the suit schedule properties and for mesne profits.

4. The plaintiff would submit that he and the defendants are the children of one Sarathi and Dhanathammal. The said Sarathi was working abroad and while so he had been periodically sending money to his wife and when the plaintiff and the defendants were minors aged 16, 12 and 5 respectively, he had purchased immovable property in their name. The purchase was for the benefit of the minors.



S.A.No.139 of 2021

WEB COPY

5. On attaining majority, the plaintiff and defendants 1 and 2 were jointly cultivating the lands and had been dividing the proceeds among themselves after defraying the expenses incurred for the lands and agricultural operations. The plaintiff would submit that teak wood saplings had been planted in the lands in R.S.No.161/3 to an extent of 6 cents in the year 1981 and a bore well had been sunk and electricity service connection obtained. Thereafter a shed was put up by the plaintiff and defendants 1 and 2 which is part of the dry lands.

6. In the year 1983, the plaintiff out of his own efforts and funds of his wife purchased immovable properties to the north of the Punja properties belonging to the family. The property so purchased is the self-acquired property of the plaintiff. The defendants 1 and 2 to spite the plaintiff had instigated their father to make a claim against the plaintiff and this dispute was settled through mediation.



S.A.No.139 of 2021

WEB COPY

7. The defendants 1 and 2 had raised sugarcane in the suit property but had failed to pay the plaintiff's 1/3 share. Defendants 1 and 2 had joined together and were preventing the plaintiff from taking his tractor to his land through the suit property. Therefore, the plaintiff had filed O.S.No.159 of 2012 on the file of the Principal District Munsif Court, Mayiladuturai, for permanent injunction. The said suit was dismissed on the ground that the plaintiff and defendants are co-owners and that the plaintiff is entitled to a 1/3rd share and the defendants are entitled to a 2/3rd share in the suit property.

8. Therefore, to avoid disputes and multiplicity of proceedings, the plaintiff had issued a legal notice dated 03.04.2014 to the defendants calling for an amicable partition. The defendants however failed to comply with the request and therefore the plaintiff had come forward with the above suit.



S.A.No.139 of 2021

WEB CO **Written statement of the 1st defendant**

9. The 1st defendant had filed a written statement inter alia admitting the plaintiff's contention that the properties had been purchased jointly in the names of the plaintiff and the defendants when they were minors with their mother acting as their guardian. It is also the contention of the 1st defendant that there are other properties available to the joint family which have not been included in the suit schedule in which the 1st defendant has a 1/3rd share. The 1st defendant would submit that the plaintiff is not entitle to partition and sought for a dismissal of the suit.

Written Statement of the 2nd defendant.

10. The 2nd defendant had filed a written statement inter alia contending that their father Sarathi had filed the suit O.S.No.712/1988 for recovery of possession of the suit property and the said suit was decreed in his favour. Thereafter, under an oral arrangement, the suit



S.A.No.139 of 2021

1st and the 2nd items of property and an extent of 1 acre 67 cents in the 3rd item of the property was allotted to the share of the 2nd defendant.

Only 200 Kuzhi in the 3rd item of the suit property was allotted to the share of the 1st defendant. The remaining 5 acres was allotted to the plaintiff. As per this oral arrangement, parties have been enjoying their respective properties. Therefore, the suit for partition filed by the plaintiff has to be dismissed.

11. The 2nd defendant would submit that he has spent over a sum of Rs.1,00,000/- on the 2nd item of the suit property and in the remaining extent of land he had cultivated sugarcane. Prior to that, he had cultivated paddy and sugarcane in these lands. The 1st defendant and the plaintiff are enjoying their respective properties allotted to them under the compromise agreement. The 2nd defendant would further submit that the plaintiff had earlier filed a suit O.S.No.159/2012 for declaration and injunction which was dismissed on 28.11.2013. As against the said judgment and decree there has been no appeal and



S.A.No.139 of 2021

therefore this suit is clearly barred by res judicata. He had also pleaded adverse possession.

Trial Court:

12. The Trial Court had framed the following issues:-

1. வாதி கோரியுள்ளவாறு வாதிக்கு தாவா சொத்துக்களைப் பொறுத்து 1/3 பாகம் கிடைக்கத்தக்கதா?
2. தாவா 1,2 அயிட்ட சொத்தில் 1 ஏக்கர் 67 செண்ட்டும், 3வது அயிட்ட சொத்தும் 2ம் பிரதிவாதிக்கு பாத்தியப்பட்டதா?
3. வாதிக்கு தாவா சொத்தின் உரிமை ouster கோட்பாட்டின் மூலம் தடைபடுகிறதா?
4. வாதி த.நா.நீ.க.ச.பிரிவு 37(2)-ன்படி செலுத்திய நீதிமன்ற கட்டணம் சரியானதா?
5. வாதிக்கு கிடைக்கத்தக்க இதர பரிகாரங்கள் என்ன?

13. On the side of the plaintiff, 2 witnesses were examined and Ex.A.1 to A.7 were marked. The defendants examined 3 witnesses and marked Ex.B.1 to B.10.



S.A.No.139 of 2021

14. The learned Trial Judge on considering the evidence on record decreed the suit as prayed for. Challenging the said judgment and decree the defendants had preferred A.S.No.11 of 2017 on the file of the Additional District Court, Mayiladuthurai.

Lower Appellate Court:

15. The learned Appellate Judge by his judgement and decree dated 31.01.2020 had allowed the appeal solely on the ground that the suit is bad for non-joinder of necessary parties i.e; the non-impleadment of Sarathi, the father of the plaintiff and the defendants and had set aside the judgement and decree passed by the Trial Court. Challenging the same, the plaintiff has filed the above Second Appeal.

Substantial Question of Law:

16. The Second Appeal has been admitted on the Substantial Question of Law hereinbelow extracted:-

"Whether the Lower Appellate Court erred in law in dismissing the suit for non-joinder of necessary



S.A.No.139 of 2021

WEB COPY

*party and the same was not even raised in the
Memorandum of Grounds and the absence of points
for determination?"*

Submissions:

17. Mr. A.Muthukumar, learned counsel appearing on behalf of the plaintiff would submit that the defendants had taken the plea of partial partition, oral partition and adverse possession. The Trial Court had disbelieved the plea of oral partition as well as adverse possession. Both the defendants had not taken the plea of non-joinder of necessary parties. He would draw the attention of the Court to para. no.12 of the judgement of the lower Appellate Court wherein the learned Judge has clearly held that the defendants had not proved the oral partition/oral arrangement. The learned Judge had observed as follows:-

"சுமாராக 20 ஆண்டுகளுக்கு முன்பு வாய்மொழி பாகப்பிரிவினை நடந்தது என பிரதிவாதி தரப்பில் கூறப்பட்டபோதிலும் பி.சா.ஆ 1 தீர்ப்புரையில் 2ம் பிரதிவாதி தாக்கல் செய்த எதிர் வழக்குரையில் ,,,,என



S.A.No.139 of 2021

பாகபிரிவினை நடைபெறவில்லை என கூறியுள்ளார். எனவே பிசா.ஆ.1

WEB COPY

வழக்கு தாக்கல் செய்யப்பட்ட 2013ம் ஆண்டிலும் சாரதி

தலைமையியலான பொது குடும்ப சொத்துக்கள் பிரிவினை

செய்யப்படவில்லை என்ற வாதத்தை 2ம் பிரதிவாதி முன்னிட்ட நிலையில்

அதற்கு முரணாக 20 ஆண்டுகளுக்கு முன்பே வாய்மொழி

பாகப்பிரிவினை செய்யப்பட்டதாக இவ்வழக்கில் கூறும் வாதம்

பொருத்தமற்றதாகும். எனவே சாரதி குடும்ப சொத்துக்களை பொறுத்து

வாய்மொழி பாகப்பிரிவினை ஏதும் நடைபெறவில்லை என பிரச்சனை

எண்.3க்கு தீர்வு காணப்படுகிறது,

18. Likewise, the Lower Appellate Court had disbelieved the plea of ouster pleaded by the 2nd defendant and had held as follows:-

"பிசா.ஆ.1 வழக்கின் வழக்குரையில் பிராது சொத்தில் தனக்கு

உரிமையிருப்பதாக வாதி கூறியுள்ளார். எதிரிடை அனுபோகம் என்ற

வாதம் முன்வைக்கப்படும் போது வாதியின் உரிமை ஒப்புக்



S.A.No.139 of 2021

கொள்ளப்பட்டுள்ளது என்பது அனுமானம் ஆகும். வாய்மொழி

WEB COPY

பாகப்பிரிவினையும் நீரூபிக்கப்படாததாலும் எந்த தேதி முதல் வாதிக்கு

தொரிந்தே 2ம் பிரதிவாதி தனித்த அனுபவத்திலிருந்து வருகிறார் என்பது

தெளிவற்ற நிலையிலுள்ளதாலும் 2ம் பிரதிவாதிக்கு எதிரிடை அனுபோகம்

சித்தித்துள்ளதாக கூற இயலாது. எனவே பிரச்சனை எண்.4

பிரதிவாதிக்கு எதிராக தீர்மானிக்கப்படுகிறது.

19. However, the learned counsel for the appellant would argue that the learned Appellate Judge had proceeded to hold that Sarathi, the father of the plaintiff and the defendants was the Karta of the Joint Hindu Family and the properties in question being the joint family properties failure to implead him as a party to the proceeding was fatal to the case and therefore held that the suit is bad for non joinder of necessary parties and allowed the appeal only on this ground.



S.A.No.139 of 2021

20. The learned counsel would submit that this plea has not been taken by the defendants and neither was an issue raised in this regard. He would submit that the properties which are sought to be partitioned are only the properties which were being purchased in the name of the plaintiff and the defendants jointly, under Ex.A.1. These properties by no stretch of imagination are the joint family properties.

21. Per contra, Mr.B.Jawahar learned counsel appearing on behalf of the 1st respondent would submit that the Appellate Court has rightly allowed the appeal on the ground of non-joinder of necessary parties since the properties have been purchased from out of the funds of the father, Sarathi. This fact is proved by the decree in O.S.No.712 of 1988. He would submit that this plea has been raised in para no.6 of the 1st defendant's written statement. He would also rely upon Ex.B.1 suit register in respect of O.S.No.712/1998 which would show that the father of the plaintiff and the defendants, Sarathi had obtained a decree for declaration and recovery of possession and the property in that suit



S.A.No.139 of 2021

is the property which is the subject matter of the present suit.

Therefore, he would submit that the Lower Appellate Court was right in allowing the appeal.

22. Heard the counsels on both sides.

Discussion:

23. The suit has been filed for a partition on the basis that the suit property had been purchased under Ex.A.1 sale deed in the joint names of plaintiff and the defendants and that since it is not possible to continue to enjoy the property jointly the same had to be partitioned.

24. The defendants have countered the claim by contending that there are other properties belonging to the joint family which has not been included in the suit and therefore the suit is hit by partial partition that apart the 2nd defendant had raised a plea that there was an oral arrangement between the plaintiff and defendants after the decree in O.S.No.712 of 1988 whereunder the properties had been partitioned



S.A.No.139 of 2021

and the share allotted to the respective sharers and each of them are enjoying their respective shares. The 2nd defendant had also pleaded that this arrangement had taken place 20 years ago and each party has been enjoying their share for the last 20 years and therefore they had perfected title by adverse possession.

25. The Courts below have disbelieved the plea of oral partition, partial partition and adverse possession. The defendants have not challenged this finding of the Lower Appellate Court. The ground on which the appeal has been allowed is a ground which has not been pleaded. The defendants have nowhere raised the plea that the non-inclusion of their father, Sarathi as a party to the proceeding is fatal to the case. This was not even an issue either before the Trial Court or before the Lower Appellate Court. In fact, this is not even raised as a point for consideration by the Lower Appellate Court.



26. The points for consideration which had been framed by the

Lower Appellate Court are as follows;-

- 1. Whether the petition I.A.No.1/2019 should be allowed?*
- 2. Whether the plaintiff is entitled to partition and the Trial Court has rightly considered the same?*
- 3. Whether the Trial Court has rightly examined the plea of oral partition?*
- 4. Whether the Trial Court has rightly considered the plea of adverse possession?*
- 5. Whether the appeal should be allowed?*

27. The Lower Appellate Court had allowed the appeal only on the ground of non-joinder of the necessary party. However, this plea had not been taken by the defendants and neither was an issue raised in this regard and the Lower Appellate Court had allowed the appeal on a point which was never in contest. Therefore, the Judgement and Decree of the Lower Appellate Court has to necessarily be set aside. The Trial



S.A.No.139 of 2021

Court had extensively considered the evidence and the pleadings and decreed the suit. The Lower Appellate Court had also concurred with the findings of the Trial Court regarding the defence of adverse possession and oral partition. Therefore, the substantial question of law is answered in favour of the plaintiff.

28. In fine, the Second Appeal is allowed, the Judgement and Decree of the lower Appellate Court is set aside and the Judgement and Decree of the Trial Court is confirmed. No costs.

01.02.2024

Index: Yes/No
Speaking order/non-speaking order
Neutral Citation: Yes/No
shr

To

17/19



S.A.No.139 of 2021

WEB COPY

1. The Addl.District Judge, Mayiladuthurai.
2. The Principal Subordinate Judge, Mayiladuthurai.
3. The Section Officer,
V.R.Section,
High Court, Madras.

P.T.ASHA, J.,



WEB COPY



S.A.No.139 of 2021

shr

S.A.No.139 of 2021

01.02.2024