



S.A.No.439 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.07.2024

CORUM

THE HONOURABLE MRS.JUSTICE N.MALA

S.A.No.439 of 2021
and
CMP.No.8547 of 2021

1. Arulmurugan
2. Jayalakshmi
3. Premalatha
4. Rajeswari
5. Gomathi

...Appellants

Vs.

1. Ambika
2. Minor arun
3. Minor arthi

Minors 2 & 3 are rep. by Guardian mother Ambika.

...Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, pleaded to set aside the Judgment and Decree dated 22.12.2020 passed in A.S.No.08/2019, on the file of II Additional District Judge, Tindivanam and confirm the Judgment and decree dated 11.07.2018 passed in O.S.No.81/2014 on the file of Principal Sub Judge, Tindivanam.

For Appellants : Mr.D.Senthilkumar

For Respondent : Mr.D.Rajasekar

for R1
RR2 & 3 – Minors (rep. by R1)



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JUDGMENT

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The unsuccessful plaintiffs are the appellants in the Second Appeal. The Second Appeal is filed against the reversing judgment of the lower appellate court. The parties will be referred to as per their rank in the trial court.

2. The suit is filed by the plaintiffs for partition of their $\frac{1}{2}$ share in the suit schedule properties and also for permanent injunction against the defendant restraining him from creating any encumbrance over the plaintiffs $\frac{1}{2}$ share in the suit properties.

3. The summary of facts are as follows:

The plaint schedule property and other properties originally belonged to one Ranjitham gunapoosani ammal, the wife of Padmanaba gounder. The couple had 4 children namely Seetharaman, Jayalakshmana gounder, Jotheeswari and Adhibagavan gounder. The 2nd plaintiff is the wife of the deceased Jayalakshmana gounder and the plaintiffs 1,3,4,5 are the children of the second plaintiff. According to the plaintiffs, Ranjitham gunapoosani ammal executed a registered settlement deed on 21.07.1977 settling the schedule "A" property therein to her



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sons Jayalakshmana gounder and Adhibagavan gounder and the "B" schedule property to her only daughter, Jotheeswari. According to the plaintiffs the settlement deed was acted upon and Jotheeswari took possession of "B" schedule property and was in peaceful possession and enjoyment of the same. On the request of Ranjitham gunapoosani ammal "A" schedule properties were jointly enjoyed by late Jayalakshmana gounder and the defendant Adhibagavan gounder. While so, Ranjitham gunapoosani ammal died on 07.12.1994 and Jayalakshmana gounder died on 15.03.2008. Around January 2014, trouble started when the defendant prevented the plaintiff from cultivating the plaintiff schedule properties, claiming exclusive right under a cancellation of the registered settlement deed on 21.09.1994 and a Will executed by Ranjitham gunapoosani ammal in his favour. The plaintiffs case was that the Will as well as the cancellation deed were fabricated documents as the said Ranjitham gunapoosani ammal had not reserved any right in the settlement deed to cancel the same. The plaintiffs therefore filed the suit for the relief of partition and permanent injunction for their ½ share in the suit property.



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4. The defendant filed written statement denying that the suit schedule properties were enjoyed jointly by late Jayalakshmana gounder and himself. The defendant denied execution of the registered settlement deed dated 21.07.1977. According to the defendant the said settlement deed was not acted upon and even otherwise the said Ranjitham gunapoosani ammal cancelled the settlement deed on 21.09.1994. The defendant further submitted that on the same day on which Ranjitham gunapoosani ammal cancelled the registered settlement deed dated 21.07.1977, she also executed a Will in favour of the defendant bequeathing the suit property exclusively to the defendant. The defendant therefore on the basis of the Will and the cancellation of the settlement deed submitted that he was entitled to the suit property absolutely. The defendant filed additional written statement raising the plea of adverse possession on the basis of his exclusive possession and enjoyment of the suit property for about 20 years on the basis of the Will in his favour. The defendant further submitted that the suit was barred by limitation. The defendant therefore prayed for dismissal of the suit.

5. Before the trial court the plaintiffs examined five witnessess and marked Ex.A1 to Ex.A15. The defendand examined two witnessess and marked



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Ex.B1 to Ex.B12. The trial court on the basis of the pleadings framed the following

issues:

1. வாதி கோரியுள்ள முதல்நிலை தீர்ப்பாணை பெற அருகரா?
2. வேறு என்ன பரிகாரம்?

கூடுதல் எழுவினா:-

1. தாவா சொத்தில் பிரதிவாதிக்கு எதிரிடைப் பாத்யம் சிந்தித்துள்ளது என கூறவது உண்மையா?

6. The trial court on an appreciation of entire evidence on record found that settlement deed was acted upon and valid. The trial court also found that the cancellation of the settlement deed and the Will were fraudulent documents. The trial court further found that the defendant had failed to establish that he had perfected title to the suit property by adverse possession. The trial court therefore decreed the suit for partition of the plaintiffs $\frac{1}{2}$ share and further granted relief of injunction restraining the defendant from alienating or encumbrancing the plaintiffs $\frac{1}{2}$ share in the suit property. Aggrieved by the judgment and decree of the trial court the defendant preferred appeal before the lower appellate court.

7. The lower appellate court on an appreciation of the entire evidence on record, held that the execution of the settlement deed Ex.A1 was proved; however,



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the same was not implemented and did not come into effect. The lower appellate court found that the defendant had failed to prove the Will Ex.B11 and that the defendant had also failed to prove that he was in possession of the suit property on the basis of Ex.B10 and Ex.B11. The lower appellate court thereafter found that the defendant, by his long and exclusive possession, had perfected title over the suit properties and also that the suit was barred by limitation. The lower appellate court therefore reversed the judgment and decree of the trial court. Aggrieved by the judgment and decree of the lower appellate court the plaintiffs have filed the above Second Appeal.

8. At the time of admission, this court framed the following substantial questions of law:

(i) Whether the First Appellate Court should have reversed the judgment and decree of the Trial Court on the basis of adverse possession without duly considering the implications of the settlement deed (Ex.A.1)?

(ii) Whether the First Appellate Court was correct in concluding that a partition suit is barred by the law of limitation?

(iii) Whether the First Appellate Court was correct in relying upon the cancellation of settlement deed (Ex.B.10)?



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(iv) Whether the First Appellate Court was correct in reversing the judgment and decree of the Trial Court and accepting the claim of the respondents on the basis of adverse possession in spite of entering a finding that the Will (Ex.B.11) is not valid?

9. The admitted facts are that the suit property originally belonged to Ranjitham gunapoosani ammal. Ranjitham gunapoosani ammal was married to one Padmanaba gounder and through the wedlock they had four children namely Seetharaman, Jayalakshmana gounder, Jotheeswari and Adhibagavan gounder. The 2nd plaintiff is the widow of Jayalakshmana gounder who died on 15.03.2008 and the plaintiffs 1,3,4 and 5 are the children of late Jayalakshmana gounder. The defendant Adhibagavan gounder is the brother of Jayalakshmana gounder. It is admitted that Ranjitham gunapoosani ammal died on 07.12.1994. The plaintiffs claim $\frac{1}{2}$ share in the suit property on the basis of the registered settlement deed dated 21.7.1977 marked as Ex.A1. Under the settlement deed "A" schedule property consisting of two items was settled in favour of late Jayalakshmana gounder and Adhibagavan gounder and "B" schedule property was settled in favour of Jotheeswari. The plaintiff's on the strength of the settlement deed claimed $\frac{1}{2}$ share to the suit property which is "A" schedule property of the settlement deed.



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The plaintiffs stated that in January 2014, the defendant tried to interfere with the plaintiffs possession of the suit "A" schedule property and therefore the plaintiffs were constrained to file the suit for partition and permanent injunction with respect to their $\frac{1}{2}$ share. The defendant on the other hand stated that Ranjitham gunapoosani ammal during her life time cancelled the settlement deed vide Ex.B.10 on 21.09.1994 and on the same day executed a Will in his favour under Ex.B11. The defendant on the basis of Ex.B10 and Ex.B11 claimed exclusive right to the suit property. The defendant further stated that in pursuance of Ex.B10 and Ex.B11, the defendant by continuous, long and uninterrupted possession and enjoyment of the suit property had perfected title to the same.

10. I have heard both the learned counsels and I have perused the materials placed on record.

11. At the time of hearing the learned counsel for both sides unanimously agreed that the only point that raises for consideration in the Second Appeal is, substantial question of law four.



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12. The learned counsel for the appellants as also the respondent agree that the core issue to be decided in the Second Appeal is whether the lower appellate court was right in non-suiting the plaintiff on the ground of adverse possession. Therefore the learned counsels restricted their arguments with reference to the 4th substantial question of law which is as follows:

(iv) Whether the First Appellate Court was correct in reversing the judgment and decree of the Trial Court and accepting the claim of the respondents on the basis of adverse possession in spite of entering a finding that the Will (Ex.B.11) is not valid?

13. Before examining the plea of adverse possession, the law on the subject is visited. The Hon'ble Supreme Court in the case of *Karnataka Board of Wakf Versus Government of India and Others* reported in (2004) 10 SCC 779 laid down the essential requirements as to pleading regarding adverse possession. The Hon'ble Supreme Court held that, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d)



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how long his possession continued, and (e) his possession was open and undisturbed. The Hon'ble Supreme Court in the case of *Parsinni (dead) by lrs. and others Versus Sukhi and others* reported in (1993) 4 SCC 375, held that the burden undoubtedly lies on the party who pleads adverse possession to plead and prove that he remained in possession in his own right, adverse to the respondents. The Hon'ble Supreme Court further held that the possession must be adequate, in continuity, in publicity and in extent to show that possession was adverse to the co-owner. The person setting up the plea of adverse possession must prove that his possession was "*nec vi, nec clam, nec precario*" i.e., peaceful, open and continuous. It is further to be noted that the possession of a co-owner to be adverse to the others, it is necessary that there should be ouster or something equivalent to it. The Hon'ble Supreme Court in the case of *Mohd. Zainulabudeen (since deceased) by Lrs. Vs. Syed Ahmad Mohideen and others* reported in AIR 1990 SC 507 held as follows:

“Ouster“ does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus (ii) long and



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uninterrupted possession of the person pleading ouster and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner...."

14. The pleadings of the defendant with regard to adverse possession are as follows:

"4. இந்த பிரதிவாதி தாவா சொத்தை கடந்த 1994 முதல் இந்த பிரதிவாதிக்கு ஏற்பட்ட உயிலின் அடிப்படையில் தொடர்ந்து அனுபவம் செய்து வருகின்றார். இந்த பிரதிவாதி மேற்கண்டவாறு வழக்கு சொத்தினை தொடர்ந்து வெளிப்படையாக யாதொரு குறக்கீடுமின்றியும், ஆட்சேபனையுமின்றியும் அனுபவம் செய்து வருகின்றார். இந்த பிரதிவாதி மேற்கண்டவாறு தாவா சொத்தை அனுபவம் செய்து வருவதை 2-ம் வாதியின் கணவரும், வாதிகளும் எந்த காலத்திலும் ஆட்சேபனை செய்தது கிடையாது. இந்த பிரதிவாதியும் தாவா சொத்திற்கான வரி, வாய்தா போன்றவற்றை செலுத்திக்கொண்டு கடந்த 20 ஆண்டுகளுக்கு மேலாக தாவா சொத்தை அனுபவம் மற்றும் எதிரிடை பாத்தியம் சித்தித்துவிட்டது. வாதியின் அனுபவம் மற்றும் பாத்தியதையொட்டி தாவா சொத்திற்கான பட்டாவும் இந்த பிரதிவாதியின் பெயரில் மாற்றப்பட்டுள்ளது. இந்த பிரதிவாதியின் அனுபவத்தையொட்டி சொத்திற்கு தனி உட்பிரிவும் வழங்கப்பட்டுள்ளது. இதையெல்லாம் மறைத்து வாதிகள் இந்த வழக்கை தாக்கல்



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செய்துள்ளனர்."

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To sustain the said plea the defendant filed the following documents:

பிரதிவாதிகள் தரப்பு சான்றாவணங்கள்

பி.வா.சா.ஆ.1	08.05.79	தீர்வை	ரசீது	அசல்
பி.வா.சா.ஆ.2	08.05.79	தீர்வை	ரசீது	அசல்
பி.வா.சா.ஆ.3	22.09.84	தீர்வை	ரசீது	அசல்
பி.வா.சா.ஆ.4	11.03.85	தீர்வை	ரசீது	அசல்
பி.வா.சா.ஆ.5	27.06.85	தீர்வை	ரசீது	அசல்
பி.வா.சா.ஆ.6	02.06.86	தீர்வை	ரசீது	அசல்
பி.வா.சா.ஆ.7	08.02.87	தீர்வை	ரசீது	அசல்
பி.வா.சா.ஆ.8	04.04.98	தீர்வை	ரசீது	அசல்
பி.வா.சா.ஆ.9	04.01.08	தீர்வை	ரசீது	அசல்

15. The above documents, by no stretch of imagination establish the defendants uninterrupted long, continuous and hostile possession. There is a long gap of 10 years between Ex's.A1, A2 and the intermittent documents filed over the period from 1979 to 2008 are barely sufficient to sustain the plea. It is pertinent to note from the above extract of the pleadings of the defendant, that the defendant claims adverse possession from 21.09.1994 i.e. date of execution of the Will in his favour. The only documents that are filed to prove adverse possession by the defendant for the period from 1994 are Ex's.A8 and Ex.A9. No other evidence is



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filed to establish the defendant's long, uninterrupted and continuous possession.

The standard of proof to establish ouster against a co-owner is very heavy, because it is well settled that the possession of one co-owner would be construed as possession on behalf of all the other owners who are not in possession. The lower appellate court by wrongly casting the burden on the plaintiffs to prove joint possession with the defendant, rendered the finding on adverse possession in favour of the defendant. The lower appellate court even without considering the documents filed by the defendant on assumptions and presumptions held that the defendant was in continuous possession for more than 20 years. In my view the lower appellate court's finding on adverse possession is perverse as the same is rendered on a misconception of the law on adverse possession and misconstruction of the evidence on record. Hence the finding of the lower appellate court on adverse possession is set aside. In view of the above discussions, the 4th substantial question of law is answered in favour of the appellant.

I find that the reversing judgment and decree of the lower appellate court is erroneous and unsustainable hence the same is set aside. The Second Appeal is accordingly allowed. No costs. Consequently connected CMP is closed.



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30.07.2024

Index: Yes/No
Speaking order: Yes/No
Neutral Citation: Yes/No
dsn

To

1.The II Additional District Judge,
Tindivanam.

2.The Principal Sub Judge,
Tindivanam.

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