



S.A.No.840 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.01.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.840 of 2023
and C.M.P.No.26687 of 2023

Periyasamy

...Appellant

Vs

1. Perumal
2. Mohan
3. Saroja
4. Santhi
5. Pichai Ammal
6. Selvam
7. Ravi

...Respondents

Prayer: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 11.08.2022 passed in A.S.No.9 of 2019 on the file of the Principal District Judge, Ariyalur confirming the judgment and decree dated 01.12.2018 passed in O.S.No.58 of 2014 on the file of the Subordinate Judge, Ariyalur.



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For Appellant : Mr.D.N.Dhurgasha

For Respondents :Mr.P.Valliappan, senior counsel

1 to 5 for M/s.PV Law Associates for
Caveator.

JUDGMENT

The first defendant in a suit O.S.No.58 of 2014 on the file of the Subordinate Judge, Ariyalur is the appellant before this Court challenging the concurrent judgment and decree passed against him.

2. The facts are briefly set out herein below and the parties are referred to in the same ranking as before the trial Court.

3. The plaintiffs had filed the above referred suit for a partition and separate possession of their 10/18th share in the suit schedule properties by metes and bounds and for rendition of accounts. It is the



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case of the plaintiffs that the suit properties are the ancestral properties of one Ponnusamy. Ponnusamy and his wife Sellammal had two daughters, Lakshmi and Pichai Ammal(5th plaintiff) and a son, Periyasamy (1st defendant). Palanisamy died intestate leaving behind him surviving his wife, Sellammal, two daughters and son. Thereafter, Lakshmi died intestate leaving behind her surviving the plaintiffs 1 to 4 and defendants 2 and 3 as her legal heirs. The defendants 2 and 3 have not supported the plaintiffs and is supporting the first defendant and therefore, they have been impleaded as defendants 2 and 3. The 2nd defendant is none else than the son-in-law of the 1st defendant. It is the case of the plaintiffs that the suit properties are the ancestral joint family properties of the plaintiffs and defendants which had remained undivided and both the plaintiffs and defendants are deemed to be in joint possession. The plaintiffs would submit that in order to defeat their rights, the first defendant was



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attempting to alienate the suit properties. However, when the plaintiffs have demanded partition, the first defendant was evading their request. This prompted the plaintiffs to issue a legal notice dated 18.10.2013 to which there was no response. Therefore, the suit.

4. The first defendant had filed a written statement *inter-alia* denying the claim of the plaintiffs and contending that the suit properties belonged exclusively to the first defendant. It is his contention that his sister, Lakshmi and Pichai Ammal (5th plaintiff) had been married 45 years ago by providing jewellery and dowry articles befitting their status. Therefore, they had not claimed any right to the suit properties. He would further contend that in the year 1990, there was an oral partition between him and his father and the suit properties were allotted to his share and that he has been in possession and enjoyment of the same for all these years. Therefore,



he sought to have the suit dismissed.

5. The trial Court had framed the following issues.

1. 1ம் பிரதிவாதி குறிப்பிடுவது போல் 1990ல் 1ம் பிரதிவாதிக்கும் பொன்னுசாமிக்கும் இடையே வாய்மொழி குடும்ப ஏற்பாடு நடைபெற்றதா?
- 2.தாவா சொத்துக்களில் பொன்னுசாமிக்கு எவ்வித உரிமையும் இல்லையா?
- 3.வாதி கோரிய பாகப்பிரிவினை பரிகாரம் அவருக்கு கிடைக்கத்தக்கதா?
- 4.வாதிக்கு வேறு என்ன பரிகாரம் கிடைக்கத்தக்கது?

6. The first plaintiff had examined himself as P.W1 and the 5th plaintiff was examined as P.W2 and Exs.A1 to A4 were marked on their side. On the side of the defendants, the first defendant had examined himself as D.W1 and one Thiagarajan as D.W2 and no



documents were marked on their side.

7. The learned Subordinate Judge, Ariyalur by his judgment and decree dated 01.12.2018 was pleased to decree the suit as prayed for. The learned Judge observed that the first defendant, who had contended that there was an oral partition between him and his father in the year 1990 and that patta has been mutated in his name, have not produced any document to prove the same. That apart, the learned Judge had observed that there is absolutely no pleading with reference to ouster or the fact that the first defendant is in continuous possession and enjoyment of the properties exclusively. Therefore, the defense of the defendants had to be rejected and the suit be decreed.

8. Aggrieved by this judgment and decree, the first defendant



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had filed A.S.No.9 of 2019 on the file of the Principal District and Sessions Judge, Ariyalur. The learned Judge by his judgment and decree dated 11.08.2022 was also pleased to dismiss the appeal confirming the judgment and decree of the trial Court. Challenging the same, the first defendant is before this Court.

9. The learned counsel for the first defendant would reiterate the arguments advanced before the Courts below. He would submit that the oral partition had taken place in the year 1990 and the father had died in the year 2012 and at no point in time, had the father claimed a right to the suit properties. He would further submit that the first plaintiff is not entitled to a share in the suit properties as he is not a co-parcener as defined under **Section 6(3)(b)** of the Hindu Succession Act. He would further submit that the plaintiffs have not been receiving any income from the properties for over 45 years,



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which would clearly establish the long possession and enjoyment of the property by the first defendant. He would rely on the judgment of this Court reported in *AIR 1972 MAD 467 [Ibramsa Rowther (Minor) and Others Vs. Sk.Meerasa Rowther and others]* in support of his argument regarding ouster. He would therefore submit that, in the light of the above, both the Courts below have committed an error in not considering the plea of ouster and decreed the suit.

10. Per contra, Mr.P.Valliappan, learned senior counsel appearing on behalf of respondents 1 to 5 would submit that first defendant has not pleaded ouster before the trial Court, nor has this issue been raised as a ground before the lower appellate Court. However, the trial Court has considered the issue of ouster in paragraph 10 of the judgment. The learned Judge has observed that Ponnusamy had passed away in the year 2006 and his daughter,



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Lakshmi had passed away in the year 2012. The legal notice-Ex.A2 has been issued immediately on 18.10.2013 which has been received by the first defendant under Ex.A3 and the suit has been filed on 21.04.2014. Therefore, within 12 years of the death of the father Ponnusamy, the suit has been filed and therefore, the first defendant cannot claim an exclusive right to the suit properties on the ground of ouster. He would submit that the courts below in detail have considered the evidence on record and decreed the suit and this court sitting in second appeal may not re-appreciate the well considered judgment of the Courts below.

11. Heard the learned counsel on either side and perused the materials available on record.

12. The suit has been filed for partition stating that the



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properties belonged to one Ponnusamy who died intestate leaving behind him the 5th plaintiff, the 1st defendant and one Lakshmi. The plaintiffs would submit that on the death of Ponnusamy, his children are entitled to a 1/3rd share each in the suit properties. Since Lakshmi had passed away, her 1/3rd share devolved on plaintiffs 1 to 4 and defendants 2 and 3. The defense to the above case is that there was an oral partition in the year 1990 between the first defendant and Ponnusamy and that, from the date of oral partition, the first defendant has been in exclusive possession and enjoyment of the property. The first defendant has not filed a single document to show his exclusive possession of the suit property or that there has been an oral partition. There is nothing to indicate as to which properties had been allotted to the father Ponnusamy under this oral partition. In the written statement, the first defendant would only state that there was an oral partition and that the suit properties had been allotted to him



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exclusively. Therefore, the oral partition has not been proved by the first defendant, and the courts below have also considered the same. Though the first defendant has not raised the plea of ouster, the trial court has considered the same and passed a detailed finding on the same in paragraph 10 of its judgment. Therefore, the first defendant has failed to prove his contention that the suit properties have been allotted to him and he is in exclusive possession and enjoyment of the same. Both courts below have rightly concluded that the properties belonged to Ponnusamy and, on his death, the properties would devolve equally upon his three children and thereby granted the partition. Since the defendants have not been able to show as to how the judgment and decree of the courts below are wrong, and as the second appeal does not give rise to any substantial question of law much less than a substantial question of law, the second appeal is dismissed. However, there shall be no order as to costs.



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Consequently, connected miscellaneous petition is closed.

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Index : Yes/No

Speaking order/non-speaking order
srn

To

1. The Principal Subordinate Judge, Kallakurichi
2. The Subordinate Judge, Ariyalur.
3. The Section Officer, V.R.Section, High Court, Madras.



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