

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23-11-2015

(Judgment Reserved on 21-09-2015)

CORAM:

THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

Civil Suit Nos.185 of 2012 and 522 of 2013
& O.A.No.242 of 2012 and A.No.896 of 2013 in
C.S.No.185 of 2012
& O.A.No.571 of 2013 in C.S.No.522 of 2013

Dr.T.A.Mohan @ Mohan Aiyaswamy Pillai,
represented by his Power of Attorney
Mrs.N.G.Bhuvaneshwari

.. Plaintiff in C.S.No.185 of
2012 and defendant in C.S.No.522 of 2013

Vs.

1. Mr.N.Jitendra Kumar
2. Mr.Nitin Mukesh
3. Mr.Ankit

.. Defendants in C.S.No.185 of 2012
and plaintiffs in C.S.No.522 of 2013

Plaint filed and numbered as Civil Suit in C.S.No.185
of 2012 under Order 7 Rule 1 of the Code of Civil Procedure
and under Order 2 Rule 2 of the Madras High Court Original
Side Rules, praying for judgment and decree :

(a) granting permanent injunction restraining the
defendants 1 to 3 from interfering with the physical
possession of the suit property either by themselves or by
their agents, servants, hirelings and others and

(b) directing the defendants to pay the costs of the suit including advocate's fee.

Plaint filed and numbered as Civil Suit in C.S.No.522 of 2013 under Order 4 Rule 1 of the Madras High Court Original Side Rules, read with Order 7 Rule 1 of the Code of Civil Procedure, praying for judgment and decree :

(a) for a partition and separate possession of the plaintiffs' 2/3 share of suit property, morefully described in the schedule, by metes and bounds by appointing an Advocate Commissioner to allot the same to the plaintiffs by passing a preliminary decree;

(b) for a permanent injunction restraining the defendant, his men, agents, servants or anybody from encumbering, alienating or demolishing the existing building in the suit property, morefully described in the schedule hereunder, and

(c) for the costs of the suit.

Schedule of property in both the suits

All that piece and parcel of land and building thereon at Plot No.110, New Door No.14, Old Door No.37, South Street, Venkatesapuram Colony, Ayanavaram, Chennai-600 023,

land measuring an extent of 4,409 Sq.Ft. comprised in Old S.No.154/1, T.S.No.72, Block No.36 of Ayanavaram Village, Purasawalkam Perambur Talulk, the land being bounded on the:

North by: Plot No.89, the property in T.S.No.51 ;
 South by: 40' feet Road (South Street);
 East by : Plot No.111, the property in T.S.No.73 and
 West by: Plot No.109, the property in T.S.No.71,
 measuring on the East to West on the Northern side: 49' feet
 East to West on the Southern side: 48' feet and 6" inches
 measuring on the North to South on the Eastern side: 91' feet
 North to South on the Western side: 91' feet,
 and situated within the Registration District of Chennai Central and Sub-Registration District of Madras Anna Nagar.

For plaintiff in C.S.No.185 of 2012 & for defendant in C.S.No.522 of 2013: Mr.S.A.Rajan

For defendants in C.S.No.185 of 2012 & for plaintiffs in C.S.522 of 2013: Mr.G.Veerapathiran

COMMON JUDGMENT

Civil Suit No.185 of 2012 is filed by the plaintiff for grant of permanent injunction restraining the defendants 1 to 3 from interfering with the physical possession of the suit property either by themselves or by their agents, servants, hirelings and others and to direct the defendants to pay the costs of the suit including advocate's fee.

2. Civil Suit No.522 of 2013 is filed by the plaintiffs for partition and separate possession of the

plaintiffs' 2/3 share of suit property, by metes and bounds by appointing an Advocate Commissioner to allot the same to the plaintiffs by passing a preliminary decree, for permanent injunction restraining the defendant, his men, agents, servants or anybody from encumbering, alienating or demolishing the existing building in the suit property and for the costs of the suit.

3. It is the case of the plaintiff in C.S.No.185 of 2012, who is the defendant in C.S.No.522 of 2013, that the suit property belonged to T.D.Aiyaswamy, who was the Secretary of Tamil Nadu Public Service Commission and he purchased the suit property by sale deed dated 13.09.1996 and had put up large dwelling unit on the property from out of his self-acquisition; on his death, his legal heirs, including the plaintiff, inherited the suit property in equal shares, as the deceased T.D.Aiyaswamy and his legal heirs are Hindus. As Mrs.Meenakshi, the wife of the deceased T.D.Aiyaswamy, died, the sons and daughters of the deceased T.D.Aiyaswamy inherited the suit property with equal shares having 1/9 share in the suit property. Mr.T.A.Thayumana Sundaram, brother of the plaintiff and Mr.T.A.Gnanasundaram, another brother of the plaintiff, released their 2/9 share, by document dated 17.02.2010 in

favour of the plaintiff herein. Thus, the plaintiff acquired right and title to the extent of 1/3 share in the suit property and as on date, the plaintiff is the owner of the undivided 1/3 share in the suit property. The other shareholders who are owing 2/3 undivided share in the suit property are Mr.T.A.Tirumalai (son of the deceased T.D.Aiyaswamy), Mrs.Kanthimadhi (daughter of the deceased T.D.Aiyaswamy), Mrs.Rajamani (daughter of the deceased T.D.Aiyaswamy), Mrs.R.Kalavathy (daughter of the deceased T.D.Aiyaswamy), Mr.T.A.Durairajan (son of the deceased T.D.Aiyaswamy) and Mr.T.A.Shanmuganandam (son of the deceased T.D.Aiyaswamy). It is further stated that Mrs.Rajamani and Mrs.Kanthimadhi (daughters of the deceased T.D.Aiyaswamy) died, leaving behind their respective legal heirs. Mr.T.A.Tirumalai (one of the sons of the deceased T.D.Aiyaswamy) also died, leaving behind his legal heirs. It is the further case of the plaintiff that Mr.T.A.Shanmuganandam sold his 1/9 undivided share in the suit property to an outside purchaser, who is the first defendant herein, by sale deed, dated 08.07.2011. The legal heirs of Mrs.Kanthimadhi, one of the deceased daughters of the deceased T.D.Aiyaswamy, the legal heirs of Mr.T.A.Tirumalai, who is one of the sons (who is deceased)

of the deceased T.D.Aiyaswamy and Mr.T.A.Durairajan, one of the sons of the deceased T.D.Aiyaswamy, sold their $\frac{3}{9}$ ($\frac{1}{3}$) undivided share in favour of the second and third defendants jointly by sale deed dated 24.08.2011. The legal heirs of Mrs.Rajamani, one of the deceased daughters of the deceased T.D.Aiyaswamy, and Mrs.R.Kalavathy, one of the daughters of the deceased T.D.Aiyaswamy, sold their $\frac{2}{9}$ undivided share by sale deed dated 24.10.2011 in favour of the defendants 2 and 3.

4. The plaintiff in C.S.No.185 of 2012 further state that the defendants 1 to 3 have become $\frac{2}{3}$ undivided shareholders of the suit property, of which, the plaintiff has $\frac{1}{3}$ undivided share. As the defendants 1 to 3 are outside purchasers and not the members of undivided family, the plaintiff is entitled to seek partition against the defendants and to claim other reliefs. The plaintiff is a medical practitioner in United States. The property is wholly occupied by the plaintiff, as the other shareholders sold their shares. The property is managed by the Power Agent of the plaintiff and the plaintiff's representative is in physical occupation of the property. The plaintiff, his wife and his relatives often visit Chennai and stay in the suit property, as the same is in their enjoyment and

possession. Taking advantage of the fact that the plaintiff is in United States and that the property is managed by his agent and taken care of by the caretaker of the plaintiff, the defendants 1 to 3 are attempting to trespass into the suit property and planned to demolish the existing superstructure. The suit property is a dwelling house, which belonged to an undivided family and the plaintiff is a co-sharer who is in occupation of the entire suit property and as the suit property is not divided by metes and bounds by the other legal heirs of the father of the plaintiff, the plaintiff is entitled to protect his possession of the suit property as against the defendants.

5. It is further stated by the plaintiff in C.S.No.185 of 2012 that when he knew about the sale made in favour of the first defendant, the plaintiff filed C.S.No.709 of 2011 for partition as against the first defendant and the other co-sharers and since subsequent to the filing of the said suit, the other co-sharers sold their shares in favour of the defendants 2 and 3, the said suit does not survive and hence, this suit in C.S.No.185 of 2012 is filed for the relief stated supra.

6. It is seen from the records of this Court that the said suit in C.S.No.709 of 2011 was dismissed as withdrawn

on 19.04.2012.

7. The defendants in C.S.No.185 of 2012 filed written statement under Order 8 Rule 1 CPC and under Order 5 Rule 1 of the Madras High Court Original Side Rules, and the defendants in C.S.No.185 of 2012 are the plaintiffs in C.S.No.522 of 2013, and they state that the suit in C.S.No.185 of 2012, filed for bare injunction, is not maintainable in law and on facts, that the Power Agent is not entitled to file the suit, that the defendants are not aware of C.S.No.709 of 2011 filed by the plaintiff for partition and the orders passed thereon, that the suit is not maintainable under Order 2 Rule 2 of CPC, that the suit is barred by res-judicata, that the suit property is not a HUF property, that the suit property originally belonged to T.D.Aiyaswamy, who purchased it from Venkatesapuram Co-operative House Construction Society Limited, under sale deed dated 13.09.1996, that after purchase, the said T.D.Aiyaswamy constructed the building, that the said T.D.Aiyaswamy died intestate on 09.05.1984 leaving behind his wife and six sons and three daughters as legal heirs, each of whom are entitled to 1/10 share in the suit property, that after the death of his wife, who died intestate on 09.07.1992, after which, surviving legal heirs

became entitled to 1/9 share each, that the legal heirs of the deceased son and daughters of the deceased T.D.Aiyaswamy inherited their respective shares and that the brothers of the plaintiff, namely Mr.T.A.Thayumana Sundaram and Mr.T.A.Gnanasundaram, released their 1/9 respective shares in favour of the plaintiff under the Deed of Release, dated 17.02.2010.

8. The defendants in C.S.No.185 of 2012 further state that they came to know about the sale of the property through their relative and friend Mr.Dilip Gulecha, who came to know about the property through Mr.Balamurugan and as requested by the defendants, when the said Dilip Gulecha approached all the owners including the plaintiff, they agreed to sell the said property, and the said Dilip informed them that the sale deed(s) would be either in the name of the first defendant or in the name of the second and third defendants, that most of the owners are living outside India and only Dr.T.D.Ayyaswamy was carrying on pharmacy business in the suit property as the building was not suitable for residential purpose, that when the said Dilip approached the plaintiff and his wife, both agreed to sell 1/3 undivided share in the suit property and as it was not possible to come down to Chennai for sale, the

plaintiff executed General Power of Attorney in favour of his wife Mrs.Geetha, that in pursuance of the E-mail communications between the said Mrs.Geetha and the said Dilip and negotiations with all the owners, who have agreed to sell their respective shares, Mr.T.A.Shanmuganantham sold 1/9 share in favour of the first defendant under the sale deed dated 08.07.2011, that the other owners sold their 3/9 share in favour of the second and third defendants under the sale deed dated 24.08.2011, that by sale deed dated 24.10.2011, some of the owners sold their 2/9 share in favour of the second and third defendants, that thus the defendants are the owners of 1/9, 3/9 and 2/9 undivided shares i.e. 2/3 share in the undivided share in the suit property, that the above vendors gave vacant possession of the entire suit property and the plaintiff is having 1/3 share in the suit property, that before purchase of the property, a publication in the newspapers "Deccan Chronicle" and "Daily Thanthi" on 02.04.2011 and 03.04.2011 had been effected and non-traceable certificate was obtained by the defendants in C.S.No.185 of 2012, that the defendants are not the members of the family of the plaintiff, that the suit property is not divided by metes and bounds, that the defendants deny the allegation of the

plaintiff that they are taking advantage of the fact that the plaintiff is residing outside India, they also deny that the suit property is managed by the agent of the plaintiff, that the defendants are not attempting to trespass into the suit property and plan to demolish the building, that the defendants as co-owners, after the above purchase, are in absolute possession and enjoyment of the suit property, that the defendants paid Corporation Tax and other Revenue Taxes upto date, that the plaintiff has not made out any prima-facie case and the balance of convenience is in favour of the defendants, that if any order is passed against the defendants, they would be put to irreparable loss and hardship and that the plaintiff had been postponing the sale and filed this suit for unlawful gain, which may be dismissed.

9. The defendants in C.S.No.185 of 2012 filed additional written statement under Order 8 Rule 1 of CPC and under Order 5 Rule 1 of the Madras High Court Original Side Rules, stating that from the date of purchase, the defendants had been in absolute possession and enjoyment of the suit property, that somebody over-locked the suit property over the lock of the defendants, that both the plaintiff and defendants appeared before the Police in

respect of claim and counter-claim between them and that based on the interim order obtained by the plaintiff and as per the direction of the Police, the father of the second defendant was forced to give a letter dated 30.11.2012 to the Police stating that they would open the door from 30.11.2012 and settle the dispute amicably.

10. Apart from stating the facts already stated in the written statement and additional written statement filed in C.S.No.185 of 2012, the plaintiffs in C.S.No.522 of 2013 (who are the defendants in C.S.No.185 of 2012) also state in the plaint in C.S.No.522 of 2013 that as per the Partition Act, if a dwelling house was sold by some of the sharers, the remaining shareholders have got the right to purchase the property from the other person who has purchased the property from the other shareholders and in this case, such a right is not available for the defendant in C.S.No.522 of 2013 (plaintiff in C.S.No.185 of 2012) because he himself filed a suit for partition against the other shareholders who sold their share to the plaintiffs in C.S.No.522 of 2013 and since the defendant in C.S.No.522 of 2013 already exhausted his remedy by filing a suit for partition, the relief of purchasing the said property as per Section 4 of the Partition Act is not available for

him. It is further stated that the defendant in C.S.No.522 of 2013 is changing to alter the structure of the building in the suit property, which he has no right to do and the plaintiffs and the defendant (in C.S.No.522 of 2013) are the co-owners and therefore, the defendant in C.S.No.522 of 2013 has got no right to interfere with the possession of the plaintiffs in the suit property, that through mediation, the plaintiffs in C.S.No.522 of 2013 demanded their shares to be divided in the said property, but the defendant in C.S.No.522 of 2013 is avoiding and therefore, the plaintiffs have filed C.S.No.522 of 2013 for the relief stated supra.

11. Apart from stating the facts in the plaint filed C.S.No.185 of 2012, the defendant in C.S.No.522 of 2013 (who is the plaintiff in C.S.No.185 of 2012) also state that since some of the shareholders sold their 1/9 share to the first plaintiff in C.S.No.522 of 2013 (who is the first defendant in C.S.No.185 of 2012), the defendant in C.S.No.522 of 2013 filed C.S.No.709 of 2011 for partition against 13 other shareholders and against the first plaintiff in C.S.No.522 of 2013 and when that suit in C.S.No.709 of 2011 was pending, the defendants 1 to 13 in the said suit in C.S.No.709 of 2011 sold their shares to

the second and third plaintiffs in C.S.No.522 of 2013 without any notice to the defendant in C.S.No.522 of 2013, and the transfers were secretly made when the defendant in C.S.No.522 of 2013 was in abroad, and the said transfer was done by the plaintiffs in C.S.No.522 of 2013 and the other shareholders in order to avoid the defendant in C.S.No.522 of 2013 invoking his preferential right to acquire the property as per law and the said transfer is pendente-lite, which is affected in law. Since the transfer was made subsequent to the filing of C.S.No.709 of 2011, the plaintiff in C.S.No.709 of 2011 (defendant in C.S.No.522 of 2013) withdrew the said suit in C.S.No.709 of 2011, that the defendant in C.S.No.522 of 2013 does not know about the publication in the newspapers "Deccan Chronicle" and "Daily Thanthi" and has no knowledge about the contents of the same and prayed for dismissal of C.S.No.522 of 2013.

12. By order dated 01.10.2012, this Court framed the following issues for consideration in C.S.No.185 of 2012:

(i) Is not the suit property a dwelling house belonging to an undivided family of the plaintiff with the other co-owners, who sold their 2/3 share to the defendants ?

(ii) Whether the plaintiff is in possession of the suit property and managed by his Power Agent Mrs.N.G.Bhuvaneswari ?

(iii) Whether the Power Agent is entitled to file the suit for permanent injunction ?

(iv) Whether other shareholders delivered possession of the suit property to the defendants and whether the defendants are in absolute possession of the suit property ?

(v) Is the plaintiff entitled for an order of permanent injunction restraining the defendants from interfering with possession of the suit property by the defendants ?

(vi) Whether the suit is barred under Order 2 Rule 2 CPC ? and

(vii) To what relief the parties are entitled to ?

13. By order dated 02.04.2013, this Court framed the following additional issue for consideration in C.S.No.185 of 2012 :

"Whether the plaintiff is in possession only after filing of the suit as contended by the defendants ? "

14. On a reading of the entire written statement and additional written statement filed by the defendants in C.S.No.185 of 2012, it is seen that they admit that they are entitled to 2/3 share in the suit property and the plaintiff in C.S.No.185 of 2012 is entitled to 1/3 share in

the suit property. Hence, in view of the above admission of the defendants in C.S.No.185 of 2012 (who are the plaintiffs in C.S.No.522 of 2013), it is not necessary to frame issues in C.S.No.522 of 2013 regarding the share in the suit property. As far as the prayer relating to permanent injunction is concerned, the issue is already framed in C.S.No.185 of 2012, in issue No.(v) as stated above. Moreover, the learned counsel for the plaintiffs in C.S.No.522 of 2013 submitted that except the relief of partition, he is not pressing the prayer for permanent injunction and hence, he submitted that the prayer for permanent injunction in suit in C.S.No.522 of 2013 may be dismissed as not pressed.

15. Hence, by consent of both parties, both the suits are taken up for disposal together and the issues and additional issue framed in C.S.No.185 of 2012 are sufficient for disposal of both the suits and in view of the above admission of the defendants in C.S.No.185 of 2012, who are the plaintiffs in C.S.No.522 of 2013, no issues are framed in C.S.No.522 of 2013.

16. The Power of Attorney of the plaintiff, i.e. his wife, was examined as P.W.1 and Exs.P-1 to P-7 were marked on the side of plaintiff in C.S.No.185 of 2012. The first

defendant in C.S.No.185 of 2012 was examined as D.W.1 and Exs.D-1 to D-26 were marked on the side of defendants in C.S.No.185 of 2012.

17. For the purpose of convenience, the parties are hereinafter referred to as they are ranked in C.S.No.185 of 2012.

Issues and additional issue:-

18. Learned counsel for the plaintiff submitted that the plaintiff is the one of the sharers and he is in possession and enjoyment of the suit property. Even though the plaintiff is in America, he is maintaining the suit property and whenever he visits India, he stays in the suit property. The suit property is wholly occupied by the plaintiff, and since he is out of India, the defendants 1 to 3 attempted to trespass into the suit property and tried to demolish the superstructure put up in the suit property and virtually, the defendants 1 to 3 have encroached upon the suit property. Pending suit, this Court granted interim injunction in O.A.No.242 of 2012 in C.S.No.185 of 2012 on 04.04.2012 for two weeks. Subsequently, the defendants filed A.No.5286 of 2012 for vacating the said interim order of injunction and it was dismissed as withdrawn on 14.12.2012. Subsequently, the defendants filed A.No.896 of

2013 for restitution of the suit property to them, which was taken by the plaintiff by virtue of interim order dated 04.04.2012 passed in O.A.No.242 of 2012. Thus, the learned counsel for the plaintiff contended that the plaintiff is in possession of the suit property, pending suit. Since the defendants are outsiders to the family of the plaintiff, they have no right to disturb the possession of the suit property. Hence, the plaintiff has filed C.S.No.185 of 2012 for permanent injunction against the defendants and the defendants have filed the other suit in C.S.No.522 of 2013 for partition and permanent injunction.

19. Learned counsel for the defendants submitted that the defendants purchased 2/3 share in the suit property from some of the legal heirs of the deceased T.D.Aiyaswamy. He further submitted that as per Section 4 of the Partition Act, if a dwelling house was sold by some of sharers, the remaining shareholders have got a right to purchase the property from the other person who has purchased the property from the other shareholders, and in this case, such a right is not available for the plaintiff, as he himself filed a suit for partition in C.S.No.709 of 2011 against the other shareholders, who sold their shares to the defendants in C.S.No.185 of 2012 and since the

plaintiff already exhausted the remedy by filing a suit for partition in C.S.No.709 of 2011, the relief of purchasing the property as per Section 4 of the Partition Act is not available for him. He further contended that the plaintiff is always residing outside India and the defendants are in possession of the suit property by virtue of the sale deeds executed in their favour by some of the legal heirs of the deceased T.D.Aiyaswamy. After obtaining the order of interim injunction from this Court pending suit in C.S.No.185 of 2012, the plaintiff dispossessed the defendants and got into the suit property by illegal means. Hence, the defendants filed application for restitution of the suit property, which is pending. The suit in C.S.No.522 of 2013 filed for partition by the defendants is being heard along with the suit in C.S.No.185 of 2012. The suit filed by the plaintiff in C.S.No.185 of 2012 for bare injunction against the co-owners, who are the defendants, is not maintainable and the same may be dismissed.

20. It is admitted that the suit property belongs to T.D.Aiyaswamy, who purchased the same out of his own earnings, by sale deed dated 13.09.1996 and subsequently, he had put up dwelling unit on the suit property. It is further admitted that the said T.D.Aiyaswamy died on

09.05.1984 and subsequent to his death, his legal heirs, namely, the wife, sons and daughters, inherited the suit property in equal shares and subsequent to the death of the wife of the deceased T.D.Aiyaswamy, the sons and daughters are entitled to equal shares having 1/9 share in the suit property. Two brothers of the plaintiff released their 2/9 share in favour of the plaintiff and thus, the plaintiff acquired right and title in respect of 1/3 undivided share in the suit property. The other shareholders who were owing 2/3 undivided share in the suit property are Mr.T.A.Tirumalai (son of the deceased T.D.Aiyaswamy), Mrs.Kanthimadhi (daughter of the deceased T.D.Aiyaswamy), Mrs.Rajamani (daughter of the deceased T.D.Aiyaswamy), Mrs.R.Kalavathy (daughter of the deceased T.D.Aiyaswamy), Mr.T.A.Durairajan (son of the deceased T.D.Aiyaswamy) and Mr.T.A.Shanmuganandam (son of the deceased T.D.Aiyaswamy). Mrs.Rajamani and Mrs.Kanthimadhi, the daughters of the deceased T.D.Aiyaswamy died, leaving behind their respective legal heirs. Mr.T.A.Tirumalai, one of the sons of the deceased T.D.Aiyaswamy died, leaving behind his legal heirs. It is further admitted that Mr.T.A.Shanmuganandam sold his 1/9 undivided share in the suit property to the first defendant herein, by sale deed,

dated 08.07.2011. The legal heirs of Mrs.Kanthimadhi, one of the deceased daughters of the deceased T.D.Aiyaswamy, the legal heirs of Mr.T.A.Tirumalai, who is one of the sons (who is deceased) of the deceased T.D.Aiyaswamy and Mr.T.A.Durairajan, one of the sons of the deceased T.D.Aiyaswamy, sold their $\frac{3}{9}$ ($\frac{1}{3}$) undivided share in favour of the second and third defendants jointly by sale deed dated 24.08.2011. It is further admitted that the legal heirs of Mrs.Rajamani, one of the deceased daughters of the deceased T.D.Aiyaswamy, and Mrs.R.Kalavathy, one of the daughters of the deceased T.D.Aiyaswamy, sold their $\frac{2}{9}$ undivided share by sale deed dated 24.10.2011 in favour of the defendants 2 and 3. Thus, it is admitted that the defendants 1 to 3 are entitled to $\frac{2}{3}$ undivided share in the suit property, of which, the plaintiff is entitled to $\frac{1}{3}$ undivided share.

21. It is further admitted that the defendants 1 to 3 in C.S.No.185 of 2012 are the outsiders to the family of the plaintiff in C.S.No.185 of 2012 and the defendants acquired title to the suit property by virtue of purchase from some of the legal heirs of the deceased T.D.Aiyaswamy. Since the defendants in C.S.No.185 of 2012 are strangers to the family of the plaintiff, their right is only to file

the suit for partition and not to enter upon the possession and they shall only claim joint possession with the legal heirs of the deceased T.D.Aiyaswamy. Even though the defendants in C.S.No.185 of 2012, have filed application for vacating the said order of interim injunction obtained, the same was dismissed as withdrawn. The plaintiff in C.S.No.185 of 2012 is entitled to the possession of the property until he is dispossessed in accordance with law. The plaintiff has also conclusively proved that he is in possession of the suit property by producing relevant documents and the defendants are out of possession. Admittedly, the defendants in C.S.No.185 of 2012 filed C.S.No.522 of 2013 for partition of their 2/3 share in the suit property, which is being disposed of along with the other suit in C.S.No.185 of 2012 by this common judgment. The defendants in C.S.No.185 of 2012 have got right to take possession of the suit property after getting final decree in C.S.No.522 of 2013 and until then, they should not interfere with the possession of the plaintiff in the suit property until the plaintiff is dispossessed in accordance with law.

22. To substantiate their respective contentions, learned counsel for the parties relied on Section 4 of the

Partition Act and Section 44 of the Transfer of Property Act, which read as follows:

"Section 4 of the Partition Act: Partition suit by transferee of share in dwelling- house--(1) Where a share of a dwelling- house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub- section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

"Section 44 of the Transfer of Property Act: Transfer by one co-owner: Where one of two or more co-owners of immoveable property legally competent in that behalf transfer his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

23. Learned counsel for the plaintiff in C.S.No.185 of 2012 relied on a decision of the Supreme Court reported in AIR 1990 SC 867 (Dorab Cawasji Warden Vs. Coomi Sorab Warden and others) to contend that since the plaintiff and the other legal heirs of the deceased T.D.Aiyaswamy are in possession of the undivided share in the suit property and since the property is not divided by metes and bounds and since the defendants are not the members of the family of the plaintiff, the plaintiff is entitled for injunction as prayed for and the defendants are not entitled to joint possession or other common or part enjoyment of the suit property, as stated in Section 44 of the Transfer of Property Act and Section 4 of the Partition Act. The Supreme Court in the said decision, while dealing with Section 44 of the Transfer of Property Act and Section 4 of the Partition Act, observed that while Section 44 of the Transfer of Property Act does not give a transferee of a dwelling house belonging to an undivided family a right to joint possession and confer a corresponding right on the other members of the family to deny the right to joint possession to a stranger transferee, Section 4 of the Partition Act gives a right to a member of the family who

has not transferred his share to purchase the transferee's share on a value to be fixed in accordance with law when the transferee filed a suit for partition; both these are valuable rights to the members of the undivided family whatever may be the object or purpose for which they were conferred on such members; in some cases, it is stated that the right to joint possession is denied to a transferee in order to prevent a transferee who is an outsider from forcing his way into a dwelling house in which the other members of his transferee's family have a right to live; in some other cases, giving joint possession was considered to be illegal and the only right of the stranger purchaser is to sue for partition; all these considerations show that denying an injunction against a transferee in such cases, prima-facie, would cause irreparable injury to the other members of the family.

24. Learned counsel for the plaintiff also relied on a decision of this Court reported in AIR 1935 Madras 628 (Subramanya Vs. Sheik Ghannu), wherein this Court held that the proviso to Section 44 of the Transfer of Property Act applies even though the members of the family did not reside. This Court in that decision further held that the only two requisites laid down in the proviso to Section 44

of the Transfer of Property Act are that the house must be a dwelling house and that it must belong to an undivided family. In the said decision, this Court further held that Section 44 of the Transfer of Property Act does not speak of a family dwelling house, nor does it say that the dwelling house must be occupied either permanently or even occasionally by the undivided family.

25. The ratio laid down in the above two decisions is squarely applicable to the facts of the present case. Learned counsel for the plaintiff in C.S.No.185 of 2012 contended that since the suit property is in possession of the plaintiff, he filed C.S.No.185 of 2012 for permanent injunction, as the defendants are attempting to trespass into the property and demolish the existing building and hence, permanent injunction may be granted in favour of the plaintiff. The plaintiff has every right to encumber or alienate the suit property according to his wish, as he has proved his possession in the suit property. But, the plaintiff cannot be prevented by an order of injunction from doing so, but the defendants in C.S.No.185 of 2012 have to be restrained only from demolishing the existing building or superstructure in the suit property, as they have no right to demolish the existing building in the suit

property.

26. Learned counsel for the defendants in C.S.No.185 of 2012 fairly admitted that the defendants will not encumber or alienate or demolish the superstructure in the suit property. Since the defendants in C.S.No.185 of 2012 admitted in their written statement that the plaintiff is entitled to 1/3 share and the defendants are entitled to 2/3 share in the suit property, the argument of the learned counsel for the plaintiff that the defendants may be restrained from demolishing or encumbering or alienating the suit property by an order of injunction, has to be accepted. Moreover, the alleged transfer by the other co-sharers in favour of the defendants in C.S.No.185 of 2012, is pendente-lite, i.e pending the earlier suit in C.S.No.709 of 2011, which was dismissed as withdrawn on 19.04.2012. This Court is of the considered view that the plaintiff in C.S.No.185 of 2012 is entitled for decree of permanent injunction as prayed for and the defendants in C.S.No.185 of 2012 are entitled for preliminary decree of partition of their 2/3 share as prayed for by them in C.S.No.522 of 2013.

27. From the above discussion, it has to be held that the suit property is a dwelling house belonging to an

undivided family of the plaintiff and the other co-owners who sold their 2/3 share to the defendants; that the plaintiff is in possession of the suit property and the suit property is managed by his Power Agent Mrs.N.G.Bhuvaneswari; that the Power Agent is entitled to file the suit for permanent injunction; that the other shareholders did not deliver possession of the suit property to the defendants and the defendants are not in absolute possession of the suit property; the plaintiff is entitled for an order of permanent injunction restraining the defendants from interfering with the possession of the suit property; that the suit is not barred under Order 2 Rule 2 CPC as the whole claim is prayed for in the suits and the plaintiff is in possession of the property even before the filing of the suit and not after filing of the suit as contended by the defendants. The issues and additional issue are answered accordingly.

28. Accordingly, the plaintiff in C.S.No.185 of 2012 is entitled to get 1/3 share in the suit property and the defendants in C.S.No.185 of 2012 are entitled to get 2/3 share in the suit property.

29. In the result,

C.S.No.522 of 2013:

(i) Preliminary decree for partition is passed as prayed for.

(ii) There is no necessity to appoint Advocate Commissioner at this stage and it is open for the plaintiffs to seek for the same at the appropriate stage when final decree proceedings are initiated by parties.

(iii) In view of the representation made by the learned counsel for the plaintiffs that he is not pressing Clause (b) of the prayer, the same is dismissed as not pressed.

(iv) O.A.No.571 of 2013 in C.S.No.522 of 2013 is closed.

(v) No costs.

C.S.No.185 of 2012:

(i) The suit is decreed for permanent injunction as prayed for and the defendants are restrained from demolishing the existing building/superstructure in the suit property till final decree is passed in C.S.No.522 of 2013.

(ii) O.A.No.242 of 2012 and A.No.896 of 2013 in C.S.No.185 of 2012 are closed.

(iii) No costs.

Witnesses examined on the side of plaintiff in C.S.No.185 of 2012 :--

P.W.1 - Mrs.Geetha Mohan (wife of the plaintiff) (Power of Attorney of the plaintiff)

List of documents marked on the side of plaintiffs in C.S.No.185 of 2012:-

<i>Exhibit No.</i>	<i>Date</i>	<i>Description of the exhibit</i>
P-1	20.11.1989	Xerox copy of the Legal Heirship Certificate in respect of the deceased T.D.Iyyasami Pillai
P-2	19.04.2012	Certified copy of the order of this Court in C.S.No.709 of 2011 and O.A.Nos.881 of 2011 and A.No.5772 of 2011
P-3	02.11.2012	General Power of Attorney executed by the plaintiff in favour of his wife Geetha Mohan Pillai
P-4 series	30.04.2013	Xerox copy of Affidavit and Judge's Summons in A.No.574 of 2013 in C.S.No.522 of 2013
P-5 series	19.12.2012 and February 2013	Affidavit in the application filed by the defendants for restitution of possession of the suit property in C.S.No.185 of 2012 and Judge's Summons therein
P-6	16.07.2012	Affidavit in the application filed by the defendants for vacating the interim injunction granted in O.A.No.242 of 2012 in C.S.No.185 of 2012
P-7	14.12.2012	Certified copy of the order passed in A.No.5286 of 2012 in C.S.No.185 of 2012

Witnesses examined on the side of defendants in C.S.No.185 of 2012 :-

D.W.1 - Mr.N.Jitendra Kumar - First defendant

Documents marked on the side of defendants in C.S.No.185 of 2012 :-

<i>Exhibit No.</i>	<i>Date</i>	<i>Description of the exhibit</i>
D-1	07.01.2013	Notice by the defendants' counsel to the plaintiff's counsel
D-2	26.01.2010	Xerox copy of the General Power of Attorney executed by Mr.T.A.Thayumanasundaram in favour of Mr.S.Krishnan
D-3	28.01.2010	Xerox copy of the General Power of Attorney executed by Mr.T.A.Gnanasundaram in favour of Mr.S.Krishnan
D-4	17.02.2010	Xerox copy of the Release Deed executed by Mr.T.A.Thayumanasundaram in favour of the plaintiff
D-5	23.03.2011	Xerox copy of the General Power of Attorney executed by the plaintiff in favour of his wife Geetha Mohan Pillai
D-6	13.08.2011	Xerox copy of the General Power of Attorney executed by the plaintiff in favour of Mrs.N.G.Bhuvaneswari
D-7	07.04.2012	Notice issued by the plaintiff's Advocate to the defendants with enclosures
D-8	23.03.2011	Xerox copy of the General Power of Attorney executed by the plaintiff in favour of his wife Mrs.Geetha Mohan Pillai
D-9	17.02.2010	Xerox copy of the Release Deed executed by Mr.T.A.Thayumanasundaram in favour of the plaintiff
D-10	27.07.2011	Copy of e-mail message sent by Geetha Pillai to S.Krishnan and reply by S.Krishnan to Geetha Mohan Pillai --- forwarded by Geetha Mohan Pillai to Dilip Golecha

<i>Exhibit No.</i>	<i>Date</i>	<i>Description of the exhibit</i>
D-11	10.04.2012	Copy of e-mail message sent by Dilip Golecha to Abhay Khicha - forwarded message of Geetha Mohan Pillai to Dilip Golecha
D-12	10.04.2012	Copy of e-mail message sent by Dilip Golecha to Abhay Khicha - forwarded message of Geetha Mohan Pillai to Dilip Golecha
D-13	11.12.2006	Letter sent by Director-Sales of UCB India Pvt. Ltd., Mumbai to The Assistant Purchase Officer of the Director of Purchase and Stores, MRPU, Chennai
D-14	15.04.2010	Letter written by the Commercial Tax Officer, Ayanavaram Assessment Circle to Tvl.Reliance Pharmacy
D-15	08.07.2011	Xerox copy of the sale deed executed by Mr.T.A.Shanmuganathan in favour of the first defendant
D-16	24.08.2011	Xerox copy of the sale deed executed by Mr.Dorairajan, Mrs.Saraladevi Thirumalai, Dr.T.T.Ayyaswamy, Dr.T.T.Jaishankar, Dr.T.T.Satyanarayana, Mr.M.Janardhanan, Mrs.J.Krishna Kumari and Mr.M.Balamurugan in favour of the defendants 2 and 3
D-17	18.09.2012	Original Property Tax Card and payment receipt
D-18	10.08.2011	Original Water Tax payment receipt
D-19 series	-	Original Tamil Nadu Electricity Board Cards
D-20 series	-	Original Tamil Nadu Electricity Board Cards
D-21 series	-	Original Tamil Nadu Electricity Board Cards
D-22 series	21.03.2012	Original E.B. charges payment receipts

<i>Exhibit No.</i>	<i>Date</i>	<i>Description of the exhibit</i>
D-23 series	06.07.2012	Original E.B. charges payment receipts
D-24 series	27.08.2012	Original E.B. charges payment receipts
D-25	21.04.2012	Oiriginal E.B. charges payment receipts including E.B. re-connection charges
D-26	30.11.2012	Xerox copy of the letter written by the defendants to the Inspector of Police, K.2 Ayanavaram Police Station, Chennai

Court witness and Court document : Nil

sd/G.C.J

23.11.2015

//Certified to be a true copy//

Dated this the day of 2016

R.s/25.01.2016

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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