

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :28.11.2016
Pronounced on : 12.12.2016

CORAM

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

Second Appeal No.464 of 1997

1.Thippanna(died)
2.Sampamma
(2nd appellant is recorded as LR of the
deceased 1st appellant vide order dated
30.07.2003 made in C.M.P.Nos.13853 and
13854 of 1999 by PSDJ)

3.Chennamma

4.Ganesh

5.Venkatesh

6.Govindan

7.Munirathinam

(Appellants 3 to 7 brought as LR of the
deceased 1st appellant vide order dated
30.08.2003 made in C.M.P.Nos.13853
and 13854 of 1999 by PSDJ)

..Appellants

/vs/

1.Akkayamma(died)

2.Thippamma

3.Sakkamma

4.Victoria Mary Bai

5.Gowramma

6.Venkatalashamma

7.Yesodamma

8.K.Kothandaraman

9.Suresh Babu

10.Ramesh @ Appi (Minor)

(reptd. By mother and
guardian Santhamma)

(RR8 to 10 brought on record as

LR of the deceased 1st respondent vide
as per order of Court dated 30.07.2003
made in C.M.P.No.18361 of 1997 by
PSDJ)

..Respondents

Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 15.05.1996 in A.S.No.15 of 1991 on the file of the Principal District Judge, Dharmapuri District at Krishnagiri partly confirmed the judgment and decree on 26.03.1991 made in O.S.No.30 of 1987 on the file of the Sub Judge, Krishnagiri.

For appellants	:Mr. G.Sumithra
For respondents	:Mr.V.Nicholas for R2
	Mr.M.Muruganantham for
	Mr.V.Raghavachari for R3
	Mr.J.Hariharan for R8 to R10
	No appearance for R5 to R7
	R1-died

JUDGMENT

The legal heirs of the deceased 1st defendant are the appellants before this Court.

2. The suit filed for partition was allowed and a preliminary decree was passed holding that the plaintiff is entitled for 1/8th share in the suit schedule property. On appeal, the first appellate Court has modified the trial Court judgment and decree to the limited effect of deleting 6th item and confirmed the partition in respect of the other

items. The reason for deleting 6th item is that, it being a dwelling house, was occupied by the first defendant, according to the lower Appellate Court under Section 23 of the Hindu Succession Act, 1956, the plaintiff is not entitled to seek for partition of dwelling house as long as the first defendant chooses to have a division. Aggrieved by the judgment and decree of the trial Court, as modified by the first appellate Court, the present Second Appeal is filed. No appeal or cross appeal preferred by the plaintiff in respect of the disallowed portion viz., item No.6 of the suit property. The respondents expecting appeal had filed caveat petition, before admitting the Second Appeal.

3. This Court issued notice to the respondents regarding admission and the respondents have entered appearance and submitted that there is no substantial question of law arise in this appeal.

4. Facts leading to the appeal are as follows:-

One Sanjeevappa was the original owner of the suit properties. The 1st defendant is the son, the 2nd defendant is the daughter and the 3rd defendant is the wife of Sanjeevappa. Sanjeevappa's pre-deceased daughter was one Pedhathipakka, whose daughter is the plaintiff Akkayamma. Sanjeevappa died during 1964

leaving being the plaintiff and defendants 1 to 3 as his legal heirs. The suit properties are the ancestral properties of Sanjeevappa. The 1st defendant is entitled to 3/8 share and the defendants 2 and 3 are each entitled to 1/8 share. The plaintiff is entitled to 1/8 share in the suit properties. The 1st defendant, taking advantage of his position as the male member, had alienated portions of the suit properties to the defendants 4 to 6.

5. As against the above pleadings, the first defendant has filed written statement stating that the 2nd defendant filed a suit for declaration of her title and for permanent injunction against the 3rd defendant in O.S.No.143 of 1984 on the file of the Subordinate Judge, Krishnagiri, which was dismissed after trial. Thereafter, to give trouble, the 2nd defendant had set up the plaintiff to file the instant suit. The plaintiff's mother and the 2nd defendant had received certain jewels from Sanjeevappa, long ago, in lieu of rights in the immovable properties. Therefore, the plaintiff had no right to claim partition. The plaintiff was not at all residing in the village at any time. She was not in joint possession of the suit properties. She cannot claim any share in the suit properties.

6. The 1st defendant had also contended that he had sold small plots in favour of 4th and 5th defendants. The 1st defendant had also contended that the husband of late Pedhathipakka is alive and he was not impleaded as a party and the suit is bad for non-joinder of necessary party. The suit is a collusion suit between the plaintiff and the 2nd defendant to defeat the interest of the defendants 1 and 3. Earlier, the second defendant filed the suit in O.S.No.143 of 2008 for declaration of title and for permanent injunction against the third defendant on the file of the Sub Court, Krishnagiri, which was dismissed, after full trial. Therefore, by way of re-agitating the same cause, the second defendant has preferred this suit in O.S.No.30 of 1987 through the plaintiff. The suit properties are not joint family property and are not in joint possession with the plaintiff. She is not entitled for partition. While the third defendant adopted the written statement of the first defendant, the defendants 4 to 8, who are the subsequent purchasers from the first defendant, has put forth their respective cases and pleaded that they are the bonafide purchasers for value and their right and title over the property, should not be disturbed.

7. The trial Court has framed seven issues and examined two witnesses on behalf of the plaintiff, 8 witnesses on behalf of the

defendants. Admitted, Exs.A1 to A4 on behalf of the plaintiff and Exs.B1 to B17 on behalf of the defendants and has concluded that the plaintiff has proved her co-ownership over the suit properties and entitled for share in the suit properties. Accordingly, the trial Court passed a preliminary decree for partition and allotment of share to the plaintiff and other co-sharers, which has to be worked out in the final decree proceedings.

8. Aggrieved by that, the defendants 1 and 3 have preferred the Second Appeal, wherein as per the order of this Court in C.R.P.No.1957 of 1994, dated 09.11.1994, an additional written statement with specific plea of adverse possession as well as ouster was taken by the first defendant/appellant.

9. The first appellate Court framed the following points for consideration:

1. Whether the 2nd defendant lost title by ouster?

2. Whether the plaintiff acquired title to the property by adverse possession?

10. The first appellate Court has confirmed the decree of the trial Court, except 6th item being the dwelling house of the first defendant. Aggrieved by the judgment of the first appellate Court, the second appeal is preferred by the legal heirs of the deceased first defendant.

11. As seen from the pleadings and evidence, the plaintiff trace her right and title through one Pedhathipakka, who is the mother of the plaintiff. Whereas the case of the first defendant is that, the second defendant and the plaintiff's mother Pedhathipakka had relinquished their right in the property during the life time of Sanjeevappa, through whom the parties claim right over the property. The Courts below have disbelieved his version of absolute right through relinquishment of the other co-owners. Insofar as the plea of ouster and adverse possession, the first appellate Court has pointed out that Sanjeevappa died in the year 1964. The first defendant is the son of Sanjeevappa and the second defendant is the daughter of Sanjeevappa. The plaintiffs being the grant daughter of Sanjeevappa through his pre-deceased daughter Pedhathipakka. The parties are joint owners of the suit properties. Therefore, relying upon the Supreme Court Judgements, on the point of ouster and adverse possession, it is held that the three basic elements of

adverse possession are viz., open, continuous and hostile by a person on the other person property, are totally absent in this case.

12. In the case of third party, the factum of possession itself is sufficient to show hostile claim against the true owner. The same is not applicable in respect of co-owners, because the possession of one co-owner is deemed to be the possession of other co-owners. There is no evidence to show that the first defendant has exhibited his adverse animus to the knowledge of the other co-owners. Alienation of a small portion of the property, independently by the first defendant, will not indicated the hostile claim against the other co-owners.

13. The case of the plaintiff is that the property is self acquired property of Sanjeevappa. Contrarily, the first defendant plea is that it is an ancestral property and he is a sole surviving co-parcener. He alone is entitled for inherent property. It is further contention of the first defendant is that he has given enough jewels to the plaintiff's mother long ago and therefore, the plaintiff has no right to claim partition over the property. The first defendant, who was initially pleaded exclusive right over the property, after some time, has taken out an application to make alternative plea of adverse possession, which was also allowed at

the instance of the High Court in C.R.P.No. 1957 of 1994, dated 09.11.1994. The first defendant was examined as D.W.6 and he has not able to substantiate his claim that the plaintiff's mother was provided with enough jewels, in lieu of her claim over the property. The other witnesses, who have been examined on behalf of the defendants, have also not able to substantiate or corroborate his claim. The first defendant has also admitted the share of the plaintiff in the suit property and the only defence was that the right over the property was relinquished by the plaintiff's mother on receiving jewels, which fact has not been established.

14. One of the contention of the appellant is that the earlier judgment and decree passed in O.S.No.143 of 1984 will act as *res judicata* to the present suit. Ex.B6 and B7 are the judgment and decree passed in O.S.No.143 of 1984. In that case, the suit for declaration and injunction filed by Thippamma against Thippanna and others was dismissed, after trial. But, at the same time, the trial Court has clearly observed that the dismissal of the declaration suit in O.S.No.143 of 1984 will not stand in the way of a partition suit. Therefore, the plea of *res judicata* has no force and at the same time, the suit in O.S.No.143 of 1984, the very same defence was taken by the first defendant that the

mother of the plaintiff herein, was given jewels, in lieu of her share was rejected and the trial Court has specifically held that the first defendant has no exclusive ownership of the property and the property is liable for partition. In fact, that finding has attained finality and the first defendant has not challenged it by way of an appeal. Therefore, this Court finds that the Substantial questions of law raised by the appellants are not substantiated or worth any consideration.

15. Section 23 of the Hindu Succession Act, 1956, was repealed by the Hindu Succession Amendment Act, 2005 (w.e.f. 09.09.2005). The exclusion of dwelling house from partition by the first appellant Court, in view of Section 23 of the Hindu Succession Act, is no more correct proposition of law. The appellate Court judgment, excluding 6th item of the property, itself require to be revisited, in the light of repealing Section 23 of the Hindu Succession Act, in the year 2005. Since this point is not raised by the respondents by way of filing cross objection, this Court leaves that issue open.

16. To sum up, (i) the plea of appellants that the property is the co-parcenary property, is not proved. (ii) The plea of *res judicata* is not applicable, in view of the specific observation made in the earlier

proceedings in O.S.No.143 of 1984. (iii) The alternative plea of adverse possession has not been established by the appellants.

17. Under these circumstances, this Court finds that no substantial question of law found to interfere.

18. In the result, ***the Second Appeal is dismissed.*** No order as to costs.

.....12.2016

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To

1.The Principal District Judge, Dharmapuri District at Krishnagiri.

2.The Sub Judge, Krishnagiri.

Dr.G.JAYACHANDRAN,J.

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S.A.No.464 of 1997

12.12.2016

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