

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:

PRONOUNCED ON: 24.11.2016

CORAM :

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.324 of 2011
& MP.No.1 of 2011 & M.P.Nos.1 to 3 of 2014

1.L.M.Natarajan(deceased)

2.Ponniakkal

3.Bharathi Chinnasamy

4.Sivashanmugam

5.Mahendran

... Appellants

(Appellants 2 to 5 brought
on record as the legal heirs
of the deceased sole appellant
vide order of Court dated
13.11.2014 made in
MP.Nos.1 to 3 of 2014
in S.A.No.324 of 2011)

Vs.

1.N.Sivagami

2.L.M.Ponnusamy

... Respondents

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 05.07.2010 passed in A.S.No.80 of 2009 on the file of the I Additional District Court, Coimbatore confirming the judgment and decree dated 25.02.2008 passed in O.S.No.664 of 2006 on the file of the II Additional Sub Court, Coimbatore.

For Appellants : Mr.N.Manokaran
For Respondents : No appearance

J U D G M E N T

Challenge in this Second Appeal is made by the second defendant against the judgment and decree dated 05.07.2010 made in A.S.No.80 of 2009 on the file of the first Additional District Court, Coimbatore, confirming the judgment and decree dated 25.02.2008 passed in O.S.No.664 of 2006 on the file of the II Additional Sub Court, Coimbatore.

2.Suit for partition.

3.Shorn of unnecessary details, the case of the plaintiff is as follows:

The plaintiff is the only daughter of late. Nanjappa Gounder. Nanjappa Gounder died on 05.12.1956, leaving behind the plaintiff and his wife as his legal representatives. Defendants are the sons of late. Marudappa Gounder. Marudappa Gounder, Palani Gounder, Karuppa Gounder and Nanjappa Gounder are the sons of Veerappa Gounder and the suit property belonged to Veerappa

Gounder. As per the oral partition, the suit property was jointly allotted to Marudappa Gounder and Nanjappa Gounder and after their death, the plaintiff and the defendants are in joint possession and enjoyment of the same. The deceased Marudappa Gounder i.e., the father of the defendants purchased the share of the plaintiff's mother Ayyammal under the Sale Deed dated 17.01.1974. Thus, the deceased Marudappa Gounder's family has 3/4th share in the suit property and the plaintiff has got 1/4th share in the suit property. The plaintiff and the defendants are in joint possession and enjoyment of the suit property. The demand made by the plaintiff for amicable partition, despite notice was not accepted. Hence the suit.

4.The case of the defendants in brief as follows:

The suit is not maintainable either in law or on facts. The relationship set out in the plaint is true. It is true that the defendants' father Maruthappa Gounder had purchased the property from the plaintiff's mother under the Sale Deed dated 17.01.1974. The partition pleaded by the plaintiff is not true. It is false to state that the suit property belonged to Veerappa Gounder. The suit property belonged to plaintiff's mother and she had

alienated the same to the defendants' father under the Sale Deed dated 17.01.1974 and there after the defendants' father settled the property in favour of the defendants under the Settlement Deed dated 19.03.1981 and pursuant to the same, the defendants under the Partition Deed dated 30.04.1982, divided the properties amongst themselves and therefore the plaintiff is not entitled to claim any share in respect of the suit property as pleaded by her. Further, the first defendant had alienated the share allotted to him under the above said Partition Deed in the year 1996 itself and the second defendant is in the possession and enjoyment of his share by putting up house construction on the same. The suit is barred by limitation. The plaintiff has not come forward with the suit claiming her share immediately after the sale of the property by her mother and on the other hand she has laid the suit, 33 years after the above said sale and hence the suit is barred by limitation. Further, the suit is bad for non-joinder of necessary parties and hence the plaintiff is not entitled to the reliefs sought for and therefore the suit is liable to be dismissed.

5. In support of the plaintiff's case, PW1 has been examined. Exs.A1 to 3 were marked. On the side of the defendants DW1 has been examined. Exs.B1 to B8 were marked. On a consideration of

the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to grant a preliminary decree in favour of the plaintiff as sought for. The first Appeal preferred by the second defendant failed. Challenging the same, the present Second Appeal has been preferred by the second defendant.

6.The Second Appeal was admitted and the following substantial questions of law are formulated for consideration in this Second Appeal:

(a)Whether the suit is barred by limitation under Article 110 of the Limitation Act?

(b)Whether the suit for partition filed by the plaintiff without impleading the proper and necessary parties is maintainable in law simply because the defendants did not chose to furnish the names and particulars of the proper and necessary parties?

7.Only two points were agitated in this Second Appeal by the learned counsel for the second defendant. One on the question of limitation and the other on the question of the suit being bad for non-joinder of the necessary parties. According to the learned

counsel for the second defendant the suit is hit by limitation under Article 110 of the Limitation Act. It is contended that the suit preferred by the plaintiff much belatedly after the alienation made by her mother under Ex.B1, Sale Deed dated 17.01.1974 is hopelessly barred by limitation and on that sole ground, the Courts below should have non suited the plaintiff.

8.However, the above plea of the second defendant's counsel cannot be accepted. The plea on the above score made by the second defendant to resist the claim of partition to which the plaintiff is entitled to, has been rejected by the Courts below and a reading of the reasonings given by the Courts below for rejecting the same, does not call for any interference. It could therefore be seen that the Courts below have rightly held that the plaintiff is entitled to claim 1/4th share in the suit property. On the question of limitation, it is argued that the defendants have ousted the plaintiff and therefore, the plaintiff having failed to claim her share in the suit property within the time allowed by law, the plaintiff's suit is barred by limitation.

9.However, as rightly found by the Courts below, the right to claim the partition being a continuous cause of action and when the

defendants have failed to establish that they had ousted the plaintiff from enjoying the suit property and thereby acquired the title to the suit property by way of adverse possession, it could be seen that the contention of the defendants that the suit is hit by limitation cannot be countenanced.

10.As rightly found by the Courts below, insofar as this case is concerned, the defendants have not specifically in the written statement made a plea that they have perfected their title to the suit property by adverse possession by ousting the plaintiff for more than the statutory period. In such view of the matter, when there is no pleading and when there is also no evidence to hold that the defendants have perfected their title to the suit property by ousting the plaintiff beyond the statutory period, it could be seen that the plaintiff is also a co-owner in respect of the suit property and thus the possession of one co-owner is to be deemed in law, the possession of the other co-owners also, and so viewed it could be seen that the plea now put forth by the defendants that the plaintiff having failed to lay the suit within the stipulated time would render her claim time barred cannot be countenanced.

11.In such circumstances, the decision relied upon by the

learned counsel for the second defendant reported in **2010 (4) CTC 640(Venkataramana and 6 others Vs. N.Munuswamy Naidu & 4 others)** would not be applicable to the facts and circumstances of the present case.

12.As regards the plea of non-joinder of necessary parties, it is contended that the first defendant has alienated his share allotted to him under the Partition Deed dated 30.04.1982 and therefore, the suit laid by the plaintiff is bad for non-joinder of necessary parties. The Courts below have disbelieved the partition pleaded by the defendants under the above said Partition Deed and per contra held that the plaintiff is a co-sharer in respect of the suit property and entitled to claim 1/4th share. As regards the contention of non-joinder of the necessary parties, as rightly found by the Courts below, the plea put forth by the defendants in their written statement is very vague and nebulous. They have claimed that the first defendant had alienated his share in the year 1996. It has not been averred in the written statement as to whom the first defendant had alienated his so-called share under what mode, when actually the sale was effected and whether the purchasers had put up any construction or residing in the suit property etc. As regards the above aspects, as rightly found by the Courts below,

the particulars are not forthcoming on the side of the defendants either in the written statement or during the course of their evidence. At the foremost it has not been established by the defendants that the first defendant is entitled to alienate any portion of the property to third parties. It could therefore be seen that the alienation if any made by the first defendant would not be binding on the plaintiff insofar as her share is concerned.

13. Further, as found by the Courts below, when the details of the plea of non-joinder of the necessary parties are not made known in the written statement clearly, it could be seen that the plaintiff cannot be found fault with for non impleading the so-called purchasers from the first defendant.

14. In this connection, the Courts below have rightly placed reliance on the decision reported in ***AIR 1993 SC 1587 (Laxmishankar Harishankar Bhatt Vs. Yashram Vasta(dead) by LRs)*** for holding that when there are no averments made in the written statement as to who are the other co-owners and what rights they claim over the suit property, on such ground the suit cannot be dismissed for non-joinder of necessary parties as the same being a very vague plea. Similar is

the position in our case also. Except the bald averment that the first defendant had alienated his share, it has not been brought out as to who had purchased the so-called share of the first defendant, whether the purchaser was the bonafide purchaser for value without notice and whether the purchaser is in the possession of the suit property etc. When the details of the third parties coming into the suit property either by way of purchase or any other mode are not spelt out in the written statement, on such hazy pleas, the suit cannot be dismissed on the ground of non-joinder of the necessary parties. It could therefore be seen that no interference is warranted to disturb the findings of the Courts below that the suit cannot be dismissed on the ground of non-joinder of necessary parties.

15. In the light of the above position, the decision relied upon by the learned counsel for the defendants reported in **2009 (3) CTC 760 (Balamani and Others Vs. S. Balasundaram)** is found to be inapplicable to the facts and circumstances of the present case. As seen supra, when the details of the third parties claiming any right in the suit property have not been made out, it could be seen that on such vague pleas, the suit cannot be rejected on the ground of non-joinder of necessary parties. If really the so called

purchasers from the first defendant have any legal right over the suit property purchased, nothing prevented the defendants from taking steps to implead them as the parties in the suit. Therefore, without giving any particulars of the so-called purchasers and also not establishing the same by adducing any evidence, to expect the plaintiff to implead the so-called purchasers, as found by the Courts below, cannot be acceded to and so it could be seen that the suit cannot be dismissed on the plea that the plaintiff has failed to implead the so-called purchasers from the first defendant.

16.The learned counsel for the defendants contended that the plaintiff during the course of her evidence has admitted that the first defendant had alienated his share and left. Therefore, the plaintiff having admitted the alienation of the first defendant, the plaintiff is bound to implead the purchasers in the suit for partition laid by her.

17.However, the above contention cannot be accepted straightaway. A reading of the evidence of the plaintiff wholly would go to show that the plaintiff has asserted that her share in the property still remains and she has also subsequently disputed that she has knowledge about the alienation made by the first

defendant. That apart, the plaintiff has also denied the suggestion that she knew that the purchasers had put up building on the suit property. Such being the position, the vague plea of non inclusion of necessary parties would not by its own without proof or further pleadings disentitle the plaintiff to claim her relief. Nothing prevented the defendants from giving full particulars with reference to the so- called alienation made by the first defendant or mark the copy of the sale deed said to have been executed by the first defendant in favour of the third parties. That apart, the first defendant has also not gone into the witness box to substantiate his plea of alienation in favour of the third parties.

18.In the light of the above discussions, the substantial questions of law framed are answered in favour of the plaintiff and against the appellant. In conclusion, I hold that the appellant has failed to establish that the Second Appeal deserves acceptance and accordingly the Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

.11.2016

Index: Yes/No
Internet:Yes/No

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To

- 1.The I Additional District Court,
Coimbatore
- 2.The II Additional Sub Court,
Coimbatore

T.RAVINDRAN.J.,
Dn

S.A.No.324 of 2011

24.11.2016