

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.02.2017

Pronounced on : 17.02.2017

CORAM

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

S.A.No.661 of 1997

1.Mara Naicker (died)

2.Pongi Annan

3.Pachi Ammal

4.Pazhani Ammal (died)

(2nd appellant recorded as legal representatives of the deceased 1st and 4th appellants (vide memo dated 08.09.2011) as per order dated 31.10.2011 in S.A.No.661/1997

5.Annammal

(5th Appellant brought on record as LR.of deceased 1st appellant vide order of Court dated 25.06.2014 made in CMP.Nos.1163 to 1165/2011)

.. Appellants/Defendants 1to4 and LR.of deceased 1st appellant

Vs.

1.Subbyal

2.Superintending Engineer,
Tamil nadu Electricity Board,
Periyar Power Project, Mettur Road,
Erode.

3.Junior Engineer,
(Operation & Maintenance)
Tamil Nadu Electricity Board,
Gobichettipalayam (South)

(Respondents 2 & 3 given up as they remained ex-parte)

..Respondents/Plaintiffs & Defendants 5 & 6

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree in A.S.No.49 of 1995 dated 12.11.1996 on the file of the Sub Court, Gobichettipalayam against the judgment and decree in O.S.NO.289 of 1992 dated 01.06.1995 on the file of the District Munisf Court, Gobichettipalayam.

For Appellant : Mr.M.Naraayanaswamy

For R1 : Mr.R.Babu for
Mr.N.Manoharan

For R2&3 Given up

JUDGMENT

The defendants are the appellants before this Court. The suit was filed for partition and injunction restraining the defendants 5 and 6 from providing the electricity service to the defendants 1 to 4 in the bore well put up by them in the suit property.

2. The facts of the case leading to the appeal is that the suit property was settled in favour of the plaintiff through the settlement deed dated 15.07.1968 by Maranaicker. After life time of her mother, the plaintiff is entitled to 1/8th share, the 1st and 3rd defendants are entitled for 2/8th share, the 2nd defendant is entitled for 3/8th share and the 4th defendant is entitled for 2/8th share. The suit property was in joint possession by the defendants and the plaintiff without any partition by metes and bounds.

3. The request of the plaintiff to effect partition was not conceded by the defendants 1 to 4, while so, the defendants 1 to 4 a put up a bore well in the suit property, removed the standing trees and also trying to get electricity service connection without the consent of the plaintiff. She being the co-owner, the defendants 5 and 6 cannot provide electricity service to the suit well without her consent. Therefore, the present suit for partition by metes and bounds and allot of 2/8th share to the plaintiff and injunction restraining the defendants 5 and 6 from providing electricity service connection.

4. In the written statement, the defendants 2 and 3 have accepted the execution of settlement deed dated 15.07.1968 executed by Maranaicker. However, claim that partition has been effected 22 years back, even prior to survey settlement and as per the partition, patta has also been issued to the respective sharers. According to the partition, Maranaicker/ father of the plaintiff was allotted the S.Nos.69/2, 69/6, 69/7, 69/9 and 69/4. Periya Palaniyammal and Chinna Palaniyammal were allotted the S.No.69/3, the plaintiff and the first defendant were jointly allotted S.Nos.69/2, 69/6, 69/7 & 69/9. Accordingly, the joint patta was issued to the plaintiff and the first defendant for S.No.69/14, joint patta was also issued to Periya Palaniyammal and Chinna Palaniyammal to the properties allotted to them. The second defendant, Pongi Annan got the property allotted to Periya Palaniyammal through the

settlement deed dated 21.12.1967. In one such property bearing S.No.69/3 bore well is located. The plaintiff and her mother never objected the mutation of records and issuance of patta after resurvey. They were fully aware of it. Therefore, after lapse of 22 years from the date of partition, which was accepted and acted upon by all the parties are concerned, the plaintiff is not entitled for further share in the entire extent of land in S.No.69 by way of partition. The defendants have improved their respective shares after partition. Therefore, the plea of plaintiff that properties is in joint possession and enjoyment is false. The bore well is dug not in the common property as contended by the plaintiff. It is in the land owned by the second defendant. Therefore, the suit is not maintainable and liable to be dismissed.

5. Based on this rival pleadings, the trial Court framed issues and in the trial, examined P.W.1 & 2 on behalf of the plaintiff, admitted 9 documents marked as Exs.A1 to A9, on behalf of the defendants examined four witnesses and 22 documents marked as Exs.B1 to B22. After appreciation of the above evidence, the trial court arrived at the conclusion that the plaintiff is entitled for share in the property and without her consent, the other co-sharers defendants 1 to 4 cannot get service connection for the bore well located in the common property. Accordingly, decreed the suit as prayed for.

6. Aggrieved by the judgement and decree of the trial Court, the defendants preferred first appeal in A.S.No.49 of 1995. Appellants re-iterated their stand that the partition has already been effected resulting in mutation of the revenue records and improvement. Therefore, the plaintiff cannot seek for further partition. The appellate court formulated the following point for determination.

- i). Whether the Judgment of the trial Court the proper?
- ii) What relief, the appellant is entitled for?

7. The appellate Court rejected the contention of the appellants/defendants and dismissed the appeal, confirming the Judgment and decree of the trial Court. Against the concurrent findings at the Court below and Aggrieved by the same, the defendants have preferred the present appeal.

8. This Court at the time of admission has formulated the following substantial questions of law:

1. Whether in law the Court below are right in over-looking that under Section 27 of the Limitation Act the first respondent's right to institute a suit for possession was extinguished?

2. Whether in law the lower Appellate Court is right in failing to frame proper points of determination as provided under order 41 Rule 31 C.P.C?.

9. The specific case of the plaintiff is that she is entitled for share in the property through the settlement deed dated 15.07.1968, which is marked as Ex.A9. As per the settlement deed, the suit properties were settled in favour of Marakkal for her life and after her life time to devolve upon the plaintiff's. The said Marakkal died four years prior to institution of the partition suit. This fact is not denied by the defendants. Whiles, in such situation, the case of the plaintiff will not fall under Section 25 of the Limitation Act.

10. The contra case of the defendants in the suit for partition is that 22 years ago there was oral partition among the sharers that means the oral partition should have been taken place somewhere in the year 1970, since the suit is of the year 1992. This cannot be a true statement because Ex.B1 dated 04.1.1979, Ex.B3 dated 02.03.1972, Ex.B4 dated 02.01.1979 in documents relied by the defendants, the properties are described as common property. If the oral partition pleaded by the defendants are true then the documents of the years 1972 and 1979 should have reflected the fact of oral partition. Non reference of the partition in these documents indicates that there was no formal partition among the sharers and whatever separate enjoyment of the respective parties been only for the sake of convenience of parties.

11. For the above said reason, the trial Court and the Appellate Court concurrently held against the defendant, insofar as, the plea of oral partition concern. No proof for oral partition and evidence available shows the property held in common. Therefore, Section 27 of the Limitation Act cannot be pittered against the plaintiff.

12. Insofar as, failure to frame proper point for determination, this Court finds that, appellate Court ought to have framed the point for determination more precisely to decide the dispute under consideration. In this case, this Court finds that the Lower Appellate Court has arrived at decision and providing the reason for the decision, without proper formulation of point for determination. So, no prejudice caused to the appellant due to the lapse of non formulation proper point for determination.

13. In view of this Court, since the appellate Court has not omitted any essential point for determination, no way prejudice to the appellant counsel. Only essential error of law committed by both Courts below is in respect of granting

interim injunction restraining the defendants 5 and 6 from providing electricity service to the defendants 1 to 4. The trial Court has erroneously granted injunction stating that one of the co-owners is objecting the Electricity Board (represented by the defendants 5 and 6) for providing electricity service for the bore well located in the suit property; the appellate Court also without considering the illegality in the said finding very superficially dealt the issue and confirmed the order of the trial Court.

14. The appellate Court should have formulated a separated point for consideration in respect of injunction relief sought for by the plaintiff, since it has failed to do so, the Judgment of the Court below requires interference to the limited extent of pointing out the illegality committed by the courts below in granting injunction and suffice if that illegality is rectified. The service connection of the bore well to draw water is very essential for any agricultural land. One of the co-sharers, who have minuscule share in the property cannot object the majority share holders from drawing water, providing if it is not detrimental to the interest of the minuscule share holders. The plaintiff is declared only 1/8th share in the suit properties, the remaining 7/8th share is with defendants 1 to 4. By way of injunction, majority share holders who are holding 7/8 share are now been deprived of enjoying the fruits of the bore well. Therefore, this Court finds that there is illegality in the Judgment of the trial Court regarding the relief of injunction granted against the defendants. Hence the Judgment and Decree of the trial Court as confirmed by the appellate Court is liable to be set aside in respect of the injunction granted.

15. Accordingly, this second appeal is partly allowed. The relief of injunction granted in favour of the plaintiff, is set aside and the relief of preliminary decree allotting 1/8th share to the plaintiff is confirmed. No costs.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

kkd

To

1 The Sub Judge, Gobichettipalayam.

2.The District Munisf, Gobichettipalayam.

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VR Section, High Court, Madras.

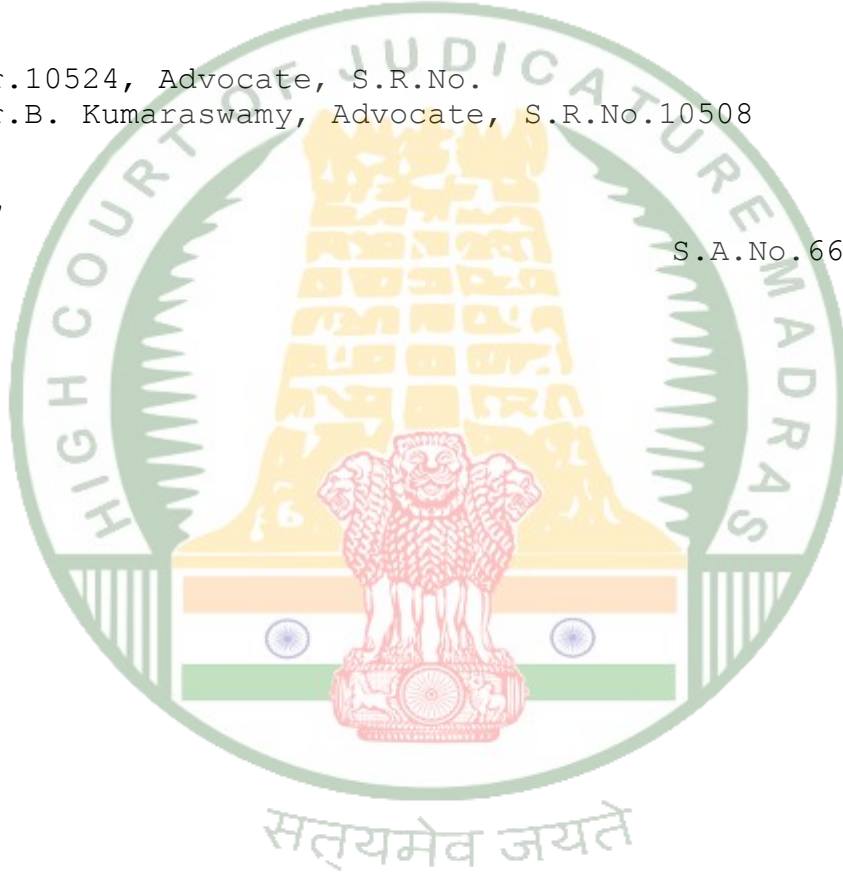
+1cc to Mr.10524, Advocate, S.R.No.

+1cc to Mr.B. Kumaraswamy, Advocate, S.R.No.10508

PA(CO)

Eu 22.3.17

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