

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.01.2017

CORAM:

THE HONOURABLE Mr.JUSTICE R.SUBRAMANIAN

A.S.Nos.327 and 486 of 2010
and MP No.1 of 2010 in A.S.No.327 of 2010

N.Murugesan

... Appellant in both the
Appeals/Plaintiff

Vs

1. Smt.Nanjammal
2. Smt.Dhanalakshmi
3. Smt.Bhakialakshmi
4. Jacob Mathew
5. Kumar
6. Nasser (Deceased)
7. Avinashiappan
8. The Commissioner,
Coimbatore Corporation
Coimbatore.
9. C.S.Hanifa
- 10.A.Abbas
- 11.A.Mustaffa

... Respondents in A.S.No.327 of 2010/
Defendants

Avinashiappan @ Mani

... Respondent in A.S.No.486 of 2010/
Defendant

Prayer in both the appeals:-

These appeals are filed under Section 96 of Code of Civil Procedure, against the Judgment and Decree made in O.S.No.175 of 2002 & O.S.No.2229 of 2004, dated 31.01.2007, on the file of the Additional District and Sessions Court cum Fast Track Court No.2, Coimbatore.

For Appellant-Mr.S.Vediappan for M/s.R.Karthikeyan
in both appeals

For Respondent -Mr.P.Jagadeesan for R1 to 3 in As.327/10
Mr.J.Prakasam for Respondent in AS.486/10
for 587 respondent in AS 327/10

C O M M O N J U D G M E N T

A.S.No.327 of 2010 has been filed against the dismissal of O.S.No.175 of 2002, which is a suit for partition and A.S.No.486 of 2010 has been filed against the the dismissal of O.S.No.2229 of 2004, which is a suit for demarcation, permanent injunction and for mandatory injunction, directing the defendant to remove the newly put up construction. The plaintiff in both the suits is one and the same person namely Murugesan.

2. The claim of the plaintiff in O.S.No.175 of 2002 is as follows:-

The suit 'A' schedule property was purchased by his father Nanjappa Gounder on 02.05.1944 from and out of the sale proceeds of the ancestral land at Telungupalayam village. The said Nanjappa Gounder had married one Kaliammal as his first wife, through her, he had three children viz., Kandasamy, Murugesan (plaintiff) and Saraswathy. The first wife Kaliammal died in 1953. Thereafter, the said Nanjappa Gounder married Nanjammal (first defendant herein), through whom, he had two children viz., Dhanalakshmi and Bhagyalakshmi, arrayed as defendants 2 and 3. According to the plaintiff, the suit 'B' schedule property was purchased by Nanjappa Gounder on 19.02.1961 from and out of the income from the suit 'A' schedule property and the compensation that was paid by the Coimbatore Municipality when it acquired a portion of suit 'A' schedule property. Therefore, according to the plaintiff, the suit properties are the joint family properties and as such, he is entitled to a share as a coparcener. It is the further case of the plaintiff that Kandasamy, son of Nanjappa Gounder, through his first wife Kaliammal, died in the year 1967, as a bachelor and therefore, his share would devolve on the plaintiff. Therefore, the plaintiff had claimed in all 7/9 shares in the suit 'A' and 'B' schedule property. In the course of the pleadings, the plaintiff had also stated that his sister Saraswathy got certain properties and separated herself from the joint family.

3. The suit was resisted by the defendants, who are the second wife and the daughters through the second wife, contending that the suit properties are not ancestral properties of Nanjappa Gounder. According to them, Nanjappa Gounder was working in M/s.Kaleeswara Mills, Coimbatore. The suit 'A' schedule property was purchased by him, from his own funds. The suit 'B' schedule property was purchased by the first defendant out of the sale proceeds of her jewels in the year 1961 and therefore, the plaintiff cannot claim any share in the suit 'B' schedule properties. Even with reference to suit 'A' schedule property, the defendants had contended that the plaintiff had filed an earlier suit in O.S.No.823 of 1965, seeking partition and separate possession of his 1/6 share in the suit 'A' schedule property and a preliminary decree came to be passed on

23.09.1966, declaring that the plaintiff is entitled to 1/6 share. Subsequently, the Sister of the plaintiff viz., Saraswathy, who was the second defendant in the said suit, filed an application for passing of final decree in I.A.No.69 of 1967. During the pendency of the said application, Kandasamy, son of Nanjappa Gounder, through his first wife, died unmarried on 08.02.1967.

4. In the said final decree application filed by the second defendant Saraswathy, a compromise was entered into on 22.09.1970 and a compromise decree was passed by the Court. As per the said compromise, it was agreed that the present plaintiff/Appellant would be entitled to 1/4 share and Saraswathi, the petitioner in the final decree application/the second defendant in O.S.No.823 of 1965, would be entitled to 1/4 share and the defendants in the present suit, who were respondents 2 to 4 in the final decree application, would be entitled to half share in the suit 'A' schedule property. Under the said compromise, Saraswathy was allotted a particular property towards her share and there was also a direction to the other sharers to pay a sum of Rs.700/- to her towards the difference in value of the properties allotted to her. Clause 7 of the said compromise decree also provides that if any one of the parties, does not abide by the same, the other parties can execute the said decree through Court. The defendants would also plead that in the light of the earlier suit for partition in respect of the suit 'A' schedule property, the present suit is not maintainable.

5. On the above pleadings, the learned Additional District Judge, Coimbatore [Fast Track Court No.2] framed the following issues:-

- (i) whether the plaintiff is entitled to a share as claimed?
- (ii) whether the plaintiff is entitled to mandatory injunction as prayed for? and
- (iii) to what relief the plaintiff is entitled to?

The following additional issue was framed on 27.02.2006:-

- (i) whether the present suit is barred by res-judicata, in view of the judgment in O.S.No.823 of 1965?

6. The plaintiff in O.S.No.175 of 2002 had also filed O.S.No.2229 of 2004 seeking demarcation of the boundaries between Door Nos.102 and 103, for a permanent injunction restraining the defendants from interfering with the plaintiff's enjoyment of Door No.102, for a mandatory injunction directing the defendant to remove the construction put up by him and also for a mandatory injunction directing the defendant to restore the construction, which according to the plaintiff, was demolished by the defendant and others. The defendant in the said suit, Avinashiappan, is the purchaser of Door No.103 from Saraswathy, the sister of the plaintiff and a tenant under the first defendant, with reference to Door No.102. The plaintiff would contend that he is also

entitled to the property in Door No.102 and therefore, he is seeking aforesaid relief against the said Avinashiappan in respect of the boundary between Door Nos.102 & 103. The said suit was resisted by Avinashiappan on the ground the plaintiff has no right in Door No.102 and he being the owner of the property in Door No.103 is entitled to put up construction in his property. He had further contended that he is a lessee under the first defendant in respect of the property situated at Door No.102. Therefore, the suit filed by the plaintiff is totally misconceived.

7. On the above pleadings, the learned Additional District Judge, Coimbatore [Fast Track Court No.2] framed the following issues:-

- (i) Whether Door Nos.100, 101, 102 belong to the plaintiff?
- (ii) Whether the plaintiff is entitled to maintain the suit?
- (iii) Whether the defendant had caused any damage to the wall situated between Door No.102 and 103?
- (iv) Whether the plaintiff has given proper description of the property sought to be removed by him by way of mandatory injunction?
- (v) Whether the defendant has put up any construction in Door No.102?
- (vi) Whether the plaintiff is entitled to fixation of rent for Door Nos.102 and 103?
- (vii) Whether the plaintiff is entitled to permanent injunction as claimed for by him?
- (viii) Whether the plaintiff is entitled to relief of the mandatory injunction as claimed by him? and
- (ix) To What other relief the plaintiff is entitled to?

8. I have heard Mr.S.Vediappan, learned counsel for the appellant and Mr.P.Jagadeesan, learned counsel for the respondents 1 to 3. ***Mr.J.Prakasam, Learned Counsel appearing for the respondent in AS.486/2010 and for the 5th and 7th respondents in AS.No.327/2010.** The other respondents are all tenants and some of them have been given up, as they have remained ex-parte before the Trial Court. ***The 8th respondent has been served.** He has not chosen to enter appearance either in person or through counsel duly instructed. Notices to respondents 4 and 9 to 11 have not been served. But I find that they are all tenants and they remained ex-parte before the Trial Court. Since I have heard the counsels for the contesting parties before this Court, I proceed to dispose of the appeals on merits.

9. The following questions arise for determination in the appeal:-

- (i) Whether the present suit for partition is maintainable in the light of the admitted portion that earlier suit in O.S.No.823 of 1965 was also filed by the plaintiff and the same

has ended in a decree;

(ii) Whether the plaintiff is entitled to claim a share in the suit 'B' schedule property?

(iii) whether the plaintiff is entitled to relief of demarcation, permanent injunction and mandatory injunction sought for by him in O.S.No.2229 of 2004 insofar as the suit 'A' schedule property is concerned.

10. It is the case of the plaintiff in the present suit that the suit 'A' schedule property was purchased out of the money obtained by the deceased Nanjappa Gounder from the sale of ancestral properties. He would also claim the share of his brother Kandasamy as a class 2 heir under Section 8 of the Hindu Succession Act, 1956.

11. Mr.S.Vediappan, learned counsel for the appellant vehemently contended that the first defendant as DW-1 has admitted that when the suit in O.S.No.823 of 1965 was filed, the family remained joint and counsels were engaged by them and therefore, the decree in O.S.No.823 of 1965 was brought about by the first defendant. He would further contend that there was a re-union in the family after the decree in O.S.No.823 of 1965.

12. Per contra, Mr.P.Jagadeesan, learned counsel for the respondents 1 to 3 contended that the plaintiff has filed the earlier suit for partition, which had resulted in preliminary decree as well as final decree. Therefore he cannot seek another partition by projecting a totally different case. Mr.P.Jagadeesan also relied upon the Suit Register Extract in O.S.No.823 of 1965, which was marked as Ex.A-19, and contended that the present plaintiff, who was also the plaintiff in the said suit had in fact claimed only 1/6 share in the suit 'A' schedule property, thereby admitting that the suit 'A' schedule property is the self-acquired property of the deceased Nanjappa Gounder. According to the learned counsel, the second suit for partition is not maintainable.

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13. I have gone through the pleadings as well as the evidence. I find that the plaintiff has suppressed the filing of O.S.No.823 of 1965 and he has very cleverly pleaded that his sister Saraswathy separated herself by getting some share in the joint family property. He has not disclosed as to how some share was allotted to her. Ex.A-19 clinchingly proves that the suit in O.S.No.823 of 1965 resulted in a preliminary decree and a compromise decree in the final decree petition filed by the second defendant therein namely Saraswathy.

14. In my considered opinion, the compromise that was entered into in the final decree application on 22.09.1970, is very clear. Under the said compromise, 1/4 share was allotted to the plaintiff in that suit, who is also the plaintiff in the present suit for partition. Half share is allotted to the defendants 3, 4 and 5 in O.S.No.823 of 1965 and they are shown as defendants 1 to 3 in the present suit. Another 1/4 share was allotted to Saraswathy and a specific portion of the property was allotted to her under the compromise decree. A clause was also incorporated to the effect that she should be put in possession of the property allotted to her. It is an admitted fact that Door No.103 was allotted to Saraswathy under the compromise decree and she has sold the same to the defendant in O.S.No.2229 of 2004 Avinashiappan.

15. Mr.S.Vediappan, learned counsel for the appellant would invite my attention to certain portions of DW-1's evidence and contended that DW-1 had in fact admitted that the family remained joint even after the suit in O.S.No.823 of 1965, I am unable to countenance his submission for the following reasons:-

(a) on the passing of the preliminary decree in O.S.No.823 of 1965 at the instance of the plaintiff himself, there is severance of status in the family.

(b) the plaintiff has not pleaded any re-union.

(c) DW-1 has deposed that after the compromise decree dated 22.09.1970, there was a partition between the plaintiff and defendants 1 to 3 and they have been allotted separate portions and were in enjoyment of the said portions allotted to them.

16. I am unable to countenance the submission of Mr.S.Vediappan, learned counsel for the appellant to the effect that there was a re-union in family due to lack of pleadings and evidence at the side of the plaintiff. Apart from the above, the plaintiff has taken a totally new stand in the present suit. He never claimed that the property was ancestral property in the earlier suit. The very fact that he has sought for 1/6th share would show that he had admitted the nature of the property as the self acquired property of deceased Nanjappa Gounder. Therefore, I am of the considered opinion that the second suit filed by the plaintiff for partition with reference to the suit 'A' schedule property is not maintainable.

17. With reference to the suit 'B' schedule property, the plaintiff would claim that Nanjappa Gounder had purchased the same out of the income from the suit 'A' schedule properties as well as the compensation received when a portion of the 'A' schedule property was acquired by the Coimbatore Municipality. Admittedly, the sale deed in respect of the 'B' schedule property stands in the name of the first defendant. The fact that the plaintiff had not included the suit 'B' schedule property when he filed the earlier suit in O.S.No.823 of 1965, would itself show that the claim of the plaintiff relating to the suit 'B' schedule property is an after-thought. There is another hurdle in the way of the plaintiff, when he attempts to put forth a claim over the 'B' schedule property. Section 3(2)(a) of the Benami Transactions (Prohibition) Act, creates a statutory presumption in respect of the properties purchased in the name of a wife or unmarried daughter by a person. The presumption that the purchase was for the benefit of the wife, though the said presumption is rebuttable, no evidence strong enough to rebut the said presumption, has been let in by the plaintiff. Therefore, the plaintiff cannot lay the claim for the suit 'B' schedule properties.

18. It is also contended by the defendants that after the compromise decree in the year 1970, there was a oral partition between the plaintiff and the defendants, wherein the plaintiff is allotted certain portions of the property and the defendants were allotted certain portions. They are in enjoyment as per the said oral partition.

19. In view of the above discussion, I find that the plaintiff is not entitled to any relief in the present suit for partition in O.S.No.175 of 2002.

20. Insofar as the suit in O.S.No.2229 of 2004 is concerned, it is based on the assumption that the suit properties remained undivided and the plaintiff is also entitled a share in Door No.102. Since I have already found that the plaintiff is not entitled to any right in Door Nos.102 and 103. The defendant Avinashiappan is the owner of the property in Door No.103, having purchased the same from the plaintiff's sister and a tenant in respect of Door No.102 under the first defendant. The claim of the plaintiff for demarcation, permanent injunction and mandatory injunction is not acceptable. The Trial Court, in fact, found that the plaintiff has not proved that he is entitled to any portion of Door No.102. In the light of the above findings, the plaintiff is not entitled to seek any of the reliefs in O.S.No.2229 of 2004.

21. In fine, both the appeals are dismissed, confirming the judgment and decree of the Trial Court. However, considering the facts and circumstances of the case and the relationship between the parties and the fact that ***is a Subsequent Purchaser** there shall be no order as to costs in both the appeals.

-s/d-
Assistant Registrar

***Corrected order to issue
as per order of this court
dated 02.02.2017 in As.327
& 486/10**

-s/d-

**Assistant Registrar(CO)
dt:15/02/2017**

True Copy

Sub-Assistant Registrar

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To

1.The Additional District
and Sessions Judge
Fast Track Court No.2
Coimbatore

2. The Section Officer,
V.R. Section, High Court, Madras.

+2 ccs to Mr.S.Vediappan Advocate sr 1149 & 1150
+1 cc to Mr.P.Jagadeesan Advocate sr 862
+1 cc to Mr.J.Prakasam Advocate sr 863

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