

IN THE HIGH COURT OF JUDICATURE AT MADRAS

**Reserved on:09.02.2017
Pronounced on:21.02.2017**

Coram

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

**Second Appeal No.1094 of 2009
and
C.M.P.No.6115 of 2016**

1.Jayaraman
2.Anbazhagan
3.Ramasamy
4.Elangovan

.. Appellants

/versus/

1.Krishnasami Pillai
2.Mathiazhagan

.. Respondents

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree of the Additional Subordinate Judge's Court at Tiruvannamalai dated 13.03.2007 in A.S.No.81 of 2005, confirming the judgment and decree of the Additional District Munsif Court of Tiruvannamalai dated 18.08.2005 in O.S.No.368 of 2002.

For Appellants :Ms.P.T.Asha for
Sarvabhauman and Asso.

For Respondents :Mr.A.K.Kumarasamy for R1
No appearance for R2

J U D G M E N T

The suit for declaration and injunction was decreed by the trial Court and on appeal, the same was confirmed by the first appellate Court. Aggrieved by the concurrent finding of the Courts below, the defendants are before this Court as appellants.

2. For the sake of convenience, the parties are described as per their rank and status shown in the original suit.

3. The brief facts of the case is that the plaintiff, 1st defendant and one Rajangam are sons of one Muthusamy Pillai. The suit property originally belonged to one Thillaikannu @ Periyamayagam, S/o Chinnasamy. On 21.03.1953, Muthusamy purchased undivided half share from the said Thillaikannu @ Periyamayagam and his son Alphonse. This property and other properties were jointly enjoyed by Muthusamy and his sons namely, Krishnasamy Pillai-plaintiff, Jayaraman-first defendant and Rajangam. There was an oral partition among them 30 years ago. The first defendant Jayaraman was allotted $\frac{1}{4}$ share in the joint family property. Likewise, the plaintiff Krishnasamy Pillai and his brother Rajangam were allotted each $\frac{1}{4}$ share in the joint family property, which was jointly enjoyed by the plaintiff Krishnasamy Pillai and Rajangam.

Some time later, that was divided between them. The undivided $\frac{1}{2}$ share in the suit property was allotted to their father Muthusamy. It was enjoyed by him along with his co-sharer Pachaiyappa Pillai. The share of Muthusamy Pillai was brought under Court auction pursuant to the decree passed in O.S.No.1021 of 1973. Pachaiyappa Pillai has purchased $\frac{1}{2}$ share of Muthusamy Pillai through court auction dated 02.01.1974. Later, Pachaiyappa Pillai and his son Govindaraj sold the property to the plaintiff Krishnasamy Pillai vide, sale deed dated 02.11.1976. Till 1980, it was jointly enjoyed by the plaintiff and his father. In 1980, an oral partition was effected between Muthusamy Pillai and his sons the plaintiff-Krishnasamy Pillai and the first defendant-Jayaraman. The undivided half share of the suit property was allotted to the plaintiff and from that day onwards, the plaintiff is in possession and enjoyment of the suit property and also paying tax. Thus, the plaintiff being in possession and enjoyment of the entire suit property for more than 25 years, by purchase as well as by continuous enjoyment he has perfected the title over the property. The first defendant has stealthily inserted the survey number of the suit property in the patta issued in his name. Taking advantage of it, the defendants are trying to interfere with the possession and enjoyment of the suit property. Hence, suit for declaration and injunction was filed.

4. The defendants in the written statement admit that the suit

property originally belonged to Muthusamy Pillai and the same was jointly enjoyed by him and his three sons as joint family property. 1.71 acres of land in S.No.23/2 was purchased by Muthusamy Pillai on 21.03.1953. from one Tillaikannu. Pursuant to the decree passed in O.S.No.589 of 1969, Pachiappa Pillai purchased half share in the suit property for which the sale price was given by Muthusamy Pillai and the said Muthusamy Pillai was enjoying the same absolutely. Pachiappa Pillai was only a name lender to the court auction purchase. The three sons of Muthusamy effected partition among themselves and the suit property was allotted to the first defendant. Thereafter, the first defendant is in possession and enjoyment of the property. The portion of the property which was purchased by Muthusamy Pillai in the name of Pachiappa Pillai as binami in S.No.42/1, 1.24-1/2 acres of land out of 2.49 acres was allotted to the plaintiff and the plaintiff is enjoying that portion of the property. The alleged sale transaction dated 2.11.1976 purported to have been executed by Pachiappa Pillai, S/o Govindaraj in respect of half share of the suit property, is only sham and nominal document. The plaintiff was never in possession of the suit property. It is in fact in possession of the first defendant. Making use of his influence, the plaintiff got the transferred patta in his name. Therefore, knowing that, complaint to the revenue officer was lodged in the year 2002. After enquiry patta was

issued to the first defendant. The averments of the plaintiff that there was a partition between the plaintiff and Rajangam on 31.01.1976 and another oral partition was effected in the year 1980 in respect of undivided half share in the suit property, are all denied. Since the plaintiff has no cause of action or right over the suit property, the suit is liable to be dismissed.

5. The trial Court pointed out that as per Ex.A1, the father of the plaintiff has purchased only a portion of the suit property and the remaining portion had been purchased by Pachiappa Pillai on 02.01.1974 in Court auction. The plaintiff's father Muthusamy Pillai and Pachiappa Pillai happened to be brothers. This shall not be a reason to infer that Muthusamy Pillai and Pachiappa Pillai were enjoying the suit property jointly as joint family property. Therefore, the plea of the first defendant that during the oral partition the entire suit property was allotted to him is unbelievable. Accepting Exs.A2,A3 and A4, the trial court held that the contention of the plaintiff that in the year 1980 oral partition among Muthusamy Pillai and his sons was effected is proved. A portion of the suit property has been purchased by the plaintiff on 02.11.1976 vide Ex.A13 from Pachiappa Pillai, the remaining portion was allotted to him during oral partition in the year 1980. Ex.A13 document being a

registered document of title and possession in favour of the plaintiff is established. Therefore, the plaintiff is entitled for the relief of declaration and injunction.

6. On appeal, the first appellate Court while confirming the decree passed by the trial Court observed that, the defendants though pleaded that the sale transaction dated 02.1.1974 was a benami transaction and his father Muthusamy purchased half share in the suit property in the name of Pachiappa Pillai and it form part of the joint family property of Muthusamy, no evidence was let in to prove benami transaction or enjoyment of the property as joint family property. Examining Exs.A14, A16, A17 and Exs.B17 to B39 Adangal and other documents, the appellate Court has recorded that in all the documents except for Fasali 1395, the name of Krishnasamy Pillai the plaintiff and and others finds place. Whereas, in Fasali 1395 exclusively the name of Krishnasamy Pillai is mentioned. Therefore, through these documents the first appellate Court has inferred that the plaintiff is in continuous enjoyment of the property and confirming the trial court decree.

7. Aggrieved by the concurrent finding, the appellants/defendants

1,3 to 5 have filed the present Second Appeal. At the time of admission, this Court has formulated the following Substantial Questions of Law for consideration:

“(1)Whether the respondent, who has admitted that joint patta has been granted to him and the first appellant in the earlier suit O.S.No.693 of 1984 in respect of the suit property is not estopped from claiming an exclusive right now in respect of the suit property?

(2)Is not the suit barred by limitation inasmuch as even in the year 1984 the appellants had staked a claim to the suit property in the suit O.S.No.693 of 1984 on the file of the District Munsif Court at Tiruvannamalai?

(3)Is not the present suit barred by the principles of constructive resjudicata in view of the admission with regard to the joint patta issued in the name of the parties herein, in view of the judgment made in O.S.No.693 of 1984 on the file of the District Munsif Court, Tiruvannamalai?.”

8. The learned counsel appearing for the appellants submitted that the Courts below failed to consider the revenue records in proper perspective and in Ex.B13-patta, the suit property survey number has been subsequently added using the influence of the plaintiff and such entry cannot be given much credence for deciding the case.

9. The plaintiff claim of title based on the sale deed dated 02.11.1976, then on the basis of oral partition in the year 1980 as well as on the basis of adverse possession. The Courts below failed to appreciate that title on the basis of document and on the basis of prescription are contradictory to one another. The courts below failed to consider the fact that in the earlier suit O.S.No.693 of 1984 when the plaintiff was examined as PW1, he has admitted that joint patta has been given to him and the appellant/1st defendant. Therefore, the plaintiff/1st respondent is estopped to plea contrary. The present suit for declaration is filed after 12 years from the day of above said admission of title. Hence, the present suit is barred by limitation. The Courts below failed to appreciate Ex.B14 and Ex.B43 properly the earlier suit O.S.No.693 of 1984. While the present appellant put forth his exclusive right in the suit property, the 1st respondent failed to stake his claim. Having failed to stake his claim in the earlier suit, the present suit is barred by the principle of constructive res judicata.

10. Per contra, the learned counsel appearing for the 1st respondent/plaintiff submitted that half share in the suit property was purchased by the plaintiff's father under Ex.A1 and the remaining ½

share vide Ex.A2 was purchased by the plaintiff being the absolute owner of the property, he is entitled for declaration. The Courts below after appreciating the evidence, have granted the relief of declaration based on proof and facts. The grounds raised by the appellants are not sustainable in the eye of law and there is no substantial question of law for the Court to interfere with the judgments of the Courts below.

11. The schedule of property which is the subject matter of this appeal is as under:-

"Schedule of Property

Thiruvannamalai District,
Thiruvannamalai Revenue District, Vettavalam
Sub Division, Su.Nallur Village, S.No.23/2-
0.69.0 hectare kist Rs.2.34 (old Parimash
No.72)"

12. The case of the plaintiff is that he purchased ½ share in the suit property from Pachiappa Pillai and Govindaraj under Exs.A2 and A13 which are the certified copy of the sale deed and original registered sale deed respectively. Perusal of this sale deed indicates that Krishnasamy Pillai has purchased the second item of property, which is 85 ½ cents, out of 1.71 acres in S.No.23/2 from Pachiappa Pillai and his son Govindaraj. The recital of sale deed indicates that this property was purchased by his vendor under court auction held in R.E.P.No.1021 of 1973 in O.S.No.589

of 1969. The remaining $\frac{1}{2}$ share in the suit property, which was purchased by his father Muthusamy was allotted to him in the oral partition held in the year 1980. Thus, he has become the owner of the entire extent of 1.71 acres in S.No.23/2.

13. Contra, the case of the first defendant is that Pachiappa Pillai purchased $\frac{1}{2}$ share in the court auction held in the year 1974 from out of the money given by Muthusamy Pillai and therefore, Pachiappa Pillai is only a name lender. The transaction is a binami transaction. The suit property was purchased by Muthusamy Pillai and enjoyed by him and his sons. Later, it was allotted to the first defendant during the oral partition held 30 years ago. The case of Benami transaction finds only in pleading but no evidence necessary to prove, benami transaction is placed before the court. He, who assert the existence of a fact should prove the fact asserted exist. Mere a bald averment that the property was purchased by Muthusamy Pillai through Pachiappa Pillai is not sufficient to shift the burden of proof. Therefore, on his own, the plaintiff is entitled for $\frac{1}{2}$ share by purchase.

14. In so far as the remaining half share purchased on

21.03.1953 from Thillaikannu vide registered document Ex.A1 by Mthusamy Pillai, the case of the plaintiff is that during the oral partition held between his father Mthusamy and other brother Rajangam the remaining $\frac{1}{2}$ share in the suit property was allotted to him. Per Contra, the case of the defendants is that two properties purchased by Mthusamy Pillai in the name of Pachiappa Pillai in the court auction. The first item namely S.No.42/1, 1.24- $\frac{1}{2}$ acres out of 2.49 acres was allotted to the plaintiff and the second item of property bearing S.No.23/2 which is the subject matter of the suit, was allotted to the 1st defendant.

15. If one look at the pleadings and relief sought in the earlier suit O.S.No.693 of 1984, the suit has been filed, when there was a dispute between the the plaintiff and the first defendant in the year 1984. The said suit is for declaration and injunction. In that suit, it has been contended by the 1st respondent herein that his father Mthusamy Pillai had ancestral property to the extent of 7 acres of land 20 years ago partition effected between the sharers, in which two and half acres of land was allotted to the defendant and 4 and $\frac{1}{2}$ acres of land was allotted jointly to him and his brother Rajangam. Pursuant to the partition, patta was issued to the individual sharers. After getting their respective share, the parties have alienated or improved the property independently.

Thereafter, between him and his brother Rajangam, 4 1/2 acres of land allotted jointly in the earlier partition was further divided through the registered partition deed dated 31.01.1976 in which the plaintiff Krishnasamy Pillai was allotted properties under 'A' schedule property and Rajangam was allotted the properties under 'B' schedule property. Whiles, the defendant's other brother Jayaraman attempting to interfere with his peaceful possession of A schedule property. Therefore, suit for declaration and injunction.

16. The present suit schedule property is one of the property mentioned as 'A' schedule property in the previous suit. In the earlier suit between the same parties the trial Court has rejected the plea of the plaintiff regarding declaration. Held that admittedly the suit property is an ancestral property. While the father of Muthusamy Pillai is alive, the plaintiff and the defendants, who are his sons cannot seek declaraton before succession gets open.

17. In support of his finding, the trial Court has referred the judgment of the Hon'ble Supreme Court in AIR 1964 SC page 146. Citing this judgment, the Court has rejected the relief of declaration. However, granted the relief of injunction in favour of the plaintiff restraining the

defendants from interfering his peaceful possession and his enjoyment in respect of S.No.23/2.

18. The change in circumstances is that Muthusamy Pillai, who was alive, when the earlier suit in O.S.No. 693 of 1984 disposed of, is no more when the present suit laid, after opening up of the succession; since there is no contra evidence except revenue document, which have been come into existence pending suit, there is no other substantial material evidence to disbelieve the version of the plaintiff. Therefore, this Court finds there is no illegality or perversity in the finding of the Courts below.

19. In the earlier suit in O.S.No.693 of 1984, it is discussed the devolution of title to the sons of Muthusamy Pillai in the light of the fact Muthusamy Pillai was alive at that point of time. The plaintiff was not granted the relief of declaration only for that reason. The other fact asserted by the plaintiff has been accepted in the earlier proceedings and injunction has also been granted in favour of the plaintiff regarding the joint patta exclusion and inclusion of the defendants name in pursuant to the pendency of the suit. Such entry and deletion cannot be given undue importance more than what is deserved. Since such entry is not based on any proper enquiry but a knee jerk reason to the litigation pending.

20. The proven fact in this case is that there had been a division of ancestral property among the sons of Muthusamy Pillai and they were in exclusive possession and enjoyment of the respective shares. Insofar as the suit property is concerned, 85 ½ cents of land was purchased by Muthusamy Pillai and the remaining ½ share (85 ½ cents) has been purchased by the plaintiff himself. Through evidence the plaintiff has proved that the half share in the suit property held by his father Muthusamy was allotted to him and he is in exclusive possession of it. His possession has already been proved and the decree of injunction as against the 1st defendant has been granted by the competent Court in O.S.No.693 of 1984 as early as 26.02.1993 and the defendants have not questioned it till date. The prayer for declaration was not entertained by the Court in the earlier proceeding, not on facts, but on legal point which has already been stated. The present suit is filed immediately after the legal impediment suffered by the plaintiff, when he laid the earlier suit got cleared after the demise of his father Muthusamy Pillai through whom he claims title.

21. Hence, there is no question of limitation involved in the above facts and circumstances. Since the factum of devolution by virtue of partition among the family members has not been disproved by the

defendants, the preponderance of probabilities is in favour of the plaintiff. Admittedly, the plaintiff had been in possession of the entire extent of suit property for a long time, which was never questioned by the defendants till the plaintiff filed the earlier suit for declaration in the year 1984. Even in this suit though he questioned the possession, he failed. Therefore, this court finds that there is no reason to interfere with the finding of the Courts below regarding the title of the plaintiff over the suit property. The Substantial Questions of Law are answered in negative.

22. In the result, ***the Second Appeal is dismissed.*** No order as to costs. Consequently, connected Miscellaneous Petition is also closed.

21.02.2017

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Index:Yes/No
Internet:Yes/No

To

The Additional Sub Court, Tiruvannamalai.
The Additional District Munsif Court, Tiruvannamalai.

Dr.G.Jayachandran, J.

Pre-delivery judgment made in
S.A.No.1094 of 2009

21.02.2017

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