



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.08.2017

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) No.362 of 2017

and

C.M.P (MD) No.7677 of 2017

Subbu Realities South (P) Limited,  
Through its Director,  
1/3 Leo Building,  
Main Road,  
Salaiputhur,  
Valliyoor.

... Appellant/Appellant/1<sup>st</sup> Defendant  
Vs.

1.Thangaraja  
2.Kamalavathi  
3.Vasanthi  
4.Bommi  
5.Muthulakshmi  
6.Udhayakala  
7.Shanmugakani  
8.Minor Esakkikani  
9.Minor Muthukumar  
10.Minor Sudhadevi

(8 to 10 Minors through their guardian 7<sup>th</sup>  
Respondent)

... Respondents 1 to 10/

Respondents 1 to 10/Plaintiffs 1 to 10

11.The Superintendent Engineer,  
Windmill Section,  
Tamil Nadu Electricity Board,  
Office Maharaja Nagar,  
Tirunelveli - 11.

... 11<sup>th</sup> Respondent/11<sup>th</sup> Respondent/  
2<sup>nd</sup> Defendant

**PRAYER:** Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and Decree, dated 22.06.2015 made in A.S.No.26 of 2013 on the file of the Sub Court, Valliyoor, confirming the Judgment and Decree, dated 01.07.2013 made in O.S.No.286 of 2008 on the file of the Additional District Munsif, Valliyoor.

For Appellant : Mr.T.Antony Arul Raj



### JUDGMENT

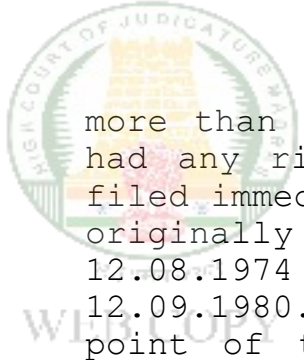
The above Second Appeal arises against the Judgment and Decree, dated 22.06.2015, passed in A.S.No.26 of 2013, on the file of the Sub Court, Valliyoor, confirming the Judgment and Decree, dated 01.07.2013 passed in O.S.No.286 of 2008, on the file of the Additional District Munsif, Valliyoor.

2.The first defendant is the appellant herein. The suit is filed by the plaintiffs for partition and separate possession and also for injunction not to put up any construction in the suit property.

3.The case of the plaintiffs is that the suit properties originally belonged to one Kumarasamy Nadar @ Koilpillai Nadar. The Kumarasamy Nadar @ Koilpillai Nadar had a daughter by name Karaniammal and two sons, namely Ponsamy Nadar and Ayyathurai Nadar. The said Kumarasamy Nadar @ Koilpillai Nadar during his life time had left a Will, dated 12.05.1971. Even during the lifetime of Kumarasamy Nadar @ Koilpillai Nadar, one of his sons Ponsamy Nadar died leaving behind his wife-Lakshmi and three sons, namely Natarajan, Thangaraja and Kumaresan. As per the Will left by Kumarasamy Nadar @ Koilpillai Nadar, the properties were bequeathed in favour of his grand-sons through Ponsamy Nadar and his another son Ayyathurai Nadar. As per the Will, the properties will have to be divided between them equally. The said Kumarasamy Nadar @ Koilpillai Nadar died on 11.10.1971. On his death, the Will had come into force and the beneficiaries have been enjoying the same jointly. Of the three sons of Ponsamy Nadar, Natarajan and Kumaresan died in the year 1992 and 1998 respectively. The heirs of Natarajan are arrayed as plaintiffs 2 to 6 and the heirs of Kumaresan are arrayed as plaintiffs 7 to 10. The other son, namely Thangaraja, is the first plaintiff. Admittedly, there is no division till the suit is filed. While so, the first defendant attempted to install a windmill in the suit property. When the plaintiffs objected to the same, it was replied by the first defendant that he had purchased the property. On verification, it was found that Ayyathurai Nadar and Lakshmiammal had sold the property to one Thangaraj.

4.It is the specific case of the plaintiffs that the sale is not binding on them, as the vendors cannot bind their share also. As per the sale deed obtained by the first defendant, he may be entitled to only one half share of Iyyadurai Nadar and balance one half belongs to the plaintiffs. As the first defendant appears to have not co-operated for the division of the properties, the suit has been filed for partition. The plaintiffs also have sought for an injunction not to put up any construction or install a wind mill and also for injunction against the second respondent not to effect service connection to the suit property.

5.Denying the averments in the plaint, the first defendant had filed the written statement contending that the suit properties were sold as early as on 1988 in favour of one Thangaraj and the said Thangaraj and his legal heirs were enjoying the suit property for



more than the required statutory period. If at all, the plaintiffs had any right in the suit property, the suit ought to have been filed immediately. It is also stated that the suit schedule property originally belonged to Ayyadurai Nadar, who had given in Othi on 12.08.1974 in favour of Sudalaimuthu. The said othi was redeemed on 12.09.1980. As the plaintiffs had never enjoyed the property at any point of time, they have no right to claim the same. The said Thangaraj Nadar, who had purchased from Ayyadurai Nadar, had sold the property on 16.05.2008 in favour of the first defendant and the first defendant has installed a wind mill and has been generating electricity. As already the wind mill has been installed, the question of injunction will not arise and power supply also has been effected by the second defendant, therefore, the prayer for injunction against the second defendant also is not sustainable.

6. On the side of the plaintiffs, three witnesses have been examined as P.W.1 to P.W.3 and Exs.A.1 to A.7 were marked and on the side of the defendants, two witnesses have been examined as D.W.1 and D.W.2 and Exs.B.1 to B.9 were marked and Exs.C.1 and C.2 were marked.

7. The trial Court had allowed the suit in part by passing a preliminary decree declaring 3/8<sup>th</sup> share of the plaintiffs and dismissed the suit as far as the relief of injunction. Against the disallowed portion, an appeal has been filed by the first defendant, which was also dismissed confirming the preliminary decree passed.

8. The question that now arise for consideration in the Second Appeal is whether the Judgment and Decree passed by the Courts below is correct?.

9. The property originally belonged to one Kumarasamy Nadar @ Koilpillai Nadar and Ponsamy Nadar and Ayyathurai Nadar are his two sons and the said Kumarasamy Nadar @ Koilpillai Nadar had left a Will, dated 12.05.1971 are all admitted facts by both parties. Ponsamy Nadar, who pre-deceased the Kumarasamy Nadar @ Koilpillai Nadar, had three sons of whom, two of them died and their heirs are plaintiffs 2 to 6 and plaintiffs 7 to 10 respectively. There is no dispute with respect to the relationship also. On 19.08.2008, when the first defendant attempted to install a windmill in the suit property, it was objected to by the plaintiffs. At that time, it was made known to the plaintiffs that Ponsamy Nadar's wife Lakshmi Ammal along with Ayyathurai Nadar had sold the property on 14.01.1988 to one Thangaraj Nadar. From the legal heirs of the said Thangaraj Nadar, the first defendant/firm had purchased the property on 16.05.2008.

10. As the trial Court has dismissed the relief of injunction and there is no appeal filed by the plaintiffs, the question of injunction need not be gone into.

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11. The learned counsel appearing for the appellant contended



that applying the principle of ouster, the plaintiffs cannot claim any share in the suit property. It is further contended that the sale itself is made by the first plaintiff's mother along with Ayyathurai Nadar. When the first plaintiff's mother herself has sold the property, it is not open to the plaintiffs to challenge the same.

12.The question of ouster will not arise in this case as there is no evidence that the other co-owner was enjoying the joint family property with the knowledge of the other owners for claiming adverse title. Plea of ouster is available only to the co-owners of the property and the first defendant being a purchaser, for the second time of a share in the property, cannot take benefit of the same. It is also settled principle that mere enjoyment of the property for many years would not automatically entitle the first defendant to prescribe the title by adverse possession, unless animus is established.

13.A mere possession, however, long the time may be, in the absence of animus, would disentitle the plaintiffs from claiming any right, even on the question of adverse possession. Considering Exs.B.6 and B.7, the lower Appellate Court has found that the first defendant has not established his long and continuous possession of the suit property. When admittedly the property belonged to Kumarasamy Nadar @ Koilpillai Nadar, even in the absence of the Will, it would devolve upon the legal heirs equally. One half share of the property has been sold by Ayyadurai Nadar and the heirs of Ponsamy Nadar are entitled to the other half share, of which, his wife Lakshmi Ammal is entitled to only  $1/8^{\text{th}}$  share. Excepting the half share of Ayyadurai Nadar and  $1/8^{\text{th}}$  share of Lakshmi Ammal, the balance  $3/8^{\text{th}}$  share belongs to the plaintiffs and the sale including  $3/8^{\text{th}}$  share is not binding on the plaintiffs. Therefore, the sale by Lakshmi Ammal selling the entire half share of Ponnusamy Nadar is not binding on the plaintiffs and they are entitled to a decree for partition of their  $3/8^{\text{th}}$  share.

14.As stated earlier, the plaintiffs are not entitled for the relief of injunction, since the first defendant has already installed the wind mill and power generation has commenced and the plaintiffs also have not preferred any appeal against the disallowed portion.

15.In the light of the above discussions, the Judgment and Decree of the Courts below are correct and there is no reason to interfere with the same and the same are confirmed.

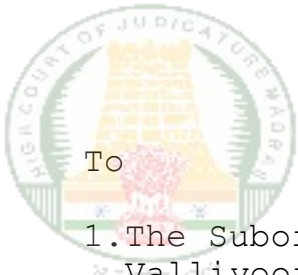
16.In fine, this Second Appeal is dismissed at the admission stage itself. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (RTI)

/True Copy/

Sub Assistant Registrar



To

1.The Subordinate Judge,  
Valliyoore.

2.The Additional District Munsif,  
Valliyoore.

Copy to:  
The Record Keeper,  
V.R Section,  
Madurai Bench of Madras High Court,  
Madurai.

+1cc to Mr.T.ANTONY ARUL RAJ Advocate in SR. No. 73678  
PS  
JS/JC/SAR.2/19.09.2017/5P-5C

**S.A(MD) No.362 of 2017**  
**21.08.2017**