

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :21.12.2018

Coram:

THE HON'BLE DR.JUSTICE G. JAYACHANDRAN

Second Appeal No.1277 of 2004
and
C.M.P.No.9477 of 2004

1.Sengodan
2.Arunachalam
3.Marisamy@ Madhappan
4.Mariappan @ Marisamy
5.Karuppannan @ Karuppan ..Appellants / Appellants /
Defendants 1 to 5

/versus/

1.Sivasubramania gounder
2.Sengottu Velappa gounder ..Respondents / Respondents /
Plaintiff

Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 12.12.2001 made in A.S.No.5 of 2001 on the file of the Sub Court, Bhavani, confirming the judgment and decree dated 29.10.1998 made in O.S.No.769 of 1995 on the file of the Principal District Munsif Court, Bhavani.

For Appellants :Mr.E.Duraivaiyapuri for
Mr.N.Manokaran

For Respondents :Ms.G.Shabnam for
Ms.D.Kamatchi

J U D G M E N T

Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondents.

2.The appellants herein are the defendants in the suit filed for partition and separate possession. The claim of the respondents/plaintiffs is that the suit property originally held by three brothers viz., Veeran @ Arthanari, Palani Koravan and Seeranga Koravan @ Gnanavachangam, son of Sengodu Veeran. On 20.03.1950, Palani Koravan and Seeranga Koravan along with their

sons executed a registered sale deed in favour of the plaintiffs conveying a common 2/3rd share and later, the entire property were put in possession and enjoyment of the plaintiffs.

3. The plaintiffs, earlier filed a suit in O.S.No.292 of 1991 for injunction restraining the defendants 1 and 2 from interfering with the plaintiffs peaceful possession and enjoyment of the suit properties. Along with the suit, they took out I.A.No.1323 of 1991 for interim injunction restraining the defendants 1 and 2 from interfering with the plaintiffs peaceful possession and enjoyment of the suit properties. Since the interlocutory application was dismissed on 16.08.1991, the plaintiffs preferred another interlocutory application in C.M.A.No.31 of 1991 and the same was also dismissed on 22.04.1992. The reason for the dismissal of their applications was that they have purchased only undivided 2/3rd share from two of the co-owners. Whereas the remaining 1/3rd undivided share will be held by the father of the defendants viz., Arthanari gounder. Hence, the injunction against the co-owners was not entertained. In the light of the above fact, they have withdrawn the suit in O.S.No.292 of 1991 with liberty to file a fresh suit. The present suit is the consequence of the said liberty wherein, the plaintiffs have sought for partition of the suit property into three equal shares by appointing an Advocate Commissioner and to allot 2/3rd share to them.

4. The defendants contended that they have perfected their title by adverse possession and therefore, there is no need for dividing the property as per the alleged sale deed of the co-owners. It is contended by the defendants in their written statement by conduct and acquaintance, the plaintiffs had given title, possession and enjoyment of the suit property in favour of the defendants.

5. The trial Court framed the following issues:

1. Whether the plaintiffs are entitled for partition and separate possession as prayed for ?

2. Whether the suit is bad for non-joinder of necessary party?

3. To what other relief, the plaintiffs are entitled to?

6. After appreciating the oral and documentary evidence let in by both the parties, the trial Court has held that the title, which is in respect of 2/3rd share, has devolved upon the plaintiffs under Exs.A1 and A2. When the defendants have failed to establish that those documents are invalid or fake, the defendants are bound to give 2/3rd share to the plaintiffs.

Accordingly, the preliminary decree for partition has been passed.

7. Aggrieved by that, the defendants have preferred A.S.No.5 of 2001 on the file of the Sub Court, Bhavani. Affirming the finding of the trial Court, the first appellate Court has dismissed the appeal. Aggrieved by that, the defendants have preferred the second appeal wherein the following Substantial Questions of Law have been raised:

1. Whether the courts below have properly appreciated and applied the principles and framed necessary issues to find out whether the defendant has prescribed title by adverse possession?

2. Whether the suit is barred by the principle of Res Judicata?

3. Whether the suit is barred by the Limitation Act?

4. Whether the judgment of the first appellate Court is in accordance with the law laid down by the Division Bench of this Hon'ble Court reported in 1996(2) Law Weekly 403=1996(2)MLJ 550?

5. Whether the Courts below were justified in coming to the conclusion that the plaintiffs and defendants were living in the suit property subsequent to 1958 and the possession of the defendant could not be regarded as hostile to the plaintiffs, when the same was not supported by the pleadings in the plaint, but only by subsequent improvement in the case at the time of arguments?

8. When the parties admitted that they trespassed their title from one Sengodu Veeran, who has left behind three sons viz., Veeran @ Arthanari, Palani Koravan and Seeranga Koravan, the plaintiffs have derived the title through valid sale deed executed as early as 1950 in their favour by Palani Koravan and Seeranga Koravan. While so, earlier suit filed for injunction restraining the defendants from interfering the peaceful possession and enjoyment over the suit property will not act as res judicata as contended by the learned counsel appearing for the appellants. More so, earlier suit in O.S.No.292 of 1991 was permitted to be withdrawn with liberty to file a fresh suit. Substantial question of limitation also will not sustain, since the parties were in enjoyment and the earlier suit filed by them for injunction will not give any ground to raise plea of limitation, when the parties are co-owners of undivided property

and there is no limitation prescribed for seeking partition between the co-owners, who are in joint enjoyment.

9. For the above said reasons, this Court finds no merit in this appeal. Hence, this Second Appeal is dismissed. There is no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Sub Judge, Bhavani

2.The Principal District Munsif, Bhavani.

copy to: The Section Officer,
VR Section, High Court, Madras.

+1 cc to M/s.D.Kamatchi, Advocate, S.R.No.89618

+1 cc to M/s.N.Manokaran, Advocate, S.R.No.89706

S.A.No.1277 of 2004
and
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SSD(CO)
SSM(15/10/2019)

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