

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 21.08.2018

DELIVERED ON 30.08.2018

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

Second Appeal No.570 of 2000

1. Arumuga Gounder (died)
2. Ponnammal (since deceased)
3. Swaminathan (since deceased)
4. Palanisami
5. Amirdhan
6. Pannerselvam
7. Saraswathi
8. Krishnamurthy

(Appellants 2 to 6 brought on record as legal representatives of the deceased sole appellant vide order dated 9.11.2006 made in C.M.P.No.9022 to 9024 of 2005 in S.A.No.570 of 2000)

(2nd appellant died, recorded, as per the memo dated 4.7.2018 and vide order of court dated 4.7.2018 made in S.A.No.570 of 2000

(Appellants 7 and 8 brought on record as legal heirs of the deceased

3rd appellant vide order dated 27.7.2018 made in C.M.P.No.12555 to 12557 of 2018 in S.A.No.570 of 2000)

... Appellants

Vs. सत्यमेव जयते

1. Velusamy
2. Poovathal
3. Ramathal
4. Rajammal
5. Subbulakshmi
6. Devana Gounder (Deceased)
7. Marathal (Deceased)
8. Loganathan (Deceased)
9. Karunthachalam
10. Chandra
11. Gopalasamy
12. Jayamani

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13. Pasupathy
14. Mallika
15. Chitra
16. Selvanayagi
17. Kousalyadevi
18. Senthilkumar

... Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgment dated 5.9.1996 in A..S.No.204 of 1995 on the file of the II Additional District Judge, Coimbatore, upholding the decree and judgment in O.S.No.3074 of 1990 dated 14.09.1995 on the file of the First Additional District Munsif, Coimbatore.

For Appellants : Dr.G.Krishnamurthy
For Respondents 1 to 5 and
R9 to R18 : Mr.N.Manokaran
Respondents 6 to 8 : died

JUDGMENT

The unsuccessful first defendant in O.S.No.3074 on the file of the I Additional District Munsif, Coimbatore is the sole appellant herein. Since he died during the pendency of this appeal, his legal heirs have been impleaded as appellants 2 to 6 and subsequently, since the 3rd appellant died, his legal heirs have been impleaded as appellants 7 and 8.

2. For the sake of convenience, the parties herein are called, as per the ranking mentioned in the suit in O.S.No.3074 of 1990.

3. The 1st respondent Thiru Velusamy is the plaintiff in O.S.No.3074 of 1990 before the First Additional District Munsif, Coimbatore. He filed a suit for partition of the suit property, which is a Punja land situate in Survey No.296/3, Kalapatti Village, Coimbatore District, within the boundaries stated in the plaint schedule. The suit property was purchased by one Karunaiammal, who is the grand mother of the plaintiff and the defendants 7 to 11, through a registered sale deed dated 21.08.1967 (Ex.A1) from one Rangasamy. Karunaiammal died intestate on 13.02.1971, as evidenced by the death extract Ex.A2. Her husband Chinnaiya Gounder executed a registered sale deed dated 22.04.1974 in favour of the first defendant (since deceased) in respect of the suit property. A certified copy of the sale deed is marked as Ex.A5. The case of the plaintiff is that, when he along with the defendants 7 to 11 are entitled to one share out of 7 shares in the suit property, his grandfather

Chinnaiya Gounder should not have sold the suit property to the first defendant on 22.04.1974 through the original of Ex.A5 and therefore, the said sale deed is void, abinitio. Chinnaiya Gounder died on 19.09.1976, as evidenced by the death extract Ex.A4. Hence, the plaintiff has filed the present suit for partition to divide the suit properties into 42 equal shares and to allot one such share to him.

4. The defendants 2 to 12 remained absent and were set exparte before both the courts below and the first defendant, who is the purchaser of the suit property from Chinnaiya Gounder alone contested the matter. The defendants 2 to 6 are the children of late Karunaiammal and late Chinnaiya Gounder.

5. The contention of the first defendant is that though the plaintiff attained majority on 03.06.1977, he did not raise any claim over the suit property within 3 years from the date of his attaining majority and that the children of Karunaiammal and Chinnaiya Gounder also did not raise any objection to the sale made by the Chinnaiya Gounder till date. According to him, late Chinnaiya Gounder sold the suit property inherited by him on the demise of his wife Karunaiammal and the first defendant is in possession and enjoyment of the suit property, ever since the date of the sale.

6. The trial court viz. the First Additional District Munsif, Coimbatore framed the following issues.

1. Whether the plaintiff is entitled to get share as prayed for?

2. Whether the plaintiff is entitled to get 1/42 share in the suit property?

3. To what relief the plaintiff is entitled?

7. In the trial court, the plaintiff examined himself and marked Ex.A1 to Ex.A6, while the defendnat examined himself and marked Ex.B1 to Ex.B3.

8. After full contest, the learned Additional District Munsif, Coimbatore decreed the suit as prayed for by the plaintiff and passed a preliminary decree for partition dividing the suit property into 42 equal shares and allotted one share to the plaintiff.

9. Aggrieved over the said decree and judgment dated 14.09.1995, the first defendant filed appeal in A.S.No.204 of 1995 before the II Additional District Judge, Coimbatore. The II Additional District Judge also concurred with the findings

of the trial judge and dismissed the appeal with costs vide his decree and judgment dated 05.09.1996.

10. Both the courts below had observed that since the plaintiff was a minor at the time of sale made by late Chinnaiya Gounder in favour of the first defendant and also not a party to the sale Ex.A5, there is no limitation for filing a suit for partition of the legitimate right of the minor, when he becomes a major. They have further observed that the possession of a co-sharer is on behalf of the other co-sharers and it cannot be said to be adverse to the remaining co-sharers. Both the courts below have thus held that the alienation made by Chinnaiya Gounder in respect of the shares of his children is void abinitio.

11. Thiru Arumugha Gounder, the first defendant filed the 2nd appeal before this court and as already observed, since he died during the pendency of this appeal, his legal heirs have been impleaded as appellants 2 to 6.

12. In this 2nd appeal, the point for consideration is whether the plaintiff can maintain the suit after a lapse of 16 years from the date of sale and that too the co-sharers namely the defendants 2 to 6 allowed the third party (first defendant) to enter into the possession of the suit property by not protesting.

13. Karunaiammal, who is the wife of the Chinnaiya Gounder had purchased the suit property from one Rangasamy through a sale deed dated 21.08.1967 (Ex.B1). Karunaiammal died intestate leaving behind her husband Chinnaiya Gounder and her sons and daughters by names 1. Devana Gounder (D6), 2. Krishnasamy, 3. Poovathal (D2), 4. Ramathal (D3), 5. Rajammal (D4), 6. Subbulakshmi (D5). Karunaiammal died on 13.07.1971 and Chinnaiya Gounder died on 19.09.1975. One of their sons Krishnasamy also died on 26.01.1971 and the plaintiff and the defendants 7 to 11 are the legal heirs of the deceased Krishnasamy. All these facts are admitted by both the parties. There is no dispute over the fact that Karunaiammal died intestate on 13.07.1971. The partition deed Ex.B1 was executed by and between Chinnaiya Gounder and his sons on 27.09.1968 (Ex.B1). The suit property is not mentioned in the partition deed Ex.B1. Obviously, since the suit property was purchased by Karunaiammal, it has not been included in the partition deed Ex.B1. Chinnaiya Gounder, husband of Karunaiammal had sold the suit property in favour of the first defendant. He has not included his children in the sale deed, who were then minors. They have also not been added as parties in the sale deed Ex.A5.

14. Both the courts below were right in holding that

there is no limitation for the plaintiff to file a suit for partition. However, in the instant case, the plaintiff is the son of late Krishnasamy, who is the son of late Chinnaiya Gounder. The suit property admittedly was purchased by Karunaiammal, the grand mother of the plaintiff. As per Section 15(1) of the Hindu Succession Act, 1956, the properties of a Hindu female, who dies intestate firstly, would devolve upon her sons, daughters and her husband. Therefore, all the children of Karunaiammal would definitely get a share in the suit property. But, in the instant case, the grand father of the plaintiff sold the property in the year 1974, without showing his children as E.O.nominee parties in the sale deed Ex.A5 and all the children (Defendants 2 to 6), including the plaintiff's father did not raise any objection to the sale made by late Chinnaiya Gounder. Even in the suit in O.S.No.3074 of 1990, all the children of Karunaiammal and Chinnaiya Gounder, D2 to D6 remained absent and were set exparte and the plaintiff had filed the suit only in the year 1990, i.e. after a lapse of 16 years from the date of sale. During the pendency of this appeal, the defendants 6 to 8 died and their legal heirs were impleaded as defendants 13 to 18.06.2017

15. The first respondent/first defendant, who is the purchaser of the suit property is a third party and the possession of the suit property was also handed over to him on the date of sale. The other co-owners namely defendants 2 to 6 allowed the stranger to be in the possession of the entire property and the requirements of continuity and the extent for adverse possession are fully complied with. In the decision in Minnalkodi V. Bharathi Mohan and others reported in 2000(1) MLJ 58, it has been held thus.

The very fact that the stranger has been included into possession and consequently, the possession of the co-owners terminated would be sufficient to put the other co-owners to notice of the conduct of the alienating co-owners. Therefore, ouster would be to their notice and the possession of transferee would be adverse from the date of possession. In this connection, it will also be worthwhile to refer to the case of Khato Lal Das V. Mohd. Jahiruddin Babur, AIR 1984 Pt. 239 or even Full Bench decision of Madras High Court in T.P.R.Palanis Pillai V. Amjath Inbrahim Rowther, A.I.R. 1942 Md. 622 (1942) 2 M..J.321.

The plaintiff is only a grand son of late Chinnaiya Gounder and his father late Krishnasamy did not raise any objection to the sale of his mother's property by his father late Chinnaiya Gounder. The plaintiff is claiming right only through his

father. Since the other children did not resist the possession of the first defendant over the suit property, within a period prescribed by law of limitation, their right gets extinguished. In the judgment cited supra, it is held in paragraphs 13, 14 and 15 thus.

In V.C.Thani Chettiar V. Dakshinamurthy Muddaliar, (1955) 1 M..J. 414: A.I.R. 1955 Mad. 288 their Lordsips held that an alienee from coparcener of a Hindu joint family is not entitled to possession. His right is only to seek partition with a prayer that he may be put in possession of that portion of the family property allotted to his vendor.

14. If alienee is not entitled to possession, and if he enters possession, what is the nature of his possession.

15. In Palania Pillai V. Amjath Ibbrahim, (1942)2 M.L.J. 321 A.I.R. 1942 Mad. 622 (F.B.) the question that came for consideration was whether a usufructuary mortgage executed by some of the co-owners for the entire property and mortgagee enters possession, whether such possession is adverse? Their Lordships said that mortgagee's possession will be adverse to the owners if the mortgagee is allowed to continue for a period of more than 12 years till prescribing mortgagee's right, the moment he fails to enter possession, that will be adverse to the non-alienating co-owners. At page 625, it is held thus:

.. When one of several co-shares lets into possession a stranger who proceeds to cultivate the land for his own benefit the other co-sharers must, unless they deliberately close their eyes, know of what is going on, but if they are so regardless of their own interests, they must taken the consequences. Where a mortgage granted by one of several coparceners remains in possession of the land and cultivates it for years, a position which we have here, there can be no doubt that the requirements of continuity, publicity and extent for adverse possession are fully complied

with.

As already observed, the children of Karunaiammal and Chinnaiya Gounder did not raise any objection to the alienation made by their father till their death. The plaintiff who is claiming right through one of the sons of late Chinnaiya Gounder, cannot maintain the suit for partition and that too after a lapse of 16 years from the date of sale made by Chinnaiya Gounder. For all the reasons stated above, I hold that the appeal is liable to be allowed.

16. In the result,

(i) the Second Appeal is allowed. No costs.

(ii) The decree and judgment dated 05.09.1996 made in A.S.No.204 of 1995 by the II Additional District Judge, Coimbatore is set aside.

(iii) The suit in O.S.No.3074 of 1990 on the file of the I Additional District Munsif, Coimbatore is dismissed with costs.

Sd/-

Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

mst

To

1. The II Additional District Judge, Coimbatore

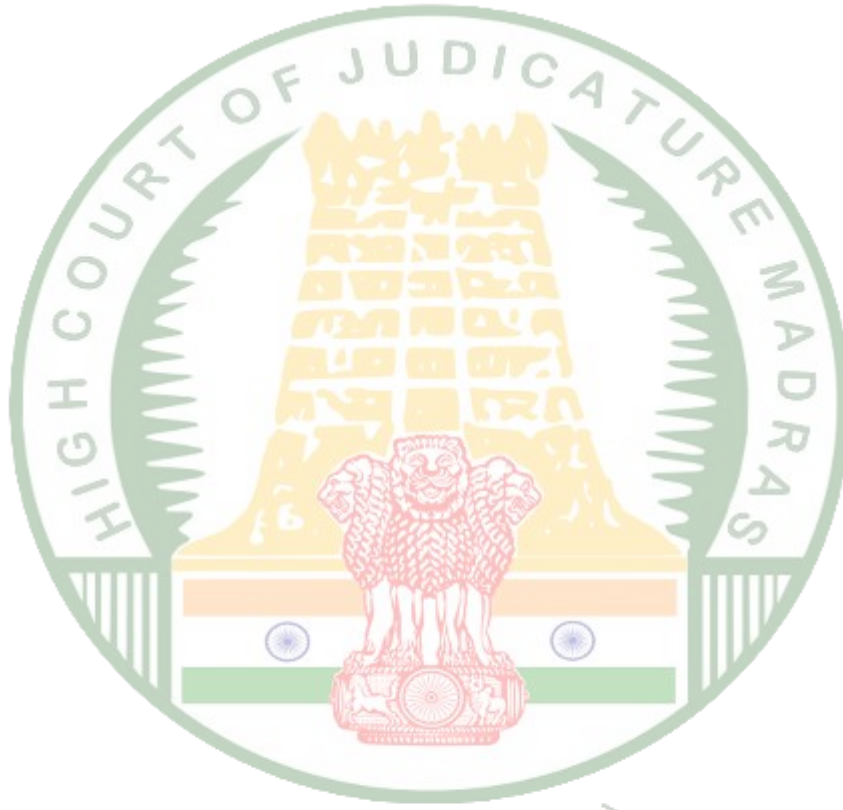
2. The I Additional District Munsif, Coimbatore

+1cc to Mr.N.Manokaran, Advocate SR.No.59906

Second Appeal No.570 of 2000

GMV(10/10/2018)

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