

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.04.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.259 of 2015
and M.P.No.1 of 2015

1. Sivaraj @ Nanjundiah
2. Jainsankariah

.. Appellants/Respondents/
Plaintiff

Vs.

Nagarathinamma

.. Respondent/Appellant/
Defendant No.7

Prayer :

Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgement and decree dated 30.01.2015 made in A.S.No.6 of 2014 on the file of the Subordinate Court, Hosur, in reversing the judgement and decree dated 29.07.2013 passed in O.S.No.112 of 2004 on the file of the District Munsif-cum-Judicial Magistrate Court, Denkanikottai.

* * *

For Appellants : Mr.P.Mani

For Respondent : Mr.J.Hariharan
for M/s.V.Nicholas

J U D G E M E N T

The unsuccessful plaintiffs in a suit for partition are the appellants.

2. The plaintiffs filed a suit in O.S.No.112 of 2004 on the file of the District Munsif-cum-Judicial Magistrate Court, Denkanikottai, to pass a preliminary decree directing the defendants to divide the suit property and to allot 9/48th share to them and to allot separate possession.

3. The case of the plaintiffs is as follows :

(i) The suit property originally belonged to one Nanjundaiah @ Nanjundasetty and his brother Mallan @ Mallikarjuna Setty, which is an extent of 0.78 cents in Survey No.213/2. The

revenue records stood in the name of the said Mallan @ Mallikarjuna Setty. As the said Mallan left the village in the year 1903 for Bengaluru, his brother Nanjundaiah was in possession and enjoyment of the suit property by constructing a house. He also constructed a temple in the suit land and performed poojas. He also dug a well in the suit property. He died intestate leaving behind his two sons, Madhaiah Setty and Madhappa Setty to succeed the suit property.

(ii) After the death of Nanjundaiah, his sons Madhaiah Setty and Madhappa Setty were in joint possession and enjoyment of the suit property. Without their knowledge, in the revenue records the suit property has been mentioned as Thoppu poramboke. Form 7A notices were also issued to the Madhaiah Setty by the Government in respect of the suit property. There was a partition deed dated 22.06.1976 between Madhaiah Setty and Madhappa Setty in respect of all other properties, except the suit property. Since the suit property was classified as Thoppu poramboke, it was not included in the partition deed.

(iii) The said Madhaiah Setty died intestate leaving behind the plaintiffs and defendants 1 to 6 as his legal heirs and the Madhappa Setty died leaving behind the defendants 7 to 10, as his legal heirs. Thus, the plaintiffs and the defendants are in joint possession and enjoyment of the suit property.

(iv) Thereafter, an extent of 0.03 cents was allotted for construction of a Co-operative ration shop and an extent of 0.05 cents was allotted for the construction of the temple, and thus, an extent of 0.70 cents of lands were in the possession and enjoyment of the plaintiffs and defendants, i.e., the suit property.

(v) It is stated that in the year 1999, suppressing the above said facts, the seventh defendant had obtained a patta claiming that the Mallan had executed a Will in her favour. On the basis of such invalid patta, the seventh defendant attempting to create third party interest in the suit property. Hence, the plaintiffs filed a suit for partition in O.S.No.80 of 2001 on the file of the same Court and the same was withdrawn to file a fresh suit. Accordingly, the present suit was filed.

4. Resisting the suit, the seventh defendant/respondent herein had filed the written statement denying the allegations raised by the plaintiffs. It is her case that the suit property belonged to Mallan and he did not leave for Bengaluru, as claimed by the plaintiffs, but on the other hand, he was in her care and custody. It is her further case that the Nanjundaiah was never in possession of the suit property and he did not construct the house, so also the temple. She also denied that

the sons of Nanjundaiah were in joint possession and enjoyment of the suit property. It is admitted by the seventh defendant that there was a partition dated 22.06.1976, which clearly, excludes the suit property. It is stated that the suit property is not a joint family property, but it belonged to Mallan, who executed a Will in her favour in the year 1979. Based on the same, she got a patta dated 11.10.1999. It is claimed by her that she constructed the house in the suit property and she is in possession and enjoyment of the suit property, by paying necessary taxes and electricity charges. Contending so, she prayed for dismissal of the suit.

5. Before the trial Court, the first plaintiff examined himself as P.W.1, in addition to examining P.Ws.2 and 3 and marking Exs.A.1 to A.3 on their side. The seventh defendant examined herself as D.W.1 and also examined D.Ws.2 and 3 and marked Exs.B.1 to B.10.

6. The trial court, upon considering the oral and documentary evidence, had decreed the suit in O.S.No.112 of 2004 holding that the plaintiffs are entitled to 9/48th share in the suit property. Aggrieved by the same, the seventh defendant filed the appeal in A.S.No.6 of 2014 on the file of the Subordinate Court, Hosur. The lower appellate court allowing the appeal reversed the judgment and decree of the trial Court and thus, dismissed the suit. This second appeal is laid by the plaintiffs against the said judgment.

7. While admitting the second appeal on 27.04.2015, this Court had framed the following substantial questions of law for consideration:

"1. Whether the plaintiffs are entitled to partition and separate possession of the suit property as claimed by them when admittedly the suit property belonged to one Mallan ?

2. Whether the 7th defendant who claimed to the suit property under Ex.B.1 Will allegedly executed by Mallan, failed to prove the same ?

3. Whether the lower appellate Court erred in dismissing the suit for partition and separate possession merely because patta has been issued in favour of the 7th defendant who claimed under Ex.B.1 - Will?"

8. Heard the learned counsel for the plaintiffs/appellants and the learned counsel for the seventh defendant/respondent.

9. Admittedly, the suit property is an extent of 0.70 cents with a Mangalore tiled house along with seven Mango trees. The property originally belonged to one Mallan. It is stated by the

seventh defendant, who is the respondent, that since the said Mallan did not have any legal heir and she being the daughter of Madhappa, he had executed a Will in the year 1979 in her favour. The said Madhappa is the son of Nanjundaiah, who is the brother of Mallan. In other words, the original owner of the property had executed a Will in favour of his brother's granddaughter.

10. The claim of the seventh defendant/ respondent is that as per the Will, she has been in possession of the property. The revenue authorities, in the year 1997, had classified the suit property as Thoppu poramboke. Though the property otherwise was standing in the name of the testator Mallan, the said classification was challenged by the seventh defendant before the revenue authorities, after which, the Tahsildar, Denkanikottai, had in his proceedings dated 11.10.1999, marked as Ex.B.2, had issued a patta in favour of the seventh defendant. After the issuance of the patta in the year 1999, the seventh defendant/respondent had been in possession by putting up pucca construction of a house and obtained electricity connection and also paying the property tax for the same.

11. The plaintiffs, while admitting the ownership of Mallan, stated that the said Mallan had migrated to Bengaluru leaving behind the properties in the hands of the Nanjundaiah Setty. The said Nanjundaiah Setty had two sons, Madhaiah Setty and Madhappa Setty. The legal heirs of Madhaiah Setty are the plaintiffs 1 and 2 and defendants 1 to 6 and the legal heirs of Madhappa Setty are the defendants 7 to 10. Hence, it is the claim of the plaintiffs that the legal heirs of both the Madhaiah Setty and Madhappa Setty are equally entitled to the suit property.

12. As stated earlier, when the suit property was reclassified as Thoppu porampoku, in an earlier partition dated 22.06.1976, this property was given up and it was not subjected to partition. Admittedly, even at that point of time, the seventh defendant/respondent was in possession of the property. Ex.A.2 Adangal and Sketch extracts, though carried the name of Madhaiah Setty, who is the father of the plaintiffs, during the relevant period, the property was classified as Thoppu poramboke. Therefore, only B memo charges would have been paid. It is only at the instance of the seventh defendant/respondent, reclassification was challenged and the seventh defendant was issued patta.

13. It is also stated by the seventh defendant/respondent that on 26.04.1979, the grandfather Mallan had executed a Will in her favour and as per which, she has been in possession of the property and only based on the said Will, she had applied for patta, which was issued under Ex.B.2 later. Though it is claimed by the seventh defendant/respondent that she came to be

in possession of the suit property, pursuant to the Will alleged to have been executed by the original owner Mallan on 26.04.1979, the Will had not been proved in the manner known to law by examining the witnesses.

14. Be that as it may, when the plaintiffs have sued for partition, the burden is on them to establish whether the suit property is available for partition. Admittedly, an extent of 0.03 cents was given to the co-operative market and an extent of 0.05 cents was allotted for construction of a temple. There is no dispute with respect to these aspects by both the parties. The original ownership of Mallan is also admitted. But the ownership of the property after the same was classified as Thoppu Poramboke is to be seen. From the adangal extract filed by the plaintiff under Ex.A.2, it can be seen that even from the year 1967, the suit property has been classified as Manthoppu poramboke. Even when the said classification was in force, the original owner Mallan had executed a Will in favour of the seventh defendant/respondent. It is also not known whether the Will had come into force. As on the date of execution of Ex.B.1, Will, the said Mallan could not have had any right for the same, because the property was classified as promboke lands. Therefore, the testator himself did not have right over the property to execute the Will in favour of the seventh defendant/respondent. As pointed out earlier, the execution is also not established by the seventh defendant/respondent in the manner known to law, as prescribed under Section 68 of the Indian Evidence Act.

15. Coming back to the possession of the property, after the lifetime of Mallan, the plaintiffs have not established their continuous possession in the property, as the legal heirs of the deceased. The seventh defendant/respondent has taken initiative to get the classification set aside and obtained patta in her name. It is also not proved whether Ex.A.2 proceedings were issued after giving notice to all the parties concerned. Ex.B.2 proceedings was issued in the year 1997 based on which, the patta was issued in favour of the seventh defendant/respondent on 01.08.2002. No doubt, the claim of the title to the suit property by the seventh defendant/respondent based on the Will is rejected, as the same is not proved. But the seventh defendant/respondent has produced the other receipts and documents for continuous possession, at least from the date of change of patta in her name. Exs.B.5 to B.8 are the electricity receipts, property tax tax receipts etc. produced by the seventh defendant/respondent to prove her continuous possession of the suit property. It is also admitted that the patta issued in favour of the seventh defendant/respondent in the year 1997 has not been challenged by the plaintiffs till today. It appears

that the plaintiffs had filed a suit in O.S.No.80 of 2001 for the relief of partition earlier. However, the same was withdrawn for the reasons best known to the plaintiffs and there is no mention about obtaining permission from the Court for filing a fresh suit after withdrawing the said suit for the same cause of action. Though the suit was not dismissed on merits, it was withdrawn by the plaintiffs without any reason.

16. Admittedly, on 22.06.1976, there was a partition between the father of the plaintiffs and others, which is marked as Ex.B.9. The reason for not including the suit property in the said partition is that the same was converted into a poramboke land. In the said partition also, there is no mention about the suit property and that there is no recital in the same that the suit property would be available for partition after getting the same converted into a patta land. It is the seventh defendant/respondent, who had got the same converted into her name. Even presuming that the suit property was treated as a joint family property, the burden is on the person, who claims it to be the joint family property. In this case the plaintiffs, who claimed that the suit property was only a joint family property, had not proved that the suit property belonged to the joint family even before the partition or after the patta was issued in the name of the seventh defendant/respondent. The plaintiffs also had not issued any notice claiming that they had a right in this property, being the joint family property.

17. On the other hand, the seventh defendant/respondent had filed documents to prove her continuous possession. P.W.1, who is the first plaintiff, had categorically deposed that at the time of partition, the suit property was not a joint family property and it was not included in the partition, because it was classified as poramboke land. He has also further admitted that he had knowledge about the issuance of patta in favour of the seventh defendant/respondent. Thus, the plaintiffs, who claimed partition contending that the suit property are joint family properties, had miserably failed in their efforts to prove the same.

18. Though, the seventh defendant had based her claim on the Will, even in the absence of proof of the same, she had produced the documents evidencing her continuous possession from 1979.

19. Accordingly, the question No.1 is answered against the plaintiffs. Questions Nos.2 and 3 are answered in favour of the seventh defendant/respondent.

20. In the light of the above discussions, the second appeal is dismissed confirming the judgment and decree of the first

appellate court dismissing the suit. No costs. Consequently,
connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS V)

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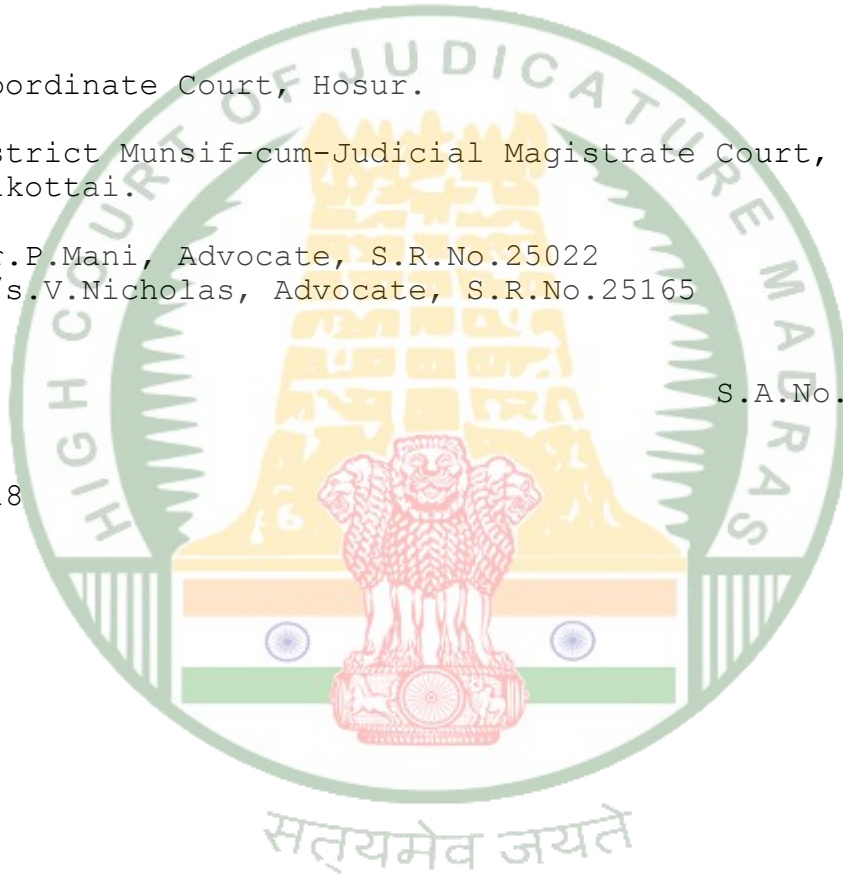
1. The Subordinate Court, Hosur.
2. The District Munsif-cum-Judicial Magistrate Court,
Denkanikottai.

+1cc to Mr.P.Mani, Advocate, S.R.No.25022

+1cc to M/s.V.Nicholas, Advocate, S.R.No.25165

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