

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.10.2019

PRONOUNCED ON : 12.11.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

A.S.No.126 of 2013

and

M.P.No.1 of 2013

T.S.Venkatesan ...Appellant/Defendant

Vs.

1. Mallika Ramanathan

2. Suseela Rajam

...Respondents/Plaintiffs

Prayer: First Appeal filed under Section 96 of Civil Procedure Code, against the judgment and decree dated 24.08.2012 in O.S.No.13667 of 2010 (C.S.No.728 of 2008, High Court, Madras) on the file of XIX Additional Judge, City Civil Court, Chennai.

For Appellant : Mr. M. Balasubramanian

For Respondents: Mrs. Rita Chandrasekar
for M/s. Aiyar & Dolia.

JUDGMENT

Aggrieved over the judgment and decree dated 24.08.2012 passed in O.S.No.13667 of 2010 on the file of XIX Additional Judge, City Civil Court, Chennai, the defendant has preferred this first appeal.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. Suit for partition and permanent injunction.

4. The case of the plaintiffs, in brief, is that they are the younger sisters of the defendant and the plaintiffs' father T.R.Sreenivasa Iyer acquired the property comprised in CC No.6681 Patta No. C642 of 1982, old survey No.1603 and New No.2660 bearing Door No.39, New No.52, Nadu Street, Mylapore, Chennai 600 004, measuring an extent of 1428 sq. ft. by way of the sale deed dated 12.03.1928 and the said property is the self

acquired property of the plaintiffs' father. The plaintiffs' father died on 06.08.1983 leaving behind the plaintiffs, the defendant and their mother as his legal heirs. The mother Visalakshi died on 08.10.1984. During his life time, the plaintiffs' father conveyed the rear portion of the abovesaid property admeasuring 524.5 1/2 sq. ft., under the sale deed dated 11.07.1980. In the abovesaid sale deed, the plaintiffs' father had recited that the defendant had been living separately and he has got no right or title over the property in question. The first plaintiff was making frequent visits and providing physical support to her parents. After the demise of the mother, the defendant forcibly took the possession of the property and chased away the second plaintiff stating that the property belongs to him and also making frantic attempts to obtain the legal-heirship certificate by excluding the plaintiffs as if he is the only legal heir of T.R. Sreenivasa Iyer with a view to grab the property and pose himself as the absolute owner of the property. The second plaintiff addressed a letter to Tahsildar, Mylapore on 15.04.1985 stating that the defendant is not the sole legal heir of the deceased T.R.Sreenivasa Iyer and the plaintiffs are also his legal heirs and requested to include their names in the legal-heirship certificate and thus the plaintiffs are entitled to each 1/3 share in the suit property and inasmuch as the defendant had failed to allot the share of the plaintiffs and on the other hand, claim himself to be the absolute owner of the same without any entitlement, according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs.

5. The defendant resisted the plaintiffs' suit contending that the plaintiffs' suit is not maintainable either in law or on facts and the suit laid by the plaintiffs 25 years and 24 years after the death of the father and mother respectively is a speculative one and admitted that the father T.R.Sreenivasa Iyer had purchased the property by way of the sale deed dated 12.03.1928 and further would contend that his father was a leading advocate in the Madras High Court Bar and treated the property purchased by him as the joint property of Hindu Undivided Family consisting of himself and the defendant, then minor, and accordingly mortgaged the property along with the defendant when he was a minor and in the said mortgage, the defendant has also been shown as the co-owner and he had also subsequently executed various mortgages describing the defendant also as a co-owner and not described himself as the absolute owner of the property and hence according to the defendant, the abovesaid documents would establish that the suit property belongs to T.R.Sreenivasa Iyer and the defendant and due to difference of opinion, T.R.Sreenivasa Iyer, used to describe the suit property as his absolute property in the subsequent

documents. On his demise, the defendant laid the suit in O.S.No.3851 of 1985 against the purchasers of the rear portion of the suit property from T.R.Sreenivasa Iyer and though the suit was originally dismissed by the trial court and challenging the same, the defendant preferred the first appeal in A.S.No.34/90 and though the first appellate court dismissed the appeal by the judgment dated 26.04.1990, had categorically held that the suit property is the joint property of the deceased T.R.Sreenivasa Iyer and the defendant by referring to the mortgages executed in the years 1946, 1951, 1953, 1956 and by holding that though the property had been acquired by the deceased T.R.Sreenivasa Iyer in his name, converted the same as joint family property and thereafter again changed the nature and character of the property and therefore, it is put forth that the abovesaid finding is binding upon the plaintiffs though the plaintiffs are not the parties to the suit, they had attempted to get themselves impleaded in the abovesaid suit and the plaintiffs had, after several years after the demise of the parents, come forward with the speculative suit containing untenable allegations and when according to the plaintiffs, they had been residing separately away from the suit from 1984 onwards and when the defendant is alleged to have forcibly sent out the second plaintiff from the suit property, the same is nothing but a clear attempt to establish the ouster and it is only the defendant who had effected mutation of records in respect of the suit property in his name after the demise of the father and enjoying the property by paying water tax, etc. and the suit property is in the exclusive possession and enjoyment of the defendant and the plaintiffs are not entitled to claim any share in the suit property and the suit laid by the plaintiffs is belated and barred by limitation and the plaintiffs have not properly valued the suit property and paid proper court fees and even if the plaintiffs had any right over the suit property, their right got extinguished on the doctrine of ouster and hence the suit is liable to be dismissed.

6. On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial court for consideration.

1. Whether the plaintiffs have established that the suit property is the separate property of their father?
2. Whether the defendant has established that the suit property is the joint family property of the Undivided Hindu Family consisting of his father and himself?
3. Whether the suit is barred by limitation?
4. Whether the plaintiffs are not entitled to lay the suit by way of ouster?

5. Whether the plaintiffs are entitled to claim partition as prayed for?
6. To what relief the plaintiffs are entitled to?

7. In support of the plaintiffs' case, P.W.1 was examined and Exs. A1 to A4 were marked. On the side of the defendant, D.W.1 was examined and Exs.B1 to B17 were marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to declare that the plaintiffs each entitled to 1/3 share in the suit property and accordingly granted the preliminary decree in favour of the plaintiff and also granted the relief of permanent injunction in favour of the plaintiffs as prayed for and accordingly disposed of the plaintiffs' suit. Impugning the same, the first appeal has been preferred by the defendant.

9. The following points arise for determination in the first appeal.

1. Whether the suit property is the joint property of the Undivided Hindu Family consisting of the deceased T.R.Sreenivasa Iyer and the defendant as claimed by the defendant?
2. Whether the suit property is the separate property of the deceased T.R.Sreenivasa Iyer?
3. Whether the plaintiffs right to claim partition in respect of the suit property had got extinguished by way of ouster as put forth by the defendant?
4. Whether the suit laid by the plaintiffs is barred by limitation?
5. Whether the plaintiffs are entitled to claim partition and separate possession of 1/3 share each in the suit property as prayed for?
6. Whether the plaintiffs are entitled to obtain the relief of permanent injunction as prayed for?
7. To what relief the plaintiffs are entitled to?
8. To what relief the defendant/appellant is entitled to?

Point Nos.1 and 2

10. The relationship between the parties is not in dispute. It is found and also not in dispute that the father of the parties, namely, T.R.Sreenivassa Iyer had purchased the property by way of a sale deed dated 12.03.1928 as described therein and the same is his separate property. The sale deed dated 12.03.1928 has been marked as Ex.A1. The defendant in his

written statement has admitted that though T.R.Sreenivasa Iyer had purchased the property in the year 1928, according to him, he treated the said property as the joint property of the Hindu Undivided Family consisting of himself and the defendant. It is found that the deceased T.R.Sreenivasa Iyer, during his life time, had sold the portion of the property acquired by him under Ex.A1 sale deed to V.S.Venkatesan and V.V. Nagarajan by way of a sale deed dated 11.07.1980 and challenging the abovesaid sale transaction it is found that the defendant has laid the suit against the purchasers, as abovestated, in O.S.No.3851 of 1985 on the file of the XII Assistant Judge, City Civil Court, Chennai. It is found that the abovesaid suit had come to be dismissed. The first appeal preferred by the defendant in A.S.No.34 of 1990 has also been dismissed by way of the judgment dated 26.04.1990. The copy of the abovesaid judgment has been marked as Ex.A10. Now, the defendant mainly relied upon the finding said to have been rendered by the first appellate court in the abovesaid first appeal for sustaining his case that the property acquired by the deceased T.R.Sreenivasa Iyer has been treated as the joint property of Hindu Undivided Family consisting of T.R.Sreenivasa Iyer and the defendant. No doubt, on a perusal of the judgment rendered in the abovesaid first appeal, it is found that such a finding had been rendered. In support of his case, the defendant is also found to have produced the mortgage deeds executed in the year 1946, 1951, 1953 and 1956, which have come to be marked as Exs. B1, B3, B5 and B6. According to the defendant, though the property had been acquired by the father under Ex.A1 sale deed independently, however, subsequently, he had treated the same as the joint property of the Hindu Undivided Family consisting of himself and his son, namely, the defendant, who was a minor at that point of time and accordingly had chosen to execute the abovesaid mortgages showing that the defendant is also the co-owner in respect of the property. Relying upon the abovesaid recitals contained in the mortgage deeds aboveresferred to, it is found that the appellate court in A.S.No.34/90 had rendered a finding that the property acquired by T.R.Sreenivasa Iyer in his individual name had been converted as the joint family property consisting of himself and his son and thereafter, T.R.Sreenivasa Iyer is not entitled to change the character of the property. The abovesaid finding is now mainly relied upon by the defendant for sustaining his defence version. Other than the abovesaid mortgage deeds, there is no other reliable material put forth on the part of the defendant worth acceptance to show that the property involved had been treated and enjoyed as the joint family property by T.R.Sreenivasa Iyer and the defendant. On the other hand, when it is found that T.R.Sreenivasa Iyer, during his life time had asserted his title to the property and alienated a portion of the same by way of the sale deed 11.07.1980 and furthermore, when it is seen that in the

documents marked as Exs.B8 and B9 the assertion of his independent title to the suit property had been reinforced, it is found that the claim of the defendant that the property had been treated as the joint Family property by T.R.Sreenivasa Iyer, as such cannot be readily accepted. The trial court proceeded to hold that the finding rendered by the appellate court in A.S.No.34 of 1990 is not binding upon the plaintiffs as the plaintiffs are not the parties to the abovesaid proceedings. Admittedly the plaintiffs are not the parties to the abovesaid proceedings. Though it is put forth by the defendant that attempts had been made by the plaintiff to get themselves impleaded in the abovesaid proceedings, the fact remains that the same having ended in vain and eventually, the plaintiffs are not the parties to the abovesaid proceedings. As rightly held by the trial court, the abovesaid finding of the appellate court, would not bind on the plaintiffs as such. However, the defendant's counsel would put forth the arguments that the abovesaid finding would operate as judgment in rem, particularly, the same having been rendered qua the status of the property and in this connection placed reliance upon the decisions reported in 2001 (1) CTC 247 (The commander Coast Guard Region (East), Fort St. George, Chennai-9 and another vs. O. Konavalov and 4 others) and (2006) 1 SCC 212 (Satrucharla Vijaya Rama Raju vs. Nimmaka Jaya Raju and others) and for the proposition that the self acquired property can also be converted into the joint family property, the defendant's counsel placed reliance upon the decision reported in AIR 1968 Supreme Court 1276 (G. Narayana Raju (dead) by his legal representative vs. G. Chamaraju and others).

11. As above pointed out, other than the mortgage deeds, above referred to, there is no other material on the part of the defendant to hold that the deceased T.R.Sreenivasa Iyer had treated the property acquired by him as the joint property. As held by the trial court, it is found that at the instance of mortgagee when it is seen that the mortgages involved in question and relied upon by the defendant, having chosen to be executed by the deceased T.R.Sreenivasa Iyer by including his son also and showing him as the co-owner thereof and on that footing alone, it cannot be inferred that there has been a clear intention on the part of the deceased T.R.Sreenivasa Iyer to throw the property into the family hotchpot and treat the same only as the joint family property. For the purpose of attributing the character of joint family property to the separate property of a Hindu coparcener, the same could be done only by the express volition and intention of the holder of the property by waiving or surrendering his right in the same and such intention could be discovered only from his words or from his acts and conduct in toto. The abovesaid position of law is outlined in the decision referred to supra in AIR 1968 Supreme

Court 1276. Accordingly, applying the above proposition of law to the facts and circumstances of the present case, it is found that other than the abovesaid mortgages, there is no material on the part of the defendant to evidence that the deceased T.R.Sreenivasa Iyer had thrown the property acquired by him into the common hotchpot and continue to treat the property as the joint family property by waiving his absolute right over the same. If that be so, when the deceased T.R.Sreenivasa Iyer proceeded to alienate the portion of the suit property, he would not have asserted his absolute right over the property in the sale deed dated 11.07.1980. T.R.Sreenivasa Iyer has asserted his title over the property and the same could be evidenced from the documents marked as Exs.B8 and B9. It is also found that the second plaintiff has been residing in the suit property and only after the demise of the parents, according to the plaintiffs' case, the defendant had thrown away the second plaintiff from the suit property. It is also the case of the plaintiffs that the first plaintiff used to frequently visit the suit property and provide support to the parents. The position being above, whether on the basis of the mortgage deeds projected by the defendant, we could presume and hold that the suit property had been treated as the joint family property by T.R.Sreenivasa Iyer. In this connection, I had an occasion to decide the issue in the decision reported in 2017-1-L.W.377 (Vasantha & others vs. Pushpa & others), wherein it has been held that the mortgage by the father and minor sons, by itself, would not lead to such a conclusion and further held that discharge by the sons of the mortgage also would not lead to the conclusion that it is the joint family property and accordingly proceeded to hold that the suit property involved in the decision is the separate property. The abovesaid position of law has been outlined in the abovesaid decision, which is extracted below:

Hindu law/Joint family property, presumption, separate property, scope presumption of joint family, when arises-Mortgage by father and minor sons would not lead to such a conclusion held: discharge by sons of the mortgage also would not lead that is joint family property - suit property is separate property.

From the evidence of DW1, it could be seen that there is absolutely no material to hold that the suit property has been ever treated as the joint family property consisting of Thiruvengada Naicker and his four sons. In such circumstances, it has not been explained by the defendants as to how without any material on record, could it be presumed or held that the suit property is the joint family property of Thiruvengada Naicker and his four sons.

Therefore, the only point that arises for

consideration in this case is whether the mortgage of the suit property by Thiruvengada Naicker along with his sons would be sufficient to hold that the suit property has been treated and enjoyed as the joint family property of Thiruvengada Naicker and his four sons. On the sole ground that Thiruvengada Naicker had jointly executed the mortgage deed along with four sons, that by itself, would not lead to the conclusion that the suit property had been treated as the joint family property of Thiruvengada Naicker and his four sons. Barring the said isolated incident, as seen from the evidence of D.W.1, there is no material whatsoever to show or evidence that the suit property had been ever treated as the joint family property of Thiruvengada Naicker and his four sons. Such being the position, it could be seen that the courts below have erred in holding that the execution of the mortgage deed by Thiruvengada Naicker and his four sons would be sufficient to hold that the suit property is the joint family property.

The mere fact that the sons had discharged the mortgage debt, as rightly argued plaintiffs' counsel could not be taken as a factor for holding that the suit property has been treated as the Joint Hindu Family property of Thiruvengada Naicker and his four sons. As rightly argued, it could be seen that, at the most, having regard to the case of the defendants, by the discharge of the mortgage debt, equities have to be worked out and adjusted while passing final orders in the final decree proceedings. Therefore, the above factor on its own, would not be sufficient to sustain defendants case.

Therefore, I hold that the suit property is the separate property of Thiruvengada Naicker and after his demise, the plaintiffs, being the class I heirs of Thiruvengada Naicker, are each entitled to obtain one seventh share in the suit property.

2005 (5) CTC 264 (Savithiri Ammal V. Illayaperumal and another) and 2013 (1) MLJ 513 (G. Kumar V. Samuthiradevi and another) - Referred to.

12. In the light of the abovesaid position, when it is found that the suit property had been acquired by the deceased T.R.Sreenivasa Iyer independently, on the mere fact that he had subsequently mortgaged the suit property along with his minor son and barring the abovesaid isolated incident, when there is no other material to show that the suit property had been treated as the Joint family property of the deceased T.R.Sreenivasa Iyer and his son, in such view of the matter, it is found that the contention put forth by the defendant that on

the basis of the mortgage deeds projected by him, the property should be held to be the Joint property of the Hindu Undivided Family consisting of the deceased T.R.Sreenivasa Iyer and the defendant, as such, cannot be accepted. In the light of the decision reported in 2017-1-L.W.377, the findings rendered by the appellate court in A.S.No.34/90 relied upon by the defendant cannot be acceded to and when the materials placed on record go to show that the deceased T.R.Sreenivasa Iyer had asserted his absolute and independent right over the property acquired by him and in such view of the matter, the trial court is found to be justified in holding that the property involved in the matter is the absolute and independent property of the deceased T.R.Sreenivasa Iyer and not the joint family property of the Hindu Undivided Family consisting of T.R.Sreenivasa Iyer and the defendant as claimed by the defendant.

13. In the light of the abovesaid discussions, I hold that the suit property is not the joint family property of the Hindu Undivided Family consisting of the deceased T.R.Sreenivasa Iyer and the defendant as claimed by the defendant. On the other hand, I hold that the suit property is the separate and independent property of the deceased T.R.Sreenivasa Iyer and accordingly, the point numbers 1 and 2 are answered.

Point Nos. 3 and 4

14. It has been held that the suit property is the separate and independent property of the deceased T.R.Sreenivasa Iyer. In such view of the matter, it is found that all his legal heirs would be entitled to claim share in the suit property. However, the defendant would endeavour to exclude the claim of share in the suit property on the part of the plaintiffs by contending that it is he who had been exclusively enjoying the suit property on his own by ousting the plaintiffs from the suit property and therefore, according to the defendant, even assuming that the plaintiffs have right over the suit property, the same got extinguished by way of ouster. Therefore, according to the defendant, the suit laid by the plaintiff is barred by limitation.

15. The defendant by taking the abovesaid plea of ouster, has impliedly admitted that the plaintiffs have title to the suit property as the legal heirs of the deceased T.R.Sreenivasa Iyer. The defendant having taken the plea of ouster for defeating the plaintiffs' claim of share over the suit property, it is for the defendant to establish his abovesaid claim with reference to the plea of ouster. The defendant has placed reliance upon the documents marked as Exs. B11 to B17. It is found that the patta had been secured by the defendant in the

year 1991 and paid some receipts during 1993, 1996 ,2001 and 2002 and also found to have paid water tax receipts during 2008. The abovesaid documents alone are relied upon by the defendant for sustaining his plea of ouster. As rightly held and determined by the trial court, when the plaintiffs and the defendants are found to be the co-owners of the suit property, the enjoyment of one co-owner of the property is deemed to be the enjoyment of the other co-owners and in such view of the matter, on the basis of the abovesaid set of documents projected by the defendant, not exhibiting his enjoyment as the absolute owner of the suit property continuously and openly beyond the statutory period by asserting his adverse title by way of ouster to the knowledge of the plaintiffs with animus possidendi and the mere enjoyment of the property exclusively on the part of one co-owner cannot be characterised as the adverse enjoyment as such particularly when the same could not be gathered based on the few documents projected by the defendant, as above pointed out, and when the defendant has failed to establish that it is he who had been enjoying the suit property in his own right by excluding the rights of the plaintiffs over the same openly, continuously and uninterruptedly by asserting his hostile title to the knowledge of the plaintiffs and when it is found that the plaintiffs had also been objecting to the claim of the defendant that he is the sole legal heir of the deceased T.R.Sreenivasa Iyer, in all, it is found that the plea of ouster put forth by the defendant for negating the claim of share of the plaintiffs in respect of the suit property cannot be accepted in any manner, particularly, on the basis of the few documents projected by him as above pointed out. In such view of the matter, the enjoyment of the property by one co-owner howsoever long over a period of time by itself would not defeat the right of the other co-owners and accordingly, the trial court is justified in negating the plea of ouster put forth by the defendant. For the reasons aforesaid, I hold that the defendant has failed to establish his plea of ouster for negating the claim of share of the plaintiffs in respect of the suit property. Consequently I hold that the suit laid by the plaintiffs is not barred by limitation. Accordingly, the point numbers 3 and 4 are answered.

Point Nos. 5 and 6

16. In the light of the answers to the point numbers 1 to 4, I hold that the plaintiffs are each entitled to obtain 1/3 share in the suit property and also entitled to the relief of permanent injunction as claimed by them. Accordingly, the point numbers 5 and 6 are answered.

Point Nos. 7 and 8

17. For the reasons aforesated, the judgment and decree dated 24.08.2012 passed in O.S.No.13667 of 2010 on the file of XIX Additional Judge, City Civil Court, Chennai, are confirmed. Resultantly, the first appeal is dismissed with costs. Consequently, connected miscellaneous petition is closed.

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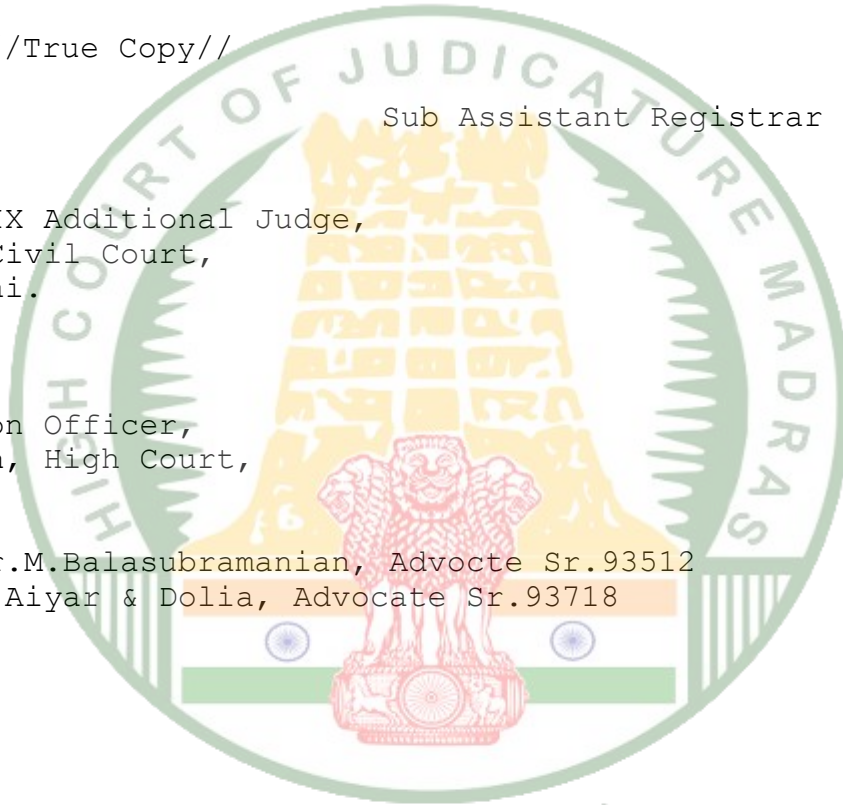
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