

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.08.2019

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.819 of 1998

- 1.T.R.Narayanaswamy (Deceased)
- 2.N.Kaliammal
- 3.N.Rukmani Devi
- 4.N.Seetharaman

(Appellants 2 to 4 are brought on record as Legal heirs of the deceased sole appellant vide order of Court dated 12.02.2018 made in C.M.P.Nos.2661 to 2663 of 2016 in S.A.No.819 of 1998)

...Appellants/Plaintiffs

..Vs..

- 1.T.R.Govindadas
- 2.T.R.Perumalsamy
- 3.Dhandava Rajan
- 4.Parthasarathy (Died)
- 5.Govindan @ Rajamani
- 6.Sivabagyam
- 7.Sellamuthu
- 8.Pappayee
- 9.Sharmila Ramkumari

(R9 brought on record as legal heir of the deceased R4 vide order of Court dated 19.06.2019 made in C.M.A.Nos.5111 to 5113 of 2018 in S.A.No.819 of 1998)

...Respondents/Defendants

PRAYER: This Second Appeal has been filed under Section 100 of C.P.C., against the Judgment and Decree dated 22.07.1997 made in A.S.No.176 of 1996 on the file of the Court of District Judge of Coimbatore, reversing the Judgment and Decree dated 23.09.1996 made in O.S.No.1782 of 1990 on the file of Court of District Munsif, Coimbatore.

For Appellants : Mr.L.Mouli

For Respondents 1, 2 : Mr.P.Willson Topaz for
M/s.A.S.Kailasam and Associates

J U D G M E N T

The unsuccessful plaintiff is the appellant herein.

2. For the sake of convenience, parties are referred to as their ranking before the trial Court.

3. The admitted relationship between the parties are: The plaintiff and defendants 1 and 2 are brothers. The defendants 3 to 5 are the sons of the 1st defendant. The 6th defendant is the daughter of the 1st defendant. Defendants 7 and 8 are the son and daughter of one Rangasami who is the eldest brother of the plaintiff and defendants 1 and 2. The said Rangaswami is no more.

4. The plaint proceeds on the basis that the plaintiff is in possession and enjoyment of the major portion of the suit property. The defendants 2, 7 and 8 are in permissive possession and enjoyment of the suit property. The suit property and other landed properties originally belonged to the plaintiff's father and his predecessors. A suit in O.S.No.541 of 1952 was filed by Coimbatore Ganesa Bank Limited represented by its Secretary Ganesan against the plaintiff his father and brothers and a money decree was also obtained against all. In the Execution Proceedings in E.P.No.814 of 1954 in O.S.No.514 of 1952 three items of the properties belonging to the plaintiff's family were brought to sale and the decree holder himself became the auction purchaser, and a sale deed was also executed in favour of the Ganesa Bank. On 14.02.1963, the plaintiff had purchased two items of property including the suit properties, for a valuable consideration of Rs.1000/- out of the above said two items, the plaintiff had sold one item of 10 the house properties to the 2nd defendant on 05.02.1973 under a registered sale deed for Rs.3000/-. In the said house, the family of the defendants 4 and 5 are now residing.

5. With the above admitted facts and position the appellant / plaintiff preferred the appeal seeking the relief of declaration and for permanent injunction restraining the defendants from anyway interfering with the plaintiff's peaceful possession and enjoyment of the suit property.

6. The suit is filed by the plaintiff for granting a decree for permanent injunction restraining the defendants, their men from in anyway interfering with the plaintiff's peaceful possession and enjoyment of the suit property. Having filed this suit for a prohibitory relief it is the prime duty of the plaintiff to prove his possession in respect of the property for which he has sought for permanent injunction. As stated supra, the plaintiff, 1st and 2nd appellant are brothers. The

defendants 3 to 5 are the sons of the 1st appellant. The 6th appellant / defendant is the daughter of the defendant. The defendants 7 and 8 are the son and daughter of one Rangasami who is the elder brother of the plaintiff and the 1st and 2nd defendants. He is no more. Admittedly, the suit property and the other landed properties belonged to the plaintiff's father and his predecessors. The suit property including the other properties were given as security by the father, plaintiff's elder brother Rangasami and the appellants / defendants 1 and 2 in favour of Ganesa Bank in respect of a loan obtained by them. Since the loan amount was not discharged, a suit in O.S.No.541 of 1952 was filed by the Ganesa Bank and they have also obtained a decree to that effect. The creditor bank had taken Execution Proceedings in E.P.No.814 of 1954 in O.S.No. 541 of 1952 and brought three items of properties for sale and the Decree Holder himself became the auction purchaser and therefore, a sale deed was executed in favour of the Ganesa Bank. These are all the admitted facts of both parties.

7.Though the plaintiff himself has admitted in his plaint that the defendants 2, 7 and 8 are in possession and enjoyment of the suit property. But he has contended that they were on permissive possession. But on careful appreciation of the oral and documentary evidences there is no material on record to show that the defendants 2, 7 and 8 are in permissive possession and enjoyment of the suit property under the plaintiff. Therefore, it is clear that the contention with regard to permissive possession has not been proved by the plaintiff.

8.The trial Court, on consideration of both oral and documentary evidence has held that on the date of filing of the suit the plaintiff was not in possession of the property. However, since he is having the title and he was displaced away by the other brothers held that he was entitled for permanent injunction and accordingly decreed the suit.

9.Aggrieved against the Judgment and Decree passed in O.S.No.1782 of 1990 in A.S.No.176 of 1996, II ADJ, Coimbatore, on re-appreciation of the evidence of the record the lower appellate Court has come to the conclusion that the plea of permissive possession by the defendant as contended by the plaintiff was not proved in the manner known to law and in view of the admission by the plaintiff that on the date of Ex.A1 sale deed he was not married and living along with the parents and on the date of the suit since the plaintiff was not in possession of the property and in the absence of any prayer for declaration of title and recovery of possession has allowed the appeal and consequently the suit stands dismissed and further relying upon the fact that it is a joint family / co-parcener property injunction was also rejected and hence aggrieved over the Judgment and Decree passed by the lower appellate Court the

unsuccessful plaintiff has preferred the above Second Appeal.

10.The above Second Appeal was admitted on the following substantial question of law.

"Whether the Lower Appellate Court is legally correct in holding that joint family property lost to the family, if recovered belongs to the family when the concept of the joint family itself has not been established by the respondents?"

11.The learned counsel for the appellants would contend that pursuant to Ex.A1 sale deed which is evidence in Ex.A2 which is a separate property of plaintiff and therefore the finding of the lower appellate Court that the suit property is having a joint family character is erroneous. The learned counsel also stated that since he is the owner of the property is entitled for the relief of permanent injunction. This Court has given anxious consideration to the said contention raised by the learned counsel. To that effect, the learned counsel appearing for the appellants has drawn this Court's attention to Page - 97 of the Hindu Law by S.P.Gupta. In that page, the scope of Article - 3 has been well defined. Article - 3 is giving wide explanation to the term "Joint Family" (Coparcenary property). Property means and includes:-

"1.Property which is regarded as 'ancestral' in Hindu Law:

2.Property which is acquired:-

(i)with the aid or assistance of joint family property,

or

(ii)without the aid or assistance of joint family property provided it is acquired jointly by two or more coparceners as joint family property;

3.Property of the separate ownership of a coparcener but thrown by the owner into the common stock of the family voluntarily and with the intention of abandoning all separate claims upon it.

Explanation: Joint family property lost to the family if recovered belongs to the family.

(i)wholly where recovered with the aid or assistance of family property.

(ii)to the extent or three-fourthes only where recovered without the aid or assistance of family property provided it is recovered by a member of the family other than the father and the property recovered is immovable."

The proposition of law is well settled under Article 3 of Hindu Law that if a joint family property is lost to the family and regained by a member of the family which according to law entitle the other members of the joint family to share the same. As already discussed in supra the sources for the purchase of property under Ex.A1 has not been satisfactorily explained by the respondent / plaintiff. He himself admitted that the 1st appellant / 1st defendant through his earnings as a member had

purchased the property. At the time of his purchase he was bachelor, and residing with his parents and brothers under the same roof. When such being the case he could not have purchased the property by his own earnings. But he could have purchased the property from the money sent by the 1st appellant / 1st defendant through his earnings in his name to the detriment of the rights of other co-sharers. Simply because of the sale deed stands in the name of the respondent / plaintiff he cannot ask for a prohibitory relief for permanent injunction against the other co-sharers. Because as admitted by the respondent / plaintiff, defendants 2, 7 and 8 are residing in the suit property.

12. Admittedly, Ex.A1 is the registration copy of the sale deed dated 14.02.1963 executed by the Secretary of Ganesa Bank Limited in favour of the plaintiff / appellant and Ex.A2 is the original sale deed executed in favour of the respondent on the strength of the above said deed. The plaintiff claims exclusive rights on the suit property. It is not in dispute that the subject matter of the suit property was originally a joint family property was mortgaged to Ganesa Bank Limited and for non payment of the amount suit has been laid in O.S.No.541 of 1952, which has resulted in exparte decree and thereafter, the decree holder after obtaining necessary permission before the execution Court has participated in the auction and purchased the property. It is admitted by the P.W.1 in the cross examination that after the Court auction in favour of the Bank, a sale deed was executed even then for 10 years they resided in the suit property as a tenant and the joint family members were residing together and the family was joint in nature and P.W.1 further admitted that at the time of execution of Ex.A1 sale deed in favour of him, he was a bachelor, unmarried living along with his parents and elder brother and the second elder brother namely the 2nd and third defendants at the time of the Ex.A1 he was not earning any amount, while the first defendant and other brothers are employed are all lived together jointly, also goes against the appellant / plaintiff. In view of the explanation as extracted above, coupled with the answer initiated in the cross examination of the P.W.1 as narrated and extracted above goes against him.

13. In view of the above discussion this Court finds that on the factual matters of this case explanation as extracted above goes to show that when the joint family property was lost to the family and in the event of its recovery it belongs to the family. Furthermore it is also seen that even by his own admission in the witness box as extracted supra, it is seen that he had no means to purchase the property.

14. In fact the above said factum is also duly corroborated by the evidence of D.W.2 who said to have purchased

the other property covered under Ex.A1 sale deed wherein he himself has admitted that sale deed in favour of the second defendant by the plaintiff in the year 1973 that it is mentioned in the document the sale consideration is Rs.3,00,000/-. The second defendant as D.W.2 admitted in evidence that the income of the family was derived through the earning of the first defendant and other agricultural sources and the sale in his favour is only sham and nominal and no consideration was passed on to D.W.2 and hence, this Court is of the considered view that in view of the law laid down as discussed supra coupled with the admission of the P.W.1 that he had no means to purchase the property, the property which was lost to the family on its recovery, belongs to the family and the defendants and plaintiffs are holding the property as a joint family property and hence, the reasoning given by the lower appellate Court is that well considered and well merited, does not call for any interference at this appellate stage.

15. Furthermore it is to be stated that the appellant / plaintiff himself voluntarily admitted in his plaint and evidence that the appellants 2, 7 and 8 are residing in the suit property. Further he has also admitted that he has not been residing in the suit property and that he is residing some where in L.T.O. Colony, Madukkarai Road. On the other hand, the learned counsel appearing for the respondent / plaintiff would argue that there was no documents to show that the appellants have exercised their right to the suit property. To that effect I would like to add that the admitted fact need not be proved by documentary evidence. Because the appellant / plaintiff himself has admitted that the defendants 2, 7 and 8 are residing in the suit properties. He has also fairly admitted that he is out of possession. From the evidence it is clear that he was not in possession and enjoyment of the suit property at the time of filing the suit or even prior to the filing of the suit. I find that this suit for bare injunction should fail, for the simple reason that the appellant / plaintiff has not been in possession and enjoyment of the suit property. The suit is filed by the appellant / plaintiff for bare injunction stating that he is the exclusive owner of the suit properties. But his exclusive right is being questioned by the respondents / defendants in their written statement, even though his contention is being questioned the appellant / plaintiff has not come forward to amend the body of the plaint as well as the prayer for declaration of his title. Moreover, he has admitted that the possession of the suit property is with the respondents / defendants, and he is out of possession. Though he has admitted that he is out of possession and the possession of the suit property is with the respondents / defendants, he has not come forward with the prayer for recovery of possession from the respondents / defendants. Therefore, in this suit for bare injunction, the title of the parties need not be searched

because the respondents / defendants himself has admitted that he is out of possession and that the respondents 2, 7 and 8 / defendants are in possession and enjoyment of the suit property.

16. In view of the above discussion, this Court answers this substantial question of law, as extracted above in negative against the plaintiff and for the reason stated in the presiding paragraphs. In the result, the Second Appeal stands dismissed. No costs.

Sd/-
Assistant Registrar(CS-VI)

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Sub Assistant Registrar

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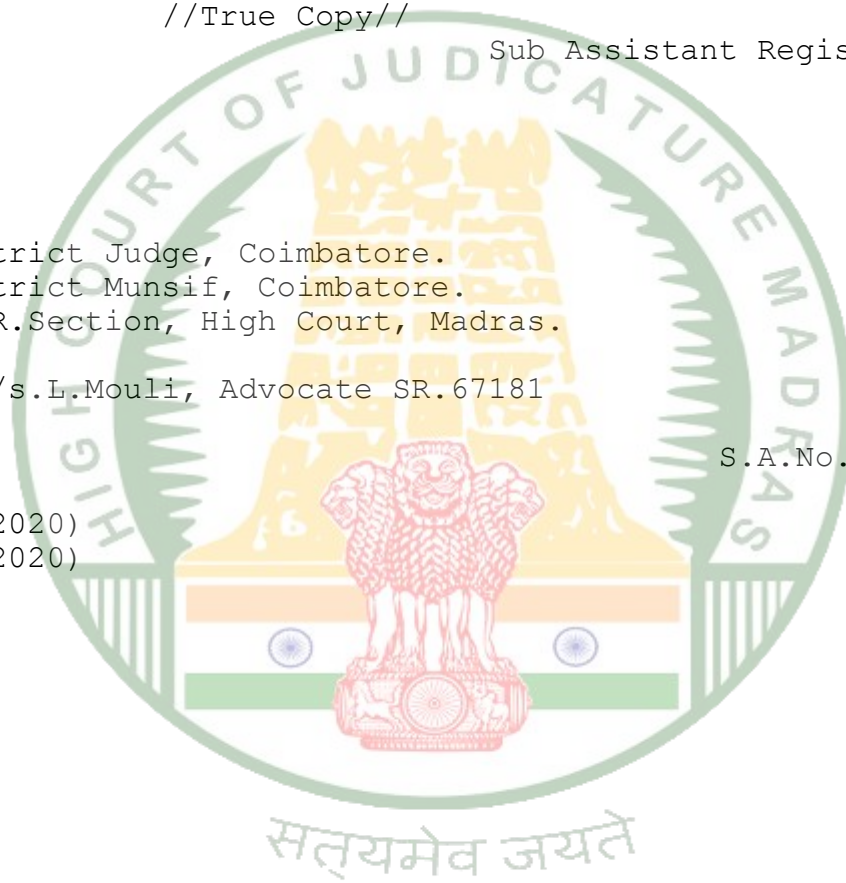
To

- 1.The District Judge, Coimbatore.
- 2.The District Munsif, Coimbatore.
3. The V.R.Section, High Court, Madras.

+1cc to M/s.L.Mouli, Advocate SR.67181

S.A.No.819 of 1998

SAI(CO)
CB(15/06/2020)
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