

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 28.01.2019

Judgment Pronounced on : 01.02.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

A.S.No.941 of 2009
and M.P.No.1 of 2012
and CMP.No.10300 of 2018

1.Prema
2.Om Prakash (Minor)
Minor represented by his mother Manjula
3.Manjula Appellants
Vs
1.Manivannan
2.Rathinam ... Respondents

Prayer :- Appeal Suit filed under Order 41 Rule 96 of CPC, against the judgment and decree passed in O.S.No.64/2006 on the file of the Additional District Judge, Fast Track Court No.1, Chengalpattu, dated 30.04.2009.

For Appellants : Ms.M. Christella
For Respondents : Mr.N.Dhanasekaran [R2]
R1 - No appearance

JUDGMENT

This appeal is preferred challenging plaintiffs' suit for partition of their alleged 2/3 share in the suit property. Parties would be referred to by their rank before the trial Court.

2. The plaint with its jerky narration of facts may be concisely stated:

- There are two items of suit properties, the 1st item measuring 1.08 acres in S.No.75 of Periyaputheri village, and the 2nd item measures 0.67 acres in S.No.26/2 of Reddykuppam Village, both in Chengalpattu Taluk. These properties are wet agricultural lands and were the ancestral properties in the hands of one Krishtappa Naicker. His wife was Savithri Ammal. Krishtappa Naicker purchased the 1st item of property in 1966 in favour of his wife Savithri Ammal, and she was chiefly a name-lender. The 2nd item of property was purchased by Savithri Ammal herself on 05.08.1971. By then, Krishtappa Naicker had already died. Savithri Ammal died subsequently on 23-10-1991.

- Krishtappa Naicker and Savithri Ammal had five children of who Mohan, Giridhar and Manivannan are their three sons, and Ambika and Easwari are their daughters. Mohan died on 06.04.1990 and his wife is the first plaintiff. Giridhar died on 07.05.1995 leaving behind him surviving his minor son, the 2nd plaintiff in the suit. Manivannan is the 1st defendant.
- During the lifetime of Savithri Ammal, both Ambika and Easwari were provided with other properties and the suit properties were allotted to her male children. On the demise of Savithri Ammal, the entire suit properties came to be jointly enjoyed by the plaintiffs and 1st defendant and that the plaintiffs are jointly entitled to 2/3 shares.
- Be that as it may, the 1st defendant has been cultivating the suit properties but all the sharers used to participate in the agriculture income till 2003. However, it appears that the 1st defendant had entered into some agreement with the 2nd defendant, without the knowledge or consent of the plaintiffs, and not for any family necessity. The 2nd defendant has no right in the suit properties and cannot claim any title affecting the right of the plaintiffs. Hence, in January 2003, the plaintiffs demanded partition. Earlier, at the instance of the plaintiffs, a suit notice dated 15.3.1994 was served on the 1st defendant demanding partition, and yet another notice dated 10.01.2006 was issued for the same purpose. As there was no positive response to any of these notices, this suit came to be laid.

3. The 1st defendant remained exparte, and only the 2nd defendant contested the suit. Denying the allegation that Krishtappa Naicker had purchased the 1st item property in the name of his wife, benami, it is alleged that both the items of suit properties belonged to Savithri Ammal. The properties had never been ancestral properties. At no point of time the properties have devolved on the plaintiffs nor have they been enjoying them. Be that as it may, on 27.5.1996, Ambika and Easwari both daughters of Savithri Ammal, and sisters of the 1st defendant had executed separate release deeds as regards their 2/3 share in the suit properties in favour of the 1st defendant. Based on that, on 02.06.2003, the 1st defendant had sold both the items of suit properties for a total consideration of Rs.2,40,000/-. This defendant is a bonafide purchaser for value without notice of any claim as is now set up by the plaintiffs. Since the date of sale the second defendant has been in absolute and exclusive possession of the suit properties. It is relevant to state that

in January, 1992, Giridhar, one of the son's of Savithri Ammal had demanded partition of the properties and this was rejected by the 1st defendant as well as by his two sisters Easwari and Ambika. Thus, from 1992 onwards, Giridhar has been excluded from the enjoyment of the suit properties. So far as the 1st plaintiff is concerned, inasmuch as her husband Mohan had pre-deceased his mother, the 1st plaintiff is not legally entitled to any share. The allegation that the plaintiffs had demanded partition in January, 2003 is false. So far as the suit notices demanding partition dated 15.3.1994 and 10.01.2006 are concerned, this defendant does not remember to have received them. In this regard, it is pertinent to state that in the first of the notices dated 15.3.1994, the plaintiffs have included another property in S.No.18 in Reddikuppam Village, but this is seen omitted in the plaint. Hence, the suit is bad for partial partition. At any rate, Ambika and Easwari are necessary parties to the proceedings and the suit is bad for non-joinder of necessary parties. The suit is under valued.

4. Before the trial Court, the guardian of the 2nd plaintiff (Widow of Giridhar) has examined herself as PW1 and one Govindaraj was examined as PW2. For the defendants, the 2nd defendant was examined as DW1 and a certain Thiayagraja Chettiyar was examined as DW2. While the plaintiffs have produced Exts.A-1 to A-15, the defendants have marked Exts.B-1 to B-12. Surprisingly both sides appeared to believe that they participated in a trial in a territory where Evidence Act does not apply, since the documents produced by both parties are photostat copies of the original. Sadly the Courts below believed in its truth.

5. Turning to the trial per se, the Court has framed as many as five issues and the critical issues are issues No.1 and 2, which relate to the character of Savithri Ammal's title to the suit properties, and the plaintiffs' right to claim partition. Rejecting plaintiffs' contentions that the suit properties were ancestral properties and that they were purchased in the name of Savithri Ammal benami, the trial Court has held that the suit properties are the properties of Savithri Ammal herself. It however, dismissed the suit chiefly on two grounds:

- That the second defendant is a bonafide purchaser.
- That in the suit notice dated 15-03-1994, besides the present suit properties, the plaintiffs have included another item of property comprised in S.F.No:18, and inasmuch as this item was not included in the present suit, the suit itself is bad for seeking partial partition.

This decree is now under challenge in this appeal.

6. Points to be considered are:

- 1) Whether the plaintiffs have any share in the suit properties? If so what is the share?
- 2) Whether the Giridhar and following him the second defendant is ousted of their share in the suit property?

7. The argument of the appellants' counsel was premised on the correctness of the findings of the trial Court that the suit properties are not the personal properties of Savithri Ammal. But this assertion through the pleadings has come in post Benami Transactions (Prohibition) Act, 1988 era and hence plea of benami is barred under Section 4 of the Act. The arguments now raised are that:

- a) When Savithri Ammal died, her right in the suit properties devolved equally on all her children and accordingly the plaintiffs would be entitled to 2/10 share. This cannot be denied except as per law.
- b) That the contesting second defendant has purchased the properties only in 2003, and he cannot obtain any right greater than the right of the first defendant. He admittedly has 3/5 share, one share of his own, and the other two shares are that which he had obtained as per the release deeds dated 27-05-1996 Vide Exts.B-7 and B-8, executed by his sisters Ambica and Eswari.
- c) On the aspect of partial partition, the property in S.No:18, Reddikuppam Village referred to in Ext.A-9 suit notice dated 15-03-1994, has since been sold under a sale deed dated 23-03-1995. A copy of this is now produced under Order XLI Rule 27 CPC Vide CMP No:10300 of 2018. At any rate this is not a ground which a purchaser from one of the co-sharer can raise since his interest is confined only to the property that he has purchased. Reliance was placed on Karuppaiah & another Vs C. Muniyappan & others [2014 (2) CTC 706].
- d) The reasoning of the trial court that the second defendant is a bonafide purchaser is alien to the plaintiffs' claim to the extent of their right in the suit properties. This ought not to have weighed.

8. The counsel for the second defendant came up with three pronged arguments: (a) That the second defendant is a bonafide purchaser; (b) that the suit is bad for partial partition for

including the property in S.F.No:18; and (3) that the suit is time barred. Ext.A-9 suit notice is dated 15-03-1994 but the suit is laid only on 17-03-2006, which is well beyond the 12 years period for losing title to the property by ouster/adverse possession.

9.1 Have the plaintiffs any right in the suit properties? As per Ext.A-8 death certificate, Savithri Ammal had died on 23-10-1991. Her son Mohan (the husband of the first plaintiff) had predeceased his mother on 06-04-1990, as evidenced by Ext.A-6 death certificate, whereas her other son Giridhar had died on 10-05-1995. When Savithri Ammal had died, her right in the suit properties had devolved on her heirs under Sec.15 of the Hindu Succession Act, as per which, a widow of a predeceased son is not a heir. Hence, the first plaintiff is not entitled to any share in the suit properties.

9.2 So far as Giridhar is concerned, since he died after his mother, he had obtained $\frac{1}{4}$ share in the suit properties along with his other brother (the first defendant) and his two sisters. This $\frac{1}{4}$ share has devolved equally on both his widow and his child and accordingly the second plaintiff is entitled to $\frac{1}{8}$ share.

10.1 The next question is have the plaintiffs lost their right to seek partition? In view of the above finding this point would apply essentially to the second plaintiff. Here the finding of the trial court that the second defendant/second respondent is a bonafide purchaser claiming title under the first defendant has little relevance. A purchaser from a co-sharer cannot claim a right greater than the right which his vendor himself possessed in the property sold, unless the other co-sharers are ousted of their vested share in the suit properties.

10.2 So far as ouster goes, there is no specific pleading on the aspect. Here the argument founded on Ext.A-9 is not impressive. Is there any evidence that those of the plaintiffs who have a right in the suit properties have been ousted by their other co-sharers within twelve years next before the sale in favour of the second defendant/ second respondent. In other words the ouster should have been completed as on the date of Exts.B-7 and B-8. A mere inaction or non responsiveness to a demand for partition by a co-sharer is inadequate to strip the latter of his vested right in the property. It is an act, positive in character, that must be done by a co-sharer adverse to the interest of the other co-sharer who is sought to be ousted, and to the latter's knowledge. Here this Courts spots a huge void both in the pleadings of the 2nd defendant and the evidence he has let in. The second respondent has not examined his own vendor, who alone is competent to speak about it. Therefore, it ought to be presumed that till the first respondent sold the

properties to the second defendant, the former was in possession and enjoyment of the properties for the other co-sharers as well. And admittedly the second plaintiff and his mother Manjula (P.W1) are jointly entitled to $\frac{1}{4}$ share in the property.

10.3 Another ground on which the trial Court has dismissed the suit is one founded on partial partition for non-inclusion of the property in S.No.18. That this property has been sold by the additional document now produced Vide CMP.No.10300 of 2018. Since the sale deed only clarifies a fact, but does not affect the cause of action for the suit, the CMP is allowed. The sale deed dated 23.03.1995 is marked as Ext.A16.

11. In the result, this appeal is partially allowed, and the judgement and the decree dated 30.04.2009 passed in O.S.No.64 of 2006 , on the file of the Additional District Judge, Fast Track Court No.1, Chengalpattu, is set aside, and the 2nd plaintiff is declared to have $\frac{1}{4}$ share in the suit properties. The defendants will be jointly entitled to have only $\frac{3}{4}$ share in the suit properties. No costs. Consequently, connected miscellaneous petition in CMP.No.10300 of 2018 is allowed and MP.No.1 of 2012 is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

Appendix : Ext.A16 - Xerox copy of sale deed dated 23.3.1995.

To:

1.The Additional District Judge (FTC No.1)
Chengalpattu.

2.The Section Officer
VR Section, High Court, Madras.

+1cc to Mr.N.Dhanasekaran, Advocate sr.8723

+1cc to Ms.M. Christella, Advocate sr.8716

A.S.No.941 of 2009

pp(co)
nr 12/11/2019