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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.03.2019
PRONOUNCED ON : 22.05.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.Nos.362 and 363 of 2000

In S.A.No.362 of 2000:

Sattar ..Appellant / 2nd Defendant /
Cross objector / 2nd Defendant

Vs.

1. Thaiyalnayagi (deceased)
2. Chinnaponnu
3. Kaliyammal
4. Chandra
5. Subramanian
6. Subash ..Respondents/Plaintiff & D1

(R6 brought on record as LR of the deceased R1
vide Order of the Court dated 10.01.2019
made in CMP.Nos.22925, 22927 & 22929/2018
in SA.No.362/2000)

PRAYER : Second Appeal filed under Section 100 of C.P.C.,
against the judgment and decree dated 22.06.1999 made in
A.S.No.13 of 1999 and memo of Cross-Objections on the file of
the Court of Principal Subordinate Judge, Mayiladuthurai in
reversing the judgment and decree dated 20.11.1998 made in
O.S.No.91 of 1995 on the file of the Court of District Munsif,
Sirkali.

In S.A.No.363 of 2000:

1. Abdul Sattar
2. Kurshid Begum Appellants/Respondent-
Cross Objector/ Plaintiffs

Vs.

1.Ganesan
2.Thaiyalnayagi (deceased)
3.Chinnaponnu
4.Kaliyammal



5.Chandra

6.Subash

(R6 brought on record as LR of the deceased R2
vide Order of the Court dated 10.01.2019
made in CMP.Nos.22917, 22921 & 22922/2018
in SA.No.363/2000)

... Respondents/Appellants/Defendants

PRAYER : Second Appeal filed under Section 100 of C.P.C.,
against the judgment and decree dated 22.06.1999 made in
A.S.No.14 of 1999 and memo of Cross-Objections on the file of
the Court of Principal Subordinate Judge, Mayiladuthurai in
reversing the judgment and decree dated 20.11.1998 made in
O.S.No.105 of 1995 on the file of the Court of District Munsif,
Sirkali.

For Appellant : M/s.M.Premkumar
(in both the appeals)

For Respondents : M/s.S. Sounthar
for R2 to R4 and R6
(in SA.No.362/2000)

For R3 and R4 to R6
(in SA.No.363/2000)

R5-set exparte
(in SA.No.362/2000)

C O M M O N J U D G M E N T

S.A.No.362 of 2000 has been filed by the second
defendant on the file of the District Munsif, Sirkali, against
the judgment and decree passed in A.S.No.13 of 1999 on the file
of the Principal Sub-Judge, Mayiladuthurai dated 22.06.1999
reversing the judgment and decree passed by the District Munsif,
Sirkali in O.S.No.91 of 1995 dated 20.11.1998.

S.A.No.363 of 2000 has been filed by the plaintiffs
against the judgment and decree passed by the Principal Sub-
Judge, Mayiladuthurai in A.S.No.14 of 1999 and Cross-objections
dated 22.06.1999 reversing the judgment and decree passed by the
District Munsif, Sirkali in O.S.No.105 of 1995 dated 20.11.1998.

2. The respondents 1 to 4 in S.A.No.362 of 2000 had
filed a suit in O.S.No.91 of 1995 on the file of the District
Munsif, Sirkali to divide the suit property into five equal
shares and allot four such shares to them. The appellants in
S.A.No.363 of 2000 had filed a suit in O.S.No.105 of 1995 on



the file of the District Munsif, Sirkali, for the relief of permanent injunction restraining the defendants from interfering with their peaceful possession and enjoyment of the suit property. The learned District Munsif, Sirkali, had tried both the suits jointly and disposed of the same by a common judgment dated 20.11.1998. In the said common judgment, he dismissed the suit in O.S.No.91 of 1995 without costs and decreed the suit in O.S.No.105 of 1995 without costs. Aggrieved by the same, the plaintiffs in O.S.No.91 of 1995 had filed an appeal in A.S.No.13 of 1999 and the defendants in O.S.No.105 of 1995 had filed an appeal in A.S.No.14 of 1999 on the file of the Principal Sub-Judge, Myladuthurai. The second defendant in O.S.No.91 of 1995 had filed Cross-objection in A.S.No.13 of 1999. The learned Principal Sub-Judge, Mayiladuthurai, by the common judgment dated 22.06.1999 had allowed both the appeals and set aside the judgment and decree passed by the trial court and passed a preliminary decree in O.S.No.91 of 1995 to divide the suit property into five equal shares and allot four such shares to the plaintiffs therein. He dismissed the suit in O.S.No.105 of 1995 and also the cross objections. Feeling aggrieved, the second defendant in O.S.No.91 of 1995 has filed the second appeal in S.A.No.362 of 2000 and the plaintiffs in O.S.No.105 of 1995 have filed the second appeal in S.A.No.363 of 2000.

3. For the sake of convenience, the parties are referred to as described in O.S.No.91 of 1995 on the file of the District Munsif, Sirkali.

4. The averments made in the plaint in O.S.No.91 of 1995 are in brief as follows:

The plaintiffs 1 to 4 are the daughters and the first defendant is the son of one Nagammal. The suit property was originally assigned to the said Nagammal by the Government under the Land Ceiling (Disposal of surplus lands) Act. The said Nagammal died on 20th day of the Tamil month of Vaigasi, 1994, leaving behind the plaintiffs and the first defendant as her legal heirs. The plaintiffs 1 and 2 are residing in a portion of the suit property by putting up a hut in the north-western corner of the suit property. Thus the plaintiffs are in the joint possession of the suit property. The first defendant is not in a cordial terms with the plaintiffs. The first defendant has taken away all the records including the assignment deed given to the deceased Nagammal. The first defendant is giving out that he would alienate the suit property in favour of the second defendant. The first defendant has no right to do so. The plaintiffs 1 to 4 got 4/5th share in the suit property. Hence, the plaintiffs made a request with the first defendant on 10.04.1995 to come for an amicable partition but he did not come forward to divide the suit property amicably. On the other hand,



the first defendant has colluded with the second defendant and gave all kinds of troubles to the plaintiffs. Hence the plaintiffs are constrained to file the above suit for partition.

5. The averments made in the written statement filed by the first defendant in O.S.No.91 of 1995 are in brief as follows:

The plaintiffs are not entitled to get any share in the suit property. The plaintiffs are not in joint possession of the suit property. The suit property was allotted under the Land Ceiling Act. The second defendant is an unnecessary party. The plaintiffs were already got married and gone to their husband's house respectively. There is no cause of action for the suit. Therefore, the first defendant prayed to dismiss the above suit.

6. The averments made in the written statement filed by the second defendant are in brief as follows:

The description of the property given in the suit is not correct. The suit property was originally belonged to the first defendant in which the plaintiffs cannot have any right. The first defendant had sold the suit property to the second defendant and his wife Tmt. Kurshit Begum for valid consideration of Rs.10,000/- under a registered sale deed dated 10.04.1995 and handed over the possession of the suit property to them. The second defendant and his wife are enjoying the suit property. The suit property is a nanja land, in which, a house cannot be constructed. There is no house in the suit property as alleged in the plaint. The plaintiffs and one Ganesan tried to disturb the possession of the second defendant and his wife and hence, they filed a suit in O.S.No.105 of 1995 for the relief of permanent injunction and the same is pending. The plaintiffs already got married and they are residing in their respective husband's house. They are not in possession of the suit property. The suit property is in exclusive possession of the second defendant and his wife. So, the suit should have been valued under Section 37 (1) of the Tamilnadu Court Fees and Suits Valuation Act, but the suit has been valued under Section 37 (2) of the said Act as if the plaintiffs are in joint possession and therefore, the suit has to be dismissed on that ground alone. Therefore, the second defendant prayed to dismiss the suit.

7. The averments made in the plaint filed in O.S.No.105 of 1995 on the file of the District Munsif, Sirkali are in brief as follows:

The plaintiffs had purchased the suit property from one Subramanian under a registered sale deed dated 10.04.1995 and they are in possession of the suit property from that date



onwards. The defendants 2 to 5 are close relatives of the first defendant. The first defendant approached the plaintiffs' vendor Subramanian and made a request to sell the suit property to him. But the said Subramanian sold the suit property to the plaintiffs and aggrieved by the same, the first defendant colluded with the defendants 2 to 5 and tried to trespass into the suit property and hence the plaintiffs were constrained to file the above the suit for the relief of permanent injunction.

8. The averments made in the written statement filed by the third defendant and adopted by other defendants in O.S.No.105 of 1995 are in brief as follows:

The allegation that the plaintiffs had purchased the suit property under a registered sale deed dated 10.04.1995 from one Subramanian, is denied. The said sale deed will not bind upon the defendants. Under the said sale deed, the plaintiffs cannot claim any right over the suit properties. The suit property was originally allotted to one Nagammal and she died on 20th day of Vaigasi, 1994, leaving behind the defendants 2 to 5 and one Subramanian as her legal heir and as such, the defendants 2 to 5 and the said Subramanian got equal shares in the suit property. The defendants 2 to 5 are entitled to get 4/5th share in the suit property and the sale deed which has been executed by the said Subramanian alone will not confer title in favour of the plaintiffs in respect of the entire suit property. The defendants 2 to 5 had already filed a suit in O.S.No.91 of 1995 seeking partition and the same is still pending and therefore, the aforesaid suit is not maintainable and liable to be dismissed.

9. Based on the aforesaid pleadings, the learned District Munsif, Sirkali, had framed necessary issues and tried both the suits jointly. The evidence was recorded in O.S.No.91 of 1995 and the same was treated as evidence in O.S.No.105 of 1995 also. During trial, the second plaintiff in O.S.No.91 of 1995 viz., Chinnaponnu was examined as PW1, but they have not marked any exhibits on their side. The second defendant in O.S.No.91 of 1995 viz., Abdul Sattar was examined as DW1 and one more witness was examined as DW2 and they have marked Exs.B1 to B11 as exhibits.

10. The learned District Munsif after considering the materials placed before him found that the plaintiffs in O.S.No.91 of 1995 are not in joint possession and hence they ought to have valued the suit under Section 37 (1) of the Tamilnadu Court Fees and Suits Valuation Act, 1995, but the suit was valued under Section 37 (2) of the said Act and the same is not proper. He further found that the suit property was originally assigned by the Government to one Nagammal and she



died intestate and as such, the plaintiffs in O.S.No.91 of 1995 are entitled to get 4/5th share in the suit property. However, he dismissed the suit in O.S.No.91 of 1995 on the ground that before filing of the suit, the first defendant in O.S.No.91 of 1995 had sold the entire suit property in favour of the second defendant and his wife under a registered sale deed on 10.04.1995 and that being so, the wife of the second defendant is a necessary party, but she has not been impleaded as a party. He decreed the suit in O.S.No.105 of 1995 granting permanent injunction restraining the defendants therein from interfering with the peaceful possession and enjoyment of the plaintiffs therein. Aggrieved by the same, the plaintiffs in O.S.No.91 of 1995 had filed an appeal in A.S.No.13 of 1999 and the defendants in O.S.No.105 of 1995 had filed an appeal in A.S.No.14 of 1999 on the file of the Principal Sub-Judge, Myladuthurai. The second defendant in O.S.No.91 of 1995 had filed cross objections in A.S.No.13 of 1999. The learned Principal Sub-Judge, Myladuthurai, by the common judgment dated 22.06.1999 had allowed both the appeals and set aside the judgment and decree passed by the trial court and passed a preliminary decree in O.S.No.91 of 1995 to divide the suit property into five equal shares and allot four such shares to the plaintiffs therein. He dismissed the suit in O.S.No.105 of 1995 and also the cross objections. Feeling aggrieved, the second defendant in O.S.No.91 of 1995 had filed the second appeal in S.A.No.362 of 2000 and the plaintiffs in O.S.No.105 of 1995 had filed second appeal in S.A.No.363 of 2000.

11. This court at the time of admitting these second appeals, has formulated the following substantial questions of law:

" i) Whether the lower appellate court not erred in law in holding that the suit is bad for non-joinder of necessary party, when admittedly the second defendant's wife is a sharer, on the ground that her husband is a party and he can represent for herself?

ii) When Nagammal, the predecessor in interest of the suit property, nominated her son, the first defendant, to take her right in the land allotted to her and when the second defendant and his wife purchased the same for adequate consideration, whether the lower appellate court erred in law in holding that the suit property is available for partition?"

12. During pendency of the second appeals, the first respondent viz., Thaiyalnayaki in S.A.No.362 of 2000 died and her legal representative has been impleaded as sixth respondent.



The said Thaiyalnayaki has been arrayed as second respondent in S.A.No.363 of 2000 and hence her legal representative has been impleaded as sixth respondent in S.A.No.363 of 2000 also.

13. Heard Mr.M.Premkumar, learned counsel for the appellants in both the appeals and Mr.S.Sounthar, learned counsel for the respondents 2 to 4 and 6.

14. Substantial Questions of law (i) and (ii):

The learned counsel for the appellants has submitted that the first appellate court failed to see that the original assignee viz., Nagammal had nominated her son Subramanian to take suit property absolutely and therefore, the same is not available for partition. He further submitted that the first appellate court failed to see that the second defendant's wife also purchased the suit property from the first defendant under Ex.B1 sale deed and therefore, she is a proper and necessary party in the suit for partition. He further submitted that the first appellate court erred in holding that the second defendant is conducting the case on behalf of his wife also. He further submitted that as per Ex.B1 sale deed, the possession of the suit property is only with the second defendant and his wife and that being so, the suit should have been valued under Section 37 (1) of the Tamilnadu Court Fees and the Suit Valuation Act, but it was valued under Section 37 (2) of the said Act. On that ground alone, the suit for partition has to be dismissed. He further submitted that Exs.B3 to B9 would show that even before purchase, the suit property was in possession and enjoyment of the second defendant and his wife and therefore, the first appellate court ought not to have dismissed the suit which was filed by the second defendant and his wife for permanent injunction. Therefore, he prayed to allow the second appeals and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

15. In support of the aforesaid contentions, the learned counsel for the appellants relied upon the following decisions:

i) Karuppayammal Vs. Samiyappa Gounder and others (A.S. (MD).No.199 of 2005, dated 30.06.2017)

ii) Rajani Sivakumar Vs. Duraikannan (S.A.No.563 of 2003, dated 25.01.2010)

16. Per contra, learned counsel for the respondents has submitted that the trial court and the first appellate court have concurrently found that the suit property was assigned by the Government to one Nagammal and she died intestate and as such the plaintiffs 1 to 4 and the first defendant are entitled to 1/5th share each and in the said concurrent findings, this



court cannot interfere. He further submitted that even though the wife of the second defendant was not impleaded as a party in O.S.No.91 of 1995, she is a party in the connected suit in O.S.No.105 of 1995 and in such a case, it cannot be said that the suit for partition is bad for non-joinder of the second defendant's wife as a party. He further submitted that since the plaintiffs are co-owners, it has to be presumed that they are in joint possession and as such, the suit which has been valued under Section 37(2) of the Tamil Nadu Court Fees and the Suit Valuation Act is proper. He further submitted that the first defendant is having only 1/5th share in the suit property, but he has sold the entire suit property in favour of the second defendant and his wife under Ex.B1 sale deed and the said sale deed will not bind upon the plaintiffs and taking into consideration of the aforesaid facts, the first appellate court has rightly allowed the appeals and passed a preliminary decree in O.S.No.91 of 1995 to divide the suit property into five equal shares and allot four such shares to the plaintiffs therein. He further submitted that since the plaintiffs 1 to 4 are co-owners, the second defendant and his wife cannot seek injunction against co owners and hence the first appellate court has rightly dismissed the suit in O.S.No.105 of 1995 which has been filed by the second defendant and his wife for permanent injunction and in the said factual findings, this court cannot interfere and therefore he prayed to dismiss the second appeals.

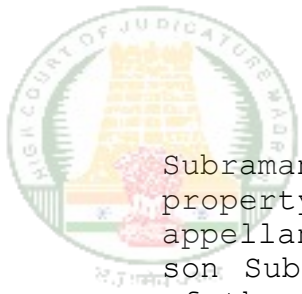
17. In support of the aforesaid contentions, the learned counsel for the respondents relied upon the following decisions:-

i) Wills Padma (died) Vs Charles Jeya Thilak (S.A.(MD). No.591 of 2010, dated 04.09.2018)

ii) R.Anita and others Vs Ramakrishnan and Others (C.R.P.No.1963 of 2000, dated 07.03.2002)

18. It is an admitted fact that the plaintiffs in O.S.No.91 of 1995 and the first defendant viz., Subramanian in O.S.No.91 of 1995 are the daughters and son of one Nagammal. It is seen from Ex.B2 that the suit property was assigned by the Government on 16.08.1983 in favour of the said Nagammal. According to the plaintiffs, the said Nagammal died intestate on the 20th day of Vaigasi, 1994 and the said fact has not been disputed by the defendants. So, it is clear that after the death of the said Nagammal, the plaintiffs and the first defendant being the legal heirs, succeeded to the suit property.

19. In Ex.B2, it is stated that the sale consideration for the suit property has been fixed at Rs.2,325/- and the same has to be paid with 5% interest in 20 annual instalments. It is also stated that already the first instalment has been paid. It is also stated that after the death of Nagammal, his son



Subramanian has been nominated by her to enjoy the said property. Based on the said clause, the learned counsel for the appellants has submitted that after the death of Nagammal her son Subramanian (first defendant) has become the absolute owner of the suit property and hence he is entitled to dispose of the said property and accordingly, he sold the said property to the second respondent and his wife under Ex.B1 sale deed. From the aforesaid clause, it cannot be said that after her death, her son Subramanian is entitled to the suit property as absolute owner. As per the aforesaid clause, he was nominated only to enjoy the property. The aforesaid clause might have been mentioned only for the purpose of paying the instalments to the Government and not for any other purpose. The trial court taking into consideration of the aforesaid clause has found that based on the said clause, the first defendant cannot claim absolute right over the suit property and the said finding has been confirmed by the first appellate court and in the said factual concurrent findings, this court cannot interfere.

20. The trial court found that by virtue of Ex.B1 sale deed, the second defendant and his wife are in exclusive possession of the suit property. It also found that the plaintiff failed to prove that they are in joint possession and hence the plaintiffs ought to have valued the suit for the relief of partition under Section 37(1) of the Tamilnadu Court fees and Suits Valuation Act, but the first appellate court has held that since the plaintiffs are co-owners and it has to be presumed that they are in joint possession of the suit property and hence the court fees paid by them is correct. Admittedly, the suit property is an agricultural land. As per Section 7 (2) of the Tamilnadu Court Fees and Suits Valuation Act, 1955, the market value of land in suit filing under Section 37(1), 37 (3) of the Act shall be deemed to be where the land is ryotwari land - 30 times the survey assessment on the land. In this case, in Ex.B2 (assignment), the kist has not been mentioned. In Ex.B1 sale deed also, kist value has not been mentioned. In Exs.B4, B5, B6, B7 and B9, different amounts have been mentioned as kist. So, there is no concrete evidence with regard to what is the kist value of the suit property. Under the said circumstances, the court fees paid by the plaintiffs have to be accepted as correct. Further, according to the plaintiffs, they being the co-owners, they have to be treated as in joint possession. Further, if the case of the second defendant is accepted that the plaintiffs are not in joint possession, then, the second defendant has to pay mesne profits. Taking into consideration of the aforesaid facts, the first appellate court has held that the suit has been properly valued and the court fees has been properly paid and the same does not require any interference.



21. Exs.B8 and B10 would show that the second defendant had paid certain installments to the Government and merely because he has paid certain installments, that would not confer exclusive right over the suit property. Since the second defendant and his wife had purchased the property from one of the legal heirs of Subramanian, at the most, they can get valid title only in respect of his share alone i.e., 1/5th share. Since they paid some instalments to the Government as contemplated under Ex.B2, they are entitled to get proportionate amount from the plaintiffs.

22.The next question that arises for consideration is whether the suit is bad for non-joinder of the second defendant's wife as a party. Though the second defendant's wife has not been impleaded as a party in the partition suit (O.S.No.91 of 1995), she has filed a suit along with her husband in O.S.No.105 of 1995 and her husband is second defendant in O.S.No.91 of 1995 and both the suits have been tried jointly. Therefore, no prejudice would be caused for not impleading her as a party in O.S.No.91 of 1995. The defence could have been taken by her, has been taken in her plaint in O.S.No.105 of 1995 itself.

23.In Wills Padma (died) Vs. Charles Jeya Thilak (cited supra), this court has held that the purchasers of the suit property prior to the filing of the suit if not impleaded as a party, he can be added as a party in the final decree proceedings and hence the suit need not be dismissed on that ground. A similar view was taken in R.Anita and others Vs. Ramakrishnan and others (Cited supra). Therefore, the contention of the learned counsel for the appellants that the suit is bad for non joinder of necessary party cannot be accepted. As already pointed out that she has effectively participated in the trial as a party in the connected suit. Further in the partition suit, her husband, who is one of the joint purchasers has filed written statement and effectively defended the said suit on his behalf and also on behalf of his wife. Therefore, in the final decree proceedings she can be added as a party.

24. In Karuppayammal Vs. Samiyappa Gounder and Others, (supra) the co-owner was not impleaded as a party. Hence, this court has held that he is a necessary party and since he is not added as a party, the suit is bad for non-joinder of the necessary party.

25.In Rajani Sivakumar and Others Vs. Durai Kannu and Others (cited supra), this court has held that the question of non joinder of necessary party in a suit for partition can be raised at any time as it goes to the root of the matter. Further, it was held that a suit for partition is not



maintainable in the absence of some of the co-sharers. Whereas in this case, as already pointed out that the second defendant's wife is only a co-purchaser from one of the sharers viz., the first defendant. Further, she herself has filed a suit along with her husband in O.S.No.105 of 1995 and the said suit also has been tried along with O.S.No.91 of 1995. Under the said circumstances, it cannot be said the suit is bad for non-joinder of necessary party. Further as held by this court in Wills Padma (died) Vs. Charles Jeya Thilak (cited supra) in R.Anita and others Vs. Ramakrishnan and others (cited supra), she can be added as a party in the final decree proceedings.

26. The plaintiffs are co-owners and they are entitled to get 4/5th share in the suit property. The second defendant and his wife who are the plaintiffs in O.S.No.105 of 1995 are not entitled to get injunction against the co-owners and hence their suit has to be dismissed. In so far as the suit in O.S.No.91 of 1995 is concerned, as already pointed out that the second defendant had paid certain amounts towards instalments to the Government. On equity basis, the plaintiffs are liable to pay the proportionate share to the second defendant. Only on payment of the said amount, the plaintiffs are entitled to the preliminary decree for partition of 4/5th share in O.S.No.91 of 1995. Accordingly, the substantial questions of law are answered.

27. In the result,

S.A.No.362 of 2000 is partly allowed and that the judgment and decree passed by the courts below are modified as follows:-

That the plaintiffs in O.S.No.91 of 1995 are entitled for the preliminary decree of partition of 4/5th share in the suit property on payment of their proportionate share of the amount which was paid by the second defendant to the Government towards sale consideration as contemplated under Ex.B2.

S.A.No.363 of 2000 is dismissed.

Considering the facts and circumstances of the case, the parties are directed to bear their respective costs in both the second appeals.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gv



To

1. The Principal Subordinate Judge,
Mayiladuthurai.

2. The District Munsif,
Sirkali.

copy to: The Section Officer,
VR Section, High Court, Madras.

+2 ccs to Mr.M.Premkumar, Advocate, S.R.No.44156, 44157

S.A.Nos.362 and 363 of 2000

SVI (CO)
SSM(03/10/2019) .