

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 11.02.2019
PRONOUNCED ON : 21.02.2019
CORAM
THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S. A.No.392 of 2006

1. Aruchamy Gounder(Deceased)
2. Jayabalakrishnan ...Appellants
2nd appellant brought on record as the legal
heir of the deceased sole appellant vide orders
of court dated 09.02.2012 made in M.P.No.1/11
in S.A.No.392 of 2006.

Vs.

1. Palanichamy Gounder(Deceased)
2. Kanagasabapathy
3. Chinnamani
Deivathal (deceased)
4. Balasubramaniam
5. P.Kanniammal
6. P.Gopala Sundaram
7. P.Chinnathurai
8. R.Nagarathinam ...Defendants
RR5 to 8 brought on record as LRS of the deceased
R1 vide order of the court dated 08.02.2019 made in
M.P.No.1/2010 in S.A.No.392 of 2006.

Appeal dismissed against vide court order dated 08.02.2019 in
M.P.No.1/2010 in S.A.No.392 of 2006.

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code,
against the Judgment and decree dated 07.02.2005 made in
A.S.No.10 of 2001 on the file of the Sub-court, Pollachi
reversing the judgment and decree passed in O.S.No.310 of 1996
dated 11.10.1996 on the file of the District Munsif Court,
Pollachi.

For Appellants : Mr.R.venkatachalapathy
for M/s. S.Kadarkarai
For Respondents : No appearance. Set exparte
vide order dated 11.02.2019

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 07.02.2005 passed in A.S.No.10 of 2001 on the file of the Subordinate court, Pollachi reversing the judgment and decree dated 11.10.1996 passed in O.S.No.310 of 1996 on the file of the District Munsif Court, Pollachi, as regards the 2nd item of the suit properties. The first defendant has come forward with the present second appeal.

2. The second appeal has been admitted on the following substantial questions of law.

1. Whether the lower appellate court is right in allowing the partition of the suit property amidst the appellant and the respondents as if it was joint family property, when the suit property is under independent ownership, possession and enjoyment by the first respondent/appellant?
2. Whether the lower appellate court is right in rejecting the Exs.B1 to B21, which prove the first respondent/appellant's continuous possession and enjoyment of the suit property?
3. Whether the findings of the lower appellate court are vitiated in law by the failure to consider the entire evidence on record and by the failure to apply the correct principles of law?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. Parties are referred to as per their rankings in the trial court.

5. Suffice to state that the plaintiff has laid the suit against the defendants for partition claiming 1/3 share in the 2nd item of the suit properties as shown in the plaint. The plaintiff, the first defendant and one Krishnasamy Gounder are the sons of Marappa Gounder. Krishnasamy Gounder had died and the second defendant and the third defendant are the son and wife of the deceased Krishnasamy Gounder. As regards the case of the plaintiff that the first item of the suit properties is the ancestral property belonging to Marappa Gounder, the contesting first defendant has not controverted the same and also admitted that, as put forth in the plaint, the three sons of Marappa Gounder are entitled to 1/3 share in the first item of the suit properties and accordingly it is found that the trial court as well as the first appellate court had upheld the case

of the plaintiff as regards the first item of the suit properties.

6. With reference to the second item of the suit properties, the plaintiff has put forth the case that it is a vacant site and the Government had issued pattas in respect of the same in the names of the plaintiff and the first defendant in the year 1968 with a view to construct a house in the same and in the year 1971, the house, fully described in the 2nd item, had been constructed by the efforts of joint family and out of its funds and accordingly stated that the second item of the suit properties is in the possession and enjoyment of the joint family abovestated from the year 1968 onwards and in respect of the land properties, the joint family members had effected partition by way of a registered partition deed dated 15.03.1973 with a reservation to divide the house properties later and inasmuch as the plaintiff felt inconvenient to enjoy the suit properties jointly with the defendants, accordingly, he has sought for his claim of share in the same and inasmuch as the defendants did not come forward to effect an amicable partition as sought for, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

7. The first defendant resisted the plaintiff's case as regards the second item of the suit properties, contending that in respect of the same, the pattas had been issued separately in favour of the first defendant as well as in favour of the plaintiff and the plaintiff has been given the patta on the northern side and he has not put up construction in the abovesaid portion and on the other hand, it is only the first defendant, who had put up construction in the site allotted to him with his separate funds and accordingly, the house tax also has been assessed in his name and is paying the house tax and enjoying the said property absolutely and the plaintiff, with a view to grab the said property, had included the same in the plaint as if the said property is also the joint family property and furthermore, the first defendant has also taken the plea that he has been in the exclusive possession and enjoyment of the abovesaid house property for more than 20 years openly, continuously and as a matter of right, to the knowledge of the plaintiff and the other defendants without any objection or obstruction in respect of the same and therefore, the plaintiff is estopped from questioning the right of the first defendant in respect of the abovesaid house property by way of adverse possession and thereby prayed for the dismissal of the plaintiff's suit.

8. Based on the material projected by the respective parties, both oral and documentary, the trial court was pleased to grant the relief of partition as prayed for in favour of the plaintiff as regards the first item of the suit properties, but

dismissed the suit of the plaintiff as regards the second item of the suit properties. Aggrieved over the same, the plaintiff preferred the first appeal. The first appellate court, on a consideration of the materials available on record and the pleas put forth by the respective parties with reference to the subject matter in dispute, upheld the case of the plaintiff even as regards the claim of partition in the second item of the suit properties and accordingly decreed the suit in entirety in favour of the plaintiff as prayed for. Impugning the same, the present second appeal has been filed by the first defendant.

9. The dispute is now between the parties only as regards the second item of the suit properties. The relationship between the parties is not in dispute. The materials placed on record go to show that the joint family members, had effected the partition in respect of the land properties on 15.03.1973 by way of the partition deed and the abovesaid partition deed has come to be marked as Ex.A4. It is seen that the parties had chosen to divide the house properties belonging to them at a later point of time and accordingly it is found that the present suit has come to be laid by the plaintiff in respect of the house properties belonging to the joint family properties.

10. With reference to the second item of the suit properties, it is the specific case of the plaintiff that the pattas had been granted with reference to the same both in his name as well as in the name of the first defendant for the purpose of putting up the house construction and accordingly the same had been treated as the joint family property by the members and the house construction had been put up thereon, out of the funds belonging to the joint family members and thus, it is the case of the plaintiff that the second item of the suit properties is also the joint family property belonging to the plaintiff and the defendants as abovestated and he is entitled to claim 1/3 share in the same.

11. From the document marked as Exs.A1 and B1 respectively, it is found that, as put forth by the plaintiff, in respect of the house site described in the second item of the suit properties, pattas had been issued both in the name of the plaintiff and the first defendant. As above noted, the plaintiff and the other defendants had remained joint and undivided and as regards the land properties, they had chosen to effect the partition only in the year 1973. It is thus found that when the parties had remained joint and undivided, the pattas had come to be issued in their names though separately and accordingly inasmuch as the parties had not chosen to divide the house properties separately and remained joint with reference to the same even after Ex.A4 partition effected in respect of the land properties, it is found that as regards the house site and the house properties, as put forth by the plaintiff, the parties

are in joint possession and enjoyment of the same and in such view of the matter, merely because separate pattas had been issued in favour of the plaintiff and the first defendant as regards the house site described in the second item of the suit properties in the year 1968 that by itself, could not be held as the basis for holding that the said pattas had been issued in their favour as conferring independent title upon them respectively in respect of the house site comprised therein. When it is admitted by the first defendant that as regards the house site and house property, the parties had not divided, it is evident that the pattas had been granted in favour of the plaintiff and the first defendant in respect of the house site described in the second item of the suit properties only jointly as members of the joint family for the purpose of putting up a house construction in the same.

12. Though it is claimed by the first defendant that he had put up the house construction in the second item of the suit properties independently out of his own funds, when at the relevant point of time the plaintiff and the first defendant, in particular, had remained joint and enjoying the house site and house property in unison without effecting any division by metes and bounds and furthermore, when there is no material placed on the part of the first defendant worth acceptance to show that he had independent income of his own and the same had been derived without the aid of the joint family income, in such view of the matter, as rightly determined by the first appellate court merely because the house tax in respect of the construction put up in the second item of the suit properties stands in the name of the first defendant, that by itself, could not be the basis for upholding the exclusive and separate title of the first defendant in respect of the said house property. As rightly pointed out by the first appellate court, when there is no material placed by the first defendant as regards his separate earnings, to put forth the case that he had put up the house construction independently out of his self funds, it has been rightly disbelieved by the first appellate court. In such view of the matter, as pointed out and held by the first appellate court, even if the house tax in respect of the house construction put up in the second item of the suit properties stands in the name of the first defendant, that could only be construed as having been issued in respect of the joint family members for their joint enjoyment and in such view of the matter, the first defendant, on that footing, cannot claim exclusive title to the same as put forth in the written statement. The first defendant's possession and enjoyment of the house construction put up in the second item of the suit properties shall be deemed to be in the possession of the joint family members.

13. Furthermore, as could be seen from Exs.A1 and B1 respectively, the pattas had been issued in favour of the plaintiff and the first defendant respectively of an extent of 5 cents each in the second item of the suit properties. On the other hand, considering the evidence adduced in the matter, particularly, the commissioner's report and plan, when it is found that the first defendant has been granted patta of an area measuring north to south 53 feet only, considering the house construction put up in the second item of the suit properties, when the same is found to be measuring 69 feet north to south and to the north of the same, the vacant site is shown, in all, it is seen that inasmuch as the house site which had been granted in favour of the plaintiff and the first defendant had been jointly in the possession and enjoyment of the joint family members, accordingly, it is noted that the first defendant had been allowed to put up the house construction beyond the extent sanctioned to him by way Ex.B1 by the joint family members and accordingly as the house tax could be assessed only in the name of one of the joint family members, it is found that the house tax had been assessed in the name of the first defendant and on that basis, the first defendant cannot be allowed to put forth the case that the house construction put up in the second item of the suit properties absolutely belong to him.

14. Inasmuch as the first defendant is unable to substantiate his case that he has exclusive title to the second item of the suit properties as put forth by him, it is found that he has taken the plea of adverse possession with reference to the same against the plaintiff and the other defendants. Now, according to the first defendant, he has been enjoying the second item of the suit properties by putting up the construction there on and enjoying the same for several years openly, continuously and uninterruptedly asserting his exclusive title to the same to the knowledge of the plaintiff and the defendants with animus possidendi and thereby he had prescribed adverse title to the same. The abovesaid case of the first defendant is being seriously challenged by the plaintiff. In such view of the matter, it is for the first defendant to establish his abovesaid case. As regards the same, the first defendant seems to rely only upon the house tax receipts and the EB bills standing in his name marked as Exs.B4 to B19. When the house construction put up by the first defendant on the site described in the second item of the suit properties is not shown to have been put up exclusively by him out of his separate funds and on the other hand, when the house site had been assigned to the joint family members when they were undivided in the year 1968 and till date as regards the house properties and house site, the joint family members are remaining united and undivided and they had effected partition in 1973 qua the land

properties alone, accordingly, it is found that as put forth by the plaintiff, as determined by the first appellate court, the second item of the suit properties is also found to be in the joint possession of the family members and accordingly they had permitted the house construction put up in the said site and merely because the house tax had been assessed in the name of the first defendant in respect of the construction put up there on, that alone, cannot be the basis for holding that the said property is the exclusive and separate property of the first defendant as claimed by him. When as regards the house site and house property, the parties are not yet divided and the possession and enjoyment of one co-owner is deemed to be the possession and enjoyment of the other co-owners, in such view of the matter, when the first defendant has failed to establish his case of deriving separate income and utilising the same for putting up the construction in the second item of the suit properties on his own, the house tax receipts and EB bills projected by him, on their own, would not entitle him to claim exclusive title or adverse title as put forth by him and accordingly, it is found that the first appellate court taking into consideration the above factors in the right perspective, had held that the plaintiff is entitled to secure his due share in the second item of the suit properties also as claimed in the plaint.

15. Considering the above factual matrix, the first defendant failed to establish his claim of exclusive title to the second item of the suit properties and also having failed to establish his claim of adverse title in respect of the same and when the materials placed on record go to disclose that the second item of the suit properties is the joint family property of the family members as put forth in the plaint and when the documents projected by the first defendant would not advance his claim of adverse title to the second item of the suit properties and when the possession and enjoyment of one co-owner is, under the law, deemed to be the possession and enjoyment of the other co-owners, unless exclusion by way of ouster is pleaded and proved with reference to the abovesaid position, the materials projected by the first defendant do not support his case in any one of the aspects and the first appellate court had rightly assessed the oral and documentary evidence projected in the correct perspective and applied the position of law with reference to the same in the proper manner and accordingly and rightly rejected the first defendant's case and granted the relief of partition in favour of the plaintiff even in respect of the second item of the suit properties. The substantial questions of law formulated in this second appeal are accordingly answered against the first defendant and in favour of the plaintiff.

16. In conclusion, the second appeal fails and is accordingly dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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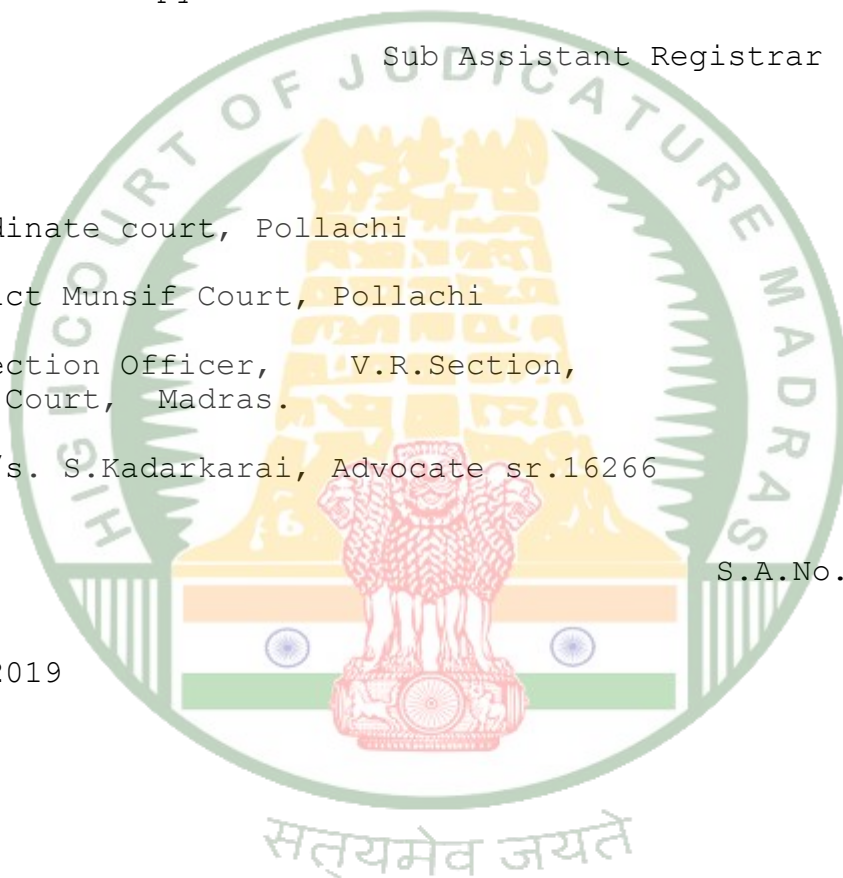
To

1. Subordinate court, Pollachi
2. District Munsif Court, Pollachi
3. The Section Officer, V.R.Section,
High Court, Madras.

+1cc to M/s. S.Kadarkarai, Advocate sr.16266

S.A.No.392 of 2006

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