



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 04.01.2019	Pronounced on: 18.01.2019
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Coram:

The Honourable Dr.Justice G.Jayachandran

Second Appeal No.2172 of 2004

K.P.Srinivasan,
S/o.Pappu Chettiar,
N.Kosampatti,
Namakkal Taluk.

... Appellant/Defendant

/versus/

1. Gopalammal,
W/o.Late T.V.Venkatasami Chettiar.

2. P.V.Venkatachalam,
S/o.Late T.V.Venkatasami Chettiar.
Respondent 1 and 2 are residing at
N.Kosavampatti, Namakkal Taluk.

3. Pappathi,
W/o.A.T.Krishnasamy,
Vellapatti, Musiri Taluk.

... Respondents/Plaintiffs

PRAYER: This Second Appeal has been filed under Section 100 of Civil Procedure Code, against the judgment and decree passed by the Learned Additional District Judge, Fast Track Court-III, Namakkal in A.S.No.38 of 2003 dated 20.08.2004 reversing the judgment and decree passed by the learned Additional District Munsif, Namakkal in O.S.No.148 of 1994 dated 12.09.1997.

For Appellant : Mr.G.K.Muthu Kumar

For Respondents : Mr.Naveen Kumar Moorthy
for Mr.R.Santhanam

J U D G M E N T

The appellant herein is the defendant in the suit filed for declaration and permanent injunction.

2. The case of the plaintiffs (i). Ranganaygiammal and (ii). Gopalammal is that the suit schedule property is an ancestral property inherited by her father Chettyappa Chettiar under partition deed. Their father died interstate in the year 1977 leaving behind the plaintiffs and one Nallusamy as her

legal heirs. The properties was jointly enjoyed by her father Chettiappa Chettiar and brother Nallusamy. After the demise of her father, Nallusamy is entitled for 4/6 shares and the plaintiffs are entitled for 2/6 shares. Accordingly, the plaintiffs along with Nallusamy were jointly enjoying the property. Though, the plaintiffs are in constructive possession, her brother Nallusamy without their knowledge, sold the suit property to the defendant on 18.04.1985, which they came to know recently. The said sale deed will not bind the plaintiffs and their shares. Therefore, reserving the right of seeking partition by metes and bounds, the suit has been laid to restrain the defendants from further alienating the suit property to the third parties since, they themselves have no absolute right under the sale deed to which the plaintiffs are not parties, though they were shares of the property.

3. Before filing a comprehensive suit for partition, to protect the property from further alienation and creating encumbrance, the present suit for declaration in respect of 2/6 shares of the plaintiffs and injunction restraining the defendant from not to create any further encumbrance or to put up any permanent structure the suit is filed.

4. In the written statement, the defendant has denied the claim of the plaintiffs for 2/6 shares in the suit property. Without seeking partition of other properties of their deceased father, partial partition for the suit property alone is only to cause hindrance to the peaceful possession and enjoyment of the defendant over the suit property. The suit has been instigated by Nallusamy. The defendant has already initiated O.S.No.186 of 1994 against the plaintiffs and Nallusamy, to divide the joint family properties of the plaintiffs by metes and bounds and to allot the present suit property to the defendant or to allot some other property to the plaintiffs, from among the share of their vendor. Even according to the plaintiffs, the defendant are joint owners of the suit property. Therefore, injunction restraining the co-owners from putting up permanent structure is not maintainable without seeking relief of partition. The plaintiffs have not produced any records to prove their possession over the suit property. Further, Nallusamy who is the vendor of the suit property to the defendant not arrayed as a party to the suit. He is a proper and necessary party to the suit. Without impleaded him as a party, the suit is bad for non-joinder of the necessary party.

5. In the Additional written statement, the defendant has beside reiterating the contention that the plaintiffs have not sought for partition and separate possession of their share. Without relief of partition, permanent injunction restraining the co-owners is not maintainable, further contended that the defendant is in possession and enjoyment of the suit property since 18.04.1985. Patta, Chitta, Adangal has been transferred in his name. Having been in possession continuously for more

than the period prescribed, he has perfected the title by adverse possession also and the plaintiffs have lost the right to seek partition.

6. Based on the pleadings, the trial Court has rightly framed the following issues:

- (i). Whether the plaintiffs and defendant are joint owners?
- (ii). Whether Nallusamy the brother of the plaintiff is a necessary party?
- (iii). Whether the suit property is in possession of the plaintiffs?
- (iv). Whether the plaintiffs are entitled for declaration and permanent injunction?
- (v). What the relief the plaintiffs are entitled?

Additional Issues:-

Whether the plaintiffs have perfected the title by adverse possession.

7. After examining two witnesses on behalf of the plaintiffs and one witness on behalf of the defendant and considering documents marked as Ex.A.1 to Ex.A.3 and Ex.B.1 to Ex.B.14, the trial Court dismissed the suit holding that without seeking partition and ascertaining their right and the respective share over the suit property, declaration and injunction relief cannot be granted.

8. Further, the trial Court has also held that the suit property is in possession of the defendant and same is proved by the defendants through Ex.P.1 to Ex.P.14. Therefore, the plaintiffs are not entitled for injunction.

9. Aggrieved by the dismissal of the suit, the plaintiff has preferred the Appeal in A.S.No.38 of 2003.

10. The Lower Appellate Court has formulated the following points for determination.

- (i). Whether the suit property is the ancestral property of the defendant.
- (ii). Whether the plaintiffs are entitled for share in the suit property as per law of inheritance.
- (iii). Whether the plaintiffs are entitled for declaration and injunction as prayed for.

- (iv). Whether the defendant has perfected the title by adverse possession.
- (v). What are the relief the plaintiffs are entitled.

11. The Lower Appellate Court relying upon the recital in Ex.A.3 sale deed executed by Nallusamy in favour of the defendant on 18.04.1985 has held that the suit property is admittedly an ancestral property of Nallusamy. The plaintiffs are the legal heirs of Chettiappa Chettiar along with Nallusamy. Therefore, they have right in the ancestral property under Section 6 of the Hindu Succession Act.

12. The Lower Appellate Court has accepted the reason stated by the plaintiffs for not filing the suit for partition reserving the right to file the partition suit in future and held that the present suit for declaration and injunction is maintainable to keep the physical features of the suit property unaltered.

13. Regarding possession, the Lower Appellate Court has held that in case of ancestral property, the plaintiffs need not prove their possession. Mutation of revenue records, transfer of title to the defendants will not exclude the right of the plaintiffs over the suit property. Without the consent of the plaintiff, the alienation of the ancestral property by Nallusamy will not bind them. Therefore, the plaintiffs are entitled for permanent injunction restraining the defendant from alienating the suit property or to alter the physical features of the suit property by putting up any construction upon it.

14. The Lower Appellate Court has also justified the non-impleading of Nallusamy in the present suit, holding that the suit is not for partition but only for declaration and injunction. Therefore, the said Nallusamy is not a necessary party to the suit. Non-impleading of Nallusamy as a party will not affect the maintainable of the suit.

15. With the above said reasons, the Lower Appellate Court has allowed the appeal which resultant in allowing the suit for declaration and injunction filed by the plaintiff.

16. Aggrieved by the reversal judgment, the defendant has preferred the Second Appeal on the ground the Lower Appellate Court has erroneously allowed the suit granting the relief of injunction to the plaintiff. The plaintiffs have not established their right over the suit property and the extent of right over the suit property. The plaintiffs have failed to produced evidence to prove their possession over the suit property. After 1985 the enjoyment and possession of the appellant which was continuously open and hostile to the plaintiff ought to have been considered by the Lower Appellate Court, which the Lower Appellate Court has miserably failed.

17. It is also contended by the learned counsel for the appellant that the Nallusamy who is the brother of the plaintiffs is also the vendor of the defendant. So he is a necessary party to the suit. Omission to implead him as a party is fatal to the case of the plaintiff. When Ex.A.3 does not whisper about the ancestral nature of the suit property, the Lower Appellate Court has presumed that the suit property is an ancestral property therefore the plaintiffs have share in it.

18. At the time of admission, the following Substantial Questions of law has been formulated for consideration.

(i). Whether the Lower Appellate Court is correct in coming to the conclusion that the appellant's vendor (i.e) the co-owner of the suit property is not a necessary party in a suit for declaration and permanent injunction?

(ii). Whether that Lower Appellate Court is correct in coming to the conclusion that in the dispute of the ancestral property, the suit for partition is not a must, mere filing of declaration will hold good?

(iii). Whether the Lower Appellate Court is right in coming to the conclusion that mere possession of patta and chitta will not confer title to the appellant as against the co-owner?

19. The learned counsel appearing for the appellant would submit that the suit filed by the respondent is not at all maintainable in law. The remedy available to the respondents was to file a comprehensive suit for partition, which they have not resorted till date. Contrarily, the respondents without filing suit for partition claiming share in the estate of their father has filed suit in respect of one property. The respondents had failed to prove the possession either physical or constructive.

20. The learned counsel for the appellant would stress the point that the respondents claim share in the property through their father. Admittedly they are not the only legal heirs. The vendor of the appellant is a sole male member of the family and the property is the ancestral property. In the factual matrix, without impleading their brother, the plaintiff has filed the suit questioning the alienation of the suit property by their brother in favour of the appellant. This will clearly show that the respondent herein and their brother are hand in glove.

21. Per contra, the learned counsel for the respondents has filed written submission wherein, he relies the

following two judgments.

(i). Manikayala Rao Vs. M.Narasimhaswami reported in AIR 1966 SC 470:-

" It is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased."

(ii). A.Ramakrishnan Vs.S.Malikarjuna Raju and another reported in (2002) 1 MLJ 734.

"An alienee cannot claim the status of an undivided Hindu member or coparcener. He acquires the undivided interest of his alienor. He is also not entitled to claim joint possession with other coparcener and equally he is not entitled to demand separate possession of any part of the family property, but he is entitled to possession of that part of the family property which might fall to the share of his alienor at a partition."

22. Submitted that Ex.A.3 is sufficient to show that the suit property is an ancestral property and the respondents got absolute right and share over the same through constructive possession. Therefore, the appeal is liable to be dismissed.

23. Further it is also contented in the written submission that the respondents were enjoying interim injunction throughout the pendency of the suit and therefore balance of convenience is in favour of the respondent/plaintiff. Hence, the contention of the appellant that he had been in possession of the property throughout and had perfected the title by adverse possession is also not sustainable.

24. The case of the plaintiffs is that the suit schedule property is an ancestral property inherited by their father Chettiappa Chettiar. On his demise, the $\frac{1}{2}$ share of his father has to devolved upon his 2 daughters (plaintiffs) and his son Nallusamy (vendor of the defendant). Therefore, claiming $\frac{1}{6}$ shares in the suit property, for each of the plaintiffs the suit for declaration and injunction has been sought for. The suit for declaration is in respect of $\frac{2}{6}$ shares and injunction not to construct any permanent structure, without division of ancestral properties by metes and bounds.

25. The pleadings and records reveals the Chettiappa Chettiar has died interstate in the year 1977. His son Nallusamy alienated the suit property in favour of the defendant

in the year 1985. The plaintiffs who are daughters of the Chettiappa Chettiar for the first time has made a claim of 1/6 shares in the suit schedule property through Lawyer notice dated 01.02.1994, which is marked as Ex.A.1. Admittedly, the Chettiappa Chettiar has inherited other properties also apart from the suit property but they have not sought for partition of any of those properties, except filing the suit in respect of the property which was alienated to the 3rd defendant without arraying the vendor of the 3rd defendant. The declaration prayer is couched in the way that the suit property is an ancestral property and their 1/6 share each has already been ascertained.

26. In the reply notice marked as Ex.A.2, the defendant through her Advocate had asserted that the property is in possession of the defendant, for more than 17 years. The title has been transferred in his favour by virtue of the sale deed executed by Nallusamy. Further, the suit has already been initiated against the plaintiffs by the defendant in O.S.No.601 of 1991. The appeal in A.S.No.140 of 1993 is pending.

27. Despite this reply, instead of filing the suit for partition of all the properties left by Chettiappa Chettiar, the plaintiffs have chosen the suit property alone which was sold by his brother Nallusamy to the defendant claiming it as his exclusive property, which he has inherited from his ancestors. Strangely, the plaintiffs have not even impleaded their brother who according to them, acting against their interest and alienated the suit property to the defendants including their share without their consent.

28. While the trial Court has rightly pointed out that the non-inclusion of Nallusamy the brother of the plaintiffs, through whom the defendant claim title and possession as a party to the suit, for non-joinder of necessary party the suit is bad. The Lower Appellate Court has erred in law holding that in a suit for injunction the vendor Nallusamy is not a necessary party. It is not mere suit for injunction but the suit is coupled with declaratory relief explicitly claiming 2/6 shares in the suit property. The remaining 4/6th shares, as per the plaintiffs are held by Nallusamy who is the vendor to the defendant. In such circumstances, the suit is bad for non-joinder of necessary party. While the trial Court has rightly held so, the Lower Appellate Court has gone tangent to the facts of the case and allowed the suit.

29. Particularly, on reading the recital of sale deed Ex.A.3 executed in favour of the defendant, this Court finds that Nallusamy and his sons have sold the property to the defendant claiming the property which they have inherited from their ancestors. Chettiappa Chettiar who is the father of the plaintiffs and Nallusamy died in the year 1977, intestate. The succession opened on the day of his death. Nallusamy and his sons claiming themselves as male descendants of Chettiappa Chettiar have inherited the property and sold the same to the

defendant in the year 1985 vide Ex.A.3. The present suit is presented on 17.02.1994. Precisely 17 years after the demise of Chettiappa Chettair and 9 years after the alienation of the property by Nallusamy to the defendant. The plaintiffs have not even taken care to implead Nallusamy as a party to the litigation when they claim share in the property along with Nallusamy. They have not produced any document to show that after filing the suit for declaration in respect of one property and reserving the right to file a comprehensive partition suit after collecting all the details and documents, they have filed such suit for partition for all the properties left by Chettiappa Chettair. This failure to file a suit for partition and the omission to seek all the relief in one suit, which the plaintiffs are entitled, exposes the malafide intention of the plaintiffs in filing the present suit with enormous delay beyond period prescribed for adverse possession.

30. The two judgments relied by the learned counsel for the respondent/plaintiff are not helpful to the respondents. While, the appellant herein had already initiated a suit for partition though the plaintiffs have failed to do so. The judgment cited by the learned counsel for the respondent in Manikayala Rao Vs.Narasimhaswami reported in AIR 1966 SC 470 has no application. Similarly, when the vendors have claimed exclusive right over the property and sold it to the appellant and pursuant to the sale deed the appellant had already put in possession and been in continuous enjoyment, for more than 7 years, the principle laid in these judgments relied by the learned counsel for the respondent on facts differs.

31. The relief sought in the suit by the respondents that the appellant is not entitled to occupy or encumber 2/6th share and consequential injunction from putting up construction or building. It is a vague prayer and a decree interim in nature cannot be passed without larger relief of ascertaining the portion of the suit property. A co-sharer in the property cannot be put to in convenience for perpetuity at the behest of minor sharer.

32. The Lower Appellate Court without considering the legal infirmity in the claim of the plaintiffs had erroneously reversed the well considered judgment of the trial Court. Therefore, the judgment and decree passed by the learned Additional District Judge, Fast Track Court-III, Namakkal in A.S.No.38 of 2003 is liable to set-aside. In the result, the Second Appeal is Allowed. The judgment and decree passed by the Learned Additional District Munsif, Namakkal in O.S.No.148 of 1994 is confirmed. No costs.

Sd/-

Assistant Registrar (CS)

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Sub Assistant Registrar

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To,

1.The Learned Additional District Judge, Fast Track Court-III,
Namakkal.

2.The learned Additional District Munsif, Namakkal.

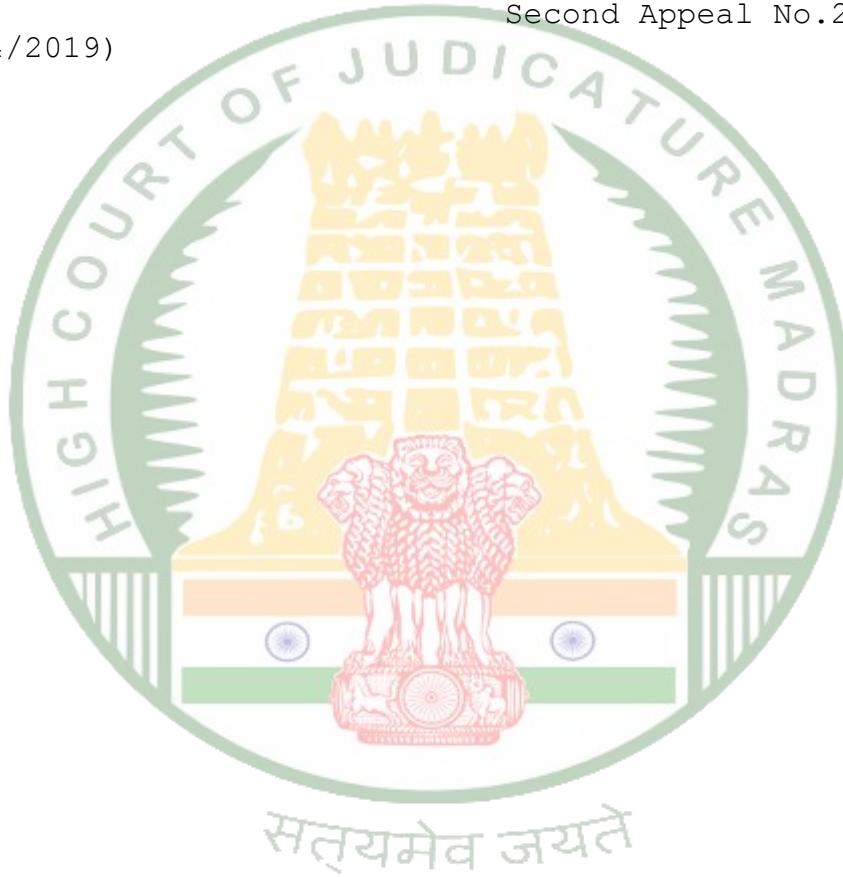
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+1cc to Mr. G.K.Muthu Kumar,Advocate SR.No. 3609

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A.SK(02/04/2019)



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