

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.03.2019

PRONOUNCED ON : 09.04.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN
S.A.No.1412 of 2005

S.Venkatesan,
S/o.Subramania Maistry,
residing at Vannara Theru,
Karnatham Village,
Virudhachalam Taluk,
Cuddalore District. Appellant/2nd Plaintiff

Vs.

1. Panchalai,
W/o.Thangarasu Maistry,
residing at Vannara Theru,
Karnatham Village,
Virudhachalam Taluk,
Cuddalore District.
2. Dhanakodi,
W/o.Sadayan,
residing at
Sembiamathevi Village,
Kallakurichi Taluk,
Villupuram District. Respondents/Defendants

Second Appeal filed under Section 100 of C.P.C.,
against the judgment and decree dated 20.01.2005 in
A.S.No.45 of 2004 on the file of the Principal Subordinate
Court, Virudhachalam, confirming the judgment and decree
dated 27.02.2004 in O.S.No.358 of 1986 on the file of the
First Additional District Munsif Court, Virudhachalam.

For Appellant : Mr.R.Agilesh

For R1 : Mr.V.Anand

For R2 : No appearance

JUDGMENT

Challenge in the second appeal is made to the judgment and decree dated 20.01.2005 passed in A.S.No.45 of 2004 on the file of the Principal Subordinate Court, Virudhachalam, confirming the judgment and decree dated 27.02.2004 passed in O.S.No.358 of 1986 on the file of the First Additional District Munsif Court, Virudhachalam.

2. The parties are referred to as per their rankings in the trial court for the sake of convenience.

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

"a. Are the Courts below correct and justified in dismissing the suit especially when plaintiff had purchased $\frac{3}{4}$ share belonging to 3 sons of the owner and when his vendors are not questioning the sale?

b. When a suit is based on title, whether prior possession is essential and, even assuming though not admitting, merely because possession was not there, can title be rejected?

c. Parties being in the position of co-owners, can one co-owner claim prescriptive title as against another in his absence on the plea of ouster?"

4. 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.

5. The plaintiff has laid the suit against the defendants seeking for partition and also for permanent injunction.

6. From the materials placed on record, it is found that the suit property belonged to Alamelu, wife of Chinnasamy and the same is not in dispute. It is also not in dispute that Raman, Lakshmanan and Ramachandran are the sons and the second defendant is the daughter of Alamelu.

Alamelu died leaving behind her abovesaid sons and daughter as her legal representatives. It is therefore evident that the suit property belonging to Alamelu would devolve upon her children and thus, it is found that each would be entitled to obtain $\frac{1}{4}$ share in the property left behind by Alamelu. Accordingly, putting forth the case that the plaintiff had purchased $\frac{3}{4}$ share of the suit property belonging to Ramar, Lakshmanar and Ramachandran by way of a sale deed dated 03.01.1979 and inasmuch as the defendants, despite requests, had not endeavoured or evinced interest to come forward to allot the share to which the plaintiff is entitled to in respect of the suit property and on the other hand, the defendants are attempting to cut the Karuvai trees in the suit property without any entitlement, accordingly, seeking for appropriate reliefs, the plaintiff has come forward with the suit against the defendants.

7. The first defendant in particular resisted the plaintiff's suit contending that Alamelu, to whom the suit property belonged, had orally gifted the suit property to her daughter namely the second defendant and since then, it is only the second defendant who had been in the possession and enjoyment of the suit property and according to her, the second defendant had settled the suit property in favour of the first defendant on 02.01.1979 and since then, it is only the first defendant who has been in the possession and enjoyment of the suit property and the claim of the plaintiff that he had purchased the suit property from the sons of Alamelu is not true and valid and the same is not binding upon the first defendant and hence, according to the first defendant, the suit laid by the plaintiff is liable to be dismissed.

8. Based on the materials placed on record, both oral and documentary, by the respective parties, the Courts below were pleased to dismiss the plaintiff's suit. Impugning the same, the present second appeal has been laid.

9. Admittedly, the suit property originally belonged to Alamelu. Therefore, on her demise, it is evident that her legal heirs would be entitled to succeed to the suit property. When it is not in dispute that Alamelu died leaving behind the three sons and one daughter, all the children of Alamelu would be entitled to the equal share in the suit property. Accordingly, it is the case of the plaintiff that he had purchased $\frac{3}{4}$ share of the suit property from the three sons of Alamelu on 03.01.1979 and thus entitled to the abovesaid extent of the suit property and the sale deed dated 03.01.1979 has been marked as Ex.A1 and putting forth the case that the defendants without any

authority had refused to part with the share in the suit property to which the plaintiff is entitled to and on the other hand, they had been attempting to cut the trees in the suit property without any entitlement, according to the plaintiff, he has been necessitated to lay the suit against the defendants for appropriate reliefs.

10. The only defence projected by the first defendant to resist the plaintiff's case is that the suit property originally belonged to Alamelu and inasmuch as Alamelu had orally gifted the suit property in favour of her only daughter namely the second defendant and therefore, according to the first defendant, Alamelu's sons are not entitled to alienate $\frac{3}{4}$ share of the property in favour of the plaintiff and therefore, it is put forth that the sale deed dated 03.01.1979 projected by the plaintiff for claiming $\frac{3}{4}$ share of the suit property marked as Ex.A1 is not valid in the eyes of law and accordingly, the suit laid by the plaintiff, is liable to be dismissed. Further according to the first defendant, Alamelu's daughter namely the second defendant had settled the suit property in her favour on 02.01.1979 and since then, it is only the first defendant who has been in the possession enjoyment of the suit property and further according to her, with a view to deprive the first defendant of her right in the suit property, it is put forth that the sale deed dated 03.01.1979 has been brought about by the plaintiff and hence, the suit laid by the plaintiff is liable to be dismissed.

11. At the foremost, it has not been explained by the first defendant as to how the oral gift projected by her for asserting the title on the second defendant is valid. When as per law, oral gift is not permissible and if at all any gift is to be made, the same could be effected only by way of a registered instrument, the defence version of the first defendant that her settlor acquired title to the suit property from her mother Alamelu by way of an oral gift, as such, cannot be accepted in the eyes of law. Furthermore, there is no material whatsoever placed on the part of the first defendant to evidence that her settlor namely the second defendant had been in the exclusive possession and enjoyment of the suit property pursuant to the alleged oral gift said to have been made by Alamelu in favour of the second defendant. At the foremost, the first defendant has not come with the clear case as to when the alleged oral gift had been made by Alamelu in favour of the second defendant and coupled with the fact that when there is no material to evidence that following the alleged oral gift made by Alamelu, the second defendant had been in

possession and enjoyment of the suit property validly, it is found that the plea of oral gift projected by the first defendant for upholding the title on her settlor, as such, cannot be countenanced. All the abovesaid facts have been failed to be considered by the Courts below in the right perspective.

12. The Courts below seem to have rejected the plaintiff's case mainly on the footing that the plaintiff has failed to establish the passing of consideration under Ex.A1 sale transaction. As rightly put forth by the plaintiff's counsel, when Ex.A1 sale transaction is found to have been made in favour of the plaintiff by the three sons of Alamelu and when the three sons of Alamelu had not questioned the same in any manner, in such view of the matter, the determination of the Courts below that Ex.A1 cannot be accepted to be a valid transaction on the failure of the plaintiff to establish the passing of consideration as projected by him, as such, cannot be accepted in any manner. If at all Ex.A1 can be validly challenged, the same could be done only by the sons of Alamelu and not by others. When as per law, the sons of Alamelu would be entitled to acquire equal share in the suit property and when the first defendant has projected only the plea of oral gift, when the same does not stand scrutiny in the eyes of law, it is found that the first defendant's settlor namely the second defendant had no valid title to the entire suit property as sought to be made out and at the most, the second defendant would be only entitled to $\frac{1}{4}$ share in the suit property and not more than that. In such view of the matter, the alleged settlement deed said to have been effected by the second defendant in favour of the first defendant in respect of the entire suit property, as such, cannot be accepted and as rightly put forth by the plaintiff's counsel, if at all the settlement deed effected by the second defendant in favour of the first defendant is to be accepted, the same could be accepted as regards the $\frac{1}{4}$ share of the second defendant in respect of the suit property and not beyond that. The Courts below also seem to have proceeded on the footing that the three sons of Alamelu having not conveyed any specific share in the suit property as such, the sale transaction projected by the plaintiff is not valid. However, when the legal heirs of Alamelu are each entitled to obtain $\frac{1}{4}$ share in the suit property and accordingly, when it is found that the three sons had alienated their $\frac{3}{4}$ share in favour of the plaintiff under Ex.A1 sale transaction, in such view of the matter, the fact that they have not in specific detailed the $\frac{3}{4}$ share of the suit property in any manner and thereby the same would render the sale transaction Ex.A1 as invalid, as such, cannot be countenanced.

13. As above pointed out, inasmuch as the plea of oral gift put forth by the first defendant for tracing the title of her settlor has no legal sanctity, it is evident that the first defendant is unable to place any material whatsoever to establish that since the date of the alleged oral gift, her settlor is in the possession and enjoyment of the suit property as the full owner thereof. Therefore, the Courts below had failed to consider the above aspects of the matter in the right perspective and found to have erroneously dismissed the plaintiff's suit.

14. The Courts below seem to have also proceeded on the footing that the second defendant and the first defendant, on account of their long and continuous possession had prescribed title to the suit property as such and therefore, the plaintiff is not entitled to the reliefs as prayed for. However, as regards the plea of adverse title put forth against the plaintiff and his vendors, they being found to be the co-owners of the suit property, unless and until the first defendant pleads ouster and adverse title in specific and also establish the same by placing acceptable and reliable materials, the abovesaid case of the first defendant cannot be upheld in any manner. When with reference to the abovesaid case projected by the first defendant sans acceptable pleas pointing to the same and also when there is no material, at all, placed on the part of the first defendant to hold that she and her settlor had been in the possession and enjoyment of the suit property excluding the plaintiff and his vendors openly, continuously and uninterruptedly beyond the statutory period by asserting the title on themselves with animus possidende and also by ousting them and in such view of the matter, the plea of prescriptive title projected by the first defendant and upheld by the Courts below in favour of the first defendant, cannot be accepted in any manner and the same is liable to be rejected sans any proof pointing to the same.

15. Knowing fully well that the second defendant has no valid title to the suit property other than her entitlement to $\frac{1}{4}$ share in the suit property, the first defendant has also taken the plea that in the event of the sons of Alamelu proceeding to alienate their share in the suit property, it is put forth that they should have alienated their share only in favour of the second defendant and instead the three sons having alienated the share in favour of the plaintiff, according to the first defendant, the alienation in favour of the plaintiff by the three sons is

invalid in the light of Section 22 of the Hindu Succession Act, 1956. By way of the abovesaid defence, it is seen that the first defendant is projecting the preferential right vested with the second defendant in acquiring the property from her brothers. By taking the abovesaid defence, as rightly put forth by the plaintiff's counsel, the first defendant has admitted the right of the three sons of Alamelu in respect of the suit property. Only upon accepting the joint entitlement of the suit property qua all the legal heirs of Alamelu, the abovesaid plea could be validly projected by the first defendant or the second defendant as the case may be, accordingly, it is found that by taking the abovesaid plea, the first defendant has impliedly admitted that the sons of Alamelu also have right in the suit property and accordingly, it is found that the sons having validly conveyed their right in the suit property to the plaintiff by way of Ex.A1 sale transaction, in such view of the matter, the oral gift projected by the first defendant in favour of her settlor for fixing the title on her settlor falls to the ground. Furthermore, when the second defendant in particular has not been shown to have exercised any right to purchase the shares of her brothers in the suit property and also not shown to have elected her so-called preferential right to acquire the shares of her brothers and when with reference to the same, the second defendant, in particular, has not come forward with any valid case as such and furthermore, when the ingredients provided under Section 22 of the Hindu Succession Act, 1956, are not shown to be satisfied in the present case, in all, it is found that the abovesaid plea projected by the first defendant is militating against her defence and when the first defendant has also not established that her settlor is entitled to the preferential right in respect of the purchase of the shares of the sons of Alamelu, therefore, the abovesaid plea does not merit acceptance.

16. In the light of the abovesaid discussions, it is found that the Courts below had committed error in dismissing the plaintiff's suit. When the plaintiff is found to have acquired $\frac{3}{4}$ share belonging to the sons of Alamelu in the suit property and when the same has not been challenged by the sons in particular, when the plaintiff has acquired undivided share of the suit property from the sons of Alamelu under Ex.A1 sale transaction, accordingly, it is found that the plaintiff is entitled to maintain the suit for partition based on the claim of purchase of $\frac{3}{4}$ share of the suit property. When the first defendant has not made valid pleas as regards the case of ouster and

adverse title and also not placed acceptable and reliable materials to sustain the abovesaid claim, the plea of adverse title by way of ouster goes. By taking the plea of preferential right to purchase the shares of the sons of Alamelu in the suit property, the first defendant, thereby having admitted the entitlement of the sons of Alamelu to the suit property, accordingly, it is found that her settlor has no exclusive title to the suit property and when the plea of oral gift projected by the first defendant for asserting the title of her settlor is not found to be valid in the eyes of law and that apart, the very factum of the oral gift also having not been established, as such, by the first defendant, her claim of title to the suit property based on the settlement deed, said to have been executed by her settlor, as such, cannot be accepted and the Courts below having failed to consider the abovesaid points in the right perspective, had totally committed a serious miscarriage of justice in dismissing the plaintiff's suit.

17. The counsel for the appellant, in support of his contentions placed reliance upon the decision of this Court reported in AIR 2000 MADRAS 516 [P.Srinivasamurthy Vs. P.Leelavathy and others].

The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

18. In the light of the above discussions, the substantial questions of law formulated in the second appeal are accordingly answered in favour of the plaintiff and against the defendants.

19. For the reasons aforesaid, the judgment and decree dated 20.01.2005 passed in A.S.No.45 of 2004 on the file of the Principal Subordinate Court, Virudhachalam, confirming the judgment and decree dated 27.02.2004 passed in O.S.No.358 of 1986 on the file of the Additional District Munsif Court, Virudhachalam, are set aside and resultantly, the preliminary decree is granted in favour of the plaintiff declaring his $\frac{3}{4}$ share in the suit property and as regards the relief of permanent injunction sought for by the plaintiff, as the Karuvai trees had already been cut and the sale proceeds had been deposited in the Court, the plaintiff is held entitled to obtain his due share in the same and on the abovesaid lines, the suit laid by the plaintiff in O.S.No.358 of 1986 is disposed of with costs.

Accordingly, the second appeal is allowed with costs.
Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(Ccc)

//True Copy//

Sub Assistant Registrar

nsd

To

1. The Principal Subordinate Judge,
Virudhachalam.
2. The First Additional District Munsif Judge,
Virudhachalam.

Copy to

The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.T.Dhanasekar , Advocate SR.No. 34406

A.SK(29/07/2019)

S.A.No.1412 of 2005



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