

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No. 299 of 2016
and
C.M.P.No. 5535 of 2016

Peramayee (since deceased)
Palanisamy(since deceased)

1.Perumal
2.Nataraj
3.Kavundiappan
4.Subbulakshmi
5.Sankar
6.Prakash

...Appellants/Defendents 3-8

Vs.

A.L.Chinnasamy

..Respondent/Plaintiff

Prayer: Memorandum of Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree dated 11.12.2015 made in A.S.No. 86 of 2014 on the file of the First Additional Sub-Ordinate Judge, Erode reversing the judgment and decree dated 01.08.2014 made in O.S.No. 774 of 2010 on the file of the II-Additional District Munsif Court, Erode.

For Appellants : Mr. R.Arundattan
for Mr.C.Munusamy

J U D G M E N T

The defendants 3 to 8 in O.S.No. 774 of 2010, who succeeded in the Trial Court in getting the suit for partition filed by the respondent herein dismissed upon reversal of the said judgment and decree by the lower Appellate Court have come forward with this second appeal.

2. The suit in O.S.No. 774 of 2010 was laid by the plaintiff seeking partition and separate possession of the plaintiff's ½ share in the suit property. According to the

plaintiff, the suit property belonged to four persons namely, Karuppana Gounder, Nalla Gounder, Muthu Gounder and Sengoda Gounder. Under a sale deed dated 15.09.1993, the plaintiff had purchased an extent of 2211 sq.ft., of undivided share in the land from Ganesan, grandson of Nalla Gounder and Subramani, Sengottaiyan and Pongiannan, son and grandsons of Sengoda Gounder respectively. Subsequently, on 26.02.2010, the plaintiff had purchased another extent of undivided 367 ½ sq.ft., from Subramani, Sengottaiyan and Pongiannan. Therefore, the plaintiff would claim that he is entitled to ½ share in the suit properties having purchased the share of Nalla Gounder and Sengoda Gounder.

3. The suit was resisted by the defendants contending that the suit is barred by limitation and that the defendants have perfected title by adverse possession for over the statutory period. This plea was raised mainly on the ground that the plaintiff, who had purchased an extent of 2211 sq.ft., on 15.09.1993 did not chose to exercise his right till the year 2010 when he came up with the present suit. The defendants also pointed out that one Pavayee, wife of Subramani, son of Muthu Gounder was not impleaded as a party to the suit and hence the suit is bad for non-joinder of necessary parties.

4. The Trial Court, on consideration of the evidence on record concluded that the plea of adverse possession raised by the defendants cannot be accepted. The Trial Court found that the plaintiff has averred that he was in joint possession of the properties along with the defendants and therefore the plaintiff has proved that he was in joint possession and therefore, there is no question of defendants claiming adverse possession. The Trial Court also took note of the fact that the plaintiff being a Co-owner, the defendants have to prove Ouster and not adverse possession. The Court also concluded that the defendants have not proved the essential ingredients of Ouster in order to deny the relief of partition. The Trial Court, however, concluded that the non-impleading of Pavayee, wife of Subramani, son of Muthu Gounder, one of the sharers is fatal to the suit and dismissed the suit on the ground of non-joinder of necessary parties. Aggrieved, the plaintiff preferred an appeal in A.S.No. 86 of 2014.

5. Pending appeal, the plaintiff filed an application in I.A.No.132 of 2014 seeking to produce additional documents under Order XLI Rule 27 of the Code of Civil Procedure. The document that was sought to be marked was a release deed executed by Pavayee in favour of her brother on 29.08.1994. This document was sought to be relied upon to show that Pavayee had no

interest in the property on the date of suit and therefore, the conclusion of the Trial Court that the suit is bad for non-joinder of necessary parties is flawed. As against the findings of the Trial Court rejecting the plea of adverse possession, the defendants filed cross objections. The lower Appellate Court, after considering the evidence on record as well as the provisions of Order XLI Rule 27 of the Code of Civil Procedure received the release deed dated 29.08.1994. The lower Appellate Court, upon a consideration of the evidence on record and the evidence produced before it concluded that the Trial Court was wrong in dismissing the suit on the ground of non-joinder of necessary parties when Pavayee had relinquished her interest in favour of her brother even in the year 1994. Thus, the sole ground on which the suit was dismissed was effaced. As regards the claim of adverse possession also, the lower Appellate Court concurred with the findings of the Trial Court. On the said conclusions, the lower Appellate Court allowed the appeal and granted a decree for $\frac{1}{2}$ share as prayed for by the plaintiff. Aggrieved, the defendants are on appeal.

6. I have heard Mr.R.Arundattan for Mr.C.Munusamy, learned counsel for the appellants. The respondent though served had not entered appearance either in person or through counsel, duly authorized.

7. Mr.R.Arundattan, learned counsel appearing for the appellants while elaborating on the question of law would contend that the suit is barred under Article 110 of the Limitation Act in as much as the plaintiff is admittedly a third party purchaser had not sought for partition, since the year 1993 till 2010. He would also submit that the lower Courts below erred in negating the plea of adverse possession. As regards the applicability of Article 110 of the Limitation Act, I do not think the said article could be applied to the suit on hand. It would apply only to a person excluded from enjoyment of joint family property and seeks to enforce a right to share there in. The starting point of limitation is when the exclusion becomes known to the plaintiff. The present suit is by the purchaser from some of the sharers and the plaintiff has averred that he is in joint possession along with the defendants. The suit has been valued under Section 37(2) and a fixed Court fee has been paid on the ground that the plaintiff is in join possession with the defendants. The defendants have not raised a plea that the Court fee paid is incorrect, though they had claimed adverse possession. The plaintiff, being a Co-owner, even assuming that he was excluded from enjoyment of the property, mere exclusive possession alone cannot confer title on the defendants. It is for the defendants to plead and prove

Ouster. The requirement of law to prove Ouster is much more stringent than mere adverse possession. The Co-owner, who claims Ouster of the other Co-owner should not only prove exclusive possession but he should also go one step further and prove that they had asserted independent title and had in fact excluded the other Co-owner from enjoyment of the property to his knowledge. The Courts below have examined the evidence and have come to the conclusion that such evidence is absent. I do not think I can interfere with the said concurrent findings sitting in second appeal. A reading of the judgments of the Courts below would show that the conclusions regarding adverse possession / Ouster are based on thread bare analysis of the evidence on record and the same cannot be termed as perverse so as to enable me to interfere with the said factual findings. This answers the questions of law 1 and 2 framed at the time of admission.

8. Question of Law No.3:- This question of law relates to non-joinder of necessary parties. The Trial Court had concluded that the suit is bad for non-joinder of necessary party namely, Pavayee. In the Appellate Court, additional evidence has been produced and the release deed executed by Pavayee in favour of her brother Koundiyappan in the year 1994 has been received as additional evidence. The said document is not in dispute therefore, Pavayee Ammal did not have any right over the property on the date when the suit came to be filed and hence, her non-joinder is not fatal to the suit. The lower Appellate Court after admitting the additional evidence namely, the release deed dated 29.08.1994 had come to conclusion that the suit is not bad for non-joinder of necessary parties. Therefore, the third question of law is also answered against the appellant.

9. Last but not the least, Mr.Arundattan, learned counsel appearing for the appellant would submit that when the plaintiff has purchased specific extent of undivided share in the property, the Courts below were not right in granting $\frac{1}{2}$ share to them. It is seen from the sale deed dated 15.09.1993, the plaintiff has purchased 2211 sq.ft., of land and under sale deed dated 26.02.2010, the plaintiff has purchased 367 $\frac{1}{2}$ sq.ft. Thus, the plaintiff had in all purchased 2578 $\frac{1}{2}$ sq.ft., which is less than $\frac{1}{2}$ of the total extent namely, 5882 $\frac{1}{2}$ sq.ft. Therefore, the learned counsel would submit that the Courts below were not right in granting a decree for $\frac{1}{2}$ share as claimed by the plaintiff. I find some force in the contention of the learned counsel in this regard. It is not as if the plaintiff had purchased the entire share of Nalla Gounder and Sengoda Gounder from their legal heirs. What has been purchased is a specific extent of undivided share under two sale deeds. Therefore, the

plaintiff cannot claim anything more than what he has purchased. The lower Appellate Court had not adverted to this aspect which resulted a error in determining the shares. Therefore, the decree granted by the lower Appellate Court is liable to be modified. The second appeal is allowed in part, modifying the decree of the lower Appellate Court and granting a declaration that the plaintiff is entitled to partition and separate possession of 2578 ½ sq.ft., out of 5882 ½ sq.ft., in the suit property. Subject to this modification, the judgment and decree of the lower Appellate Court are confirmed. Consequently, connected Civil Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To:-

- 1.The First Additional Sub-Ordinate Judge,
Erode.
- 2.The II- Additional District Munsif Court,
Erode.
- 3.The Section Officer,
VR Section, High Court,
Madras-104.

+1cc ti Mr.C.Munusamy, Advocate SR.82611

S.A.No. 299 of 2016

and

C.M.P.No. 5535 of 2016

SR(CO)

CB(09/03/2020)

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