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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.01.2020

DATE OF VERDICT : 27.02.2020

CORAM

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

S.A.No.728 of 1998

1. Muthusamy (Deceased)
2. Palaniammal (Died)
3. Kaliammal
4. M.Palanisamy ...Appellants/Appellants/Plaintiffs

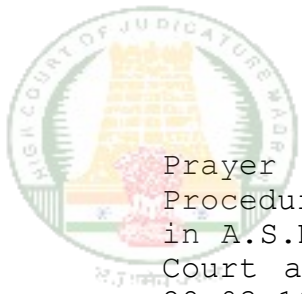
(3rd Appellant impleaded as Party
Appellant vide order of Court dated
01.11.2010 made in C.M.P.Nos. 776 & 1551
of 2010 in S.A.No.728 of 1998 & 4th
Appellant impleaded vide order of court
dated 25.08.2014 made in C.M.P.No.273 of
2014 in S.A.No.728 of 1998)

Vs.

1. Gurusamy Udayar
2. Varadarajan
3. Amaravathi @ Daivanai ammal
4. K.Natarajan
5. Arumuga Udayar @ Arumugham
rep.by his Power Agent
Periasamy
S/o.Arumuga Udayar
6. Palaniammal
7. P.Natarajan
8. Pavayee
9. T.Selvi

...Respondents/Defendants

(R6 to R9 impleaded as Party
Respondents, LR's of the deceased
Palaniammal vide order of court
dated 01.11.2010 made in C.M.P.Nos.
776 & 1551 of 2010 in S.A.No.728 of
1998).



Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 17.10.1997, in A.S.No.100 of 1995 on the file of the III Additional District Court at Salem partly confirming the Judgment and Decree dated 28.03.1995 made in O.S.No. 22 of 1989 on the file of the Sub Court, Namakkal.

For Appellants : Mr.T.Dhanyakumar

For Respondent : Mr.R.Krishna prasad
for M/s.Sarvabhauman Associates
for R5.
R6 to R9 - Exparte
RR1 & 2 - Notice D/W

For R3 : Mr.P.Elavarasan, (No Appearance)

R4 : No Appearance

JUDGMENT

This appeal has been filed as against the Judgment and Decree dated 17.10.1997, passed in A.S.No.100 of 1995 on the file of the III Additional District Court at Salem partly confirming the Judgment and Decree in O.S.No.22 of 1989 dated 28.03.1995 on the file of the Sub Court at Namakkal.

2. For the sake of convenience, the parties are referred to as per their ranking before the trial Court.

3. The case of the plaintiffs in brief is as follows :-

3.1. The suit is filed for partition. The first defendant and the fifth defendant are cousins. They owned the punja land admeasuring 9.18 acres classified as Anaivedu punjai situated at Vasanthapuram Village, Thusur Melmugam Mitta of Namakkal District. The said land originally had been taken over by the State Government under the provisions of Tamil Nadu Estates Abolition Act, 1948. In pursuance of the Survey and Settlement operations initiated under the said Act, the said Anaivedu punjai was numbered as S.No. 173/4 measuring 10.82 acres, in which the first defendant was entitled to 5.41 acres and the other extent of 5.41 acres owned by the fifth defendant. The land belonged to the fifth defendant remains intact with him.

4. In so far as the portion of the said Anaivedu Punjai belonging to the first defendant is concerned, his entire half



share was sold in court auction under two different execution proceedings of the Court of the District Munsif, Namakkal resulting in the complete deprivation of the first defendant's entire half share measuring 5.41 acres, as per the survey record; his half share measuring 4.59 acres, as per the Mitta records. In fact there was no division between the 1st defendant and the 5th defendant by metes and bounds except for the fact that each one was enjoying certain specific plots for their convenient enjoyment tentatively till final effect of partition between them. Of course, at the time, when the share of the 1st defendant was brought for court auction sale, under two different execution proceedings, the land comprised in S.No.174/1 measuring 5.95 acres was uncultivated with spontaneous growth of grass and bushy plants. Effectively the said survey field was used more as a grassing field rather than a cultivable land and that is the position even at present.

5. The 1st plaintiff purchased 1/4 undivided share belonging to the 1st defendant in the said Anaimeedu Punjai, measuring 10.82 acres, with 1/4 right in the common well therein on 11.03.1970 in R.E.P.No. 915/69 in O.S.No. 1256/68 on the file of the District Munsif Court, Namakkal. The said sale was confirmed on 16.04.1970 and later in pursuance of the Sale certificate issued to him, he took symbolic possession. The 2nd plaintiff purchased the other 1/4 share of the 1st defendant on 17.09.1971, under a registered sale deed for Rs.2,100/- from one Periannan S/o.Veerappa Gounder who purchased the said 1/4 share in the court auction held on 02.04.69, later confirmed on 02.06.69. The said Periannan has taken symbolic delivery of the said 1/4 share of the 1st defendant. The 1st plaintiff is the son in law of the 2nd plaintiff and hence the entire half share of the 1st defendant as enjoyed by him is under the absolute and exclusive enjoyment of the 1st plaintiff. In fact so far as S.No. 174/1 is concerned, it is the 1st plaintiff who is using the entire said field for grazing his cattle and sheep. The 1st plaintiff is cultivating the other fields for the past about 18 years and he paying kist.

6. On the strength of the same, he also sold certain portions to the defendants 2 & 4 as if he was the owner of the said sold out portions. Cause of action for the suit arose in November 1988 when the plaintiffs came to know about the alleged sale in favour of the defendants 2 to 4 by the 1st defendant. On 07.12.1988 notice was issued to all the defendants and on 16.12.1988 a reply was given by the 3rd defendant.

7. Resisting the same, the 4th defendants filed a separate written statement, denying the averments made in the plaint. The first defendant was alleged to be the owner of 5.41 cents of the



suit property and denied the Court auction stated by first and second plaintiffs. Therefore, prayed for dismissal of the suit.

8. The 5th defendant filed a written statement denying the fact that the share of the first defendant was auctioned and the plaintiffs 1 & 2 purchased the same. He also denied the fact that there was no partition between the first and fifth defendants in respect of the suit property and prayed for dismissal of the suit.

9. On the side of the plaintiffs PW1 to PW3 were examined and Exs. A1 to A5 were marked. On the side of the defendants DW1 & DW2 were examined. The Advocate Commissioner report and the sketch were marked as Exs.C1 & C2.

10. After perusing the documents and evidences, the trial court dismissed the suit and aggrieved by the same, the plaintiffs filed an appeal suit in A.S.No.100/1995 and the First Appellate Court partly allowed the suit in respect of the property comprised in S.No.174/4 and dismissed the other portion of the prayer. Aggrieved by the same, the plaintiffs preferred this Second Appeal.

11. At the time of admission of the Second Appeals, the following substantial questions of law were framed :-

(a) Whether Article 65 of the Limitation Act 36/1963 alone is applicable to the present case?

(b) Whether the suit is barred by Limitation?

(c) Whether the Courts below are perverse in holding that there was a partition between the 1st defendant family and the 5th defendant family in respect of the suit properties.

12. The plaintiffs filed a suit for partition. According to the plaintiffs, the first and fifth defendants are cousins and they have owned the suit property, in which the first defendant was entitled 5.41 acres and the 5th defendant was entitled to other remaining share. The entire share of the first defendant had been sold in Court auction in R.E.P.No. 915 of 1969 in O.S.No. 156 of 1968 by auction sale dated 11.03.1975 and 02.04.1969. The first and second plaintiffs had purchased the 1/4 share of the suit schedule property and the same was also confirmed by the sale certificate dated 16.04.1996 and 02.06.1969, which was marked as Ex.A1. The first plaintiff purchased 1/4 share of the suit schedule property, comprised in 174/1 and symbolic possession was handed over to the first plaintiff, which was marked as Ex.A3 and the endorsement was



marked Ex.A4. Likewise in O.S.No. 1382 of 1967, the Execution Petition was filed in E.P.No. 813 of 1968 and in the auction, one Periyannan have purchased 1/4 of the suit property, which was marked as Ex.A5. Pursuant to the purchase, the said Periyannan had sold the property purchased through auction in favour of the second plaintiff, which was marked as Ex.A2, dated 17.09.1971. Thereafter, the defendants 2 & 4 have purchased the property which was already purchased by the plaintiff through Court auction from the first defendant. Therefore, the sale is not a valid one and they have no title over the suit property. The property comprised in S.No. 174/1 admeasuring 1.62 acres belonged to one Ponnusamy Udaiyar, the property comprised in S.No. 174/2 admeasuring 4.17 acres belonged to Periyathambi Udayar, the property comprised in S.No. 174/3 without mentioning the extent belonged to Periyathambi Udayar, and also the property comprised in S.No. 174/1 without mentioning the extent belonged to Periyathambi Udayar and the property comprised in S.No. 174/5 admeasuring 1.28 acres belonged to Ponnusamy Udayar. As per the settlement register, the land comprised in S.No.174/1 admeasuring 5.95 acres belonged one Ponnusamy Udayar, the land comprised in S.No. 174/2 admeasuring 44 cents belonged to Periyannan Udayar, the land comprised in S.No. 174/3 admeasuring 2.81 acres belonged to Periyannan Udayar, the land comprised in S.No. 174/4 admeasuring 11 cents belong to Ponnusamy Udayar and Periyannan Udayar and in respect of the property comprised in 174/5, admeasuring 1.51 acres belonged to Ponnusamy Udaiyar.

13. Periyathambi Udayar or Periyanna Udayar is the father of the first defendant. Ponnusamy Udayar is the father of the 5th defendant. Their father name of the Ponnusamy Udayar and Periyathambi Udayar is mentioned as Nallappa Udayar. Accordingly, the patta was issued in favour of the 5th defendant which was marked as Ex.P3, dated 03.02.1983. Therefore, the property was already subdivided and separate patta was issued in favour of the 5th defendant in respect of the property admeasuring 7.46 acres. Therefore, the said property subdivided to the first and fifth defendant in S.Nos. 174/1 & 174/5. Though the defendants took a stand that the suit is barred by limitation, since suit was filed after a period of 12 years from the date auction purchase, namely, in the year 1969-1970. Already the property was subdivided and as such the question of limitation does not arise. Accordingly, the defendants 2 & 4 have no title over the property. The plaintiffs also proved by the patta that they are in possession and enjoyment of property comprised in S.Nos. 174/2 & 174/3 through the Court auction purchase. In so far as the property comprised in S.Nos. 171/1 & 171/5, admittedly belonged to the 5th defendant and separately patta was issued and the 5th defendant is in peaceful and possession and enjoyment of the property. Therefore, in the property comprised in S.No.174/4 alone, there is a common well



situated and as such 1st and 5th defendant are equally entitled to have 1/2 share. The plaintiffs are entitled to have their respective shares in the land comprised in S.No.174/4. Accordingly, the First Appellate Court decreed the suit in favour of the plaintiffs.

14. In view of the above discussion, this Court does not find any valid reason to interfere with the reasonings and findings rendered by the Courts below for upholding the case of the defendants. As such, this Court is of the considered opinion that no substantial question of law is involved in this appeal. Be that as it may, all the substantial questions of law formulated by this Court are answered in favour of the defendants and as against the plaintiffs.

15. In fine, the second appeal stands dismissed by confirming the judgment and decree passed by the First Appellate Court. Consequently, connected miscellaneous petition if any, is closed. There is no order as to costs.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

kmm

To

1. The III Additional District Court,
Salem
2. The Sub Court,
Namakkal.

+1cc to Mr.T.Dhanyakumar, Advocate, S.R.No.17404
+1cc to M/s.Sarvabhauman Associates,S.R.No.17011

S.A.No.728 of 1998

VG-II(CO)
RGA(13/09/2021)