

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 08.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

S.A.No.1300 of 2019 &
C.M.P.No.28057 of 2019

K.Raja

.. Appellant

Versus

1.K.Kabali
2.Mrs.Pattu

.. Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and Decree in A.S.No.207 of 2018, on the file of the XVII Additional City Civil Judge, Madras, dated 12.06.2019 in confirming the Judgment and Decree in O.S.No.7629 of 2007, on the file of the III Assistant Judge, Civil Court, Chennai dated 12.09.2017.

For Appellant : Mr.V.Lakshminarayanan

For 1st Respondent : Mr.Ashok Menon
Cavetor

JUDGMENT

This Second Appeal is directed against the judgment and decree of the XVII Additional Judge, City Civil Court, Chennai, passed in A.S.No.207 of 2018, confirming the judgment and decree of the III Assistant Judge, City Court, Chennai in O.S.No.7629 of 2007.

2. The suit in O.S.No.7629 of 2007 was filed by the first respondent herein, as plaintiff, seeking 1/3rd share in the suit property and for rendition of accounts and to pay 1/3rd share to him.

3. It is averred in the plaint is that the plaintiff and the first defendant are the sons and the second defendant is the daughter of Kuppusamy Naicker. The suit property was the absolute property of their father Kuppusamy Naicker. During his life time, he built a house and shop and enjoyed the income therefrom, till he passed away on 07.11.1989. After the demise of his father, the plaintiff and the defendants became each

entitled to 1/3rd share in the suit property. The plaintiff and the second defendant demanded partition from the first defendant, but he refused to do so. Despite notices dated 10.04.2002 and 24.12.2005, the first defendant did not take any steps to partition the property and hence, the suit.

4. The suit was resisted by the first defendant, by filing a written statement, contending that the father of the plaintiff and the defendants Kuppusamy Naicker was not the absolute owner of the property and it was purchased by Murugappa Naicker, by a sale deed in the year 1951. It is further stated that the Indian Bank, MGR Nagar Branch, instituted a suit in O.S.No.13573 of 1996 against Murugappa Naicker for recovery of loan amount of Rs.3,00,000/-. The bank has also filed a case before the Debt Recovery Tribunal for recovery of Rs.29,09,823/-. It is alleged that the first defendant's father deserted him when he was a minor and left the suit property in the year 1960 and started living at Nandambakkam Village Bhurma Colony, Chennai along with his concubine and the mother of the first defendant. In a family partition, his father Kuppusamy Naicker was allotted 1 acre situated at Bhurma Colony, Nandambakkam in the year 1960. After his demise, the plaintiff, the first defendant's step mother are enjoying the same and also the agricultural income from the land for the past 40 years. The first defendant had spent more than Rs.2,00,000/- to the second defendant at the time of her marriage and hence, the suit is liable to be dismissed in limini.

5. A written statement filed by the second defendant supporting the case of the plaintiff.

6. On the basis of the pleadings, the trial Court framed necessary issues. On the side of the plaintiff, P.W.1 was examined and Exs.A1 to A4 were marked. On the side of the first defendant, D.W.1 was examined and Exs.B1 and B2 were produced. Upon consideration of the evidence, the trial Court decreed the suit. The Judgment and Decree was confirmed by the appellate Court. Assailing the same, the present appeal has been filed.

7. Mr.V.Lakshminarayanan, learned counsel for the appellant would argue that the plaintiff has not proved that the suit property was the absolute property of their father Kuppusamy Naicker and on the other hand, Ex.B1 shows that the suit schedule property was purchased by Murugappa Naicker in the year 1951. It is further argued that all the legal-heirs of Murugappa Naicker were not added as parties to the suit, hence, the suit is liable to be dismissed for non-joinder of necessary parties and the suit is barred by limitation. The learned counsel further added that in the written statement, it has been categorically stated that there is an ancestral property in

Bhurma Colony, but it was not included in the schedule of properties and hence, the suit is also liable to be dismissed on the ground of partial partition. The additional documents sought to be produced in the appeal are relevant and material documents, but the appellate Court rejected it, adducing artificial reasons. It is the contention of the learned counsel that there was no challenge to the validity of the documents by the respondents and hence, the Courts below ought not to have rejected the documents and its order to the contrary is illegal and unjustifiable.

8. Per contra Mr.Ashok Menon, learned counsel for the respondents made submissions in support of the finding of the Courts below.

9. In the matter on hand, the suit in O.S.No.7629 of 2007 was filed for partition on the basis that the father of the plaintiff and the defendants was absolute owner of the suit schedule property and he died intestate on 07.11.1989. It is not disputed that the mother of the plaintiff and defendants pre-deceased, hence, the plaintiff claimed 1/3rd share each in the suit property. It is further stated that despite issuance of two notices, dated 10.04.2002 and 24.12.2005, the first defendant did not come forward to partition the property. The suit was resisted by the first defendant stating that the suit property was owned by Murugappa Naicker, the grandfather of the plaintiff and the defendants. The suit is liable to be dismissed on the grounds of limitation and non-joinder of necessary parties.

10. On perusal of the records, it is seen that the first defendant has not furnished the particulars of the other legal-heirs of his grandfather-Murugappa Naicker. During the cross-examination, D.W.1. admitted that, except the plaintiff, no other person have claimed partition in the property in dispute and to his knowledge, there is no other person entitled for partition. I.A.No.1 of 2019 was filed before the appellate Court to receive genealogy table, as document No.1; release deed, dated 05.09.1996 as document No.2, and the notice issued by the plaintiff, as document No.3, as additional documents. Since the appellant did not give details of the legal-heirs and no explanation was found for non-production of the documents before the trial Court, the appellate Court rejected the application.

11. It is true that the suit property was purchased by Murugappa Naicker under Ex.B1, dated 21.07.1951. The first defendant contested the suit stating that other legal-heirs of Murugappa Naicker were not impleaded in the suit. After considering the evidence of D.W.1, the Courts below found that Kuppusamy Naicker was the only son of Murugappa Naicker and he

inherited the property. It is also found that as per Ex.A4, the plaintiff and the defendants are the only legal-heirs of Kuppusamy Naicker. It is not the case of the first defendant that Kuppusamy Naicker alienated the property during his life time.

12. The decision of the Hon'ble Supreme Court in Vidya Devi Vs. Prem Prakash and others [(1995) 4 SCC 496], was relied on to reject the contention that the suit is barred by limitation, wherein, it has been observed as follows:-

"20. The legislature has not prescribed any period of limitation for filing a suit for partition because partition is an incident attached to the property and there is always a running cause of action for seeking partition by one of the co-sharers if and when he decides not to keep his share joint with other co-sharers. Since the filing of the suit is wholly dependent upon the will of the co-sharer, the period of limitation, specially the date or time from which such period would commence, could not have been possibly provided for by the legislature and, therefore, in this Act also a period of limitation, so far as suits for partition are concerned, has not been prescribed. This, however, does not mean that a co-sharer who is arrayed as a defendant in the suit cannot raise the plea of adverse possession against the co-sharer who has come before the Court as a plaintiff seeking partition of his share in the joint property."

13. The Hon'ble Supreme Court in the case of Mamidi Venkata Satyanarayana Manikyala Rao and Ors. Mandela Narasimhaswami and ors [AIR 1966 SC 470], has held that right of alienee to sue for partition is a continuing right and there is no period of limitation for enforcing such right and the relevant paragraph is extracted hereunder:-

"19. On behalf of the appellants learned counsel put forward the argument that the right of the alienee to sue for partition is a continuing right and there is no period of limitation for enforcing such right. In my opinion, there is no warrant for this argument. A suit for partition filed by the alienee from a coparcener is not, in a technical sense, a suit will not have the necessary effect of breaking up the joint ownership of the members of the family in the joint property nor the corporate character of the family. As observed by Bhashyam Ayyangar, J. In Aiyagari Venkataramayya v. Aiyagari Ramayya.

"The vendee's suit to enforce the sale

by partition is not a suit for 'partition', in the technical sense in which 'partition' or 'vibhaga' is used in the Hindu Law. A suit for partition, in technical sense, can be brought only by an undivided member of the family. The right to such partition is personal to him and not transferable. Such a suit can be brought only in the lifetime of the coparcener and even if so brought, it will abate if he should die before final decree, without leaving male issue. A partition in the technical sense, whether effected amicably or by decree of court, breaks up not only the joint ownership of property, but also the family union i.e. the corporate character of the family. Each member thereafter becomes a divided member with a separate line of heirs to himself. An undivided member of a family, though he may alienate either the whole [Gurulingappa v. Nandappa - I. L. R. 21 Bom. 797, or any part of his undivided share will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of all the family property other than what he has transferred. The transferee, however, does not step into the shoes of the transferor as a member of the family and there will be no community of property between him and all or any of the members of the family in respect either of the property transferred to him or the rest of the family property."

14. In the light of the principles laid down in the above decisions, I find no substance in the submission of the learned counsel for the appellant. In my considered opinion, both the Courts on proper appreciation of evidence and law, rightly came to the conclusion that the plaintiff is entitled for the relief sought for in the suit. In such view of the matter, the Second Appeal fails and the same is dismissed. There is no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

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Sub Assistant Registrar

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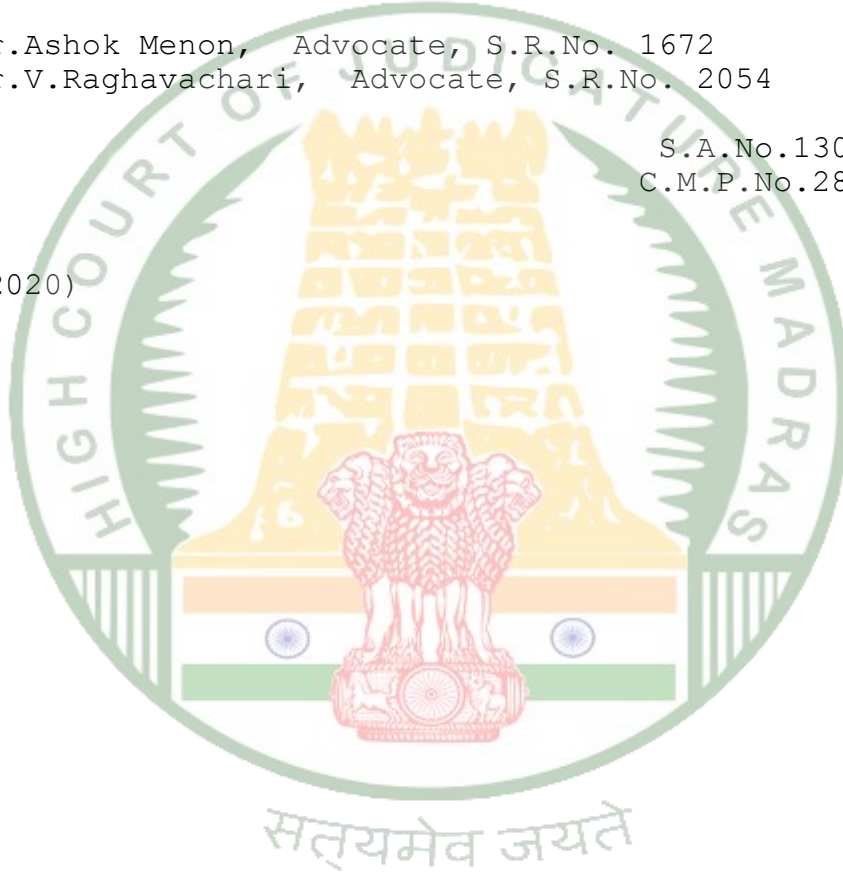
To

1. The XVII Additional City Civil Judge,
Chennai.
- 2.The III Assistant Judge,
Civil Court, Chennai.
- 3.The Section Officer,
V.R. Section, High Court,
Madras.

+2cc to Mr.Ashok Menon, Advocate, S.R.No. 1672
+1cc to Mr.V.Raghavachari, Advocate, S.R.No. 2054

S.A.No.1300 of 2019 &
C.M.P.No.28057 of 2019

SS(CO)
GN(25/08/2020)



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