

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	21.01.2020
Delivered on	27.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A. (MD)No.768 of 2006

Sivathanulingam : Appellant/1st Respondent/1st Plaintiff

Vs.

1.Sankaralingam (Died) : 1st Respondent/Appellant/4th Defendant

2.Chandran

3.Vijayakumar

4.Manimegalai : Respondents 2 to 4/Respondents 2 to 4/
Plaintiffs 2 to 4

5.Ilaiyaperumal Nadar

6.Sundaralingam

7.Annapushpam

8.Pudumai Lakshmi

9.Lakshmi

10.Selvi

[Respondents 2 to 4 and 6 to 10 are dispensed with
vide Court order dated 08.01.2018]

11.Murugesha

12.Santhi

13.Bama

[Respondents 11 to 13 were brought on record as
Legal Representatives of the deceased first respondent
vide Court order dated 08.01.2018 made in
M.P.(MD)Nos.1 to 3 of 2013]

: Respondents/Respondents/Defendants

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, against the judgment and decree made in A.S.No.203 of 2005 on the file of the Principal Sub Court, Tirunelveli, dated 21.04.2006, reversing the judgment and decree made in O.S.No.24 of 1995, on the file of the Additional District Munsif Court, Valliyur, dated 18.01.2005.

For Appellant

: Mr.V.George Raja,
For M/s.Ajmal Associates

For Respondent No.5

: Mr.M.P.Senthil,
For Mr.G.Prabhu Rajadurai

For Respondents 11 to 13

: Mr.T.Lajapathi Roy



J U D G M E N T

Aggrieved over the judgment and decree of the first Appellate Court, reversing the judgment and decree of the Trial Court, which granted a decree of partition in favour of the plaintiffs, the present Second Appeal is filed.

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

3. The brief facts leading to the filing of the suit are as follows:

The suit property originally belonged to one Marthanda Nadar. Valliammal is the only daughter of the said Marthanda Nadar. After the death of Marthanda Nadar, Valliammal got the plaint schedule property. After the death of the said Valliammal, her daughter Esakkiammal alias Esakki Pillai got the plaint schedule property. The said Esakkiammal alias Esakki Pillai had only son, namely Perumal Nadar, who is the father of the plaintiffs and the fifth defendant. Perumal Nadar had enjoyed the property as its absolute owner. The property was looked after by Arumuga Nadar and Rajaiah Nadar, who are the brothers of Perumal Nadar's mother. The said Rajaiah Nadar and Arumuga Nadar were looking after the property on behalf of Perumal Nadar. After the death of Arumuga Nadar, his son Ayyadurai and Rajaiah Nadar looked after the property. Ayyadurai and Rajaiah Nadar have no title whatsoever to the plaint schedule property. The father of the plaintiffs died on 06.11.1994. Thereafter, on 04.12.1994, the defendants 2 to 4 attempted to disturb the plaintiffs' enjoyment over the plaint schedule property. The fifth defendant married the daughter of the third defendant. The plaintiffs and the fifth defendant are co-owners. They are each entitled to one fifth share in the plaint schedule property. Hence, the suit for partition and permanent injunction.

4. The third and fourth defendants filed a written statement stating that originally the property belonged to the parents of the third defendant. The parents of the third defendant executed a Will in the year 1973 in favour of the third defendant. After the death of the parents, the third defendant became the absolute owner of the suit property. He is in possession and enjoyment of the property. On 08.12.1994, the third defendant executed a sale deed in respect of the suit property in favour of the fourth defendant. The plaintiffs have no right or title over the suit property. They are strangers to the suit property. Hence, they prayed for dismissal of the suit.

5. Based on the above pleadings, the Trial Court has framed the following issues:

"(i) Whether the plaintiffs are entitled to 4/5 shares in the suit property?"



- (ii) Whether the plaintiffs are entitled to permanent injunction? and
(iii) To what relief?"

6. On the side of the plaintiffs, P.W.1 was examined and Ex.A.1 was marked. On the side of the defendants, D.W.1 and D.W.2 were examined and Exs.B.1 to B.10 were marked.

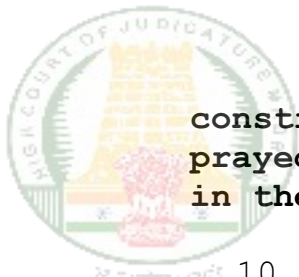
7. Though the suit has been filed as if the property of Marthanda Nadar devolved on Valliammal, his only daughter, after the death of Valliammal, the property was devolved on her only daughter Esakkiammal alias Esakki Pillai. After the death of Esakkiammal alias Esakki Pillai, her son Perumal Nadar, the father of the plaintiffs and the fifth defendant, became entitled to the suit property. Based on the admitted case of the defendants, the Trial Court recorded a finding to the effect that the property belonged to Marthanda Nadar, after his death, the same belonged to his only daughter Valliammal. The said Valliammal had one daughter and three sons, namely Esakkiammal, Arumuga Nadar, Subramaniya Nadar and Rasaiah Nadar and held that there is no partition in respect of the suit property. The sale made by the third defendant in favour of the fourth defendant is exceeding the share of their father. Accordingly, the Trial Court granted a preliminary decree of partition in respect of the plaintiffs and the fifth defendant's share.

8. Whereas, on appeal, the first Appellate Court has reversed the finding of the Trial Court mainly on the ground that the defendants are in possession of the suit property more than the statutory period and the Court fee ought to have been paid under Section 37(1) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955 and allowed the appeal, aggrieved against which, the present Second Appeal came to be filed.

9. While admitting the Second Appeal, the following substantial questions of law were framed:

"(i) Whether the lower appellate Court is right in law in holding that the defendants have perfected title over the suit property by adverse possession in the absence of any plea of adverse possession raised in the written statement or evidence of the defendants? and

(ii) Whether the lower appellate Court is right in law in holding that the suit is not maintainable on the ground that the Court Fee in the suit for partition by metes and bounds is paid under Section 37(2) of the Tamil Nadu Court Fee and Suit Valuation Act and not under 37(1) of the said Act overlooking the fact that the plaintiffs are co-owners of the suit property and are in



constructive joint possession of the suit property and prayed for partition by metes and bounds of 4/5th share in the suit property?"

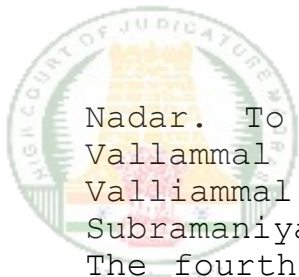
10. The learned counsel appearing for the appellant submitted that though the plaintiffs sought for partition on the ground that the property belonged to their father, on evidence, it is clearly established that their grandmother and her three brothers are equally entitled to the property. Only on the above basis, the Trial Court has granted partition. It is his further contention that no issue with regard to the Court fee has been raised in the written statement. Further, there is no plea as to the possession over the statutory period. Similarly, there is no plea as to the partition among the male members in the family. Hence, it is contended that the first Appellate Court, without any pleading in this regard, has non-suited the plaintiffs. In respect of the submissions, he has also relied upon the following judgments:

- (i) **Virudambal v. Kandasamy [2000(II) CTC 263]];**
- (ii) **Neelavathi v. N.Natarajan [AIR 1980 SC 691];**
- (iii) **Beekamchand Sowcar v. Jayaraman [1985(1) MLJ 324]; and**
- (iv) **Palaniammal & Ors. vs. Sundarambal & Ors. [AIR 2007 (NOC) 2460 (Mad)].**

11. Per contra, Mr.M.P.Senthil, learned counsel appearing for the fifth respondent and Mr.T.Lajapathi Roy, learned counsel appearing for the respondents 11 to 13 submitted that the suit itself has been laid suppressing the other legal heirs and it is laid as if Esakkiammal alias Esakki Pillai, daughter of Valliammal, became entitled to the suit property. It is further contended that only after the death of Perumal Nadar, the son of Esakkiammal, the plaintiffs have filed the present suit. This fact itself clearly indicated that they are not in possession of property. Whereas, the third defendant has become entitled to the property as per the Will of his parents. Thereafter, he has sold the property to the fourth defendant. The first Appellate Court, considering these facts and also having taken note of the admission of P.W.1, clearly held that the plaintiffs are not in possession of the property and the Court Fee paid is not correct. Hence, it is submitted that the judgment of the first Appellate Court does not require any interference.

12. I have perused the entire evidence.

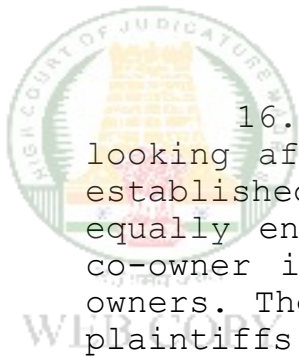
13. As already discussed, though the suit has been laid as if Esakkiammal alias Esakki Pillai, the only daughter of Valliammal became entitled to the suit property, after the death of her son, Perumal Nadar, the plaintiffs are entitled to equal share in the property. Though the defendants 1, 2 and 3 were also made as parties, the plaint pleadings is silent about their relation with Valliammal, the original owner. On evidence of both sides, it is not disputed that the suit property originally belonged to Marthanda



Nadar. To prove the same, Ex.A.1 is filed. The relationship of Vallammal with Marthanda Nadar is also not in dispute. The said Valliammal had four children, namely Esakkiammal, Arumuga Nadar, Subramaniya Nadar and Rasaiah Nadar. This fact is not in dispute. The fourth defendant has purchased 2 Acres and 1 Cent under Ex.B.1 from the third defendant. Similarly, he has also under Ex.B.2 purchased 1 Acre and 6 Cents and the remaining 9 cents were retained by the third defendant. The third defendant is the son of one Arumuga Nadar. Similarly, another son Subramania Nadar sold his share to Arumuga Nadar's wife. Wife of the said Arumuga Nadar, namely Anna Packiyam bequeathed the property under Ex.B.4 in favour of the third defendant. These are all established on record. However, the Will has not been proved in the manner known to law.

14. Be that as it may, the legal heirs have not been disputed in evidence. Valliammal had four children, namely Esakkiammal, Arumuga Nadar, Subramaniya Nadar and Rasaiah Nadar. All the legal heirs, after the death of Valliammal, entitled to one fourth share in the suit property. Whereas, the documents Exs.B.1 and B.2 clearly indicate that the fourth defendant has purchased from the other legal heirs of Valliammal. The documents, in fact, indicate that more than his entitlement, the third defendant dealt with the property and sold it to the fourth defendant. There is no pleading that the property had already been partitioned among all the legal heirs in the written statement filed by the third and fourth defendants and there is no whisper whatsoever as to the oral partition and there is no specific denial in the written statement. There is no denial of the plaint pleadings that Arumuga Nadar and Rasaiah Nadar were looking after the property on behalf of Perumal Nadar. Further, there is no whisper in the written statement as to any partition took place among the sons of Valliammal. Similarly, there are no issues whatsoever raised in the written statement as to the Court fee paid for partition. Whereas, the Trial Court, though the pleadings of both sides are bereft of details, on the basis of the admission of the parties with regard to the relationship and entitlement, has held that the plaintiffs and the fifth defendant were together entitled to one fifth share in the suit property. Whereas, the first Appellate Court, without any pleadings as to the objection of the Court fee paid on the plaint and without pleading as to any oral partition and without any pleading as to the possession of the defendants over the statutory period, has held that male heirs of Valliammal had partitioned the properties and the above partition has been established and the defendants are in possession of the property over the statutory period.

15. It is well settled that in the absence of any plea with regard to the adverse possession and also partition among the male heirs excluding the female heir, the first Appellate Court coming to such conclusion, based on the documents filed by the defendants to show their possession, is against the well settled principle of law.



16. The plaint pleadings proceeds that the co-owners were looking after the property on behalf of Perumal Nadar. When it is established on law that all the legal heirs of Valliammal are equally entitled to share in the suit property, possession of one co-owner is deemed to be a possession on behalf of the other co-owners. Therefore, merely on the basis that for certain period, the plaintiffs were not in actual possession of the property, it cannot be construed to hold that they are totally out of possession. Particularly, even such plea has never been raised in the written statement.

17. It is also to be noted that the law normally presumes joint possession, so long as the right of the plaintiffs to share and the nature of the property is not disputed.

18. In the judgment reported in **Beekamchand Sowcar v. Jayaraman [1985(1) MLJ 324]**, this Court has held that unless the plea raised by the defendant on the value of the suit would affect the jurisdiction of the Court to deal with the subject matter of the suit, the value determined and the Court fee payable could not be questioned by the defendant in appeal stage.

19. Similar view is also taken by this Court in **Palaniammal & Ors. vs. Sundarambal & Ors. [AIR 2007 (NOC) 2460 (Mad)]**. This Court, in Paragraph No.8 of the said judgment, has held that the Court fee was never an issue raised by the defendants 3 and 4 in the Court below and, therefore, the Trial Court did not frame it as an issue and there was no decision rendered in that regard also. In such circumstances, the power and jurisdiction of the Appellate Court in that regard is relevant to be considered, as enshrined under Section 12(4) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955 and held that there is no *suo motu* power on the Appellate Court to decide about the correctness of Court fee. Since it is the correctness of the order passed by the lower Court in respect of the Court fee, the same alone can be decided by the Appellate Court and held that the power of the Appellate Court in deciding about the correctness of the Court fee itself is possible only when the Lower Court has given a decision about the Court fee and if the defendants have not raised any objections about the correctness of the Court fee and no issue was framed, the Appellate Court cannot, on its own motion, consider it's correctness.

20. Having regard to the above judgments, this Court is of the view that as the Court fee issue was never an issue and not even pleaded in the written statement, the first Appellate Court going into the question and holding that the Court fee paid under Section 37(2) is not correct, is patently wrong.

21. It is well settled that in the case of co-owners, the possession of one is in law possession of all, unless ouster or



exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. So long as the right to share and the nature of the property as joint is not disputed, the Law presumes that he is in joint possession, unless he is excluded from such possession. Therefore, the finding of the first Appellate Court, without any pleadings in this regard, is erroneous. Similarly, absolutely, there is no pleading in the entire written statement as to the nature of the possession. There is no pleading as to ouster, etc. The entire written statement is only vague denial and there is no specific averment made in the written statement. There is no pleading as to the partition among the male heirs alone. Without any pleadings, the first Appellate Court has presumed the partition and held that the plaintiffs are not entitled to partition. Such finding of the first Appellate Court is also against the well settled position of law. The Trial Court has analyzed the factual aspects and granted partition on the basis of their entitlement. The first Appellate Court, on technical ground and on its own presumption, has held that the defendants are in possession more than the statutory period and the plaintiffs are excluded and there was partition among the male legal heirs of Valliammal. Such conclusion without any materials or pleadings in the written statement is erroneous. Such being the fact, this Court is of the view that the finding of the first Appellate Court is necessarily to be interfered with. Accordingly, the substantial questions of law are answered in favour of the appellant/first plaintiff herein.

22. In the result, the Second Appeal is allowed and the judgment and decree of the Trial Court dated 18.01.2005, made in O.S.No.24 of 1995, are restored. Considering the nature of relationship between the parties, there is no order as to costs.

Sd/-

Assistant Registrar

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Sub Assistant Registrar(CS)

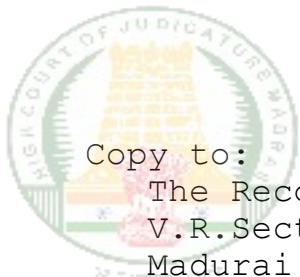
SML

To

1.The Principal Sub Judge,
Tirunelveli.

2.The Additional District Munsif,

<https://hcservices.courts.gov.in/>



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+1 CC to M/s.T.LAJAPATHI ROY, Advocate (SR-3540[F] dated
29/01/2020)

Judgment made in
S.A. (MD) No. 768 of 2006
Delivered on: **27.01.2020**

MK (17.02.2020) 8P 6C