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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :15.02.2021

Pronounced on :18.02.2021

CORAM:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Appeal Suit No.773 of 2008

in

M.P.No.1 of 2008

&

M.P.No.1 of 2014

Madhamohan

.. Appellant / 1st Defendant

/versus/

1.Lakshmi

2.Vijayalakshmi

3.Vasanthakumari

4.Santhi

5.Ayyappan

6.Matheswaran

... Respondents / Plaintiff's

7.M/s Amirth Textiles Rep.by Saspaul Singh

carrying on business D.No.240,

Eswaran Koil Street,

Erode.

..7th Respondent /2nd Defendant

Prayer: Appeal Suit has been filed under Section 96 of the Civil Procedure Code against the judgment and decree dated 19.03.2008 made in O.S.No.248 of 2007 on the file of the I Additional District Court, Erode.

For Appellant : Mr.N.Manoharan

For Respondents : Mr.T.Murugamanickam,

Senior Counsel for

M/s Zeenath Begum for R1 to R6



J U D G M E N T

This appeal filed by the first defendant, aggrieved by the judgment and decree passed by the trial Court in the suit filed for partition.

2.The brief facts of the case is as under:-

The suit property belongs to the joint family consisting of Periyasamy and his two sons viz. P.Madhanmohan and A.P.Pushpanathan. The said Periyasamy and A.P.Pushpanathan borrowed money from a Private Finance Concern by name, R.A.N.Muthusamy Mudaliar Chit Funds. For the unpaid debt, the said Chit Funds Company obtained award against Periyasamy and A.P.Pushpanathan in C.C.No.3 of 1993 before the Registrar of Chits, Erode. Based on the award, Execution Proceedings was initiated. The suit property was put to the Court auction. One Venkatesan was the successful bidder in the auction held on 22.06.1995. Sale was confirmed on 22.08.1995 for consideration of Rs.3,90,500/-. The sale certificate was issued in favour of A.Venkatesan. In E.A.No.221 of 1997 in E.P.No.147 of 1993, the Sub Court, Erode recorded symbolic possession of the suit property, since 2/3rd share in the suit property has been purchased by Venkatesan and the delivery of symbolic possession was also recorded. The said Venkatesan became 2/3rd share holder in the suit property. The said Venkatesan died intestate on 24.03.2001. The wife and children, who are the legal representatives of the said deceased Venkatesan, filed suit for partition to divide the property into 3 equal shares by metes and bounds; allot two divided shares to the plaintiffs and to direct the defendants to pay future damages for use and occupation of the suit property till actual delivery of possession.

3.The first defendant/co-sharer in the property filed Written Statement in which he contended that, there is no truth in the averments that the plaintiffs took symbolic possession of the suit property, pursuant to the execution petition. The allegation that the first defendant has let out the premises to the second defendant for the monthly rent of Rs.4,500/- also denied. The portion let out to the second defendant belongs to his 1/3rd share. The remaining 2/3rd share is in occupation of his father and mother. Infact, only A.P.Pushpanathan was indebted to



the finance company. For the said debt, Periyasamy stood only as guarantor. The auction purchaser Venkatesan, who was working as an Amine in the Court and being the co-brother of Periyasamy, assured that he will take the suit property in auction on behalf of Periyasamy. Periyasamy believed the words of Venkatesan, paid a sum of Rs.4,00,000/- to Venkatesan to pay the auction price and get sale certificate in his name. Later, Venkatesan refused to transfer the property in the name of Periyasamy. In the Panchayat held in the month of January 2001, Venkatesan orally relinquished his 2/3rd share in the suit property and promised that he will not dispossess Periyasamy. Hence, the plaintiffs have no right in the property, since their predecessor Venkatesan has already relinquished his right in favour of Periyasamy.

4. In the additional written statement, relying upon Sections 3 and 4 of the Partition Act, 1893, claimed pre-emptive right of purchase on the ground that major portion of the suit property being a dwelling- house, he as a co-sharer is entitled to exercise his right of purchase from the third party-co-sharer, who has initiated partition suit. To the Additional Written Statement, the plaintiffs have filed reply statement denying the Panchayat alleged to have been held in the month of January 2001 and relinquishment of right by Venkatesan.

5. The Trial Court framed the following issues:-

- (1) Whether the oral relinquishment made by Venkatesan as contended by the 1st defendant is true?
- (2) Whether the plaintiffs are entitled to the relief of partition as prayed for in the suit?
- (3) To what relief, the parties are entitled to?

6. On behalf of the plaintiffs, 5th plaintiff Ayyappan was examined as PW-1. Four exhibits were marked. On behalf of the defendants, no witness examined and no document marked.

7. The Trial Court, after considering the evidence, held that the auction purchaser have lawful right of 2/3rd share in the suit property and as legal heir of the deceased Venkatesan the plaintiffs are entitled for preliminary decree of partition. Having admitted that the property is an ancestral property jointly held by him along with father and brother, the 1st defendant right is restricted only to 1/3rd share in the suit



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property and he cannot let out the premises exclusively and enjoy the property. Insofar as the plea of pre-emptive right of purchase, the trial Court rejected the contention of the first defendant on the ground that the plaintiffs have no intention to transfer the property to any other stranger. The right of pre-emptive purchase will arise only when the co-sharer of dwelling-house intend to sell the share to the stranger. Whereas in this case, the suit property was sold in the Court auction and the plaintiffs cannot be considered as strangers.

8. In the appeal, the first defendant/appellant has contended that the Court below failed to see that the suit property is a dwelling-house and the appellant is residing in a portion of the same. Since the plaintiffs are strangers, they are entitled to exercise the right under Section 4 of the Partition Act, 1893. The total extent of the suit property is only 600 sq.ft. and it cannot be divided by metes and bounds.

9. It was pleaded by the learned counsel for the appellant, the Court ought to have exercised its power under Section 4 of the Partition Act, 1893 and should have directed the plaintiffs to sell the property to the first defendant, after receiving the auction price. The Court below failed to consider the fact that Venkatesan during his lifetime did not claim any right in the suit property, since he relinquished his right before the panchayators and permitted his co-brother Periyasamy to occupy the suit property. In the suit for partition, Periyasamy, Pushpanathan are necessary parties through whom the plaintiffs claim title. Without impleading them, the suit is bad for non joinder of necessary party. The Court below miserably failed to consider the legal point raised and formulated necessary issues, therefore, the judgment of the trial Court is liable to be set aside.

10. The learned Senior Counsel appearing for respondents 1 to 6 would submit that the contention of the appellant in his written statement and the additional written statement are contrary to each other and dis-entitled him to exercise the benefit of Section 4 of the Partition Act, 1893. Even if he has right, the plea of pre-emptive purchase is pre-mature. Only during the final decree proceedings, if the suit property could not be divided, then the right of pre-emptive purchase will enure on the appellant/first defendant.



11.The learned Senior Counsel would also submit that admittedly, the appellant is not dwelling in the suit property. In his written statement, he has categorically stated that the portion, which he has let out the second defendant is the 1/3rd share which he is entitled. The remaining 2/3rd share is occupied by his father Periyasamy with the permission of Venkatesan. While so, 1/3rd share which the appellant claims to be in his possession is admittedly let out to the second defendant for commercial purpose and it is not the residential unit.

12.Pointing the relevant portion in the written statement and the additional written statement and the provisions of Partition Act, 1893, the learned Senior Counsel for the respondents 1 to 6 submitted that in the absence of evidence, the appellant/1st defendant cannot contradict his own admission in the written statement and the additional written statement.

13.Second 4 of the Partition Act, 1893 reads as below:-

"4.Partition Suit by Transferee of share in dwelling-house:-(1)Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and property directions in that behalf.

(2)If in any case described in sub-section(1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section(2) of the last foregoing section."

14.In para 8 of the Written Statement, the first defendant has stated as below:-

"The first defendant submits that this defendant is entitled to 1/3rd share in the property as the same is



ancestral property. He leased out 1/3 share to M/s Amirth Textiles and he is received the rent for his portion alone. He is residing separately from his father. His father and mother were enjoying the remaining properties. His father kept his property for his personal use only and he was not leased out to any portion. Only symbolical possession has been handed over by the 1st plaintiff's husband namely, Venkatesan as per the plaint allegation but factually it is wrong."

15. In the Additional Written Statement at para 3 he has stated as below:-

"As per the provisions under Sections 3 and 4 of the Partition Act, 1893, this defendant is entitled to purchase the share of his father namely A. Periyasamy and his brother Pushpanathan, as he is the first class heir. As the major portion of the suit property is dwelling house, the preference should be given to this defendant to purchase. Except this defendant no other co-sharer is claiming any shares in the property. Hence, this defendant submits that he is ready to pay the sale price quoted in the sale certificate issued by the Subordinate Judge Court, Erode, in favour of A. Venkatesan, the husband of the 1st plaintiff and the father of the plaintiffs 2 to 6."

16. It is pertinent to note that to substantiate his pleadings, the defendant has not adduced any evidence. Going by his own statement, it is clear that he is not residing in the suit property. He has let out his 1/3rd share to the 2nd defendant. In the said circumstances, this Court finds that there is no iota of merit in the case of the appellant to interfere with the judgment of the trial court. If during the final decree proceedings, the Court come to a conclusion that the suit property is indivisible by metes and bounds and resort to Section 3(2) of the Partition Act, 1893, then alone, the 1st defendant/appellant herein can seek to exercise his pre-emptive right of purchase. Even in such situation, the said right shall be open to both the parties and not to the appellant alone.

17. In the result, this Appeal Suit is dismissed. The



judgment and decree of the trial Court passed in O.S.No.248 of 2007 dated 19.03.2008 is confirmed. No order as to costs. Consequently, connected Miscellaneous Petitions are closed.

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Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

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To:

The I Additional District Judge,
I Additional District Court,
Erode.

Copy To

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

+1cc to Mr.N.Manokaran, Advocate, S.R.No.9851

+1cc to M/s.Zeenath Begam, Advocate, S.R.No.9578

A.S.No.773 of 2008
in
M.P.No.1 of 2008 &
M.P.No.1 of 2014

VG-I(CO)
SB(13/09/2021)