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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.01.2021

CORAM

THE HONOURABLE MR. JUSTICE T. RAVINDRAN

S.A.No. 1134 of 2008

and

M.P. No.1 of 2008

1. Kannammal
W/o. Late Ayyasamy

2. Pushpa
W/o. Gurusamy

3. Rajeswari
D/o. late Ayyasamy

4. Murugesan ... Appellants/Defendants

Vs.

Saraswathi
D/o. late Ponnusamy

... Respondent/3rd Plaintiff

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against judgment and decree dated 28.01.2005 made in A.S.No.38 of 2004 on the file of the Principal Sub Court, Gobichettipalayam confirming the judgment and decree dated 29.06.2004 made in O.S.No.15 of 1997 on the file of the District Munsif Court, Sathyamangalam.

For Appellants : Mr. N. Manokaran

For Respondent : Mr. R.T.Doraisamy

JUDGMENT

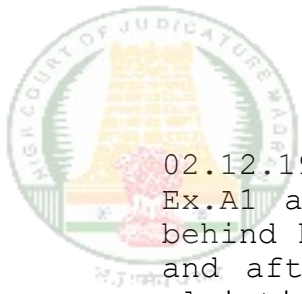
Challenge in this second appeal is made to the judgment and decree dated 28.01.2005 passed in A.S.No.38 of 2004 on the file of the Principal Subordinate Court, Gobichettipalayam, confirming the judgment and decree dated 29.06.2004 passed in O.S.No.15 of 1997 on the file of the District Munsif Court, Sathyamangalam.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. The defendants in O.S. No.15 of 1997 are the appellants in the second appeal.

4. Suit for partition.

5. The deceased first plaintiff, namely, Ponnusamy has levied the suit for partition against the defendants on the footing that the suit property originally belonged to his father Kullappa Asari @ Kulla Asari by virtue of the sale deed



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02.12.1949, the copy of which sale deed has been marked as Ex.A1 and his further case is that, his father died leaving behind him and his two brothers, namely, Arumugam and Ayyasamy and after the demise of his father, both the deceased first plaintiff, Arumugam and Ayyasamy were enjoying the suit property in common. It is further stated that the daughters of Kullappa Asari @ Kulla Asari had already got married and also died prior to the demise of Kullappa Asari @ Kulla Asari and Kullappa Asari @ Kulla Asari died on 13.12.1968 and his Death Certificate has been marked as Ex.A2. Further it is put forth by the plaintiff that his brother Ayyasamy died in the year 1978 leaving behind the defendants 1 to 4 as his legal heirs. According to the deceased first plaintiff, after the demise of Ayyasamy, he migrated to Karnataka State with his family for his livelihood and also further put forth the case that his brother Arumugam died in the year 1993 without marriage and subsequently, according to the deceased first plaintiff, after he had decided to settle in the village, the defendants who are the legal heirs of the deceased Ayyasamy, refused to permit him to enjoy the suit property in common along with them and infact, the defendants also laid a suit against him for the relief of permanent injunction in O.S.No.194/1994, on the file of the District Munsif Court, Sathyamangalam, which came to be dismissed. Hence, inasmuch as the defendants had refused to allow him to enjoy the suit property in common as one of the lawful sharers, according to the deceased first plaintiff, he issued a notice on 16.09.1996 to the defendants seeking for the partition of his half share in the suit property. Since the defendants, despite the receipt of the notice, failed to comply with the demand made therein, according to the deceased first plaintiff, the suit has been laid for partition.

6. Pending suit, the deceased first plaintiff died and his wife has been added as the second plaintiff and subsequently the second plaintiff having died, her daughter Saraswathi has been added as the third plaintiff.

7. In the written statement, the defendants challenged the claim of the deceased first plaintiff that he is the son of Kullappa Asari @ Kulla Asari. That the suit property originally belonged to Kullappa Asari @ Kulla Asari by way of the sale deed dated 02.12.1949 is not disputed by the defendants. According to them, Kullappa Asari @ Kulla Asari had only two sons, namely, Ayyasamy and Arumugam and after his demise, his two sons were enjoying the suit property in common and therefore, according to the defendants, the deceased first plaintiff is totally a stranger to the suit property and has no right or share in the same. The contention of the defendants is, therefore, that inasmuch as the deceased first plaintiff is not a legal heir of the deceased Kullappa Asari @ Kulla Asari and not been in the possession and enjoyment of the suit property at any point of time, hence according to them, the suit laid by the plaintiff for partition is liable



to be dismissed.

8. The daughters of Kullappa Asari @ Kulla Asari, according to the defendants, never claimed any right over the suit property and also put forth the case that one Arumugam had executed the registered release deed dated 02.05.1960 in favour of Kullappa Asari @ Kulla Asari. Therefore, it is put forth by the defendants that it is only the deceased Ayyasamy who was in the exclusive possession and enjoyment of the suit property after the demise of Kullappa Asari @ Kulla Asari and thereafter the deceased Ayyasamy subsequently demised, the defendants, on account of the long and continuous enjoyment of the suit property, have acquired the title to the suit property by way of the adverse possession and even assuming that the deceased first plaintiff has any right over the suit property, his right has been extinguished on account of limitation and further put forth that the suit is bad for non joinder of necessary parties and accordingly prayed for the dismissal of the plaintiff's case.

9. In support of the plaintiff's case, P.Ws.1 to 3 were examined and Exs.A1 to A24 were marked. On the side of the defendants, D.Ws. 1 and 2 were examined and Exs.B1 to B3 were marked.

10. On a consideration of the oral and documentary evidence adduced in the matter and the submissions put forth by the respective parties, the courts below were pleased to declare that the plaintiff is entitled to the half share in the suit property and accordingly, granted the preliminary decree in favour of the plaintiff. Impugning the judgment and decree of the courts below, the present second appeal has been laid by the defendants.

11. The deceased first plaintiff has laid the suit claiming partition in the suit property on the footing that he is the legal heir of the deceased Kullappa Asari @ Kulla Asari. That the suit property originally belonged to Kullappa Asari @ Kulla Asari is not in dispute and the copy of the sale deed in the name of Kullappa Asari @ Kulla Asari dated 02.12.1949 has been marked as Ex.A1. Kullappa Asari @ Kulla Asari died on 13.12.1968 and the same could be evidenced from his death certificate marked as Ex.A2. According to the contesting defendants the deceased first plaintiff is not the legal heir of Kullappa Asari @ Kulla Asari, on the other hand, only Arumugam and Ayyasamy are the sons of the deceased Kullappa Asari @ Kulla Asari and further put forth the case that the daughters of Kullappa Asari @ Kulla Asari, never claimed any right over the suit property. The plaintiff has also put forth the case that the daughters of the Kullappa Asari @ Kulla Asari had died even prior to the demise of Kullappa Asari @ Kulla Asari. From the sale deed dated 21.06.1982 marked as Ex.A10, as rightly held by the courts below, it is found that the sons of Kullappa Asari @ Kulla Asari, namely, Ponnusamy and Arumugam had alienated the property to one Palanisamy. As rightly concluded by the courts



below, when the deceased first plaintiff has alienated the property along with his brother Arumugam describing themselves as the sons of Kullappa Asari @ Kulla Asari and when it is noted that the fourth defendant, examined as D.W.1 pleads complete ignorance about the abovesaid sale transaction, as rightly held by the courts below, the deceased first plaintiff Ponnusamy is one of the sons of Kullappa Asari @ Kulla Asari. It is not the case of the defendants that Arumugam, one of the vendors under Ex.A10 is not the son of Kullappa Asari @ Kulla Asari. Furthermore, the notice sent by the Municipality with reference to the payment of the property tax marked as Ex.A12 would go to show that the same had been issued to both the deceased first plaintiff and the first defendant and in the same, it has been mentioned that the first plaintiff Ponnusamy Asari, Ayyasamy Asari and Arukutti Asari are the sons of Kullappa Asari @ Kulla Asari. D.W.1 would plead ignorance about the demand notice abovestated. It is not in dispute that Arumugam is also known as Arukutti. Therefore, it is evident from the demand notices sent by the Municipality regarding the property tax viz-a-viz the suit property marked as Exs.A12 and A13 that Kullappa Asari @ Kulla Asari had three sons, namely, Ponnusamy, Ayyasamy and Arukutti @ Arumugam, all the abovesaid documents also would fortify the case of the plaintiff that the deceased first plaintiff is one of the sons of Kullappa Asari @ Kulla Asari. Furthermore, considering the evidence of P.Ws.2 and 3, it is seen that the deceased first plaintiff is the son of Kullappa Asari @ Kulla Asari and after his demise, the deceased first plaintiff and Ayyasamy had been residing in the suit property and Kullappa Asari @ Kulla Asari had three sons and despite cross examination, nothing has been culled out from them to disbelieve their evidence particularly as regards the status of the deceased first plaintiff as the son of Kullappa Asari @ Kulla Asari. Furthermore, D.W.2 Chinnannan examined on behalf of the defendants also would admit during the course of cross examination that the deceased first plaintiff is the eldest son of Kullappa Asari @ Kulla Asari and therefore, it is evident that the deceased first plaintiff, as the legal heir of Kullappa Asari @ Kulla Asari, is entitled to claim the share in the suit property.

12. As above pointed out, one Arumuga Asari has executed the Release Deed in favour of Kullappa Asari @ Kulla Asari. The defendants are the legal heirs of the deceased Ayyasami. Though the defendants would claim that the deceased first plaintiff is not the legal heir of the Kullappa Asari @ Kulla Asari. However, to bring out the truth, the defendants have not come forward to produce the legal heir certificate of Kullappa Asari @ Kulla Asari for holding that the deceased first plaintiff is not the son of Kullappa Asari @ Kulla Asari. Therefore, considering the abovesaid factors in toto, it is noted that the courts below had rightly concluded that the deceased first plaintiff, namely, Ponnusamy is one of the sons of Kullappa Asari @ Kulla Asari and the brother of Ayyasamy.



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13. Inasmuch as the suit property is the property of the Kullappa Asari @ Kulla Asari, thus it is noted that the deceased first plaintiff is entitled to claim the half share in the suit property as put forth by him.

14. The main defence taken by the defendants is that the deceased first plaintiff at no point of time enjoyed the suit property. However, considering the documents put forth by the plaintiff, particularly, the kists receipts, all would go to show that the deceased first plaintiff during certain faslis, had been enjoying the suit property and the kists receipts in the name of Kullappa Asari @ Kulla Asari have also been exhibited in the matter on behalf of the plaintiff. All put together would go to establish that the deceased first plaintiff was also in the possession and enjoyment of the suit property.

15. According to the deceased first plaintiff, he had migrated to Karnataka for his livelihood and thereafter the suit property was in the possession and enjoyment of Ayyasamy and subsequent to his demise, with the defendants. According to the defendants, on account of their continuous, long and uninterrupted possession and enjoyment of the suit property over the statutory period, they had prescribed title to the suit property by way of the adverse possession. However, as rightly concluded by the courts below, no single document has been projected by the defendants to show that they had been in the possession and enjoyment of the suit property at any point of time, particularly, after the demise of Kullappa Asari @ Kulla Asari or Ayyasami. Even with reference to the enjoyment of the suit property by the deceased Ayyasami, there is no material placed on the part of the defendants. Exs.B1 to B3 do not, in any manner, point to the possession and enjoyment of the suit property by the defendants hostile to the right of the plaintiff. Therefore, the courts below are found to be justified in declining the plea of adverse possession put forth by the defendants for claiming exclusive title to the suit property.

16. The defendants have not taken the plea of partial partition in the written statement. Even during the course of evidence they have not put forth any case that Kullappa Asari @ Kulla Asari died leaving not only the suit property but also the other properties, which are liable to be partitioned. Therefore, the plea of partial partition now taken in the second appeal does not merit acceptance.

17. The counsel appearing for the defendants would contend that the suit for partition laid by the plaintiff is bad for non joinder of necessary parties. According to him, the daughters of Kullappa Asari @ Kulla Asari have not been impleaded and therefore, they also being entitled to claim the share in the suit property, their non impleadment would be



fatal to the plaintiff's case. From the materials placed on record, it is evident that Kullappa Asari @ Kulla Asari died leaving behind three sons and two daughters. His two sons, namely, Arumugam and Ayyasamy had died. The defendants are the legal heirs of the deceased Ayyasami. The first plaintiff died during the pendency of the suit. Now, according to the plaintiff, the daughters of Kullappa Asari @ Kulla Asari died even prior to his demise. That fact has also been admitted by D.W.1 during the course of cross examination. As above pointed out, Arumugam died without marriage. Even the defendants have also admitted in the written statement that the daughters of Kullappa Asari @ Kulla Asari, have not claimed any right over the suit property. In the light of the abovesaid factors, when the defendants have not come forward with the specific case as to who are the other legal heirs entitled to claim share in the suit property and the extent and nature of the right of such sharer, other than vaguely pleading that the suit is bad for non joinder of necessary parties, when they themselves have come forward with the case that the daughters of Kullappa Asari @ Kulla Asari had not claimed any right over the suit property, in such circumstances, as rightly contended by the plaintiff's counsel, the plaintiff's suit cannot be thrown out on the footing that the same is bad for non joinder of necessary parties. In this connection, the Apex Court in the decision reported in AIR 1993 SCC 1587 (Laxmishankar Harishankar Bhatt v. Yashram Vasta (dead) by L.Rs.) has explained the position of law that when the defendant takes the plea for non joinder of necessary parties, the defendant has to come out with the specific case as to who are the other co-owners and what right they claim and without such particulars, the suit cannot be dismissed for non joinder of necessary parties. The position of law has been outlined by the Apex Court in the abovesaid decision as follows:

Civil P.C.(1908), O.1, R.9 - Dismissal for non-joinder of necessary parties - Suit for recovery of possession - Plaintiff-purchaser claiming to have acquired entire ownership of suit property - Plea by defendant-tenant that suit is liable to be dismissed for non-joinder of co-owners - No averments, however, in written statement as to who are other co-owners and what rights they claim - Suit cannot be dismissed for non-joinder on such vague plea.

.....

13. A careful reading of above clearly discloses that there is no clear averment as to who are the co-owners and what exactly is the nature of right claimed by them. A vague statement of this character, in our considered opinion, could hardly be sufficient to non-suit the appellant on the ground of non-joinder of parties. We are unable to comprehend as to how the trial court had come to the conclusion that the executants of the sale



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deed dated 12.2.1968 could not pass a full title when itself points out that the shares of the other co-owners were not known. May be the appellant took the stand that it was not necessary to implead others but that does not mean the appellant is liable to be non suited. The stand of the appellant is consistent with his case that he has come to acquire the entire ownership of the suit property. Therefore, the courts should have insisted on some material on record as to the existence of other co-owners and their rights pertaining to suit properties. In juxtaposition to revenue record, there must be some worthwhile evidence for the court to conclude that there are other co-owners. Genealogical tree filed along with the written statement cannot point to the existence of co-owners without specific evidence in this regard. Such an evidence is totally lacking in this case. Therefore, we find it equally impossible to accept the finding of the High Court when it endorsed the view of the trial court in this regard. Accordingly, we conclude that in the absence of a specific finding as to whether there are other co-owners and how they are necessary parties, the suit could not have been dismissed for non-joinder of necessary parties. On this conclusion, we think it is unnecessary to go into the legal aspect as to whether in the absence of other co-owners, one co-owner could maintain a suit."

I also had an occasion to follow the abovesaid decision in the judgment rendered by me in S.A. Nos.240 & 241 of 2005 dated 27.08.2018. Considering the abovesaid facts in toto, it is noted that the plea of non-joinder of necessary parties raised by the defendants in the written statement being a vague plea without any particulars and also the defendants having failed to substantiate the said plea with materials worth acceptance and on the other hand, they having themselves admitted that the daughters of Kullappa Asari @ Kulla Asari have not claimed any right over the suit property, all put together, the courts below are found to be justified in holding that the plaintiff's suit is not bad for non-joinder of necessary parties.

18. In the light of the abovesaid factors, it is evident that the courts below have, on proper appreciation of the materials placed on record, both orally and documentary, rightly held that the plaintiff is entitled to claim the half share in the suit property and accordingly proceeded to grant the preliminary decree in favour of the plaintiff. In such view of the matter, I do not find any valid reason to interfere with judgment and decree of the courts below. I therefore hold that no substantial question of law is involved in the second appeal. Resultantly, the second appeal is



dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

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Sd/-
Assistant Registrar (CS-V)

//True copy//

Sub Assistant Registrar

bga

To

1. The Principal Subordinate Judge,
Gobichettipalayam
2. The District Munsif,
Sathyamangalam.

+1cc to Mr.N.Manokaran, Advocate SR.No.3395

S.A.No.1134 of 2008

SV (CO)
GMY (06/09/2021)