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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.09.2021

CORAM

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.NO.44 OF 2008

1. G.Jayaraman
...1st Appellant/1st Appellant/10th Defendant
2. Shanmuganathan
...2nd Appellant/2nd Appellant/14th Defendant
3. Balashanmugavel (died)
4. Gurusamy Nadar
...3rd Appellant/12th Respondent/9th Defendant
5. Sasirekha, B.
6. Venkatraj, B.
...5th & 6th Appellants/
LRs of the Deceased 6th Defendant

Appellants 5 and 6 brought on record as LRs of the deceased 3rd appellant viz., Balashanmugavel vide court order dated 19.07.2021 made in CMP No.10728 of 2021.

Vs.

1. R.Vasudevan
2. Ravikumar
3. Viswanathan
...Respondents 1 to 3/Respondents 1 to 3/Plaintiffs
4. U.S. Arumugam
...4th Respondent/4th Respondent/1st Defendant
5. Vadivu (deceased)
6. Gurulakshmi
...6th Respondent/6th Respondent/3rd Defendant
7. M. Balasubramaniam
...7th Respondent/7th Respondent/4th Defendant
8. Uma alias Amirthavalli
...8th Respondent/8th Respondent/5th Defendant
9. Thilagavathi
...9th Respondent/10th Respondent/7th Defendant



10. Vijayalakshmi

...10th Respondent/11th Respondent/8th Defendant

11. Danalakshmi

12. Bhoopathi

13. Guruchinnappa

...Respondents 11 to 13/13 to 15th Respondents/
11 to 13th Defendants

Prayer : Second Appeal filed under Section 100 of CPC, 1908 against the decree and judgment dated 14.03.2006 passed in A.S. No.8 of 2005, on the file of the Principal District Judge, Erode, upholding the decree and judgment dated 10.08.2004 passed in O.S. No.95 of 2002, on the file of the Subordinate Court, Tharapuram.

For Appellants : Mr.T.S.Baskaran

R1 to R3 : Mr.V.Raghavachari

JUDGMENT

The appellants in the present second appeal are the defendants 6,9,10 & 14 in O.S.No.95 of 2002 on the file of the Subordinate Judge, Dharapuram, Thiruppur District.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and in appropriate places, their ranking in the present appeal would also be indicated.

3. The case of the plaintiffs is as follows:

The suit property originally belonged to Palaniappa Chettiar through a registered sale deed dated 02.05.1918 (Ex.A1). Palaniappa Chettiar had six children namely Chinnammal, Kamatchi Ammal, Muthu Raja, Gurusamy, Chinnasamy and Valliammal. The first daughter Chinnammal and her husband Marudamuthu died intestate without any issues. Palaniaapa Chettiar died on 08.04.1967 intestate and his wife pre-deceased him. Therefore the suit property devolved upon Kamatchi Ammal, Muthu Raja, Gurusamy, Chinnasamy and Valliammal, each entitled to 1/5 share in the suit property. The plaintiffs purchased 1/5 undivided share from Valliammal on 27.10.1999 through a



registered sale deed (Ex.A2). He also purchased 1/15 share from Rajaratinammal and others through a registered sale deed dated 29.08.2001(Ex.A3). Before purchasing the same, the first plaintiff was a tenant in the suit premises by running a shop. Since the plaintiffs could not enjoy the suit property in common with the other legal heirs of late Palaniappa Chettiar, they demanded for amicable partition from the defendants by issuing a notice dated 09.10.2001 (Ex.A4). The defendants 9,10,13 & 14 sent a reply with a false allegation that the suit property was purchased by Palaniappa Chettiar from out of the income derived from his ancestral properties and therefore, the sale in favour of the plaintiffs is not valid. The plaintiffs therefore, filed a suit for partition of the suit property into 15 equal shares and to allot 8 such shares to them.

4. The suit was resisted by the defendants 2,5,6,7,9,10 &14 on the following grounds:

- (1)The suit property was purchased from out of the income derived from the ancestral properties of Palaniappa Chettiar.
- (2)The sale deeds Ex.A2 and Ex.A3 executed by Valliammal and the children of Kamatchiammal are not valid as the daughters cannot claim any right in the ancestral properties.
- (3)Since no partition is effected among the co-sharers, the co-sharers are entitled to a right of pre-emption in the dwelling house which is the suit property.

5. On the basis of the above pleadings, the trial court framed necessary issues and after full contest decreed the suit. A preliminary decree dated 10.08.2004 for partition was passed dividing the suit property into 15 equal shares and to allot 8 such shares to the plaintiffs on the following grounds:

- (1)The defendants did not adduce any documentary evidence to show that the suit property was purchased from out of the income derived from the ancestral properties of late Palaniappa Chettiar.



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(2) In fact the defendants did not prove the existence of any ancestral properties.

(3) The defendants did not also exercise their right to purchase the shares sold in favour of the plaintiffs.

6. Aggrieved over the same, the defendants 10 & 14 filed an appeal in A.S.No.8 of 2005 before the Principal District Judge, Erode. The Principal District Judge, Erode after analyzing the evidence on record upheld the findings of the Trial Court.

7. Aggrieved over the same, now the second appeal is filed by the appellants.

8. Notice of motion was ordered in the second appeal and after several adjournments the matter is posted today for final hearing.

9. Mr.T.S.Baskaran, learned counsel appearing for the appellants fairly conceded that both the Courts below had rightly held that the suit property is a self acquired property of late Palaniappa Chettiar. However, he contended that as per Section 22 of the Hindu Succession Act, the appellants have the right of pre-emption to purchase the shares which were sold to the strangers (the plaintiffs herein). His specific contention is that both the Courts below did not deal with this aspect properly.

10. Per contra Mr.Raghavachari, learned counsel for the respondents contended that since the decree and judgment was not challenged by the 6th defendant (since deceased) and the 9th defendant, they cannot file the second appeal seeking for a right of pre-emption. He would also contend that the right of pre-emption should be exercised within the period of one year as per Article 97 of the Limitation Act, 1963 and therefore the appellants have lost their right.

11. The Trial Court had clearly held that the defendants did not exercise their right of pre-emption to purchase the shares sold in favour of the plaintiffs. It is pertinent to



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mention that the first appeal was filed by the defendants 10 & 14 who are the sons of Gurusamy Nadar (the 9th defendant in the suit). The first appellate Court had observed in his judgment dated 14.03.2006 thus;

"The suit property is the self acquired property of Palaniappa Chettiar. As such the defendants 10 and 14 cannot claim any right as co-parceners when their father the 9th defendant Gurusamy is still alive. At best, the defendants 10 and 14 viz., the appellants herein can claim share in the suit property only after the death of defendant No.9 Gurusamy. Till then, they are not entitled for any right in the suit property. As such they cannot construed as co-heirs and hence they are not entitled for the right of pre-emption as contemplated under Section 22 of Hindu Succession Act. Since it is not disputed that the father Gurusamy is alive, and since we have decided in point 1 that the property is the self acquired property of Palaniappa Chettiar then the present appellants/defendants 10 and 14 cannot be construed as co-heirs along with Valliammal and the heirs of Chinnaamy from whom the plaintiffs have purchased a portion of the suit property through Ex.A.2 and A.3. sale deeds.

.....

Until defendant No.9 is alive and if at all they want to adjudicate, they have no agitate by filing a separate suit and they cannot agitate the sale effected by Valliammal and the heirs of Chinnaamy by seeking recourse to Section 22 of Hindu Succession Act."

12. Section 22 of the Hindu Succession Act reads as follows:

22. Preferential right to acquire property in certain cases.

"1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with



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others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred. Explanation.—In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf."

As per Section 22 of the Hindu Succession Act, the conditions necessary for invoking the same is,

An interest in any immovable property of an intestate or in any business devolves upon two or more heirs specified under clause 1 of the schedule, any one of such heirs proposes to transfer his / her interest in the property or business, in that case, the other heirs shall have preferential right to acquire the interest proposed to be transferred.



13. The object of Section 22 (1) is that in cases where by virtue of intestate succession under the Act any interest in an immovable property has devolved upon two or more heirs specified in clause I of the schedule and any one of such heirs proposes to transfer his interest in the property, the other heirs should have a preferential right to acquire the interest which is so proposed to be transferred.

14. In the decision in Gautam Paul Vs. Debi Rani Paul [(2000(8) SCC 330)] it has been held thus,

"There is no law which provides that co-sharer must only sell his/her share to another co-sharer. Thus strangers/outsideers can purchase shares even in a dwelling house. [Section 44](#) of the Transfer of Property Act provides that the transferee of a share of a dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. [Section 44](#) adequately protects the family members against intrusion by an outsider into the dwelling house. The only manner in which an outsider can get possession is to sue for possession and claim separation of his share. In that case, [Section 4](#) of the Partition Act comes into play. Except for [Section 4](#) of the Partition Act there is no other law which provides a right to a co-sharer to purchase the share sold to an outsider. Thus before the right of pre-emption under [Section 4](#) is exercised, the conditions laid down therein have to be complied with. As seen above, one of the conditions is that the outsider must sue for partition. [Section 4](#) does not provide the co-sharer a right to pre-empt where the stranger/outsideer does nothing after purchasing the share. In other words, [Section 4](#) is not giving a right to a co-sharer to pre-empt and purchase the share sold to an outsider anytime he/she wants. Thus even though a liberal interpretation may be given, the interpretation cannot be one which gives a right which the legislatures clearly did not intend to confer. The legislature was aware that a partition Suit



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would result in a "decree for partition". The legislature only provided for such right when the "transferee sues for partition". The intention of the legislature only provided for such right when the "transferee sues for partition". The intention of the legislature is clear. There had to be initiation of proceedings or the making of a claim to partition by the stranger/outsider. This could be by way of initiating a proceeding for partition or even claiming partition in execution. However, a mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of pre-emption. There is a difference between a mere assertion that he has a share and a claiming for possession of that share. So long as the stranger-purchaser does not seek actual division and possession, either in the suit or in execution proceedings, it cannot be said that he has sued for partition."

In the decision in Srinivasamurthy, P. Vs Leelavathi, P. (2000(CTC325), this Court has held that since Section 22 does not provide for any special procedure for seeking the said remedy, the co- sharer has to seek enforcement of such right under Section 22 (1) by way of a regular civil suit before a competent Court.

15. As far as the present case is concerned, the appellants, till date, did not file any separate civil suit for exercising their right under Section 22 of the Hindu Succession Act. Even in the suit filed by the respondents/plaintiffs seeking for a partition of their shares in the suit property, they did not file any petition under Section 4 of the Partition Act, 1893. Article 97 of the Limitation Act provides one year limitation for claiming such a right and the defendants having failed to exercise their right under Section 22 of the Hindu Succession Act in the manner known to law, cannot claim such a right in the present second appeal. I therefore find no substantial question of law involved in the present second appeal.



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16. In the result,

- i. the second appeal is dismissed. No costs.
- ii. the decree and judgment dated 14.03.2006 passed in A.S. No.8 of 2005, on the file of the Principal District Judge, Erode, and the decree and judgment dated 10.08.2004 passed in O.S. No.95 of 2002, on the file of the Subordinate Court, Tharapuram, are upheld.

Sd/-
Assistant Registrar(CS-IX)

// True Copy //

Sub Assistant Registrar

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To

1. The Principal District Court,
Erode.
2. The Subordinate Court,
Tharapuram.

Copy To

The Section Officer,
VR Section,
High Court, Madras.

+1cc to Mr.T.S.Baskaran, Advocate, S.R.No.50297

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.49988

S.A.No.44 of 2008

GJ(CO)
RLP(09/11/2021)