



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22 / 09 / 2021

CORAM:

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

SECOND APPEAL NO.321 OF 2015

AND

MP NO.1 OF 2015

1.Jayammal

2.Sundarambal

3.Jayaraman

4.Sivagami ... Appellants/Appellants/Defendants 1 to 4

Vs.

1.C.R.Arulanand ... 1st Respondent/1st Respondent/Plaintiff

2.Subramani ... 2nd Respondent/2nd Respondent/5th Defendant

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 28.11.2014 made in A.S.No.28 of 2014 on the file of the Principal District Judge, Namakkal, confirming the judgment and decree dated 14.02.2014 made in O.S.No.46 of 2011 on the file of the Subordinate Judge, Rasipuram.

For Appellants : Mr.S.Senthil

For Respondents : Mr.T.L.Thirumalaisamy

J U D G M E N T

The unsuccessful defendants are the appellants before this Court. For the sake of convenience, the parties are called as per their litigative status in the Suit.

2.The plaintiff / first respondent filed a Suit for partition and permanent injunction restraining the third defendant / third appellant from alienating or encumbering the Suit property. According to the plaintiff, the property originally belonged to one Sellappa Gounder. He died intestate. After his demise, his legal heirs are enjoying the property jointly without partition. The first defendant is the first wife



of Sellappa Gounder and defendants 2 to 4 are her children. The fifth defendant / second respondent is the son of Sellappa Gounder born through his second wife Vasantha. One another daughter namely Chitra was also born to Sellappa Gounder through his second wife Vasantha. Thus, after the demise of Sellappa Gounder, all these children are entitled to 1/6th share in the Suit property. The daughter Chitra demanded partition from the defendants on so many occasions. But, they were not amenable for the same. Due to her son's ill health and for family necessity, Chitra sold her undivided share in the Suit property to the plaintiff by virtue of two different Sale Deeds dated 30.04.2010 and 04.08.2010, for valid consideration. The said Sellappa Gounder derived this property by virtue of a Partition Deed dated 19.04.1972 from his brother. The third defendant with an ulterior motive to grab the property is attempting to alienate the same to third parties. The Patta stands in the name of the plaintiff and having stepped into the shoes of one of the legal heirs of Sellappa Gounder, the plaintiff filed a Suit for partition and injunction.

3. In the written statement, the defendants have taken a stand that the property originally belonged to Sellappa Gounder and he died intestate. But the averments that the fifth defendant born to Sellappa Gounder through his second wife Vasantha was denied. According to them, there is only one wife to Sellappa Gounder and he had no other wife. It is false to state that the fifth defendant and Chitra are the legal heirs of the deceased Sellappa Gounder. Further, as per law, without getting divorce, Sellappa Gounder said to have married the second wife, which is not legally sustainable and the second wife is not a legal wife. The property was not enjoyed jointly by the legal heirs of first and second wife. On the other hand, the property was exclusively enjoyed only by the defendants 1 to 4. It is false to state that the said Chitra is a legal heir and that she has 1/6th share in the Suit property. The averments made in the plaint are false. The property is an ancestral property of Sellappa Gounder and he got the same by virtue of a Partition Deed dated 19.04.1972 and the Patta stands in the name of the defendants. The plaintiff fraudulently transferred the Patta in his name. Therefore, the Suit is legally unsustainable.

4. The Trial Court has framed appropriate issues and decreed the Suit in favour of the plaintiff. The First Appellate Court has also confirmed the findings on the basis of the Legal Heirship Certificate and the Transfer Certificate issued by the School Authorities as well as on the basis of the oral evidence let in by P.W.1 to P.W.3.



WEB COPY

5. This Court admitted the Second Appeal on 29.04.2015 on the following substantial questions of law:-

"a. Whether the findings of the Courts below are vitiated without rendering a finding about the factum of second marriage between Vasantha and Sellappa Gounder?

b. Whether the proof of the second marriage between Sellappa Gounder and Vasantha is the sine quo non for the plaintiff to maintain the suit for partition as a purchaser through P.W.2.?

c. Whether in any event, the illegitimate issues are not entitled to inherit the joint family properties and consequently, the plaintiff is not entitled to maintain the suit for partition ?"

6. The crucial issue which is to be decided is as to whether it can be presumed that Vasantha is the second wife of Sellappa Gounder and the marriage was proved and whether the burden lies on the defendants to prove that Vasantha is not the second wife and that the illegitimate children are entitled to partition or not ?

7. Admittedly, the plaintiff is the purchaser from one of the legal heirs of Sellappa Gounder of the undivided 1/6th share of his property. But, neither the vendor of the Suit property nor the said Vasantha who is said to have been the second wife of Sellappa Gounder were impleaded as parties. The plaint averments categorically shows that the property is an ancestral property and it was derived by Sellappa Gounder by virtue of Partition Deed dated 19.04.1972. In that event, it is clear that the property is an ancestral property and the moot question whether the illegitimate children are entitled to share in the ancestral property is a matter sub-judiced before the Hon'ble Supreme Court. The plaintiff said to have stepped into the shoes of one of the legal heirs, namely Chitra, born to Sellappa Gounder through his second wife Vasantha.

8. It is well settled that for determination of validity of marriage, the conduct of marriage would be relevant. The long cohabitation and how the Society treated them would also be relevant. If it is proved that a man and woman, were living together as man and wife, it can be presumed that they were legally wedded and living together as husband and wife.

9. Further, it is to be seen as to whether the material placed before the Court give rise to the presumption or not? In the evidence of Chitra, who was examined as P.W.2, she would simply state that the first defendant Jayammal and her mother



Vasantha are sisters. Jayammal is the first wife and Vasantha is the second wife of Sellappa Gounder. Chitra is one of the legal heirs of Sellappa Gounder born through Vasantha. The Legal Heirship Certificate issued by the Tahsildar is marked as Ex.X1 and the Transfer Certificate issued by the School Authorities is marked as Ex.X2. Other than this, there is no evidence as to the marriage that was said to have happened between Sellappa Gounder and her mother Vasantha nor about the cohabitation of Sellappa Gounder and Vasantha under the same roof. There is no iota of evidence that the Sellappa Gounder was living with Vasantha. On the other hand, during her cross examination, P.W.2 would depose that till his death, the said Sellappa Gounder was living with Jayammal. Therefore, it can be easily inferred that P.W.2 who claims to be the daughter of deceased Sellappa Gounder has not spoken about the cohabitation of Sellappa Gounder with her mother or her usual routines in staying with him. P.W.3 is an independent witness examined to prove that Chitra was born to Sellappa Gounder through his second wife Vasantha. But in the cross examination, he would state that he had not been to the second marriage of Sellappa Gounder and that he heard from the residents of the area that Chitra was the second wife's daughter and that he does not know the fact directly. He would come to the Court on the request of his friend, C.R.Arulanand, the plaintiff herein. This witness also does not prove the basic issue that the said Sellappa Gounder and Vasantha got married and they were living together as husband and wife. In other words, the relationship between Sellappa Gounder and Vasantha or marriage between them was not at all proved.

10.The Hon'ble Supreme Court in REVANASIDDAPPA VS. MALLIKARJUN [2011 (11) SCC 1] has referred the issue as to whether the children of void or voidable marriages are entitled to father's property, whether it is self acquired or ancestral. The matter is still sub-judice before the Hon'ble Supreme Court.

11.When there is a conflicting position as to whether Section 6(3) of the Hindu Succession Act, 1956 will apply to devolution of property is restricted only to the father's property or even to ancestral property, it is not proper to decide the issue on that point. Even assuming that the children born out of void or voidable marriages are entitled to share in the ancestral property, it shall be proved that they were born through void or voidable marriages.

12.In the instant case, other than the Legal Heirship Certificate issued by the Tahsildar vide Ex.X1 and the Transfer Certificate issued by the School Authority vide Ex.X2, there is



no other document to indicate that there was a marriage between Vasantha and Sellappa Gounder and that the vendor of plaintiff born to Sellappa Gounder. The other evidences like Birth Certificate, Ration Card are independent, which can speak about the relationship between Sellappa Gounder and Vasantha were not produced before the Court. It is true to state that the Transfer Certificate issued by the School Authorities, will support the paternity of a person, but a perusal of the Transfer Certificate does not contain the signature of the father at all. Usually, in a School Transfer Certificate, father's signature would be found. But, it is not there in Ex.X2. It is also well settled that the person from whose custody the certificate is produced should be examined to prove the same. But, in the instant case, neither the School Authorities nor the Tahsildar who issued the Certificates were examined as witnesses.

13.It is also pertinent to note that a best witness to speak about the long relationship as man and wife is the second wife herself. She was neither made as a party nor called as a witness before the Trial Court. It is curious to note that the vendor who sold her undivided share claiming to be the legal heir of Sellappa Gounder was not also arrayed as a party. The plaintiff, who is a subsequent purchaser claims that he stepped into the shoes of legal heirs and filed the Suit is not sustainable without proof of legal heirship. The Legal Heirship Certificate and the School Transfer Certificate are not conclusive proof as nobody identified that it is the very same Sellappa Gounder who is the father of the defendants 2 to 4 was the father of the vendor of the plaintiff also.

14.The learned counsel appearing for the respondents would rely on a judgment of this Court in KUPPAN VS. MUNIAMMAL AND ANOTHER [2010 (2) CTC 622]. But the facts and circumstances of that case is entirely different. In para 18 of the said judgment, it is recorded as under:

"18.In his evidence, PW1 (2nd Plaintiff) has stated that family was living together and in fact for some time, 2nd Plaintiff was living with Defendant in Chennai in Saligramam. While so living with Defendant in Chennai, 2nd Plaintiff had also sent Money Order to his mother Muniammal (1st Plaintiff) as seen from Ex.A9 - Money Order coupon. It is also pertinent to note that even according to Defendant in the panchayat lands were given to Plaintiffs in S.No.142/1A and 1/9th share in the Well Electric



WEB COPY

Motor and Pumpset situated in S.No.152/A. Allotment of certain extent of lands to Plaintiffs is a clear recognition of their status. Overwhelming documentary and oral evidence would clearly show that 2nd Plaintiff is the son of Sadasiva Gounder and 1st Plaintiff."

15. In that case, the conduct of the deceased father was proved. The school certificate corroborated the status of the illegitimate child. But, in the instant case, there is no iota of evidence to prove the conduct of the father or relationship of Sellappa Gounder and Vasantha. Therefore, the said judgment will not apply to the case on hand.

16. This Court in THANGAVEL AND OTHERS VS. DHANABAGYAM AND OTHERS [2020 (6) CTC 181] has observed as under:

"24. In Ibramsa Kowther (Minor) & Others vs- Sheik Meerasa reported in 1972 (85) LW 596 = 1972 AIR(Mad) 467 the doctrine of lost grant and presumed ouster where the exclusive possession of one co-owner was for a considerable length of time been explained and discussed referring all the leading judgments on this aspect. Since this judgment vividly explains the difference between the claim of ouster by stranger and a co-sharer, the relevant portions are extracted below for buttressing my reasoning.

8. We shall briefly summaries the legal position. There is a basic distinction between adverse possession as between strangers and ouster and exclusion of co-owners. In the case of adverse possession as against strangers, it is sufficient that adverse possession is overt and without any attempt at concealment so that the person, against whom time is running, ought, with the exercise of due vigilance, to be aware of what is happening. It is not necessary that adverse possession should be brought home to the knowledge of the owner. If his rights, have been openly usurped (not secretly), he cannot be heard to complain that the fact of adverse possession was not brought to his knowledge. If the adverse possession is open, visible and notorious, even if the owner remains ignorant



WEB COPY

and indifferent, it is his own fault. The observations in some of the cases, in general, that, in the case of adverse possession between strangers, knowledge of adverse possession on the part of the owner is an essential element of adverse possession are too widely expressed and do not represent the correct legal position. Vide: the following observations of Lord Macmillan in Secretary of State for India in Council v. Debendralal Khan, ILR 61 Cal 262 at p.266 : AIR 1934 PC 23:

"The classical requirement is that the possession should be Nec Vi, Nec Clam, Nec Precario. Mr.Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown "but in their Lordships' opinion, there is no Authority for this Requirement.

" It is sufficient that the possession be overt and without any attempt at concealment so that the person, against whom time is running, ought, if he exercises due vigilance, to be aware of what is happening".

In a case of ouster of a co-owner, the position is entirely different. The possession of one co-owner is presumed to be on behalf of all the co-owners in view of the unity of title and possession. Because of this presumption of joint ownership in the case of co-owners, the law requires, to constitute ouster, proof of something more than mere exclusive possession and exclusive receipt of income. Along with exclusive possession there must be an ouster, a hostile, open denial and an open repudiation of the other co-owner's right to the latter's knowledge. The co-owner in exclusive possession cannot render his possession adverse to the other co-owner merely by any secret, hostile animus on his own part in derogation of other co-owner's title. Vide the observations in P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314 at pp.317 and 318; Sinnaraj Pillai v. Ramayee Animal, (1968) 2 Mad LJ 639 at pp.647 and 648 : AIR 1969 Madras 96 and Shambhu Prasad v. Phool Kumari, AIR 1971 SC 1337 at p.1345."



17.The learned counsel for the respondents also relied on the judgment of the Hon'ble Supreme Court in UDAY GUPTA VS. AYSHA AND ANOTHER [SLP (CRL) NO.3390 OF 2014 DECIDED ON 21.04.2014]. In the said judgment, the Hon'ble Supreme Court relied on its judgment in MADAN MOHAN SINGH AND OTHERS VS. RAJNI KANT AND ANOTHER [AIR 2010 SC 2933] and reproduced the relevant portion as under:

"21.The courts have consistently held that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a number of years. However, such presumption can be rebutted by leading unimpeachable evidence. (Vide: Mohabbat Ali Khan Vs. Mohd. Ibrahim Khan, AIR 1929 PC 135; Gokalchand Vs.. Parvin Kumar, AIR 1952 SC 231; S.P.S. Balasubramanyam Vs. Suruttayan, (1994) 1 SCC 460; Ranganath Parmeshwar Panditrao Mali Vs. Eknath Gajanan Kulkarni, (1996) 7 SCC 681; and Sobha Hymavathi Devi Vs. Setti Gangadhara Swamy & Ors., (2005) 2 SCC 244). "

But, there is no such presumption arises in the present case. Therefore, the findings of the Courts below on the basis of Exs.X1 and X2, the Legal Heirship Certificate and the School Transfer Certificate are not unsustainable and there is no proof to show that the vendor of the plaintiff was born out of void marriage between the said Sellappa Gounder and Vasantha. In that event, the concurrent findings rendered by the Courts below are not legally sustainable and they are liable to be interfered with.

18.Accordingly, the judgment and decree dated 28.11.2014 passed in A.S.No.28 of 2014 by the learned Principal District Judge, Namakkal, confirming the judgment and decree dated 14.02.2014 passed in O.S.No.46 of 2011 by the learned Subordinate Judge, Rasipuram stands set aside and the substantial questions of law are answered in favour of the appellants.

19.In fine, the Second Appeal stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

TK



To

1.The Principal District Judge
Principal District Court
Namakkal.

2.The Subordinate Judge
Subordinate Court
Rasipuram.

+lcc to Mr.S.Senthil, Advocate SR.No.48385

+lcc to Mr.T.L.Thirumalaisamy, Advocate SR.No.48726

SECOND APPEAL NO.321 OF 2015

KJ(CO)
GN(19/01/2022)