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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

S.A.No.166 of 2013

and

M.P.No.1 of 2013

Kuppusami

...Appellant/Respondents/Plaintiff

Vs.

1. Krishnamurthy

2. Gomathi

3. Muralidharan

4. Sangeetha

...Respondents/Appellants/Defendants

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 17.09.2012 passed in A.S.No.80 of 2008 before the III Additional District Court, Kallakurichi, reversing the judgment and decree dated 13.10.2005 passed in O.S.No.468 of 2001 on the file of the Principal District Munsif Court, Kallakurichi.

For Appellant : Ms.R.Meenal

For Respondents : M/s.R.Kumaravel

J U D G M E N T

The present Second Appeal has been filed against the judgment and decree dated 17.09.2012 passed in A.S.No.80 of 2008 before the III Additional District Court, Kallakurichi, reversing the judgment and decree dated 13.10.2005 passed in O.S.No.468 of 2001 on the file of the Principal District Munsif Court, Kallakurichi.

2. The plaintiff is the appellant herein. The plaintiff filed a suit for permanent injunction restraining the defendants from interfering with his peaceful possession and enjoyment. The plaintiff and the defendants are legal heirs of one Ramu Konar. The plaintiff is the eldest son and the first defendant is a younger brother and the second defendant is the youngest



brother. The first defendant namely, Kaliyamurthy died and his legal heirs are impleaded as Defendant Nos. 3 to 5. According to the plaintiff, there was an oral partition in respect of the suit property in the year 1978. On the basis of the oral partition, he obtained a patta and secured a loan from Sankarapuram Cooperative Society. The first defendant also secured a loan in respect of his property on the very same date. Thereafter, he enjoyed the property as he owned and put up a thatched house and obtained an electricity service connection and paid the property tax. Since the defendants interfered with his possession with effect from 10.07.2001, he filed a suit for permanent injunction. In the written statement, the defendants denied the factum of partition and claimed that the plaintiff was managing the family. He being the eldest son had fraudulently obtained the patta in his name instead of getting joint patta in the name of the plaintiff and the defendant Nos. 1 and 2.

3. According to the defendants, as per the family arrangement, the properties of the plaintiff and the defendants were orally divided in January, 1990. In respect of house sites, they were enjoyed in common. The suit filed by the plaintiff for declaration and permanent injunction in O.S.No.465 of 1996 is not connected to the said property. Therefore, he claimed that interference of the possession by the defendants from 10.07.2001 is false and there is no cause of action for filing the suit and the suit is not maintainable for injunction as it is filed against the co-sharers of the property.

4. The Trial Court framed the issue as to whether the property is in separate possession of the plaintiff and decreed the suit in his favour. On appeal, the Lower Appellate Court has found that the oral partition is not proved and therefore, it is a joint family property and dismissed the suit filed for injunction against the co-owners. Aggrieved over the same, the plaintiff has preferred the above Second Appeal and it was admitted on the following substantial questions of law:-

"1. Whether in law the lower Appellate Court was right in ignoring the series of documentary evidence proving the separate possession of the suit property by the appellant and coming to a perverse conclusion?

2. Whether in law the lower Appellate Court was right in failing to see that in the suit for bare injunction, a decree had to be granted when the appellant had proved his long and continuous possession on the date of the suit and when the respondents did not file even a single document to



show their possession even on a single day?"

5. The learned counsel for the appellant would vehemently contend that by virtue of Ex.A5, a mortgage deed is executed in favour of the Sankarapuram Cooperative Society, it is clearly proved that the plaintiff is the owner of the six cents of land in Kosapadi Village and the first defendant is the owner of five cents on southern side of the property, which was also mortgaged on 12.07.1978 vide Ex.A7. Further, the property was brought into auction by Sankarapuram Cooperative Society vide Ex.A8. All these documents would go to show that the partition had been effected between the brothers. All the properties are shown with definite boundaries. In the Commissioner's Report, it is clearly explained that S.No.102/7B is divided into three portions as per the revenue records in S.No.102/7B, 7C and 7D. The properties are clearly identified as separate properties and that the plaintiff is the owner of the property in S.No.102/7B. Further, Ex.A1 to Ex.A4 clearly show that the appellant/plaintiff was paying kists and property tax and payment of loan to the cooperative society proves his exclusive possession. Therefore, the plaintiff is entitled to injunction as prayed for by him. The Lower Appellate Court misread the evidence and wrongly proceeded that the oral partition was not proved. On the other hand, Ex.A5, Ex.A7 and Ex.A8 amply proved the partition and separate possession and therefore, the finding of the Lower Appellate Court is liable to be set aside.

6.Per contra, the learned counsel appearing for the respondent would rely on the evidence of P.W.1. According to him, the plaintiff in his cross examination, has categorically admitted that the house and vacant site were not included in the partition of the family property in January, 1990, and that he has not included the said property in the suit filed for declaration and injunction in O.S.No.465 of 1996. This admission itself proves that there was no partition in respect of the suit property and that the plaintiff being the Manager of the family, has fraudulently transferred the revenue records in his favour and the injunction suit against the co-owners is not maintainable and therefore, he seeks for dismissal of the Second Appeal.

7.I have considered the submissions made on either side and perused the materials placed before this Court.

8.The admitted facts remain that the parties are legal heirs of one Ramu Konar. Ramu Konar has left behind the property in Kosapadi Village, which is a house site and other landed properties in Sankarapuram. Apart from that, the parties admit that there are female heirs of Ramu Konar. The said Ramu Konar died intestate in the year 1974. The only dispute revolves



around the oral partition on 12.07.1978 as claimed by the plaintiff. According to him, on 12.07.1978, the partition had happened in a vacant site opposite to Government Hospital, Sankarapuram. Even though the Registrar Office was 200 feet away, it was not reduced down in writing and registered. Other than that, there is no evidence to show that the brothers have entered into a partition excluding their sisters. It is not in dispute that there was a mortgage deed executed by the plaintiff as well as the father of the defendants 3 to 5 on 12.07.1978 and the properties was brought to auction. But, that itself will not prove the oral partition. The case put up by the defendants is that the plaintiff being the Manager of the family, had fraudulently transferred the patta in his favour. The other person, who had mortgaged the property vide Ex.A7, is not alive to substantiate the said statement.

9. The Commissioner's Report reveals that except for the front portion of the property, the remaining portions are lying vacant as they then were. From this it is inferred that the front portion of the property is alone developed and the back portion of the suit property is lying vacant without any demarcation. In that event of claiming oral partition, as held by the Lower Appellate Court, onus is cast upon the plaintiff to prove such oral partition had taken place. As claimed by the defendants, as Manager of the family, the plaintiff could have made arrangement to mortgage the property by securing patta in his name and whether it was fraudulently obtained or not is proved by the defendants in their evidence. But, the plaintiff filed the suit in O.S.No.465 of 1996 for declaration and injunction in respect of his property. It is also an admitted fact that there was a partition in the year 1990 in respect of all the landed properties laying out the present house site situated in Kosapadi Village. There is no explanation as to why he left out his property while filing the suit for declaration and injunction against the very same defendants in O.S.No.465 of 1996. Further, in his cross examination, he categorically admitted that the house site and vacant site in Kosapadi Village were not included in partition, which happened in January, 1990, which leads to a presumption that the suit property in Kosapadi Village was not included in the partition, which happened in January, 1990, which means the property was enjoyed as a common property. The plaintiff by clear evidence, should prove that there was an oral partition with the consent of the defendants and pursuant to the oral partition, they have acted upon it. Apart from the patta and the mortgage deed, there is no positive evidence through independent witnesses that the oral partition had taken place. In addition, in the evidence of D.W.1, it is categorically stated that they have partitioned only landed properties, wherein, the elder brother was allotted 24 Acres and other two brothers were allotted 15 Acres each. The property in



respect of Kosapadi and Sankarapuram Village was not partitioned and it was left out.

10. Therefore, the finding of the Lower Appellate Court that mere mutation of the revenue records and creation of mortgage deed will not prove the oral partition is well founded. The learned counsel for the respondent would rely on the judgment of the Hon'ble Supreme Court in the case of Kulwant Kaur and Ors. Vs. Gurdial Singh Mann (Dead) by Lrs. And Ors. reported in AIR 2001 SC 1273, wherein it is stated that injunction cannot be claimed against anybody, when separate possession and enjoyment is not proved. It is a well settled principle that injunction suit against co-owners is not maintainable. Since this Court has found that oral partition is not proved, the property shall be construed as Joint Family Property.

The Second Appeal merits no consideration and accordingly, the same is dismissed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-I)

//True Copy//

Sub Assistant Registrar

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To

1. The III Additional District Court,
Kallakurichi.
2. The Principal District Munsif Court,
Kallakurichi.
3. The Record Keeper,
V.R. Section, High Court,
Madras.

+1cc to Mr.R.Kumaravel, Advocate, S.R.No.44139

+1cc to Mrs.R.Meenal, Advocate, S.R.No.44392

S.A.No.166 of 2013
and
M.P.No.1 of 2013

AK(CO)
RGA(09/06/2022)