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S.A.No.2 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.08.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.2 of 2019

and

C.M.P.No.17 of 2019

Punithavathi (died)

1.Kannammal

2.Saraswathi

3.Bakkiam

4.Eswari @ Pragateeswari

...Appellants/Respondents 2 to 5
Plaintiffs 2 to 4

Vs.

1.K.M.Petharan

...1st Respondent/Appellant/
6th defendant

Ayyamperumal (died)

2.Sarasa

3.Maheswari

4.Nesavelu

5.Thangamani

6.Lakshmi

...Respondents 2 to 6/Respondents 7 to 11
Defendants 2 to 5 and 7



S.A.No.2 of 2017

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 29.01.2018 in A.S.No.7 of 2017 on the file of the learned IV Additional District Judge, Bhavani, Erode, (transferred A.S.No.45 of 2010 - Principal Sessions Court, Erode) reversal of the Judgment and Decree dated 21.01.2015 in O.S.No.23 of 2005 on the file of the learned Subordinate Judge, Bhavani.

For Appellants : Mr.N. Manokaran

For Respondents : Mr.T. Murugamanickam,
Senior Counsel
for M/s.Zeenath Begum for R1

No appearance – R2 to R6 – Served.

JUDGMENT

The plaintiffs in a suit for partition are the appellants before this Court challenging the Judgment and Decree in A.S.No.7 of 2016 on the file of the learned IV Additional District Judge, Erode in and by which the learned Judge has reversed the Judgment and Decree of the learned Subordinate Judge, Bhavani in O.S.No.23 of 2005.



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2.The parties are referred to in the same litigative status as before the trial Court.

3.The plaintiffs had filed O.S.No.23 of 2005 on the file of the learned Subordinate Judge, Bhavani seeking partition and separate possession of their 5/12 shares in the suit schedule property. The suit schedule property is described hereinbelow:

“ஈரோடு ரிடி., பவானி சப்டி., பவானி
தாலுக்கா, ஆண்டிக்குளம் கிராமம் க.ச.77-J
பு.ஏ.0.28 இதில் ஆறுமுக கவுண்டர் இடத்துக்கும்
வடக்கும், தெற்கும், ரோட்டிற்கும் கிழக்கு,
ஆறுமுக கவுண்டன், ஊண்முகம் பூமிக்கும்
மேற்கு, இதன் மத்தியில் கிழமேல் மூாம் 48
நாற்பத்தி எட்டு முழம். தென்வடல் முழம் 24
இருபத்தி நான்கு முழம். இந்த அளவுள்ள
காலியிடம் பூராவும். மேற்படி சொத்து
ஆண்டிக்குளம் கிராமம் காதையாம்பட்டிக்கு

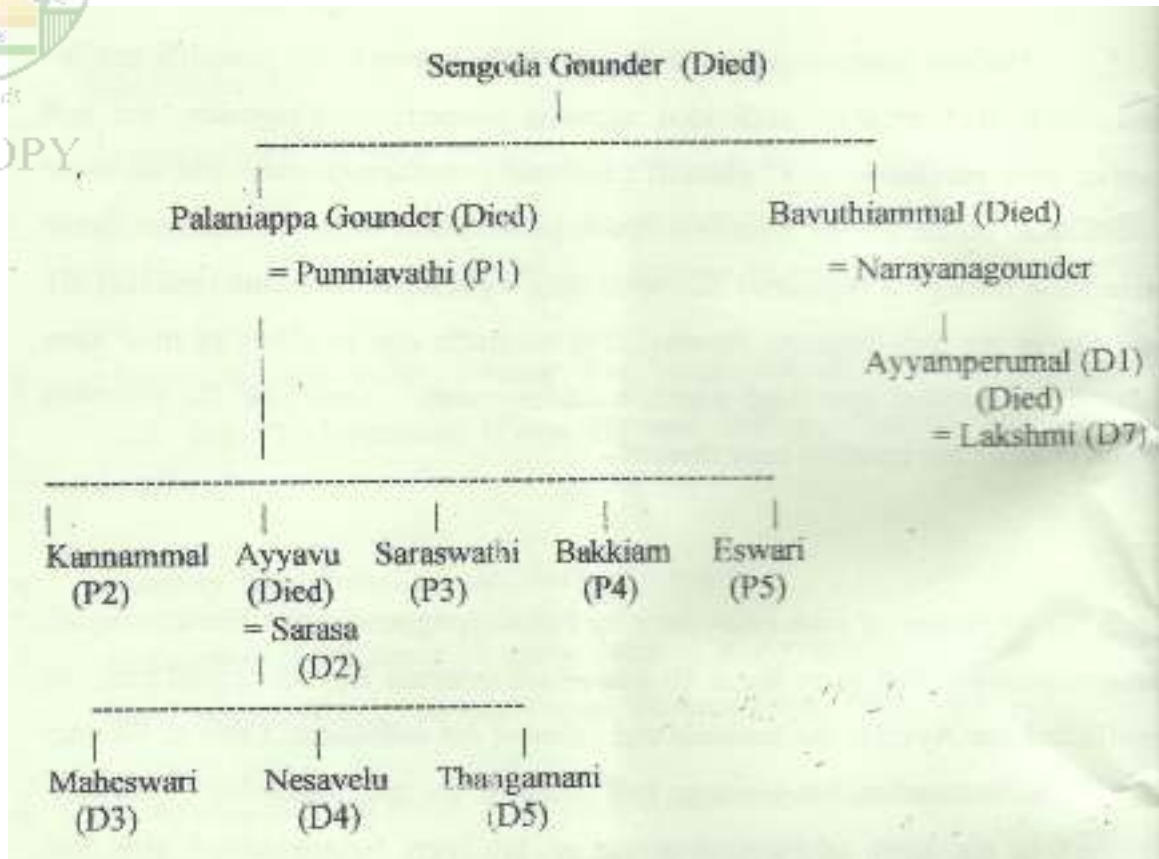


சேர்ந்தது. ஆண்டிக்குளம் பஞ்சாயத்து போர்டு
எல்லைக்குட்பட்டது. மேற்படி சொத்துக்குண்டான
மாழில் வழிநடை தடம் சகிதம். மேற்படி
சொத்து நத்தம் ரீ.ச.எண்.35/A5 ஆகும்.”

4.The genealogical tree of Late Sengoda Gounder extracted
hereinbelow is necessary to understand the relationship and case of
the parties:



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5.The plaintiffs would contend that the suit property was originally purchased by one Palaniappagounder and his sister Bavuthiammal under a Sale Deed dated 26.04.1961 from one Arumuga Gounder. The 1st plaintiff is the wife of Palaniappagounder and the plaintiffs 2 and 5 are his daughters. The 2nd defendant's husband and the father of the defendants 3 to 5 one Ayyavu is the son



of Palaniappagounder and the 1st plaintiff Punniavathi. The 1st defendant is the son of Bavuthiammal.

6.The plaintiffs would contend that Palaniappagounder and Bavuthiammal were jointly enjoying the properties. Palaniappagounder died intestate ten years back leaving behind him surviving the plaintiffs and his son Ayyavu. After the death of Palaniappagounder, his sister Bavuthiammal also passed away leaving behind her surviving her only son the 1st defendant herein. After the death of the brother and sister, the plaintiffs, Ayyavu and the 1st defendant have jointly succeeded to the suit properties and have been continuing to be in enjoyment of the same without partition. Ayyavu passed away about five years back and the defendants 2 to 5 being his legalheirs succeeded to his share in the property. Since the plaintiffs were not comfortable continuing in joint possession they had requested the defendants 1 to 5 to partition the properties and to allot the respective shares to the parties.



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7. In the meanwhile, the 6th defendant who had no right, title or interest to the suit property had started interfering in the suit property. Therefore, a Legal Notice dated 28.12.2004 has been issued to the plaintiffs to stop his illegal attempts. This notice was received by him on 30.12.2004, however, there was no response from him.

8. That apart, defendants 1 to 5 were taking steps to alienate the entire extent of the suit property. The defendants 1 to 5 are entitled to alienate only their shares not including the 5/12 shares of the plaintiffs. The plaintiffs would further submit that any alienation if created is not binding on the plaintiffs 5/12 share in the suit property. Further, the defendants are bound to divide the properties. Therefore, the plaintiffs have come forward with the suit in question.

9. The 6th defendant alone had contested the suit. He had filed a Written Statement *inter alia* contending that the suit property has

been purchased by him from the deceased Ayyavu under a Sale Deed dated 08.10.1987. This Sale Deed had been executed by the said Ayyavu for himself and on behalf of his minor children. On the very same day, the possession of the property was also taken by the 6th defendant. He would contend that the plaintiffs have no share in the suit property and it is only Ayyavu who is in enjoyment of the same. In fact, the 6th defendant had pleaded that the mother and the sisters had relinquished their shares in favour of Ayyavu after receiving cash from him and thereafter, the suit property has been sold to him by Ayyavu and he was in enjoyment of the suit property. He has also put up a thatched shed in it. The 6th defendant would also plead that he has been in an uninterrupted possession from the date of his purchase and therefore, he had perfected title by adverse possession.

10.The learned Subordinate Judge, Bhavani had framed the following Issues:



“(1)Whether the suit property belongs to the 6th

defendant by virtue of Sale Deed dated 08.10.1987?

(2)Whether the plaintiffs are entitled to 5/12

shares as prayed for?

(3)Whether the plaintiffs are entitled to

Preliminary Decree as prayed for?

(4)To what other relief?”

11.To prove their case, the plaintiffs have examined, three witnesses and marked Ex.A.1 to Ex.A.3. On the side of the defendants, DW1 to DW3 were examined and Ex.B.1 to Ex.B.5 were marked. The learned Subordinate Judge, Bhavani, on considering the evidence on record had proceeded to decree the suit as prayed for. Challenging the same, the 6th defendant had filed A.S.No.45 of 2010 on the file of the learned IV Additional District Judge, Bhavani, Erode.



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12.The learned Judge reversed the Judgment and Decree of the trial Court only on the ground of laches. The learned Judge held that the plaintiffs having failed to demand the partition as soon as the death of Palaniappagounder and Bavuthiammal they were not entitled to the decree for partition. The learned Judge also held that the respondent had perfected title by adverse possession. Challenging the said Judgment and Decree, the plaintiffs have filed the above Second Appeal.

13.The Second Appeal was admitted on the following Substantial Questions of Law:

"(1)Whether the First Appellate Court is correct in upholding the 6th defendant's title by adverse possession, particularly, when the contradictory plea of title under Ex.B.1 and adverse possession will not dwell together? (2)Whether the conclusion of the First Appellate Court that mere plea of possession of the



purchaser/6th defendant over the vacant land is sufficient enough to uphold the title by adverse possession is valid in law in the absence of any animus and hostile possession over the suit property to the knowledge of the plaintiffs? (3)When the vendor of the 6 th defendant by name Ayyavoo is not competent to transfer more than what he is entitled to, is it necessary for the plaintiffs to sue for cancellation of the void E.B.1 - Sale Deed?

(4)Whether the suit for partition is hit by limitation, for not filing the suit immediately after the death of Palaniappa Gounder, Bavuthiammal and Ayyavoo?”

14.Mr.N.Manokaran, the learned counsel for the appellant would submit that admittedly, the property in question belonged to Palaniappagounder and his sister Bavuthiammal. Therefore, both



Palaniappagounder and Bavuthiammal had equal shares in the suit property. Apart from Ayyavu, the said Palaniappagounder and his wife, the 1st plaintiff had four daughters. Therefore, on the demise of Palaniappagounder, his share would devolve on his wife and plaintiffs 1 to 5 and Ayyavu. Bavuthiammal's $\frac{1}{2}$ share fell to the share of her only son the 1st defendant. Admittedly, the properties were not partitioned even at this point of time. Therefore, each of the legal representatives are entitled to the suit property. He would further argue that it is the specific case of the 6th defendant that the mother and the sisters had relinquished and released their shares in favour of Ayyavu and that Ayyavu had thereafter entered into an oral partition with K.M.Petharan and none of which have been proved.

15.That apart, with reference to the plea of adverse possession, the defendants in their Written Statement have not set out any of the ingredients required to plead adverse possession. There is nothing to show as to the date from which the plaintiffs had been put on notice



that the 6th defendant was exercising an absolute right to the suit property. He would further submit that the Sale has been effected in respect of the entire suit property when admittedly half of the property fell to the share of Bavuthiammal after whom the property had devolved only upon the 1st defendant. Even with reference to the plaintiff's share, the deceased Ayyavu had sold away their shares in the property also. Such a Sale is illegal, null and void and not binding on the plaintiffs in so far as it relates to the share of the plaintiff.

16. In support of his arguments, the learned counsel has relied on the Judgment reported in **(2018) 8 Supreme Court Cases 67 [Eureka Builders and others v. Gulabchand]**. He would rely on Paras 35 and 36 of the said Judgment as follows:

“35) It is a settled principle of law that a person can only transfer to other person a right, title or interest in any tangible property which he is possessed of to transfer it for consideration or otherwise. In



other words, whatever interest a person is possessed of in any tangible property, he can transfer only that interest to the other person and no other interest, which he himself does not possess in the tangible property.

36) So, once it is proved that on the date of transfer of any tangible property, the seller of the property did not have any subsisting right, title or interest over it, then a buyer of such property would not get any right, title and interest in the property purchased by him for consideration or otherwise. Such transfer would be an illegal and void transfer.”

17. This Judgment would support his arguments that a person can only transfer the right, title or interest in any intangible property which he possessed and he cannot transfer the interest of an other. He would therefore submit that the Sale Deed executed by Ayyavu in



favour of the 6th defendant was invalid.

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18.As regards the question of laches, the learned counsel would contend that the suit property is a vacant site and at no point of time had the 6th defendant put the plaintiff on notice that he is the owner of the property and that he is exercising the right over the same. Therefore, he would submit that the Lower Appellate Court has erred in allowing the appeal only on the ground of laches. He would therefore pray the Judgment and Decree of the Lower Appellate Court to be set aside and the Judgment and Decree of the trial Court to be restored.

19.Per contra, Mr.T.Murugamanickam, learned Senior Counsel appearing for the respondents would address his arguments only on the point of limitation. He would submit that the description of the suit property is similar to the description as provided under Ex.A.1-Sale Deed under which Palaniappagounder and Bavuthiammal have



purchased the property. A perusal of Ex.B.1 would show that the 6th defendant had properties on the East and North of the suit property. While so, it was inconceivable as to how the plaintiffs would plead that they have no knowledge about the Sale in favour of the 6th defendant.

20.The learned counsel would place reliance on the Judgment of the Division Bench of this Court in ***Vol 1985 L.W. 596 [Minor Ibramasa Rowther, by guardian and next friend father Ayyavoo Rowther alias Ibramoli Rowther and others v. Sheik Meerasa Rowther and others]*** with particular reference to the following:

“Even then the plaintiff has been indifferent and inactive. There are undoubtedly other circumstances which support the presumption of ouster, taken along with exclusive possession for a considerable length of time. In such a situation, as observed by Venkataraman, J. in Abdul Kadir v. Umma (1970) I.L.R. 2 Mad. 636, it



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is obvious good sense and justice that Courts should be reluctant to unsettle quiet and undisturbed possession for ever three decades and, in order to maintain the person in such possession, the law presumes a lawful origin of possession which, in the context, must originate from ouster and continue to be such for the statutory period. For all these reasons, we have no hesitation in holding that, independently of the truth of the partition arrangement, the plaintiff's rights have been extinguished by ouster. For the same reasons, we hold that the plaintiff is not entitled to claim any share as an heir to his brother Appavoo who died in 1936. For twenty-four long years, the plaintiff slept over, though, in the interim, there was a litigation and the parties were fighting. It cannot be pretended that the plaintiff was ignorant of his rights as an heir to the estate of his deceased brother Appavoo. If the plaintiff kept quiet for



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over two decades, it must be because he was quite content that his brother's widow and daughter might take Thamarapadi lands for themselves to the exclusion of the plaintiff.”

21.The learned counsel would also inform this Court that after Judgment of the Appellate Court, the 1st respondent has sold the properties on 29.02.2018 after waiting for ninety days period for the appellants to file their appeal. However, the plaintiffs/appellants have filed this Second Appeal only with a delay.

22.Heard the learned counsels appearing on either side and perused the papers.

23.Admittedly, the property is the self acquired property of Palaniappagounder and Bavuthiammal, who have jointly purchased the same. Therefore, both of them are the absolute owners of an



undivided $\frac{1}{2}$ share in the suit property. Palaniappagounder had 5 children who are the plaintiffs and the defendants Ayyavu.

Palaniappagounder's wife who has arrayed as the 1st plaintiff also had an interest in the suit property on the demise of Palaniappagounder.

On his demise each of his heirs became entitled to a $\frac{1}{6}$ th undivided share in the $\frac{1}{2}$ share of Palaniappagounder i.e., $1 \frac{1}{12}$ th share in the suit property. The other $\frac{1}{2}$ share fell to the share of the 1st defendant.

The 6th defendant has pleaded that the plaintiffs have released and relinquished their shares in favour of Ayyavu. The same has not been proved by him. That apart, the very fact that such a plea has been taken clearly indicates that the 6th defendant was acknowledging the right, title and interest of the plaintiffs to the suit property. He has also pleaded that there has been a partition between the 1st defendant and Ayyavu. Neither this document nor any evidence let in to prove the fact. Once again by making such a statement, the 6th defendant has categorically admitted Bavuthiammal's right to the suit property.

Therefore, in the absence of any proof to show the relinquishment or



oral partition, each and every sharer have right to the suit property.

That being the case, Ayyavu had no right to alienate the something over and above his right and the Sale would fall within the prohibition adumbrated in the Judgment of the Hon'ble Supreme Court in **(2018) 8 Supreme Court Cases 67 [Eureka Builders and others v. Gulabchand]** as relied upon by the learned counsel for the appellants.

24.Coming to the question of adverse possession, admittedly, the property is a vacant site and the 6th defendant has not taken any overt step to exercise his exclusive ownership over the suit property. That apart, the Written Statement does not contain any detail as to the date from which the 6th defendant had taken possession and had been exercising exclusive hostile possession to the knowledge of the plaintiffs and the 1st defendant. In the absence of such a plea, the finding of the Lower Appellate Court that the suit is hit by laches, is without any basis and the finding that the 6th defendant has perfected title by adverse possession is also baseless. The Substantial



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Questions of Law are answered in favour of the plaintiffs/appellants.

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This Second Appeal is allowed, however, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

17.08.2021

Index : Yes/No
Internet : Yes/No
mps

To
1.The IV Additional District Judge,
Bhavani,
Erode.

2.The Subordinate Judge,
Bhavani.

P.T. ASHA, J,

mps



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