



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.08.2021

CORAM

THE HONOURABLE MR. JUSTICE G.R. SWAMINATHANS.A. (MD)Nos.804 & 805 of 2008

WEB COPY

S.A. (MD)No.804 of 2008

- | | |
|---------------------------|---------------------------------------|
| 1. Ponnusamy Nadar (Died) | ... Appellant/Appellant/
Plaintiff |
| 2. Ramasamy | |
| 3. Pattamudaian | |
| 4. Ganesan | |
| 5. Sermakani | |
| 6. Thennammal | |
| 7. Pushpam | |
| 8. Uchimakali | |
| 9. Ponnuthurai | |
| 10. Suryaramya | |
| 11. Muthusudha | |
| 12. Aathi Selvam | |

(Appellants 2 to 12 are brought on record as LR's. of the deceased sole appellant vide Order dated 06.07.2021 made in C.M.P. (MD)Nos.5263, 5298, 5299, 5302, 5303 and 5304 of 2021)

... Appellants

Vs.

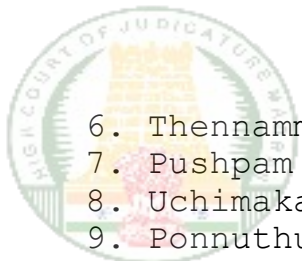
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|--|--|
| 1. Sudar Olivu Nadar | |
| 2. Veerasangili Nadar (Died) | |
| (R-2 died and R-1 represents R-2 vide Order dated 06.07.2021 made in C.M.P. (MD)Nos.5263, 5298, 5299, 5302, 5303 & 5304 of 2021) | |

... Respondents/Respondents/
Defendants

Prayer: Second appeal filed under Section 100 of C.P.C., to allow the second appeal with costs through out setting aside the judgment and decree of the learned Sub Judge, Ambasamudram, dated 12.02.2007 in A.S.No.91 of 2006 confirming the judgment and decree of the Additional District Munsif, Ambasamudram, dated 12.06.2006 in O.S. No.199 of 2004.

S.A. (MD)No.805 of 2008

- | | |
|---------------------------|---------------------------------------|
| 1. Ponnusamy Nadar (Died) | ... Appellant/Appellant/
Defendant |
| 2. Ramasamy | |
| 3. Pattamudaian | |
| 4. Ganesan | |
| 5. Sermakani | |



6. Thennammal
7. Pushpam
8. Uchimakali
9. Ponnuthurai
10. Suryaramya
11. Muthusudha
12. Aathi Selvam

(Appellants 2 to 12 are brought on record as LR's. of the deceased sole appellant vide Order dated 06.07.2021 made in C.M.P. (MD) Nos. 5263, 5298, 5299, 5302, 5303 and 5304 of 2021)

... Appellants

Vs.

Sudar Olivu Nadar

... Respondent/Respondent/
Plaintiff

Prayer: Second appeal filed under Section 100 of C.P.C., to allow the second appeal with costs through out setting aside the judgment and decree of the learned Sub Judge, Ambasamudram, dated 12.02.2007 in A.S.No.90 of 2006 confirming the judgment and decree of the Additional District Munsif, Ambasamudram, dated 12.06.2006 in O.S. No.198 of 2004.

For Appellants

: Mr.T.S.R.Venkat Ramana

For R-1

: Mr.M.GA.Natraj,

for Mr.M.Ganagasabapathy.

C O M M O N J U D G M E N T

Thiru.Ponnusamy Nadar was the appellant in both these appeals. He filed O.S.No.2 of 2000 on the file of the Sub Court, Ambasamudram, for partition and separate possession of 2/3rd share in the suit property which is comprised in Survey No.830 and measures an extent of 4 acres and 62 cents. The first defendant in the suit was Sudar Olivu Nadar who had purchased the entire suit property under two sale deeds (Ex.A.1 and Ex.A.2 dated 19.08.1993) from the second defendant Veerasangili Nadar. The defendants entered appearance and also filed written statement. Thereafter, Sudar Olivu Nadar filed O.S.No.36 of 2002 on the file of the District Munsif, Ambasamudram, seeking permanent injunction restraining Ponnusamy Nadar from interfering with his possession and enjoyment of the suit property. Since the subject matter of both the suits was one and the same, at the instance of Ponnusamy Nadar the injunction suit was transferred to the Sub Court. Later on account of increase in pecuniary jurisdiction, both the suits were transferred to the file of the Additional District Munsif, Ambasamudram. Even though the partition suit was filed earlier in point of time, the transferee Court erroneously numbered the injunction suit as O.S.No.198 of 2004 and the partition suit as O.S.No.199 of 2004. The suits were jointly tried. Sudar Olivu Nadar examined himself as P.W.1 and his vendor/D2



Veerasangili Nadar as P.W.2. Ex.A.1 to Ex.A.14 were marked. Ponnusamy Nadar examined himself as D.W.1 and Ex.B.1 to Ex.B.23 were marked. After considering the evidence on record, the trial Court vide judgment and decree dated 12.06.2006 decreed the injunction suit and dismissed the partition suit. Aggrieved by the same, Ponnusamy Nadar filed A.S.No.90 of 2006 and A.S.No.91 of 2006. Both the appeals were heard together and by the impugned judgment and decree dated 12.02.2007, the decision of the trial Court was confirmed and both the appeals were dismissed. Challenging the same, these second appeals were filed.

2. S.A.(MD)No.805 of 2008 arises out of the injunction suit, while S.A.(MD)No.804 of 2008 arises out of the partition suit. The learned counsel for the appellant commented that he insisted that the appeal arising out of the partition suit must be numbered first. I agree with his contention that whenever there is such transfer of suits, the first filed suit should be numbered first. The chronology of filing must be reflected in the suit numbers given by the transferee Court. They were admitted on the following substantial questions of law:-

"1. Can plaintiff/respondent file a suit for bare injunction when a partition suit challenging his rights had already been filed?

2. Are the Courts below right in decreeing the suit for injunction against a co-owner when P.W.2 admitted the family relationship?

3. Whether the Courts below were right in accepting oral partition when there is no pleading or proof for the same?

4. Whether the Courts below were right in refusing a partition decree, when admittedly parties are co-owners? "

3. Heard the learned counsel on either side.

4. The suit property is comprised in Survey No.830, Keelakadayam Village and measures an extent of 4 acres and 62 cents. The contesting respondent herein, namely, Sudar Olivu Nadar claims title and possession over the suit property on the strength of Ex.A.1 to Ex.A.4. Ex.A.1 and Ex.A.2 are sale deeds, while Ex.A.3 and Ex.A.4 are rectification deeds. The second defendant Veerasangili Nadar is his vendor. The purchaser had examined Veerasangili Nadar as D.W.2. D.W.2 had admitted in his evidence that the suit property originally belonged to three persons, namely, Gnanamuthu Nadar, Pattamudaiyan Nadar and Irulamadan Nadar. Of course the learned counsel appearing for the contesting respondent would assert that the suit property belonged to Irulamadan Nadar and Pattamudaiyan Nadar and that Gnanamuthu Nadar was not their brother. But Sudar Olivu Nadar cannot argue against the evidence of his own vendor.



Veerasangili Nadar traces his authority to sell the suit property in favour of Sudar Olivu Nadar in two modes; a) by inheritance from Irulamadan Nadar and b) by purchase through Ex.A.10 through Chithiraikanakku Nadar who belongs to Pattamudaiyan Nadar branch.

5. A mere look at Ex.A.10 would show that Chithiraikanakku Nadar had sold only undivided share of the suit property in favour of Veerasangili Nadar. Whether Chithiraikanakku Nadar could have conveyed 2 acres and 31 cents of undivided share in the suit property in favour of Veerasangili Nadar is open to grave doubt. The property belonged to three persons, namely, Gnanamuthu Nadar, Pattamudaiyan Nadar and Irulamadan Nadar. Pattamudaiyan Nadar branch will have only $1/3^{\text{rd}}$ undivided share in the suit property. Chithiraikanakku Nadar hails from Pattamudaiyan Nadar branch. It is not the case of Chithiraikanakku Nadar that his undivided share in the suit property had gained accretion on account of any purchase made from Gnanamuthu Nadar branch. There is no evidence to that effect. In any event, the undisputed fact is that Veerasangili Nadar had only undivided share in the suit property. There is absolutely no evidence to establish the plea of oral partition.

6. The learned counsel appearing for the contesting respondent would claim that Irulamadan Nadar had three sons, namely, Nayinar Nadar, Masanamuthu and Ramasamy and that partition took place between them way back in the year 1947. Apart from the utter paucity of evidence to that effect, there is nothing on record to show that the suit property was allotted in its entirety in favour of Nayinar Nadar. If really partition had taken place, then vide Ex.A.10 Chithiraikanakku Nadar would not have conveyed undivided share in the suit property. The purchase of undivided share in the suit property by the second defendant clinches the issue in favour of the appellants.

7. Though the appellant Ponnusamy Nadar would claim that he had $2/3^{\text{rd}}$ undivided share in the suit property, the evidence adduced by him does not really establish the same. While the precise share of Ponnusamy Nadar in the suit property may be open to argument, it is beyond dispute that Ponnusamy Nadar did have undivided share in the suit property. While Ponnusamy Nadar is the original co-sharer, Sudar Olivu Nadar is only a subsequent purchaser. It is well settled that the purchaser of an undivided share in the suit property has to sue for partition and work out his rights.

8. I hold that the suit for injunction was patently not maintainable. Its very filing was an abuse of process. Sudar Olivu Nadar was shown as the first defendant in the partition suit filed by Ponnusamy Nadar. If Sudar Olivu Nadar wanted to get some relief, he should have filed I.A. in the partition suit. It is well settled that a defendant can also apply for temporary injunction. Instead,



he chose to file an injunction suit independently after entering appearance in the partition suit and that too before another Court.

9. I cannot appreciate the conduct of Sudar Olivu Nadar. A purchaser of undivided share from one co-sharer has to only seek the relief of partition and cannot seek injunction against the other co-sharer. The first and second substantial questions of law are answered in favour of the appellants.

10. The judgment and decree dated 12.02.2007 made in A.S.No.90 of 2006 on the file of the Sub Court, Ambasamudram, confirming the judgment and decree dated 12.06.2006 made in O.S.No.198 of 2004 on the file of the Additional District Munsif, Ambasamudram, is set aside. S.A.(MD)No.805 of 2008 is allowed.

11. The judgment and decree dated 12.02.2007 made in A.S.No.91 of 2006 on the file of the Sub Court, Ambasamudram, confirming the judgment and decree dated 12.06.2006 made in O.S.No.199 of 2004 on the file of the Additional District Munsif, Ambasamudram, is set aside. S.A.(MD)No.804 of 2008 is allowed and the matter is remanded to the file of the trial Court since the exact extent of share of Ponnusamy Nadar in the suit property is not clear.

12. The learned counsel appearing for the contesting respondent would state that after his purchase under Ex.A.1 from Veerasangili Nadar, Sudar Olivu Nadar has been in possession and enjoyment of the entire suit property. He had dug a well. He had also availed subsidies from the Government schemes. The Government officials have also done a spot inspection. Though I have held that the suit for injunction filed by Sudar Olivu Nadar against Ponnusamy Nadar was not maintainable, I have to necessarily take note of the prevailing ground reality. The learned counsel appearing for the appellants would state that the legal heirs of Ponnusamy Nadar occupy 1/3rd portion. The learned counsel appearing for the contesting respondent would state that Sudar Olivu Nadar is occupying the entire suit property. Though the facts are not quite clear, it is beyond dispute that Sudar Olivu Nadar had obtained an order of interim injunction even during the pendency of the suit. His suit eventually came to be decreed. The decree of injunction was not suspended during the pendency of the first appeal. The appeal filed by Ponnusamy Nadar was also dismissed. The learned counsel appearing for the contesting respondent gives an undertaking that Sudar Olivu Nadar will extend his fullest co-operation for concluding the partition suit proceedings within a period of six months from the date of receipt of a copy of this order. Since such an undertaking has been given and since for the last 20 years Sudar Olivu Nadar has had the benefit of injunction, the said position will continue till the conclusion of the suit proceedings.



13. It is open to the parties to seek amendment of the respective pleadings. The parties can also adduce further evidence. The parties will appear before the Court below either by counsel or in person on 06.06.2022. The evidence taken during the joint trial will remain on record. No costs.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

PMU

Note: 1. In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Sub Judge,
Ambasamudram.
2. The Additional District Munsif,
Ambasamudram.
3. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court, Madurai.

S.A. (MD) Nos.804 & 805 of 2008
26.08.2021

SMV(CO)
KB(10.05.2022) 6P 5C