



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 11.08.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.224 of 2011 and

M.P.(MD)No.1 of 2011

WEB COPY

1. Saratha Amma
2. Latha Kumari
3. Sugathakumari (Died) ... Appellants/Appellants/
Defendants 4 to 6

4. S.Subhadhra Devi
5. A.S.Shreejith (Minor)
6. Athira (Minor)

(Appellants 4 to 6 are brought on record as LR's. of
the deceased 3rd appellant vide Order dated 17.03.2016 in
M.P.(MD)No.1 of 2013.)

(Appellants 5 and 6 Minors are represented by
their father R.J.Ajaynath) ... Appellants 4 to 6

Vs.

1. Savithiri Amma
2. Santhakumari Amma ... Respondents/Respondents 1&2/
Plaintiffs 1 & 2

3. Bhakulan Nair
4. Prabhavathi Amma
5. Lekshmi Bai ... Respondents/Respondents 3 to 5/
Defendants 1 to 3

Prayer: Second appeal filed under Section 100 of C.P.C., to set
aside the Judgment and Decree passed in A.S.No.26 of 2007 dated
26.11.2009 on the file of the Sub Judge, Kuzhithurai, confirming the
Judgment and Decree passed in O.S.No.431 of 2004 dated 11.10.2006 on
the file of the Principal District Munsif, Kuzhithurai and allow the
second appeal.

For Appellants : Mr.C.Kishore,
for Mr.K.Sreekumaran Nair.

For R-1 & R-2 : Ms.J.Anadhavalli

For R3 to R5 : Exparte

J U D G M E N T

The contesting defendants in O.S.No.431 of 2004 on the file
of the Principal District Munsif, Kuzhithurai, are the appellants in
this second appeal.



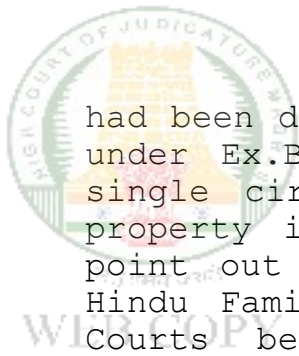
2. Respondents 1 and 2 herein filed the said suit seeking the relief of partition. The case of the plaintiffs is that the suit property measuring 34½ cents belonged to the tarward of Bhasurangi Amma who is the mother of the plaintiffs and defendants 1 to 5. Bhasurangi Amma had passed away. Since she left behind the son (first defendant) Bhakulan Nair and six daughters, each of them will be entitled to 1/7th share in the suit property. The plaintiffs came to know that an illegal alienation was made in favour of the sixth defendant Sugatha Kumari and therefore she was also made as the defendant. Since the request for partition was not complied with, the suit came to be laid.

3. Defendants 4 to 6 contested the suit and filed their written statement. They controverted all the suit averments. According to them, the suit property is not the tarward property of Bhasurangi Amma. According to them, this was her independent self-acquired property and that she had settled the same in favour of defendants 4 and 5 vide settlement dated 03.03.1976 (Ex.B.3). In turn, defendants 4 and 5 have alienated the property in favour of the sixth defendant vide Ex.B.5 dated 28.04.1997. The contesting defendants have been enjoying the suit property in their independent and exclusive capacity since 1976 and therefore, the suit is also hit by adverse possession.

4. Based on the rival pleadings, the trial Court framed the necessary issues. The second plaintiff examined herself as P.W.1 and marked Ex.A.1 to Ex.A.7. On behalf of the sixth defendant, her husband was examined as D.W.1. Ex.B.1 to Ex.B.30 were marked. After considering the evidence on record, the trial Court by judgment and decree dated 11.10.2006 granted preliminary decree allotting 2/7th share among the total extent of 17¼ cents in the suit property. Aggrieved by the same, the contesting defendants filed A.S.No.26 of 2007 before the Sub Court, Kuzhithurai.

5. The plaintiffs also filed cross appeal therein. After considering the rival contentions, the first appellate Court by the impugned judgment and decree dated 26.11.2009, dismissed the appeal as well as the cross appeal. Challenging the same, this second appeal came to be filed.

6. The learned counsel appearing for the appellants submitted that the Court below erred in holding that 17¼ cents in the suit property is a tarward property. According to him, the entire suit property was the absolute property of Bhasurangi Amma. He pointed out that Bhasurangi Amma had dealt with the property vide Ex.B.1. According to Marumakkathayam Law that prevailed during the relevant time, consent of the members would be required for selling the immovable property or mortgaging the possession for more than twelve years or leasing out for more than twelve years. The learned counsel appearing for the appellants would point out that in Ex.B.1 no such consent of the members of the tarward was taken. Bhasurangi Amma



had been described as Karnavathi. The suit property that is covered under Ex.B.1 was not referred to as tarward property. From this single circumstance, the learned counsel would contend that the property in question is not the tarward property. He would also point out that Marumakkathayam Law was abolished by Kerala Joint Hindu Family System (Abolition) Act, 1975. He contended that the Courts below erred in granting even partial relief to the plaintiffs.

7. Per contra the learned counsel appearing for the plaintiffs/contesting respondents submitted that the impugned judgment and decree do not call for any interference.

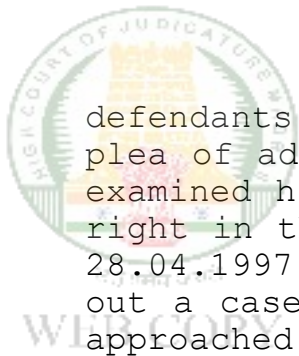
8. I carefully considered the rival contentions and went through the evidence on record.

9. The suit property presently measures 31 cents. The Courts below noted that Bhasurangi Amma got only $17\frac{1}{4}$ cents in the partition vide Ex.A.2 partition deed(07.09.1110 M.E.). The remaining extent of the land in the suit schedule came to her by virtue of relinquishment made by the sister and son of Bhasurangi Amma. Therefore, the Courts below rightly treated that the remaining extent of property as an independent property of Bhasurangi Amma. The plaintiffs have not filed any second appeal, questioning the same.

10. Therefore, the only question which concerns this Court is whether Courts below were correct in holding that $17\frac{1}{4}$ cents of the suit property is the tarward property or not. As rightly pointed out by the learned counsel appearing for the respondents, in the partition suit filed by Bhakulan Nair in O.S.No.17 of 1998, the present appellants filed written statement on 08.10.1998(Ex.A.6 and Ex.A.7) in which they took the stand that the property in question is a tarward property. Since they have taken such a categorical stand in the proceedings between the first defendant Bhakulan Nair and Karnavathi Bhasurangi Amma, it is not open to the appellants to take a contra stand in the present proceedings.

11. The learned counsel appearing for the appellants would contend that an erroneous concession on an aspect of law cannot operate as an estoppel. I cannot agree with the said contention. Whether the property in question is a tarward property or not is predominantly a question of fact. Therefore, the Courts below were justified in anchoring their conclusion on the stand taken by the appellants vide Ex.A.6 and Ex.A.7.

12. As rightly pointed out by the learned counsel appearing for the respondents, the plea of adverse possession now canvassed before this Court also does not have any merit. In the written statement filed by the appellants, the ingredients which make out a



defendants 4 and 5 had not entered the witness box to sustain the plea of adverse possession. Only the husband of the sixth defendant examined himself as P.W.1. Admittedly, the sixth defendant obtained right in the suit property only by virtue of Ex.B.5 sale deed dated 28.04.1997. Therefore, the testimony of D.W.1 cannot in any way make out a case for adverse possession. The Courts below have correctly approached the issue. No substantial question of law arises for consideration. I do not find any merit in this second appeal. This second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

PMU

Note: 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,
Kuzhithurai.
2. The Principal District Munsif,
Kuzhithurai.
3. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+1 CC to M/s.J.ANANDHAVALLI, Advocate (SR-26116[F] dated 12/08/2021)

+1 CC to M/s.K.SREEKUMARAN NAIR, Advocate (SR-26269[F] dated 13/08/2021)

S.A.(MD)No.224 of 2011
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