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A.S.(MD)NO.8 OF 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.06.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

A.S.(MD)No.8 of 2018 and
C.M.P.(MD)No.314 of 2018

1. S.Sagayamary
2. S.Dhiliban Cyril Albert ... Appellants/
Defendants 2 & 3

Vs.

1. G.Theresa Gunaseeli
2. A.Catherin Kalaiselvi
3. G.Francis Malarvizhi ... Respondents 1 to 3/
Plaintiffs

G.Mary @ Mariyammal(died)

4. G.Arokiasamy
5. J.Amalakumari
6. Joseph Gratian
7. Lourdhmary
8. Jayamary ... Respondents 4 to 8/
Defendants 4 to 8

Prayer: Appeal suit filed under Section 96 of C.P.C.,
to set aside the Judgment and Decree dated 30.06.2017 made
in O.S.No.143 of 2014 on the file of the learned Principal
District Judge, Tiruchirappalli, by allowing this appeal.



For Appellants : Mr.S.Vinayak,
for Mr.P.Jayaprakash Narayan.
For R-1 to R-3 : Ms.J.Mariya Roseline
For R-7 & R-8 : Mr.S.Meenakshi Sundaram
For R-4 & R-5 : No appearance.

* * *

J U D G M E N T

This first appeal arises out of a suit for partition.

2. O.S.No.143 of 2014 on the file of the Principal District Judge, Tiruchirappalli, was filed by respondents 1 to 3 herein. The first appellant is the wife of Late.Santhanadoss, while the second appellant is his son. Santhanadoss, plaintiffs, fourth respondent Arokiasamy and the fifth respondent Amalakumari were born to Gratian and the first defendant Mary @ Mariyammal. The other respondents were born to Gratian through his other wife. The suit properties are nine in number. There is no dispute that Gratian passed away on 18.03.1996 without executing any Will. Santhanadoss passed away on 17.02.1998. There is also no dispute that items 1 to 3



stood in the name of mother Mary @ Mariyammal/first defendant and that she executed Ex.A.1 settlement deed dated 22.01.2014 settling the same in favour of the plaintiffs and the fourth defendant. She had also settled her share in the remaining items in their favour. After issuing the suit notice demanding their share in the suit properties, the aforesaid partition suit came to be filed on 04.08.2014. Mary @ Mariyammal appears to have died shortly thereafter. The third plaintiff G.Francis Malarvizhi examined herself as P.W.1 and one Senguttuvan was examined as P.W.2. Ex.A.1 to Ex.A.24 were marked. On the side of the defendants, the second defendant Sagayamary examined herself as D.W.1. Ex.B.1 to Ex.B.9 were marked. The defendants born through the first wife did not evince any interest in the matter. Likewise D.W.4 and D.W.5 remained exparte. The following issues were framed by the trial Court for determination of the suit:-

“1. Whether the settlement deed executed by 1st defendant dated 22.01.2014 is true and acted upon?

2. Whether the suit items 1 to 3 are self acquired properties of the 1st defendant?



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3. Whether the suit items 1 to 3 are purchased by the 1st defendant from and out of her husband's income for the purpose of the benefit of family?

4. Whether the 1st defendant has no right to execute settlement deed and it is not valid?

5. Whether the plaintiffs' claim of shares in suit properties are wrong?

6. Whether the suit is bad for non-joinder of necessary parties?

7. Whether the suit is bad for partial partition?

8. Whether the 5th item of suit property was allotted to the 2nd defendant on 21.09.1988 and whether from date of allotment of 5th item of property the 2nd and 3rd defendants are in possession of the property?

9. Whether the plaintiffs are entitled to get $\frac{3}{4}$ share in 1 to 3 items and $\frac{21}{36}$ shares in item Nos.4 to 9 as prayed for?



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10. To what relief the plaintiffs are entitled? “

3. The contest was essentially between the plaintiffs on the one hand and the appellants on the other. The appellants would allege that the entire suit proceedings have been engineered at the instance of the fourth respondent Arokiasamy. The learned trial Judge after a consideration of the evidence on record granted preliminary decree for partition and separate possession of the plaintiff's 1/4th share in items 1 to 3 and 21/36th share in items 4 to 9.

4. Aggrieved by the same, this appeal has been filed by the contesting defendants 2 and 3.

5. The learned counsel appearing for the appellants reiterated all the contentions set out in the memorandum of appeal. He submitted that if the contesting respondents are agreeable, the appellants would give up their right and share in item Nos.4, 6 to 9 and accept Ex.A.1 settlement deed and provided the respondents recognise the absolute right of the appellants with regard to item No.5.

6. Per contra, the learned counsel appearing for the contesting respondents submitted that the impugned



judgment and decree do not call for any interference. The learned counsel appearing for the contesting respondents pointed out that admittedly the suit items 1 to 3 stood in the name of the deceased mother Mary @ Mariyammal. Therefore, she had every right to settle the property in any manner that she deemed fit. She also submitted that being a Christian, the deceased first defendant could have bequeathed her share in the other items only to the extent of her 1/3 share. She pointed out that the Court below had correctly applied the principles of Christian Law of Succession and granted preliminary decree accordingly. She would also state that both in the written statement as well as in the proof affidavit, the appellants have pleaded as if the suit item No.5 was allotted to the deceased Santhanadoss. It was simply improbable. Admittedly, suit item No.5 belonged to Gratian and therefore Santhanadoss did not have any preexisting right. Likewise, she denied the theory of oral partition that was projected as having taken place following the demise of Santhanadoss. No particulars have been furnished to prove the theory of oral partition. If item No.5 was allotted to the appellants herein, then the other sharers also must have been granted some



allotment. Those details are not forthcoming. Therefore, the learned counsel appearing for the contesting respondents would submit that the appellants have miserably failed to establish the defence put forth by them and she pressed for dismissal of the first appeal.

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

8. The Court below in paragraph No.12 of the impugned judgment while rejecting the defence of the appellants had stated that if really item No.5 was allotted separately in favour of defendants 2 and 3, the defendants would have obtained separate patta in their names immediately after the allotment of the property in their favour. As rightly pointed out by the learned counsel appearing for the appellants, this reason runs contrary to the record. Ex.B.2 is the revenue patta bearing No.868 issued in respect of item No.5(Survey No.108/2A, Mettupatti Village, Lalgudi Taluk). Of course Ex.A.23 is the patta passbook issued in the name of the deceased Mary @ Mariyammal in respect of the very same property and it indicates that it is a joint patta. The date of issuance of Ex.A.23 patta passbook is not clear. Though it



states that it is a joint patta, the names of the appellants are mentioned as other owners in the joint patta. There is no dispute that the property originally stood in the name of Gratian and it did not stand in the name of the mother Mary @ Mariyammal.

9. The point for consideration arising in this appeal is whether the finding given by the trial Court as regards issue No.8 / 5th item is sustainable or not.

10. In this regard, the testimony of P.W.1 assumes some significance. P.W.1/third plaintiff admitted that even during the lifetime of her brother Santhanadoss, panchayat was held to arrive at some amicable solution. When suggestion was put that in the said panchayat, item No.5 was given to Santhanadoss, P.W.1 replied that her brother was allotted item No.5 for cultivation alone. It was not allotted to him absolutely. She was not aware as to whether patta in respect of the property stood in the name of Santhanadoss. The learned counsel appearing for the contesting respondents would state that Ex.B.2 came into existence after the institution of the suit and that it should not be looked into. I am unable to agree with the said contention. Head Quarters



Deputy Tahsildar had issued a certified copy on 20.02.2015 and therefore, it cannot be stated that Ex.B.2 came into existence after the institution of the suit. The appellants had marked Ex.B.2 to Ex.B.5 which are Kist receipts standing in the name of the first appellant Sagayamary. They pertain to the years 2000 to 2002.

11. The learned counsel appearing for the contesting respondents would strongly contend that possession by one of the co-sharers should be construed as possession of all the sharers. As held in ***Jai Singh V. Gurmej Singh (2009) 15 SCC 747***, the above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other. The specific stand of the appellants is that even during the lifetime of Santhanadoss, panchayat had taken place and that this property was allotted to Santhanadoss. In the written statement, the following pleading is found:-

“It is relevant to submit that, by a family arrangement, the 5th item of the suit property in



S.F.No.108/2A an extent of 0.39.5 ares in patta No.868 at Mettupatti Village was allotted to this defendant to lead her life with her son, the 3rd defendant herein even on 21.09.1988 itself.”

The appellants did not stop with pleading. They proved this by marking certain documents and by visiting suitable answers from P.W.1. Ex.A.23 patta passbook mentions the appellants as the joint pattadhars. The names of defendants 4 and 5 are absent in Ex.A.23 patta passbook. P.W.1 concedes in her testimony that Santhanadoss was allotted to carry on cultivation in the suit item No.5. Ex.B.1 probabalises the case of the appellants. Ex.B.1 is the electricity card standing in the name of Santhanadoss. It shows that on 03.02.1998, agricultural electricity service connection was effected in the name of Santhanadoss. The agricultural electricity service connection will not be granted for the asking, because it is a free service connection. Obviously, an application must have been made long time back and that is why on 03.02.1998, agricultural electricity service connection No.303 was given in favour of Santhanadoss. The survey number is mentioned as 108/2A. Ex.B.3 to Ex.B.5 are the Kist receipts standing in the name of Sagayamary. The documentary evidence i.e. Ex.B.1



to Ex.B.5 clearly establishes that the appellants/defendants 2 and 3 have been in possession and enjoyment of suit item No.5 in their own capacity.

12. The suit was instituted only on 04.08.2014. Santhanadoss had passed away way back in February 1998. The specific stand of the appellants is that even much prior thereto, they have been in exclusive possession and enjoyment of the suit item No.5. The suit for partition could not have been maintained as regards suit item No.5, in view of the application of the principle of ouster. Even while confirming the impugned judgment and decree of the trial Court as regards the other items, the same is set aside as regards suit item No.5. However, the appellants have agreed to give up their claim in the remaining items if the respondents accept the appellants' right over item No.5.

13. This appeal suit is partly allowed. No costs. Consequently, connected miscellaneous petition is closed.

28.06.2021

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Internet : Yes/ No
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A.S.(MD)NO.8 OF 2018

G.R.SWAMINATHAN,J.

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To:

1. The Principal District Judge,
Tiruchirappalli.
2. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court, Madurai.

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