



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.08.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.118 of 2014

and

M.P.(MD).No.1 of 2014

S.Renugaraju

... Appellant

Vs.

1. Sellammal @ Sellappa

2. V.Marimuthu

3. Padmavathi

4. Malika

... Respondents

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the Judgment and Decree of the III Additional District Judge, Tiruchirappalli in A.S.No.98 of 2012 dated 21.06.2013 by confirming the decree and judgment of the Principal Subordinate Judge, Tiruchirappalli in O.S.No.526 of 2002 dated 29.11.2011.

For Appellant : Mr.M.Subash Babu
For Mr.Ashok Adhithyan.



For Respondents : Mr.M.Saravanan,
for R1.
R2 – Exparte.
Mr.N.Vijayarajan,
For R3 & R4.

JUDGMENT

This Second Appeal arises out of a partition suit. The first defendant is the appellant herein. His sister Sellammal @ Sellappa filed O.S.No.526 of 2002 on the file of Sub Court, Tiruchirappalli for partition and separate possession of 1/5th share in the suit properties. The suit properties are 7 in number. Admittedly, the suit properties stood in the name of the father of the plaintiff, namely, Sivalingam. Sivalingam got married to one Jagathamba and through the said wedlock, the appellant and the plaintiff were born. After the death of the first wife, he married the third defendant Padmavathi and through the said wedlock, Malliga and Rajendran were born. Sivalingam died intestate on 05.03.1989. Rajendran had passed away after the demise of Sivalingam. According to the plaintiff, while her brother Rengaraju, herself and Malliga are entitled



to 1/5th share in the suit properties, Padmavathy will be entitled to 2/5th share. The second defendant Marimuthu who remained ex-parte is said to be a front-man for the appellant. The trial Court granted decree as prayed for. The first appellate Court confirmed the same. Challenging the said decrees and judgments, the first defendant has filed this second appeal. The second appeal was admitted on 04.02.2014 on the following substantial questions of law:-

“ a) Whether the Courts below are correct and justified in coming to the conclusion and passing preliminary decree that the non-examination of the appellant/appellant/first defendant is adverse to his defence when his wife acquainted with the facts of the case is examined as D.W.1 on behalf of him?

b) Are the Courts below are correct and justified in granting preliminary decree for partition without framing necessary issues with regard to the right of co-ownership and co-shares right claimed by the respondent / respondent / plaintiff and respondents / respondents / defendants 2 and 4.



WEB COPY



c) Are the Courts below correct and justified in passing preliminary decree without framing issues with regard to ouster when the appellant / appellant / first defendant pleaded and proved the same?”

2. The learned counsel appearing for the appellant reiterated his stand as projected in the grounds of appeal. He submitted that the plaintiff following her marriage had completely dissociated herself and that the principle of ouster has to be applied. He also submitted that two items of property have been alienated under Ex.B.5 and Ex.B.6. He called upon this Court to answer the substantial questions of law in favour of the appellant and set aside the judgments of the Courts below and allow this appeal.

3. Per contra, the learned counsel appearing for the plaintiff submitted that no substantial question of law actually arises for consideration. He called upon this Court to dismiss the second appeal.

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



WEB COPY

5. The basic facts are beyond dispute. The suit properties originally belonged to one Gopal Muthuraja. On 29.10.1955, he and his wife Velayi Ammal executed Ex.A.1 Will in favour of their children. “B” schedule in the said Will was allotted in favour of Sivalinga Muthuraja (father of the plaintiff and the first defendant). Sivalingam died intestate on 05.03.1989. He was survived by five legal heirs. The plaintiff being one of them is entitled to 1/5th share. The only way by which her claim could have been negated was to establish that she had been ousted. This can be done only by convincing evidence. It is only her brother(D1) who could have led evidence. Admittedly, D1 is a co-owner. The Hon'ble Supreme Court in the decision reported in **(2009) 15 SCC 747 (Jai Singh V. Gurmej Singh)** held as follows:-

“ 7. The principles relating to the inter-se rights and liabilities of co- sharers are as follows:

(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to



WEB COPY



ouster as the possession of one is deemed to be on behalf of all.

(4) 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.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to disturb the arrangement without the consent of others except by filing a suit for partition.”

On the side of the first defendant, his wife Amsavalli was examined. Ex.B.1 to Ex.B.6 were marked. Ex.B.1 to Ex.B.4 are only kist receipts in the name of Rengaraju. There is nothing unusual about this. The plaintiff



could not have known that Rengaraju had taken kist receipts in his name.

This by itself will not constitute ouster. There is no explanation for the first defendant in not entering the witness box. Adverse notice was rightly taken of his non-examination. The first substantial question of law is answered against the appellant. Even though the trial Court did not frame any specific issue regarding ouster, the appellant cannot be said to have suffered any prejudice as a result. Having taken the plea that he is the absolute owner of the property, the appellant cannot blame the trial Court for framing the issues accordingly. In any event, in view of the authoritative ruling of the Hon'ble Supreme Court as mentioned above, the appellant has no case whatsoever against his own sister. The Courts below have correctly approached the issues. The second and third substantial questions of law are also answered against the appellant.

6. It is true that alienations appear to have been made in respect of two items under Ex.B.5 and Ex.B.6. The alienees have not been made parties. That was probably because in the written statement, the details have not been spelt out. Ex.B.5 and Ex.B.6 have been marked through D.W.2 who was not a party to the documents. What impact the rights of the alienees would suffer can be decided during execution proceedings.



The judgments and decrees passed by the Courts below are confirmed.

The second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

26.08.2021

Index : Yes / No
Internet : Yes/ No
kmm / pmu

To:

1. The Principal Subordinate Judge, Tiruchirapalli.
2. The III Additional District Judge, Trichirapalli.

Copy to:

The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



G.R.SWAMINATHAN, J.

Kmm / pmu

S.A.(MD)No.118 of 2014

26.08.2021