



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.08.2022

Pronounced on : 01.09.2022

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A.No. 1039 of 1996

1. Lakshmi
2. Papayee
3. Nallammal
4. Padmavathi
5. Madheshwari ... Defendants 3 to 7/Respondents 3 to 7/Appellants 3 to 7

Vs.

1. Chellayee (died)
2. Saraswathi ... Plaintiffs/Appellants/Respondents

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree dated 16.04.1992 and made in A.S.No. 78 of 1991 on the file of the Sub Court, Sankari, reversing the Judgment and Decree dated 08.03.1991 and made in O.S.No. 266 of 1984 on the file of the District Munsif Court,



Tiruvhengode.

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For Appellants : Ms. Hema Sampath
Senior Counsel
for Mr. K.Sasindaran

For 2nd Respondent : Mr. Ishtiaq Ahmed

JUDGMENT

The third to seventh defendants in O.S.No. 266 of 1984 on the file of the District Munsif Court, Tiruchengode, are the appellants herein.

2. The suit in O.S.No. 266 of 1984 had been filed by the respondents Sellayee and her daughter Saraswathi, seeking declaration of title and permanent injunction to protect possession with respect to the suit properties which had been described as 33 cents in S.No. 152/4, 0.05 cents in S.No. 152/5 and 0.74 cents in S.No. 157/2, all in Tiruchengode, Namakkal District.

3. By Judgment dated 08.03.1991, the suit was dismissed. The plaintiffs then filed A.S.No. 78 of 1991 before the Sub Court, Sankari.



By Judgment dated 16.04.1992, the appeal suit was allowed and the Judgment of the trial Court was set aside and the suit was decreed. This necessitated the third to seventh defendants to file the present Second Appeal. It must be mentioned that the first and second defendants had died even during the pendency of the suit.

4. During the pendency of the present Appeal, the first respondent died and the second respondent was recognized as a legal heir. The Second Appeal had been admitted on the following two substantial questions of law:-

“a) Whether the Lower Appellate Court erred in law and misdirected itself in assuming that the defendants are not in possession of the suit properties after having held that no valid title had been conveyed by the defendants under Exs. A-3 and A-4?; and

b) Whether the alleged deeds of sale, Exs. A-3 and A-4, would constitute ouster of title against the defendants and whether the



burden is on the defendants to establish that they have been in possession of the suit properties within 12 years from the date of institution of the suit?”

O.S.No. 266 of 1984 [District Munsif Court, Tiruchengode]:

5. The suit had been filed by the widow of Shanmugha Goundar and her daughter against the widow of Nallaiya Goundar and his other legal heirs claiming title on the ground that the suit properties had been purchased by Shanmugha Goundar by sale deed dated 27.04.1955 from Chellappa Goundar, who in turn had purchased the suit schedule properties by registered sale deed dated 02.12.1954 from Subbaraya Goundar. Further claiming that from the date of purchase, Shanmugha Goundar was in possession of the properties and that after his death, patta had been transferred to the name of the first plaintiff and that the defendants tried to dispossess her, the suit had been filed seeking declaration of title and for permanent injunction restraining the defendants from interfering with peaceful possession.

6. In the written statement filed by the first defendant, which was



adopted by the other defendants, the claim of the plaintiffs that the suit property had been purchased by Shanmugha Goundar by a valid sale deed and that his vendor had purchased from Subbaraya Goundar by a valid sale deed were both denied and disputed.

7. It was claimed that both the sale deeds were sham documents. It was claimed that Subbaraya Goundar has no right or title to convey the suit properties to Chellappa Goundar and therefore, the purchase by Shanmugha Goundar was not valid. It was further claimed that the husband of the first defendant Nallaiya Goundar and the husband of the first plaintiff Shanmugha Goundar were both brothers. Their father was Subbaraya Goundar. It was claimed that the suit properties were joint family properties. Subsequently, a partition deed had been entered into between Nallaiya Goundar and Shanmugha Goundar and the suit properties were held over to be used in common by both of them. It was therefore stated that Subbaraya Goundar, the father had no right or title to execute a sale deed with respect to the suit properties and it was therefore stated that the plaintiffs claim for exclusive title has to be rejected by the Court. It was also claimed that the defendants were in



joint possession of the suit property. It was therefore stated that the suit should be dismissed.

8. On the basis of the above pleadings, the District Munsif, Tiruchengode framing necessary issues particularly whether Subbaraya Goundar had right and title to execute necessary sale deed with respect to the suit properties and whether the partition deed dated 04.09.1942 would bind Subbaraya Goundar and whether such partition deed would be a bar for the plaintiffs to claim exclusive title.

9. During trial, the second plaintiff Saraswathi was examined as PW-1 and one independent witness was examined as PW-2. The third defendant Lakshmi was examined as DW-1.

10. The plaintiffs marked Exs. A-1 to A-11. Ex.A-3 was the sale deed dated 02.12.1954 executed by Subbaraya Goundar to Chellappa Goundar and Ex.A-4 was the sale deed dated 27.04.1955 executed by Chellappa Goundar to Shanmugha Goundar. The defendants marked Exs. B-1 to B-4. Ex.B-1 was the partition deed dated 04.09.1942.



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11. On the basis of the pleadings and the oral and documentary evidence, it was held that the plaintiffs had failed to prove that Subbaraya Goundar was holding the properties as absolute properties with right to encumber the same by way of sale. It was also found that he had not objected to the partition Ex.B-1 which was dated 04.09.1942 for the prescribed period of 12 years and it was therefore held that he had acquiesced to the partition deed. It was therefore held that Subbaraya Goundar could not have conveyed the properties in the first instance to Chellappa Goundar and therefore, it was held that the further conveyance of the properties by Chellappa Goundar to Shanmugha Goundar was invalid. It was also held that there was no evidence to hold that the plaintiffs were in exclusive possession of the suit properties. Holding so, the suit was dismissed.

A.S.No. 78 of 1991 [Sub Court, Sankari]:

12. The plaintiffs then filed the aforementioned Appeal Suit. The learned Sub Judge framed necessary points for determination particularly whether the partition deed dated 04.09.1942 / Ex.B-1 would bind



Subbaraya Goundar and whether Ex.A-3 and Ex.A-4 the sale deeds dated 02.12.1954 and 27.04.1955 were lawful and valid documents and if they are not lawful and valid documents whether the defendants can claim title to the properties after a period of 12 years.

13. Before the First Appellate Court, an application to produce additional evidence was also presented. The documents so presented was a certified field map of S.No. 157, a general power of attorney dated 25.04.1984 and certified copies of chita. The First Appellate Court did not permit production of such documents.

14. Thereafter, on the basis of the available evidence, it was found that Ex.B-1 the partition deed had been executed in the year 1942 and had not been objected by Subbaraya Goundar, the father. It was also found that under the partition deed, the suit properties were agreed to be held in common and the other properties had been sold after division. It was finally held that Ex.B-1 is a valid partition deed and the document was upheld. It was also found that the said deed was binding on Subbaraya Goundar. It was also found that the said partition deed was



between the husband of the first plaintiff and the husband of the first defendant.

15. Thereafter, the two sale deeds were taken up for consideration and it was found that since the partition deed was binding on Subbaraya Goundar, he had no authority to sell the lands by Ex.A-3, dated 02.12.1954. It was therefore held that the said sale deed was not a lawfully executed the document. It was however found that both the documents, Exs. A-3 and A-4 would bind the respondents in the Appeal.

16. It was then again observed that Subbaraya Goundar had no right to sell the properties.

17. It was thereafter specifically found that Ex.A-3 document was not lawful and not valid. However, it was found that the plaintiffs / the husband of the first plaintiff had been in continuous possession and therefore, it was be presumed that the defendants had been ousted from possession and in view of that particular presumption, it was held that the appellants/plaintiffs were entitled for declaration of title and consequential



injunction. The Appeal Suit was therefore allowed and the Judgment of the trial Court was set aside.

S.A.No. 1039 of 1996:

18. The Second Appeal had been admitted on the following two substantial questions of law:-

“a) Whether the Lower Appellate Court erred in law and misdirected itself in assuming that the defendants are not in possession of the suit properties after having held that no valid title had been conveyed by the defendants under Exs. A-3 and A-4?; and

b) Whether the alleged deeds of sale, Exs. A-3 and A-4, would constitute ouster of title against the defendants and whether the burden is on the defendants to establish that they have been in possession of the suit properties within 12 years from the date of institution of the suit?”



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19. The first substantial question of law is with respect to the reasoning of the Lower Appellate Court that the defendants were not in possession, though it was held that valid title had not been conveyed under the two sale deeds Ex.A-3 and A-4. The second substantial question of law is whether such sale deed would constitute ouster of title and whether the First Appellate Court was correct in shifting the burden to the defendants to prove that they were in possession of the suit properties.

20. Heard arguments advanced by Ms. Hema Sampath, learned Senior Counsel for Mr.K.Sasindaran, learned counsel appearing on behalf of the appellants and Mr. Ishtiaq Ahmed, learned counsel appearing for the second respondent.

21. The facts in the case revolves around land holdings by one family and whether it was divided or whether one branch can claim exclusive title to the said properties.



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22. The suit schedule properties, namely, S.No. 152/4, 0.05 cents in S.No. 152/5 and 0.74 cents in S.No. 157/2, all in Tiruchengode, Namakkal District, were ancestral properties of the joint family consisting of Subbaraya Goundar and his two sons Shanmugha Goundar and Nallaiya Goundar. Under Ex.B-1 dated 04.09.1942, the two sons Nallaiya Goundar and Shanmugha Goundar had entered into a partition with respect to the properties. The suit schedule properties were kept in common. The other properties were apparently divided and also dealt with by them.

23. One argument which had been raised is whether this partition deed, in the absence of participation of the father Subbaraya Goundar could be a valid document.

24. A reading of Ex.B-1 shows that the brothers had taken the suit schedule property in common but at the same time had agreed to discharge existing liabilities and debts of the father, Subbaraya Goundar, namely, a promissory note for Rs.450/- executed on 17.04.1942, promissory note for Rs.100/-, another promissory note for Rs.60/-, yet



another promissory note for Rs.450/-. In the year 1942, these amounts had substantial value and discharge of all these debts can be reasonably taken as relieving the father Subbaraya Goundar from his liabilities and also as a direct way of providing him with security and screening him away from action on the promissory notes. Thereafter, each one of the suit schedule items had been discussed. With respect to the first item, the lands with the house was discussed. With respect to the second item, the wall was discussed and it was finally covenanted that in all the three items, which had been given in the suit schedule, the parties would take “பொதுவில் பேர் பாதி” which would mean one half for each one of the two brothers in the properties held in common.

25. I would therefore hold that on and from the date of the partition deed, Ex.B-1, Subbaraya Goundar had lost his right and title over the properties but had gained by being relieved all his existing debts which he had incurred and also from the promissory notes, which he had executed.



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26. Both the Courts below had returned a concurrent finding that Ex.B-1 was binding on Subbaraya Goundar. This naturally led to conclusion that the sale deed executed by him under Ex.A-3 and the subsequent sale deed executed by his purchaser Chellappa Goundar under Ex.A-4 were both sham documents. The concurrent findings are correct. I therefore hold that in the absence of any cross appeal filed by the plaintiffs as against these findings, which are damaging, I shall not interfere with the concurrent findings on facts.

27. Order XLI Rule 22 of the Civil Procedure Code reads as follows:-

“22. Upon hearing respondent may object to decree as if he had preferred a separate Appeal.

(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court



below in respect of any issue ought to have been in his favour;

and may also take any cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

Explanation-

A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.



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(2)

(3)

(4)

(5) ”

28. The First Appellate Court had allowed the Appeal suit and decreed the suit by holding that the defendants have not proved that they were in possession of the properties.

29. This reasoning of the First Appellate Court is not correct.

30. In *Neelavathi V. N.Natarajan [(1980) 2 SCC 247 at page 252]*, it had been held by the Hon'ble Supreme Court, albeit while examining Section 37 of the Tamil Nadu Court Fees and Suits Valuation Act and while examining whether in a suit for partition, the defendants/co-owner could be considered to be in possession of the property, held as follows:-



“37. The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless he is excluded from such possession. ”

31. In *T. Lakshmipathi v. P. Nithyananda Reddy*, (2003) 5 SCC

150, the Hon'ble Supreme Court had held as follows:-

“....The law as to co-owners is well settled. Where any property is held by several co-owners, each co-owner has interest in every inch of the common property, but his interest is qualified



*and limited by similar interest of the other co-owners. One co-owner cannot take exclusive possession of the property nor commit an act of waste, ouster or illegitimate use, and if he does so he may be restrained by an injunction. A co-owner may, by an arrangement, express or implied, with his other co-owners, possess and enjoy any property exclusively. Such a co-owner can also protect his possession against the other co-owners and if he is dispossessed by the latter, he can recover exclusive possession. (See **Jahuri Sah v. Dwarika Prasad Jhunjunwala** [AIR 1967 SC 109 : 1966 Supp SCR 280])* “

32. The law is thus clear. The co-owner is deemed to be in possession and in the instant case under Ex.B-1 both the brothers had agreed to hold the suit properties in common in equal shares. The finding of the First Appellate Court is also disturbing because there is no pleading on evidence of the defendants and no evidence has also been let in by the plaintiffs on adverse possession or even ouster. I hold that therefore, the Judgment of the First Appellate Court will necessarily have to be interfered with.



33. The first substantial question of law is whether the First Appellate Court had misdirected itself in assuming that the defendants were not in possession. The findings above would clearly show that such an assumption can never be and should never have been returned by the First Appellate Court. The issue of possession was never put to test by either party. I answer the first substantial question of law holding that the First Appellate Court did infact misdirect itself in holding in the defendants were not in possession.

34. The second substantial question of law is whether Exs.A-3 and A-4 would constitute ouster of title. When the First Appellate Court had held that Ex.B-1 is a document lawfully entered into and binding on the father Subbaraya Goundar and had, as a consequent also held that Exs. A-3 and A-4 are not valid documents, then the issue whether the defendants were in possession for 12 years or not pales into insignificance and that issue should never have crossed the minds of the First Appellate Court. The second substantial question of law is answered



that again the First Appellate Court had erred in shifting the burden to the defendants to establish possession. If the relationships between the families of the two brothers are still strained, the only option is for either of them to institute a suit for partition to divide the properties.

35. In view of the above reasonings, I have no hesitation in setting aside the Judgment and Decree of the Sub Court, Sankari in A.S.No. 78 of 1991 dated 16.04.1992 and in restoring the Judgment and Decree of the District Munsif Court, Tiruchengode, in O.S.No. 266 of 1984 dated 08.03.1991. The Second Appeal stands allowed, however in the circumstances and more particularly in view of the relationships among the parties, without costs.

01.09.2022

Index :Yes/No
Internet:Yes/No
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To

1. District Munsif Court, Tiruchengode.
2. Sub Court, Sankari.



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C.V.KARTHIKEYAN, J.

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**Pre-Delivery Judgment made in
S.A.No. 1039 of 1996**

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