



A.S.No.937 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

WEB COPY

Reserved on : 08.02.2022

Pronounced on : 28.02.2022

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Appeal Suit No.937 of 2008

M.Sukumar,

... Appellant

/versus/

1. Mani Achari
2. Selvaraj
3. Mrs.Revathi
4. Miss. Renuka
5. Minor Manjula
6. Minor Pandian

5 & 6 Rep. by their father and natural guardian 2nd respondent/3rd defendant.
Respondent No.2 to 6 residing at
No.14, Perumal Koil Street,
Koyambedu, Chennai – 600 107.

... Respondents

Prayer:- This Appeal Suit is filed under Section 96 of the Code of Civil Procedure, to set aside the decree and judgment passed in O.S.No.5279 of 2004 dated 19.06.2008 on the file of VI Additional, City Civil Judge, Chennai, decree the suit as prayed for by the appellant/plaintiff.



A.S.No.937 of 2008

For Appellant : Mr.M.Arun Kumar, for
M/s.Sampath Kumar Associates

For R2 to R6 : Mr.D.Ashok Kumar

For R7 : Mr.S.William

For R8 : M/s.Pass Associates

For R1 : No appearance

J U D G M E N T

The appellant herein is the plaintiff in the suit. Being aggrieved by the dismissal of his suit, the present appeal is filed.

2. The prayers sought in the suit are :- i). Declaration of his share in the suit schedule property. ii). Direction to divide the property into two halves and allot one half to the plaintiff and iii). Rendition of accounts by the defendants for the rental income derived from the suit property from 01/01/2004 till the date of plaint.

3. For the sake of convenience, parties are described as per their status and ranking found in the suit.



A.S.No.937 of 2008

The case of the plaintiff is that, the suit premises was purchased by one Choodamani Ammal under a registered sale deed dated 17/10/1950. She died intestate on 20/03/1959. Till her lifetime, she was in absolute possession and enjoyment of the suit property. Choodamani Ammal had two children namely Shyamala and Mani Achari. They are the first and second defendant respectively in the suit. On the demise of Choodamani Ammal, the suit property came to the hands of her two children. They as co-owners took possession of the property and were in enjoyment of the property jointly. In the year 1994, they demolished the old construction and put up new construction and continued their enjoyment jointly. While so, Mani Achari, the second defendant on 07/01/2004 sold his undivided share in the suit property to the plaintiff and thus, the plaintiff has become the co-sharer of the suit property.

4. On purchase of the half share in the property, the plaintiff sent a letter dated 07/01/2004 to the first defendant Shyamala intimating the purchase of undivided half share in the suit property and requested her to concur for the division of the property amicably. The first defendant refused for division and caused reply notice dated 07/02/2004. After causing a re-joinder dated 16/02/2004 to the first defendant and receipt of reply dated 30/03/2004 from



A.S.No.937 of 2008

him, the suit is filed for the division of the property and allot half share in the suit property. Also to render accounts for the rent collected from the suit property.

5. Pending suit, Shyamala the first defendant died and her LR's were brought on record as defendants 3 to 7. The 8th defendant, who purchased part of the suit land from Shyamala and the 9th defendant, who advanced loan on the suit land were impleaded subsequently.

6. The case of the first defendant, who died pending suit is that, she and the second defendant are sister and brother. Their mother Choodamani Ammal married one Lakshmanachari and they residing at Pammal. During the lifetime of Choodamani ammal, her mother Thayar ammal acquired the suit land in the year 1950. When Choodamani ammal died in the year 1959, the first defendant was 1½ years old infant. Hence, her grandmother Thayarammal took her to Koyembedu and she was brought up by her grand mother Thayarammal at Koyembedu. Whereas, her brother Mani Achari, the second defendant and her father Lakshmanachari continued to live at Pammal and severed all relationship with them. On the death of Choodamani ammal, the



A.S.No.937 of 2008

suit property came into possession of this defendant and ever since, she is in occupation and enjoyment of the property absolutely. She with the assistance of her husband Selvaraj demolished the old structure and put up a new construction on the suit land in the year 1994. The revenue records stands in her name and property tax revised and levied as per the new construction and collected from her. Her brother the second defendant ceased to have any connection and not been heard till 2002. The property being a Grama natham and being in continuous occupation and enjoyment of it, she alone is the absolute owner of the land and the building constructed by her. The second defendant, who was never residing in the suit property and a resident of Pammal, cannot have any claim over the suit property. Therefore, the alleged sale by the second defendant in favour of the plaintiff the undivided half share of a dwelling house without any prior division by metes and bounds that too without any reference to the first defendant, who is in occupation and paying tax for the property is nothing but a collusive document to deprive the right of the first defendant.

7. The 8th defendant had purchased totally (490+168+112) 770sq.ft of land from the first defendant under three different sale deeds dated



A.S.No.937 of 2008

22/10/1999, 27/1/2000 and 30/09/2005 respectively. He, in his written statement had contended that, he is not aware of the exchange of notices between the parties. He, on purchase of the land as stated above from the first defendant had put up construction investing Rs.5,50,000/- at the time of construction none objected. Neither the second defendant nor the plaintiff had ever visited the suit property. He is not aware of the fact that his vendor have a brother or the transaction between her brother and the plaintiff. So, he reasonable believe the alleged sale deed through which the plaintiff claims share in the suit property is only sham and nominal. In any case, he being a bonafide purchaser for value in any event his right in the portion of the suit property should not be affected and must be protected.

8. The 9th defendant, who has advanced loan to the first defendant based on the mortgage of the suit property after scrutiny of i). The original sale deed dated 17/10/1950 in the name of Thayar Ammal, ii). Notice by Thasildar to Shyamala (first defendant) and iii). Property Tax receipt issued to Shyamala in his written statement contended that for default in repayment of loan, this defendant took steps to bring the suit property for auction. To deprive this defendant from realising the loan by auctioning the property, the suit is filed



A.S.No.937 of 2008

collusively. The plaintiff, who is not the legal owner of the property, the suit is to be dismissed.

9. The Trial Court on the above pleadings framed issues and on considering the evidence placed by the parties, held that the second defendant, who is the vendor of the plaintiff had not proved his joint possession or he was residing in the suit property before or after the demise of his mother in the year 1959. The plaintiff failed to prove the passing of consideration for the sale transaction Ex.A-2. The second defendant the vendor of the plaintiff mounted the witness box and examined as PW-2 (Mani Achari) to support the case of the plaintiff but had admitted that he is settled at Pammal and not staying in the suit property. To prove the joint enjoyment, P.W-2 had not produced any evidence contrarily to prove her exclusive possession, the first defendant had filed numerous documents like Ration card, Property Tax, demand notice, tax receipt notice Electricity service connection, water and sewage connection records and Election Voter ID card all to show her possession of the suit property. Hence, the trial Court has dismissed the suit with costs.



A.S.No.937 of 2008

10. The Trial Court judgment and decree is assailed in this appeal

on the ground that the Trial Court has completely ignored the basic law on possession. Despite settled principal of law that possession of one co-owner is to be considered as possession of all co-owners. When the vendor has not raised any dispute regarding passing of consideration and positively admits the receipt of consideration from the plaintiff, it is unwarranted for the Trial Court to comment on passing of consideration mentioned in Original sale deed (Ex.A.2) .

11. The creation of mortgage or sale deed by the first defendant claiming absolute ownership will not confer title over the entire property and no right will flow to the mortgagee or the purchasers when the mortgagor/vendor had no title over the property. However, the Trial Court has erred in ignoring the law had relied on the self serving documents of the first defendant executed to create mortgage in favour of 9th defendant and sale deeds executed in favour of 8th defendant. Further, though revenue records are not document of title and mutation of entries in the revenue documents will not confer title, the Trial Court has relied the revenue records and mutation of records in the name of the first defendant to hold that she is the absolute owner



A.S.No.937 of 2008

of the property and the second defendant have no share in the property though admittedly the property belongs to deceased mother of the first and second defendants.

Point for determination:-

Whether the long and exclusive physical possession of the suit property by the first defendant will extinguish the right of the second defendant in the suit property ?

12. Before the Trial Court, the plaintiff has examined two witnesses. P.W-2 is the second defendant and he is the vendor of the plaintiff. Only through him the plaintiff claims title and share in the suit property. Seven documents were marked as Ex.A-1 to Ex.A-7. On the side of defence, Four witnesses and 46 exhibits marked. D.W-1 is the 3rd defendant is the husband of the first defendant and he was brought on record after the demise of the first defendant.

13. The admitted facts by the parties and also substantiated by oral and documentary evidence is that the property was purchased by Choodamani



A.S.No.937 of 2008

ammal on 17.10.1950 through sale deed marked as Ex.A-1. Choodamani died intestate on 20.03.1959 and her son (second defendant) and daughter (first defendant) were the surviving class1 legal heirs.

14. In the plaint, it is specifically averred that the suit property came into possession of the defendants 1 and 2 after the demise of Choodamani ammal and jointly enjoyed by them. In the written statement of the first defendant, it is averred in the year 1959 when Choodamani ammal died, the first defendant was 1 ½ years old infant. There is no denial to this assertion.

15. While in the plaint it is specifically averred that in the year 1994 the old building was demolished and new construction was put up jointly by the defendants 1 and 2, conspicuously there is no documentary evidence to substantiate the said assertion. Particularly, when the first defendant has specifically denied the said assertion and has pleaded that the new structure was put up by her with the assistance of her husband Selvaraj (later impleaded as 3rd defendant and mounted the witness box and got examined as D.W-1). The omission to produce proof for construction of the building jointly in the year 1994 is fatal to the case of the plaintiff because, the suit is for land and



A.S.No.937 of 2008

superstructure on the premise that it is jointly owned by the defendants and from the second defendant the half share transferred to the plaintiff on 07/01/2004 through sale deed marked as Ex.A-2. Neither for construction of the superstructure jointly or for any animus of joint possession proof produced by the plaintiff or his vendor. That apart, from the evidence, it is proved not only the construction of the building by the first defendant alone in the year 1994, it is also proved that the first defendant has treated the property as her exclusive property ousting her brother and same within his knowledge and sold part of the suit property to the 8th defendant in the year 1998, 2000 and 2005. The 8th defendant on his first purchase of 490 sq.ft had immediately put up construction on this land and further constructions subsequently after purchasing 168 sq.ft on 27/12/2000 and 30/09/2005. As contended by the 8th defendant, there was no objection from the plaintiff's vendor i.e., the second defendant when there transaction took place and construction made by 8th defendant.

16. It is also to be noted that it is pleaded by the plaintiff that his vendor was persuading and demanding partition of the suit property by metes and bounds into two shares and for allotment of his half shares. Since the first



A.S.No.937 of 2008

defendant did not co-operate the second defendant had sold his half share to the plaintiff by registered sale deed dated 07/01/2004 (Ex.A-2). To believe this plea, the plaintiff should have placed evidence to show the second defendant claimed half share and persuaded the first defendant for partition. But, nothing on record to show that before 07/01/2004 there was claim by the second defendant over the suit property or he persuaded the first defendant for partition. In the said context, the admission of the second defendant in the witness box that he never resides in the suit property and he was residing at Pammal all along his life gains significance.

17. There can be no dispute regarding the preposition of law that possession of co-owner is possession of all. The catena of judgments cited by the appellant counsel well buttress this preposition. However, when any of the co-sharer has consciously lost his animus over the possession of the property and such relinquishment is manifested in his conduct, the principal of ouster, acquiescence and extinguishment of right has to be applied. In ***Mohd. Zainulabudeen (since deceased) by LRs –vs- Sayed Ahmed Mohideen and others reported in 1990 (1) SCC 345***, the Hon'ble Supreme Court had clarified this preposition as under:-



WEB COPY



A.S.No.937 of 2008

“Where one co-heir pleads adverse possession against the another co-heir then it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. The possession of one one co-heir is considered in law, as possession of all the co-heirs. The co-heir in possession cannot render his possession in adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co heir’s title. Thus it is settled rule of law as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to construe ouster.”

18. In the instant case, the suit property held by Choodamani ammal till 1959 admittedly was in physical possession and occupation of the first defendant. In the year 1994, the house tax receipts, demand notice and EB service connection in the absence of any other contra evidence indicates that the superstructure which stood on the land was demolished and reconstructed by the first defendant and not by the vendor of the plaintiff. The suit presented on 16/07/2004 after causing pre suit notice on 07/01/2004 (Ex.A-3) immediately after purchase of the share in the suit property under Ex.A-2 from



A.S.No.937 of 2008

the second defendant. Between 1994 to 2004 for nearly 20 years, though the physical feature of the property changed on several occasion either by additional structure or alienations the vendor of the plaintiff had been a mute spectator without any protest and his conduct is proof for relinquishment of right. The first defendant has asserted her hostile title coupled with exclusive possession which was open, continuous and within the knowledge of the plaintiff's vendor. Therefore, on combined reading of Article 65 in the Schedule of the Limitation Act and Section 27 of the Limitation Act and the documents relied by the defendants marked in 'B' series establishes that the plaintiff's vendor had no alienable right over the suit property as on 07/01/2004 when he executed the sale deed Ex.A-2 in favour of the plaintiff and therefore, the conclusion of the Trial Court dismissing the suit is terms of law and facts.

19. As the result, the Appeal Suit is dismissed with costs.

28.02.2022

Index :Yes/No.
Internet :Yes.
Speaking order/Non-speaking order
bsm



A.S.No.937 of 2008

To,

1. The VI Additional, City Civil Judge, Chennai.
2. The Section Officer, V.R. Section, High Court, Madras.



WEB COPY



A.S.No.937 of 2008

Dr.G.JAYACHANDRAN,J.

bsm

Pre-delivery judgment in
Appeal Suit No.937 of 2008

28.02.2022