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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.04.2022

CORAM

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.NO.1784 OF 2002

AND

C.M.P.NO.15156 OF 2002

1.Patchamuthu (died)

(Memo dated 03.10.2018) is recorded
as per Order dated 14.12.2018

2.Perumal

3.Ramasamy

4.Poovayee

5.Anjali

6.Ponnammal

7.P.Poomalai

8.P.Ramar

9.P.Venkatesan

10.Vennila

...Appellants / Defendants

Appellants 7 to 10 brought on record as LRS of the
deceased 1st appellant viz, Patchamuthu vide court
order dated 03.01.2022 made in CMP No.14174/2021.

Vs.

1.Patchayammal (deceased)

2.Poochi @ Pappammal

3.Alagappa Konar

4.Kuruvammal

5.Sakkubai

6.Devagi

7.Lakshmi

8.Srinivasan

...Respondents

Prayer : Second Appeal filed under Section 100 CPC, 1908 against
the decree and judgment dated 21.06.2002 passed in A.S. No.40
of 2001, on the file of the Additional District Judge cum Chief
Judicial Magistrate, Perambalur, upholding the decree and
judgment dated 21.04.1994 passed in O.S. No.256 of 1981, on the
file of the District Munsif Court, Perambalur.



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For Appellants : Mr.R.Selvakumar
For Respondents 2 & 3 : Mr.P.Dinesh Kumar
for M/s.Sarvabhauman Associates
For Respondents 4 to 8 : No Appearance

JUDGMENT

The appellants are the legal heirs of Ponnusamy Konar, the first defendant in O.S. No.256/1981 on the file of the District Munsif, Perambalur. During the pendency of the present second appeal, Patchamuthu Konar, one of the legal heirs of the Ponnusamy Konar, died and his legal heirs were impleaded as appellants 7 to 10. The first respondent Patchayammal (since deceased) was impleaded as the second plaintiff after the death of Ramasamy Konar, the plaintiff in the suit in O.S. No.256/1981. The third defendant in the said suit is also one of the legal heirs of Ramasamy Konar. The suit was filed by the plaintiff for partition of the suit properties into two equal shares and to allot one such share to him and for future mesne profits.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present appeal would also be indicated.

3. The case of the plaintiff in nutshell is as follows:

The plaintiff is lacking the sense of hearing and ability to speak. The suit properties are the ancestral properties of the plaintiff and the first defendant. The plaintiff executed a settlement deed dated 28.08.1959 (Ex.A6) in favour of his daughter and son-in-law (defendants 3 and 4) in respect of his undivided half share in the suit properties, who in turn sold the same in favour of the fifth defendant. The first defendant filed a suit in O.S. No.191/1961 before the District Munsif, Thuraiyur, against the fifth defendant for a declaration that the settlement deed executed by the plaintiff and the sale deeds executed by the defendants 3 and 4 based on the settlement deed in favour of the fifth defendant are null and void. The said suit was subsequently transferred to the court of District Munsif, Ariyalur, and renumbered as O. S. No.512/1962. In that suit, the first defendant, as the plaintiff contended that there was a partition in the family during the year 1948 pursuant to which the suit properties mentioned in the said suit were allotted to his share. Though the said suit was decreed in favour of the plaintiff (first defendant in the present suit), the plea of earlier partition was not accepted by the court and therefore, he cannot once again take the same plea in the present suit since it is barred under the principles of res judicata. Though the plaintiff



demanded the first defendant to effect a partition of the ancestral properties, he did not evince any interest. However, the first defendant, subsequent to the decision in O.S. No.512/1962 (Ex.A4) executed a sale deed in favour of the second defendant in respect of some of the family properties. Hence, the first plaintiff filed the suit for partition.

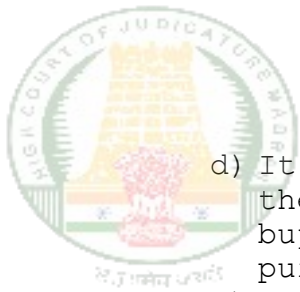
4. The suit was resisted by the first defendant on the following grounds:

- 1) The suit properties are not joint family properties.
- 2) There was a partition in the family of the plaintiff and first defendant during the year 1948 from which onwards, the plaintiff and the first defendant are living separately.
- 3) The suit is also barred by limitation.
- 4) The father of the plaintiff and the first defendant was owning 1.41 acres in Survey No.617/2A2 and this property was allotted to the first defendant. Subsequently, the first defendant purchased the remaining extent of 1.81 acres in the same Survey number from one Kandasamy Pillai.
- 5) The first defendant sold the entire extent in Survey No.617/2A2 in favour of the second defendant through a registered sale deed dated 01.09.1967 (Ex.B8). However, the plaintiff executed a settlement deed in favour of the defendants 3 and 4 in respect of this property.
- 6) In fact, the defendants 3 and 4 are in possession of the properties allotted to the share of the plaintiff and thus the settlement deed (Ex.A6) is valid only to that extent.
- 7) The first defendant had also prescribed title by way of adverse possession and prescription.

Thus the plaintiff cannot file a suit for partition.

5. The trial court after framing necessary issues and after full contest, decreed the suit in favour of the plaintiff vide its decree and judgment dated 21.04.1994. The appeal filed by the first defendant also failed. Both the courts concurrently held that

- a) The sale deed Ex.B8 was executed by the first defendant in favour of the second defendant much later after passing of decree in O.S.No.512/1962 (Ex.A4).
- b) The first defendant did not produce any evidence in O.S.No.512/1962 to prove the alleged oral partition that took place in the year 1948.
- c) The first defendant was only acting as a karta in the Hindu Undivided Family as the plaintiff is lacking the sense of hearing and ability to speak. In the circumstances, merely because the patta stands in the name of the first defendant, it cannot be held that the first defendant is in exclusive possession and enjoyment of the suit properties. Moreover, the plaintiff had also paid kist for the suit properties.



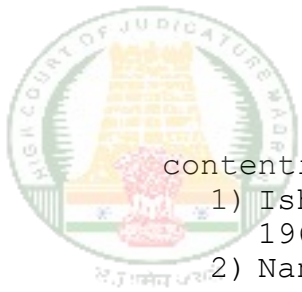
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- d) It is evident from the oral and documentary evidence that the income from the joint family properties were surplus to buy other properties and thus the first defendant had purchased 1.81 acres in Survey No.617/2A2.
- e) No evidence was adduced by the first defendant that he purchased 1.81 acres in Survey Number 617/2A2 from out of his own income.
- f) The first defendant failed to prove his exclusive title over the suit properties by adducing acceptable evidence.
- g) The first defendant also did not challenge the decree and judgment passed in O.S. No.512/1962 and it has become final and hence the present suit is barred by the principles of res judicata as the factual matrix of the present case was the subject matter of the earlier suit in O.S. No.512/1962.
- h) There is no document to show that there was a partition subsequent to the passing of decree in O.S. No.512/1962.
- i) The first defendant had executed a sale deed Ex.B8 in favour of the second defendant without the knowledge of the first plaintiff and hence the said sale deed is not valid. The suit for partition is also not barred by limitation.
- j) The first defendant did not prove that he perfected his title in respect of the suit properties by way of adverse possession and prescription.

6. At the time of admission, the following substantial questions of law were framed:

- i. Whether the courts below are right in accepting the evidence of the third defendant, who was set ex parte and was examined on the side of the plaintiff, without any orders for transposition? Is not proving of pleadings and documents by the plaintiff, through D3, illegal?
- ii. Whether the courts below are right in holding that the judgment and decree in O.S. No.512 of 1962 would operate as res judicata, though:
 - a) the parties are not same,
 - b) the properties are not different and
 - c) when there is no issue as such in O.S. No.512 of 1962 as to whether the properties are divided or undivided properties?

7. Mr. R. Selvakumar, learned counsel for the appellants contended that the entire findings by both the courts below revolved around the decree and judgment passed in O.S. No.512/1962, in which the plaintiff was not at all a party and the present suit properties were not shown as suit properties in that suit. His further contention is that a part of item No.4 in the present suit alone was shown as the suit property in O.S. No.512/1962. According to him, the sale deed executed in favour of the second defendant subsequent to the passing of decree in O.S.No.512/1962 would not operate as res judicata. He relies on the following decisions to substantiate his



contentions in this regard.

- 1) Isher Singh vs. Sarwan Singh and others reported in AIR 1965 SC 948.
- 2) Nand Ram (dead) through legal representative and others vs. Jagdish Prasad (dead) through legal representatives reported in (2020) 9 Supreme Court Cases 393
- 3) Syed Mohd. Salie Labbai (dead) by Lrs and others vs. Mohd. Hanifa (dead) by Lrs and others reported in (1976) 4 Supreme Court Cases 780.

It is also his contention that the third defendant, who remained absent and was set ex parte before the trial court was examined on the side of the plaintiff and such a procedure adopted by the trial court cannot be accepted since the third defendant was not transposed as one of the plaintiffs.

8. Per contra Mr. P. Dinesh Kumar, learned counsel for the respondents contended that both the courts below properly appreciated the evidence adduced on both sides and concurrently held that the plaintiff is entitled to half share in the suit properties. According to him, there is no substantial question of law involved in the present second appeal.

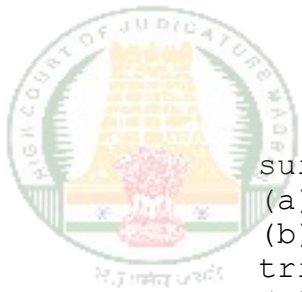
9. It is admitted that the plaintiff and the first defendant are brothers and the suit properties are their ancestral properties. Though the first defendant contended that he purchased 1.81 acres of land in Survey No.617/2A2 from out of his funds, both the courts below concurrently held that the first defendant did not prove the same by adducing acceptable evidence especially when it is admitted that there was surplus income from the joint family properties and that the first defendant acted as a karta since the first plaintiff was physically challenged. It was also observed that mere grant of patta in the name of the first defendant alone could not be sufficient to hold that the first defendant was in exclusive possession of the suit properties. All the observations of both the courts below are based on factual aspects of the case. They have considered the oral and documentary evidence adduced on both sides in a systematic manner.

10. The main contention of the learned counsel for the appellants is that the present suit is not barred under principles of res judicata since

- A) the present plaintiffs were not parties to the earlier suit in O.S.No.512/1962.
- B) The oral partition claimed by the first defendant was decided only incidentally.

11. In the decision in Isher Singh vs. Sarwan Singh and others (cited supra), it has been held thus:

"14. We thus reach the position that in the former



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suit the heirship of the respondents to Jati deceased
(a) was in terms raised by the pleadings,
(b) that an issue was framed in regard to it by the trial Judge,
(c) that evidence was led by the parties on that point directed towards this issue,
(d) a finding was recorded on it by the appellate court, and
(e) that on the proper construction of the pleadings it would have been necessary to decide the issue in order to properly and completely decide all the points arising in the case to grant relief to the plaintiff. We thus find that every one of the conditions necessary to satisfy the test as to the applicability of Section 11, Civil Procedure Code is satisfied."

In the earlier suit in O.S. No.512/1962 the first defendant claimed that there was an oral partition during the year 1948 and that the suit properties fell to his share. It was also claimed that the sale deed (Ex.B12) executed by the defendants 3 and 4 in favour of the fifth defendant is null and void. Though the said suit was decreed, it was also observed that there was no partition in the family in the year 1948 as alleged by the first defendant and hence the transferee of an undivided share can only file a suit for partition. The third and fourth defendants derive title to the part of suit Item No.4 (suit property in O.S.No.512/1962) through a settlement deed (Ex.A6) executed by the first plaintiff in their favour. In such circumstances, the first defendant cannot once again take the same plea in the present suit as it would operate as res judicata in the present suit.

12. In the decision in Syed Mohd. Salie Labbai (dead) by Lrs and others vs. Mohd. Hanifa (dead) by Lrs and others it has been held thus:

"Before a plea of res judicata can be given effect, the following conditions must be proved:

- (1) that the litigating parties must be the same;
- (2) that the subject-matter of the suit also must be identical;
- (3) that the matter must be finally decided between the parties; and
- (4) that the suit must be decided by a court of competent jurisdiction.

The best method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suits, and then to find out as to what had been decided by the judgments which operate as res judicata."

In fact, all the above conditions are satisfied in the instant



case since the plaintiff and the first defendant own joint family properties and the third and fourth defendants executed a sale deed Ex.B12 in favour of the fifth defendant and this was challenged by the first defendant contending that there was a prior oral partition in the year 1948 in the family and this plea was negatived by the court in the earlier suit. Admittedly no appeal was filed by the first defendant and the same has become final.

13. It is also seen that the sale deed in favour of the second defendant was executed by the first defendant on 01.09.1967 when the decree in O.S. No.512/1962 was passed in the year 1962. It is also not the case of the first defendant that subsequent to the passing of decree in O.S. No.512/1962 there was a partition in the family.

14. Relying on the decision in Nand Ram (dead) through legal representative and others vs. Jagdish Prasad (dead) through legal representatives (cited supra), learned counsel for the appellants contended that when the matter was only "collaterally or incidentally" in issue and decided in an earlier proceeding, the finding thereon would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue. A decision of a competent court on a matter in issue may be res judicata in another proceeding between the same parties; the matter in issue may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent court is finally determined between the parties cannot be reopened between them in another proceeding. The partition of the year 1948 was the necessary issue for adjudicating the principal issue in O.S. No.512/1962 and was decided that there was no partition. In such circumstances it has to be treated as "directly and substantially in issue".

15. As observed in the suit in O.S. No.512/1962, the first plaintiff had filed the suit for partition and there is no limitation for filing the suit for partition especially when the properties remained as joint family properties. Both the courts below had analysed threadbare the entire evidence adduced on both sides and had come to a conclusion that the plaintiff is entitled for half share in the suit properties. All the observations of both the courts below are based on sound principles of law and cannot be termed as perverse by any stretch of imagination.

16. As far as the adverse possession is concerned, the defendants 1 and 2 cannot claim adverse possession over the suit properties as the second defendant claims that he became entitled to the suit property by way of the sale deed executed



by the first defendant in the year 1967. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor or on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. Where possession of the property could be referred to a lawful title, it will not be considered to be adverse. The reasons being that a person whose possession can be referred to a lawful title, will not be permitted to show that his possession was hostile to another's title.

17. The contention of the learned counsel for the appellants that the examination of the third defendant as a witness on the side of the plaintiff without transposing her as plaintiff is bad in law cannot be accepted for the simple reason that no law prohibits examination of a defendant on the side of the plaintiff in a civil case. For this purpose there need not be a transposition of the third defendant as a plaintiff.

18. In view of the reasons stated, I answer the substantial questions of law 1 and 2 against the appellants.

19. In the result,

- i. the second appeal is dismissed. No costs. Consequently connected Civil Miscellaneous Petition is also dismissed.
- ii. The decree and judgment dated 21.06.2002 passed in A.S. No.40 of 2001, on the file of the Additional District Judge cum Chief Judicial Magistrate, Perambalur, and the decree and judgment dated 21.04.1994 passed in O.S. No.256 of 1981, on the file of the District Munsif Court, Perambalur, are upheld.

Sd/-

Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

bga

To

1. The Additional District Judge
cum Chief Judicial Magistrate,
Perambalur.



2.The District Munsif,
Perambalur.

+1cc to M/s.P.Dinesh Kumar, Advocate Sr.No.26516

+1cc to M/s.R.Selva Kumar, Advocate Sr.No.26306

S.A.No.1784 of 2002

SSN(CO)
RVM(23/05/2022)