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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.03.2022

CORAM:

THE HONOURABLE Mr. JUSTICE S.S.SUNDAR

S.A. No.122 of 2022

and

C.M.P. No.2573 of 2022

Marakkal (died)

1. Palanisamy
2. Deivanai

.. Appellants

Vs.

Subbanmal (died)

1. Vellingiri
2. Devaraj
3. Mani

.. Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, 1908, against the decree and judgment dated 18.02.2021 passed in A.S. No.102 of 2017 by the learned IV Additional District & Sessions Judge, Coimbatore by confirming the decree and judgment dated 14.11.2016 passed in O.S. NO.119 of 2011 by the Subordinate Judge, Pollachi, Coimbatore.

For Appellants : Mr. C.Veeraraghavan

JUDGMENT

The appellants in this appeal are the defendants 2 and 3 in the suit in O.S. No.119 of 2011 on the file of the Sub-Court, Pollachi, Coimbatore. The deceased Subbammal, the mother of first respondent in this appeal, as plaintiff, filed the suit in O.S. No.119 of 2011 before the Sub-Court, Pollachi, Coimbatore, for partition and separate possession of her 1/3rd share in all the suit properties.

2. The suit properties are agricultural lands comprised in several survey fields and the total extent of suit property is 2.39.00 Hectare equivalent to 5.91 acres of land in Solavampalayam Village, Pollachi Taluk. A house site in natham Survey No.469/8 is also included as one of the suit property.

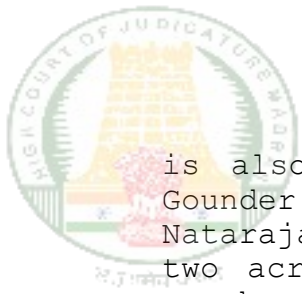


3. From the genealogy admitted, it is seen that one Muthae Gounder is the father of deceased plaintiff in the suit. The plaintiff had a sister by name Rangammal and brother by name Subbae Gounder. The first respondent is the son of Subbammal, the plaintiff in the suit. The appellants are defendants 2 and 3 who are the son and daughter of Subbae Gounder. Other respondents in the appeal are the sons of plaintiff's sister by name Rangammal. The first defendant is the mother of appellants. She died during pendency of proceedings.

3. It is the case of plaintiff that the suit property originally belonged to her father by name Muthae Gounder who purchased the property under a registered sale deed dated 06.09.1961 and the exchange deed dated 24.10.1966. It is not in dispute that the entire property described in the plaint originally belonged to Muthae Gounder, the father of plaintiff and grandfather of first respondent. It is stated in the plaint that Muthae Gounder died leaving behind plaintiff and defendants as his legal representatives. Stating that the defendants stopped giving the due share of the income from suit properties and started refusing to recognise the 1/3 share of plaintiff, the suit for partition came to be filed by the plaintiff.

4. The suit was contested by defendants 1 to 3 by stating that plaintiff and her sister were given in marriage by Muthae Gounder long back by spending huge money and that the suit properties were inherited only by Subbae Gounder who was in exclusive possession and enjoyment of the suit properties as an absolute owner. It is further stated that Subbae Gounder executed a settlement deed regarding the suit properties in favour of defendants 2 and 3. The first settlement deed executed in favour of third defendant and the subsequent settlement deed dated 01.08.2007 executed in favour of second defendant would show that the defendants 2 and 3 are in possession and enjoyment of the suit properties as absolute owners and hence the suit for partition is not maintainable.

5. It is the further case of appellants that the plaintiff was never in possession of the property nor she was receiving any income from any of the suit properties after the death of father. The defendants contended that the plaintiff had no right to claim partition over the suit properties. The written statement filed by the second defendant was adopted by other defendants. In the additional written statement it is stated that Muthae Gounder sold an extent of one acre in S.F.No.57/1 as per the registered sale deed dated 27.11.1961 to one Chinna palanisamy Gounder and that Subbae Gounder subsequently purchased the same along with first defendant as per the registered sale deed dated 24.02.1970 and that therefore the said property is the exclusive property of first defendant. It



is also stated that by a sale deed dated 06.04.1985, Subbae Gounder sold an extent of two acres in S.F. No.57/1 to one Natarajan and as per the registered sale deed dated 09.03.1990, two acres of property sold by Subbae Gounder was subsequently purchased by Subbae Gounder. It is stated that in S.F. No.58, an extent of 20 acres was purchased by Subbae Gounder as per the registered sale deed dated 10.04.1985. Therefore, the defendants contended that the suit in respect of two acres of land purchased by Subbae Gounder is not partible.

6. The trial Court, after framing necessary issues, found that the suit properties are the self acquired properties of Muthae gounder and the plaintiff is entitled to 1/3rd share in all the properties of Muthae Gounder. The trial Court decreed the suit in respect of 4.91 acres of land after holding that the plaintiff is not entitled to seek partition of the property that was sold by Muthae Gounder during his lifetime. It is held by the trial Court that though the property was subsequently purchased by Subbae Gounder, the plaintiff is not entitled to seek relief of partition in respect of the property. As regards the sale deed executed in respect of two acres of suit property in favour of one Natarajan by Subbae Gounder, the property, though, was subsequently purchased by Subbae Gounder in the year 1990, was held to be the property in respect of which plaintiff is entitled to claim partition of her 1/3rd share. Therefore, the suit for partition was decreed in respect of properties except an extent of one acre which was transferred by Muthae Gounder during his lifetime.

7. Aggrieved by the judgment and decree of the trial Court, the appellants have preferred an appeal in A.S. No.102 of 2017 before the IV Additional District Judge, Coimbatore. The lower appellate Court also confirmed the judgment and decree of the trial Court and dismissed the appeal. Aggrieved by the concurrent judgment and decree of the Courts below, the above Second Appeal is preferred by defendants 2 and 3.

8. The appellants have raised the following substantial questions of law:

" 1. Whether the Courts below correct in granting decree by dismissing the civil suit and the first appeal, since admittedly the properties comes under S.F. No.57/1 were sold to the third party under Ex.B3?

2. Whether the Courts below correct in decreeing the suit when the property was sold to the third party and subsequently purchased the said property from the third party can be treated as the joint family property under Ex.B4?



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3. Whether the Courts below correct in decreeing the suit by virtue of succession Subbae Gounder become absolute owner of the property after the demise of his father Muthae Gounder 30 years ago, that can be treated as ancestral in nature as claimed by the plaintiffs and the 4th and 5th defendants?

4. Whether the Courts below are correct in decreeing the suit filed by the plaintiffs admittedly the property was settled in favour of the appellants in the year of 2000 itself?

5. Whether the Courts below are correct in decreeing the suit when the property was settled in favour of the appellants as early as 31.12.2004 itself ?

6. Whether the Courts below are correct in decreeing the suit filed by the plaintiffs since the amended act itself not applicable to the plaintiffs when the properties were settled in favour of the appellants prior to 31.12.2004?

7. Whether the Courts below are correct in not deciding the ouster plea at first, and without answering the ouster plea of limitation can pass judgment and decree ?"

9. Learned counsel for the appellants submitted that the Courts below though denied the relief in respect of property which was sold by Muthae Gounder, did not accept the same reason or logic in respect of properties which were sold by Subbae Gounder in the year 1985. Learned counsel submitted that the property, which was sold to a third party, cannot be the subject matter of division. Since the appellants' father had purchased the property subsequently, the character of the property will be taken as the separate property of the appellants.

10. This Court is unable to accept the submission of the learned counsel for the appellants for obvious reasons. The trial Court accepted the case of appellants as regards the property which was sold by father himself. If the property was subsequently purchased by the appellants, the property is not available immediately after the death of Muthae Gounder. Therefore, the plaintiff, as heir of Muthae Gounder, is not entitled to claim any right over the property which was sold by Muthae Gounder. Same analogy or logic cannot be applied in respect of property which was sold by Subbae Gounder who has no right to deal with the property of joint family members. In case Subbae Gounder does not purchase the property, the suit would



have been laid against the purchaser for purchasing the property from Subbae Gounder. Now the suit has been laid against the legal heirs of Subbae Gounder on the ground that the previous sale deed executed by Subbae Gounder is not binding on him. The properties which were conveyed by Subbae Gounder cannot be treated as the property sold by Muthae Gounder during his lifetime.

11. Learned counsel submitted that the suit properties were sold long back in favour of third parties and that the appellants' possession and enjoyment of the property should be treated as adverse to the plaintiff and therefore the plaintiff is not entitled to seek partition after thirty years. This argument is not supported by specific pleading. As in the case of co-owners, the defendants cannot succeed by merely saying that they are in possession of property for long number of years. It is to be noted that the plaintiff has not pleaded ouster so as to claim exclusive ownership in respect of the properties sold by Subbae Gounder on 10.04.1985. Though the sale deed executed by Subbae Gounder on 10.04.1985 can be treated as an overt act, this Court cannot simply infer that the defendants' father was in adverse possession. The plea of adverse possession or ouster as against the plaintiff in this case is not properly established as held by the Courts below. There is no positive evidence to show that the appellants' father Subbae Gounder was in enjoyment of the property claiming title adverse to the interest of plaintiff. It is not even suggested that the sale deed earlier executed by Subbae Gounder was known to the plaintiff.

12. As against the concurrent findings of the Courts below, the counsel appearing for the appellants is unable to demonstrate any irregularity or illegality or perversity in appreciation of evidence or application of principles. This Court is unable to interfere with the concurrent findings of the Courts below.

13. In fine, this Court finds no substance in any of the substantial question of law raised by the appellants and hence this Second Appeal is dismissed accordingly. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To:

1. The IV Additional District & Sessions Judge,
Coimbatore.
2. The Subordinate Judge,
Pollachi, Coimbatore.

+lcc to M/s.C.Veeraraghavan, Advocate, S.R.No.18030

S.A. No. 122 of 2022

SKM(CO)
SU(22/04/2022)