



S.A.No.364 of 2006

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Dated : 19.01.2022

CORAM

THE HONOURABLE Mrs.JUSTICE J.NISHA BANU

S.A.No.364 of 2006
and
CMP.No.4938 of 2006

1.Susila Ammal

2.Minor Vaishnavi

Rep. by next friend and guardian 1st appellant

...Plaintiffs/appellants

vs.

1.Padmavathy Ammal (died)

2.Iyyadurai Nainar (died)

3.R.Sridhar

4.R.Hari

5.N.Vijay

6.Alamelu

7.Maheswari

8.Balasubramanian @ Senthil

9.Jayathi

10.Rajeswari

..Respondents/Defendants.

R1 – Padmavathy ammal died R3 to R5 are impleaded.

R6 to R10 brought on record as LR's of the deceased R2

vide order of this court dated 20/11/2020

made in CMP.No.843 to 846, 1364, 1777/2008 in S.A.No.364/2006.



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Prayer: Second Appeal is filed against the judgment and decree dated 25.07.2005 passed in A.S.No. 209 of 2001 on the file of the Principal, District Court, Villupuram District, confirming the judgement and decree dated 24.09.2001 passed in O.S.No.7 of 2000 on the file of Principal Subordinate Court, Villupuram.

For appellants : Mr.T.Dhanyakumar

For respondents : Mr.P.Dineshkumar for
Mr.D.Rajasekar for R3 to R5.

JUDGMENT

This second appeal is filed against the judgment and decree dated 25.07.2005 passed in A.S.No. 209 of 2001 on the file of the Principal, District Court, Villupuram District, confirming the judgement and decree dated 24.09.2001 passed in O.S.No.7 of 2000 on the file of Principal Subordinate Court, Villupuram.

2. Suit is for partition and also for appointment of Advocate Commissioner and also directions.



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3. As per the plaint averments, the suit schedule property is situated at Thirunaavalur village. Srinivasa Rao and Krishna Rao are the sons of one Shyama Rao. It was a joint family property. Srinivasa Rao had no issues and he died without any documents regarding to whom the property must be divided next. Likewise, Padmavati Ammal, wife of Srinivasa Rao also died. Therefore the entire property was in the hands of Krishna Rao. Krishnammal was the wife of Krishna Rao. Sethuammal is the daughter of Krishna Rao. Krishnammal's brother Gopal Rao married Sethuammal. After the death of Sethuammal, Gopal Rao, married first defendant-Padmavathy Ammal. Krishna Rao and Krishnammal adopted Sanjeevi Rao, who is the grand son of Krishnammal's sister and registered the adoption on 19.02.1971. After the death of Krishna Rao, Krishnammal given one fourth share of the property to her son-in-law Gopal Rao. But there was no document in respect of remaining three fourth share of the property. Gopal Rao and his wife till their death, given the proceeds/income belonging to three fourth share of the property to Sanjeevi Rao. Sanjeevi Rao also died in the year 1996. First defendant used to cultivate and give the proceeds to the legal heirs of plaintiffs. But thereafter since no income from the suit property was given to the plaintiffs, they sought for possession. Even the rent was not given by the first defendant. There was an arrangement between the plaintiffs and first defendant to the effect that the first



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defendant has to manage the properties and give the income therefrom to the plaintiffs. The said arrangement was in operation till 1997, that is, until the death of Sanjeevi Rao. According to plaintiffs they are entitled to 3/4 share in the suit schedule properties. It is alleged that the third defendant along with first defendant created fabricated documents. Since the suit properties are joint family properties, item 2 to item 5 are in possession of second and third defendants and the first defendant is in possession of item six and house property, the plaintiffs prayed for accounts to be submitted by the defendants and also income from the property. Further, since defendants 2 to 5 are in possession of item 2 to 5 properties, the proceeds from the said properties are to be handed over to the plaintiffs.

4. The first defendant in her written statement denied certain averments of the plaintiffs. First defendant specifically denied the adoption, arrangement between plaintiffs and first defendant and the 3/4th share belonging to Sanjeevi Rao. First defendant submitted that the entire property was in possession of Gopal Rao. In the lifetime of Gopal Rao neither Sanjeevi Rao nor his wife claimed any rights in the properties. The suit for partition is to be dismissed.

5. Second defendant also filed written statement denying the adoption



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document of Sanjeevi Rao dated 19.02.1971. Second defendant submitted that the entire suit properties were in possession of Gopal Rao and Sanjeevi Rao has no rights in the properties. After Gopal Rao's death, first defendant was in possession of the suit property. First defendant has not given any income from the property to the plaintiffs. Second defendant has also not given any income from item 4 and 5 properties. There was no arrangement between first defendant and Sanjeevi Rao. Second defendant by way of registered document purchased item 4 and 5 properties on 07.08.1973 from Gopal Rao. Second defendant incurred huge amounts to develop the lands which were purchased by him. The partition sought for by the plaintiffs in item 4 and 5 is not sustainable and the suit to be dismissed.

6. The Trial Court after going through the plaint, written statement of 1st and 2nd defendants framed the following 2 issues for consideration:

- 1) Whether the plaintiffs are entitled for partition.
- 2) To what reliefs the plaintiffs are entitled to.

7. On the side of plaintiffs, 1st plaintiff Susila Ammal was examined as P.W.1 and Srinivasa Rao as P.W.2. Ex. A.1 to A.5 were marked on the side of plaintiffs. On the side of defendants D.W.1 to 3 were examined and documents



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B.1 to B.41 were marked.

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8. The trial court, on going through the plaint, written statement and evidence placed before, found that Plaintiffs are asking for 3/4th share in the schedule properties. On the other hand, 1st defendant submission is that adoption deed was not true, Will was written on 29.03.1972 and in the year 1986 for the notice given by Sanjeevi Rao, 1st defendant's husband given reply to the same objecting to the relief stated in the notice. As such, the defendants got adverse possession in respect of the properties. Due to the stiff between the plaintiff and defendant family, there was an arrangement as per which, Kolakudi properties were settled to Sanjeevi Rao and Thirunaavalur properties were settled to 1st defendant. Thereafter, Sanjeevi Rao sold the Kolakudi properties. In such circumstances, after selling Kolakudi property, seeking share in the Thirunaavalur property is not at all maintainable.

9. P.W.1/Plaintiff stated that after the death of Krishna Rao, 1 /4 share of the properties were given to Gopal Rao by Krishnammal, therefore, after the death of Krishnammal, balance 3/4 share should come to Sanjeevi Rao. Sanjeevi Rao died in 1996, hence, wife/P.W.1 and daughter 2nd plaintiff are



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entitled for $\frac{3}{4}$ share. Thirunaavalur properties were maintained by the 1st defendant and the 1st defendant has given the proceeds out of the said properties for a period of one year from the death of Sanjeevi Rao. But thereafter, it was not given. So, a notice has been issued to the 1st defendant which is marked as Ex.A.4 for which 1st defendant given reply notice which is marked as Ex.A.5. but the statements in reply notice was not true. 3rd defendant has purchased item 2 and 3 properties vide sale agreement and the amounts due out of the said transaction were given to them/plaintiffs. So the plaintiff clearly stated that they are not seeking for any share in item 2 and 3 properties.

10. One Srinivasa rao was examined as P.W.2. According to him he was the Accountant till the year 1980, thereafter he was working as Panchayat Clerk. P.W.2 stated about the properties belonging to Krishnarao and Krishnammal. Also clearly spoken about the adoption of Sanjeevi Rao by Krishnarao and Krishnammal that it has taken place before the family members and the adoption was as per the rituals. Further adoption deed has also been written. After the death of Krishnarao, last rites has been done by Sanjeevi rao. Earlier the management of properties were done by Krishnammal and Sanjeevi



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Rao, thereafter, Padmavathy, 2nd wife of Gopal Rao has undertaken it, however, dispute arose in the year 1986. So Panchayat convened as per which, 7 ½ acres of Kolakudi property, 2 acres and house, and house garden were given to Padmavathy Ammal (1st defendant) and further Thirunaavalur properties were also managed by Padmavathy ammal and the proceeds out of the said land was given to plaintiffs.

11. Per contra, on the side of defendants, Exhibits D.1 to D.41 have been marked. The details of said Exhibits is as follows:-

Ex.B.1-24.5.1986- Sanjeevi's notice to Padmavathy Ammal.

Ex.B.2-6.6.86 – Reply notice from the advocate of Padmavathy Ammal.

Ex.B.3 – Chitta copy of schedule property

Ex.B.4 to Ex.B.15 – Patta No.164- tax paid in the name of Gopal Rao.

Ex.B.16- Electricity Bill demand notice sent in the name of Gopal Rao

Ex.B.17- Will written by Gopala Rao in favour of his wife.

Ex.B.18- Patta No.1040 stands in the name of Gopal Rao

Ex.B.19- House land patta given to Padmavathy Ammal.

Ex.B.20 and 21- Patta No.164 and kist receipt from the name change of Gopal Rao to Padmavathy Ammal.

Ex.B.22 to Ex.B.26 are all Sale agreements written by Sanjeevi to one Kuchitha



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Padayachi and others.

Ex.B.27- Sanjeevi's document of Mortgage dated 07.10.1985 to one Saraswathy Ammal.

Ex.B.28-Original Sale document pertaining to Gopal Rao in favour of Ayyadurai.

Ex.B.29 –Fasli tax details

Ex.B.30 – Chitta relating to schedule properties.

Ex.B.31 to Ex.B.41 – Receipts for paying necessary tax pertaining to Patta No.164 in the name of Ayyadurai.

12. On the side of defendants, Padmavathy ammal was examined as D.W.1. In her deposition, she stated that she is the 2nd wife of Gopal Rao and the first wife name is Sethu Ammal and Sethu Ammal died who was the daughter of Krishnammal and Krishna Rao. D.W.1 rejected the adoption of Sanjeevi. She has stated that Padmavathy Ammal written Will in favour of Gopal Rao which is marked as Ex.B.3, as per which $\frac{1}{4}$ share was given to Gopalrao and that Thirunaavalur properties were given in favour of Gopal Rao and Kolakudi properties were given in favour of Sanjeevi Rao. She and Gopal Rao were in possession only of Thirunaavalur property and Sanjeevi Rao never had enjoyed the properties of Thirunaavalur. As per the above said



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arrangement, name transfer in patta has been effected. Thereafter, house tax, electricity tax have been paid and receipts stand in the name of Gopal Rao. In the year 1973, Gopal Rao by sale agreement sold some of the properties to Ayyadurai. Further in 1983 a Will was written in favour of her/Padmavathy Ammal in respect of the remaining properties, which is marked as Ex.B.17. P.W.2 stated that her husband died in the year 1986 and thereafter, she is in possession of the said properties and she is paying the taxes due and receipt of such tax payments after her husband's death has been marked as Ex.B.20 to Ex.B.22. Only after the death of Gopal Rao, Sanjeevi Rao given notice to her asking for share in Thirunaavalur property. In so far as Kolakudi properties are concerned, Sanjeevi Rao sold by way of Registered documents which is marked as Ex.B.24 to Ex.B.26 and Sanjeevi also mortgaged one property. It is further stated that Sanjeevi never met her before issuance of notice and for the said notice, reply notice has been given. It was alleged by the 1st defendant (D.W.1) that after the demise of her husband Gopal Rao, Sanjeevi asked share in the properties, issued notice and she sold the property to the 3rd respondent, however, money payable to her, has been taken by Sanjeevi family. D.W.1 submitted that she is in possession of house and except it, no other property she owns and that she is not in possession of 6th item.



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13. D.W.2 Ayyadurai stated that he purchased item 4 and 5 properties by registered document dated 07.08.1983 vide Ex.B.28. He purchased the same from Gopal Rao who showed the Parent document.

14. D.W.3 Subburama Iyer deposed that he very well knows Gopal Rao; also had knowledge about registration of the property by Ayyadurai and the document was written by one Thandavarayapillai and from the date of registration, Ayyadurai is in possession of the said property.

15. The trial court, on the basis of above testimonies held that there was no dispute that originally the property belonged to Krishnammal and Krishnarao. Krishnammal written a Will in respect of 1/4th share of the properties which is marked as Ex.P.3. The same was written in favour of 1st defendant's husband namely Gopal Rao which was also not disputed. The plaint prayer is that the remaining 3/4th share of the properties has to be partitioned only to plaintiffs. Since Sanjeevi is the adopted son of Krishnarao, his share of the properties has to be given to the plaintiffs, who are the wife and children of Sanjeevi.



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16. Krishnammal and Krishnarao had no issues and therefore, they adopted Sanjeevi as foster son and that was proved by adoption deed and also witness on the side of plaintiffs. However, learned counsel on the side of defendants argument was that natural father of Sanjeevi has not signed in the adoption deed and hence, the said adoption cannot be taken as legally valid one. However, the trial court viewed that as per Ex.A.3, Krishnammal had written that her adopted Son Sanjeevi. Even Ex.A.1 would go to show that Sanjeevi is the adopted son of Krishnammal. The trial court pointed out that from the evidence, it is clear that Sanjeevi was the adopted son of Krishnammal and Krishnarao and the document dated 19.02.1971 is acceptable.

17. The next issue was with respect to properties. Totally 6 items has been stated in the suit schedule properties, in which, item 2 and 3 have been sold after the filing of the suit and the plaintiffs stated to have received money in respect of the said transaction. Therefore, the trial court restricted the relief in respect of items 1, 4, 5 and 6 of the suit schedule properties.

18. In respect of item Nos.4 and 5, the evidence would clearly make out that those properties were sold to Ayyadurai (2nd defendant) who after execution of the registered document, was in possession of the same. The



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properties transferred to the name of Ayyadurai was clearly proved by exhibits Ex.B.31 to Ex.B.41. Further based on Exhibits D. 28 to D.41, it was very clear that item 4 and 5 properties have been registered in the name of Ayyadurai in the year 1973 and he is in possession of the same.

19. In respect of other properties, it was contended before the trial court on the side of 1st defendant that as per the oral agreement between the two families, Kolakudi properties totally 10 acres land and house have been settled to Sanjeevi. Thirunavallur properties i.e. 4 acres land, land with house have been settled to Gopal Rao. Kolakudi properties registered in the name of Sanjeevi by Gopal Rao is also proved on the side of defendant by Ex.B.24 to Ex.B.26. The trial court held that documents exhibited would show that Kolakudi properties were in possession of Sanjeevi and he had sold the same to few persons. However, there was no document exhibited on the side of plaintiffs to show that Gopal Rao was in possession of Kolakudi properties. Therefore, the trial court held that Kolakudi properties were in entire possession of Sanjeevi.

20. In respect of item 5 and 6 properties, it was proved by defendants 1



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and 2 that 1st defendant along with her husband Gopal Rao was in possession of the property for more than 12 years and therefore, by adverse possession, 1st defendant proved that it is their property and also produced documents to show that they have been paying all taxes.

21. According to 1st defendant, in the year 1986, when Gopal Rao was alive, Sanjeevi issued notice seeking for share in the properties owned by Gopal Rao and that time itself, a reply notice was sent to Sanjeevi. So when the division of properties were refused by Gopal Rao in the year 1986 itself, the present suit was filed in the year 2000. Even though plaintiffs taken a plea that they have share in the schedule mentioned properties, by virtue of adverse possession, 1st defendant is only entitled to the said properties. The said legal position was drawn to attention by the trial court . The trial court further went on to discuss that only on the premise of adverse possession, the defendants 1 and 2 cannot take a stand that they are in absolute possession of items 1, 4 , 5 and 6 properties. Since it was claimed by the plaintiffs that on the permission of plaintiffs, in respect of item 1, 1st defendant was in enjoyment and items 4 and 5 of properties were in enjoyment of 2nd defendant and the 1st and 2nd defendant were giving the proceeds coming out of those lands. The trial court



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held that even assuming that by notice in the year 1986, Sanjeevi refused the adverse possession stand taken by the 1st and 2nd defendants, they would have filed the suit within 12 years of such claim. However, only in the year 2000, present suit has been filed. The trial court therefore, held that in view of limitation, the suit is not maintainable. Further, 1st defendant by way of registered document, sold item 4 and 5 properties to 2nd and 3rd defendants, therefore, the right of share in the schedule mentioned properties is no longer available and accordingly, 3/4th share prayed for by the plaintiffs cannot be granted.

22. So the trial court, held that by virtue of limitation also, the plaintiffs are not entitled to suit schedule properties and as such, dismissed the suit.

23. Aggrieved by the said judgment passed by the trial court, the plaintiffs filed first appeal. The argument of plaintiffs before the first appellate court is that even though Kolakudi properties were settled to Sanjeevi by way of oral arrangement, in respect of Thirunavalur properties i.e, suit schedule properties, since it has been written in Will by Krishnammal that Gopal Rao being the son in law is entitled to 1/4th share, the remaining 3/4th share has to



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be given to plaintiffs.

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24. The first appellate court held that even during the life time of Sanjeevi, Gopal Rao and 1st defendant were not giving proceeds out of the income from lands to plaintiffs and plaintiffs have not claimed their share. Till 06.01.2000, no case has been filed against the defendants. Since the 1st and 2nd defendants are in possession of the properties for more than 12 years, by virtue of adverse possession, the defendants are in absolute possession of the suit schedule properties and the prayer of the plaintiffs cannot be granted. As such, the first appellate court confirmed the findings of the trial court and dismissed A.S.No.209 of 2001.

25. The unsuccessful plaintiffs are before this court. This court while admitting the Second appeal, framed the following substantial questions of law:-

1. Whether the decision of the courts below is vitiated in holding that the defendants have prescribed title by adverse possession without considering the close relationship of the parties and also that the parties to the proceedings are co owners?



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2. Whether the decision of the courts below is vitiated in the absence of plea of ouster by defendants especially when the defendants cannot prescribe title by adverse possession against the co owners ?

26. The learned counsel for the appellants/plaintiffs would submit that suit items was acknowledged by the parties and their shares are paid periodically and hence, there could not be any adverse possession relating to the suit properties. Even the plaintiffs acknowledged heir right in respect of item 2 and 3 properties in their favour. By oral and documentary evidence, plaintiffs proved that till the life time of Gopal Ro, plaintiffs' share of income was given to them. Since plaintiffs' share of income was given, the claim of adverse possession cannot be taken that too when Gopal Rao being maternal uncle of Sanjeevi Rao and in such close relationship, claiming adverse possession by the representatives of Gopal Rao is not correct.

27. It is also argued that defendants have not taken specific plea of ouster and therefore, the courts below erred in non suiting the plaintiffs on the ground



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of adverse possession. It is further submitted that in Ex.B.29 name of Sanjeevi Rao has found place in the years 1975, 1981 and 1984. Per contra, learned counsel for respondents 3 to 5 submitted that the judgment passed by the trial court is based on facts and evidence and the same has been confirmed by the first appellate court, which does not require any interference by this court.

28. In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case. Having regard to the peculiar facts involved in the case, this court is of the opinion that the plaintiffs had established that Krishnammal written Will giving 1/4th share of suit schedule properties to Gopal Rao and so they are entitled for 3/4th share. Further, Sanjeevi Rao is the adopted son of Krishnammal and Krishnarao. While Sanjeevi is the adopted son of the Krishnammal and adoption deed has also been accepted by the trial court, being son of Krishnammal, Sanjeevi rao is entitled to Krishnammal's properties. When it is the case of defendants that Gopal Rao was in possession of the properties, being son in law, he acquired title by ousting the plaintiffs, by declaring hostile title in himself which was to the knowledge of his cosharers, Gopal Rao was



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sharing income to the plaintiff's family at that point of time.

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29. Possession of co-sharer is concerned, it cannot be adverse to the plaintiffs, unless there is a denial of their right to their knowledge by the person in possession and exclusive and ouster following thereon for the statutory period. Co-owner in exclusive possession cannot render his possession adverse to the other co-owner, but if a co-owner fails to assert his right for considerable length of time, his right may extinguish by lapse of time. But in the case on hand, it is accepted by the defendants that as early as on 1986, Sanjeevi issued notice claiming share in the suit schedule properties. In ***Cheedella Padmavathi & Others vs Cheedella Lakshminarasimha Rao (died) per LRs. & Others reported in 2015(5) ALT 634***, it was held that a person pleading adverse possession has no equities in his favour, since he is trying to defeat the rights of the true owner, thus it is for him to clearly plead and establish all facts necessary for adverse possession. Property ownership is certainly desired by all of us, but this coveted position comes with a lot of complexities.

30. Permissive possession cannot be said to be as adverse possession.



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Since the 1st plaintiff's husband Sanjeevi is the adopted son of Krishna Rao and Krishnammal, the claim of the plaintiffs has to be considered in proper perspective. As narrated in the preceding paragraphs, relief is not sought for in terms of items 2 and 3 of the schedule mentioned properties. As far as items 4, 5 and 6 are concerned, those properties have already been transferred to the names of 2nd and 3rd defendants by way of registered sale deed. Therefore, item 1 suit schedule property is alone available for partition. As such, the plaintiffs are entitled to item 1 of the suit schedule property in respect of their partition.

31. In view of the above discussion, the Second Appeal is partly allowed. The plaintiffs are entitled to item 1 of the suit property alone. Substantial questions of law are answered in favour of the plaintiffs. Since already this court by order dated 29.11.2006, granted interim injunction restraining the first defendant from making any alienation of the 1st item of property and the Second Appeal is allowed, injunction granted becomes absolute and the petition stands closed. Considering the relationship of the parties, there shall be no orders as to costs.

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The Principal, District Judge, PDJ Court, Villupuram District,

2.The learned Principal Subordinate Judge,

Subordinate Court, Villupuram.



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