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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 12.01.2022  
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CORAM

THE HON'BLE Mr. JUSTICE G.CHANDRASEKHARAN

S.A.No. 1293 of 2019

K. Jaganathan ...Appellant/Appellant/Plaintiff

Vs.

1. S. Balachandar

2. Vanitha Balachandar ...Respondents/Respondents/Defendants

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure to set aside the judgment and decree dated 18.06.2019 in A.S.No.11 of 2015 on the file of the Additional District Judge, Namakkal confirming the judgment and decree dated 06.11.2014 passed in O.S.No. 38 of 2009 on the file of the Additional Sub Court, Namakkal.

For Appellant : Mrs.V.Srimathi  
for Mr.V.Raghavachari

For Respondents: Mr.E.K.Kumaresan

JUDGMENT

This Second Appeal is filed against the judgment and decree dated 18.06.2019 of the Additional District Judge, Namakkal in A.S.No. 11 of 2015, confirming the judgment and decree dated 06.11.2014 in O.S. No. 38 of 2009 of the Additional Subordinate Judge, Namakkal.

2. The appellant/plaintiff filed the suit claiming the relief of declaration that he is entitled to  $\frac{1}{4}$ th share in the suit properties, as per the sale deed dated 06.12.2007; for division and allotment of his  $\frac{1}{4}$ th share in the suit properties and for costs.

3. The case of the appellant is that the suit properties and other properties originally belonged to Nalli Gounder, Ramasamy Gounder and Palanisamy. It is stated that the suit



properties are their ancestral joint family properties. They partitioned the properties on 17.08.1982 through a registered partition deed. In the said partition, the suit properties and other properties were allotted to Palanisamy and Perumayee as 'B' Schedule Properties. Palanisamy and Perumayee have two sons named Ramasamy and Selvaraj and a daughter named Gomathi. Since the suit properties are ancestral properties, Palanisamy and his children are each entitled to 1/4<sup>th</sup> share in the suit properties. Ramasamy was enjoying his 1/4<sup>th</sup> share along with other sharers. He executed a power of attorney deed in respect of his 1/4<sup>th</sup> share in favour of Kaliannan on 04.12.2007. The Appellant purchased this 1/4<sup>th</sup> share from the power agent Kaliannan through the registered sale deed dated 06.12.2007. Ever since the date of purchase, the appellant is in possession and enjoyment of his 1/4<sup>th</sup> share in the suit properties along with other sharers. He has been paying house tax to a thatched house in the suit property. Patta is also given in the joint name of himself and others. The respondents asked the appellant to sell his 1/4<sup>th</sup> share in the suit properties for a mean price. Later the appellant found that the entire extent of suit properties were sold to respondents on 07.07.1997 in two sale deeds by Palanisamy, Perumayee, Selvaraj and Gomathi suppressing the existence of Ramasamy and without the consent of Ramasamy. The sale executed without reference to Ramasamy in respect of suit properties, when Ramasamy had sold his 1/4<sup>th</sup> share to the appellant, is not valid. Therefore, the appellant requested the respondents to divide the suit properties and allot his 1/4<sup>th</sup> share and as the respondents were not amenable for the same, the suit was filed for the aforesaid reliefs.

4. The case of the respondents is that it is a fact that the suit properties along with other properties were originally belonged to Nalli Gounder, Ramasamy Gounder and Palanisamy. There was a partition among them, in and by which, the schedule properties were allotted to Pallanisamy and his wife Perumayee. The respondents understood that the power of attorney deed in favour of Kaliannan was executed by impersonating Ramasamy. The sale in favour of the appellant by the power agent Kaliannan is not valid in law. The suit properties belonged to Palanisamy and his family and allotted to Palanisamy and his wife in a partition as a B Schedule property. Pallanisamy and Perumayee have ½ share each in the properties. They sold their shares to the respondents on 07.07.1997 along with their children Selvaraj and Gomathi. After the purchase of the suit properties, the respondents are in possession and enjoyment of the suit properties. They are running a dairy farm named Vangal Dairy farm. If Palanisamy had a son by name Ramasamy, he would not



have avoided him. Even if Palanisamy had a son by name Ramasamy, the suit filed after 12 years from the date of sale to the respondents, is not maintainable, for the reason that the respondents are in continuous possession and enjoyment of the suit properties. There are two suits O.S.No. 200 of 2004 and 230 of 2004, in respect of promissory notes, pending on the file of Namakkal District Court between the first respondent and Palanisamy. Therefore, Palanisamy had instigated the filing of the suit claiming that he has one more son Ramasamy. The other allegations with regard to claim of partition are not true. The suit has no merits and is liable to be dismissed.

5. The Trial Court has framed the following issues:

- '1. Whether the plaintiff is entitled to 1/4th share in the suit property as per sale deed dated 06.12.2007?
2. Whether the plaintiff is entitled for the relief of declaration?
3. Whether the plaintiff is entitled for 1/4th share in the suit property?
4. Whether the suit is maintainable without proper relief or prayer ?
5. To what other relief ?''

6. During the course of trial, P.Ws.1 and 2 were examined and Exs. A1 to A7 were marked on the side of the appellant/plaintiff. D.W.1 was examined and Exs. B1 to B21 were marked on the side of the respondents/defendants.

7. On considering the oral and documentary evidence, the learned Trial Judge found that the appellant had admitted that the respondents are in possession and enjoyment of the suit properties. Therefore, the court fee paid under Section 37(2) of Tamil Nadu Court Fees and Suits Valuation Act is not correct. When it is disputed whether Palanisamy has a son Ramasamy, the appellant has not chosen to take steps to implead Ramasamy, the suit had been filed nearly after 12 years of purchase of suit properties by the respondents, when Ramasamy has not raised any claim in the suit properties, the power of attorney deed in favour of Kaliannan and the subsequent sale in favour of the appellant is not legally valid. On these reasons, the Trial Judge dismissed the suit.

8. In the appeal filed by the appellant in A.S.No. 11 of 2015, the learned Appellate Judge has also concurred with the findings of the Trial court, and further found that the



appellant has not even taken care to verify as to whether there is any encumbrance in the suit property before buying it and whether his vendor is in possession of the suit property or not and finally confirmed the judgment and decree of the learned Trial Judge, dismissed the appeal. Challenging the said appeal, the appellant has filed this second appeal.

9. When the second appeal was admitted, the following substantial questions of law were framed:

i) Whether the courts below were right in dismissing the suit for partition when the petitioners had established his unimpeachable right of property?

ii) Whether the courts below are right in holding that the suit is barred by limitation when the defendants have failed to prove the plea of Ouster?

iii) Whether the Courts below were right in rejecting the claim of the plaintiff on the ground that the plaintiff's vendor has not been made a party to the suit?

10. Learned counsel for the appellant submitted that the suit properties were ancestral joint family properties in the hands of Palanisamy and his children Ramasamy, Selvarj and Gomathi. Therefore, each of them are entitled to 1/4<sup>th</sup> share in the suit properties. The appellant purchased the 1/4<sup>th</sup> share through the power agent of Ramasamy. This was clearly proved from Ex.A1 partition deed, Ex.A2 General Power of Attorney deed and Ex.A.3 Sale deed. Exs.A.6 and A.7, would also prove that appellant has been paying the house tax and kist. In spite of production of these documents and oral evidence, in support of the case of the appellant, both the courts below have wrongly dismissed the suit. The sale of the entire suit properties by Palanisamy and Perumayee and other two children to the respondents through Exs.A.4 and A.5, Sale deeds are not legally valid. When the suit properties were ancestral joint family properties, the gift of undivided interest by Palanisamy in favour of Perumayee is not valid. Therefore, the learned counsel for the appellant submitted that the judgments and decrees of the courts below have to be set aside and the suit has to be decreed.

11. In response, learned counsel for the respondents submitted that the schedule properties were originally belonged to the family members of Palanisamy under Ex.A.1 partition dated



17.08.1982, Nalli Gounder and Ramasamy Gounder along with Palanisamy that is, husband of Perumayee and father of Selvaraj and Gomathi, along with Perumayee divided family properties. It is admitted that in all the properties Nalli Gounder and Ramasamy Gounder, had  $\frac{2}{3}$ <sup>rd</sup> share and Palanisamy had  $\frac{1}{3}$ <sup>rd</sup> share. After the death of Nalligounder, father of Palaniswamy gounder, Palanisamy had settled  $\frac{1}{3}$  share in the suit properties in favour of his wife Perumayee. Therefore, she was also joined in the partition. The properties were divided and B Schedule properties were allotted to Palanisamy and Perumayee. Therefore, it is claimed by the learned counsel for the respondents that Palanisamy and Perumayee had equal share in the suit properties. They joined with their children, Selvaraj and Gomathi and sold the suit properties to the respondents. The sale in favour of the respondents is perfectly valid under law. When appellant claims that Palanisamy and Perumayee have a son Ramasamy, who executed a power of attorney in favour of Kaliannan and said Kaliannan sold undivided  $\frac{1}{4}$  th share to the appellant, the appellant ought to have impleaded the said Ramasamy. That was not done in this case. Due to the money suit pending between Palanisamy and first respondent, the power of attorney deed and sale deed had been created and suit is filed. Both the Courts below have concurrently found that the appellant has failed to prove the validity of Ex.A.1 Sale deed and that he is in possession and enjoyment of the suit properties and therefore the learned counsel for the respondents prayed for dismissal of the second appeal.

12. The origin and nature of the suit properties and how the same fell to the share of Palanisamy and Perumayee is fairly accepted by both the parties. The partition among Nalli Gounder, Ramasamy Gounder and Palanisamy is proved by the production of Ex.A.1 partition deed. The reading of the partition deed shows that Nalligounder and Ramasamygounder are the sons of one Palanigounder. Palanisamy is the son of Nalligounder and Palanisamy's wife is Perumayee. Both are two different families. However, they enjoyed the properties purchased by Palanigounder and Nalligounder jointly and acknowledged that Nalligounder and Ramasamygounder have  $\frac{2}{3}$ <sup>rd</sup> share and Palanisamy has  $\frac{1}{3}$ <sup>rd</sup> share. In the said  $\frac{1}{3}$  share of Palanisamy, he executed settlement in favour of his wife Perumayee on 26.10.1966. Then during the partition on 17.08.1982, she was also joined as one of the parties in the partition and the properties were divided accordingly. B schedule properties representing  $\frac{1}{3}$ <sup>rd</sup> share of Palanisamy and Perumayee were allotted to them under Ex.A.2. It is evident from these documents that though Palanisamy settled  $\frac{1}{2}$  share of his



properties to Perumayee, she relinquished that settlement by joining as one of the parties to the partition and in the partition, she and her husband, Palanisamy were allotted B Schedule properties, representing  $\frac{1}{3}$ <sup>rd</sup> of the properties covered under this partition deed. Therefore, there is no need to consider validity for gift executed by Palanisamy in favour of Perumayee on 28.10.1966. As per partition deed, namely Ex.A.1, Palanisamy and Perumayee are each entitled to  $\frac{1}{2}$  share in the suit properties.

13. The prime question in this case is whether Palanisamy and Perumayee have a son named Ramasamy and he was enjoying the suit properties along with Palanisamy, Perumayee, Selvaraj and Gomathi. To establish this question, learned counsel for the appellant relied on the evidence of D.W.1 and submitted that D.W.1 has himself admitted that Palanisamy and Perumayee have a son Ramasamy and he executed power of attorney in the name of Kaliannan and Kaliannan in turn sold the suit property to appellant. He also relied on the evidence of D.W.1 to state that Palanisamy had admitted about the pendency of the proceedings for recovery of money, that he has a son Ramasamy and he was not shown as a son deliberately in the sale in favour of the respondents. Except this evidence, admittedly, the appellant has not produced any single piece of evidence like an identity card, Aadhar card, family card, voters id or name in the electoral list to show that Ramasamy is the son of Periyasamy. As rightly pointed out by the learned counsel appearing for the respondents, when it is seriously disputed that Ramasamy is not the son of Periyasamy, the appellant has not taken steps to implead Ramasamy as a party to the suit or at least examine him as witness. Therefore, it is now necessary to find out whether the above said evidence of D.W.1 is sufficient to prove that Palanisamy has a son Ramasamy and whether he executed a power of attorney to Kaliannan.

14. The reading of D.W.1's evidence shows that D.W.1 stated that he gave evidence in two cases relating to promissory notes, pending against Palanisamy and Palanisamy has also given evidence. While giving evidence, Palanisamy has admitted that he has two sons and one daughter namely Selvaraj, Ramasamy and Gomathi. It is also admitted by him that when the respondents purchased the properties, Ramasamy was in abroad and if it is shown that Ramasamy is his son, they (respondents) would not be in a position to get loan from bank and as per his request, Ramasamy was not shown as a son of Palanisamy in the sale deed. This evidence of D.W.1 is sought to be relied by the learned counsel for the appellant to prove that Palanisamy has a son



Ramasamy and he was living in abroad at the time when the respondents purchased the suit properties from Palanisamy and others.

15. The learned counsel for the appellant also relied on the evidence of D.W.1, wherein he admitted that Ramasamy is the son of Palanisamy and Perumayee and executed a power of attorney deed Ex.A.2 to Kaliannan and Kaliannan sold the property through Ex.A.3 sale deed to the appellant. Both the above evidence of D.W.1 is sought to be relied by the learned counsel for the appellant to establish that Palanisamy has a son, Ramasamy. So far as the first part of the evidence is concerned, it is not the evidence of D.W.1 admitting that Palanisamy has a son Ramasamy and at the request of D.W.1, Ramasamy was not shown in the sale deed in favour of the respondents. It is claimed by D.W.1 that this is the evidence of Palanisamy. The evidence of one person can be contradicted or corroborated only through that person and not through a different person. Therefore, the first part of the evidence cannot be relied on in support of the case of the appellant to show that Palanisamy has a son, Ramasamy.

16. As regards next part of the evidence, it is seen from the evidence that D.W.1's proof affidavit was filed on 08.03.2013. Documents were marked on 25.04.2013. He was partly examined on 12.07.2013 and when the cross examination continued on 12.07.2013, it appears that there was an admission in his evidence that Palanisamy and Perumayee have a son, Ramasamy, that he executed Ex.A.2 Power of attorney in favour of Kaliannan and Kaliannan executed Ex.A.3 sale deed in favour of the appellant. His consistent evidence is that Palanisamy and Perumayee have no son named Ramasamy and assuming that they have a son he has no right in the suit properties. It is further claimed that Ex.A.2 Power of attorney was executed by impersonation. Thus, it is clear from the case of the respondents that it is a disputed fact that Ramasamy is the son of Palanisamy and Perumayee.

17. Certain factors are relevant to consider the issue involved in this case. The sale in favour of the respondents 1 and 2 in respect of the suit properties had taken place on 07.07.1977 through Ex.A.4 and A.5 sale deeds. Ramasamy stated to have executed the power of attorney deed A.2 in favour of Kaliannan on 04.12.2007. Two days thereafter, Kaliannan sold the property to the appellant through Ex.A.3 sale deed on 06.12.2007. The suit was filed on 03.03.2009, nearly after 11 ½ years. Why there is such a huge delay in filing the suit. There is no explanation from the appellant. Had he applied for





20. The combined reading of the evidence of D.W.1 and D.W.2 clearly shows that both of them knew that there is a dairy farm in the suit property at the time of execution of Exs.A2 and A3 documents. P.W.2 specifically knew that the dairy farm was run by respondent Balachandar. However the existence of dairy farm was not shown in Exs.A2 and A3 documents. As per the evidence of P.W.2, the appellant is dealing with real estate and as per appellant's own evidence he has the experience of buying properties. It is his admission that he has not verified as to whether there is any encumbrance in the suit properties before buying the suit properties. All these facts clearly prove that Ex.A.2 Power of Attorney deed and Ex.A.3 sale deed had all been created only to create litigation.

21. As already stated, when appellant claims that Ramaswamy is the son of Palanisamy and when the respondents stoutly denied that Ramasamy is not the son of Palanisamy and Perumayee, it is for the appellant to prove that Ramasamy is their son. He has not taken any steps to file voters list or other documentary evidence in support of his claim. He could have summoned concerned authorities to produce documents which would prove that Ramasamy is the son of Palanisamy and Perumayee. He could have summoned either Palanisamy or Perumayee as a witness, if not impleaded them as parties to the suit to establish that Ramasamy is the son of Palanisamy and Perimayee. Unfortunately, appellant has not done any of these things to prove his case. Coupled with all these things, there is a huge delay of nearly 11 1/2 years in filing the suit after the purchase of the suit properties by the respondents. If really Ramasamy has a genuine claim of 1/4th share in the suit properties, he ought to have filed a suit immediately after the execution of Exs. A4 and A5 Sale deeds. This is also not done in this case. The appellant/plaintiff is expected to prove his case from his own set of pleadings and evidence and should not find holes in the case of defendants/respondents. From the over all analysis of the evidence available in the case, there is only one conclusion possible, and that is the appellant had miserably failed to establish that Ramasamy is the son of Periyasamy and Perumayee and that Exs.A.2 and A.3 had been created only to create litigation and gain out of that litigation.

22. Oral and documentary evidence produced in this case show that appellant was not at all in possession and enjoyment of the suit property and on the other hand it is found that the respondents are in possession and enjoyment of the suit properties. Appellant is out of possession of suit property.



Therefore, the findings of the Trial Court that the court fee paid under Section 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act is not correct and the court fee should have been paid under Section 37(1) of the Act. For the above stated reasons, this court finds that the courts have rightly decided to dismiss the suit on the basis of oral and documentary evidence available on record. Thus the substantial question of law No. 1 is answered. The suit for declaration should have been filed within a period of three years from the date when the right to sue accrued. Exs. A4 and A5 sale deeds have been executed on 07.07.1997 and these are registered sale deeds. The suit was not filed within 3 years from the sale and therefore, the suit is barred by limitation. Thus, the substantial question of law No.2 is answered against the appellant and in favour of the respondents. When it is seriously disputed about the very existence of vendor, it is for the appellant to examine him or by prove through some other evidence, the existence of the vendor. That was not done in this case. The validity of sale in favour of the appellant is not proved. Therefore, the appellant is not entitled to any relief. Thus, the substantial question of law No.3 is answered.

23. Therefore, this Court is of the considered view that both the courts have rightly found that the appellant is not entitled for the reliefs claimed in the plaint and dismissed the suit. This court finds no reason to interfere with the judgment and decree of the First Appellate Court, which confirmed the judgment and decree of the Trial Court. Thus, the judgment and decree of the learned District Judge, Namakkal in A.S.No. 11 of 2015, confirming the judgment and decree of the Subordinate Judge, Namakkal in O.S.No. 38 of 2009 are confirmed and the Second Appeal is dismissed with the costs of the respondents throughout.

Sd/-

Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

mrn

To

1. The Additional District Judge,  
Namakkal
2. The Additional Subordinate Judge,  
Namakkal.



3.The Section Officer,  
VR Section,  
High Court, Madras.

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+1cc to Mr.E.K.Kumaresan, Advocate SR.No.5825  
+1cc to Mr.V.Raghavachari, Advocate SR.No.5849

S.A.No. 1293 of 2019

AK (CO)  
GN (14/03/2022)