



A.S.No.384 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 23.06.2023

Judgment Pronounced on : **11.07.2023**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

A.S.No.384 of 2015

and M.P.No.1 of 2015

1.Rajammal (Deceased)

2.S.Gomathi

3.A.Balakrishnan

4.B.Malathy

5.D.Sumathi

6.A.Kudiarasan

7.A.Mathan

8.A.Parivallal

9.Suganya

10.S.Pradeep

.. Appellants

(Appellants 2 to 10 are brought on record as LR's of the deceased sole appellant vide order of this court dated 16.04.2018 made in CMP.No.5056 of 2019 in A.S.No.384 of 2015 by this Court)

Versus



A.S.No.384 of 2015

1.Seetha

2.Goyindammal

3.Ethiraj

4.G.Gopal

5.G.Siva Rao

6.G.Sankar Rao

7.Krishna Rao

8.Manimegalai

9.Revathy

10.Leelavathy

11.Bhuvaneswari

12.M/s.Ten Win Properties Pvt. Ltd.,

Rep. by its Directors, L.Boopathy & S.Dayalan,
TKSPM Towers, 1st Floor,
No.792, Trunk Road,
Poonamallee,
Chennai 600 056.

13.The Central Govt. Employees

Welfare Housing Organization,
6th Floor, A Wing,
Janpath Bhawan, Janpath Lane,
New Delhi 110 001.

.. Respondents

(Respondents 1 to 12 are given up

As no relief is sought for against them)

(Amended vide Court order dated 14.8.2018

made in CMP.14063 of 2018 in AS.384 of 2015
by this Court)



Prayer : Appeal Suit filed under Order XLI Rule 1 r/w Section 96 of Civil Procedure Code to set aside the Judgement and Decree dated 09.01.2014 passed in O.S.No.88 of 2011 on the file of the III Additional District Court, Thiruvallore at Poonamallee, and decree the suit as prayed for.

For Appellants : M/s.Chitra Sampath, Senior Counsel
Assisted by Mr.R.Bharath Kumar

For Respondents : Mr.C.Umashankar (for R13)
Assisted by Mr.S.Thiruvenkadam

JUDGMENT

This appeal suit is filed against the judgment and preliminary decree passed in O.S.No.88 of 2011 dated 09.01.2014 by the III Additional District Court, Tiruvallur at Poonamallee. Herein after in this judgment parties would be referred to as per their array in the suit.

2. The case of the plaintiff is that Item No.1 & 2 of the suit schedule properties originally belong to the father of the plaintiff by name Thiagarajan. The plaintiff's father purchased the item No.1 of the suit schedule property under a registered sale deed dated 17.05.1945 and item No.2 of the suit schedule property under the registered sale deed dated 26.09.1946. The plaintiff's father died in the year 1957 leaving behind two sons and three daughters. The plaintiff, 1st and 2nd defendants are daughters, the 3rd defendant



is one son and the other son Govindharajan had passed away and the defendants 4 to 11 are his legal heirs. Therefore, the plaintiff, 1st defendant, 2nd defendant, 3rd defendant and the defendants 4 to 11 jointly are entitled to 1/5th share each in the suit schedule properties.

3. While so, in the year 2011, 3rd defendant was trying to sell the suit properties to defendants 12 & 13 and therefore, plaintiff issued a legal notice on 18.04.2011 requesting the other defendants to come for partition. Even thereafter, the defendants did not come forward and hence the suit.

4. The suit was not contested by the defendants 1 to 11. The 13th defendant, who is the subsequent purchaser, filed a written statement, where under it was mentioned that the defendant was not concerned with the item No.1 of the suit schedule property. As far as the item No.2 is concerned, the same was sold by the 3rd defendant and other son Govindharajan, whose legal heirs are defendants 4 to 11 by a sale deed dated 26.11.1977 to the vendor of the 13th defendant and from the said vendor, the 13th defendant purchased the property in the year 2005 vide registered sale deed bearing Doc No.4280 of 2005. Similarly, another portion in S.No.489/B3 was also purchased from 3rd defendant by a sale deed registered as Doc.No.1208 of 1983. From the said date, the defendants 12 & 13 are in possession and occupation of the said extents of the property and therefore, to the extend it is sold by the said sale



deed, the suit is barred by limitation. On the strength of the said pleadings, the

trial Court framed the following issues,

- (a) Whether the plaintiff is entitled for 1/5th share in the suit property?
- (b) Whether the plaintiff is entitled for the preliminary decree as prayed for?
- (c) To what relief the plaintiff is entitled?

5. On the said issues, the parties let in evidence. Plaintiff examined himself as P.W.1 and Ex.A1 to A7 were marked. On behalf of the 13th defendant, one Vijaya Kumar Babu was examined as D.W.1 and Ex.A.1 to A.6 were marked. Thereafter, the trial Court proceeded to consider the case of the parties and found that the properties was self acquired property of the father of the plaintiff and that he died interstate and that he left behind three daughters and two sons and therefore, the plaintiff and defendants 1 to 3 and the defendants 4 to 11 will be entitled to his properties with 1/5 share each in his property.

6. However, the trial Court found that since in respect of the schedule II of properties, already 1 Acre and 50 Cents have been sold long back by Ex.B2 sale deed dated 26.11.1977 and Ex.B3 sale deed dated 01.09.1983. The suit is barred by limitation as the suit is filed only in the year 2011.



However, in respect of the balance extent of the item No.2 of the suit schedule property, the trial Court held that the plaintiff, 1st defendant and 2nd defendant will be entitled to 1/3 each. Aggrieved by the same, the plaintiff is on appeal before this Court.

7. Heard, Mrs.Chitra Sampath, learned Senior Counsel appearing on behalf of the appellant and Mr.C.Umashankar, learned Counsel appearing on behalf of the respondent.

8. Mrs. Chitra Sampath, learned Senior Counsel would submit that admittedly the property is a self acquired property of Thiagarajan. Admittedly, he died leaving behind two sons and three daughters. Therefore, in all his properties they are entitled to 1/5th. In that view of the matter, having found favour with the case of the plaintiff, if the 3rd defendant and the other son Govindharajan had sold a part of the schedule 2 of the property, even then the Court ought to have held as available for partition and only to that the extent of the share of the said Ethiraj and Govindharajan, who sold the property, it can be allowed in favour of the subsequent purchasers in the final decree. Therefore, excluding the said extent itself is incorrect in law. The learned Senior counsel would rely upon the judgment of the Hon'ble Supreme Court of India in ***Md.Mohammad Ali (dead) by Lrs. Vs. Jagadish Kalita and others*** reported in **(2004) 1 SCC 271**, for the proposition that there cannot be any limitation or



adverse possession as the possession by a co-sharer is deemed to be possession of the other sharers also. The learned Senior Counsel also relied upon the judgment of Hon'ble Supreme Court of India in ***Laxman Tatyaba Kankate and another Vs. Taramati Harishchadra Dhatrak*** reported in (2010) 7 SCC 717 for the proposition that the equitable consideration would require the trial Court to include the entire property in the preliminary decree and only to the extent it falls to the share of the vendors can be excluded from the purview of partition.

9. Per contra, Mr.C.Uma Shankar, learned counsel appearing on behalf of the 12th & 13th defendant would submit that after selling the property in the year 1977 & 1983, belatedly after 34 years, the family members of the plaintiff colluded between themselves and have filed the suit by one sister and the remaining persons remained absent only to create trouble in the possession and enjoyment of the 13th defendant. One extent of the property was sold to the vendor of the 13th defendant in the year 1977 and thereafter, resold in the year 2005. Similarly, the other extent of 50 cents was also sold in the year 1983. The properties were in the open possession and enjoyment of the 13th defendant to the knowledge of the plaintiff as well as the other defendants. Therefore, even though the plaintiff and the defendants 1 & 2 had 1/5th right in the said extent of the property, when the 3rd defendant and the deceased Govindharajan, exercised right over the said extent of the property as if the



property belong to their own by even dealing with the property and subsequently, by virtue of the said assertion of the right, the defendants 12 & defendant 13 being in continuous and long possession for about 34 years and 28 years, the plaintiff and the defendants 1 & 2 have lost their title by way of ouster.

10. I have considered the rival submissions made on either side and perused the material records of the case. Upon consideration thereof, the points for consideration in this appeal suit is,

- (i) Whether or not the exclusion of 1 Acre and 50 cents in item No.2 of the suit schedule property from the preliminary decree by the trial Court is in order?

The extent of 1 Acre and 50 cents of the property is in the exclusive possession of the 13th defendant. Not only the possession is exclusive, it is a long and continuous, that is from the date of purchase in the year 1977 and 1983. There has also been mutation of records as patta in Ex.B.5 stands in the name of the 13th defendant. It is not mere a continuous long and exclusive possession, but it is in pursuant to documents of sale executed on 26.11.1977 and 01.09.1983. Thus it can be seen that even though in law, mere possession by a co-owner how so ever long and continuous it may be would be deemed to be possession on behalf of all the sharers when exclusive title is asserted that too by selling



the property as if they alone are the sole owners of the property, at least at that relevant point of time, there is a cause of action for the plaintiff and the defendants 1 & 2 to seek for partition and their share in the said property, even though succession open and their father died in 1957. Though there is no limitation to file the suit for partition with reference to the opening of succession, there will be some acts of the co-sharers, which has to be considered as giving rise to cause of action for the plaintiff to have suited for partition and selling the properties as if it is their own is one such action.

11. Thus, more than 12 years of time have passed from the date of first sale in Ex.B2 in the year 1977 and second sale in Ex.B3 in the year 1983 and the suit is filed in the year 2011. Therefore, the plaintiff's claim in respect of the 1 Acre and 50 cents sold away by the 3rd defendant and the deceased Govindarajan stood extinguished by ouster. However, in respect of the remaining extent of the properties, since there is no contest on behalf of the other defendants, the question is considered only in respect of the extent sold to the contesting defendant alone.

12. This Court had an occasion to consider the issue as to when the title of the co-sharers will be affected by ouster in ***M.Kumar (died) Vs. Kalaiselvi & Ors*** reported in ***MANU/TN/0052/2023***, where after considering the relevant judgments, this Court has held that when the long and continuous



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possession coupled with hostile assertion of title and creation of records such as mutation of revenue records and title documents would all cumulatively amount to ouster of the title. The trial Court has also taken into account the equitable considerations and has held that in the remaining 50 cents, the defendants 3 and 4 to 11 will not have any share and have allotted 1/3rd share to the plaintiff, 1st and 2nd defendant.

13. In that view of the matter, I answer the point that the judgment and decree of the Trial Court is proper in as much as it excludes the 1 Acre and 50 cents sold to the 13th defendant from being available for partition.

14. In the result, A.S.No.384 of 2015 is dismissed. The judgment and decree in O.S.No.88 of 2011 dated 09.01.2014 by the III Additional District Court, Tiruvallur at Poonamallee is confirmed. There shall be no orders as towards costs. Connected Miscellaneous petition is closed.

11.07.2023

Index : yes/no
Speaking order/Non-speaking order
Neutral Citation : yes/no
mpl

To

1. The III Additional District Court,
Thiruvallure at Poonamallee,



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2. The Section Officer,
V.R. Section,
High Court of Madras.



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D.BHARATHA CHAKRAVARTHY, J.,

mpl

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