



S.A.No.202 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.04.2023

CORAM

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.202 of 2008

M.M.Madheswaran

... Appellant

Vs.

1.M.Gangayammal (Deceased)

2.Tmt.Marammal

3.Smt.Pattaiyammal

4.Tmt.Kannammal

5.Venkatachalam

6.Tmt.Rajeswai

7.M.Sorojini

8.M.Mani (Deceased)

9.M.Mahendran

10.R.Jayammal

(R7 to R10 brought on record as LR's of the deceased R1 vide order of this Court dated 31.10.2017 made in C.M.P.Nos.1 & 2 of 2009)



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11.Tmt.Chandra

12.M.Senthil Kumar (Deceased)

13.M.Sivasakthi

14.S.Mageshwari

15.Minor S.Chitrabala

16.Minor S.Dharshan

... Respondents

(R8 died, R11 to R13 brought on record as LR's of the Deceased R8 and R12 died, R14 to R16 brought on record as LR's of the Deceased R12 vide order of this Court dated 28.11.2022 made in C.M.P.Nos.11230, 11232 & 11234 of 2021 and C.M.P.Nos.29, 33 & 35 of 2022 in S.A.No.202 of 2008)

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and decree dated 15.11.2005 in A.S.No.39 of 2005 on the file of the Principal Sub Court, Gobichettipalayam, setting aside the Judgment and decree dated 22.06.2004 in O.S.No.492 of 1997 on the file of the District Munsif Court, Gobichettipalayam.

For Appellant : Mr.K.M.Venugopal
for Mr.K.Vellayaraj



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For Respondents :
For R1 : Died (steps taken)
For R2 to R6 : Given up

For R7 & R10 : No appearance

For R8 & R12 : Died (steps taken)

For R9, R11,
R13 to R16 : Ms.Adishri
for Mr.N.Manokaran

JUDGMENT

The fifth defendant in O.S.No.492 of 1997 on the file of the District Munsif Court, Gobichettipalayam and A.S.No.39 of 2005 on the file of the Principal Sub Court, Gobichettipalayam, is the appellant before this Court.

2. There was one Muthusamy Gounder, who married twice. His first wife was one Pachamuthammal and the second wife was one Rajeshwari. From the union between Muthusamy Gounder and Pachamuthammal, they got four daughters and one son. The daughters are Gangayammal, Mariammal, Pattayammal and Kannammal and the



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son was Krishnasamy. The said Gangayammal had one son, by name Matheswaran.

3. The suit relates to the absolute properties of the said Pachamuthammal. The said Matheswaran claimed that his grand mother Pachamuthammal had orally gifted the property to him and that, the same was recorded by the Criminal Court in S.T.R.No.1657 of 1997 on the file of the Judicial Magistrate Court at Bhavani.

4. On the strength of this oral gift, he had filed O.S.No.274 of 1991 seeking declaration of his title. The learned Subordinate Judge at Gobichettipalayam had dismissed the suit.

5. Against the same, a regular appeal was filed in A.S.No.390 of 1997 on the file of the District Court at Erode. The said appeal also ended in dismissal.

6. The learned counsel appearing for the appellant would plead that a second appeal was preferred by the appellant from the said



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Judgment, but, unfortunately he is not in a position to furnish the SR number or the second appeal number or what happened to the fate of the papers said to have been filed in the second appeal against A.S.No.390 of 1997.

7. Pending the appeal, the mother of Matheswaran i.e., Gangayammal presented the present suit for partition. She impleaded her father Muthusamy Gounder, her siblings as well as the son of her only brother Venkatachalam. She claimed 1/5th share in the suit schedule property. The said suit was dismissed by the learned Trial Judge on the ground that since the proceedings initiated by Matheswaran, the appellant/fifth defendant had not yet concluded, in the sense that A.S.No.390 of 1997 was still pending, on the date on which, O.S.No.492 of 1997 was filed, the suit for partition is not maintainable.

8. Against the said Judgment and decree, Gangayammal filed A.S.No.39 of 2005. It is pertinent to point out that when A.S.No.39 of 2005 was taken up, the appeal in A.S.No.390 of 1997 against the Judgment and Decree in O.S.No.274 of 1991 had been disposed of.



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9. Consequently, there being no bar, the learned Principal Subordinate Judge, Gobichettipalayam decreed the suit as prayed for granting 1/5th share to the plaintiff.

10. Aggrieved by the said Judgment and Decree, the present second appeal has been filed.

11. Heard Mr.K.M.Venugopal for Mr.K.Vellayaraj appearing for the appellant and Ms.Adishri for Mr.N.Manokaran appearing for R9, R11, R13 to R16.

12. Mr.K.M.Venugopal would vehemently contend that as the second appeal was pending against the Judgment and decree of the Court in A.S.No.390 of 1997, the learned Principal Subordinate Judge, Gobichettipalayam had erred in decreeing the suit as prayed for. He would also argue that since Venkatachalam, the fifth respondent/sixth defendant does not have a right in the property of his grand mother, the Court ought not to have granted him the relief in the suit.



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13. He would also claim that the appellant has perfected his title to the property by adverse possession and therefore, the Judgment of the Principal Subordinate Judge, Gobichettipalayam deserves to be reversed and the appeal has to be accepted.

14. Countering the arguments, Ms.Adishri for Mr.N.Manokaran appearing for R9, R11, R13 to R16 would submit that there is no proof that a second appeal had been preferred from the Judgment and decree of the District Court at Erode in A.S.No.390 of 1997 and therefore, the Lower Appellate Court rightly concluded that the plaintiff is entitled to 1/5th share. She would further submit that the son of a pre-deceased son is a Class-I Heir under the Hindu Succession Act, 1956, and therefore, he is entitled to a share in his grand mother's property. Finally, she would submit that there is no proof of adverse possession and O.S.No.274 of 1991 having been dismissed and the same plea cannot be reopened in the suit for partition filed by the mother of the plaintiff in the said suit.



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WEB COPY 15. This second appeal was admitted on 19.02.2008 on the following substantial questions of law:-

“a. Whether the appellate Court is right in law in not finding that the present suit is barred by principles of Res-judicata?

b. Whether the appellate Court is right in law in finding that all the proper and necessary parties have been impleaded and as such the suit is not bad for non-joinder?

c. Whether the appellate Court is right in law in awarding a share to the brother of plaintiff who is neither the legal heir of any party to the suit nor he is a beneficiary under any document?

d. Whether the appellate Court is right in law in rejecting the claim of adverse possession made by the appellant (5th defendant) herein?”

16. I have carefully perused the pleadings. I have gone through the evidence and the Judgment and decree in O.S.No.492 of 1997 as well as A.S.No.39 of 2005.



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17. I am afraid that I am not in agreement with Mr.K.M.Venugopal on a submission that since the appeal was pending, the Court below ought not to have granted a decree for partition.

18. It is admitted by both sides that the appellant/fifth defendant had filed O.S.No.274 of 1991 before the Sub Court, Gobichettipalayam and had failed. He had taken the decree on appeal to A.S.No.390 of 1997 before the District Court at Erode and had also failed.

19. Though Mr.K.M.Venugopal would submit that a second appeal is pending, till date, the SR Number or the second appeal number has not been furnished. Therefore, I am constrained to presume that the appeal in O.S.No.274 of 1991 as confirmed in A.S.No.390 of 1997 has become final. The result flowing out this finality is that the property of Pachamuthammal, who had died intestate, are liable to be partitioned. The relationship between the parties is not in dispute and therefore, it is simple application of the Hindu Succession Act, 1956.



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WEB COPY 20. On his claim that Venkatachalam, the fifth respondent/sixth defendant is not entitled to a share, I have to hold that the son of a pre-deceased son is entitled to a share.

21. Finally, on the argument of adverse possession, I am unable to accept the said plea, because, the suit for declaration of title on the basis of the alleged gift itself, came to be filed only in the year 1991. For a person, to perfect the title by adverse possession, there must be evidence to prove the possession was open, hostile and continuous.

22. In the present case, the appellant/fifth defendant had neither filed any exhibit nor had entered into the witnesses box. Therefore, the plea of adverse possession is not proved. Adverse Possession requires positive proof of all its aforesaid ingredients. As the appellant/fifth defendant has kept away from the witness box, I cannot presume the adverse possession.



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23. Apart from this fact, the present suit for partition had been presented within six years of the claim made by Matheswaran that he is the owner of the property. Therefore, the plea of adverse possession has to fail.

24. In fine, the Judgment and decree of the learned Principal Subordinate Judge, Gobichettipalayam in A.S.No.39 of 2005 dated 15.11.2005 in setting aside the Judgment and decree of the learned District Munsif, Gobichettipalayam in O.S.No.492 of 1997 dated 22.06.2004 is confirmed. The Second Appeal is dismissed with costs.

25. This is a suit for partition. As directed by the Hon'ble Supreme Court, the parties need not be pushed to file a separate application for final decree. Therefore, the learned District Munsif, Gobichettipalayam is hereby requested to initiate final decree proceedings and appoint a Commissioner and ensure that the proceedings are concluded on or before 30.11.2023. The Trial Court is requested to proceed further for final decree proceedings on or from 05.06.2023.



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26. The parties shall appear before the learned Principal Subordinate Judge, Gobichettipalayam on 05.06.2023. The parties having been in litigation for over 32 years, the learned District Munsif is requested to give priority and ensure that, the proceedings are completed, in any event, before the date fixed by this Court on 30.11.2023.

27. The learned District Munsif, Gobichettipalayam shall ensure that both the parties are heard and orders are passed at the earliest and submit a report to this Court.

28. Absolute discretion is granted to the learned District Munsif, Gobichettipalayam, to refuse any unnecessary adjournments. In case, he feels that the parties are indulging in dilatory tactics, he may refuse the same and proceed in accordance with law with all expedition which the matter requires.

19.04.2023

Index : Yes/No
Speaking Order : Yes/No
Neutral Citation : Yes/No

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V.LAKSHMINARAYANAN, J.

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To:

- 1.The District Munsif,
Gobichettipalayam.
- 2.The Principal Subordinate Judge,
Gobichettipalayam.
- 3.The Section Officer,
Vernacular Section,
High Court of Madras.

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