



THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.11.2023

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE N.SENTHILKUMAR

A.S.No.564 of 2017
and
C.M.P.No.18830 of 2017

Veerabadran

...Appellant

Vs.

1.Kavitha Anand alias A.Kavitha

2.Minor A.Ramya

3.Minor A.Veerendharan

4.Rangammal

...Respondents

Prayer: Appeal Suit filed under Section 96 read with Order XLI Rule 1 of the Code of Civil Procedure to set aside the judgment and decree in O.S.No.619 of 2012 dated 06.08.2016 on the file of the First Additional District Court, Coimbatore.



For Appellant : Mr.S.Senthilnathan

For Respondents : Mrs.Reshmi Christy

J U D G M E N T

(Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)

The 1st defendant in O.S.No.619 of 2012, aggrieved by the grant of a decree for partition in the said suit is on appeal.

2. The suit was laid by the respondents 1 to 3 seeking partition and separate possession of their 2/3rd share in the suit properties on the ground that they had purchased the shares of the 2nd and 3rd defendants in the suit under two registered sale deeds dated 23.07.2008. The plaintiffs would justify their claim for partition contending that the suit properties belonged to one Kanniappa Gowder, who left behind three sons Badrappan, Chinnasamy and Ramasamy. At a partition between the three sons of Kanniappa Gowder, the suit properties measuring about 4 acres and 65 cents were allotted to the share of Badrappan, who died intestate on 25.08.1998, leaving behind his wife Bettammal, daughter Rangammal and



son Veerabadran. It is the claim of the plaintiffs that the husband of the 1st plaintiff V.Anand purchased the share of Bettammal and Rangammal, as already stated, under the two sale deeds dated 23.07.2008.

3. The purchaser Anand died on 01.10.2008 leaving behind the plaintiffs as his legal representatives and at a partition between the plaintiffs, the mother and the brothers of Anand on 10.03.2010, the 2/3rd share purchased under the sale deed dated 23.07.2008 was allotted to the share of the plaintiffs.

4. The plaintiffs would submit that since they were residing in Chennai she had required the 1st defendant, son of Badrappan to look after the property and he was paying her the share in the income also. Claiming that it was no longer possible to continue joint enjoyment, the plaintiffs sought for partition.

5. The suit was resisted by the defendants contending that the



description of the property was incorrect. The plaintiffs have shown only 2/3rd share that was purchased by Anand as suit property and therefore the suit is liable to be dismissed. It was the further contention that the sale in favour of Anand happened during the pendency of the suit for partition filed by the 3rd defendant herein viz., Rangammal in O.S.No.118 of 2002 and the said suit having been dismissed for default, the alienation made during the pendency of the suit is not valid. It was also contended that the claim of joint possession is not true and the plaintiffs being alienees cannot take advantage of Section 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955 and Court fee should have been paid under Section Section 37(1) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955.

6. It was also the contention of the 1st defendant that the suit properties were ancestral properties and hence as the son, he would be entitled to a half share and the defendants 2 and 3 who are the wife and daughter would be entitled to only 1/6th share viz., 1/3rd share in the 1/2 share of Badrappan.



7. On the above pleadings the learned trial Judge framed the following issues:

1) Whether the suit properties are ancestral properties in the hands of Badrappa Gowder or his separate properties?

2) Whether the defendants 2 and 3 have salable interest in the suit schedule property and if so, what is their share?

3) Whether the sale deed dated 23.07.2008 executed by the 2nd and 3rd defendant in favour of the 1st plaintiff's husband Anand is binding on the first defendant?

4) Whether the plaintiffs are entitled for partition and separate possession of their 2/3rd share in the suit property?

5) Whether the plaintiffs have paid proper Court fee?

8. At trial, the 1st plaintiff was examined as PW1 and Exs.A1 to A8 were marked. The 1st defendant was examined as DW1 and two other witnesses DW2 and DW3 were examined on his side. Exs.B1 to B12 were



marked.

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9. On a consideration of the evidence on record, the learned trial Court concluded that the properties are self-acquired properties of Kanniappa Gowder and therefore once they are allotted under the partition between the sons of Kanniappa Gowder, Badrappan would take it as his self-acquired property and it will not assume the character of ancestral property in the hands of Badrappan. The learned trial Judge also found that the plaintiffs who are the co-owners are presumed to be in joint possession since there was no evidence of exclusion of enjoyment by the plaintiffs. Since there was no issue relating to the plea of *lis pendens*, the trial Court did not answer the same. The defense regarding description of the property did not survive since the suit schedule was amended subsequently by making the entire property subject matter of the suit. On the above findings, the learned trial Judge granted a decree for partition as prayed for. Aggrieved the 1st defendant is on appeal. The mother/ the 2nd defendant died pending suit.



10. We have heard Mr.S.Senthilnathan, learned counsel appearing for the appellants and Mrs.Reshmi Christy, learned counsel appearing for the respondents 1 to 3. The 4th respondent though served is not appearing either in person or through counsel duly instructed.

11. Mr.S.Senthilnathan, learned counsel appearing for the appellants would vehemently contend that the trial Court ought to have held that the sale deed executed during the pendency of O.S.No.118 of 2002 which was subsequently dismissed for default would be invalid and therefore the suit for partition at the instance of the purchaser is not maintainable. He would also point out that the theory of joint possession cannot be accepted since the plaintiffs are purchasers and they were excluded from possession.

12. Contending contra Mrs.Reshmi Christy, learned counsel appearing for the respondents would submit that the doctrine of *lis pendens* would not apply since the suit was dismissed for default. The only bar that would be attracted is the bar created under Order IX Rule 9 of the Code of



Civil Procedure, which only precludes a suit on the same cause of action.

According to her, the suit in O.S.No.118 of 2002 being one for partition it was always open to the plaintiffs to make another demand and create a fresh cause of action and file another suit. Therefore, according to the learned counsel, the dismissal for default of O.S.No.118 of 2002 will not preclude the purchasers from the plaintiffs therein to launch a suit for partition subsequently.

13. On the above contentions of the learned counsel, the following points arise for determination.

1) Whether the sale deeds dated 23.07.2008 can be said to be hit by the doctrine of lis pendens.

2) Whether the trial Court was right in concluding that the plaintiffs can avail the benefit of Section 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955.

Point No.1:



14. On the first contention regarding *lis pendens*, we have no hesitation in concluding that it has to be rejected at the out set. Section 52 of the Transfer of Property Act, requires that in order to apply the doctrine of *lis pendens* a suit or proceeding, in which the right to immovable property is directly and specifically in question, to be pending and the transfer in such case is made subject to the result of the said proceeding.

15. Admittedly, O.S.No.118 of 2002 was only dismissed for default and there was no determination on the rights of the parties on merits. As we have already pointed out Order IX Rule 9 of the Code of Civil Procedure only bars a subsequent suit on the same cause of action. Therefore, there is no bar for the plaintiffs to file a subsequent suit for partition based on the sale deeds. Since there is no actual determination of the rights of the parties on the merits of the claim, the doctrine of *lis pendens* cannot be invoked. We therefore answer Point No.1 against the appellants.

Point No.2:



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16. As regards Point No.2 it is the contention of Mr.S.Senthilnathan, learned counsel appearing for the appellant that the plaintiffs being strangers are not entitled to claim joint possession. Section 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955, only enables payment of fixed Court fee by co-owners, who are in joint possession of the property. The plaintiffs have categorically alleged in the plaint that they have not been excluded from the possession and the 1st defendant has been sharing the income with them. The liability to pay Court fee will have to be decided on the averments in the plaint and once it is averred that the plaintiffs are in joint possession, we do not think we can mulct the liability to pay higher Court fee on the plaintiffs, that too, in a suit for partition. The trial Court has considered the issue and has arrived at a conclusion that the plaintiffs being in joint possession are entitled to invoke Section 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955. We therefore do not find any reason to interfere with the issue of Court fee also.



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17. Though Mr.S.Senthilnathan, learned counsel appearing for the appellant would attempt to argue on the nature of the property viz., ancestral or self-acquired, we do not find any merit in the said contention also, because, the fact that the properties were self-acquired property of Kanniappa Gowder is admitted and on his death it was inherited by Badrappan and his brothers as Class I heirs under Section 8 of the Hindu Succession Act 1956. There was a partition between him and his brothers. Therefore, the self-acquired property of the father allotted to a son at a partition between the sons will not assume the character of the ancestral property. The same will remain self-acquired property, more so, because Kanniappa Gowder died in 1965, that is, after coming into force of the Hindu Succession Act, 1956.

18. We do not find any reason to interfere with the judgment and decree of the trial Court. The appeal is **dismissed** confirming the judgment and decree of the trial Court. We however make no order as to costs in this



appeal. Consequently, the connected miscellaneous petition is closed.

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(R.S.M.,J.) (N.S.,J.)
29.11.2023

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Index :No
Internet :Yes
Neutral Citation :No
Speaking order



To

The I Additional District Judge,
Coimbatore.

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