



S.A.No.886 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.12.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.886 of 2023

and

C.M.P.No.28279 of 2023

1. R.Thirumoorthi
 2. R.Eswaramoorthi
- Appellants

...

Vs.

K.M.Shanmugam (died)

1. M.S.Gowdham
2. Sathyabama

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C. to set aside the judgment and decree dated 28.03.2023 in A.S.No.41 of 2018, passed by the learned III Additional District and Sessions Judge, Dharapuram, confirming the judgment and decree dated 26.03.2018 in O.S.No.246 of 2011, passed by the learned Subordinate Judge, Dharapuram.

For appellants : Mrs.Hema Sampath, Senior Counsel
for Mr.S.Prabhu.



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JUDGMENT

The unsuccessful defendants in both the Courts have approached this Court.

2. The facts are briefly set out hereinbelow with the parties being shown in the same rank as before the Trial Court.

FACTS OF THE CASE:

2.1. The sole plaintiff had originally filed the suit for partition of his half share in the suit schedule properties. Pending the suit, the sole plaintiff had died and his legal heirs have been brought on record as plaintiffs 2 and 3.

2.2. It is the case of the sole plaintiff that he and his elder brother Durairaj has possessed extensive agricultural lands as ancestral properties in Surianallur Village. On 09.11.1972, they have entered into a partition deed and had divided their joint family properties. 'A' schedule property described in the partition deed was allotted to Durairaj and 'B' schedule property was allotted to the first



plaintiff.

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2.3. One of the properties which was divided in the partition deed was to an extent of 9.82 acres in S.F.No.1030 in Suriyanallur village. This property was divided into two shares measuring 5.96 1/2 acres and 3.85 1/2 acres. The larger extent was allotted to Durairaj and it forms a part of 'A' schedule property and lesser extent was allotted to first plaintiff and it forms a part of 'B' schedule property. However, the said extent of 9.82 acres was not divided by metes and bounds and it was being enjoyed in common.

2.4. The elder brother Durairaj died in the year 1994 leaving behind his wife and two daughters. Just before the filing of this suit, the defendants have come to the suit properties, claiming that they have purchased the entire suit properties including the share of the first plaintiff. Further, on verification, the sole plaintiff had come to know that the original survey number was changed from 1030 to



1190/2 and 1190/3 and that patta was issued for the entire extent in the name of Durairaj.

2.5. The sole plaintiff would submit that he had not received any notice before the issue of the changed patta and taking advantage of this patta standing in the name of Durairaj, his wife and daughters had sold the property to one Ganesan and his wife on 04.01.2007. These purchasers had never taken possession of the suit properties. Thereafter, it appears that they had executed a sale deed in favour of the defendants on 26.02.2009 conveying the entire extent to them. The sole plaintiff would submit that the vendors had no right to the extent of 3.85 1/2 acres as it belongs to him. Therefore, the sole plaintiff had come forward with the suit for partition.

2.6. The first defendant had filed a written statement which was adopted by the second defendant *inter alia* claiming that the suit was false, vexatious and frivolous. The defendants would submit that



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after the partition deed dated 09.11.1972, the sole plaintiff had left the village and settled in Coimbatore. He had sold away the properties allotted to him and ceased to have any interest in the property. His brother Durairaj took possession of the entire properties and he was in possession and enjoyment of the properties as one unit. The defendants would submit that it is false to state that the properties in Old S.F.No.1030 were not demarcated by boundaries.

2.7. It is the case of the defendants that they have purchased the property and after the purchase, they have dug a well and got electricity connection and installed motor pump-sets. The defendants would submit that since the plaintiffs are out of possession of the suit properties, the suit has not been properly valued and the Court Fee paid was also inadequate. Therefore, they sought for the dismissal of this suit for partition.

TRIAL COURT:



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3. The Trial Court had framed the following issues.

“(i)Whether the plaintiffs are entitled to preliminary decree of partition of 3.85 1/2 acres of lands as prayed for?

(ii)Whether the deceased the first plaintiff has sold away his share as alleged by the defendants?

(iii)Whether the share of the first plaintiff became the property of the deceased Durairaj by adverse possession?

(iv)To what other relief?”

4. The second plaintiff had examined himself as P.W.1 and one Nirmaladevi, Senior Revenue Officer as P.W.2. The first defendant had examined himself as D.W.1 and one Muthusamy as D.W.2. On the side of the plaintiffs, Exs.A1 to A6 were marked and on the side of the defendants, Exs.B1 to B6 were marked.

5. The Trial Court, on considering the evidence on record, particularly, the admission of D.W.1 had proceeded to decree the suit as prayed for.



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LOWER APPELLATE COURT:

6. Aggrieved by the same, the defendants had filed an appeal in A.S.No.41 of 2018 on the file of the Court of the learned III Additional District and Sessions Judge, who had also concurred with the judgment and decree of the Trial Court and proceeded to dismiss the appeal.

7. Thus, aggrieved by this, the defendants are before this Court and the matter is listed for admission.

8. The learned Senior Counsel appearing for the appellants would submit that the plaintiffs have not bothered to return to the village and take over the properties. Durairaj had passed away in the year 1994 and even thereafter, the plaintiffs have not taken any step whatsoever to take over the properties and therefore, the defendants' predecessor-in-title has been enjoying the properties as a single unit.



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The suit filed is a belated one and lacks merits. The learned Senior Counsel would submit that the defendants have perfected title over the properties through adverse possession.

9. Heard Mrs.Hema Sampath, Senior Counsel appearing on behalf of the learned counsel on record for the appellants and perused the materials available on record.

DISCUSSION:

10. It is an admitted fact that under Ex.A1 - the partition deed dated 09.11.1972, the suit properties have been divided into two portions, one measuring 5.96 1/2 acres and other measuring 3.85 1/2 acres, however, without dividing the same by metes and bounds. These properties have not been partitioned between the brothers and till the year 2011 and there was no adverse claim over the properties.



11. The first plaintiff has come to know about the sale in favour of the defendants, that too, when the defendants who are the second purchasers came to the properties. They have immediately filed the suit and therefore, there is no delay on the part of the plaintiffs.

12. Further, in order to sustain the plea of adverse possession, the pleadings should comply with the parameters that are required when pleading adverse possession / ouster. In the instant case, since the parties are co-owners, it is ouster that has to be pleaded which requires a higher degree of proof. A perusal of the written statement does not indicate as to the point in time from which the defendants predecessors-in-title have asserted their exclusive right over the suit properties. Further, the sale to the vendors of the defendants has taken place on 04.01.2007 and sale to the defendants has taken place on 26.02.2009 and the sole plaintiff had filed the suit as soon as the



defendants had attempted to enter the properties which is when they have come to know about the granting of patta in the name of Durairaj and the sales effected thereafter.

13. Both the Courts below have considered the above facts and proceeded to decree the suit. I see no reason to interfere with the concurrent judgment and decree of the Courts below, as there is no substantial question of law involved in the above second appeal.

Accordingly, this second appeal stands dismissed. Consequently, connected C.M.P. stands closed. No costs.

14.12.2023

Index : Yes/No
Speaking order/non-speaking order
ssa

To

1. The III Additional District and Sessions Judge, Dharapuram.
- 2.The Subordinate Judge, Dharapuram.
- 3.The Section Officer, V.R.Section, High Court, Madras.

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P.T.ASHA, J.,

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