



S.A.Nos.694 & 695 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 08.01.2024

Pronounced on: 31.01.2024

CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.Nos.694 & 695 of 2010

S.A. No.694 of 2010

Venkatachalam

...Appellant in S.A. No.694 of 2010

Vs.

1.Sadasivam

2.Kannammal

3.Gunasekaran

...Respondents in S.A. No.694 of 2010

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and decree dated 11.11.2009 made in A.S. No.60 of 2008 on the file of the Subordinate Judge, Thiruchengode in confirming the judgment and decree dated 31.08.2005 made in O.S. No.466 of 1996 on the file of the District Munsif, Thiruchengode.



S.A.Nos.694 & 695 of 2010

S.A. No.695 of 2010

Venkatachalam

...Appellant in S.A. No.695 of 2010
Vs.

1.Sadasivam

2.Pavalayee

3.Premavathi

...Respondents in S.A. No.695 of 2010

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and decree dated 11.11.2009 made in A.S. No.61 of 2008 on the file of the Subordinate Judge, Thiruchengode in confirming the judgment and decree dated 31.08.2005 made in O.S. No.472 of 1996 on the file of the District Munsif, Thiruchengode.

For Appellant : Mrs.Chitra Sampath,
Senior Counsel for
Mr.C.Jagadish in both SAs.

For Respondents : Mr.S.Parthasarathy,
Senior Counsel for
Mr.M.Guruprasad for R1 in both SAs.

COMMON JUDGMENT

The unsuccessful plaintiff in a suit for partition in O.S. No.472 of 1996



on the file of the District Munsif Court, Thiruchengode is the appellant in the present Second Appeal. The very same plaintiff who was the first defendant in O.S. No.466 of 1996 on the file of the District Munsif Court, Thiruchengode, who suffered a decree for permanent injunction, is the appellant in the other Second Appeal.

2. The parties are described as per the litigative status in O.S. No.472 of 1996, which is the substantial suit for partition. The plaintiff in the said suit approached the Court seeking the relief of partition and separate possession of a 1/4th share in the suit properties, on the strength of the averments that the properties originally belonged to one Alagappa Gounder; the said Alagappa Gounder had a son by name Ramasamy and two daughters, Thangapillai and Karuvachi @ Pappal; the daughter Thangapillai died without any legal heirs and his son Ramasamy Gounder was blessed with a son by name Sadasivam who is the first defendant in O.S. No.472 of 1996; he was also blessed with a daughter and he was survived by his wife.

3. The case of the plaintiff is that the said Alagappa Gounder enjoyed



the properties during his lifetime and after his lifetime, Ramasamy Gounder and Karuvachi @ Pappal were enjoying the suit properties jointly without a partition by metes and bounds. Thereafter, on 21.03.1996, the son of Karuvachi @ Pappal, namely Ramasamy executed a registered sale deed in favour of the plaintiff in respect of 1/4th undivided share in the suit scheduled properties and the suit has been laid in respect of this 1/4th share purchased by the plaintiff.

4. It is the case of the plaintiff that Ramasamy and Karuvachi @ Pappal were entitled to one half share each and at the request of Sadasivam, the son of Ramasamy Gounder, Karuvachi @ Pappal has taken only a 1/4th share, even though she was entitled to one half share and the remaining 3/4th share was allotted to the share of the first defendant, Sadasivam, for the benefit of himself and his mother. Pending the suit, the mother and sister of the first defendant were also impleaded as defendants 2 and 3. The suit was necessitated, according to the plaintiff, since the defendants refused to accede to the request of the plaintiff for an amicable partition.

5. The said suit was resisted by the defendants on the ground that the



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vendor of the plaintiff had no right, much less a 1/4th share and therefore, the sale deed in favour of the plaintiff was not valid. Further, the plaintiff has not disclosed the earlier suit in O.S. No.466 of 1996 and further the mother of Ramasamy viz., Karuvachi @ Pappal, pre-deceased even Alagappa Gounder, the original owner of the suit properties and therefore, she could never have been in possession of the suit scheduled properties which was admittedly belonging only to Alagappa Gounder.

6. In the injunction suit, the very same averments and allegations were traded by the respective parties. The suits were tried jointly by the trial Court and the trial Court dismissed the suit for partition in O.S. No.472 of 1996 and granted a decree for permanent injunction as prayed for by the plaintiff in O.S No.466 of 1996. The Appeals in A.S. Nos.60 & 61 of 2008 filed by the plaintiff viz., the appellant herein came to be dismissed, confirming the findings of the trial Court.

7. I have heard Mrs.Chitra Sampath, learned Senior Counsel for Mr.C.Jagadish, learned counsel for the appellant and Mr.S.Parthasarathy, learned Senior Counsel for Mr.M.Guruprasad, learned counsel for the



respondents.

8. Having heard the learned Senior Counsel on either side, I have admitted the Second Appeals on the following substantial questions of law in the above Second Appeals, i.e.,:

(i) whether the Courts below were right in dismissing the partition suit against the appellant, when the appellant's vendor was admittedly, a Class I legal heir of Alagappa Gounder, entitled to a share in the suit properties?

(ii) whether the Courts below were justified in granting the relief of permanent injunction in favour of the respondents when admittedly, the appellant's vendor was entitled to a share in the properties of Alagappa Gounder?.

9. I have heard the learned Senior Counsel on either side. Having perused the pleadings of the respective parties, oral and documentary evidence adduced by them before the trial Court and the judgments of the trial Court as well as the First Appellate Court, I proceed to adjudicate the above Second Appeals, by answering the substantial questions of law.

10. Both the substantial questions of law are interconnected. The



short point that requires consideration is as to whether the appellant's vendor had a right in the suit properties and thereby, entitled the plaintiff/purchaser to seek partition. There is no dispute with regard to the genealogy. It is an admitted fact that Alagappa Gounder purchased the first item of the suit properties in the year 1960. According to the defendants, there was a partition in the family on 30.04.1980, in and where by the first respondent i.e., the plaintiff in the suit for injunction and his father Ramasamy Gounder were jointly allotted the second item of the suit scheduled properties and that after the demise of the father, Ramasamy Gounder, his son Sadasivam has been in peaceful possession and enjoyment of the same.

11. The learned Senior Counsel for both sides are in agreement with the family tree that has been drawn up and submitted by the learned counsel for the first respondent. Though they are not agreeable with regard to the date of death of Karuvachi @ Pappal, the daughter of Alagappa Gounder, it is seen that Alagappa Gounder, died leaving behind one son, Ramasamy Gounder and two daughters, Thangapillai @ Marayammal and Karuvachi @ Pappal. It is admitted on both sides that the daughter, Thangapillai @



Marayammal died issueless.

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12. It is the specific contention of the learned Senior Counsel for the appellant that when admittedly, the daughter Karuvachi @ Pappal was a Class I legal heir of Alagappa Gounder, she was having a right in the suit properties and the same cannot be taken away except by a partition deed or release deed or any other deed of relinquishment under which, her share has been either transferred or given up. According to the learned Senior Counsel for the appellant, neither the said Karuvachi @ Pappal nor her son gave up their share in the suit properties by executing any such document and therefore, consequent to her demise, her only son Ramasamy, inherited a share in the suit properties and therefore, he was entitled and also justified in alienating the same in favour of the plaintiff in O.S. No.472 of 1996 (First defendant in O.S. No.466 of 1996). She would also contend that amount of claim or enjoyment behind the back of said son of Karuvachi @ Pappal would not enure to the benefit of the respondents, to claim that they were absolutely entitled to the suit properties.

13. Per contra, learned Senior Counsel for the respondents Mr.S.Parthasarathy, would state that the plaintiff had approached this Court



with wrong facts and claimed his right for partition based on incorrect particulars and therefore, the suit itself was not maintainable and liable to be dismissed. The thrust of the argument of the learned Senior Counsel for the respondents is that when admittedly Karuvachi @ Pappal had pre-deceased, Alagappa Gounder, the claim of the plaintiff that Ramasamy Gounder and Karuvachi @ Pappal were enjoying the suit properties jointly, without a partition by metes and bounds, was wholly unsustainable and rocks the very foundation of the claim for partition made by the plaintiff.

14. Further, the learned Senior Counsel for the respondents would also state that even assuming that the son of Karuvachi @ Pappal had any right or share in the suit properties, by ouster, his share had already been taken away by the respondents and therefore, he could not have validly conveyed his 1/4th share in favour of the plaintiff/appellant.

15. However, the learned Senior Counsel for the Appellant, Mrs.Chitra Sampath would invite my attention to the written statement of the respondents to show that there was no plea of ouster pleaded by respondents in the written statement. Further, she would also rightly



contend that for even taking the plea of ouster, unless the share of the party whose right is said to be ousted is admitted, the plea of ouster cannot be taken. Therefore, she would contend that if the argument of the learned Senior Counsel for the respondents, Mr.S.Parthasarathy is to be accepted regarding ouster, then it has to be taken that the respondents are admitting to the share of Ramasamy, son of Karuvachi @ Pappal and therefore, it cannot be said that the appellant's vendor did not have any right in the suit properties.

16. Insofar as the plea of ouster itself, the learned Senior Counsel for the appellant Mrs.Chitra Sampath would vehemently contend that, first of all, there is no clear, definite or specific plea of ouster taken by the defendants in the written statement. Further, even if the averments that are said to be pleaded regarding ouster as contended by learned Senior Counsel for the respondents are considered, even then the defendants have miserably failed to establish the said plea of ouster. She would therefore, contend that both the Courts below have misdirected themselves and failed to appreciate the oral and documentary evidence available on record, in proceeding to dismiss the suit for partition.



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17. The learned Senior Counsel for the respondents Mr.S.Parthasarathy, as already discussed herein above, would revolve his arguments only with regard to the maintainability of the suit on the strength of the pleadings in the suit for partition and the evidence let, in support of the same.

18. As rightly pointed out by the learned Senior Counsel for the respondents, the plaint does not state proper facts. The facts pleaded in the plaint are contrary to the ground position. The mother of the appellant's vendor, whether she died before the commencement of the Hindu Succession Act, 1956 or after the commencement of Hindu Succession Act, 1956, did not actually matter, since the plaint proceeds on the basis that she was in joint enjoyment of the suit properties after the demise of her father, Alagappa Gounder. The said Alagappa Gounder admittedly died only in the year 1979, much after the demise of his daughter Karuvachi @ Pappal. However on the date of demise of Alagappa Gounder on 10.09.1979, he left behind him, his son Ramasamy Gounder who died much later on 12.05.1993 and his grandson Ramasamy, through daughter Karuvachi @ Pappal, who



again died much later only on 09.12.2000 and during his lifetime, he had executed a sale deed in favour of the appellant/ plaintiff, in respect of which properties, the plaintiff has approached the Court seeking partition and separate partition. No doubt, the manner in which the relief of partition has been claimed is not proper. However, the suit for partition cannot be treated akin to a suit for declaration of title or other suits like Specific Performance etc.,

19. The substantive rights of the parties in a suit for partition have to be addressed by the Court. Merely because, the plaintiff has sought for an incorrect share, be it a larger share or lesser share or that the pleadings culminating to such a claim for partition are based on misconception or wrong facts, it may not be fatal ultimately, while adjudicating the rights of the parties. If the Court finds that the plaintiff who has approached the Court seeking partition is entitled to a share in the suit properties, then the suit for partition would have to necessarily be decreed, though may not be the share which has been sought for by the plaintiff originally in the plaint. Though the plaintiff has not traced the derivation of title to the suit properties in a true and correct fashion, ultimately, he approached the Court



only for partition and separate possession of his 1/4th share. If the Court finds that the plaintiff is entitled to a 1/4th share in the suit properties or any other share, then the suit for partition would have to be entertained even though the plaint averments did not lend any support to the plaintiff's case as projected, seeking partition at the original instance, while filing the suit.

20. In fact, the Hon'ble Supreme Court in a very elaborate judgment rendered in the case of ***G.Sekar Vs. Geetha and Ors***, reported in **(2009) 6 SCC 99**, found that the suit for partition filed by the sisters was actually bad at the very inception. However, the defence set up by the brother was under a Will said to have been executed by their father. The Courts below had rejected the truth and genuineness of the Will and granted a decree for partition. When the matter came up before the Hon'ble Supreme Court, it was held that the suit for partition was hit by then Section 23 of the Hindu Succession Act, 1956, where a married daughter could not seek for partition of a dwelling house wholly occupied by male members of the family. At the same time, the Hon'ble Supreme Court felt that it would be an exercise in futility by directing the sisters to over and again file a suit for partition and proceeded to confirm the preliminary decree for partition



granted by the High Court, despite holding the law to be otherwise, viz., operation of Act 39 of 2005, being prospective and not retrospective as held by this Court.

21. Applying the ratio and also approach of the Hon'ble Supreme Court to the facts of the present case, merely because, the plaintiff has not pleaded the entitlement of his vendor to 1/4th share in the suit properties in a proper manner or had given incorrect facts and particulars, when the Courts finds that the appellant's vendor did have a 1/4th share in the suit properties which has been conveyed in favour of the appellant, then the suit for partition can be decreed, instead of dismissing the suit, citing the improper and incorrect facts pleaded in the plaint.

22. Further, even if a suit is dismissed on such a technical ground of incorrect pleadings, despite recognising the existing right of the plaintiff, it would not prevent the plaintiff from approaching the Court and seek partition once again, setting out true and proper facts. Thus, I am proceeding to examine as to whether the appellant's vendor had a 1/4th share in the suit properties and if so, whether the suit for partition at the instance



of the purchaser from the son of Karuvachi @ Pappal, daughter of Alagappa Gounder, the original owner can be sustained.

23. With regard to the relationship between the parties, there is no quarrel. Even taking that Karuvachi @ Pappal died prior to the commencement of the Hindu Succession Act, 1956, being the grandson through pre-deceased daughter, the appellant's vendor Ramasamy was a Class I legal heir of Alagappa Gounder. It is not the case of the parties that the properties were the ancestral properties of Alagappa Gounder.

24. It is the specific case of the respondents that Alagappa Gounder purchased the properties only in the year 1960 under three registered sale deeds. Though the respondents' claim under the registered partition deed dated 30.04.1980, admittedly, the said partition was only subsequent to the demise of Alagappa Gounder on 10.09.1979. Therefore, on the said date when the estate opened, Ramasamy viz., the grand son of Alagappa Gounder, through Karuvachi @ Pappal, daughter of Alagappa Gounder was admittedly entitled to a share in the suit properties. The said partition deed behind the said Ramasamy, that is the appellant's vendor was not binding on



him and cannot be said to have validly taken away his share in the suit properties.

25. As rightly pointed out by the learned Senior Counsel for the appellant Mrs.Chitra Sampath, the plea of ouster is also not specifically pleaded and further in any event, the very fact that the contentions regarding ouster are putforth only go to show that the right of said grandson Ramasamy, in the suit properties was admitted to be existing, for the plea of ouster to be even taken. Thus, I am unable to countenance the submission of the learned Senior Counsel for the respondents that the appellant's vendor's share in the suit properties stood ousted. The share of the said Ramasamy, the appellant's vendor was existing, having been vested in him consequent to demise of Alagappa Gounder on 10.09.1979 and in the absence of any partition involving the said Ramasamy or in the absence of any document by way of release, sale or transfer or encumbrance of any other nature, giving up his share in the suit properties, it cannot be said that Ramasamy was not entitled to a share in the suit properties.

26. Further, the specific case of the appellant is that what was



purchased by the appellant was only 1/4th share and therefore, it is not a share which can be said to be in excess of the share of the Ramasamy. The plaintiff claims partition in respect of only 1/4th share that the plaintiff purchased from his vendor viz., Ramasamy and when I have already found that the said share of Ramasamy has not been either released or relinquished or stand ousted in favour of the respondents, the plaintiff viz., the appellant was well within his right to seek for partition and separate possession.

27. The learned Senior Counsel for the respondents would invite my attention to the judgements of this Court in the case of ***M.Sukumar Vs. Mani Achari and others*** reported in **2022 (5) CTC 163** and in the case of ***Puniyavathi Vs. Pachiammal and others*** reported **2022 (4) CTC 590**. This Court has held, in the case of ***M.Sukumar*** (cited supra), the co-sharer has consciously lost his animus over the possession of the properties and such relinquishment is manifested in his conduct and the principles of Ouster, Acquiescence and Extinguishment of right would become applicable. In the case of ***Puniyavathi*** (cited supra), this Court dismissed the suit for partition filed 31 years after the Succession opened on the ground that the plaintiff's right gets extinguished under Section 27 of the Limitation Act, 1963.



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28. The facts of those cases were entirely different and the ratio laid down by this Court in the said cases may not be usefully followed and applied to the facts of the present case, where admittedly, the plea of adverse possession and ouster have been found to be not specifically taken by the respondents, leave alone established and proved in accordance with law.

29. Further, the fact that the original owner, Alagappa Gounder died only on 10.09.1979 and the appellant's vendor has sold 1/4th share in favour of the appellant in 1996 and the appellant had also mutated records in his favour, though, subsequently set aside by the Appellate Revenue Authorities and from the oral and documentary evidence adduced by the parties, it cannot be said that Ramasamy, son of Karuvachi @ Pappal, had acquiesce to any absolute enjoyment by the other Co-sharers which resulted in ouster and extinguishment of his right.

30. The only document that stares in the face of the appellant is the partition deed dated 30.04.1980. The said partition deed was within a few months after demise of the owner, Alagappa Gounder. The various Exhibits



pertaining to Revenue Records are all only pursuant to the said registered partition deed marked as Exhibit B7. Admittedly, the grandson of Alagappa Gounder through his daughter Karuvachi @ Pappal, has not been made a party to the said partition deed Exhibit B7. It is neither pleaded nor proved as to how the said grandson's right has stood extinguished.

31. From the pleadings as well as oral and documentary evidence, it does not lead to any presumption that the said Ramasamy had acquiesced himself of the adverse right claimed by the son, Ramasamy and thereby his share in the suit properties stood ousted. Therefore, I am unable to hold that the grandson Ramasamy, the appellant's vendor had knowledge of Ex.B7, partition deed and that by his own conduct, he had acquiesced himself which resulted in ouster and extinguishment of his right in the suit properties. Thus the constructive possession and enjoyment of grandson Ramasamy, along with the other co-sharers has to be presumed in the eye of law and the respondents having not succeeded in establishing their case of adverse possession or ouster, cannot contend that the Appellant's vendor did not have any right in the properties. When admittedly a 1/4th share in the suit properties is found to be intact and the same is in joint and constructive



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possession with the remaining co- sharers, then the suit for partition would have to be necessarily entertained.

32. The substantial questions of law are answered in favour of the appellant and in fine, the Second Appeals stand allowed and the judgment and decree of the Courts below are set aside. There shall be a preliminary decree declaring the appellant/plaintiff's 1/4th share in the suit properties as prayed for (O.S. No.472 of 1996). The suit for permanent injunction stands dismissed (O.S. No.466 of 1996). No costs.

31.01.2024

Index : Yes/No

Internet : Yes/No

rkp

To

1. The Subordinate Judge,
Thiruchengode.

2. The District Munsif,
Thiruchengode.



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S.A.Nos.694 & 695 of 2010

P.B.BALAJI, J,

rkp

Pre-delivery Judgment in
S.A.No.694 & 695 of 2010

31.01.2024