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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.01.2024

CORAM :

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.559 of 2013

Rukmani

... Appellant/plaintiff

Vs.

- 1.Chinnapillai @ Ravuthayammal(died),
- 2.Muthuravuthar Gounder(died),
- 3.M.Meenatchi
- 4.Easwari
- 5.S.Sumathi
- 6.Vijayalakshmi
- 7.Ponnusami

..respondents/defendants

(RR3 to 5 brought on record as Lrs of deceased R2 vide Court order dated 08.03.2022 made in MP.No.1 of 2013 in SA.No.559 of 2013 by NAVJ)

(RR6 & 7 brought on record as legal heirs of the deceased R1 vide order of Court dated 08.03.2022 made in CMP Nos.2217, 2219, 2223 of 2022 in SA.No.559 of 2013 by NAVJ)

Prayer:- This Second Appeal has been filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 12.12.2012 in A.S.No.103 of 2011 on the file of the I Additional Judge, Erode confirming the judgment and decree dated 20.04.2011 passed in O.S.No.116 of 2006 on the file of the II Additional Subordinate Judge, Erode.



For Appellant : Mr.A.Muthukumar

For Respondents : Mr.S.Kaithamalai Kumaran for
RR3 & 5
Mr.T.Murugamanickam for
Ms.Zeenath Begum for R4
Mr.A.Sundaravadanan for R7

JUDGMENT

The present Second Appeal has been preferred against the Judgment and decree dated 12.12.2012 in A.S.No.103 of 2011 on the file of the I Additional Judge, Erode confirming the judgment and decree dated 20.04.2011 passed in O.S.No.116 of 2006 on the file of the II Additional Subordinate Judge, Erode.

2. For the sake of convenience, the parties are referred to as per their rankings in the suit.

3. O.S.No.116 of 2006 was presented by the appellant/plaintiff before me seeking the relief of partition and separate possession as she wanted item nos.1 to 6 of the suit schedule properties to be divided into



1/3rd equal shares and 1/3rd share to be allotted to her.

4.The plaintiff, namely, Rukmani, the first defendant Chinnapillai @ Ravuthayammal and Kannupaiyan @ Muthuravuthar Gounder are the children of Ravutha Gounder and Soliyammal @ Pappayee. Ravutha Gounder died on 17.11.1962 and Soliyammal @ Pappayee died on 26.12.1975. According to the plaintiff, item no.1 of the property had been purchased by their father Ravutha Gounder along with their grandfather Soliappa Gounder about 50 years ago, before the presentation of the plaint. Insofar as item nos.2 to 6 are concerned, the case of the plaintiff as well as that of the contesting defendant namely the second defendant, is that they are joint family properties.

5.The defence that was taken by Muthuravuthar Gounder @ Kannupaiyan was that he had purchased item no.1 of the property along with his uncle Kolantha Gounder and had put up super-structure therein. He further pleaded that between his uncle and himself, there was a suit for partition, from which, two appeals arose vide SA.Nos.1969 & 1970



of 1991 before this Court. It ended in compromise on 20.09.2002. He sought to defeat the claim of the plaintiff in respect of item no.1 on three specific grounds, viz.,

(i) that there was oral relinquishment by the sisters namely the plaintiff and the first defendant in his favour on the 16th day ceremony, after the death of Ravutha Gounder on 17.11.1962,

(ii) that the suit suffers from non-joinder of necessary parties, namely, Kolantha Gounder and his sons as they are the co-owners of the property.

(iii) that he has prescribed the title by adverse possession as well as by ousting the plaintiff and the first defendant from the property.

6. The learned trial Judge on consideration of the evidence let in by the parties, disbelieved the case of oral relinquishment but upheld the plea of non-joinder of necessary parties as well as ouster. The First Appeal filed by the plaintiff was unsuccessful. Hence, the present Second Appeal.



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7.Originally, this Court ordered notice regarding admission on 28.06.2013 and after hearing both sides, admitted the Second Appeal on the following substantial questions of law:

(i) Whether both the Courts below erred in applying the Doctrine of ouster by merely considering the continuous possession of one of the co-owner?

(ii) Whether both the Courts below erred in finding that the appellant had orally relinquished her right in the suit properties after having found that the second respondent/second defendant had not proved the relinquishment of the rights in and over the suit properties by the appellant/plaintiff?

(iii) Whether both the Courts below failed to see that even if items 2 to 5 of the suit properties are taken to be the joint family property, whether the plaintiff/appellant will be entitled for a share in the properties by virtue of the 2005 amendment to the Hindu Succession Act and by virtue of the judgment of the Hon'ble Supreme Court in (*Vidya Drolia and Others Vs. Durga Trading Corporation*) reported in 2019 SCC OnLine SC 358?

(iv) Whether both the Courts below failed to see that insofar as 1st item of the suit property is concerned, the



plaintiff/appellant was not a party to the earlier suit and in any case, the second defendant was entitled for ½ share in the said property and hence, the plaintiff/appellant will be entitled to claim for the share in the 1st item of the suit property also?

(v) Whether the findings of the lower Appellate court are inconsistent and hence, warrants interference in the Second Appeal? And

(vi) Whether the findings of both the Courts below can be termed as perverse due to improper appreciation of the oral and documentary evidence available on record?

8. Since the suit for partition and the issues involved are inextricably linked with each other, I am taking all the questions of law together and answering them.

9. Insofar as item nos. 2 to 6 of the suit property are concerned, there is no dispute on either side that the said property is a joint family property. The plea of oral relinquishment by the sisters in favour of their brother having been rejected, I merely have to adopt the dictum of a Constitution Bench of the Supreme Court in “*Vineeta Sharma Vs.*



Rakesh Sharma & Others” reported in 2020(5) CTC 302.

10. Interpreting amended Hindu Succession Act (Section 6) by Act 39 of 2005, the Bench was pleased to hold that the female heir is entitled to enforce partition in the joint family property unless it is shown that the family had divided the properties by way of partition deed, prior to the cut off date or if the family had already litigated before the Court and final decree proceedings had been passed. That situation not having arisen in the present case and as the parties to the suit have admitted that the property is the joint family property insofar as item nos.2 to 6 is concerned, by virtue of this binding precedent, the plaintiff would be entitled to partition decree insofar as item nos.2 to 6 are concerned.

11. Insofar as item no.1 is concerned, Mr.T.Murugamanickam, learned Senior counsel would submit that by virtue of the judgment in ***“Kale and Others Vs. Deputy Director of Consolidation and Others”*** reported in 1976(3) SCC 119, he is entitled to the properties, which have been allotted to him in the oral relinquishment by the sisters. I am unable



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to accept this point since the trial Court as well as the lower appellate Court have held that oral relinquishment by the sisters have not been proved. Being concurrent findings of the Courts below, I am not in a position to interfere with the same as the learned counsel for the appellant has been unable to show that the said findings are perverse.

12.Insofar as item no.1 is concerned, the plea of *res judicata*, i.e. the parties have already litigated before this Court in S.ANos.1969 & 1970 of 1991 is concerned, I have to find whether the principle of *res judicata* will apply where the litigation is not between the same parties or between the persons forming under them or between their legal heirs. Further, I have to see whether the subject matter of the property is one and the same and the issue should have been heard and finally decided by the Court.

13.On a perusal of the records, it appears that the previous litigants are Muthuravuthar Gounder and Kolantha Gounder. The previous litigation was between Muthuravuthar Gounder and his paternal uncle



Kolantha Gounder with respect to the properties that both of them had purchased jointly on 15.07.1964.

14.The present litigation does not relate to the said property but to the one purchased by Soliappa Gounder and Routhar Gounder. It relates to that property that fell to the share of the later's children on account of the death of Routhar Gounder on 17.11.1962. The title to the property involved are different and the parties to the litigation are different and therefore, there is no question of applying the principles of *res judicata* to the present case.

15.With respect to non-joinder of necessary parties, Mr.T.Murugamanickam, would invite my attention to the evidence of PW1 to state that she had admitted to the fact that the second defendant had put up row houses on the property belonging to him by virtue of being legal heir of Routhar Gounder and on the property that he had purchased along with his uncle Kolantha Gounder. He would argue that since row houses had been constructed over both the properties of



Kolantha Gounder, Kolantha Gounder's son should have been impleaded in this suit.

16. As already pointed out earlier, this litigation arose on account of the death of Routhar Gounder *intestate*. The purchase made from different source of title and by no stretch by imagination that Kolantha Gounder can be considered as legal heir of Routhar Gounder. This suit for partition has been presented to enforce partition amongst the legal heirs of Routhar Gounder. The impleadment of his brother in the suit is neither essential nor proper. The impleading of Kolantha Gounder would have resulted in embarrassment of the suit, particularly when the issues which are irrelevant to the present case would have been raised by Kolantha Gounder. Kolantha Gounder has no right over the properties of Routhar Gounder, who had admittedly died intestate. Therefore, I reject the second plea of Mr.T.Murugamanickam, that non-impleading of Kolantha Gounder or his son is fatal to the present suit.

17. Other point that is urged by Mr.T.Murugamanickam is that the



plaintiff and the first defendant have effectively been ousted from the family properties by virtue of the possession of the plaintiff for more than 25 years. In order to prove that the second defendant had ousted the plaintiff and his other sisters, there must be a strong evidence to prove that the second defendant possessed the property as an absolute owner in exclusion of the other sharers. Such evidence is awfully lacking in the present case. The possession by one co-owner is for and on behalf of the other co-owners and for the mere fact that one co-owner does not possess the property, it cannot be held that the said co-owner is ousted from the possession of the property.

18. Further more, the second respondent having pleaded that he has been in adverse possession as against the plaintiff and the first defendant shows that he concedes to the title of his sisters to the suit properties. No doubt, the defendant is entitled to raise destructive pleas in his written statement, but at the time of trial having failed in his plea of ouster, it is not open to the defendant to raise the plea of adverse possession also. The trial Court as well as the lower Appellate Court



having applied the principles of law erroneously and have upheld the plea of ouster, which renders the judgment and decree contrary to the evidence on record and therefore, the same are perverse.

19.In the light of the above, all the questions of law are answered in favour of the appellant and consequently, the Second Appeal is allowed. The suit in O.S.No.116 of 2006 on the file of II Addl.Subordinate Judge, Erode shall stand decreed as prayed for.

20.The Court below is requested to follow the recent verdict of the Supreme Court and not wait for the parties to file an application for final decree. It shall take up the case immediately on receipt of the judgment and initiate the final decree proceedings after issuance of notice to the parties concerned.

21.In fine, the Second Appeal is allowed. The judgment and decree of the Court of I Additional District Judge, Erode in A.S.No.103 of 2011 dated 12.12.2012 in confirming the judgment and decree made in



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O.S.No.116 of 2006 dated 20.04.2011 on the file of the II Additional Subordinate Judge, Erode are set aside. There shall be a preliminary decree in favour of the plaintiff to the extent of 1/3rd share. No costs.

29.01.2024

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To

- 1.The I Additional Judge, Erode
3. The Additional Subordinate Judge, Erode



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V.LAKSHMINARAYANAN.J,

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