



A.S.(MD).No.71 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.02.2024

CORAM

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
AND
THE HON'BLE MR.JUSTICE C.KUMARAPPAN**

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1.B.Nawabjan (Died) .. Appellant/Plaintiff

2.N.Ashiq Ahamed .. 2nd Appellant

(2nd Appellant is brought on record as LR of the deceased sole appellant vide Court order dated 15.11.2017 made in M.P.(MD).No.1 of 2013 in A.S.(MD).No.71 of 2012)

Vs.

B.Babajan (Since Deceased) .. 1st Defendant

1.Pyari Begum

2.Zahir Ahamed

3.B.Arif Ahamed

4.Mumtaz Begum

5.Nazrin .. Respondents 1 to 5/Defendants 2 to 6

6.N.Fazila Banu

7.N.Shakila Banu .. Respondents 6 & 7

(R-6 and R-7 are impleaded vide Court order dated 27.10.2022 made in C.M.P.(MD).No.1869 of 2016 in A.S.(MD).No.71 of 2012)



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PRAYER: Appeal Suit filed under Section 96 r/w Order 41 Rule 1 of Civil Procedure Code, praying to allow the First Appeal, set aside the judgment and decree dated 04.04.2012 and made in O.S.No.258 of 2004 on the file of the 1st Additional District Judge, Tiruchirappalli and to decree the suit as prayed for with costs throughout.

For Appellants : M/s.S.Mahalakshmi

For Respondents : Mr.R.Govindaraj for R-2, R-3 & R-5
Mr.S.Deenadhayalan for R-4
R-1 - died

JUDGMENT

DR.G.JAYACHANDRAN,J.
and
C.KUMARAPPAN,J.

This Appeal Suit is filed by the plaintiff, who has lost the suit for partition preferred against his brother. The parties are Muslims and governed by their personal law.

2. The gist of the averments in the plaint is that the suit property morefully described in the plaint was purchased in the name of the first defendant, Babajan on 23.07.1973 from and out of common fund of the family. Thereafter, the plaintiff and the first defendant have jointly



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improved the property by constructing a building and they were in joint possession and enjoyment of the same. There was no division of the property. While so, in the year 1978, the brothers felt inconvenient to remain in joint possession of the property and therefore, a partition deed was entered into on 02.06.1978, wherein, the plaintiff, the first defendant Babajan and the other brother, Hafeezjan were parties. Accordingly, the suit property was allotted to the plaintiff and the first defendant equally and the said partition deed was duly registered. Since difference of opinion between the plaintiff and the first defendant cropped up, it was suggested to the first defendant to divide the property and allot a share, but that was declined by the first defendant, which has led to filing of the suit seeking partition.

3. Pending suit, the first defendant, Babajan died and hence, his legal heirs were impleaded as the defendants 2 to 6. The defendants filed a written statement denying the claim made in the plaint, ascertaining that the suit property was originally purchased as a vacant site by the first defendant from and out of his funds and developed by the first defendant by putting up construction. The alleged partition deed dated 02.06.1978 was denied and the averment that in the said partition deed, the suit property was allotted to



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the plaintiff and the first defendant was also denied. In the written statement, it has also been asserted that the plaintiff earlier instituted a suit before the Principal Sub Court, Trichy in O.S.No.562 of 2000 claiming partition based on alleged oral gift (Hiba) dated 01.12.1988, stating that under the Hiba, half share in the suit mentioned property was allotted in favour of the plaintiff, to which one of his son and wife of the first defendant were witnesses to it. The said suit was contested by stating that the alleged oral gift dated 01.12.1988 is a figment of imagination and no such gift was made by the deceased first defendant to and in favour of the plaintiff and the claim of joint possession was also denied. However, the defendants in their written statement admitted that the plaintiff was a permissive occupant. The previous suit in O.S.No.562 of 2000, when posted for trial, the plaintiff allowed it to be dismissed for default.

4. It is further stated in the written statement that another suit in O.S.No.780 of 2000 before the II Additional District Munsif Court, Trichy against the Municipal Corporation, Trichy for declaration and injunction, was instituted by the plaintiff ascertaining right over the suit property. In that suit, the defendants have got themselves impleaded and contested the



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matter. The defendants pointed out that the plaintiff having abandoned the earlier suit in O.S.No.562 of 2000, pegging his right based on an oral gift, there is no cause of action for the present suit. Further, in the written statement, the defendants have narrated how the property morefully described in the plaint schedule is owned by them exclusively. The defendants pointed out suppression of fact of the earlier suit filed by the plaintiff and terming the other suits filed by him as vexatious litigation, they sought for dismissal of the suit.

5. The Trial Court framed issues based on the above pleadings of the parties. On the side of the plaintiff, the plaintiff and one Ganesan were examined as witnesses, P.W.1 and P.W.2 and two exhibits, namely, the certified copy of the partition deed dated 02.06.1978 in original and duplicate were marked as Ex.A1 and Ex.A2. On the side of the defendants, one Arif Ahamed, S/o.Babajan, was examined as D.W.1 and 31 exhibits were marked besides two Court exhibits, namely, the register maintained in the Registrar office, marked as Ex.X1 and Ex.X2.



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6. The Trial Court on appreciating the evidence, recorded the fact that the first defendant and the other defendants along with the plaintiff, his wife and children are staying in the suit premises, but their occupation in the suit premises cannot be construed as they are the co-owners of the property and in possession of the property in the capacity of co-owners. The Trial Court has categorically held that the first defendant being the title holder of the property, the occupation of the plaintiff and his family members is only as a permissive occupant. Their occupancy has been duly terminated by issuing Ex.B7 notice dated 15.07.2005 and the defendants are even entitled for damages from the plaintiff, but that cannot be determined in the present suit, which is filed for partition by the plaintiff. Having failed to prove that Ex.A1 partition deed is genuine and acted upon, the plaintiff has no locus to sustain the suit for partition. Insofar as Ex.B9 oral gift dated 14.02.1974, the Trial Court has held that the gift has been acted upon and the defendants 3 and 4 having enjoyed the suit property as its lawful owners and had lawfully terminated the leave and licence by issuing Ex.B7 notice dated 15.07.2005. Therefore, the suit is liable to be dismissed.

7. Being aggrieved, the present Appeal Suit is filed by the plaintiff.



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8. Pending appeal, the plaintiff died and his son, N.Ashiq Ahamed, is brought on record as the legal heir of the deceased sole appellant. The appeal is filed on the premise that Ex.A1 remains unchallenged and duly proved by the plaintiff by examining P.W.2 as an independent witness and therefore, the Trial Court is not correct in holding that the plaintiff has failed to prove Ex.A1. Regarding Ex.B4, the oral gift in favour of the plaintiff Nawabjan dated 15.12.1988, it is contended that the gift (Hiba) was not proved in the manner known to law.

9. Insofar as the suppression of the earlier partition suit in O.S.No. 562 of 2000, the case of the appellants is that the earlier suit based on Hiba will not preclude the present suit claiming half share in the suit schedule property based on inheritance. It is contended that the cause of action for the earlier suit and the present suit are entirely different and therefore, the dismissal of the earlier suit for non-prosecution will not take away the right of the plaintiff to seek partition as a co-sharer of the property.

10. The learned counsel appearing for the appellants would submit that prior to the institution of the suit and subsequent to the suit, there are



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enough material to show that the right of the plaintiff as a sharer in the suit property had been recognized by the defendants and their continuous possession in the property would go to show that there cannot be a presumption to ouster just because some of the defendants, particularly, the defendants 3 and 4, have caused termination notice in the year 2005. It is further contended that the decree passed in a withdrawal suit in O.S.No.439 of 2000 before the Sub Court, Trichy filed by the third defendant will not bind the present plaintiff since he was not added as a party in the suit. It is also contended that the suit in O.S.No.439 of 2000 is a collusive suit and the decree was obtained behind the back of the plaintiff to deprive his lawful right.

11. The learned counsels appearing for the respondents would submit that the plaint is hopelessly barred by the principles of *res judicata*, suppression of fact and also want of proof to prove the title. The Trial Court has rightly held that mere possession will not confer any title and the earlier attempt of the plaintiff to establish his title failed, got abandoned and therefore, there cannot be any further adjudication regarding the right of the plaintiff as a sharer in the suit property.



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12. The point for determination for this Court in this case is,

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Whether the plaintiff has probalised his right over the suit property to seek partition through documentary and oral evidence?

13. Admittedly, the suit property was purchased in the name of the deceased first defendant. There is no evidence to show that the property was developed by the first defendant and the plaintiff jointly and there is no evidence to show that there was common fund used for developing the suit property. The only evidence relied upon by the plaintiff is the ocular testimony of the plaintiff and one Ganesan, P.W.2 and the certified copy of the alleged partition deed of the year 1978. The content of the partition deed and the ocular evidence of P.W.2 have not substantiated the averments made in the plaint to probalise that the suit property is the common property of the plaintiff and the first defendant and it has been developed jointly by them from and out of the common fund. In the said circumstances, the Trial Court, after weighing the evidence let in by the defendants and the documents, which were marked as Ex.B1 to Ex.B31, had arrived at a conclusion that the suit property purchased and developed by the first defendant. It was enjoyed by him exclusively and all along been



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dealt by him by executing Hiba in favour of his sons and the suits filed by the plaintiff earlier in connection with the property had either been withdrawn or dismissed. Therefore, the right of the first defendant absolutely over the property remains unchallenged. The Hiba alleged to have been executed by the first defendant in favour of his two sons, which is marked as Ex.B9, had also been considered in the suit by the Trial Court and found to be genuine. Whereas, the Hiba, which is referred by the plaintiff, alleged to have been executed in his favour was the subject matter of the earlier suit and was abandoned by the plaintiff himself and allowed it to be dismissed for default.

14. Further, based on Ex.B9, the defendants 3 and 4 have also caused termination notice, Ex.B7, to the plaintiff in the year 2005 indicating that the gift deed Ex.B9 has been duly acted upon. The other documents relied upon by the defendants such as house tax receipts and mortgage deeds would also fortify the claim of the defendants ascertaining their exclusive right over the suit property excluding the plaintiff/first appellant.



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15. The learned counsel for the appellant strenuously submitted that there are other documents subsequent to the suit and pending appeal, which would go to show that the plaintiff family is in occupation and enjoyment of the property and recognized as the owner of the property. However, even if any such document issued by the local body or any other authority is available, considering the plaintiff as an ostensible owner of the property, the title deeds and the categorical findings of the Trial Court based on the evidence will not be taken away by those documents, which cannot confer any title on the plaintiff.

16. In the light of the above discussion, this Court finds no merit in the appeal. Hence, the Appeal Suit is dismissed. There shall be no order as to costs.

(G.J.,J.) (C.K.,J.)
14.02.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
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To

1. The 1st Additional District Court,
Tiruchirappalli.

2. The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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