



A.S.(MD)No.206 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved on 19.07.2024	Judgment Pronounced on 02.08.2024
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CORAM

JUSTICE N.SESHASAYEE
and
JUSTICE P.VADAMALAI

A.S.(MD)No.206 of 2020
and C.M.P(MD)No.7257 of 2020

S.M.Venkatachalam ... Appellant/Counter claim respondent/Plaintiff
Vs.
Valli ... Respondent/Counter claim Petitioner/Defendant

Prayer: Appeal Suit is filed under Section 96 r/w Order XLI of C.P.C against judgment and decree dated 12.06.2020 in O.S.No.37 of 2015 and counter claim in I.A.No.377 of 2015 on the file of the Additional District and Sessions Judge, Sivagangai.

For Appellant : Mr.H.Lakshmi Shankar
For Respondent : Mr.R.Sundar Srinivasan

JUDGMENT

(Judgment of the Court was delivered by N.SESHASAYEE, J.)

This appeal is preferred by the plaintiff challenging both the decree dismissing the suit for partition as well as the decree passed in favour of the defendant for allowing her counter claim for exercising a right of pre-emption.



2. The facts of the case are as follows:

- a) Certain Sornalingam Chettiar and his two brothers Krishnan Chettiar and Jeevanandham Chettiar were jointly allotted a block of 15,554 sq. ft. in T.S.No.11/8 of Devakottai Town under Ex.A11-Compromise decree dated 30.06.1956 in O.A.No.67 of 1952.
- b) All the three brothers referred to above had passed away and the property devolved on their respective heirs. So far as Sornalingam Chettiar is concerned, he died leaving behind him surviving wife and adopted son Seeralan. Krishnan Chettiar was married twice and through his first wife Unnamalai, he had three daughters of whom the defendant is one. His second wife is one Panchavarnam and through her, Krishnan Chettiar had two children.
- c) Turning to Jeevanandham Chettiar, he was married to Muthalammai and they have two children.
- d) While so, on 17.05.2011, under Ex.A5, the plaintiff had purchased the entire share of Jeevanandham Chettiar from his heirs as well as the share of Krishnan Chettiar's second wife and the children born through her.



e) On 21.06.2011, the plaintiff had purchased the entire 1/3rd share of Sornalingam Chettiyar from his heirs. Subsequently, under Ex.A7 dated 19.09.2011 and Ex.A8 dated 29.08.2013, sale deeds, the plaintiff had purchased the shares of two of the daughters of Krishnan Chettiar born to him through his first wife. In short, the plaintiff had purchased the entire share of all the sharers of the property except 824 sq. ft. that represents the share of the defendant. In these circumstances, the plaintiff had laid the suit for partition.

f) The principal contention of the defendant is that she is entitled to a right of pre-emption presumably under Section 22 of the Indian Succession Act, 1956 and that, the plaintiff being a third party, is not entitled to purchase the other undivided shares of her co-sharers. The dispute went to trial.

3.1. During trial, the plaintiff examined himself as P.W.1 and produced Exs.A1 to A11. Few among those documents had already been introduced. For the defendant, she entered the box to depose as D.W.1 and she produced Ex.B1, a copy of the legal notice which the plaintiff and another had issued.

3.2. On appreciating the evidence before it, the trial Court chose to dismiss the



A.S.(MD)No.206 of 2020

plaintiff's suit for partition essentially because it chose to decree the counter claim claiming pre-emption and the trial Court has not relied on Section 22 of the Hindu Succession Act, 1956, but relied on Sections 4 and 5 of the Partition Act, 1893. These decrees are now under challenge.

3. The points for consideration are:

- a) Is not counter claim barred by limitation under Article 97 of the Limitation Act, 1963?
- b) Whether the finding of the trial Court applying Sections 4 and 5 of the Partition Act, is tenable?
- c) Whether the defendant is at all entitled to seek pre-emption even if there is any as a matter of substantial right?

5. Heard both sides. Arguing for the appellant, Mr.H.Lakshmi Shankar, learned counsel for the appellant submitted as follows:

- a) Right of pre-emption is a weak right in the nature of preferential right and it is not an absolute right and in terms of Article 97 of the Limitation Act, a suit enforcing any right of pre-emption ought to be filed within one year from the date on which the purchaser under the sale sought to be impeached takes physical possession of the whole or part of the property



A.S.(MD)No.206 of 2020

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sold, or, where the subject matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered. In the instant case, all the four sale deeds, executed between 17.05.2011 and 29.08.2013 and the nature of property being a vacant site, a party cannot take physical possession thereof and hence, *terminus quo* for completing the period of limitation must be reckoned from the date of sale and this would necessarily imply the sales that had taken place in 2011. However, counter claim was made only on 31.10.2015 which is well beyond the period of limitation.

- b) A suit for enforcing a right of pre-emption without impeaching the sale deeds in favour of the plaintiff is not maintainable since a right of pre-emption only gives a preferential right to the co-sharers and does not bar the other co-sharers from alienating their shares in the property.
- c) At any rate, Sections 4 and 5 of the Partition Act, will not apply since those provisions will invite themselves for application only in the final decree stage and that too when a property is indivisible or eventually divided by metes and bounds.



A.S.(MD)No.206 of 2020

d) Even if Section 22 of the Hindu Succession Act, is considered as applicable, then it will apply only to Class-I heirs which implies Class-I heirs succeed to the estate under an intestate succession and not to those who are heirs of any such heirs. Turning to the facts of the present case, Class-I heirs contemplated are the three brothers who were jointly obtained the suit property under Ex.A11 decree and not their heirs. Again it is available only when the property devolve on them in an intestate succession and not under a decree of partition.

6. The approach of the trial Court is apparently faulty. Sections 4 and 5 of the Partition Act will come to play only during a final decree proceedings, when the Court finds that the property is indivisible. In the present case, the property indeed is divisible, since it is a plot measuring 15,554 sq.ft and the plaintiff had purchased all but undivided 824 sq.ft belonging to the cross objector.

7. Turning to the case of the defendant seeking a right of pre-emption, it is liable to fail on two grounds: (a) That it is terribly barred by limitation in terms of Article 97 of the Limitation Act; and (b) That it only creates a preference in seeking a right, but does not vest any absolute right. It is because it creates a preferential right, it is considered of a weak right.



A.S.(MD)No.206 of 2020

8. In conclusion, this appeal is allowed and the judgment and decree dated 12.06.2020 in O.S.NO.37 of 2015 and counter claim in I.A.No.37 of 2015 on the file of the learned Additional District and Sessions Court, Sivagangai is set aside. No costs. Consequently, connected miscellaneous petition is closed.

(N.S.S., J.)

(P.V.M., J.)
02.08.2024

Index : Yes / No
Neutral Citation : Yes / No
PM

To,
1.The Additional District and Sessions Judge,
Sivagangai.



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A.S.(MD)No.206 of 2020

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