

**Chellamuthu and Vs. Krishnan,**

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**SooperKanoon Citation :** [sooperkanoon.com/837867](http://sooperkanoon.com/837867)

**Court :** Chennai

**Decided On :** Apr-11-2007

**Reported in :** 2007(4)CTC383; (2007)5MLJ1219

**Judge :** P. Jyothimani, J.

**Acts :** Code of Civil Procedure (CPC) - Order 22, Rule 10

**Appeal No. :** Second Appeal No. 1088 of 1994

**Appellant :** Chellamuthu and ;muthusamy

**Respondent :** Krishnan, ;bagyam and ;muthu

**Advocate for Def. :** P. Saravanan, Adv. for V.R. Rajasekaran, Adv. for Respondent Nos. 1, 2 and 3

**Advocate for Pet/Ap. :** Sathyabama, Adv. for T.R. Rajaraman, Adv. and ;N. Jawahar, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**P. Jyothimani, J.**

1. The unsuccessful defendants 3 and 4 in the Courts below are the appellants. The first respondent has filed the suit for declaration and permanent injunction, in

respect of the suit property measuring 0.24.0 Hect. (0.60 cents) comprised in New Survey No. 287/B in Ramananaicken Palayam Village, Attur Taluk, Salem. The defendants 3 and 4 are the alienees from first and second defendants. The case of the plaintiff was that the property originally belonged to his maternal grandfather Pachamuthu Padayachi. One of his daughter Bagyam, namely, the first defendant has married Ponnusamy Padayachi and the second defendant was one of the sons born to her through Ponnusamy Padayachi. That apart the said Bagyam had other sons, namely, Singaravelu, Perumal and Jayaraman. The said Ponnusamy Padayachi who is the father of the second defendant has also married the sister of the first defendant Sampooram and through her was born the plaintiff as his son. Therefore, the plaintiff is the brother of the second defendant born to his father Ponnusamy Padayachi through Sampooram, while the second defendant was born to Ponnusamy Padayachi through the first defendant Bagyam. Pachamuthu Padayachi by a sale deed dated 22.06.1938 marked as Ex. A. 1 has sold the suit property and some other properties to the first defendant and her another elder sister Chinnammal. Thereafter, the first defendant and Chinnammal have orally partitioned among themselves, and the suit property was allotted to the first defendant.

2. After the death of the father of the plaintiff Ponnusamy Padayachi, the suit property as well as the properties purchased by him were jointly enjoyed by the plaintiff, first and second defendants and another brother of the second defendant. 15 years before the filing of the suit and after the death of the Ponnusamy Padayachi, there was a oral partition under which the suit property and some other properties were allotted to the plaintiff and the plaintiff has been in enjoyment for the past 15 years and perfected a title by adverse possession.

3. It is also the case of the plaintiff that the first defendant as well as the second defendant have also sold the properties, which were given to their share. It is only the other son of the first defendant Perumal who has retained the property. The plaintiff having sold a portion of the property has retained the suit property to the extent of 60 cents in his possession. In these circumstances, the first and second defendant have illegally entered an agreement with the third and fourth defendants for the sale of the suit property and therefore, the present suit was filed.

4. While the relationship of the parties have been admitted, it is the case of the second defendant that the first defendant and her sister Chinnammal having purchased the property under the sale deed dated 22.03.1938 have been enjoying the properties in division and in that manner the first defendant is the owner of the suit properties and the plaintiff has no right over the same. It is the case of the first defendant that the plaintiff's father Ponnusamy Padayachi has not purchased the property and it was never enjoyed as a joint family property. After trial the learned Trial Judge apart from many other reasons and also having relied upon the admission of the first defendant as D.W. 1 that after the death of her sister Sampooram, the first defendant along with the plaintiff and the second defendant and Ponnusamy Padayachi were living together and jointly enjoying the property, has come to a conclusion that the plaintiff has perfected title by adverse possession in respect of the suit property and the sale effected in favour of the third defendant by the first defendant pending the suit is affected by doctrine of lis pendens and in view of the same the suit was decreed.

5. It was against the said Judgment of the Trial Court all the defendants have filed the appeal. Again on considering the entire factual position and also evidence the First Appellate court having found that the suit property belonged absolutely to the plaintiff has dismissed the appeal as against which the third and fourth defendants who are the alienees pending suit have filed the Second Appeal.

6. While admitting the Second Appeal this Court has framed the following substantial questions of law:

1) When the suit property is the self acquisition of 1st defendant i.e. the women's estate and not capable of throwing into the common stock and not capable of partition and enjoyment, is the learned District Judge correct in his finding that the plaintiff enjoyed the property jointly along with the 1st defendant and got it by partition and he is in possession of the property?

2) Is the learned District Judge correct in decreeing the suit overlooking the documents produced i.e., Exs. B. 1 to B. 22, by the defendants to show their continuous, uninterrupted possession over the suit property?

7. It is seen that as against the third respondent who was the second defendant in the suit the appeal was dismissed by an order dated 28.09.2006. It is also seen that the second respondent who was the first defendant in the suit died and in spite of extension of time no steps were taken to bring the L. Rs. and therefore, as against the second respondent also the appeal abated. Even though it is the contention raised on behalf of the appellants that when the first defendant along with her sister Chinnammal purchased the property under Ex. A. 1 as early as 26.06.1938, there was no reason for the first defendant who got the suit property in the oral partition among them to put it in the common pool so as to enjoy with the plaintiff who was born to her sister through her husband Ponnusamy padayachi, it is admitted that P.W. 3 who is no one else than another son of the first defendant and elder brother of the second defendant who is not admittedly having any inimical relationship with first and second defendants has clearly deposed that the suit property after it was given to the share of the first defendant was enjoyed as joint family property of the plaintiff and first and second defendants and after the death of his father Ponnusamy Padayachi at the instance of panchayat there was a partition in which the it was given to the share of the plaintiff and it is the plaintiff who has been enjoying the property for the past 15 years.

8. It is based on the said uninfluenced and unimpeachable evidence of P.W. 3, the Courts below have factually come to the conclusion by believing his evidence apart from the documents filed on behalf of the plaintiff especially Ex. A. 3 and Ex. A. 4 to show the possession of the plaintiff, that the plaintiff is the owner of the property in enjoyment for the past 15 years. It is also seen that in addition to that the President of the Cooperative Society of the Village who was examined as P.W. 2 has supported the case and the plaintiff as P.W. 1 has also spoken about the panchayat by which the property was divided by oral partition and the property was allotted to the plaintiff. It is on the factual assertion of the plaintiff witnesses, namely, P.W. 1 to P.W. 4 both the Courts below have come to the conclusion that it was by oral partition 15 years ago the plaintiff was given the suit property and in these circumstances considering the fact that the plaintiff has been in possession for more than the statutory period and therefore, perfected title by adverse possession the Courts below have come to the conclusion in favour of the plaintiff.

As correctly pointed out by the Trial Court, even the first defendant as D.W. 1 has admitted the enjoyment of the property as a joint family property after the death of the plaintiff's mother Sampooram. In such circumstances the contention raised on behalf of the appellants that there was no positive evidence to show that the first defendant who got the suit property in a oral partition along with her mother Chinnammal who put it in the common pool along with the plaintiff and defendants 1 and 2, has no meaning since evidence of P.W. 3 is clinching. The reliance placed on the Judgment of the Hon'ble Supreme Court rendered in Smt. Pushpa Devi v. The Commissioner of Income Tax, New Delhi reported in : [1977]109ITR730(SC) in respect of the female member of the joint family blending her separate property with the joint family property has no application since the facts and circumstances of the present case is totally different. As correctly found by both the Courts below, on evidence it is made clear that in fact the first defendant has pooled the schedule property along with the other properties after the death of her sister Sampooram and the same was enjoyed as a joint family property and thereafter there was a partition 15 years before in which the suit property was allotted to the plaintiff.

9. Even though in respect of the second and third respondents who are the first and second defendants in the suit no steps have been taken to bring their L. Rs., since they have sold their property pending suit to the third defendant during the time when they were alive, by operation of Order 22 Rule 10 of Code of Civil Procedure the interest has devolved on the third and fourth respondents by transfer who are already on records. Therefore, as correctly pointed out by the learned Counsel for the appellant, there is no need to bring on record the L. Rs. of first and second defendants, since the third and fourth defendants who are the appellants before this Court have claimed to be the transferees from them and they are already on record by applying the ratio laid down by the Hon'ble Supreme Court rendered in P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar and Ors. reported in : [1995]2SCR585 .

10. In these circumstances, I do not think that there is any substantial question of law involved in this case and therefore the Second Appeal fails and the same is dismissed with cost.

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