

S. Thanikachalam Vs. E. Rani and Others

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Court : Chennai

Decided On : Oct-11-2012

Judge : G. Rajasuria

Appeal No. : A.S.No.468 of 2008

Appellant : S. Thanikachalam

Respondent : E. Rani and Others

Advocate for Pet/Ap. : For the Petitioner: R. Subramanian for Ms. R. Meenal ,
Advocates. For the Respondents: R1 to R9, K.Ramachandran, Advocate.

Judgement :

(Appeal against the judgment and decree dated 24.07.2007 passed in O.S.No.3291 of 2002 on the file of the Additional District Court, Chennai (Fast Track Court II).)

This appeal is focussed as against the judgment and decree dated 24.07.2007 passed in O.S.No.3291 of 2002 by the learned Additional District Judge, Chennai (Fast Track Court II).

2. For convenience sake, the parties are referred to here under according to their litigative status and ranking before the trial Court.

3. The epitome and the long and short of the germane facts absolutely necessary for the disposal of this appeal would run thus:

The plaintiffs originally nine in number filed the suit for partition as against the three defendants seeking the following reliefs:

"(a) To grant a preliminary decree for partition of the plaintiffs 7/10 share of the schedule mentioned property in the plaint;

(b) to grant an order of injunction restraining the defendants from collecting rents payable from the tenants as set out in the schedules;

(c) The defendants 1 to 3 to render true and proper account of the same and direct them to pay the rental income for the past 3 years; and

(d) For costs." (extracted as such)

on the main ground that the suit property, which is a house, belonged to Sambandam as his self acquired property. He died leaving behind his widow and four sons and six daughters. The said widow died subsequently. The plaintiffs 1 to 5 are the daughters of Sambandam; P6 is the daughter of the pre deceased daughter; and P7 to P9 are the widow and children of one other pre deceased son of Sambandam. Thanikachalam/D1, Alagiri/D2 and Selva/D3 are also the sons of Sambandam. The plaintiffs claim jointly 7/10 shares in their favour in the suit property, as the defendants, according to them, did not come forward for amicable partition even though they are in possession of it. According to the plaintiffs, the defendants and some tenants are in physical possession of the suit property.

4. Per contra, D1 filed the written statement resisting the suit on the main ground that as per Section 23 of the Hindu Succession Act, the plaintiffs, who happened to be female members, cannot file the suit for partition for residential house under the occupation of male members, namely, the defendants herein. The said Sambandam died in the year 1982, whereas, the suit was filed in the year 2002 and by that time, the plaintiffs have lost their right over it by ouster also. The Court fee paid under Section 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act was inadequate, as the suit ought to have been valued under Section 37(1) of

the Act and *ad valorem* Court fee ought to have been paid.

Accordingly, they would pray for the dismissal of the suit.

5. Up went the trial, wherein, the first plaintiff-Rani examined herself as P.W.1 along with P.Ws.2 and 3 and Exs.A1 to A6 were marked; the first defendant-Thanikachalam examined himself as D.W.1 and Exs.B1 to B15 were marked.

6. The trial Court ultimately decreed the suit allotting 7/10 shares in favour of the plaintiffs.

7. Being aggrieved by and dissatisfied with the said decree passed, this appeal has been filed by D1 on various grounds.

8. The learned counsel for the appellant/D1 would advance his arguments, which could tersely and briefly be set out thus:

(a) The suit was not properly valued as per Section 37(1) of the Tamil Nadu Court Fees and Suits Valuation Act, even though admittedly the plaintiffs were not in possession of the suit property.

(b) The lower Court failed to take into account the plea that the plaintiffs have lost their right over the suit property in view of ouster and also adverse possession which enured to the benefit of the defendants.

(c) As per the then existed Section 23 of the Hindu Succession Act, the suit itself ought not to have been entertained.

9. In a bid to torpedo and extirpate the arguments as put forth and set forth on the side of the appellant/D1, the learned counsel for the respondents/plaintiffs would pyramid his arguments, which could succinctly and precisely be set out thus:

(a) The suit was properly valued, as possession by one co-owner amounts to possession by another co-owner and furthermore, the tenants are also in the part of the suit property.

(b) Among the plaintiffs, there are also the representatives of the deceased male co-sharers are in the party array. Over and above that, Section 23 of the Hindu Succession Act, 2005 was deleted and in fact, the latest judgment of the Hon'ble Apex Court would also convey that the said amendment does have retrospective effect.

(c) The plea of ouster and adverse possession as put forth by the defendant was negated by the Court below, as absolutely there was no iota or shred, shard or molecular extent of evidence in that regard. The mother of the parties to the *lis* died during the year 2000 in the suit property only.

Accordingly the learned counsel for the plaintiffs would pray for the dismissal of the appeal.

10. The points for consideration are as to:

(1) Whether the suit ought to have been valued as per Section 37(1) of the Tamil Nadu Court Fees and Suits Valuation Act, or under Section 37(2) of the Act?

(2) Whether the then existed Section 23 of the Hindu Succession Act was an embargo for filing the suit and what is the effect of the Hindu Succession (Amendment) Act 200 on the rights of the parties in the factual matrix of this case?

(3) Whether the plea of ouster and adverse possession as pleaded by the defendants was proved?

(4) Whether there is any perversity or illegality in the order passed by the lower Court in allotting 7/10 shares?

11. All these points are taken together for discussion as they are inter linked and inter woven with one another.

12. Undoubtedly and incontrovertibly, the suit was valued under Section 37(1) of the Tamil Nadu Court Fees and Suits Valuation Act. Trite, the proposition of law, is that possession by one co-owner would constitute possession by the other co-owner, unless ouster is pleaded and proved. Hence, it has to be seen as to whether the pleas of ouster and adverse possession were proved by the plaintiffs.

13. A mere running of the eye over the decision of the lower Court and also the oral and documentary evidence adduced on the side of the defendants, would reveal that absolutely there is no probability of discerning that by ouster, the plaintiffs lost their right over the suit property and that by adverse possession, the defendants acquired absolute right over it. There is nothing to indicate and connote that the property was converted in such a manner so as to give a picture that no longer the suit property could be labelled or described as the ancestral property of the parties to the *lis*, but the exclusive property of the defendant.

14. Ex.B13 - the property tax card filed on the side of the defendant itself, bespeaks and betokens that it is in the name of the deceased propositus Sambandam. As such, it is crystal clear that even by phantasmagorical thoughts it could not be stated that the defendants acquired title over the suit property by adverse possession and that there was ouster. There is no gainsaying of the fact that the common ancestor, namely, the mother also lived in that house and died only during the year 2000, and the suit was filed in the year 2002. Hence, the plea of ouster as well as adverse possession, is nothing but a misconceived one, and there is not even any *itsy bitsy* evidence available on record.

15. The learned counsel for the plaintiffs would throw the issue into light by accentuating and inviting the attention of this Court to the last sentence in the deposition of D.W.1 (D1) and convincingly and cogently submit that D1 candidly and categorically admitted that the plaintiffs were having right in the suit property, and they were entitled to their respective shares. Wherefore, it has become beyond doubt that the plaintiffs are entitled to their aliquot shares in the suit property as the legal heirs of deceased Sambandam, the original owner of the suit property. Not to put too fine a point on it, the question of mandating them to pay the Court fee as per Section 37(1) of the Act is next to impossibility.

16. Relating to application of Sec.23 of the Hindu Succession Act, is concerned, I would like to refer to the following decisions :

(1) 2009(2) CTC 130 [M.Revathi v. R.Alamelu and 6 others]

(2) 2011-5-L.W.612 [Ganduri Koteshwaramma and another v. Chakiri Yanadi and another]

17. A plain running of the eye over those decisions would unambiguously and unequivocally highlight and display that the Hindu Succession (Amendment) Act, 1950 is having retrospective effect also. Hence, absolutely there is no embargo in this appeal and accordingly, I could see no merit in this appeal.

18. However, the learned counsel for D1 would stress upon the fact that debts were all discharged only by D1 and in such a case, in the event of the plaintiffs getting their shares, they should also share the burden. I would disambiguate the ambiguity if any that only during the final decree proceedings, those points could be considered and if at all, D1 is having evidence in this regard, he could canvass his point on that aspect; whereupon the plaintiffs are entitled to counter it and adduce rebuttal evidence. Depending upon the facts, the trial Court is at liberty to arrive at a conclusion concerning bearing the burden of debts and contributing for the same proportionately by the sharers.

In the result, this appeal is dismissed. However, there shall be no order as to costs.

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