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S.A.No.1199 of 2004

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 30.01.2023

PRONOUNCED ON: 25.04.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.1199 of 2004

Santha

...Appellant

-VS-

1. M. Pazhani

2. Saroja

{R2 given up as her whereabouts are not known}

3. Angamma (died)

{Memo dated 28.07.2021 was recorded vide
Court order dated 13.08.2021 made in
SA.No.1199 of 2004}

4. Krishnan

5. Santha

6. Minor Lekha

...Respondents

{Minor 6th respondent by mother
and guardian 5th respondent}



S.A.No.1199 of 2004

WEB COPY

Prayer: Second Appeal is filed under Section 100 of C.P.C against the judgement and decree dated 16.03.2004 of the learned Subordinate Judge, Dharmapuri in A.S.No.6 of 1996 reversing the judgment and decree dated 30.01.1996 of the District Munsif, Dharmapuri in O.S.No.137 of 1991.

For Appellant : Mr.M.Thamizhavel
For Respondent-1 : Mr.P.Valliappan, Senior Counsel
for Mr.S.Shriram Naryananan
For Respondent-2 : Given up
For Respondent-3 : Died
For Respondents 4 & 5 : Served – No Appearance

JUDGEMENT

The appellant herein is the party, who had been impleaded in the appellate stage as 11th respondent. The second appeal arises in respect of the suit O.S.No.137 of 1991 filed by the respondent herein, M.Pazhanisamy against one Kuppusamy and 7 others. Pending the First Appeal, defendants 1 to 5 had passed away and their legal heirs have been brought on record. Defendants 6 to 8 are the legal representatives of the 1st defendant, Kuppusamy, being his wife and



S.A.No.1199 of 2004

WEB COPY

sons. The 9th respondent and the 10th respondent are the legal heirs of the deceased 5th defendant, Pazhani. The 11th defendant, who is the appellant before this Court, is the purchaser from the defendant. The appellant is the purchaser of a portion of survey No.406/2B of Virupatchi Village, Dharmapuri. It is only the 11th respondent, purchaser, who has challenged the judgment and decree passed by the learned Subordinate Judge, Dharmapuri in A.S.No.6 of 1996.

2. The suit has been filed for a declaration and injunction with reference to the property described herein below:-

The Punja lands comprised in Survey No.401/3B measuring 0.15.5 hectares and Survey No.406/2B measuring 0.12.5 hectares in old Patta No.206, new Patta No.705 of Virupatchipuram Village, Dharmapuri Taluk.



S.A.No.1199 of 2004

WEB COPY

3.The facts which are necessary for disposing of the above second appeal are as follows:-

The plaintiff would submit that the suit property belongs to him absolutely by virtue of a family arrangement with his father nearly 8 years prior to the filing of the suit (around the year 1983). Since then, he has been in exclusive possession and enjoyment of the same. He would submit that originally, his father was enjoying the property and thereafter, it had fallen to his share. The plaintiff would submit that he has been allotted patta bearing No.708 in respect of the property. While so, the defendant, who had no manner of right, title or interest to the suit properties, started to interfere with the plaintiff's peaceful possession and enjoyment of the same. On 23.03.1991, there was one such attempt. Hence, the suit for the reliefs stated above has been filed by the plaintiff.



S.A.No.1199 of 2004

WEB COPY

4. The 2nd defendant had filed a written statement *inter-alia* denying the allegations contained in the plaint. It was the specific case of the defendant that besides S.Nos.401 and 406, there were other properties that belonged to the 1st defendant's family. It is his contention that a registered partition was entered into between the 1st defendant and the plaintiff's father in the year 1956, under which, the 1st defendant was allotted a share in S.No.406 and the other half share fell to the share of the plaintiff's father. In Survey Number 401, no share had been allotted to the plaintiff's father. S.Nos.401 and 406 comprises of a larger extent. The suit property has not been specifically demarcated with boundaries. The plaintiff ought to have taken out an application for appointing an Advocate Commissioner to identify the property. He would submit that in the property comprised in Survey No.401, measuring an extent of 3.62 acres, the 1st defendant was allotted a 2/3rd share. In Survey No.406, out of 1.71 acres, 80 cents was allotted to the plaintiff's father. The father of the plaintiff was not



S.A.No.1199 of 2004

allotted any share in Survey No.401. The 1st defendant had offered the properties allotted to him as a security for the loan obtained from the Government. A portion of the 1st defendant's property has now been sub divided and re-numbered as S.No.401/3B. A Power deed was given in respect of S.No.401/3B to sell the property to one Parameswari and possession was also handed over to her. Similarly, S.No.406/2B, was sold to the appellant herein and though the plaintiff was aware that the property had been sold to Santha, the appellant herein, he did not make her a party to the proceedings. She has been impleaded as a party only before the Appellate Court. Therefore, the defendant would plead that the suit is barred on the ground of non-joinder of necessary parties. That apart, it is the contention of the defendant that the plaintiff is claiming a right to the property in which his father himself had no right. The property had been sold by the 1st defendant to Mani @ Subramani, Kandasamy and Santha, who are not impleaded as parties to the proceedings. The defendants would submit



S.A.No.1199 of 2004

that the 1st defendant has acted as per the terms of partition deed dated 19.10.1956. However, the same cannot be said with regard to the plaintiff's father. Therefore, the defendants sought for dismissal of the suit.

5. The learned trial Judge on considering the evidence on record had framed the following issues:-

1. தாவா சொத்து விவரம் சரியானதா?
2. தாவா சொத்து வாதி கூறுவது போல் அவர் குடும்பத்துக்கு பாத்தியப்பட்டிருந்ததா?
3. குடும்ப பாகப்பிரிவினையில் வாதிக்கு தாவா சொத்து கிடைத்துள்ளதா?
4. வாதிக்கு தாவா சொத்து பாத்தியப்பட்டு, அவரின் சுவாதீன அனுபவத்தில் இருந்து வருகிறதா?
5. வாதிக்கு அவர்கோரும் விளம்புகை மற்றும் நிரந்தர



S.A.No.1199 of 2004

WEB COPY

உறுத்துக்கட்டளை பரிகாரங்கள் கிடைக்கக் கூடியதா?

6. எத்தகு நிவாரணம் வழங்கப்படல் வேண்டும்?

Thereafter, the following additional Issues were framed:

“1. வழக்குச் சொத்துக்கள் இறந்த 1ம் எதிர்வாதியின்

குடும்பத்திற்கு பாத்தியப்பட்டதா?

2. 1ம் எதிர்வாதி இறந்த பின்பு வழக்குச் சொத்துக்கள்

எந்த எதிர்வாதிக்கு பாத்தியப்பட்டு யாருடைய

சுவாதீனத்தில் இருந்து வருகின்றன?”

6. The plaintiff had examined himself as P.W1 and marked Exs.A1 to A27. Apart from himself, he had also examined three other witnesses as P.Ws.2 to 4. On the side of the defendants, the 2nd defendant had examined himself as D.W1 and the 3rd defendant as D.W2 and Exs.B1 to B6 were marked.

8/25



S.A.No.1199 of 2004

WEB COPY

7. The learned District Munsif, Dharmapuri, on considering the evidence, had come to the conclusion that the plaintiff has not proved his case and was not entitled to a decree for declaration and injunction. Challenging the same, the plaintiff has filed an appeal in A.S.No.6 of 1996 on the file of the Subordinate Judge, Dharmapuri. The learned Subordinate Judge, Dharmapuri, on considering the evidence and arguments had set aside the judgment and decree of the learned District Munsif, Dharmapuri passed in O.S.No.137 of 1991. Challenging the same, it was only the 11th respondent, who has filed this second appeal and the second appeal has been admitted on the following substantial questions of law:-

“1. Has not the First Appellate Court committed itself to grave error on the face of the record by lying on Ex A- 17, an unregistered deed, to confer title to the suit properties on the plaintiff, especially when there is no evidence on record to



S.A.No.1199 of 2004

substantiate the same, except the interested testimony of the PW1, the plaintiff?

2. Has not the First Appellate Court erroneously traveled beyond its jurisdiction and against well settled principles that no unregistered title deed be relied on to confer title on a person, while relying on Ex A-17 to confer title on the first respondent herein in respect of the suit property?

3. Has not the First Appellate Court erred in not considering the non- impleadment of the father of the first respondent herein as party to the suit and non-examination of the father of the first respondent herein who alone was competent to speak as to the execution and genuineness of the Ex A 17 especially when the same is challenged and disputed and when the first respondent is not admittedly having personal knowledge of the coming in to existence of EX A-17 and when the same goes to the root of and fatal to the case of the first respondent herein?



WEB COPY



S.A.No.1199 of 2004

4. Has not the First Appellate Court erred in reversing the well- considered and well-founded Decree and Judgment of the Trial Court, without properly appreciating the evidence on record and without assigning any Valid, acceptable reasons?

5. Is not the First Court erroneous in rendering the impugned judgment purely a assumptions and presumptions and Appellant surmises and surprises?

6. Is not the First Appellate Court erroneous in holding that the suit properties were given to the first respondent herein in the Family Arrangement of the year 1982 in the absence of production of the Family arrangement or other acceptable evidence to prove the same?

7. Has not the First Appellate Court erred in not considering that the suit itself is not maintainable, having been filed by the first respondent herein



S.A.No.1199 of 2004

WEB COPY

without proper and acceptable proof to show his entitlement to the suit properties?

8. The main thrust of the arguments of the appellant is that the appellate Court had relied upon the Ex.A17, the Exchange Deed to arrive at a conclusion that the plaintiff was entitled to the decree as prayed for. However, it is their contention that the said exhibit cannot be relied upon for the reason that the document does not talk about the properties that they were being exchanged and that apart, the document was not registered. Therefore, the reliance upon the same is absolutely without any basis.

9. The learned counsel for the appellant also contended that the appellant has not been made a party to the suit and has therefore lost her opportunity to substantiate her case. The learned counsel for the appellant would submit that the suit ought to have been dismissed for

12/25



S.A.No.1199 of 2004

WEB COPY

non-joinder of necessary parties, since the plaintiff had not deemed it fit to implead the parties who had purchased portions of the suit properties from the defendants and that too despite the defendants putting the plaintiff on notice about the alienation of the properties.

10. He would further submit that under the partition deed of the year 1956, the plaintiff's father had not been allotted any share in Survey No.401 and had only been allotted an extent of 80 cents in Survey No.406 out of a total extent of 1.71 acres. He would submit that in order to claim a right in the property comprised in Survey No.401, the defendant has introduced Ex.A.17, Exchange Deed (styled as a Muchalika) which is an un-registered one and a reading of which would clearly demonstrate that there is no exchange of property but appears to be more in the line of a release. He would submit that the plaintiff taking advantage of the fact that he is working in the Land Administration Department has manipulated the revenue documents.



S.A.No.1199 of 2004

WEB COPY

That apart, he would submit that the Exchange Deed cannot be relied upon since the Exchange Deed does not make any reference to the partition deed of the year 1956, which is the document under which the plaintiff's father as well as the 1st defendant have derived a right to their respective shares. He would submit that the plaintiff as P.W.1 has clearly admitted that in the partition of the year 1956, no share in Survey No.401 had been allotted to the share of his father. He had also admitted that the Exchange Deed has not been signed by the 1st defendant and further, the document is an un-registered one.

11. The learned counsel would submit that the Trial Court has rightly dismissed the Muchalika and the Appellate Court, after holding that the plaintiff could claim a right only on the basis of the Exchange Deed, has proceeded to accept an unregistered Exchange Deed despite the objection of the defendants on the ground that the same can be relied upon for the collateral purpose of proving possession. The

14/25



S.A.No.1199 of 2004

WEB COPY

Appellate Court has totally overlooked Ex.B.3, partition deed of the year 1956 between the plaintiff's father and the 1st defendant, a perusal of which would clearly show that no portion of the property in Survey No.401 has been allotted to Kuppusamy, the plaintiff's father. The subsequent document, namely the partition deed, between the plaintiff and his father of the year 1982 does not bind the defendants since they are not parties to the same and that apart it deals with properties not belonging to them. The learned counsel would submit that though even according to the plaintiff, he is only in possession of a portion of the suit property, the exact description of the suit property has not been given and it is impossible to identify the property from the description given in the suit schedule.

12. Per contra, Mr.P.Valliappan, the learned Senior Counsel appearing on behalf of the plaintiff/1st respondent would submit that it is no doubt true that no portion of Survey No.401 had been allotted to

15/25



S.A.No.1199 of 2004

WEB COPY

the father of the plaintiff, however, under Ex.A.17, exchange deed, the Plaintiff's father was allotted 30 cents in exchange for 50 cents in Survey Nos.406 and 407. He would further submit that Ex.A.17 had been given effect which is evident from Ex.A.28 (marked before this Court) which is a sale deed executed by the 1st defendant in favour of the appellant herein. He would also submit that on the basis of the exchange deed, patta has also been granted to the plaintiff's father as well as the 1st defendant.

13. He would further contend that in respect of Survey Nos.401/2 & 3, now the children of the 1st defendant had filed OS.No.284/1992 on the file of the District Munsif, Dharmapuri against the plaintiff and others in respect of the property comprised in Survey Nos.401/2 & 3 measuring an extent of 18 and half cents. In this suit also they had taken out a plea that no portion of the property in Survey



S.A.No.1199 of 2004

WEB COPY

No.401 was allotted to Muthusamy. However, the plaintiffs therein had allowed the suit to be dismissed for default which is evident from a perusal of Ex.A.29. He would further submit that under Ex.B.3, partition deed, 80 cents were allotted to the plaintiff's father Muthusamy in Survey No.406 out of a total extent of 1.71 acres. Under Ex.A.17, the 1st defendant has given an extent of 45 cents in Survey No.401 in Virupatchi Village to the plaintiff's father. The lands are described within the four boundaries namely, on the north by the lands belonging to Muthusamy, east by lands belonging to Raaji, south by lands belonging to Kandasamy Gounder and west by lands belonging to T.R.Govindaswamy.

14. He would further submit that Kuppusamy had already sold the remaining portions of the property in Survey No.401 and therefore he does not possess any right in the properties comprised in Survey No.401. He would also refer to the certain portions of the cross

17/25



S.A.No.1199 of 2004

WEB COPY

examination of the defendant in support of his contention that the Exchange Deed was given effect to. It is his case that the 1st defendant as D.W.1 during his cross examination would submit that there is no quarrel with reference to Survey No.406 and that he had admitted that the plaintiff was cultivating the lands in Survey No.406 in the suit property.

15. That apart, he has also admitted that the revenue records have been mutated in the names of the parties pursuant to the exchange even in the year 1970 itself. Therefore, in the light of the fact that the defendants were aware about the exchange and that the further sales had been made only on the basis of the exchange deed, the defendants are now estopped from contending otherwise since they have allowed the suit OS.No.284 of 1992 to be dismissed for default and therefore, he would submit that the Appellate Court has rightly allowed the appeal and decreed the suit as prayed for.

18/25



S.A.No.1199 of 2004

WEB COPY

16. Heard the counsels on either side.

17. The plaintiff has come forward with a suit for a declaration and injunction in respect of property which has been described as lands measuring an extent of 0.15.5 hectares in Survey No.401/3B and an extent of 0.12.5 hectares in Survey No.406/2B Virupatchi Village, Dharmapuri. The properties have not been defined by boundaries. Both parties have admitted that the properties comprised in the two Survey Numbers consisted of a larger extent. It is also admitted that in the year 1956 under Ex.B.3, there was a partition between the plaintiff's father and the 1st defendant in and by which the plaintiff's father was given a share only in the property comprised in Survey No.406 and no portion of the property in Survey No.401 has been allotted to the share of the plaintiff's father. 2/3rd share in the properties comprised Survey

19/25



S.A.No.1199 of 2004

WEB COPY

No.401 had been allotted only to the share of the 1st defendant. It appears that Survey No.406 measuring a total extent of 1.71 acres in which 80 cents had been allotted to the plaintiff's father and the remaining portion measuring 91 cents was allotted to the 1st defendant jointly with Muthusamy, B.R.Munusamy and D.R.Munusamy Chetti which is evidenced by Ex.A.18, proceeding of the Tahsildar, Dharmapuri. It would also show that in Survey No.401/2, the 1st defendant was allotted 1.34 acres.

18. The plaintiff would stake a claim to the property comprised in Survey No.401 only on the basis of Ex.B.3, Exchange Deed. As rightly held by the Trial Court, Ex.B.3, Exchange Deed is an unregistered document and the document does not contain any details about the property of Muthusamy which is given in exchange. Ex.A.17 would show that the 1st defendant has given the plaintiff's father 45



S.A.No.1199 of 2004

WEB COPY

cents in Survey No.401. However, what was given in exchange to the 1st defendant by the plaintiff's father is not reflected in Ex.A.17 and therefore, by no stretch of imagination can it be called an Exchange deed.

19. The entire case of the plaintiff primarily rests on this Exchange Deed which as set out above cannot be relied upon for the simple reason that it is an unregistered document and does not reflect the properties that have been taken and given in exchange. Even in the written statement the 1st defendant had highlighted the fact that the properties had been sold to third parties who are proper and necessary parties to the suit. Despite such a statement, the plaintiff has not taken efforts to implead them and it is the appellant herein who has got herself impleaded in the appellate stage, therefore, the appellant had not been given the opportunity to put across her case. The appellant herein having purchased the property even prior to the suit.

21/25



S.A.No.1199 of 2004

WEB COPY

20. It is the axiomatic principle of law that the plaintiff has to succeed or fail on the strength of his case and not on the weakness of the defendant. The plaintiff has not described in detail the property in respect of which this suit for declaration and injunction has been filed. Admittedly, the suit property is a portion of a larger extent, therefore, the identity of the property is very essential for claiming a decree.

21. The plaintiff who accepts the fact that under the partition no portion has been allotted in Survey No.401 to his father, however, seeks to stake a claim on the basis of the Ex.A.17 which, for the reasons set out supra, cannot be relied upon. That apart, the plaintiff's father, Muthusamy was very much alive and despite this the plaintiff has failed to put his father into the box for reasons best known to him. Therefore, the plaintiff has kept away the best evidence from Court. The plaintiff despite being put on notice that the property has been sold

22/25



S.A.No.1199 of 2004

WEB COPY

to the appellant herein and one Mani @ Subramani has not chosen to implead them as a party to the proceedings. Therefore, the suit ought to have been dismissed on the ground of non joinder of necessary parties.

22. The Appellate Court has chosen to place reliance upon Ex. A.17 which is contrary to law since the document is one which cannot be accepted in evidence as it is an unregistered document under which the property has been conveyed. The first Appellate Court has failed to appreciate that in order to rely upon the family arrangement of the year 1982, the plaintiff has to first prove the exchange as set out in Ex.A.17, unregistered Exchange Deed. In fact, the first Appellate Court has failed to appreciate that this family arrangement has not been proved by the plaintiff by examining his father. Therefore, the Substantial questions of law are answered against the plaintiff. The reliance on Ex.A.28 and Ex.A.29 in the light of the plaintiff having failed to prove the exchange deed is misconceived. The substantial questions of law



S.A.No.1199 of 2004

which are all related to the validity of Ex.A.17, in the light of this Court holding that the same is invalid are all answered against the plaintiff.

23. In fine, the Second Appeal is allowed, the Judgement and Decree of the lower Appellate Court is set aside and the judgement and decree of the Trial Court is confirmed. No costs.

25.04.2023

Index : Yes / No
speaking Order : Yes / No
Neutral Citation : Yes/No
shr/srn

To,

- 1.The Subordinate Judge, Dharmapuri.
2. The District Munsif, Dharmapuri
- 3.The Section Officer,
V.R.Section,
High Court, Madras -104.

24/25



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S.A.No.1199 of 2004

P.T.ASHA, J.,

shr/srn

Pre-delivery Judgment in
S.A.No.1199 of 2004

25.04.2023