



S.A.No.929 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **07.12.2023**

CORAM

THE HONOURABLE Ms. JUSTICE **P.T.ASHA**

S.A.No.929 of 2022
and
C.M.P.No.19064 of 2022

- | | | |
|------|-----------------------|-----------------|
| 1. | V.Easwaran | |
| 2. | Baby | |
| 3. | Makeshwari | |
| 4. | V.Kanakaraj | |
| 5. | Rajammal @ Rajeswari | ... Appellants |
| -Vs- | | |
| 1. | K.Santhoshkumar | |
| 2. | K.Rajeshkumar | |
| 3. | Sundararaj @ Sundaram | ... Respondents |

Prayer:- This Second Appeal is filed under Section 100 of Code of Civil Procedure Code,1908, to set aside the judgement and decree dated 04.12.2021 made in A.S.No.18 of 2018 on the file of the Sub Court, Pollachi, confirming the judgment and decree dated 22.08.2017 made in O.S.No.446 of 2011 on the file of the District Munsif Court, Pollachi.

For appellants : Mr.S.Kousik
for Mr.V.Anandamurthy

For respondents 1 and 2 : Mr.K.Murugesh
For respondent 3 : Not ready in notice



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JUDGMENT

The defendants 1, 2, 4, 5 and 7 are the appellants before this Court and they have challenged the concurrent judgment and decree passed by the Courts below.

2. The facts of the case are briefly set out hereinbelow with the parties referred to in the same ranking as before the Trial Court.

FACTS OF THE CASE:

2.1. The plaintiffs had filed a suit in O.S.No.446 of 2011 on the file of the District Munsif Court, Pollachi, for a declaration of their title over the suit property and consequently to recover possession from the defendants and for injunction restraining the defendants from alienating or encumbering the suit properties or in any manner dealing with the suit property.

2.2. It is the case of the plaintiffs that one Kandhasamy Chettiyar had become the owner of the suit property on the basis of



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the sale deed dated 26.11.1969 and on account of the cancellation receipt of the mortgage deed dated 19.01.1970.

2.3. It is the case of the plaintiffs that Kandhasamy Chettiyar is none else than their paternal grandfather. The plaintiffs' parents had passed away when they were very young and they were brought up by their paternal grandfather. On 11.11.1999, Kandhasamy Chettiyar executed a registered will in favour of the plaintiffs giving life interest to his wife Kumarammal. Kandhasamy Chettiyar died on 23.12.2003 and his wife passed away on 03.02.2011. The plaintiffs, therefore, became the owners of the suit property by virtue of the registered will dated 11.11.1999.

2.4. Thereafter, the plaintiffs had called upon the defendants to vacate and deliver the vacant possession of the property on 20.07.2011. To this, the defendants replied that pursuant to the orders passed in O.S.No.79 of 2003, the suit property belongs to



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them. They would contend that the patta has also been mutated in their names, documents have been assessed in their names and all the taxes were paid in their names.

2.5. Thereafter, the plaintiffs have made enquiries about O.S.No.79 of 2003 and they came to learn that the suit has been filed by Kandhasamy Chettiyar against the defendants for recovery of possession stating that he is the owner of the property and they had stopped paying the rent properly. Since Kandhasamy Chettiyar died on 23.12.2003, the suit was dismissed for default. Therefore, the principle of *res judicata* cannot be pleaded as against them. Therefore, they have come forward with the present suit since the defendants are not vacating and claiming the title over the suit property.

2.6. The written statement filed by the defendants 1,2 and 4 would read as follows:



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(i) The defendants would submit that the property in question belongs to one Subammal who is the maternal grandmother of the plaintiffs, Kandhasamy Chettiyar is her son and apart from him, she had three daughters viz., Mylathal, Valliammal and Thirumalaiaammal.

(ii) The first defendant's mother is Mylathal, except Mylathal, all the other daughters were married and left their home. Mylathal lived with Subammal and she was taking care of her mother. Subammal's husband Rangasamy Chettiyar deserted her and lived with an other lady viz., Karumi Ammal alias Akkammal. Kandhasamy Chettiyar chose to live with his father.

(iii) Mylathal has been living in the property for several years ie., nearly 40 years ago. Neither Kandhasamy Chettiyar nor his legal heirs lived in the property. It is the contention of the defendants that Mylathal and her daughter were in possession of the suit property.



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2.7. Further, it is the contention of the defendants that Kandhasamy Chettiyar had filed a suit in O.S.No.79 of 2003 wherein he had claimed that the defendants herein were tenants under him and they had stopped paying rent and therefore, he had terminated the lease and filed the suit for recovery of possession of the property. In that suit, the defendants asserted their title and denied the title to Kandhasamy Chettiyar.

2.8. The defendants would submit that the cause of action in the earlier suit is the very same cause of action for which this suit is filed. They would submit that the plaintiffs' contention that they came to know about the earlier proceedings only on 20.07.2011 is an utter lie. The title of the property is only with the defendants not with the plaintiffs and therefore, they sought for the dismissal of the suit.



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TRIAL COURT:

3. The Trial Court had framed the following issues:

- “1. தாவா சொத்து வாதிகளுக்கு பாத்தியப்பட்டது என கோரும் விளம்புகை பரிகாரம் கிடைக்கத் தகுதியுடையவரா?
2. தாவா சொத்தை பிரதிவாதிகள், வாதிகள் வசம் ஒப்படைக்க வேண்டுமென கோரும் பரிகாரம் கிடைக்கத் தகுதியுடையவரா?
3. தாவா சொத்தைப் பொறுத்து பிரதிவாதிகளுக்கு எதிராக வாதிகள் கோரியுள்ள நிரந்தர உறுத்துக்கட்டளை பரிகாரம் கிடைக்கத் தகுதியுடையவரா?
4. அவசியத்தரப்பினர்களை இவ்வழக்கில் சேர்க்கப்படாத காரணத்தினால் இவ்வழக்கு தள்ளுபடி செய்யப்படக்கூடியதா?
5. வழக்கு செலவுத்தொகையை வாதிகளுக்கு செலுத்த பிரதிவாதிகள் கடமைப்பட்டவரா?
6. வாதிகளுக்கு கிடைக்கக்கூடிய இதர பரிகாரம் என்ன?”

4. The first plaintiff had examined himself as P.W.1 and one Krishnamoorthy as P.W.2 and marked Exs.A1 to A11. On the side of the defendants, the first defendant had examined himself as D.W.1 and one Kanakasabapathy as D.W.2 and marked Exs.B1 to B23.



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5. The learned District Munsif held that the defendants had not proved their case, but, the plaintiffs have proved their title to the property and further, the defendants have not proved as to how they got into the property and hence, they are not entitled to the title to the property.

6. The defendants had pleaded nonjoinder of necessary parties as the other legal heirs of Kandasamy Chettiyar were not impleaded as parties. The learned Judge held that the suit is not bad for nonjoinder. The learned District Munsif had not considered the plea of ouster raised by the defendants.

LOWER APPELLATE COURT:

7. Challenging the said judgment and decree, the defendants had filed an appeal in A.S.No.18 of 2018 on the file of the Subordinate Court, Pollachi. The learned Sub Judge had framed the following point for consideration:



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1. 26.11.1969 தேதிய கிரைய ஆவணம் சட்ட தன்மையற்றது என்பது உண்மையா? அதனடிப்படையில் ஏற்பட்ட உயில்சாசனம் சட்ட தன்மையற்றது என்பது உண்மையா?
 2. 40 ஆண்டு காலமாக மேல்முறையிட்டாளர்கள் வழக்கிடைச் சொத்தின் சுவாதீனத்தில் இருந்து வருகிறார்கள் என்ற சங்கதி உண்மையா?
 3. அவ்வாறு சுவாதீனத்தில் இருந்து வருவாதாலேயே வழக்கிடைச் சொத்தில் அவர்களுக்கு மட்டும் பாத்தியம் ஏற்பட்டுள்ளது என்பது உண்மையா?
 4. விசாரணை நீதிமன்ற அ.வ.எண்.446/2011 என்ற வழக்கில் எதிர்மனுதாரர்களான வாதிகள் கோரியுள்ள விளம்புகை மற்றும் சுவாதீன பரிகாரங்கள் அவர்களுக்கு கிடைக்கத்தக்கதா?
 5. விசாரணை நீதிமன்ற அ.வ.எண்.446/2011 நாள் 22.08.2017ல் வழங்கிய தீர்ப்பு மற்றும் தீர்ப்பாணையில் ரத்து செய்ய வேண்டிய அவசியம் உள்ளதா?
 6. வேறு பரிகாரம் எதுவும் வழங்க வேண்டுமா?”

8. The main argument which has been advanced by the defendants before the lower Appellate Court is that they have perfected title by ouster. Even in the earlier proceedings, they had taken a stand that they are the owners of the property and had denied the title of the plaintiff. However, the learned Judge had proceeded to dismiss the appeal and confirmed the judgment and decree passed by the Trial Court.



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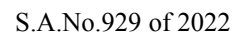
9. Aggrieved by the same, the defendants are before this court.

10. Heard the learned counsel on either side.

DISCUSSION:

11. The main argument of the appellants is that though they had taken a plea of ouster, the Courts below have not considered the issues from their correct perspective and have also not returned any finding on this issue. He would submit that a mere perusal of the issues framed by the Trial Court *viz.*, the District Munsif Court, Pollachi, would show that the Trial Court has not even framed any issue regarding ouster.

12. The lower Appellate Court has framed two points for consideration not in the lines of ouster but by raising the issue as to “Whether the defendants had proved that they had been in



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property to him.

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15. Even at that stage, the defendants had set up independent title to the property and denied the title of Kandhasamy Chettiar. The defendants have also substantiated their case by producing the revenue records in their name and Ex.B2 joint patta to show their possession of the property. This has not been challenged by the plaintiffs. The plaintiffs have not sought to cancel the entries in the revenue records and documents assessed in their names, more particularly, when they are claiming exclusive title over the property. Kandasamy Chettiyar who filed the suit as early as in the year 2003, has not proceeded/processed it, till his death in the year 2007. Therefore, the defendants had made out the plea for ouster.

16. The lower Appellate Court had held that the defendants had not filed any document to show their possession of the property. A mere perusal of EX.B10 – notice, issued by Kandasamy Chettiyar



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and the suit O.S.No.79 of 2003 would clearly show that the defendants have been in possession of the property since 1970. Therefore, it is clear that till the filing of the suit in the year 2011, the plaintiffs were not in possession of the property.

17. Considering the fact that both the Courts below have not addressed this issue, I am inclined to allow this second appeal and remit it back to the lower Appellate Court to consider point nos. 2 and 3 which has been raised by the lower Appellate Court and the issue which is now framed by this Court as to

“Whether the defendants have perfected title by ouster?”

18. While considering these issues, if the parties desire to let in any further evidence, the Lower Appellate Judge shall permit them to let in evidence and evidence shall be taken by the lower Appellate Court itself and the matter need not be remitted to the Trial Court. The said exercise shall be completed within a period of



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three months from the date of receipt of a copy of this order. The Registry is directed to send back the records forthwith.

Accordingly, this second appeal is allowed and the matter is remitted back to the file of the Subordinate Court, Pollachi. Consequently, connected C.M.P. stands closed. No costs.

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Internet : Yes
Index : Yes/No
Speaking order/Non-speaking order
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To

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



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P.T.ASHA, J.,

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