

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.10.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.Nos.371 & 433 of 2008

S.A.No.371 of 2008

1. Karumalai
2. Ramu
3. Mari
4. Subramani
5. Mariammal
6. Madhesh
- 7.Chinnakannu
8. Sambu
9. Arumugham
10. Goindee

... Appellants/Defendants 3 to  
7 and LRS  
of 2nd Defendant (6 to 10)

-Vs-

Kittu

... Respondent/Plaintiff

Second Appeal filed under section 100 of C.P.C against the judgment and decree made in A.S.No.26 of 2006 dated 04.07.2007 on the file of the Sub-Court, Mettur reversing the judgment and decree made in O.S.No.33 of 1998 dated 30.06.2006 on the file of the District Munsif cum Judicial Magistrate Court, Omalur.

S.A.No.433 of 2008

Mariammal

.. Appellant/Plaintiff

-Vs-

Kittu

.. Respondent/Defendant

Second Appeal filed under section 100 of C.P.C against the judgment and decree made in A.S.No.24 of 2006 dated 04.07.2007 on the file of the Sub-Court, Mettur reversing the judgment and decree made in O.S.No.106 of 1998 dated 30.06.2006 on the file of the District Munsif cum Judicial Magistrate Court, Omalur.

For appellants : Mr.Su.Srinivasan

For Respondent : Mr.T.S.Vijayaraghavan

#### COMMON JUDGMENT

S.A.No.371 of 2008 has been preferred against the decree of the lower appellate Court in A.S.No.26 of 2006 setting aside and reversing the decree of the trial Court made in O.S.No.33 of 1998. The said suit was filed by Kittu, the respondent herein against one Periya Gounder.

2. During the pendency of the suit, the said Periya Gounder died and 6 persons [1) Vaiyapuri, 2) Karumalai, 3) Ramu, 4) Mari and 5) Subramani, all sons of Periya Gounder and 6) Mariammal, daughter of Periya Gounder] were impleaded as defendants 2 to 7. The said suit was filed by Kittu, the respondent herein, in respect of 27 ½ cents of land comprised in S.No.168/1D and 10 cents of land comprised in S.No.177/9A shown respectively as Items 1 and 2 in the plaint schedule and praying for a declaration that the respondent herein/plaintiff was entitled to the said properties absolutely and exclusively and also for a permanent injunction restraining the defendants therein from interfering with his alleged peaceful possession and enjoyment of the suit properties. The said prayer was made based on the contention that a larger extent of property was owned by one Periya Gounder who had three sons, namely 1) Komali Goundar, 2) Irusa Goundar and 3) Kolandai Goundar; that in a partition among them under a registered partition deed dated 14.07.1942, bearing Document No.2581 of 1942 registered in the office of the Sub-Registrar, Omalur, Komali Goundar got 1 ½ acres of land to his share; that subsequently some 27 years prior to the filing of the suit, under an oral partition among Komali Goundar and his four sons, namely 1) Periathambi, 2) Govindasami, 3) Ramasamy and 4) Kittu, the suit properties measuring an extent of 37 ½ cents came to be allotted to the share of Kittu, the respondent herein, whereas Komali Goundar retained 50 cents of land, which he had purchased from the income derived from the jointly family nucleus, towards his share; that thus the respondent herein became entitled to the suit properties and he was in possession and enjoyment of the same and that the same was sought to be disturbed by the deceased first defendant Periya Goundar, as a result of which the respondent was forced to approach the Court with O.S.No.33 of 1998 for the above said reliefs.

3. The suit was resisted by Periya Goundar, who was the sole defendant, contending that the suit property which was part of the property allotted to Komali Goundar in 1942 partition, was sold by him under a registered sale deed dated 15.04.1962 to the deceased defendant Periya Goundar for discharging the family

debts and for maintaining the family of Komali Goundar; that right from the date of purchase, the said Periya Goundar was in possession and enjoyment of the same making payment of the kist to the Government; that the respondent herein/plaintiff in O.S.No.33 of 1998, having failed to challenge the said sale within the time of limitation, could not assail the sale and that the suit filed for declaration and injunction without a prayer for setting aside the sale would not be maintainable.

4. The learned trial Judge framed following general issues:

- 1) Whether the plaintiff is entitled to the relief of declaration as prayed for?
- 2) Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?
- 3) To what other relief the plaintiff is entitled?

5. It so happened, before the trial started Periya Goundar died and his sons and daughters came to be impleaded as defendants 2 to 7 in the said suit. Thereafter, the trial Court conducted a separate trial for the said suit in which three witnesses were examined as Pws 1 to 3 and 8 documents were marked as Exs.A1 to A8, whereas one witness was examined as DW1 and 6 documents were marked as Exs.B1 to B6 on the side of the defendants therein.

6. The learned trial Judge, at the conclusion of trial, on appreciation of evidence, came to the conclusion that Kittu, the respondent herein, who was the plaintiff in O.S.No.33 of 1998, had not proved his case and at the same time, accepted the case of the defendants 2 to 7, who were impleaded as the legal representatives of the deceased Periya Goundar that Periya Goundar had purchased the property stood proved. The learned trial Judge also held that since the sale was not sought to be set aside, the claim made by the respondent herein/plaintiff in O.S.No.33 of 1998 could not be sustained. Accordingly, the learned trial Judge dismissed the suit by a judgment and decree dated 30.06.2007. On appeal in A.S.No.26 of 2006, the learned lower appellate Judge, exclusively relying on Ex.A8, namely the certified copy of the plaint filed by Mariammal, the 7<sup>th</sup> defendant in O.S.No.33 of 1998 and other evidence adduced in the said case O.S.No.106 of 1998, reversed the finding of the trial Court, set aside the decree passed by the trial Court and decreed the suit O.S.No.33 of 1998 as prayed for. It is as against the said decree of the lower appellate Court dated 04.07.2007, S.A.No.371 of 2008 has been filed.

7. The second appeal was admitted on 13.03.2008 noticing following questions to be the substantial questions of law involved in S.A.No.371 of 2008:-

"1. Whether the appellate Court is right in allowing the appeal by reversing the judgment and decree in favour of the defendants without any prayer or proceedings to set aside the sale deed, dated 12.04.1962?

2. Whether the appellate Court is right in holding that the plaintiff is entitled for a relief of declaration and injunction without proving the sale deed dated 12.04.1962 is sham and nominal?

3. Whether the appellate Court is right in holding that the plaintiff is having a title over the suit property only on the basis of permissive possession in respect of 5 cents of suit property in Survey No.177/97?"

8. Mariammal, who figured as the 7<sup>th</sup> defendant in O.S.No.33 of 1998 filed a separate suit O.S.No.106 of 1998 on the file of the very same trial Court in respect of 5 cents of land within specified boundaries, out of 20 cents of land comprised in S.No.177 /9A at Kamalapuram Village, Omalur Taluk, Salem District for a declaration of title in her favour and a permanent injunction against the respondent Kittu, showing him as the sole defendant in the said suit. In the said suit, specific averment came to be made to the effect that the sale deed dated 12.04.1962 executed by Komali Goundar in favour of Periya Goundar was sham and nominal and it was not given effect to and that the vendor under the sale deed, namely Komali Goundar never parted with the possession of the property. It was also contended that while Komali Goundar divided his properties with his sons, 20 cents of land comprised in S.No.177/9A was divided into 4 equal shares and each one of the sons of Komali Goundar was allotted 5 cents; that the 5 cents allotted to Ramasamy Goundar was sold by way of a sale deed dated 11.02.1988 and that however, subsequently for one reason or the other, a sale deed was executed by Periya Goundar, Komali Goundar and others in respect of the 5 cents allotted to Ramasamy, the husband of Mariammal. Based on the said averments and contending further that her possession in respect of 5 cents shown as the suit property in O.S.No.106 of 1998 was sought to be interfered with by the respondent Kittu, she filed the above said suit for declaration and injunction.

9. The suit was resisted by Kittu denying the derivation of title by Mariammal by means of sale deed dated 11.02.1988 and her alleged possession. Contending further that the suit filed

by Mariammal was a counter blast for the suit filed by Kittu and the sale deed relied on by Mariammal also came to be executed after the service of suit summons in the suit filed by Kittu and hence no importance could be attached to such a transaction, Kittu, who figured as the sole defendant in O.S.No.106 of 1998, prayed for the dismissal of the said suit.

10. In the said suit also, following general issues similar to the issues framed in O.S.No.33 of 1998 were framed:

1) Whether the plaintiff is entitled to the relief of declaration as prayed for?

2) Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?

3) To what other relief the plaintiff is entitled?

11. The trial Court conducted a separate trial, in which two witnesses were examined as Pws 1 and 2 and 10 documents were marked as Exs.A1 to A10 on the side of the plaintiff and two witnesses were examined as Dws 1 and 2 and two documents were marked as Exs.B1 and B2 on the side of the defendant therein.

12. The learned trial Judge, at the conclusion of trial, on consideration of evidence, accepted the case of Mariammal and rejected the case of Kittu, as a result of which the suit O.S.No.106 of 1998 was decreed as prayed for. On appeal in A.S.No.24 of 2006, the learned lower appellate Judge, discussing the evidence adduced in both the cases, namely O.S.No.33 of 1998 and O.S.No.106 of 1998 ultimately allowed the appeal, set aside the decree passed by the trial Court and dismissed the suit O.S.No.106 of 1998 filed by Mariammal. As against the said appellate decree of the lower appellate Court dated 04.07.2007 made in A.S.No.24 of 2006, S.A.No.433 of 2008 has been filed.

13. The said second appeal was admitted on 28.03.2008, noticing the following questions to be the substantial questions of law involved in the said second appeal:

"1. Whether the appellate Court is right in allowing the appeal by reversing the judgment and decree in favour of the plaintiff without any prayer or proceedings to set aside the sale deed, dated 12.04.1962?

2. Whether the appellate Court is right in allowing the appeal when the plaintiff proved her title and right over the suit property by adducing evidences particularly sale deed, dated 11.02.1998?

3. Whether the Appellate Court is right in allowing the appeal without considering that the properties were sold when the defendant was minor and till now the sale deed was not questioned by him?

14. As it is admitted on both sides that S.A.No.371 of 2008 arose out of a suit (O.S.No.33 of 1998) filed by Kittu in respect of a larger extent of property and the subject matter of O.S.No.106 of 1998 filed by Mariammal against Kittu was a smaller portion of the larger extent of property concerned in S.A.No.433 of 2008, this Court directed listing of both the second appeals together for hearing. Kittu is the respondent in both the second appeals. The appellant in S.A.No.433 of 2008 is the 5<sup>th</sup> appellant in S.A.No.371 of 2008. Hence, by consent, both the second appeals are heard together for disposal by a common judgment.

15. Since the scope of S.A.No.371 of 2008 is larger and the parties to S.A.No.433 of 2008 are also parties in S.A.No.371 of 2008 and in addition, there are more parties in S.A.No.371 of 2008, the parties shall be referred to in accordance with their ranks in O.S.No.33 of 1998 from which S.A.No.371 of 2008 has arisen.

16. The arguments advanced on both sides are heard. The judgments of the Courts below and the materials available on record are also perused.

17. Though three questions have been formulated in each one of the second appeals as the substantial questions of law involved in the second appeals, during the course of hearing of the second appeals, it has been brought to the notice of this Court that the learned lower appellate Judge, without taking into account the fact that no joint trial was conducted by the trial Court, freely read the evidence adduced in one case as evidence in the other case and decided the cases ultimately in favour of the respondent herein, namely Kittu. The said procedure adopted by the learned lower appellate Judge itself can be the basis of a substantial question of law as to the propriety of reading evidence in one case as evidence into another case. Hence, this Court frames the following additional substantial question of law as the one that has arisen commonly in both the second appeals:-

"Whether the lower appellate Court has committed an error in law in reading the evidence adduced in one case as evidence in the other case and vice versa when no joint trial was conducted and no common judgment was pronounced?"

18. The submissions made in this regard on both sides are also heard and taken into consideration.

19. It is trite that unless the pleadings made and evidence adduced in one case are introduced and adduced as evidence in the other case following the procedure for adduction of evidence, the Court cannot suo motu read the evidence recorded in the one case in another case even though both the cases are dealt with by the very same Court. Nothing more is needed to hold that the procedure adopted by the learned lower appellate Judge is totally erroneous and against law. The additional substantial question of law is answered accordingly in favour of the appellants and against the respondent.

20. The above said answer to the additional substantial question of law shall not be enough to give a full and final disposal of the lis in these matters. All is not well in this case right from the beginning. Mariammal was impleaded as one of the legal representatives of Periya Goundar in O.S.No.106 of 1998 filed against Kittu himself in respect of a portion of the subject matter of O.S.No.33 of 1998. Initially Mariammal was not a party to O.S.No.33 of 1998 and she became a party defendant in the said suit after the death of Periya Goundar. In addition, in one way or other she also claims to have purchased a portion of the property under a sale deed dated 11.02.1988, which has been made the basis of her claim in O.S.No.106 of 1998. When both the cases were pending on the file of the same Court and when both the cases were tried simultaneously, the learned trial Judge ought to have considered the feasibility of a joint trial or stay of one of the suits pending disposal of the other suit in order to avoid conflict of decisions in respect of one and the same property between the same parties. Unfortunately, the learned trial Judge did not do it.

21. In addition, there are also discrepancies found in the documents marked on the side of the plaintiff in O.S.No.33 of 1998. 7 documents were marked as Exs.A1 and A3 to A8. No document was marked as Ex.A2. The certified copy of the plaint in the other suit, namely O.S.No.106 of 1998 was marked as Ex.A9. Without properly rectifying the same and making it reflected in the order sheets, the learned trial Judge simply proceeded with the pronouncement of judgments and provided a list of documents adjusting the number of the exhibits by referring to the documents marked as Exs.A3 to A9 as Exs.A2 to A8. Learned counsel for the appellant also contends that since no joint trial was conducted, the appellants were prejudiced and that the appellants were not given opportunity to lead evidence after the belated introduction of the certified copy of the plaint in O.S.No.106 of 1998 as an exhibit in O.S.No.33 of 1998.

22. Both the Courts below seems to have forgotten about the fact that the suit property of O.S.No.106 of 1998 is a portion of the suit property of O.S.No.33 of 1998. The same has resulted in the mistakes pointed out supra. The vital aspects have not been taken into consideration by both the Courts below. Under the said circumstances, this Court comes to the conclusion that the other questions formulated as substantial questions of law need not be considered and it shall be enough to set aside the decrees of the lower appellate Court and also the decrees passed in both the suits by the trial Court based on the answer provided to the additional substantial question of law and remit O.S.No.33 of 1998 and O.S.No.106 of 1998 to the trial Court for a de novo trial with a direction to try both the cases jointly. Since the cases are of the year 1998, the trial Court shall be directed to dispose of the case as expeditiously as possible, in any event not beyond a period of 6 months from the date of receipt of records.

In the result, both the second appeals are allowed and the decrees of the lower appellate Court dated 04.07.2007 made in A.S.No.26 of 2006 and A.S.No.24 of 2006 and the decrees of the trial Court dated 30.06.2006 made in O.S.No.33 of 1998 and O.S.No.106 of 1998 are set aside. O.S.No.33 of 1998 and O.S.No.106 of 1998 are remitted back to the trial Court for de novo trial with a direction to try both the cases jointly and dispose of the same as expeditiously as possible, in any event within a period of 6 months from the date of receipt of records . No costs.

Sd/-

Assistant Registrar(CS IV)

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Sub Assistant Registrar

To

1. The Sub-Court  
Mettur

2.The District Munsif cum Judicial Magistrate Court  
Omalur.

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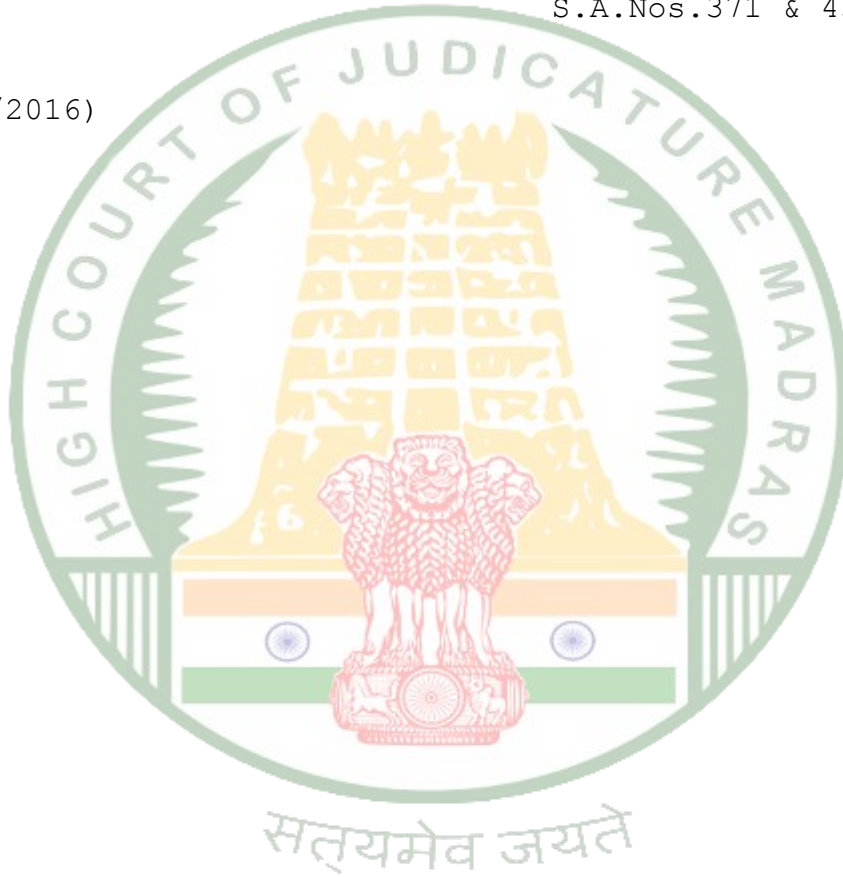
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S.A.Nos.371 & 433 of 2008

sv (CO)  
srg (28/01/2016)



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