

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.11.2016

PRONOUNCED ON : 28.11.2016

CORAM

THE HONOURABLE DR.JUSTICE G. JAYACHANDRAN

S.A.No.1662/2004 & CMP No.13018/2004

1.Kasinathan @ Kasi

2.Vasudevan (Alias)Vasu ...Appellants/Appellants/
Plaintiffs

..Vs..

1.Jaikumar

2.Raja

3.Dharani Mestry

...Respondents/Respondents/
Defendants

Prayer: Appeal filed Under Section 100 C.P.C. against the common Judgment and Decree passed in A.S.No.9/2003 and Cross Appeal No.9/2003 dated 20-02-2004 on the file of the Sub-ordinate Judge, Gudiyatham, Vellore District, dismissing the appeal filed by the Appellant and allowing the Cross Appeal filed by the 4th Respondent thereby modifying the Judgment and Decree passed in O.S.No.723/87 dated 18-02-2003 on the file of the District Munsif, Gudiyatham,Vellore District.

For Petitioner : Dr.A.Thiagarajan,
Senior Counsel for
Mr.S.Ramesh Kumar

For RR-1 & 2 : No Appearance

For RR-3 : Mr.R.Margabandhu

JUDGMENT

The appellant is the plaintiff in this suit. Dispute in respect of 9 cents of land which was purchased by Iyyavu Mudaliar in 2 pieces, one 8 cents on 26.08.1934, another 1 cent on 06.01.1935.

2. According to the plaintiff, Iyyasamy orally gave the 9 cents of property to his son Arumugam. The said Arumugam died in the year 1964. After his death, the plaintiffs who are the sons of Arumugam are in a possession and enjoyment of the property. While so, the fourth defendant claiming right over the property through defendants 1 to 3 is disturbing the peacefully possession. Hence suit for declaration and possession.

3. The defendants in the written statement has contested the suit alleging that Iyyavu Mudaliar had 3 sons. Govindasamy Mudaliar, Oomai @ Gopal and Arumugam, and 2 daughters Kamalammal and Rajammal. Arumugam died leaving behind 2 sons who are plaintiffs herein and 2 daughters by name Usha and Shanti, beside his widow Krishnaveni. Another son of Iyyavoo namely Umai @ Gopal died in the year 1970 living behind a son and a daughter by name Jothi and Vijaya respectively. Govindasamy is the first defendant. Other legal heirs of Ayyavu not impleaded as parties. The suit property not been properly described. Neither the survey number or the description of the property is specific. Without furnishing boundaries and by furnishing the wrong survey number, the suit has been filed without even impleading necessary parties. Therefore suit is liable to be dismissed.

4. It is further contended by the defendant that during the life time of Iyyavu Mudaliar oral partition was effected between his 3 sons. In respect of the suit property each one of them have taken 3 cents from out of 9 cents. While, Southern part of the property was allotted to the first defendant Govindasamy, the father of the plaintiff (Arumugam) was given the 3 cents of land on the Northern side. 3 cents of land in the middle was allotted to Gopal. Parties were enjoying their respective shares for more than 20 years. The defendants 1 to 3 sold 6 cents that is $\frac{2}{3}$ share in total 9 cents to the 4th defendant based on their right over the property. The plaintiff taking advantage of his political power and money power made mutation in the revenue records without the knowledge of the defendants and had filed the suit. On getting exparte injunction attempting to take possession of the Southern 6 cents from the 4th defendant who is the lawful purchaser from the lawful vendor.

5. With these pleadings, the Trial Court has framed the following issues.

1. Whether the suit is bad for non joinder of the necessary parties?
2. Whether the description of the property

given in the plaint schedule is incorrect?

3. Whether the plaintiffs were not in the possession of the S.No.169/2A to an extent of 6 cents falling South to the land?

4. Whether the properties are in the possession of the plaintiffs?

5. Whether the plaintiffs are entitled for the relief of declaration?

6. Whether the plaintiffs are entitled for the relief of permanent injunction?

7. What other relief the plaintiffs are entitled for?

6. Before the Trial Court, the plaintiffs have marked 24 exhibits and 4 witnesses. On behalf of the defendants, 6 exhibits and 3 witnesses were examined. On analysing the evidence available, the Trial Court has found that the plaint schedule does not carry correct particulars pointing out that the plaint schedule extent of 9 cents alleged to fall under two Survey Nos. 169/2 and 169/9, but in fact, Iyyavu Mudaliar have purchased land only in Survey No.169/2A, which was later assigned Survey No.169/9 during the re-survey. Considering Ex.A-2 & A-3 which are patta in the name of plaintiffs, the Trial Court taking note of the fact that in Ex.A-3, the Special Tahsildar has given joint patta in the name of plaintiff and the fourth defendant, and thereafter the name of the fourth defendant is scored off. The Trial Court ultimately dismissed the suit in respect of declarative relief in toto and in the respect of injunction dismissed as against defendants 1 to 3. On the ground that there is no proof for the oral alienation of the suit property by Iyyavu Mudaliar in favour of his son Arumugam. And in so far as injunction is concerned, stating there cannot be injunction as against the co-owners. Defendants 1 to 3 being the co-owners, injunction denied against them. At the same time, the Trial Court has granted relief of injunction against the fourth defendant holding that he is a third party to the property. The Trial Court has also observed that till effective partition is done among the legal heirs of Iyyavoo, the fourth defendant cannot claim the property based on the sale deed executed by some of the legal heirs of Iyyavoo Mudaliar.

7. Aggrieved by these findings, the plaintiffs have preferred an appeal and the fourth defendant has preferred cross objection as against the order of injunction restraining him from enjoying the property.

8. The First Appellate Court on re-appreciation of evidence dismissed the appeal of the plaintiff and allowed the cross objection.

9. In these back ground, aggrieved by the concurrent judgment of the Courts below, the present Second Appeal is filed on the ground that the Trial Court has misread the evidence. Sufficient revenue documents were marked on behalf of the plaintiffs to show that they were in continuous possession of the suit property. The First Appellate Court had supplemented his own view, which are not available on record, to hold that there was a partition between the three sons of Iyyavu Mudaliar and only for that purpose Iyyavu Mudaliar has purchased 9 cents of land in 2 pieces to give three cents each of his 3 sons.

10. This Court while admitting the Second Appeal has formulated the following question of law:

1. Whether the facts and in the circumstances of the case, the Court below was right in allowing the cross appeal when there was no counter claim or issue framed in the suit is correct in law?

2. Whether on the facts and in the circumstances of the case, the First Appellate Court was right in holding that the appellant and the respondents are entitled for three cents each is correct in law?

3. Whether on the facts and in the circumstances of the case, the Court below was right in dismissing the suit filed by the Appellant when material documents filed by the appellant were not rebutted by the respondents is correct in law?

11. The learned counsel for the appellant would submit that the relationship between the parties are admitted. It is also admitted by the parties that Iyyavu Mudaliar apart from the 9 cents had another 1 acre 50 cents of land which was divided between the sons. If Iyyavu Mudaliar had an intention of giving 3 cents each to his 3 sons, he would have very well done it during his life time. Therefore, the surmise of the First Appellate Court that Appavu Mudaliar purchased 9 cents of land in two sale deeds indicates that he is purchased it to give 3 cents each for his 3 sons namely Govinda Mudaliar, Gopal and Arumuga Mudaliar is totally erroneous.

12. Further, the learned counsel for the appellant submit that the First Appellate Court has unduly relied upon Ex.B-2 and B-3 to infer partition among the sons of Iyyavu was duly effected in respect of the suit property by referring the Northern boundaries of these 2 documents, which describes it as vacant cite of Govinda Mudaliar son of Iyyavoo.

13. The Trial Court while rightly held that the claim of oral alienation of the property by Iyyavu in favour of son

Arumuga Mudaliar is baseless and unacceptable. At the same time, held that it is undivided property hence open for the parties to ascertain their respective shares over the property. As a result, the Trial Court has rejected the plea of declaration. In so far as plea of Permanent Injunction, the Trial Court held that there cannot be injunction against the co-owners and treating defendants 1 to 3 alone as co-owners and as fourth defendant who is the purchaser from defendants 1 to 3 is a third party. Therefore the Trial Court has restricted the relief of injunction only as against the fourth defendant.

14. On appeal, the First Appellate Court interpreting and supplementing his own meaning to Ex.B-2 & 3 has held that there was oral partition affected among the sons of Iyyavu Mudaliar. Further sitting in the arm chair of Iyyavu Mudaliar, he has given his own reasoning why Iyyavu Mudaliar has purchased 8 cents of land in the year 1934 vide Ex.B-10, and one cent of land under Ex.B-1.

15. In this case the First Appellate Court has read between the lines of the recitals found in Ex.B.2 and B-3 to conclude the factum of partition which is disputed by the parties more patently. The First Appellate Court has substituted the name of Northern boundary owner as Govindasamy. Though the deed read as Govindaraj. This in the view of this Court appears perverse and misreading of evidence.

16. The learned counsel appearing for the respondent would submit that the fourth defendant is a genuine and bonafide purchaser for value based on the title devolved upon his vendors. Therefore there cannot be any injunction restraining him in respect of the 6 cents of land purchased by him, and the order of the First Appellate Court it is perfectly legal. The Specific case of the plaintiff is that Iyyavu Mudaliar gave the entire 9 cents of land to his son Arumugam, and his sons who are the plaintiffs enjoying the property absolutely for years. There is no evidence to that effect except a few tax receipts and revenue documents which stands in the name of plaintiffs which are not sufficient to prove title. When admittedly Iyyavu Mudaliar had other properties and given to three sons with different measurements, if he had thought fit that one of his son Arumugam should succeed the entire 9 cents of suit land excluding the other 2 sons, he would have made it clear at that time itself, which he never did till his lifetime. Further more, as pointed out in the written statement, the plaintiff has not even given the boundaries of the land, and the Court below has also recorded that the alleged 9 cents of land over which the plaintiff claims right falls in Survey No.169/9 and not in Survey No.169/2. As legal heirs of Iyyavo, the plaintiffs are certainly entitled for share in the suit property. But not in entirety. That is the reason why the

Trial Court has left their issue upon without ascertain the proportion of each sharers.

17. In this regard, the First Appellate Court has gone beyond the relief by ascertaining the shares of respective parties when other legal heir apparents are not party to the proceedings.

18. This Court is of the opinion, that by purchasing the property through valid sale deed Ex.B-5 the fourth defendant becomes a co-sharer. Restriction in law for granting injunction against co-owner applies to him also. Unless a strong case of destruction, waste or obstruction is made out, no injunction shall be granted against co-owners.

19. The plaint as it reads, we find the plaintiffs have not recognised neither defendants 1 to 3, now the fourth defendant as co-sharers. Further, in the plaint it is admitted that the plaintiffs are aware of the sale deed executed in favour of the fourth defendant. Even after that they have not challenged the sale deed. Therefore while confirming the dismissal of the suit by both the Courts, the observation of the First Appellate Court that there was partition between parties and appellants are entitled for 3 cents of land and 4th defendant through defendants 1 to 3 entitled for 3 cents of share is set aside, since it is uncalled in the suit. As both the Courts have concurrently held that there is no evidence of obstruction by the defendants injunction against the defendants does not arise. The error pointed above in Lower Appellate Court judgment for arriving the conclusion alone is set aside. However the decree of dismissal confirmed.

20. While seeking declaration, the plaintiffs have neither proved title or right over the entire property. They have not even furnished the true and correct description of the suit property. The Trial Court missed to apply the law, that by purchase through Ex.B-5 the 4th defendant had entered into the shares of defendants 1 to 3 and has become a co-sharer. Whereas the first Appellate Court has misread the evidence and gone beyond the brief before it.

21. The learned counsel for the appellant referring the recent judgment of the Hon'ble Supreme Court reported in 2016 3 SCC Page No.79 Damodar Lal -vs- Sohand Devi and others submitted that inadequacy of evidence or a different reading of evidence is not perversity, nor will a wrong finding of fact by itself constitute a question of law. In order to constitute a question of law the wrong finding should stem out would of a completely misreading of evidence or it should be based only on conjectures and surmises.

22. By allowing the Cross objection, the Lower Appellate Court has granted relief which is not the subject matter of the

suit. Without framing issue or without a counter claim the First Appellate Court ought not to have allowed the cross objection. The Appellate Court erred in apportioning the property among the contesting parties alone, while admittedly other legal heirs were not parties to the proceedings. From the pleadings and evidence let in by the parties, it is held that the plaintiffs are not the absolute owners of the entire suit properties. Further it is also established through evidence that the defendants are co-owners and no plausible reason found to grant injunction against the co-owners. Therefore the suit is liable to be dismissed in toto. In the result, suit dismissed, plaintiffs are not entitled for the reliefs sought for. The judgment and decree of the Lower Appellate Court allowing Cross Objection is set aside. Second Appeal dismissed. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

KP

To

1.The Subordinate Judge,
Vellore District Gudiyatham.

2.The District Munsif,
Gudiyatham,Vellore District.

+1 cc to Mr.R.Margabandhu Advocate sr 69942

+1 cc to Mr.S.Ramesh kumar Advocate sr 69544

S.A.No.1662 OF 2004

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