

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.10.2017

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM  
and  
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

A.S.Nos.274 and 275 of 2011

Muthuraman (Died)

1. Ramadoss
2. Pavunambal
3. Rajendran
4. Susila
5. Chitra

... Appellants/plaintiffs  
in both the Appeals

Vs.

Venugopal

... Respondent/Defendant  
in both the Appeals

Appeal Suits filed under Section 96 r/w Order 41 Rule 1 and 2 of the Code of Civil Procedure, against the common Judgment and Decree, dated 27.01.2011 made in O.S.No.28 of 2005 and O.S.No.1 of 2007 on the file of the learned Additional District Judge (Fast Tract Judge No.2), Cuddalore.

For appellants : Mr.R.Gururaj in both the Appeals.

For respondent : Mr.A.K.Kumarasamy, Senior counsel  
for Mr.Kaithamalai Kumaran

COMMON JUDGMENT

(Judgment of the Court was delivered by  
P.KALAIYARASAN, J )

Challenging the common Judgment and Decree, dismissing both the suits in O.S.No.28 of 2005 and O.S.No.1 of 2007 (one for partition and another for declaring the plaintiffs to have preferential right to purchase the property of the defendant and for mandatory injunction) by the learned Additional District Judge (Fast Track Court No.2), Cuddalore, dated 27.01.2011.

2. The plaintiffs as appellants filed these two appeals. The case of the appellants / plaintiffs is that Venkatasubbu, father of the fourth plaintiff, plaintiffs 1 to 3 and defendant

are sons and daughter of Chinnavandu Naidu and Subbulakshmi. The suit schedule property is shown in the "B" schedule in O.S.No.28 of 2005. It is a joint family property. During the life time of Chinnavandu Naidu, the properties were divided among the father and sons orally. In the partition that took place 40 years back, the suit "B" schedule property was kept in common. The property was rented out by eldest brother Venkatasubbu in 1968 and then in 1978 by all legal heirs. To execute the rent deed, the defendant also executed a power deed in favour of Venkatasubbu. In the said property one Muniyammal, mother of Sellaperumal trespassed and in occupation of North-west 2 cents and therefore, the same was agreed to be sold to them and a sale deed was executed by the fourth plaintiff, son of the eldest brother Venkatasubbu in favour of Sellaperumal on 02.03.1987. In the said registered sale deed, the first plaintiff, third plaintiff and defendant also signed as witnesses. Since Venkatasubbu passed away before filing of the suit, his son representing the heirs of Venkatasubbu along with other plaintiffs filed the suit. The boundaries mentioned in the sale deed executed in favour of Sellaperumal was subsequently attempted to be corrected by the defendant. Just before the death of Venkatasubbu, he wanted a tentative arrangement to be made. As agreed by brothers, Northern-west 1/4th of the suit property was allotted to Venkatasubbu. Next southern 1/4th share to the first plaintiff, next southern 1/4th share to the second plaintiff and the last 1/4th share on the southern most side was allotted to the defendant. As there was no immediate necessity a final partition was not effected.

3. Even after tentative partition there was cordiality between the sharers. The tentative partition was given a go-bye and it was abandoned. The defendant while in employment as Forest Officer represented that he would enjoy the property which again became common and distribute the proceeds, so that all the sharers could benefit. Hence entire extent was left in his possession on permission and consent. He fenced the area and raised teak wood trees along the boundaries, raised mango trees, guava trees and coconut trees. He has been supplying the fruits every year. On enquiry, the plaintiffs came to know that the defendant has got patta changed to his name and he managed to correct the boundary in the sale deed, dated 02.03.1987 in favour of Sellaperumal. Therefore, the plaintiffs are together entitled to 19/25 shares. The plaintiffs demanded partition from 01.03.2004 and the same was evaded by the defendant.

4. In O.S.No.1 of 2007, there was two schedule of properties. "B" schedule property is the property subjected in the above partition suit. "C" schedule property is the properties allotted to the defendant under oral partition and there is no dispute over title with respect to "C" schedule property. The plaintiffs seek declaration that they have got

preferential right to purchase the defendant's undivided 6/25 shares in the "B" schedule property and the entire "C" schedule property and they also seek mandatory injunction directing the defendant to sell the defendant's share in the "B" schedule property and the entire "C" schedule property to the plaintiff at a rate fixed by the Court. They further say that the defendant is attempting to sell the properties and the plaintiffs are willing to purchase the defendant's share at a market rate.

5. The case of the defendant is that in the oral partition that took place in the year 1954, Chinnavandu Naidu and all four sons were allotted properties. The suit "B" schedule property was allotted to the share of Chinnavandu Naidu. He died in January 1975 at the age of 83. "B" schedule property was not kept in common in the oral partition as alleged by the plaintiffs. During the life time of Chinnavandu Naidu in 1974, he expressed the desire that the suit "B" schedule property should be given to the defendant as he is the youngest son. Except Venkatasubbu, the plaintiffs 1 and 2 agreed. Venkatasubbu asked for a share in "B" schedule property. So Chinnavandu gave possession of northern most 1/4 portion to Venkatasubbu and the remaining 3/4 portion to the defendant. The plaintiffs 1 and 2 had taken lands situated near their respective lands allotted to them under the oral partition in the year 1954. The defendant did not know about the alleged lease agreement in favour of Velmurugan Nadar. Since 1/4 portion on the north in the suit "B" schedule has been allotted to Venkatasubbu, the defendant thought it fit to execute the power of attorney deed on 22.09.1976 in favour of his eldest brother Venkatasubbu for the specific purpose of leasing out the "B" schedule property. The defendant had given up his share in the ancestral house and another family house in Silambimangalam village in favour of the first plaintiff and the eldest brother Venkatasubbu. It is true that the fourth plaintiff, who is the son of Venkatasubbu has sold his two cents to Sellaperumal by a sale deed, dated 02.03.1987. The sale deed mentions correct boundaries. The defendant and plaintiffs 1 and 2 signed as witnesses as it was demanded by the purchaser. The alleged sale agreement is nothing but concocted one. In 1982, baring two cents purchased by Sellaperumal, the remaining extent of 1/4 share given to Venkatasubbu was purchased by the defendant orally from the fourth plaintiff. The defendant has put up barbed wire fence and constructed a farm house and raised fruit orchard, teak, rosewood, sissoo, bamboos, red sanders etc. The entire land is being irrigated by borewell with drip irrigation facility. The defendant is in exclusive possession and enjoyment of the property ousting other brothers. By open, long and uninterrupted and exclusive possession of the suit "B" schedule property since 1974 the defendant has perfected title by adverse

possession also. The present suit has been filed at the instance of one Venkatachalam who is son-in-law of first plaintiff.

6. Regarding O.S.No.1 of 2007, the plaintiffs filed the suit adding two more items, i.e., suit "C" schedule property, over which admittedly there is no dispute. The "C" schedule properties are absolute properties of the defendant and he can enjoy as he likes and the plaintiffs cannot have any claim. When a suit is pending for partition with respect to "B" schedule property, the plaintiffs have unnecessarily filed this suit instead of filing injunction application in the partition suit. Further, "B" schedule property is also the separate property of the defendant and the plaintiffs have no right over the same. Therefore, both the suits are to be dismissed.

7. The learned trial Judge framed necessary issues in both the suits and after analysing the evidence let in on either sides both oral and documentary, dismissed both the suits. Aggrieved by the common Judgment and Decree dismissing both the suits, the present appeals in A.S.No.274 and 275 of 2011 have been filed by the plaintiffs.

8. The learned counsel appearing for the appellants / plaintiffs argued that the "B" schedule property in O.S.No.28 of 2005 was kept in common and other properties alone were divided orally in 1954. In the sale agreement executed in favour of Sellaperumal, boundaries are clearly mentioned, whereas in the sale deed executed in favour of Sellaperumal, the boundaries was subsequently corrected to make others to believe that the defendant is the owner of the adjacent land. The defendant cultivated the land only with the permission of other sharers and the fruits were given to them every year. The defendant clandestinely got the patta in his name and claims title.

9. The learned Senior counsel appearing for the defendant argued that during the life time of Chinnavandu Naidu, "B" schedule property allotted to him was given to the eldest son Venkatasubbu and the defendant. Northern 1/4 portion was given to Venkatasubbu and the remaining 3/4 portion was given to defendant as agreed by other sharers. The defendant did not take share in the houses at Silambimangalam village. In the sale deed executed by the fourth plaintiff in favour of Sellaperumal, boundary has rightly been mentioned. The defendant put up fence and cultivated commercial trees and he has been in exclusive possession and enjoyment of the property and patta got changed long before.

10. The admitted facts are that Venkatasubbu, plaintiffs 1 to 3 and defendant are sons and daughter of Chinnavandu Naidu and Subbulakshmi. In 1954, there was oral partition among father

and sons. In 1975, Chinnavandu Naidu died and later his wife Subbulakshmi also passed away. Subsequently, their eldest son Venkatasubbu also died. His son, fourth plaintiff is representing all the heirs of Venkatasubbu in the suit.

11. The consistent case of the appellants / plaintiff is that "B" schedule property was kept in common and the same was divided tentatively among brothers and the defendant was permitted to be in possession and cultivate. As already pointed out it is admitted case of both sides that there was oral partition among the father and sons even in 1954. According to the appellants / plaintiffs, the suit "B" schedule property was kept in common whereas the same was allotted to father, Chinnavandu Naidu and he gave 1/4th to Venkatasubbu and 3/4th to the defendant, according to the defendant. The plaintiffs have not filed any acceptable proof to show that "B" schedule property was kept in common.

12. The plaintiffs mainly relied upon three documents, namely Ex.A.1 to Ex.A.3. Ex.A.1 is the lease deed executed by Venkatasubbu Naidu in favour of Velmurugan Nadar on 27.01.1968 with respect to "B" schedule property. The defendant executed a power deed in favour of Venkatasubbu Naidu to enter into a lease deed on 22.09.1976 and the same is marked as Ex.A.3. Venkatasubbu Naidu on his behalf and on behalf of the defendant and other brothers executed a lease deed in favour of Ramalinga Naidu on 08.03.1978 which is marked as Ex.A.2. As far as Ex.A.1 is concerned, Venkatasubbu Naidu as eldest son executed the lease deed and his father does not figure in the document.

13. The case of the defendant is that "B" schedule property allotted to his father Chinnavandu Naidu was given to Venkatasubbu Naidu and defendant in 1974. With respect to Ex.A2 and Ex.A3, defendant's case is that as he was away from the native place for avocation, he executed power deed in favour of Venkatasubbu. But the defendant relies on the sale deed executed by the fourth plaintiff in favour of Sellaperumal, the proceedings of Tahsildar, dated 30.06.1992, pattas and chittas in the name of the defendant. The sale deed executed by the fourth plaintiff in favour of Sellaperumal on 02.03.1987 is marked as Ex.B.5. It relates to 2 cents lying on North-west corner of the northern 1/4 portion of the "B" schedule property. According to the defendant, the northern 1/4 portion of "B" schedule was given to Venkatasubbu Naidu, father of the fourth plaintiff. The remaining 3/4 portion is stated to have been given to the defendant.

14. It is an admitted case of both sides that North-west corner two cents of land was encroached by the mother of Sellaperumal and the same was then sold to Sellaperumal. The sale deed has been executed by the fourth plaintiff. In this, the plaintiffs 1 and 2 and the defendant signed as witnesses. Having derived title from Venkatasubbu Naidu, his son Rajendran

executed sale deed in favour of Sellaperumal. Therefore, the case of the defendant that 1/4 portion of "B" schedule property was given to Venkatasubbu Naidu is acceptable in the light of the pleadings of plaintiffs that tentative partition of "B" schedule property allotting northern 1/4 portion to Venkatasubbu was given a go-bye. In the said sale deed, southern and eastern boundary is shown as the land of the defendant. According to the defendant, he orally purchased the northern 1/4 portion excluding two cents from the fourth plaintiff and therefore, the boundaries have been shown as of his lands. According to the defendant, the fourth plaintiff after sale gave no objection for change of patta and accordingly, the patta was got changed in the name of the defendant with respect to northern 1/4 portion of the "B" schedule property excluding two cents. It is pertinent to note that the fourth plaintiff has not been examined to rebut the contention of the defendant.

15. A faint attempt has also been made by the plaintiffs by marking xerox copy of the sale deed in favour of Perumal as Ex.A.6 to contend that boundaries of two cents have been corrected subsequent to the execution of the sale deed. Venkatasubbu Naidu has been struck down and Venugopal Naidu has been written above that striking place. By production of the above said xerox copy, it cannot be said that it was subsequently corrected. The plaintiffs have not attempted to bring the records from the Registrar's Office and they have not even examined the fourth plaintiff. Even assuming that correction was subsequently made, it will not help the case of the plaintiffs. Even before correction North and west boundaries of two cents is shown as Venkatasubbu Naidu's land. Therefore, northern 1/4 portion was allotted by the father to Venkatasubbu Naidu as contended by the defendant is established that too when the tentative partition alleged by the plaintiffs is given a go-bye.

16. That apart, the defendant filed the proceedings of the Tahsildar, Ex.B.5, dated 30.06.1992, ordering to issue patta in the name of the defendant for the "B" schedule property. Patta and A Register copy of the year 2004 were also marked as Ex.B.7 and Ex.B.8. From 1994 onwards, the defendant filed the kist receipt in his name for the land as Ex.B.9 to Ex.B.14. He is also having house in the land and for that he is paying the tax and to establish the same, he has also filed receipts, Ex.B.15 to Ex.B.17 from the year 1998.

17. According to the defendant, all the houses in Silambimangalam village were given to the plaintiffs and considering that also, the "B" schedule property was given to him by his father. The defendant's case has been probablised by

the evidence of P.W.1. P.W.1 in his cross-examination has deposed that in Silambimangalam village, there is a family house and the same was given to him and the defendant was not given any house. Though P.W.1 says that defendant was given some other land instead of house, he has not stated which land was given to him. It is also admitted that another house in the same village was given to another plaintiff.

18. As the oral partition has been in vogue in family, allotment of "B" schedule property by the father to Venkatasubbu Naidu and the defendant is acceptable.

19. This Court has already found that the defendant is entitled to "B" schedule property and it was not kept in common as alleged by the plaintiffs. The plaintiffs cannot claim any preferential right to purchase the same. With respect to "C" schedule in O.S.No.1 of 2007, there is no dispute as to the title to the defendant and therefore, the plaintiffs have no right much less any preferential right to purchase. Therefore, the trial Court has rightly dismissed both the suits and this Court does not find any reason to interfere with the common Judgment and Decree of the trial Court.

20. In the result, both the Appeal Suits are dismissed with costs, confirming the common Judgment and Decree, dated 27.01.2011 made in O.S.No.28 of 2005 and O.S.No.1 of 2007 on the file of the learned Additional District Judge (Fast Tract Judge No.2), Cuddalore.

Sd/-

Assistant Registrar(CS-v)

//True Copy//

Sub Assistant Registrar

tsvn

To

1.The Additional District Judge  
(Fast Tract Judge No.2), Cuddalore.

2. The Section Officer, V.R. Section, High Court, Madras.

+lcc to Mr.A.K.Kumarasamy Advocate, S.R.No. 75586

+lcc to Mr.R.Gururaj Advocate, S.R.No. 75795

Common Judgment in  
A.S.Nos.274 and 275 of 2011

CNR (CO)  
TR(08/01/2018)