

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON: 16.11.2016
PRONOUNCED ON :03.01.2017
THE HONOURABLE MR.JUSTICE T.RAVINDRAN
S.A.No.185 of 2011
&
M.P.No.1 of 2011

Ramar

... Appellant/3rd Defendant

Vs.

- 1.Periyammal (deceased)
- 2.Perumayee
- 3.Irusa Gounder
- 4.Vaiyapuri Gounder

... Respondents/Plaintiffs
& Defendant 1, 2

(R2 to R4 are brought on record
as the legal heirs of the deceased
1st respondent vide order of
Court dated 03.11.2016 made
in memo in S.A.No.185 of 2011)

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 15.12.2008 passed in A.S.No.77 of 2008 on the file of the Principal Subordinate Judge, Salem, reversing the judgment and decree dated 20.02.2007 passed in O.S.No.1574 of 2004 on the file of the II Additional District Munsif Court, Salem.

For Appellant : Mr.P.Jagadeesan
For Respondents : Mr.T.Murugamanickam

J U D G M E N T

Challenge in this Second Appeal is made by the third defendant against the Judgment and decree dated 15.12.2008 passed in A.S.No.77 of 2008 on the file of the Principal Subordinate Judge, Salem, reversing the judgment and decree dated 20.02.2007 passed in O.S.No.1574 of 2004 on the file of the II Additional District Munsif Court, Salem.

2.The second appeal is admitted and the following substantial questions of law are formulated in this second appeal for consideration.

(a)Whether or not the plaintiffs have discharged their burden of proving that the suit property was allotted to first plaintiff for her maintenance?

(b)Whether the lower Appellate Court is right in shifting the burden of proving that the

suit property was not allotted to the first plaintiff for her maintenance on the defendants? Whether that findings are unlawful and perverse in law?

3.Suit for declaration and permanent injunction.

4.The case of the plaintiffs in brief is as follows:

The defendants 1 and 2 are the sons and the second plaintiff is the daughter of the first plaintiff. The first plaintiff's husband and the father of the second plaintiff and the defendants 1 and 2 Kandasami Gounder owned about 3 acres of land in Uthamasolapuram village as his ancestral property which he obtained in partition in his family and after his death, the first plaintiff was put in possession and enjoyment of the suit property and after the death of Kandasami Gounder and after the defendants 1 and 2 became majors, the first plaintiff retained 0.35 cents of land for her maintenance with her and gave the remaining 2 ½ acres of land to the defendants 1 and 2 to be enjoyed by them in equal halves with full right about 30 years back under an oral agreement between them and since then the defendants 1 and 2 are each in possession and enjoyment of their respective share and the first plaintiff is in possession and enjoyment of 0.35 cents retained by her for her maintenance. The said 0.35 cents is the subject matter of the suit. It was agreed subsequently that since the second plaintiff is maintaining the first plaintiff and also not given any seer at the time of her marriage, the suit property should go to the second plaintiff after the death of the first plaintiff. While so, the defendants 1 and 2 have sold 0.21 cents in S.No.105/10G out of the suit property to the third defendant under the Sale Deed dated 23.01.2004 without obtaining the consent and knowledge of the first plaintiff. The defendants 1 and 2 have no right to sell any portion of the property to others. Hence, the Sale Deed dated 23.01.2004 is invalid and not binding upon the first plaintiff. The first plaintiff has subsequently sold the suit ''A'' schedule property, which forms part of the suit property to the second plaintiff under the Sale Deed dated 05.03.2004 and since then the second plaintiff is in possession and enjoyment of the suit ''A'' schedule property. The first plaintiff has retained the suit ''B'' schedule property with her. While so, taking advantage of the Sale Deed executed in favour of the third defendant, the defendants colluded together and attempted to interfere with the possession and enjoyment of the suit property by the plaintiffs, to which, who are not entitled to. Hence, the suit.

5.The case of the defendants in brief is as follows:

The suit is not maintainable either in law or on facts. The relationship between the parties is admitted. It is true that

Kandasami Gounder was owning ancestral property and after his death, the first plaintiff retained 0.35 cents of land for her maintenance and 2 ½ acres of land was given to the defendants 1 and 2 to be enjoyed by them in equal shares under the oral arrangement. The defendants are in possession and enjoyment of 2½ acres of land and the first plaintiff is in possession and enjoyment of 0.35 cents allotted to her for her maintenance. The case of the plaintiffs that the first plaintiff is living with the second plaintiff and being maintained by the second plaintiff is not true and that no seer was presented to the second plaintiff at the time of her marriage is also not true. The first plaintiff has no right in S.No.105/10G measuring 0.21 cents and the 35 cents of land given to the first plaintiff for maintenance has nothing to do with S.No.105/10G. The first plaintiff has no right or possession of 21 cents of land in S.No.105/10G sold to the third defendant by the defendants 1 and 2 as well as there is no need for defendants 1 and 2 to obtain the consent of the first plaintiff before the alienation. The defendants 1 and 2 are the absolute owners of the land conveyed to the third defendant and pursuant to the said sale, it is only the third defendant, who is the owner of the suit property and he has been in possession and enjoyment of the same. It is false to state that subsequently, the first plaintiff sold the suit 'A' schedule property to the second plaintiff under the sale Deed dated 05.03.2004 and there after retaining the suit 'B' schedule property. The Sale Deed dated 05.03.2004 is invalid in law. The first plaintiff has no right to sell the property in S.No.105/10G measuring to an extent of 21 cents. Taking advantage of the old age and illiteracy of the first plaintiff, the second plaintiff has got the Sale deed dated 05.03.2004 and hence the plaintiffs have no cause of action and the suit is liable to be dismissed.

6. In support of the plaintiffs case, PW1 to 4 have been examined. Exs.A1 to 8 were marked. On the side of the defendants, DW1 to 4 have been examined. No document was marked. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to dismiss the suit. The plaintiffs preferred the first appeal. The first Appellate Court, on a reappraisal of the evidence, set aside the judgment and decree of the trial court and decreed the suit as prayed for. The third defendant has preferred this second appeal challenging the same.

7. The defendants 1 and 2 are the sons and the second plaintiff is the daughter of the first plaintiff. Kandasami Gounder is the husband of the first plaintiff and the father of the defendants 1 and 2 and the second plaintiff. Kandasami Gounder owned about 3 acres of land in Uthamasolapuram village as his ancestral property. After his death, the first plaintiff and the defendants 1 and 2 were in joint possession and

enjoyment of the above said three acres of land and after the defendants 1 and 2 became majors, under the oral arrangement, the first plaintiff retained 35 cents of land for her maintenance and distributed 2 ½ acres of land to the defendants 1 and 2 to be enjoyed by them in equal halves and the said oral arrangement took place about 30 years ago and the first plaintiff is in possession and enjoyment of 35 cents of land allotted to her in lieu of her maintenance. With reference to the above facts, the parties are not at issue.

8. Now according to the plaintiffs, the 35 cents of land allotted to the first plaintiff in lieu of her maintenance is the suit property. The same is seriously opposed by the defendants. It is stated that the defendants 1 and 2 have sold 21 cents of land in S.F.No.105/10G out of the suit property to the third defendant under the Sale Deed dated 23.01.2004 and the copy of the same has been marked as Ex.A2.

9. According to the plaintiffs, inasmuch as the suit property as such has been given to the first plaintiff i.e., 35 cents in lieu of her maintenance, the alienation made by the defendants 1 and 2 to the third defendant under Ex.A2 is invalid in the eye of law. On the other hand, according to the defendants, the 35 cents of land allotted to the first plaintiff in lieu of her maintenance has no connection whatsoever to the suit property and it is contended that the defendants 1 and 2 have alienated 21 cents of land in S.No.105/10G allotted to them under the family oral arrangement and as the said lands are not in any manner related to the 35 cents of land given to the first plaintiff in lieu of her maintenance, the first plaintiff is not entitled to challenge the alienation made under Ex.A2 nor the defendants 1 and 2 are required to obtain the consent of the first plaintiff for the said alienation.

10. It is the case of the plaintiffs that subsequent to Ex.A2 and it could also be seen that after exchange of notices between the parties, the first plaintiff had alienated the suit 'A' schedule property to the second plaintiff under the Sale Deed dated 05.03.2004 and the same has been marked as Ex.A3. According to the defendants, the sale made under Ex.A3 is invalid in the eyes of law as the first plaintiff did not have any right or title over the property comprised therein and therefore, it is stated that the plaintiffs would not be entitled to seek any claim, right or title over the suit 'A' schedule property. It is the case of the plaintiffs that the suit 'B' schedule property has been retained by the first plaintiff. This is opposed by the defendants stating that the same is not in possession and enjoyment of the first plaintiff. It is contended that she has no title over the same as the said property is also not related to the 35 cents of land allotted to the first plaintiff in lieu of her maintenance.

11. In the light of the controversies arising between the parties as above mentioned and inasmuch as the plaintiffs have come forward with the suit seeking for the reliefs of declaration and permanent injunction on the basis that they are entitled to and having possession and enjoyment of the suit property both 'A' schedule and 'B' schedule properties as put forth by them as rightly put forth by the learned counsel for the defendants, the onus of proving that the first plaintiff has title to the suit property as claimed by the plaintiffs is upon the plaintiffs. In other words according to the defendants, the plaintiffs have to establish that the suit property was allotted to the first plaintiff in lieu of her maintenance as put forth by them.

12. As adverted to earlier, 35 cents of land are stated to be allotted to the first plaintiff in lieu of her maintenance under the family oral arrangement, which took place about 30 years ago. At the foremost, the plaintiffs have not clearly stated in the plaint as to in which survey number the 3 acres of land owned by Kandasamy Gounder is situated. Very vaguely they have averred that Kandasamy Gounder owned about 3 acres of land in Uthamasolapuram village. Further, it is not made clear either through oral or documentary evidence as to in which survey number and within what boundaries or in which survey numbers and within what boundaries Kandasamy Gounder owned the three acres of land in Uthamasolapuram village.

13. Further as per the case of the plaintiffs, the first plaintiff was allotted 0.35 cents of land in lieu of maintenance and 2 ½ acres of land is distributed to defendants 1 and 2 under the family oral arrangement. Even, with reference to the same, it has not been mentioned as to in which survey number/survey numbers the 35 cents of land are stated to be situated, which is claimed to be allotted to the first plaintiff and equally it has also not been clearly averred in which survey number/survey numbers, the 2 ½ acres of land allotted to the defendants 1 and 2 are located. Furthermore, the boundaries within which the 35 cents of land allotted to the first plaintiff and the 2 ½ acres of land allotted to the defendants 1 and 2 are situated also are not mentioned. There is no clear averment in the plaint. Equally, the plaintiffs have also not tendered acceptable oral and documentary evidence as to in which survey number Kandasamy Gounder owned about 3 acres of land and in which survey number, the 35 cents of land allotted to the first plaintiff is located and in which survey number the 2 1/2 acres of land allotted to the defendants 1 and 2 are located. Merely, on the footing that the defendants 1 & 2 have accepted that 35 cents of land had been allotted to the first plaintiff in lieu of her maintenance and 2 ½ acres of land had been allotted to the defendants 1 and 2 would not by itself be taken

for granted that the defendants have admitted the case of the plaintiffs in its entirety. Even though the above said family arrangement has been not disputed by the defendants, still according to the defence putforth by the defendants, the suit property is not allotted to the first plaintiff in lieu of her maintenance and further according to them, the suit property is no way connected to the 35 cents of land allotted to the first plaintiff in lieu of her maintenance.

14. In the light of the above defence taken by the defendants as rightly argued by the learned counsel for the 3rd defendant, the plaintiffs having come forward with the plaint seeking the relief of declaration, the burden entirely rests upon the plaintiffs to establish that it is only the suit property which had been allotted to the first plaintiff in lieu of her maintenance.

15. As regards the above case of the plaintiffs, as rightly found by the trial court, there is no acceptable and reliable evidence on the part of the plaintiffs. The evidence adduced in the case would only go to show and it could also be seen from the description of the suit property, the suit property is found to be situated in three survey numbers. If that be so then the plaintiffs have to clearly establish that the 35 cents of land allotted to the first plaintiff in lieu of her maintenance are also situated in three different survey numbers. When the case of the plaintiffs is seriously resisted by the defendants, the plaintiffs should have come forward with the adequate proof to substantiate and strengthen their case. On the other hand, other than relying upon certain revenue records, there is nothing placed before the Courts below to hold that it is only the suit property which had been allotted to the first plaintiff in lieu of her maintenance. As rightly found by the trial Court, the plaintiffs have miserably failed to establish that the suit property was given to the first plaintiff in lieu of her maintenance. Equally, the plaintiffs have also not placed on record any acceptable evidence to hold that the suit property does not form part of the 2 ½ acres of land allotted to the defendants 1 and 2 under the family oral arrangement.

16. According to the case of the defendants, the suit property in particular, the property conveyed by the defendants 1 and 2 to the third defendant under Ex.A2, formed part of the 2 ½ acres of land allotted to them under the family oral arrangement. No doubt, the defendants have not clearly established that 2 ½ acres of land inclusive of the suit property had been allotted to them under the family oral arrangement.

17. Be that as it may, inasmuch as the plaintiffs have come

forward with the suit seeking necessary reliefs and when the plaintiffs case has been stoutly controverted by the defendants, as contended, it is only for the plaintiffs to establish their case with reliable and acceptable evidence. Other than marking certain revenue records, no other material is placed to hold that the suit property as such situated in three survey numbers had been allotted to the first plaintiff in lieu of her maintenance.

18.As rightly found by the trial Court, the revenue records produced on the side of the plaintiffs would not be useful to settle the issue. It is even admitted by the plaintiffs in their plaint that after the death of Kandasamy Gounder, it is only the first plaintiff who is the mother, who had been in possession and enjoyment of three acres of land belonging to him ancestrally. It could therefore be visualized that the children of the first plaintiff being minors at that point of time and the first plaintiff being the only eldest member in the family, after the death of Kandasamy Gounder, the revenue records of 3 acres of land would have been mutated in the name of the first plaintiff. Accordingly, it could be seen that even after the family oral arrangement, which took place subsequently, the parties had not endeavoured to effect mutation in respect of the properties distributed amongst themselves orally.

19.In such circumstances, merely because the revenue records produced in the case stand in the name of the first plaintiff, that by itself would not lead to the conclusion that the suit property as such situated in the three survey numbers had been allotted to the first plaintiff in lieu of her maintenance.

20.The first Appellate Court had swayed its decision in favour of the plaintiffs mainly placing reliance upon the revenue records and the evidence of the Deputy Tahsildar, examined as DW4. According to the first Appellate court, the revenue records produced namely, the kist receipts, Ex.A1, the patta Ex.A7 and the Adangal Ex.A8 depict the name of the first plaintiff and as the extent stated to be covered in the survey numbers mentioned therein comes to about 35 cents of land, it proceeded to hold that the suit property had been allotted to the first plaintiff in lieu of her maintenance.

21.However, as rightly argued by the learned counsel for the defendants, the first Appellate Court has failed to take into consideration that the above revenue records also contain the other survey numbers than those mentioned in the description of the suit property.

22.Be that as it may, as seen earlier when the plaintiffs have failed to establish that the suit property as such has been

allotted to the first plaintiff or not allotted to the defendants 1 and 2 under the family oral arrangement, on the mere fact that Ex.A1, 7 & 8 are recorded in the name of the first plaintiff, we cannot safely conclude without any convincing evidence that the suit property had been allotted to the first plaintiff in lieu of her maintenance. The first Appellate Court had also erred in shifting the burden on the defendants to decree the suit in favour of the plaintiffs. The first Appellate Court has erred in holding that inasmuch as the defendants have not established that some other property has been allotted to the first plaintiff in lieu of her maintenance, it went on to hold that it is only the suit property which has been allotted to the first plaintiff. As found earlier, based upon certain entries in the revenue records, the above approach of the first Appellate Court is found to be patently erroneous. When the plaintiffs have filed the suit claiming for certain reliefs and when the plaintiffs case has not been admitted and disputed, it is for the plaintiffs to establish their case beyond reasonable doubt. The plaintiffs have to stand or fall on the strength of their own case. The plaintiffs cannot be allowed to sustain their case merely on the defects or loop holes found in the case of the opposite parties. In such view of the matter the failure of the defendants to establish their case by itself would not lead to the conclusion that the plaintiffs case is true without any evidence or support to sustain the same.

23.The trial Court on an analysis of the evidence adduced by the respective parties in the right perspective has also found that the motive for the institution of the lis by the plaintiffs is ulterior and hidden. As rightly found by the trial court and as could be seen from the suggestion put to the second defendant examined as DW1, it could be seen that inasmuch as the defendants 1 and 2 had not parted with the part of the sale consideration received by them under Ex.A2, Sale Deed to the plaintiffs it could be seen that the case had been instituted by the plaintiffs.

24.It could be further seen that this case has been really laid only at the instigation of the second plaintiff through her mother. According to the plaintiffs, subsequent to Ex.A2, Sale Deed, the first plaintiff had alienated the suit 'A' schedule property to the second plaintiff under Ex.A3. With reference to the said case, the first plaintiff during her evidence has admitted in cross examination that the patta for the ancestral property still stands in her name and not mutated in favour of others and she has also not preferred any application for mutation and she had alienated 28 cents of land to her daughter but she does not know for what consideration the said sale was effected and also does not know the date on which the alienation was made and also does not know as to what steps were taken for

purchasing the stamp papers, where the sale deed was executed and who had attested the Sale deed etc and she had not given any particulars or information for the sale deed. Such being the admission on the part of the first plaintiff, it could be seen that the first plaintiff is not the real litigant in this case and it is only the second plaintiff, who is the true litigant.

25. Accordingly, it could be seen that problems had arisen between the parties only after Ex.A3, Sale Deed. As found by the trial Court therefore when the foremost factor which has to be established in this case being is whether the suit property was allotted to the first plaintiff in lieu of her maintenance and when the plaintiffs have failed to discharge their burden of proof of the same and when the first Appellate court has erred in shifting the burden of proof on the defendants to prove that the suit property was not allotted to the first plaintiff in lieu of her maintenance and further shifting the burden on the defendants that they have failed to establish that some other property other than the suit property had been allotted to the first plaintiff in lieu of her maintenance, it could be seen that as rightly argued by the learned counsel for the third defendant, the first Appellate Court has seriously erred in law in shifting the onus of proof on the defendants and equally erred in law in not appreciating the evidence adduced by the parties in the right perspective and thereby faulted in setting aside the well considered judgment and decree of the trial court and decreed the suit in favour of the plaintiffs. It could therefore be seen that the entire approach of the first Appellate Court in misappreciating the evidence of the parties is nothing but perverse in law. It cannot stand scrutiny in the eyes of law. Therefore as rightly argued, the plaintiffs have miserably failed to establish that the suit property had been allotted to the first plaintiff in lieu of her maintenance and in such view of the matter, it is evident that the plaintiffs are not entitled to obtain the reliefs of declaration and permanent injunction as sought for.

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26. In conclusion, the substantial questions of law formulated in this second appeal are answered in favour of the appellant and against the respondents. Resultantly, the judgment and decree dated 15.12.2008 passed in A.S.No.77 of 2008 on the file of the Principal Subordinate Judge, Salem are set aside and the judgment and decree dated 20.02.2007 passed in O.S.No.1574 of 2004 on the file of the II Additional District Munsif Court, Salem are confirmed. Accordingly, the second

appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1.The Principal Subordinate Judge,
Salem

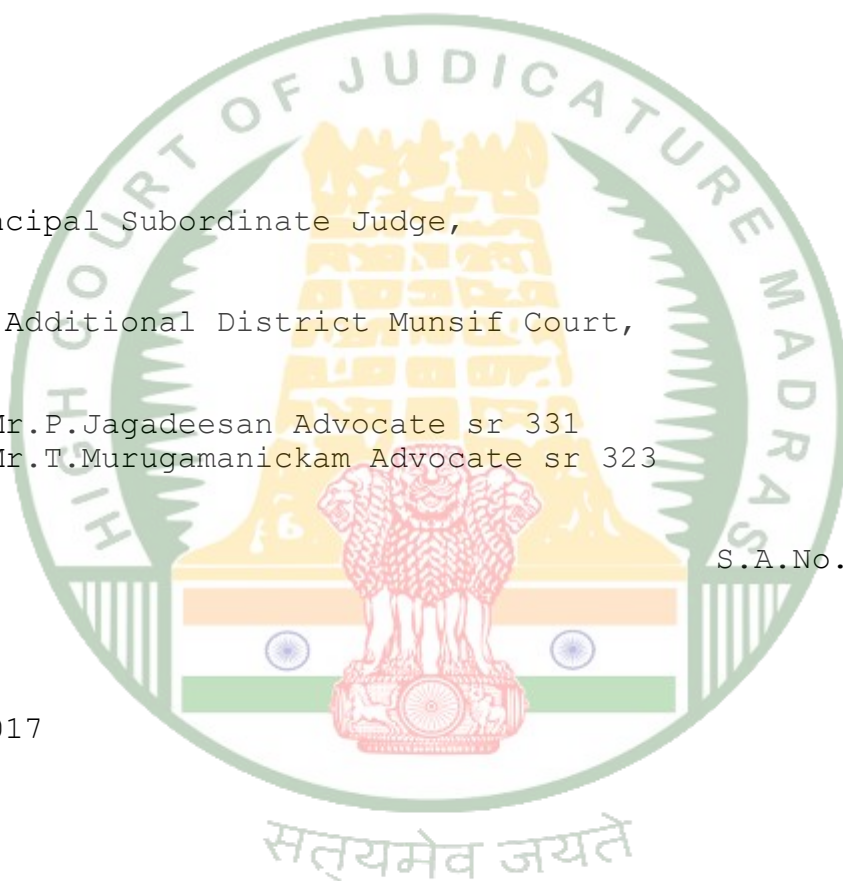
2.The II Additional District Munsif Court,
Salem

+1 cc to Mr.P.Jagadeesan Advocate sr 331

+1 cc to Mr.T.Murugamanickam Advocate sr 323

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