

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 30.10.2018

DELIVERED ON: 01.11.2018

CORAM:

THE HON'BLE MRS.JUSTICE R. HEMALATHA

S.A.No.2122 of 2001 and

S.A.No.2123 of 2002 and

C.M.P.No.518 of 2015

In S.A.No.2122 of 2001

1. Santhamani
2. Suthakaran
3. Vijayalakshmi
4. Minor Vivek

(Minor represented by his next friend, guardian
mother Santhamani Appellants

Vs.

1. Renugadevi (died)
2. Guruchandran (died)
3. Natarajan
4. Merugiri
5. Vellingiri (died)
6. Kailasam
7. Sivagiriammal (died)
8. Subbulakshmi
9. Tharani Sri Sakthi
10. Jai Gudan

(Respondents 9 and 10 are brought on record as legal heirs of
the deceased first respondent vide order dated 27.06.2014 made
in CMP Nos.943 to 954 of 2013 and 568/2013 in S.A.No.2122/2001)

11. Rajeswari
12. K.Manimala
13. Sasikala

(Respondents 11 to 13 are brought on record as legal heirs of
the deceased second respondent vide order dated 27.06.2014 made
in CMP Nos.943 to 954 of 2013 and 568/2013 in S.A.No.2122/2001)

14. Savithiri
15. Devi
16. Amudha

(Respondents 14 to 16 are brought on record as legal heirs of
the deceased 5th respondent vide order dated 27.06.2014 made
in CMP Nos.943 to 954 of 2013 and 568/2013 in S.A.No.2122/2001)

17. M.Manickam
18. S.Sasikala
19. Maheswari

(Respondents 17 to 19 are brought on record as legal heirs of the deceased 7th respondent vide order dated 27.06.2014 made in CMP Nos.943 to 954 of 2013 and 568/2013 in S.A.No.2122/2001)

... Respondents

In S.A.No.2123 of 2001

1. Santhamani
2. Suthakaran
3. Vijayalakshmi
4. Minor Vivek
(Minor represented by his next friend, guardian
mother Santhamani ... Appellants

Vs.

1. Balasubramaniam
2. Renugadevi (died)
3. Sivagiriammal (died)
4. Subbulakshmi
5. Tharani Sri Sakthi
6. Jai Gudan

(Respondents 5 and 6 are brought on record as legal heirs of the deceased 2nd respondent vide order dated 27.06.2014 made in CMP Nos.955 to 960 of 2013 in S.A.No.2123/2001)

- 7.M.Manickam
8. S.Sasikala
9. Maheswari

(Respondents 7 to 9 are brought on record as legal heirs of the deceased third respondent vide order dated 27.06.2014 made in CMP Nos.955 to 960 of 2013 in S.A.No.2123/2001)

... Respondents

PRAYER in S.A.No.2122 of 2001: Second Appeal filed under Section 100 of C.P.C. against the decree and judgment dated 29.06.2001 passed by the I Additional District Judge cum Chief Judicial Magistrate, Coimbatore in A.S.No.5 of 1999 reversing the decree and judgment dated 12.08.1998 passed by the District Munsif, Mettupalayam in O.S.No.282 of 1995.

PRAYER in S.A.No.2123 of 2001: Second Appeal filed under Section 100 of C.P.C. against the decree and judgment

dated 29.06.2001 passed by the I Additional District Judge cum Chief Judicial Magistrate, Coimbatore in A.S.No.8 of 1999 reversing the decree and judgment dated 12.08.1998 passed by the District Munsif, Mettupalayam in O.S.No.288 of 1995.

In both the appeals

For Appellants 1 and 4 : Mr.Ma.P.Thangavel

For appellants 2 and 3 : Mr.S.V.Jayaraman Senior Counsel
for Mr.T.K.S.Gandhi

In S.A.No.2122 of 2001

For Respondents

6,8,14,15 &16 : Mr.K.V.Subramanian, Senior Counsel
for Mr.Kannan

For Respondents 9 and 10 : Mr.P.P.Suhadev

For Respondents 17 to 19 : Mr.K.Balaganesh

Respondents 3 and 4 : Exparte

Respondents 11 to 13 : No appearance

Respondents 1, 2, 5 and 7 : Died

In S.A.No.2123 of 2001

For Respondents 1,5 and 6 : Mr.P.P.Suhadev,

For Respondents 7 to 9 : Mr.K.Bala Ganesh

For 4th respondent : Mr.K.V.Subramanian, Senior Counsel
for Mr.Kannan

Respondents 2 and 3 : Died

COMMON JUDGMENT

These second appeals in 2122 of 2001 and 2123 of 2001 are filed by the respondents 10 to 13 in A.S.No.5 of 1999 and respondents 4 to 7 in A.S.No.8 of 1999 on the file of the I Additional District Judge cum Chief Judicial magistrate, Coimbatore respectively.

2. The first respondent/plaintiff (since deceased) filed the suit in O.S.No.282 of 1995 seeking for a declaration of her title to the suit property and also for a permanent injunction restraining the defendants from interfering with her peaceful

possession and enjoyment of the suit property before the District Munsif, Mettupalayam. Nanjaiya Gouder (since deceased), the first defendant in O.S.No.282 of 1995, filed the suit in O.S.No.288 of 1995 before the District Munsif, Mettupalayam seeking for a declaration of his title to the suit property and also for a permanent injunction restraining the defendant in O.S.No.288 of 1995 from interfering with his peaceful possession and enjoyment of the suit property. The dispute in both the suits is with regard to a land measuring 23 cents in S.No.742/C of Bellepalayam Village, Mettupalayam Taluk, Coimbatore District.

3. The brief averments of the plaint in O.S.No.282 of 1995 and the written statement in O.S.No.288 of 1995 are as follows. Survey No.742 of Bellepalayam Villlage, Mettupalayam Taluk measuring 3.78 acres and other properties originally belonged to one Subaya Gouder. He died intestate during the year 1950. He had three sons by name Nanjaiya Gouder (first defendant in O.S.No.282 of 1995 and plaintiff in O.S.No.288 of 1995), Kandasamy Gouder (2nd defendant in O.S.No.282 of 1995) and Thottanna Gouder. During November 1954, a panchayat was convened, in which all the family properties belonging to the three brothers were partitioned. Nanjaiya Gouder was allotted 2.50 acres on the Western side in S.F.No.742 and 1.28 acres was allotted to Kandasamy Gouder along with other properties. Thottanna Gouder was given his share in the other properties of the family. A panchayat Muchilka (Ex.A2) was also written in this regard. On account of some misunderstanding, Kandasamy Gouder did not sign the said Panchayat Muchilika. However, he was made to accept the decision taken in the panchayat. During the year 1956, 0.62 acres was acquired by the Government out of 3.78 acres in S.No.742 of Bellepalayam Village and the same was sub divided as S.No.742/B. The remaining area measuring 1.94 acres was under the possession and enjoyment of Nanjaiya Gouder, while Kandasamy Gouder was enjoying 1.22 acres. Therefore, S.No.742 was further sub divided as S.No.742/A and S.No.742/C. Since Nanjaiya Gouder and Thottanna Gouder wanted to have another partition through a registered partition deed, they executed a registered partition deed dated 17.04.1957 (Ex.A4). The property under the enjoyment of Kandasamy Gouder was not included in Ex.A4. Kandasamy Gouder was in possession and enjoyment of 1.22 acres. One of his sons by name Balasubramaniam got separated from the family due to some dispute in the family. He, in fact, prevented his father Kandasamy Gouder from selling 1.22 acres to third parties and therefore, an area measuring 23 cents was set apart for the share of Balasubramaniam. Therefore, Kandasamy Gouder and his other three sons continued to be in possession of 99 cents. Balasubramaniam in turn executed a settlement deed dated 27.03.1991 (Ex.A5) in favour of his daughter Renugadevi

(plaintiff) in O.S.No.282 of 1995 and ever since the date of settlement, the plaintiff in O.S.282 of 1995 is in possession of the suit property. However, Nanjaiya Gouder, Vellangiri and Kailasam prevented the plaintiff from entering into the suit property by claiming that they are the owners of the said property. They also attempted to take possession of the suit property. The allegations that after the partition in the year 1957, there were some adjustments in the extent of land allotted to all the three brothers and that Nanjaiya Gouder became entitled to 1.94 acres in S.No.742/A and 23 cents in S.No.742/C and he has been in possession and enjoyment of the said 23 cents in S.No.742/C are totally false.

4. Brief averments of the plaint in O.S.No.288 of 1995 and written statement in O.S.No.282 of 1995 are briefly as follows. Subsequent to the partition between Nanjaiya Gouder and Thottanna Gouder on 16.04.1957 as per the Panchayat decision of November 1954, there were adjustments in the extent of land allotted to the three brothers and Nanjaiya Gouder (plaintiff in O.S.No.288 of 1995) became entitled to 1.94 acres in S.No.742/A and 23 cents in S.No.742/C and the same has also been accepted by Kandasamy Gouder the father of Balasubramaniam in his lawyer's notice dated 30.05.1957 (Ex.B2) and in the sale deed dated 08.08.1960 (Ex.B3). In fact, Nanjaiya Gouder filed a suit for declaration and injunction in O.S.No.209/1982 against Merugiri, S/o Kandasamy Gouder and one Ganesh, wherein, the title of Nanjaiya Gouder to the present suit property in S.No.742/C measuring 23 cents was declared in favour of Nanjaiya Gouder. As Balasubramaniam was not a party to the said suit, a false claim is being made at the instigation of Merugiri. The said Balasubramaniam executed some fictitious document in favour of his daughter and both of them are attempting to interfere with the possession and enjoyment of the suit property and the allegation that Nanjaiya Gouder attempted to trespass into the suit property by force is totally false, as he is in possession and enjoyment of 23 cents.

5. Since the subject matter, issues and the suit property involved in both the suits are one and the same, a joint trial was conducted by the learned District Munsif, Mettupalayam. After full contest, the suit in O.S.No.282 of 1995 was dismissed and the suit in O.S.No.288 of 1995 was decreed vide decree and judgment dated 12.08.1998.

6. Aggrieved over the decree and judgment passed by the trial court in O.S.282 of 1995 and 288 of 1995, the plaintiff in O.S.No.282 of 1995 filed A.S.No.5 of 1999 and A.S.No.8 of 1999 before the I Additional District Judge cum Chief Judicial Magistrate, Coimbatore, in which the decrees and judgments passed by the trial court in O.S.No.282/1995 and 288/1995 were

reversed.

7. Now the present appeals are filed on the following substantial questions of law.

1. Is the learned I Additional District Judge correct in holding that Ex.B3 and Ex.B4 documents are not inter parties, therefore, they are inadmissible in evidence.

2. Is the learned I Additional District Judge correct in holding that a previous judgment not between the same parties in O.S.No.209 of 1992 is inadmissible in evidence when under Section 13 of the Indian Evidence Act a transaction in which a right to property was asserted and recognized is admissible in evidence.

8. The disputed property in both the suits is a land measuring 23 cents out of 1.22 acres in S.F.742/C of Bellepalayam Village, Mettupalayam Taluk. During the pendency of first appeal, Nanjaiya Gouder and Kandasamy Gouder died and their legal heirs were brought on record. As already observed, the appeal in S.A.2122 of 2001 was filed by the respondents 10 13 in A.S.No.5 of 1999 and S.A.No.2123 of 2001 was filed by the respondents 4 to 7 in A.S.No.8 of 199.

9. Survey Number 742 of Bellepalayam Village, Mettupalayam Taluk and other properties originally belonged to one Subbaya Gouder who had three sons by name Nanjaiya Gouder, Kandasamy Gouder and Thottanna Gouder. Nanjaiya Gouder (since deceased) is the plaintiff in O.S.No.288/1995 and the first defendant in O.S.No.282 of 1995 on the file of the District Munsif, Mettupalayam. After the demise of Subbaya Gouder the properties belonged to him devolved on his three sons namely Nanjaiya Gouder, Kandasamy Gouder and Thottanna Gouder. The first defendant (Balasubramaniam) in O.S.288 of 1995 and the defendants 3 to 5 in O.S.No.282 of 1995 are brothers born to Kandhasamy Gouder (3rd defendant). Thottanna Gouder who is the other brother of Nanjaiya Gouder and Kandasamy Gouder is not a party to both the suits. However, the sons of Thottanna Gouder by name Vellingiri and Kailasam are shown as defendants 6 and 7 in O.S.No.282 of 1995.

10. On 27.11.1954, there was an oral partition between the three brothers and Nanjaiya Gouder and Kandasamy Gouder were allotted 2.5 acres and 1.28 acres in S.No.742 respectively. Though the same was reduced to writing (Ex.A2), Kandasamy Gouder did not sign the same. A copy of Ex.A2 is marked as Ex.A3. On 16.04.1957, a partition deed (Ex.A4) was executed by Nanjaiya Gouder and Thottanna Gouder. In the said partition, it is specifically mentioned that Ex.A4 was executed as per the

decision taken in the Panchayat, which was convened on 27.11.1954. The properties allotted to the share of Kandasamy Gouder was left out in Ex.A4.

11. The case of Balasubramaniam, s/o Kandasamy and Renukadevi, d/o Balasubramaniam is that 1.22 acres allotted to the share of Kandasamy Gouder was in his possession and enjoyment and since Balasubramaniam got separated from the family, due to some dispute in his family, a Panchayat was convened at the instance of Balasubramaniam. According to them, as per the decision in Panchayat, 23 cents out of 1.22 acres in S.No.742/C was set apart for the share of Balasubramaniam. Accordingly, Balasubramaniam was in continuous possession and enjoyment of the disputed property and executed a settlement deed dated 27.03.1991 (Ex.A5) in favour of his daughter Renukadevi (since deceased), the 2nd respondent herein.

12. The case of Nanjaiya Gouder is that after the partition deed dated 17.04.1957 (Ex.A4), there were some adjustments between the brothers in respect of the lands allotted to them and Nanjaiya Gouder became entitled to 1.94 acres in S.No.742/A and 23 cents in S.F.742/C and that he continued to be in possession and enjoyment of the suit property as absolute owner thereof. According to him, this was accepted by Kandasami Gouder in his notice Ex.B2 and the sale deed dated 08.08.1968 (Ex.B3).

13. Mr.S.V.Jayaraman, learned Senior Counsel appearing for the appellants drew the attention of this court to the notice Ex.B2, wherein, it is stated by Kandasamy Gouder that the extent of property allotted to him in Survey Number 742/C is 99 cents. He also drew the attention of the court to the sale deed dated 08.08.1968 (Ex.B3) executed by Kandasamy Gouder in favour of some third parties and contended that Kandasamy Gouder had clearly indicated the northern boundary of the property sold through Ex.B3 as the property of Nanjaiya Gouder measuring 23 cents in Survey No.742/c. Ex.B4 dated 28.05.1968 is a certified copy of the sale deed executed by Marammal in favour of one Krishnan, in which the northern boundary is shown as 23 cents in S.No.742/C measuring 23 cents belonging to Nanjaiya Gouder. Marammal is the wife of Kandasamy Gouder. In the notice (Ex.B2) issued by the second defendant Kandasamy Gouder, it is mentioned that as per the partition made in the year 1954, all the three brothers are in possession of their respective shares. He also wanted his brother (Nanjaiya Gouder) to have partition in respect of the properties which were not partitioned. In fact, the list of properties, which are in his possession are clearly given in Ex.B2. The extent of land in S.F.742/C held by Kandasamy Gouder is specifically shown as 99 cents.

14. However, the first appellate court has observed thus.

" Further, if the recitals of the deed as a whole is read, it would reveal that Kandasamy Gouder in his notice has attacked 1957 partition as not binding upon him and has also contended to be in possession of not only the portion in S.No.742/C, but also a portion in survey No.742/A to an extent of 92 cents and other survey numbers which according to Nanjaiya Gouder do belong to him and other brother. Thus, the recitals in this notice will not at all be taken advantage of by Nanjaiya Gouder for the simple reason that it does not lend any support to the plea putforth by Nanjaiya Gouder."

This observation of the first appellate court cannot be sustained, especially in the light of the fact that Kandasamy Gouder has clearly mentioned in the sale deed (Ex.B3) that the northern boundary of 99 cents in S.No.742/C is the land measuring 23 cents belonging to Nanjaiya Gouder in S.No.742/C. In Ex.B4 also one of the boundaries is indicated as 23 cents of Nanjaiya Gouder in S.No.742/C. The lower appellate court relying on the decision in 1990 TLNJ 293 Madras, held that the boundary recitals given in Ex.B3 and Ex.B4 sale deeds are inadmissible in evidence, as the sale deeds are not inter parties.

15. Mr.S.V.Jayaraman, learned Senior Counsel argued that the lower appellate court is wrong in its conclusion that Ex.B3 is not inter parties, because Kandasamy Gouder is the second defendant in O.S.No.282 of 1995, who is the grandfather of the plaintiff in O.S.No.282/1995 and that he conveniently remained absent and was set exparte. He also pointed out that Marammal is the wife of Kandasamy Gouder. It is admitted that Kandasamy Gouder after selling 99 cents in S.No.742/C through Ex.B3, repurchased the same in the name of his wife Marammal and Marammal sold the said property again through the original of Ex.B4 in favour of 14 persons. Therefore, he would contend that the first appellate court ought not to have thrown out Ex.B3 and Ex.B4 merely on the basis that it is not between the parties to the suit. There is force in the contention of the learned Senior Counsel appearing for the appellants.

16. Learned counsel for the respondents contended that since Balasubramaniam son of Kandasamy Gouder married a lady not belonging to his caste, he was sent out of the family and however, in the Panchayat, 23 cents in S.No.742/C was set apart for his share, which was also dealt with him by executing a settlement deed in favour of his daughter Renukadevi.

17. However, it is to be pointed out that the plaintiff Renukadevi did not file any document to prove the possession of her father Balasubramaniam over 23 cents in S.No.742/C,

especially when it is claimed by her that this particular property was allotted to the share of Balasubramaniam, even during the year 1960. In fact, Balasubramaniam, who was examined as PW1 has deposed that his father Kandasamy Gouder attempted to sell the property in S.No.742/C and the same was prevented by him. As already observed, Kandasamy Gouder had sold 99 cents in S.No.742/C to third parties through Ex.B3. No documents like patta, chitta, adangal extract is filed by the plaintiff Renukadevi and her father Balasubramaniam (PW1) to show their possession over the disputed property, since 1960. This has been dealt with by the trial court and the observations of the trial court in this regard cannot be faulted with.

18. Learned counsel appearing for the respondents would contend that Nanjaiya Gouder did not take steps to summon the second defendant to prove the recitals of Ex.B3 and Ex.B4. The plaintiff Renukadevi did not claim any relief as against the second defendant and PW1 is the son of the second defendant. The second defendant remained absent and was set exparte. Therefore, in the facts and circumstances of the case, the second defendant would not favour Nanjaiya Gouder. As already observed, since Kandasamy Gouder is shown as second defendant, the recitals in Ex.B3 and Ex.B4 would clearly bind Balasubramaniam (PW1) and his daughter Renukadevi (plaintiff in O.S.No.282 of 1995), because, only through Kandasamy Gouder they claim right over the suit property.

19. Apart from this, in the partition deed dated 05.09.1975 (Ex.B1), there is no mention about the survey number 742/C. An extent of land measuring 1.22 acres in S.No.742/A was allotted to the share of the 5th defendant in O.S.No.282/1995 through the original of Ex.B1. The 5th defendant sold 49 cents out of 1.22 acres in S.No.742/A in favour of one Ganesh. Therefore, the first defendant, Nanjaiya Gouder filed a suit in O.S.No.209/1982 before the District Munsif, Coimbatore, seeking for a declaration of his title to the property measuring 1.94 acres in Survey Number 742/A and 23 cents in Survey Number 742/C and also for a permanent injunction. The said suit was decreed after full contest in respect of 1.02 acres in S.No.742/A and 23 cents in S.No.742/C. The defendants in that suit are Merugini (5th defendant) and the purchaser Ganesh Merugini is one of the sons of Kandasamy Gouder (2nd defendant). Ex.B7 is a copy of judgment passed in O.S.No.209/1982. In fact, it is observed in the said judgment that the defendants counsel had submitted that the defendants in O.S.No.209 of 1982 have no objection in decreeing the suit in respect of the land measuring 1 Acre 2 cents in S.No.742/A and 23 cents in S.No.742/C. Though the present plaintiff and PW1 are not parties to the said suit, the decree and judgment dated 23.07.1990 passed in O.S.No.209 of 1982 by the learned District Munsif, Coimbatore has some

evidentiary value. As per Ex.A2 and Ex.A4, the first defendant Nanjaiya Gouder was allotted 1.94 acres in S.No.742/A and no area was allotted to the second defendant in S.No.742/A. Subsequently, the second defendant Kandasamy Gouder came to be in possession of a portion of the property in S.No.742/A. Similarly, though no extent of land was allotted in favour of the first defendant Nanjaiya Gouder in S.No.742/2, as per Ex.A2 and Ex.A4, 23 cents in 742/C was found to be in possession of Nanjaiya Gouder. This is why the second defendant in his notice dated 30.05.1957 (Ex.B2) addressed to the first defendant Nanjaiya Gouder has clearly mentioned that he is entitled to 99 cents in S.No.742/C. The total extent in S.No.742/C is 1.22 acres out of which 23 cents were given to Nanjaiya Gouder. This is clear from Ex.B2 notice and the sale deeds Ex.B3 and Ex.B4. This is also one of the reasons for the second defendant to remain absent in the suit in O.S.No.282/1995 filed by his grand daughter Renukadevi.

20. When the factual aspects show that subsequent to the Muchilika (Ex.A2 and Ex.A3) and partition (Ex.A4), there should have been some arrangements in the allotment of shares, the first appellate court was wrong in holding that Nanjaiya Gouder failed to prove his contentions in this regard.

21. Learned counsel appearing for the respondents would contend that any exchange should be made only through a written instrument as per Section 118 of the Transfer of Property Act and therefore, the adjustments in the shares as claimed by Nanjaiya Gouder cannot be held to be valid.

22. The case of the plaintiff Renukadevi is that the second defendant did not accept the Muchilika Ex.A2 and Ex.A3 and that he did not also sign the same. Ex.A4 partition deed is only between Nanjaiya Gouder and Thottanna Gouder the plaintiff and PW1 claiming through the second defendant are estopped from contending that any subsequent adjustments are hit by Section 118 of the Transfer of Property Act. More over, the second defendant is not a party to Ex.B4 deed. He did not also accept the terms found in Muchilika Ex.A2 and Ex.A3, as per the contention of the plaintiff Renukadevi and her father Balasubramaniam (PW1). When the facts and circumstances of the present case shows that there were some adjustments as regards the allotment of shares, the first appellate court's observation that when the brothers were not in talking terms with each other, there could not have been any adjustment in the allotment of shares in the family is only based on assumptions.

23. The evidence of PW1 is also that no document was executed in respect of 23 cents in S.No.742/C to show that the said property was allotted to his share by his father late Kandasamy Gouder. He also admitted that, he did not adduce any documentary evidence to show that he is in possession of 23 cents in S.No.742/C. In such circumstances, the first appellate

court has committed a gross error in decreeing the suit filed by the plaintiff Renukadevi in O.S.No.282 of 1995 by allowing the appeal filed by her. In view of all these reasons stated by me, both the appeals are liable to be allowed.

24. In the result,

(i) The second appeal in S.A.No.2122 of 2001 and the second appeal in S.A.No.2123 of 2001 are allowed. No costs. Consequently, connected miscellaneous petition is closed.

(ii) the decree and judgment dated 29.06.2001 passed by the I Additional District Judge cum Chief Judicial Magistrate, Coimbatore in A.S.No.5 of 1999 and A.S.No.8 of 1999 are set aside.

(iii) The decree and judgment dated 12.08.1998 passed by the District Munsif, Mettupalayam in O.S.No.282 of 1995 and O.S.No.288 of 1995 are upheld.

Sd/-
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

mst

To

1. I Additional District Judge cum
Chief Judicial Magistrate,
Coimbatore.

2. The District Munsif,
Mettupalayam.

3. The Section Officer,
V.R. Section, High Court,
Madras. (2 copies)

+2cc to Mr.T.K.S Gandhi, Advocate, S.R.No. 75195

+2cc to Mr.R.Kannan, Advocate, S.R.No. 79364

+1cc to Mr.P.Thangavel, Advocate, S.R.No. 76262

S.A.No.2122 & 2123 of 2001 and
CMP No.518 of 2015

KJI (CO)
GN(10/12/2018)