

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :21.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.2029 of 1999

and

CMP.Nos.22429/1990 & 1180/2010

Krishnaraj .... Appellant/Plaintiff

Vs.

Nandagopal (deceased) ...Respondent/Defendant

PRAYER:

The Second Appeal has been filed under Section 100 of C.P.C., to set aside the Judgment and Decree made in A.S.No.20/1997 on the file of Additional District Judge, Villupuram, dated 30.11.1998 confirming the Judgment and Decree made in O.S.No.1001/1994 on the file of Additional District Munsif Court, Villupuram dated 31.10.1996.

For Appellant : Mr.P. Ravi Shankar Rao  
for Ms.V.J.Latha

J U D G M E N T

The unsuccessful appellant/plaintiff, who has lost the case before the lower courts filed this second appeal.

2. The averments contained in the plaint, in brief, are as follows:

a) The suit 'A' schedule properties belonged to one Narayanasamy and his minor sons and they sold the I item of suit 'A' schedule property to the plaintiff's father-Adimoola Chettiar for valuable consideration on 12.06.1950 and delivered possession of the same immediately after the purchase. The suit II item of 'A' schedule property lies on the north and adjacent to the I item of 'A' schedule property measuring north-south 3x40 feet in East-West. After the sale of the I item of 'A' schedule, Narayanasamy and his sons had abandoned the II item of suit 'A' schedule since it is a small piece of land and they were settled at far away from the suit village. plaintiff's

father-Adimoolam annexed the same along with the property purchased from them and been in possession and enjoyment of the same. Thereafter, the plaintiff's father gave away some of his properties to his own brother the defendant herein on 04.02.1953. In evidence of it, a registered partition deed was executed between them so as to minimize the stamp duty. As per the partition deed, Adimoolam had kept the northern half (40x13) of the suit I item and the II item of suit 'A' schedule away from the purview of the said partition as his separate and exclusive property and had divided the southern half of 40x13 ft alone between themselves. This southern half was divided into two halves of (20x13) each. In all Adimoolam was entitled to 3/4<sup>th</sup> portion of 40x13 + 20x13 out of the suit I item of 'A' schedule along with the II item.

b) One Kannappa Mudaliar brought the properties of Adimoolam covered under the partition deed dated 04.02.1953 in court auction sale in E.P.No.323/54 in S.C.1016/50 and get them auctioned in his favour on 06.01.1955 and confirmed on 10.02.1955. However, Adimoolam was in possession and enjoyment of his northern half in I item and II item of suit 'A' schedule. Only his western half share of 20x13 in the southern half 40x13 of I item of suit 'A' schedule alone was sold in court auction. Thereafter Kannappa Mudaliar had sold away the first two items of the properties purchased by him in court auction to Adimoolam and III item to the defendant herein. Thereafter Adimoolam was in possession and enjoyment of the northern half of I item and II item of suit 'A' schedule property. The defendant is entitled to the southern half 40x13 of the I item of suit 'A' schedule alone.

c) Adimoolam died intestate on 30.11.1992 leaving behind the plaintiff and one another Subramaniyan are his sons on whom the properties of Adimoolam devolved upon. The plaintiff has become the absolute owner of the suit 'B' schedule properties along with other properties covered under the resale deed dated 17.12.1993 and executed a lease deed on the same day. Hence, the plaintiff has become the sole owner of the suit schedule property and he is in exclusive enjoyment of the same. The plaintiff and his brother entitled to B schedule property by way of adverse possession. While so, the defendant issued a legal notice on 14.09.1994. Plaintiff's brother denied the title of the plaintiff. Thereby, the plaintiff filed a suit for declaration declaring that the plaintiff is entitled to the 'B' schedule property and consequent relief of permanent injunction restraining his men, agent to interfere with the peaceful possession of the 'B' schedule property.

3. The averments contained in the written statement, in brief, are as follows:

The father of the plaintiff and the defendant are brothers. They are jointly doing business and purchased 'A'

schedule property on 12.06.1950 from one Narayanasamy in the name of the plaintiff's father. Afterwards on 04.02.1953, they divided the property by partition deed of 'A' schedule property. Through partition, the plaintiff's father retained 40x13 share and other 50 % share are divided among themselves (20x13 and 20x13) each. One Kannappa Mudaliar brought 'B' schedule property allotted to Adimoolam Chettiar and other properties for court auction and the 'B' schedule property was purchased by this defendant on 08.01.1958 from Kannappa Mudaliar. Hence, the defendant is in possession of the property which was allotted to him in the partition deed and also the property purchased from Kannappa Mudaliar and on the whole, the entire 'A' schedule property is with the defendant. This defendant is in possession and enjoyment of the 'A' schedule property for more than 34 years and hence, he has prescribed title to the suit property. Thereafter, the defendant was running a soda shop in the suit property and he has also constructed a compound wall to the height of 7 feet inherited by the defendant. The plaintiff filed a suit to grab the suit property from this defendant, for which, the plaintiff issued a legal notice on 08.09.1994. Thereafter, the defendant replied to the said notice on 12.09.1994. The plaintiff colluding with his brother had created a partition deed which was not created upon and the same was sham and nominal. Hence, the defendant is in possession of the entire suit property and the plaintiff has no right in it.

4. After elaborate consideration, after perusal of the entire records and framing the issues, the lower court had dismissed the suit. Aggrieved by the same, the plaintiff has further filed an appeal before the lower appellate court. The lower appellate court has also confirmed the dismissal order passed by the lower court. As against the concurrent findings, the present second appeal is filed.

5. At the time of admission, this court has framed the following substantial questions of law:

"(i) Whether the learned Judge is correct in deciding the title in favour of the respondent relying upon the Commissioner's report alone without any other documentary evidence?

(ii) Whether the learned Judge is correct in not framing or deciding the issue in respect of adverse possession pleaded by the plaintiff and the defendant?"

6. Learned counsel appearing for the appellant would submit that when the suit schedule property was purchased by his father from Narayanasamy. In Ex.A1, it is stated that

the said Narayasamy enjoyed 3 feet land in North-South and 40 feet East-West. The said property was not covered under the sale deed. However, the same annexure was enjoyed by the plaintiff's father. Thereafter, the plaintiff's father entered into a partition deed with the defendant, who is none other than the brother of the plaintiff's father and 20x13 feet land were allotted to the defendant and the remaining portion was allotted to the plaintiff. Accordingly, the plaintiff's father possessed 3/4<sup>th</sup> portion in 40x13 + 20x13 feet lands i.e., more than half a portion. Thereafter, the southern half alone was brought to auction by Kannappa Mudaliar and hence, he had sold property to the defendant and it would be only half share of the southern portion i.e., 20x13 feet. Hence, the plaintiff is entitled to the north-south half i.e., 40x13 feet and also 3x40 feet.

7. After framing the substantial question of law, this court ordered notice on 28.12.1999 and notice was not served to the respondents 1,2,5,6,7. However, notice was served only on respondents 3 and 4. But none represented on behalf of these respondents and other respondents were not served.

8. Even though no step has been taken to bring the legal representatives of the deceased on record, considering the pendency of the case for a long period of 19 years, this court has taken up the matter to proceed the case based on the available material and records and decide it on merits.

9. On perusal of the material and records, the undisputed facts are that the father of the plaintiff and defendant are brothers and they have partitioned some of the properties including 'A' schedule property among themselves by a registered partition deed dated 04.02.1953 and thereafter, one portion of the property was brought to court auction by one Kannappa Mudaliar and the said Kannappa Mudaliar purchased the property from court auction on 08.01.1955. Thereafter, the defendant purchased the property from Kannappa Mudaliar and the same is marked as Ex.B1. The partition deed is marked as A2. On perusal of the two documents, it is seen that originally the total extent was purchased from Narayanasamy Mudaliar is 40x26 feet. Through partition, the plaintiff's father retained 40x13 feet and 20x13 remaining 20x13 feet was allotted to the first defendant through the said partition deed. Thereafter, the western side of the property allotted to the plaintiff's father was brought to court auction and the same was purchased by Kannappa Mudaliar. Subsequently, the defendant purchased the property from Kannappa Mudaliar. Accordingly the respondent/defendant possessed 40x13 feet land by way of a

partition deed as well as the sale deed i.e., Exs.A2 and B1. However, the claim of the appellant with regard to 3x40 feet in the adjacent of 'A' schedule property is not available either in the partition deed or in the sale deed which was purchased from Narayanasamy Mudaliar. In the absence of any document, lower court as well as the lower appellate court are not in a position to arrive at a conclusion that 3x40 feet land belongs to the plaintiff. Apart from that, the Commissioner was appointed by the lower court to measure the property. The Commissioner also did not identify the property. On perusal of Exs.A2 and B1, it is seen that the defendant is in absolute enjoyment of the property and the same was acquired through partition as well as the sale deed.

10. In view of the above, I do not find any error or infirmity in the order passed by the lower court as well as the lower appellate court. Accordingly, the substantial questions of laws are answered against the appellant.

In the result, the second appeal is dismissed and the Judgment and Decree made in A.S.No.20/1997 on the file of Additional District Judge, Villupuram, dated 30.11.1998 confirming the Judgment and Decree made in O.S.No.1001/1994 on the file of Additional District Munsif Court, Villupuram dated 31.10.1996, is confirmed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

gv  
To

1. The Additional District Judge,  
Villupuram.
2. The Additional District Munsif Court,  
Villupuram.
3. The Section Officer, V.R. Section,  
High Court, Madras. (2 copies)

+1cc to Mr.V.J.LATHA, Advocate, S.R.No. 13090

S.A.No.2029 of 1999 and  
CMP.Nos.22429/1990 & 1180/2010

AK (CO)  
TR(04/04/2018)