

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.01.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1613 of 2000

1.Pachaiammal

2.Kanniammal

3.Saroja

4.Nagammal

5.Rani

6.P.Pachaiappan

7.P.Narayanan

... Appellants/Appellants/
plaintiffs 2 to 8

Vs.

1.Pachaiappa Mudaliar

2.Venkatesan

3.Nagappan

4.Gopal

... Respondents/Respondents/
Defendants

PRAYER: Second Appeal filed under Section 100 Civil Procedure Code praying to prefer the Second Appeal against the Judgment and Decree of the learned Principal Subordinate Judge of Chengalpattu dated 28.07.1999 in A.S.No.68 of 1999 confirming the Judgment and Decree of the learned District Munsif of Chengalpattu dated 16.06.1997 in O.S.No.352 of 1999.

For Appellants : Mr.V.Nicholas

For Respondents : Mr.Suryanarayana Reddy

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J U D G E M E N T

The unsuccessful plaintiffs, who lost their case before the Courts below have filed this Second Appeal with regard to 0.66 cents. The Lower Court has granted a decree in respect of 24 cents and rejected the claim of 8 cents. Aggrieved by the same, the present Second Appeal is filed.

2.The case of the appellants/plaintiffs is as follows:

i) The suit properties are the absolute properties of the first plaintiff's father Narayanasamy Mudaliar and his brother's Chengu Mudaliar and Govindaraja Mudaliar. They divided the ancestral properties long ago into three shares and were enjoying their respective shares separately. The first plaintiff had purchased the share of Govindaraja Mudaliar under a registered Sale Deed dated 02.02.1938. The said Govindaraja Mudaliar died issue less. The first plaintiff was in possession and enjoyment of the suit properties absolutely without any hindrance, for the past three decades. Patta has also been issued in his name i.e., old patta No. 270 and new patta No.188.

ii) Subsequently on 02.02.1938, Govindaraja Mudaliar, who is the third son of Periyaswamy Mudaliar, sold the property to the first plaintiff by a registered Sale Deed. Hence, the first plaintiff has become the owner of the property to the total extent of 26.66 cents. Thereafter, the suit item No.2 was purchased by the first plaintiff's mother viz., Kaniammal under a registered Sale Deed dated 12.07.1929, from the father of the first plaintiff and the first plaintiff's mother was in possession of the property till her death. Thereafter, the first plaintiff who is the only legal heir has become the owner of the property and he is enjoying the property. There are two tamarind trees, which stand in Survey No.235/1E belonging to the first plaintiff and they were fenced by him.

(iii) While so, the defendants have committed mischief on 14.04.1989 by plucking fruits from the tamarind trees causing loss to an extent of Rs.1,200/-. Apart from the above, the defendants are trying to cast a cloud on the title of the plaintiffs to the suit properties. Hence, the plaintiffs are forced to file the present suit for declaring their title to the suit properties and permanent injunction restraining the defendants, their men and agents from in any manner interfering with their possession and enjoyment of the suit properties, for damages of Rs.1,200/- and for costs.

3.The defendants filed written statement as follows:

i) The defendants had denied the allegations contained in the plaint. The defendants have admitted that the defendants' father and the first plaintiff's father and Govindaraja Mudaliar are the sons of Periyaswamy Mudaliar and they acquired 13.33 cents each from their Grandfather. Govindaraja Mudaliar sold his property to the first plaintiff's father. Therefore, the first plaintiff has got 26 cents in his share, out of which, Elumalai, who is none other than the brother and the son of Narayanaswamy Mudaliar, under Ex.B2 dated

22.08.1972, sold 2 cents to the father of the defendants. Hence, the first plaintiff has title only to an extent of 24 cents.

ii) However, after the partition in between the brothers, Survey No.235/1 consisting of 40 cents was divided into several sub-division i.e., A, B, C, D etc., and the defendants admitted that the plaintiff owned 24 cents. However, his claim for 32 cent in the plaint is unfounded and has no basis. Thereafter, for the sake of convenience, enjoyment in between the plaintiffs and defendants, there was oral exchange of certain plots in Survey No.235/1. As per the agreement, the present enjoyment is to be taken into consideration, because, the mode of enjoyment is only as per the oral exchange.

iii) This has happened some decades back, and therefore, the defendants claim 8 cents in Survey Nos.235/1C2, 235/1D2, 235/1E2 and some extent in the suit property. Therefore, the description of the suit property in the plaint has sub-divisions; 235/1, 235/1C 235/1E and the extent therein are incorrect and has no basis. However, there were four tamarind trees in survey No.235/1 sub-division and after each have taken two trees. The alleged two tamarind trees are in possession and in enjoyment of the defendants and two other tamarind trees are in the enjoyment of the plaintiffs. The defendants are entitled to remove the tamarind trees, which stand in their property and in which, the plaintiffs have no right.

4.At the time of admission, this Court has framed the following substantial questions of law:

"i) When undisputed facts need not be proved, and the defendants admit the existence of the tamarind trees, whether the Courts below are correct in placing the burden on the plaintiffs to prove the existence of the said trees.

ii) When the burden is on the defendants to prove that their father purchased an extent of 2 cents of land including the tamarind trees from the father of the first plaintiff, and they failed to discharge their burden, whether the Courts below are correct in granting the relief to the plaintiffs."

5.The learned counsel for the appellants fairly submits that even as per the calculations each brothers had acquired 13 1/3 cents. The share of Govindaraja Mudaliar was purchased by the first plaintiff's father. Accordingly, the first plaintiff's father is entitled to possess

24.66 cents. However, the Lower Court awarded only 24 cents even then, the appellants/plaintiffs are entitled to the relief. The Lower Court has only awarded 24 cents and not considered the 0.66 cents in favour of the plaintiffs.

6.The learned counsel for the respondents/defendants would submit that the Lower Court as well as the Lower Appellate Court, after elaborate discussion and on a perusal of the entire records which are marked as Exhibits, arrived at a conclusion that the appellants/plaintiffs are entitled for 24 cents. The remaining 8 cents goes in favour of the respondents/defendants. However, the substantial question of law framed by this Court is whether the tamarind trees stand in the name of the appellants/plaintiffs or the respondents/defendants.

7.The learned counsel for the respondents/defendants would submit that with respect of the tamarind trees owned by the respondents/defendants, they have not produced any documents. However, tamarind trees were removed earlier in the year 1989 itself. Without placing any document either by the defendants or by the plaintiffs, the issue is not a substantial question of law but it is only a question of facts.

8.According to the plaintiffs, Survey No.235/1 was the ancestral property of the plaintiffs and the defendants. The father of the first plaintiff Narayanasamy Mudaliar and his two brothers Chengu Mudaliar, the father of the defendants and Govindaraja Mudaliar divided the property equally about three decades ago taking 13.1/3 cents each. Subsequently, on 02.02.1938 Govindaraja Mudaliar sold his entire share of 13.13 cents to the first plaintiff. On the demise of Narayanasamy Mudaliar, the first plaintiff, his only son, inherited his share. Therefore, the plaintiff is entitled to 26.26 cents whereas Chengu Mudaliar was entitled to only 13.1/3 cents. Chengu Mudaliar, the younger brother of Narayanasamy Mudaliar had two sons viz., Thangavelu and Elumalai. The defendants are the sons of Elumalai.

9.The defendants have admitted that Narayanasamy Mudaliar was entitled to 1/3rd share in Survey No.235/1 and had purchased 1/3rd Share of Govindaraja Mudaliar under the Sale Deed dated 02.02.1988. Therefore, he is entitled to 2/3rd of the entire extent having 40 cents which comes to 26.66 cents. Thangavelu, the elder brother of Elumalai had one son Somu who inherited the 1/2 share of his father in the 1/3rd share of Chengu Mudaliar. Therefore, Somu was entitled to 6.66 cents and the Defendants were entitled to 6.66 cents. Subsequently, the defendants purchased the share of Somu by way of a registered Sale Deed dated 07.04.1989. Therefore, the defendants have become entitled to 13.33 cents in the suit properties. This is the

actual position emerging from the plaint and the written statements.

10.The 7th Plaintiff was examined as P.W.1. Through him the plaintiffs have filed Ex.A.1 Sale Deed dated 02.02.1988 by which the first plaintiff purchased 13 cents in Survey No.235/1. Thereafter, under Ex.A.2, Sale Deed Kanniammal purchased 10 cents of land in Survey No.235/1 from one Narayanasamy Mudaliar. Ex.A3 to Ex.A7 are the kist receipts for the payment of land revenue by the first plaintiff.

11.However, on a perusal of the kist receipts neither the Survey number nor the extent has been noted. However, the revenue documents are not evidence of title document and it only to establish that the first plaintiff paid the land revenue. However, in the year 1989 the defendants have cut and removed the trees and the value of the trees was Rs.1,200/-. The case of the plaintiffs is that the defendants have plucked the fruits of the trees.

12.The evidence of P.W.1 supported by Ex.A1 and Ex.A2 show that the plaintiff is entitled to 36 cents of land in Survey No.235/1. In

order to prove the case the second defendant was examined as D.W.1. He admitted that the father of the first defendant was entitled to 13 cents in Survey No.235/1. Ex.B1 is the Patta No.133 issued in the name of Thangavelu Mudaliar and others. Ex.B2 is the patta issued in the name of Elumalai Mudaliar. These two documents show that Survey No.235/1 had an extent of 40 cents. Ex.B3 is the notice under Sections 9 (2) of the Survey and Boundaries Act in favour of Thangavelu and Elumalai, in which, it has been shown that they were in Survey No.235/B2 total in 6.5 cents which is equal to 16.055 cents.

13.Ex.B8 to Ex.B14 are the kist receipts for the payment of land revenue by the defendants. Ex.B.15 to B.21 are the receipts for the payment of house tax by the defendants. Ex.B.22 to B.28 are the receipts for the payment of land revenue by the defendants.

14.The evidence of P.W.1 and documents produced by him show that he was entitled to 36.66 cents in the suit property. However, on a perusal of the evidence of D.W.1 and documents produced by him shows that they are entitled to 15.33 cents and on perusal of Ex.B3 and Ex.B7 show that the defendants were in possession and enjoyment of 16.055 cents. However, the plaintiff has instituted the suit for 32 cents. The case of the plaintiff is that the mother of the first plaintiff purchased 10 cents of land as per Ex.A2 and there was an averment in the

plaint making this claim.

15.P.W.2 has also spoken about it but the District Munsif, Chenglapattu has not considered this claim. It is true that Ex.A2 has been filed in the trial Court as a document and proved through P.W.1. But it has not been proved that the plaintiff is actually in possession and enjoyment of 10 cents purchased by Kanniammal as early as in the year 1938. If actually, the plaintiffs were in possession and enjoyment of the share of Narayanasamy Mudaliar, the land purchased by the first plaintiff and the land purchased by Kanniammal an extent of 36.66 cents, they could have claimed it.

16.Further the sale of 2 cents of the first plaintiff has been conspicuously suppressed in the plaint as well as in the evidence and an analyses of the evidence of P.W.1 shows that he is not conversant with the earlier transaction of these lands at all. After the purchase of 10 cents by Kanniammal many transactions have taken place. No account has been given about the lands purchased by her from the date of purchase till date and no possession has been proved.

17.Though the plaintiffs are entitled to 36.66 cents, they have now come forward with a claim for 32 cents. Further no proof has been let in to show that Narayanasamy Mudaliar who sold 10 cents of land to Kanniammal actually gave possession of 10 cents of land in the suit property.

18.The defendants are not claiming any right over Survey No.235/1E1 whereas they claim exclusive title over Survey No.235/1E2. In fact the plaintiffs have not proved that they are in possession and enjoyment of any part of Survey No.235/1C2, 235/1D2 and 235/1E2 whereas the defendants have established their claim through oral and documentary evidence.

19.P.W.1 who has given evidence stated that there were 4 Tamarind trees in the suit property and that they were cut and removed by the defendants in 1989. It shows that there are no Tamarind trees now. It is contrary to the plaint averment but the defendants have plucked only the fruits of the trees. Further P.W.1 has not stated in which of the sub divisions these tamarind trees are, whereas the defendants are claiming that two tamarind trees are in their exclusive possession in the lands claimed by them and this has not been disproved. Though it is the burden of the plaintiff to disprove the claim of the defendants, at the same time, it is the duty of the plaintiff to prove his own claim.

20.On a perusal of the Judgment of the Lower Court and the Lower Appellate Court, I do not find any error warranting interference. Accordingly, the substantial questions of law

are answered against the appellants.

21.In the result, the Second Appeal is dismissed and the Judgment and Decree of the learned Principal Subordinate Judge of Chengalpattu dated 28.07.1999 in A.S.No.68 of 1999 confirming the Judgment and Decree of the learned District Munsif of Chengalpattu dated 16.06.1997 in O.S.No.352 of 1999 is confirmed. No costs.

Sd/-
Assistant Registrar (CS-ix)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal Subordinate Judge,
Chengalpattu.

2.The District Munsif,
Chengalpattu

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

+1cc to Mr.V.SURYANARAYANREDDY, Advocate, S.R.No.3027
+1cc to Mr.V.NICHOLAS, Advocate, S.R.No. 2965

S.A.No.1613 of 2000

GJ(CO)
TR(26/02/2018)

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