

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :19.03.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.2051 of 2000

and

CMP.No.20057/2000

1. Devakanni
 2. Muthulakshmi (deceased)
 3. Kamatchi
 4. Meenakshi
 5. M. Desingu
 6. Dhanam
 7. Machagandhi
 8. Roja
 9. Thennarasu
- ... Appellants/Defendants

(Appellants 5 to 9 brought on record as L.Rs of the deceased 2nd appellant vide order of court dt 06.02.2018 made in CMP.Nos.2247 & 2248/2013 in S.A.No.2051/2000)

1. C.Vijayakothandapani
 - 2.Dhanalakshmi
- ...1st Respondent/Plaintiff
- ...2nd Respondents

PRAYER: The Second Appeal has been filed under Section 100 of C.P.C., to set aside the Judgment and Decree dated 04.11.1999 passed in A.S.No.54/1996 on the file of the Subordinate Judge, Panruti confirming the Judgment and Decree dated 30.11.1994 passed in O.S.No.612/1991 on the file of the District Munsif's Court, Panruti.

For Appellants : Ms.R. Meenal

For Respondents : Mr.R. Venkatesulu (for R1)
No appearance (for R2)

J U D G M E N T

The plaintiff has filed a suit in O.S.No.612/1991 for declaration declaring the title of the plaintiff over suit Item Nos.1 to 3 and permanent injunction restraining the defendant

from interfering with the peaceful possession and enjoyment of suit item Nos.1 and 2 and for recovery of possession of suit item No.3 from the defendant. The unsuccessful defendants, who lost their case before the courts below have filed the present second appeal.

2. The appellants 1 to 4 herein are defendants and the 1st respondent is the Plaintiff and the 2nd Respondent is impleaded in A.S. Appellants 5 to 9 being legal representatives of the second appellant are impleaded in this second appeal. For the sake of convenience, the parties are hereinafter referred to as per the rankings in the suit.

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

a) The plaintiff's grandfather Thiruvengada Padayachi had three sons i.e., the plaintiff's father, first defendant (Murugesan) and one Kasinathan. The first defendant is the eldest member of the family. The plaintiff's father and Kasinathan are the third son of Thiruvengada Padayachi.

b) Out of 10 acres and 15 cents, the said Thiruvengada Padayachi had purchased 0.33 cents in S.R.No.20/1 on 20.08.1928. The defendant and plaintiff's father, Chinnathambi had equally divided (16 ½ cents each) item No.1 of the suit property in the year, 1946. Thereafter, out of 79 cents the defendant purchased 8 cents on 19.12.1964 under SR.No.19/6 from one Arumuga Padayachi. The plaintiff purchased 0.20 cents from the defendant on 11.06.1990 for consideration of Rs.5,000/- by means of a registered sale deed and that 16 ½ cents mentioned as Item 'A' schedule property and 20 cents mentioned as 'B' schedule property in item No.1. After the purchase of the entire 36 cents, the petitioner mutated the revenue records and on the basis of the same, the revenue authorities also granted patta in favour of the plaintiff.

c) The plaintiff's grandfather Thiruvengada Padayachi purchased 0.09 cents out of 0.73 cents in old SR.No.11/4 of Vallam Village by a registered sale deed dated 01.07.1938. The said 9 cents are situated immediately east of 17 ½ cents, house site owned by Thiruvengada Padayachi. The total 17 ½ + 9 cents = 26½ cents is the house property and the same was divided between the brothers, plaintiff's father, defendant and Kasinathan. The eastern half was allotted to Kasinathan Padayachi and western half was allotted to Chinnathambi, father of the plaintiff. The defendant was given 4 ½ cents out of 7½ cents in S.R.No.11/3. The said 0.4 ½ cents was situated extreme northern portion of the 0.17½ cents and the southern remaining 0.13 cents was equally divided by the plaintiff's father,

Chinnathambi and defendant i.e., each got $0.6\frac{1}{2}$ cents. The eastern $0.6\frac{1}{2}$ cents was allotted to Chinna thambi and western side $0.6\frac{1}{2}$ cents was allotted to the defendant.

d) The plaintiff got one cent in S.R.No.11/4 from Kasinathan by exchange deed dated 16.05.1990. The said one cent land lies immediate east of the plaintiff's 0.4 cents. Prior to the exchange deed, the defendant was allotted one cent out of his $0.4\frac{1}{2}$ cents in Old SR.No.11/3 to the plaintiff in the year, 1973 in lieu of the plaintiff's right in 0.02 cents in SR.No.11/2. The said 0.02 cents in S.No.11/2 was sold to Deivanayaka Padayachi and to one Elumalai by this defendant.

e) The said 0.01 cent lies immediate west of this plaintiff's $0.4\frac{1}{2}$ cents in S.R.No.11/4. In all, the plaintiff is entitled to $5\frac{1}{2}$ cents in Old S.No.11/4 and 0.01 cent in S.R.No.11/3, totalling to $0.6\frac{1}{2}$ cents. The total measurement is east west 62 feet and north south $46\frac{1}{2}$ feet. The suit property is described as Item No.2 of the plaint.

f) Especially third item of suit property lies in Old S.R.No.15/3 of Vallam Village, Panruti Taluk. The plaintiff's grand father Thiruvengada Padayatchi had 0.60 cents in old S.R.No.15/3. After his death, his three sons partitioned the said 0.60 cents. The southern 30 cents were divided into three equal shares of 10 cents. It was divided on north south strips. Thereafter the western strip was allotted to the plaintiff's father who in turn sold the same in favour of the defendant on 24.12.1958. However by securing sale deeds from plaintiff's grandfather brother's son viz., Natesan and Chandran who were cousins of the plaintiff's father, the defendant claiming 0.10 cents is totally unsustainable. Without any title or right, the defendant alleging the purchase of the property from the cousins of the plaintiff's father is unsustainable one. By virtue of the manipulated sale deeds, the defendant claiming 0.10 cents is unsustainable. Accordingly, the plaintiff is entitled for recovery of possession. Therefore, the plaintiff filed a suit for declaration for declaring three items of property in favour of the plaintiff and sought for injunction in respect of item Nos.1 and 2 of the property and claiming recovery of possession in respect of item No. 3 of the property.

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

a) The defendant denied the entire averments made in the plaint. However, he admitted the relationship of the father of the plaintiff viz., Chinnathambi and defendant Thiruvengada Padayachi and another brother Kasinathan had orally divided the family property after seven years of the death of their father

Thiruvengada Padayachi. Item 1, 0.16½ cents in S.R.No.20/1 is in the possession and enjoyment of the defendant in which the plaintiff has not right, title or interest in the properties. The defendant specifically denied that the plaintiff is in possession and enjoyment of 36 ½ cents totally in suit item No.1 by paying kist. However it is true that the defendant sold 0.20 cents in favour of the plaintiff on 11.06.1990 for Rs.5,000/- by a registered sale deed.

b) With regard to the item No.2 of the house site property, the defendant had three house sites i.e., 0.17 half cents, 0.09 cents and 0.04 cents. The above three house sites were divided among three brothers. But Kasinathan had sold his share to one Venu, Pazhanivelu and the plaintiff. The enjoyment of the properties of the plaintiff and the defendant can be well founded only by a visit and report of an Advocate Commissioner along with Taluk Surveyor.

c) The admitted fact is that in third item in S.R.No.15/3, total extent is 0.60 cents of which 0.30 cents exclusively belonged to Thiruvengada Padayachi which were divided equally among the abovesaid three brothers. Another 0.30 cents belonged jointly to the Thiruvengada Padayachi, Natesa Padayachi and Deivanayaga Padayachi. In the share of Thiruvengada Padayachi, out of 0.10 cents, Kasinathan and the defendant got 0.05 cents each in the partition. The defendant purchased the share of Kasinathan 0.05 cents under a registered sale deed. The defendant also purchased another 0.10 cents from Natesa Padayachi and his brother Chandran under two registered sale deeds. In the abovesaid 0.30 cents which belonged to Thiruvengada Padayachi, this defendant purchased the shares of his brothers Chinnathambi and Kasinathan (each 0.10 cents under two registered sale deeds) Accordingly, 0.50 cents belonged to this defendant which has been sold out to the abovesaid Kasinathan 0.30 cents for Rs.12,000/- and to one Kasilingam 0.20 cents for Rs.4,000/- about three years back. After receipt of the sale consideration, the defendant handed over the possession of the properties to them. They are also necessary parties to the suit. The suit is bad for non-joinder of necessary parties.

5. In trial, the plaintiff examined himself as PW1 and marked Exs.A1 to A35 and the defendant examined himself as DW1 and one Kasilingam, who is the subsequent purchaser was examined as DW2 and marked Exs.B1 to B43. After trial and framing of issues, the lower court decreed the suit as prayed for. Aggrieved by the same, the defendant has filed the appeal

before the lower appellate court. The lower appellate court had confirmed the decree. Aggrieved by the said order, the present second appeal is filed.

6. This court, while entertaining the appeal, has framed the following substantial questions of law:

1. Whether in law the courts below are right in decreeing the suit even after finding that the plaintiff had not identified the suit properties?
2. Whether in law the courts below are right in failing to see that the appellants had prescribed title by adverse possession?
3. Whether in law the lower appellate court was right in dismissing I.A.No.59/1997 for appointment of a Commissioner when it was the duty of the plaintiff to identify the property and he had failed to do so?"

7. Learned counsel for the appellants would submit that admittedly there are three items shown in the plaint and the first item of the property stands in the name of the defendant's father and the plaintiff's grandfather. The total extent of property is 33 cents and the same was purchased by the defendant's father in the year, 1928. After the death of the defendant's father, Thiruvengada Padayachi, there was an oral partition between the brothers. Accordingly, the 16½ cents was allotted in favour of the defendant. However, the plaintiff is claiming 20 cents in Item No.1 and it is unsustainable. He was not allotted any of the properties in the suit property. Without establishing the oral partition and the allotment in favour of the plaintiff's father, claiming property in Item No.1, is unsustainable. Though the total extent of property is more than one acre, claiming 36½ cents is unsustainable one. With regard to Item No.2 - house site properties, the plaintiff did not establish that there was an exchange in between the brothers of the defendant. However, the three house sites were equally divided between the brothers. One of the brothers-Kasinathan sold some of the properties to the third parties and in favour of the plaintiff. Further the property allotted in favour of the defendant is in possession of the defendant and the same was allotted in favour of the second wife and his daughters, for which, the defendants are not entitled to any property in Item No.2. Accordingly, the plaintiff is not entitled to injunction as claimed in the suit.

8. With regard to the Item No.3 of the property situated in SR.15/3, the total extent is 60 cents. Out of 60 cents, the defendant's father Thiruvengada Padayachi possessed only 30 cents which were divided equally among the abovesaid three brothers. After the said division, the defendant purchased 10 cents from the plaintiff's father. Apart from the above, he purchased another 10 cents from the legalheirs of the Thiruvengada Padayachi. Accordingly, he is entitled to 50 cents in the S.R.15/3. After the purchase, the entire third item of property was sold in favour of Kasinathan and kasilingam without impleading the necessary parties. The plaintiff filed a suit which is bad for non-joinder of parties.

9. Without considering the above aspects, the lower court and the lower appellate court holding concurrently in favour of the appellants is unsustainable and the defendant did not establish adverse possession in respect of Item No.2 of the property and the lower court, rejecting the prayer of the defendant in seeking appointment of an Advocate Commissioner, is also unsustainable. If the Advocate Commissioner is appointed, the properties will be identified. The lower appellate court, confirming the decree passed by the lower court without appointing the Advocate Commissioner, is unsustainable. Accordingly, he prayed for allowing the second appeal.

10. Learned counsel for the respondent/plaintiff would submit that admittedly Thiruvengada Padayachi had three sons and all the three items of property fell in SR.No.20/1 and the same was given SR. No.23/7 in respect of SR.Nos.11/4 and 11/3 and SR.No.15/3 was assigned a new SR.No.18/1.

11. In respect of the first item of suit properties, Thiruvengada Padayachi owned 33 cents and the same was purchased in the year 1928. Subsequently, the said properties were mortgaged through Ex.A8. Total extent of 33 cents were divided between the defendant and plaintiff's father out of which 16½ cents each were allotted in favour of defendant and plaintiff's father. Subsequently defendant purchased 8 cents on 19.02.1964. Accordingly, the defendant possessed 24½ cents and out of that, 0.20 cents was purchased by the plaintiff on 11.06.1990. Therefore, 16½ cents + 20 cents = 36½ cents. The plaintiff is totally entitled to 16½ cents inherited from the grandfather and 20 cents purchased from the defendant. In order to establish 36½ cents, the plaintiff marked Exs.A2 and A3.

12. On perusal of the house properties in Item No.2, it is seen that all those properties were purchased by the plaintiff's grandfather and defendant's father. The extent of house properties are 26½ cents and the entire 26½ cents were divided equally in between the brothers. With regard to oral adjustment, some of the properties were adjusted in between the brothers of the defendant. Though the defendant and plaintiff are entitled to 11 cents, the defendant granted one cent in favour of plaintiff's father and the same was established by his own document and the same was marked as Ex.A.28 (registered sale deed) in favour of his first wife's daughter in which the defendant clearly mentioned that he owned 10 cents. Accordingly, he is entitled to declaration and injunction in respect of item Nos. 1 and 2 of the property. With regard to the third item of the property, which fell in SR.No.15/3, the plaintiff's grandfather and defendant's father possessed 60 cents and the same were owned by him after death of Thiruvengada Padayachi. The total 60 cents were divided as south 30 cents and north 30 cents and the defendant brothers were allotted 10 cents each. Thereafter, the plaintiff's father sold 10 cents in favour of the defendant. However, he retained 10 cents of northern side in which the defendant created some bogus records as if he purchased from the brothers of the plaintiff's grandfather which is unsustainable. No properties were allotted in favour of the plaintiff's grandfather. The entire properties were divided between the defendant's brothers. Hence the allotted sale deed executed by the plaintiff's father cousin namely Chandran and Natesan is illegal and the same was re-conveyed in favour of Kasilingam and Kasinathan is also unsustainable. The sale deed is not binding on the plaintiff. Accordingly, he is entitled for recovery of possession.

13. After perusing the order of the lower court, the lower appellate court, concurrently held in favour of the plaintiff and the well considered decision need not be interfered with in this second appeal. सत्यमेव जयते

14. On consideration of the entire material and on perusal of the findings of the courts below, admittedly, Thiruvengada Padayach had three sons viz., the defendant (Murugesan) and plaintiff's father (Chinnathambi) and one Kasinathan. There are several properties owned by Thiruvengada Padayachi and all the properties were divided between the brothers. However, the dispute arise in respect of the suit item of the property. Admittedly, the first item of the property was purchased by Thiruvengada Padayachi in the year 1928.

15. On perusal of the records, it is seen that the sale deed was marked as Ex.A1 in order to ascertain the extent of the property and on perusal of Ex.A8, it is seen that the mortgaged deed was allegedly executed by Thiruvengada Padayachi in favour of Nallamuthupusi on 20.03.1928. On perusal of Ex.A28, it is seen that there are 0.33 cents owned by Thiruvengada Padayachi, out of which, plaintiff's father and the defendant were allotted $16\frac{1}{2}$ cents each in their favour. Thereafter, on 19.12.1964, the defendant has purchased 8 cents of land and the sale deed was marked as Ex.A2. Accordingly, the defendant possessed $24\frac{1}{2}$ cents, out of which, the plaintiff's father purchased 20 cents under Ex.A3 dated 11.06.1990. After partition of property under Ex.A1 and on perusal of Ex.A3, it is seen that the plaintiff is entitled to $36\frac{1}{2}$ cents in Item No.1 of the property. Accordingly, on perusal of the entire documents, it is clear that the lower court has arrived at a conclusion that the plaintiff established that he is entitled to $33\frac{1}{2}$ cents. Accordingly, the lower court granted declaration and injunction relief in favour of plaintiff with regard to Item No.2 of house property. The plaintiff's father and his two brothers, defendant and one Kasinathan had equally divided the house properties. The said properties were situated in SR.Nos.11/3 and 11/4. The eastern half was allotted to Kasinathan Padayachi and western half was allotted to Chinnathambi, father of the plaintiff and the said $0.4\frac{1}{2}$ cents situated extreme northern portion of the $0.17\frac{1}{2}$ cents and the southern remaining 0.13 cents was equally divided by the plaintiff's father, Chinnathambi and defendant i.e., each got $0.6\frac{1}{2}$ cents through family partition. Though the defendant was allotted 11 cents, one cent was allotted to the plaintiff. The defendant retained 10 cents and the same was confirmed by Ex.A28, in which, the defendant has categorically admitted that he owned only 10 cents and out of that, $2\frac{1}{2}$ cents was executed in favour of the first wife. Totally the plaintiff clearly established by marking the documents before the lower court, in which, the lower court has granted decree also in favour of the plaintiff. In respect of third item of the property, the plaintiff's grandfather owned 60 cents in SR.No.15/3. Out of 60 cents, the properties were divided in the south and northern side and the brothers of the defendant, the plaintiff's father and Kasinathan had equally divided 20 cents each. After the partition, 10 cents was allotted by the plaintiff's father in favour of the defendant and the same was marked as Ex.B1 dated 24.12.1958. However, the defendant did not establish how he purchased the properties from the brother of Thiruvengada Padayachi and the defendant did not establish that Natesan and Chandran possessed the property in SR.No.15/3 and no document was filed in order to establish that Chandran and Natesan owned the property either by sale deed or by the family partition. Subsequently, the sale deed executed by the

defendant in favour of one Kasilingam and Kasinathan is unsustainable.

16. In view of the above discussions and in the absence of any document, I do not find any error in the order passed by the lower court as well as the lower appellate court and accordingly, the substantial question of law is answered against the appellant. Since the plaintiff has clearly established his title and possession of the property by marking the document, there is no necessity to appoint an Advocate Commissioner for identifying the property.

In the result, the second appeal is dismissed and the Judgment and Decree dated 04.11.1999 passed in A.S.No.54/1996 on the file of the Subordinate Judge, Panruti, is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

gv
To

1. The Subordinate Judge,
Panruti.
2. The District Munsif's Court,
Panruti.

Copy to:

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

+ 1 cc to Mr.R. Subramanian, Advocate Sr.20714

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andCMP.No.20057/2000

SV(CO)
EU(10/08/2018)