

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.02.2018

PRONOUNCED ON : 20.03.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1828 of 2003

Manicka Mudaliyar

...

Appellant

Vs.

1. Karthikeyan

2. Karunakaran

...

Respondents

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 16.04.2002 passed in A.S.No.32 of 2002 on the file of the Additional District Judge, Fast Track Court No.1, Tindivanam, confirming the Judgment and Decree dated 26.09.1997 passed in O.S.No.944 of 1992 on the file of the Additional District Munsif Court,Tindivanam.

For Appellant : Mr.P.Dinesh kumar
for M/s.Sarvabhauman Associates

For Respondents : Mr.G.Appavu

JUDGMENT

This second appeal is directed against the Judgement and Decree dated 16.04.2002 passed in A.S.No.32 of 2002 on the file of the Additional District Judge, Fast Track Court No.1, Tindivanam, confirming the Judgment and Decree dated 26.09.1997 passed in O.S.No.944 of

1992 on the file of the Additional District Munsif Court, Tindivanam.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for declaration and permanent injunction.

4. The case of the plaintiff, in brief, is that the suit property belongs to the plaintiff. Chidambara Mudaliar, Nallathambi Mudaliar and Sundara Mudaliar are the sons of the deceased Natesa Mudaliar and the above said brothers and their father were members of a Hindu Joint Family and Chidambara Mudaliar was the family manager of the said family, after the demise of Natesa Mudaliar and on 21.08.1940, Chidambara Mudaliar has purchased an extent of 0.42 cents of land in the suit survey and undivided 1/3 share in 0.01 cents in the suit survey number and Well on it and the other properties from Eyla Gounder and others by way of a registered document and Eyla Gounder and his father and others were entitled to only 0.42 cents and 1/3 share in the Well and 0.01 cent in the suit survey number and the remaining share in the Well and 0.01 cent was the ancestral property of Natesa Mudaliar and his sons and thus, Natesa Mudaliar and his sons were entitled to 2/3 share in the Well in the suit survey number and subsequently, following the difference between the brothers, an oral partition took place and in the said partition, the suit property had been allotted to Nallathambi Mudaliar and Sundara Mudaliar,

brothers of Chidambara Mudaliar. Nallathambi Mudaliar was allotted to 0.18 cents in the suit survey number and $\frac{1}{2}$ share in 0.03 cents and the Well on it and Sundara Mudaliar was allotted to 0.22 cents in the suit survey number and $\frac{1}{2}$ share in 0.03 cents and the Well on it and accordingly, the above said two brothers, each were entitled to the extent of land allotted to them and $\frac{1}{2}$ share in 0.03 cents and the Well on it and on 15.12.1955, Sundara Mudaliar had executed a registered settlement deed in respect of the property allotted to him as above stated by way of partition in favour of minors Sambanda Mudaliar and Thirunavukarasu and the said settlement deed has been duly accepted and came into force and accordingly, the settlees enjoyed the said property through their mother and the plaintiff's brother Devaraja Mudaliar had purchased the above said settled properties by way of a sale deed dated 07.08.1961 and also purchased the properties allotted to Nallathambi Mudaliar by way of the above said partition in the suit property by way of a registered sale deed dated 07.08.1961 and thus, Devaraja Mudaliar became the owner of the entire suit property and the above said property was purchased by Devaraja Mudaliar for the benefit of the joint family and in the oral partition effected during 1963 between Devaraja Mudaliar and others including the plaintiff, the suit property and other properties were allotted to the share of the plaintiff and accordingly, the plaintiff has been in possession and enjoyment of the suit property by obtaining patta, paying kist etc., and in any event, the

plaintiff has also acquired title to the suit property by way of adverse possession on account of continuous and uninterrupted enjoyment beyond the statutory period and the defendants have no right or interest or title in the suit property including the Well and the plaintiff came to know that patta has been also obtained by the defendants in their name in respect of the suit property wrongly and while effecting the patta in the name of the defendants, no notice has been sent to the plaintiff or Devaraja Mudaliar as the case may be and hence, the mutation of the revenue records as regards the suit property in the name of the defendants is not valid and binding upon the plaintiff and thereby, the defendants attempted to interfere with the possession and enjoyment of the suit property by the plaintiff and hence, the plaintiff sent a legal notice and to the same, the defendants sent a reply containing false allegations and the claim of the defendants that they have title to the suit property is false and the suit property had never been in the possession and enjoyment of the defendants at any point of time and hence, according to the plaintiff, he had necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts and after denying all the averments contained in the plaint as regards the source of title to the suit property projected by the plaintiff, it is stated by the defendants that

Chidambara Mudaliar cannot acquire any right or interest or title to the properties comprised in the suit survey number beyond the extent purchased by him by way of the sale deed dated 21.08.1940 and accordingly, Chidambara Mudaliar and his brothers are entitled to only 2/6 share in the Well and the claim of the plaintiff that the family of Natesa Mudaliar owned the remaining extent of the share in the Well ancestrally is false and hence, the subsequent transactions effected in respect of the entire suit property as put forth in the plaint are all not accepted, out of 0.43 cents in the suit survey number, 0.07 cents pertains to the Well and the portion appurtenant to the Well and accordingly, in order to grab more extent of land, than to which the plaintiff's predecessors in title are entitled to, the plaintiff has laid the suit falsely by claiming that he had purchased the entire suit property as put forth in the plaint, the plaintiff would be entitled to the suit property only excluding 0.07 cents of land viz., the Well and the portion appurtenant to the Well and hence, the suit having been laid only as regards the above said portion of an extent of 0.07 cents and the plaintiff having no claim of title to the same and hence, the claim of the plaintiff that he has title to entire the suit property as described in the plaint and also in possession and enjoyment of the same is false. According to the defendants, Elya Gounder settled the retained 1/3 share in the suit Well in favour of his sister Irusammal and thereby, the same had been acquired by the sons of Veerasamy Gounder, the brother of Elya Gounder and Veerasamy

Gounder's 4 sons had conveyed their share in the suit Well and the allied portion in the survey number to the defendants' father by way of the sale deed and exchange deeds as detailed in the written statement and thus, the defendants became entitled to the remaining extent of the share in the suit Well and the allied portion in the suit survey number and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PWs1 and 2 were examined and Exs.A1 to 7 were marked. On the side of the defendants, DWs1 and 2 were examined and Exs.B1 to B18 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to decree the suit only in respect of 40 cents of land and 2/6th share in respect of the Well situated in 3 cents of land and accordingly, granted necessary reliefs in favour of the plaintiff. Aggrieved over the same, the present second appeal has been laid.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

“(i) Whether the courts below are correct in law in coming to the conclusion that the appellant is entitled to 40 cent of

land only which is against the Ex.A3 sale deed which is more than 30 years old and are not the appellant is entitled to the presumption under Section 90 of Indian Evidence Act?

(ii) When Order 41 Rule 31 CPC mandates that the Appellate Court must frame points for consideration whether the judgment of learned Appellate Judge who has failed to follow the procedure prescribed is sustainable in law?"

9. The plaintiff traces his title to the suit property from the sale deed dated 21.08.1940, which document has been marked as Ex.A3/B1. On a perusal of the above said document, it is found that Chidambara Mudaliar had purchased an extent of 0.42 cents of land and 2/3 share in the Well located in the suit survey number and in the said document, the Well is stated to be located in 0.1 cent of land and by way of the above said sale deed, the case has been projected by the plaintiff as if the Well in the suit survey number is located only in 0.1 cent of land and thus, his predecessor in title had acquired 0.42 cents of land, out of 43 cents of land in the suit survey number and thus, he has entitled to the suit property. The other documents of title relied upon by the plaintiff flows only from Ex.A3 /B1. It is found that as per the case of the plaintiff, in the partition effected amongst the brothers of Chidambara Mudaliar an

extent of 0.18 cents in the suit survey was allotted to Nallathambi Mudaliar and $\frac{1}{2}$ share in 0.03 cents in the suit survey and the Well located on it. Similarly, it is found that the other brother Sundara Mudaliar was allotted 0.22 cents of land in the suit survey number and $\frac{1}{2}$ share in the Well located in 0.03 cents of land in the suit survey. Thus, it is found that inasmuch as the Well and the appurtenant portion thereof is located in 0.03 cents of land in the suit survey number, accordingly, it is seen that by way of the partition above stated, Nallathambi Mudaliar and Sundara Mudaliar had been allotted $\frac{1}{2}$ share in 0.03 cents of land where the Well and appurtenant portion are located. On a perusal of Ex.A3/B1, as rightly determined by the Courts below, it is found that by way of the same, Elya Gounder had only alienated $\frac{2}{3}$ share of the Well portion in the suit survey number, out of $\frac{1}{2}$ share owned by him. Thereby, it is found that Elya Gounder had only $\frac{1}{2}$ right in the Well portion in the suit survey number and accordingly, as rightly determined by the Courts below, Veerasamy Gounder, the brother of Elya gounder had owned the other $\frac{1}{2}$ share in the Well portion of the suit survey number. However, according to the plaintiff, even prior to Ex.A3/B1, the family of Chidambara Mudaliar were entitled to $\frac{2}{3}$ share in the Well portion of the suit survey number, etc and the remaining $\frac{1}{3}$ share belonging to Narayana Gounder and his sons viz.,Elya gounder and Veerasamy Gounder. However, as above seen, from Ex.A3/B1, Elya Gounder and others had alienated $\frac{2}{3}$ shares, out of $\frac{1}{2}$ share owned by them in the

suit Well portion and thereby, it is found that $\frac{2}{3}$ share in $\frac{1}{2}$ share of the Well portion had been only conveyed by way of the said document. Though the plaintiff would claim that the family of Chidambara Mudaliar had owned the remaining share of the Well portion in the suit survey number ancestrally, as rightly found by the Courts below, absolutely, there is no material placed on record to establish that the family of Chidambara Mudaliar owned the remaining share in the Well portion of the suit survey number and on the other hand, the recitals found in Ex.A3/B1 would go to show that it is only the family of Narayana Gounder, who had owned the full share in the suit Well portion as well as the other lands located in the suit survey number. It is thus found that as rightly determined by the Courts below, only $\frac{2}{6}$ share in the Well portion had been acquired by Chidambara Mudaliar by way of Ex.A3/B1.

10. Now, according to the plaintiff, the Well and the allied portion is only 0.1 cents of land in the suit survey number. If that be so, in the partition effected amongst the brothers of Chidambara Mudaliar, there is no need to separately allot $\frac{1}{2}$ share in the Well portion comprising in an extent of 0.03 cents. As rightly determined by the Courts below, by way of the above said plaintiff's case, it is evident that the Well portion in the suit survey number occupies an extent of 0.03 cents of land in the suit survey and accordingly, it is found that the remaining extent of 40 cents of land had been partitioned between the brothers Nallathambi Mudaliar

and Sundara Mudaliar each being allotted 0.18 cents and 0.22 cents respectively. Thus, it is found that out of 0.43 cents of land, the Well portion occupies an extent of 0.3 cents and the remaining portion pertains to the land portion. In such view of the mater, the plaintiff cannot take advantage of the recitals found in Ex.A3/B1 to contend that the Well portion is comprised only in 0.1 cent of land in the suit survey number and not in 0.03 cents of land. On the other hand, a reading of the recitals found in Ex.A3/B1 would go to show that the Well is stated to be located 0.01 cents and the allied portion are shown as "fU';fy; fl;L fpzw;wpy; xj;jf;fy; bkhp;fy; fytj; bjhiy cs;gl bghJtpy; v';fs; ghfk; ngh;ghjp fpzw;wpy; K:d;wpy; ,uz;L g';F fpzUk;. Gytif tpUc&';fspy; ngh;ghjpa[k; mDgtpj;Jf; bfhs;sntz;oaJ."

it is found that accordingly, noting that the above said Well portion occupies an extent of 0.03 cents of land, while effecting the partition, the two brothers Nallathambi Mudaliar and Sundara Mudaliar were shown to be allotted ½ share in 0.03 cents of land including the Well located therein. However, when the plaintiff has failed to establish that the family of Chidambara Mudaliar owned 2/3 share in the Well portion of the suit survey number ancestrally and as rightly determined by the Courts below with reference to the same, there is no material at all placed by the plaintiff, it is found that the plaintiff, through his predecessors in interest, would be entitled to acquire only an extent of 40 cents of land and 2/6 shares in the Well portion in the suit survey number and not more than

11. As rightly determined by the Courts below, when as per the recitals found in Ex.A3/B1, Elya Gounder and others had alienated only 2/3 share, out of 1/2 share owned by them in the Well portion, which, actually comprised of an extent of 0.03 cents of land, it is evident that the remaining portion was owned by Narayana Gounder, the father of Elya Gounder and Veerasamy Gounder. Accordingly, Elya Gounder having sold 2/3 share in his 1/2 share in the suit Well portion is found to have retained 1/3 share in the suit Well portion, it is equally found that the remaining 1/2 share Well portion of the suit survey number was owned by Veerasamy gounder and from the documents placed by the defendants marked as Exs.B2 to B5, viz., the sale deed and the exchange deeds, it is found that the sons of Veerasamy Gounder had alienated /exchanged their shares in the suit Well portion with the defendants' father and accordingly, it is found that the defendants' father owned the remaining share in the Well and the allied portion and thereby, it is found that it is only the defendants, who have title to the remaining share in the Well portion of the suit survey number.

12. As above seen, when the Well portion is found to be occupying an extent of 0.03 cents of land in the suit survey number, the plaintiff cannot lay a claim of title to the entire suit property described as consisting of 0.43 cents including the land portion as well as the Well

portion. On the other hand, when as per the title deeds produced by the plaintiff, his predecessor in title had acquired only 2/6 share in the Well portion plus 0.03 cents of land in the suit survey number and beyond that, they had not been established to have acquired title, particularly, the Well portion in the suit survey number, it is found that the Courts below have rightly held that the plaintiff could be entitled to the relief only as regards the 40 cents of land and 2/6 share in the Well portion comprising an extent of 0.03 cents of land in the suit survey number and the above determination of the Courts below are found to be based on the proper appreciation of the materials placed on record in the correct perspective both factually as well as legally and in such view of the matter, I do not find any reason to interfere with the same.

13. When Ex.A3/B1 confers title to the plaintiff's predecessor in interest only of an extent of 40 cents of land portion and 2/6 share in the Well portion comprising in an extent of 0.03 cents of land in the suit survey number and the same is also fortified by the subsequent documents of title effected in respect of the suit property marked as Exs.A4 to A7, it is found that the plaintiff cannot take advantage of the recitals that the Well is located in 0.01 cents of land in Ex.A3/B1 to contend that he is entitled to 42 cents of land portion in the suit survey number as such. The plaintiff having failed to establish that the land portion occupies an extent of 42 cents of land and on the other hand,

even as per the case of the plaintiff, his predecessors in interest had been shown to be allotted only ½ portion in the Well portion comprising of an extent of 0.03 cents of land and had divided the land portion comprised of an extent of 40 cents of land only, it is found that the Courts below have rightly analysed the recitals found in Ex.A3/B1 along with the recitals found in the other documents of title projected by the plaintiff as well as the documents of title projected by the defendants marked as Exs.B2 to 5 in the right perspective and correctly determined that the plaintiff is entitled to only the relief as determined by them and not more than that. The first appellate Court by forming the main point for determination, had analysed the issues involved in the matter in the correct perspective by sifting the materials and assessing the same in the proper manner accordingly and rightly concurred with the reasons and conclusions of the trial Court and in such view of the matter, the contention put forth that the first appellate Court has not adhered to the mandates contemplated under Order 41 Rule 31 of CPC as such cannot be countenanced. The substantial questions of law formulated in the second appeal are accordingly, answered against the plaintiff and in favour of the defendants.

In conclusion, the second appeal fails and is dismissed with costs.
Consequently, connected miscellaneous petition, if any, is closed.

20.03.2018

Index : Yes / No

Internet : Yes / No

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To

1.The Additional District Judge, Fast Track Court No.1,
Tindivanam.

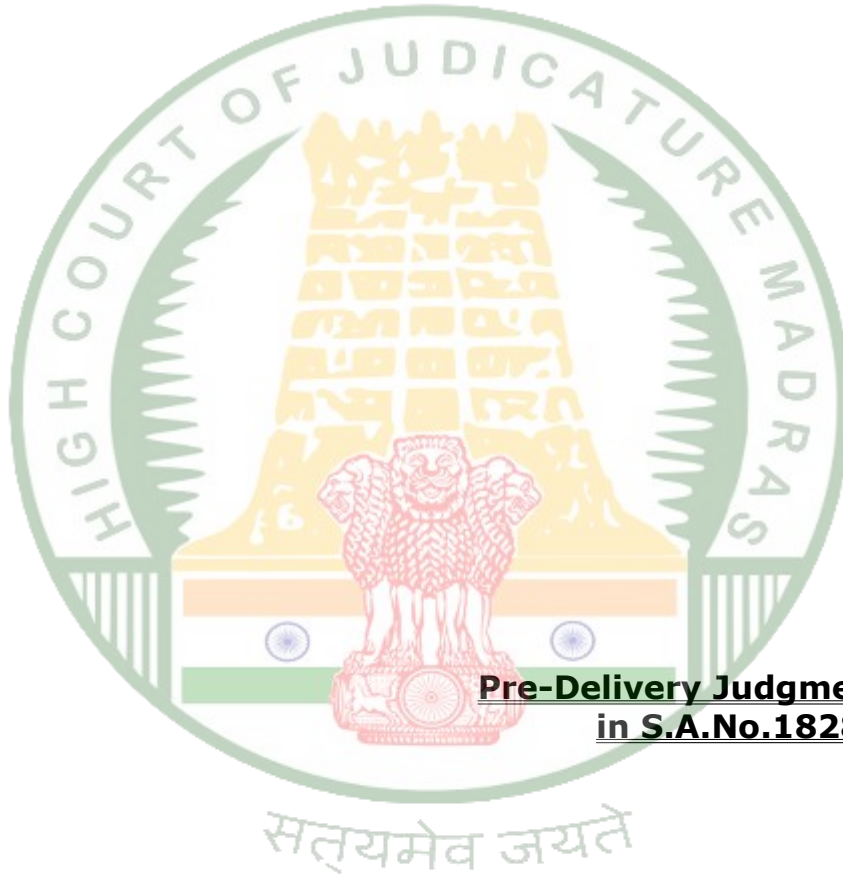
2.The Additional District Munsif Court, Tindivanam.

3.The Section Officer, V.R.Section, High Court, Madras.

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T.RAVINDRAN, J.

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**Pre-Delivery Judgment made
in S.A.No.1828 of 2003**

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