

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.02.2018

CORAM:

THE HON'BLE MR.JUSTICE M.DHANDAPANI

Second Appeal No.338 of 2002

1. P.Kaliappa Gounder (Deceased)
2. P.Loganathan
3. Saraswathi
4. Ranganayagam
5. Mohan Murthy

(Appellants 3 to 5 brought on record as LRs of the deceased 1st appellant vide order of Court dated 04.01.2018 made in CMP.No.5576/04 in S.A.No.338 of 2002)

... Appellants/Respondents/Plaintiffs

/Vs/

1. Nataraja Gounder (Deceased)
2. K.Krishnasamy Gounder
3. S.K.Nataraj
4. S.K.Murugesan
5. Sundarammal
6. Sathyamoorthy
7. Maheswari

(R5 to R7 are brought on record, as LRs of the deceased 1st respondent vide order of Court dated 09.06.2009 made in CMP.No.2318/2007 in S.A.No.338/2002)

... Respondents/Appellants/Defendants

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code against the Decree and Judgment dated 28.08.2000 made in A.S.No.12 of 1998 on the file of the Learned Subordinate Judge of Udumalpet, Partly confirming the decree and Judgment dated 21.01.1998 made in O.S.NO.648 of 1994 on the file of the learned District Munsif of Pollachi.

For Appellants : Mr.V.Nicholas
2 to 3 A1 Died

For Respondents: Mr.N.Thiagarajan (For R2 to R7)
2 to 7 R-1 Died

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J U D G E M E N T

The plaintiffs are the appellants before this Court. The trial court decreed in the suit favour of the plaintiffs, in toto. On appeal by the defendants/respondents, the judgment and decree of the trial court were confirmed, but rejected the prayer in respect of recovery of possession of 'C' schedule property. As against the judgment and decree of the lower Appellate Court, the present second appeal has been filed.

2. The sum and substance of the plaint averments are as follows:-

(i) The 'C' schedule property, morefully described consisted of an extent of 7 acres in survey No.97, Veeralpatti Village, belongs to the plaintiffs and the plaintiffs got title through a partition Deed dated 26.03.1981 executed between plaintiffs and their father. As per the partition Deed, the plaintiffs are entitled to 3.50 acres each, which are described in schedule A and B respectively. Out of the total extent of 7 acres in S.F.No.97, an extent of 2.63 acres was purchased by the plaintiff's father, Palani Gounder, under Registered Sale Deed on 17.12.1937. The remaining extent of 4.37 acres in the above survey number was purchased by the plaintiff's father by the Registered Sale Deed on 24.11.1954. Right from the date of purchase, the properties were being enjoyed by the plaintiffs and their father till 26.03.1981. Subsequently on 26.03.1981, the property was partitioned between the plaintiffs themselves. After the partition Deed, mutation of the revenue records, like the Patta and Adangal extracts were taken place. The Adangal extract for the fasli year 1403 also stands in the name of the plaintiffs.

(ii) The plaintiffs further averred that the second defendant is the neighbouring land owner. The plaintiffs understand that the second defendant herein has maneuvered to include their name in the revenue records, in respect of S.F.No.97. However, no notice was given to the plaintiffs before including their names. Now taking advantage of the fact that the second defendant's name has been included in the revenue records, he is attempting to encroach into the properties belonging to the plaintiffs. The remaining defendants are assisting the second defendant as they are close relatives of the second defendant. Right from the date of purchase, the plaintiff's father and after partition, the plaintiffs are enjoying the properties, without any demur or protest from any quarters whatsoever. Either the second defendant or the other defendants have no right whatsoever in the suit property. In fact on 05.11.1994, the second defendant along with the other defendants attempted to trespass into the suit property.

(iii) After disposal of the I.A.No.2113/94 during the first week of November 1994 the defendants had ploughed the land, in part, in the suit 'B' schedule properties and have taken forcible possession and are enjoying the lands without any legal right. Hence the plaintiffs altered the prayer including the 'C' schedule property for recovery of possession.

3. The defendants have filed the written statement, which reads thus:-

(i) The defendants denied the entire allegations made in the plaint averments by the plaintiffs; the plaintiffs are not entitled to entire 7 acres in Survey No.97; the alleged partition Deed dated 26.03.1981 in between the plaintiffs themselves is a self serving document and the same is not binding on the defendants; the plaintiffs have not explained as to how they are entitled to entire 7 acres, apart from the partition deed in their family.

(ii) The father of the plaintiffs has purchased 2.63 acres on 17.12.1937 from Kandasamy Gounder, father of defendants 1 and 2. But it is false to state that he has purchased 4.37 acres on 24.11.1954. The plaintiffs have not even mentioned the names of vendor of the respective sales. The vendor in the Sale Deed dated 24.11.1954 was one Ayimuthammal. She was entitled only to extent of 2.18 ½ acres in Survey No.97 which will be evident from the sale made in her favour. She has no right to convey 4.37 acres and she has not conveyed 4.37 acres, as contended by the plaintiffs. Any recital regarding the extent of more than 2.18 ½ acres in the Sale Deed, is not binding on the others, who have no right in the said land. It is absolutely false to contend that the entire 7 acres were enjoyed by plaintiffs and their father till 26.03.1981 and thereafter the plaintiffs are in separate possession, as per their respective shares.

(iii) The defendants are not strangers. The father of the plaintiffs and defendants are brothers. Patta has not been issued to the entire extent to the plaintiffs and the allegation that the second defendant include his name also in the revenue records is totally false. The plaintiffs clearly know that the defendants are entitled to an extent in Survey No.97 and his name is therefore included. It is totally false that second defendant is attempting to encroach into the suit properties and the second defendant is assisted by the other defendants.

(iv) The plaintiffs have suppressed the material facts. The father of defendants 1 and 2 had purchased 2.21 ¾ acres of land from one Peria Gounder on 12.10.1947 in Survey No.97 and defendants' father is entitled to half of the extent purchased. The defendants are in possession of Periya Gounder's portion also. Therefore the plaintiffs are entitled to and are in

possession of 4.81 ½ acres only, as per the earlier documents of title and nothing more.

4. The defendants have further filed an additional written statement stating that the plaintiffs were not in possession of the entire properties in Survey No.97 as described in schedules 'A' and 'B' in the plaint. The plaintiffs are not entitled to any right in 0.45 cents mentioned in 'C' schedule which belongs to these defendants and the plaintiffs are not entitled to any mesne profits as claimed in the plaint. The plaintiffs are also not entitled to possession of 'C' schedule properties.

5. After elaborate trial and upon perusing the entire documents and after framing the issues, the Lower Court decreed the suit in favour of the plaintiffs. Aggrieved by the same, the defendants filed appeal before the Lower Appellate Court. The Lower Appellate Court confirmed the decree in respect of A and B schedule property. However rejected the prayer with regard to the 'C' schedule property of 0.45 cents, i.e., in respect of recovery of possession. As against the Lower Appellate Court judgment, the present Second Appeal is filed.

6. At the time of admission of the second appeal, this Court has framed the following substantial question of law:-

"When the plaintiffs and their father executed a mortgage deed in the year 1969 in respect of the suit property wherein the first defendant has attested and as such, it is not open to the defendants to deny the title of the plaintiffs, whether the lower appellate Court is correct in dismissing the suit in respect of 'C' schedule property?"

7. The learned counsel appearing of the appellants would submit that on a perusal of the entire records, the Lower Court arrived at a conclusion that the plaintiffs are entitled to the decree in toto, including the 'C' schedule properties. The learned counsel further submitted that the plaintiff's father purchased the property vide registered Sale Deed dated 24.11.1954 and the entire extent was purchased from one Ayimuthammal and the said document is marked as Ex.A5. Without perusing Ex.A5 without properly analysing Ex.A5, both the Courts concurrently held against the plaintiff is un-sustainable one and the decision of the lower Court is liable to be interfered with. Accordingly, he prayed for allowing the second appeal.

8. Admittedly the plaintiffs' father and the defendants are brothers. The entire property was purchased by the plaintiffs and the defendants from one Ayyimuthammal. Ayyimuthammal and her husband's brother one Kandasamy Gounder owned the entire

property, in respect of Survey Nos.96 and 97 and that Ayyimuthammal had given up the entire property in respect Survey No.96 to one Kandasamy Gounder and enjoying Survey No.97 absolutely, without any interference whatsoever and the plaintiff's father purchased the property through a Sale Deed, Ex.A-2 dated 24.11.1954 from Ayyimuthammal.

9. On a perusal of the Ex.A-2 the said Ayyimuthammal conveyed only the half of the share to the plaintiff's father wherein the total extent of share available under Survey No.97 is 4.37 acres.

10. On a perusal of the entire materials available on records, the Lower Appellate Court had arrived at a conclusion that the total extent available in Survey No.97 is 4.37 acres and in that 4.38 acres, Ayyimuthammal conveyed only 18.1/2 acres in favour of Palani Gounder. Accordingly, the Lower Appellate Court rejected the prayer in respect of recovery of possession of 'C' schedule property. This Court also considered the findings of the Lower Appellate Court and perused the materials.

11. On a perusal of Ex.A-5, it is clear that Ayyimuthammal had executed a Sale Deed in favour of Palani Gounder, the plaintiff's father. It is also clear that she allotted her half of the share. Hence, in view of the above, the plaintiffs are entitled to the 'A' and 'B' schedule properties situated in Survey No.97 by virtue of Ex.A-2 and Ex.A-5. The plaintiff's father had purchased only 2.18 ½ acres from Ayyimuthammal through Ex.A-5. However the plaintiffs presume that the entire 4.37 acres altogether 7 acres were conveyed by Ayyimuthammal in favour of the plaintiffs, thereby the plaintiffs filed the suit for declaration and recovery of possession in respect of 'C' schedule property. However on a perusal of Ex.A-5, the vendor Ayyimuthammal conveyed only 2.18 ½ acres in favour of the father of the plaintiff's.

12. Hence, in view of the above, I do not find any error in the finding of the Lower Appellate Court, rejecting the prayer for recovery of possession in respect of 'C' schedule property.

13. Apart from the above, the defendants had enjoyed the property with regard to other part of lands in Survey No.97 and obtained Patta from the revenue authorities and established their possession in respect of 'C' schedule property.

14. Thus, this Court is of the view that there is no question of law much less any substantial question of law that arises for consideration in this appeal. Hence, the substantial question of law is answered against the appellants and in favour of the respondents.

15. In the result, the Second Appeal is dismissed. The judgment and decree dated 28.08.2000 made in A.S.No.12 of 1998 on the file of the learned Subordinate Judge, Udumalpet, is confirmed. No costs.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

To

1.The Subordinate Judge of Udumalpet.

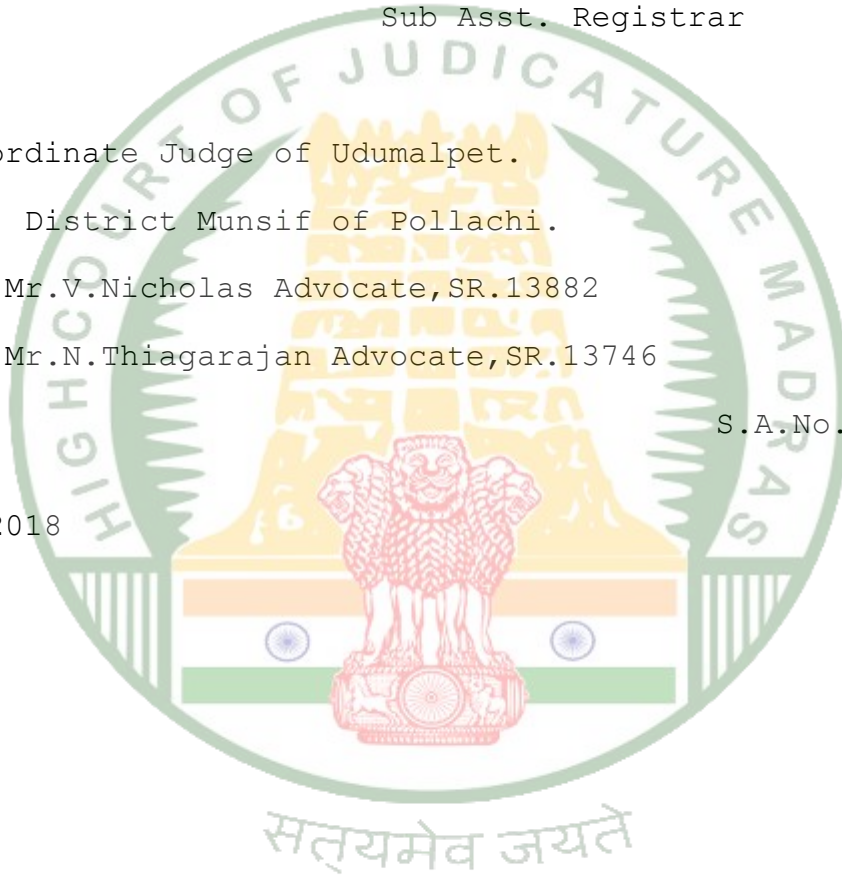
2.The the District Munsif of Pollachi.

+ 1 cc to Mr.V.Nicholas Advocate,SR.13882

+ 1 cc to Mr.N.Thiagarajan Advocate,SR.13746

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