

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.01.2018

PRONOUNCED ON : 24.01.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.576 of 2003

1. Marappa Gounder
2. Murugagappa Gounder (Deceased)
3. Muthusamy Gounder ... Appellants 1 to 3/Defendants 1 to 3
4. Mayangathal
5. Jayanthi
6. Mayilsami
7. Palaniammal

... Appellants/Defendants 1 to 3
and Lrs of deceased 2nd defendant

(Appellants 4 to 7 were brought on
record as Lrs of the deceased 2nd appellant
vide order of Court dated 11.01.2010
in C.M.P. No.38 & 39/2009)

Vs.

Subbathal

... Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil
Procedure Code, against the judgment and decree of the
Additional District Court, (Fast tract Court No.4), Coimbatore
at Tirupur, Coimbatore District rendered in A.S.No.32/2001 dated
08.02.2002 reversing the judgment and decree of the District
Munsif Court, Tirupur rendered in O.S.No.744/90 dated 13.11.97.

For Appellants : Mr.R.Saseetharan

For Respondent : set exparte vide order of this court
dated 08/01/18

JUDGMENT

Challenge in this second appeal is directed against the
judgment and decree dated 08.02.2002 passed in A.S.No.32/2001
on the file of the Additional District Court, (Fast tract Court
No.4), Coimbatore at Tirupur, reversing the judgment and decree

dated 13.11.97 passed in O.S.No. 744/90 on the file of the District Munsif Court, Tirupur.

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 was acquired by her through the settlement deed dated 21.12.1968, executed by her grand mother Periyakkal and from the date of the settlement deed, it is only the plaintiff, who is in possession and enjoyment of the property comprised thereunder by obtaining patta and paying kist etc., and thus, the plaintiff is having absolute title to the suit property and the defendants are neighbours to the suit property and out of jealousy, the defendants had attempted to disturb the plaintiff's possession of the suit property illegally and the plaintiff has also perfected her title to the suit property by way of adverse possession and as the illegal acts of the defendants to trespass into the suit property persisted, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts and the lands comprised in S.F.No.352/3 in 15-Velampalayam village belonged to the defendants ancestrally and in the partition effected, the northern portion of the field above stated measuring about 1.60 acres was allotted to Periyakkal and the southern portion was allotted to the defendants ancestrally and it is true to state that Periyakkal had executed a settlement deed in favour of the plaintiff but it is incorrect to state that the plaintiff is in possession and enjoyment of the suit property as described in the plaint. Even at the time of the oral partition which took place in the year 1955, there was an east-west ridge for demarcating and dividing the share of Periyakkal and others and accordingly, the properties situated to the south of the above said ridge was allotted to the defendants ancestrally and the plaintiff is enjoying the property situated only to the north of the east-west ridge and neither Periyakkal nor the plaintiff had been in possession and enjoyment of any portion of the property lying to the south of the east-west ridge and the defendants have perfected their title to the suit property by way of adverse possession and the property situated to the north of the east-west ridge is lying in lower in level about 2 feet than the property situated to the south of the east-west ridge and the plaintiff has laid the suit without any cause of action and the defendants have not interfered with the plaintiff's possession and enjoyment of the property lying to the north of the east-west ridge and hence, the suit is liable to be dismissed.

6. The defendants have also filed the additional written statement denying that the plaintiff is the absolute owner of the suit property as described in the plaint and the plaintiff has never been in possession and enjoyment of the suit property and the east-west ridge is in existence from time immemorial and the plaintiff has belatedly laid the suit for relief of declaration and the said relief is barred by limitation and hence, the suit is liable to be dismissed.

7. It is found that the suit laid by the plaintiff in O.S.No.744/90 as well as another suit laid by the deceased Rangasamy gounder and others against the defendants in O.S.No.734/90 were jointly tried and accordingly, it is found that common evidence had been recorded in both suits.

8. In support of the plaintiffs' case in both suits PWs 1 to 5 were examined and Exs.A1 to A25 were marked. On the side of the defendants DWs 1 to 4 were examined. Exs.B1 to B10 were marked. Exs.C1 to C4 were also marked.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss both suits above stated. On appeal preferred by the respective plaintiffs, the first appellate Court, on an appreciation of the materials placed, set-aside the judgment and decree of the trial Court and accordingly, by allowing the appeals preferred by the plaintiffs respectively, granted the relief of declaration and limited permanent injunction in favour of the plaintiffs and also granted necessary permission to the respective plaintiffs to seek for the recovery of the possession of the bund as well as their properties lying to the east of north-south bund and to the south of the east-west bund by instituting a separate suit and accordingly, disposed of the first appeals. Aggrieved over the judgment and decree passed in A.S.No.32/01 preferred against O.S.No.744/90 above mentioned, the present second appeal has come to be laid by the defendants.

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

1. Whether the first appellate Court is right in granting limited permanent injunction and declaration of title against the defendants/appellants when there is no cause of action arises on the facts narrated in the plaint?

2. Whether the first appellate Court is right in granting relief of limited declaration and permanent injunction to the plaintiff against the defendants on the basis of the inconsistent plea in the evidence without any pleading in the plaint as to the cause of action of the Court?

11. From the materials placed, it is found that the plaintiff claims title to the suit property by way of a settlement deed dated 21.12.68, executed in her favour by her grand mother Periyakkal. The said settlement deed has been marked as Ex.A15. From the pleas set out in the written statement as well as the evidence adduced by the parties in the matter, it is found that the defendants have not disputed the entitlement of Periyakkal to the suit property and according to the defendants, in the family partition effected amongst the ancestors of the parties concerned, it is their case also that Periyakkal had been allotted 1.60 acres of land situated to the north of east-west ridge and according to the plaintiff, the said property had been settled on her by Periyakkal by way of Ex.A15 settlement deed. From the evidence adduced in the matter, it is found that the parties are actually at lis/dispute only in respect of the east-west ridge lying in between the respective properties. It is also found that as per the case of the defendants, the lands situated to the south of the east-west ridge had been allotted to their ancestors. The fact remains that the defendants are not contesting the validity of the settlement deed Ex.A15 executed by Periyakkal in favour of the plaintiff and only by way of the said document, the plaintiff claims title to the suit property.

12. In so far as this case is concerned, it is found that during the course of the trial Court proceedings, Commissioner had been appointed to inspect and measure the suit property and the Commissioner's report and plan had come to be marked as Exs.C1 to C4. However, it is found that as regards the property to which the plaintiff lays a claim of title and to be in possession and enjoyment, it is found that the Commissioner had not measured as to what is the actual extent of the property in the possession and enjoyment of the plaintiff. This has been noted by the trial Court as well as the first appellate Court. Further, a perusal of the description of the property mentioned in Ex.A15 as well as the suit property, it is found that both tally and as already adverted to, the defendants are not challenging the entitlement of Periyakkal to settle the property comprised in Ex.A15 in favour of the plaintiff. In other words, it is found that the defendants had actually admitted that the plaintiff has title to the suit property obtained by her, by virtue of the settlement deed marked as Ex.A15.

13. The defendants seems to have resisted the claim of the plaintiff mainly on the footing that on ground the plaintiff is not in possession and enjoyment of 1.60 acres as claimed by her under Ex.A15 and she is only in possession and enjoyment of the property lying to the north of the east-west ridge and the plaintiff cannot have any claim of right and possession and enjoyment of the east-west ridge as well as the lands lying to the south of the said ridge and therefore, according to them, the plaintiff by way of this suit is attempting to annex the east-west ridge as well as the lands lying to the south of the same, which cannot be permitted and therefore according to the defendants, the plaintiff has laid the suit without any cause of action and hence, the suit is liable to be dismissed.

14. The plaintiff's husband examined as PW3, during the course of cross examination, has admitted that it is only he, who had furnished information to the Advocate concerned for preparing the plaint and at that point of time, he has not informed as to the measurement of the east-west ridge and further, according to him, only in respect of the east-west ridge, the suit has come to be laid and he has also admitted that in the plaint, while describing the suit property, there is no mentioning of the east-west ridge and further, according to him, he is not aware whether Periyakkal had been in possession and enjoyment of the east-west ridge during the year 1949 and also admitted that the east-west ridge was in existence at the time of the execution of the settlement deed, Ex.A15 and he has denied the suggestion that the east west ridge had been in common possession and enjoyment of the parties concerned. Therefore, from the above evidence of the plaintiff's husband examined as PW3, it is evident that though the suit, according to the plaintiff, has come to be laid in respect of the property settled on her under Ex.A15, it is found that her husband, who had been instrumental in the institution of the suit, has clearly admitted that the suit has been laid only for the east-west ridge and the same is the subject matter of dispute between the parties. However, while describing the suit property in the plaint, there is no reference at all about the east-west ridge as to whether the same is also comprised with the properties settled under Ex.A15 by Periyakkal and not only that, there is no reference at all as to the actual measurement of the east-west ridge lying on ground and the plaintiff has also not whispered as to whether she had been settled the property by Periyakkal under Ex.A15, inclusive of the east-west ridge. Now according to the plaintiff, the property lying to the north of the east-west ridge had been settled in her favour by Periyakkal under Ex.A15. A perusal of the property described under Ex.A15 as well as the plaint schedule property would go to show that only the property situated to the north of Marappa gounder and others had been settled in favour of the plaintiff under Ex.A15 and there is no clear indication either in Ex.A15 or in the

plaint schedule as to where actually the east-west ridge lie on the ground, whether it lies within the extent of 1.60 acres settled in favour of the plaintiff under Ex.A15 or whether the east-west ridge lies in the property allotted to the defendants ancestrally. If really the property lying to the north of the east-west ridge had been settled in favour of the plaintiff under Ex.A15 and when it is found that the east-west ridge had been existing from time immemorial, particularly, it was in existence at the time of Ex.A15 settlement deed, if really the property lying to the north of east-west ridge is intended to be conveyed by Periyakkal by way of Ex.A15, definitely, she would have described the property as situated to the north of the east-west ridge and on the other hand, as above seen, the said property is stated to be only situated to the north of Marappa gounder and others lands.

15. Be that as it may, the plaintiff has not placed any material to show that she is in actual possession and enjoyment of 1.60 acres settled in her favour, inclusive of the east-west ridge as projected by her. In this connection, the plaintiff examined as PW2 has admitted during the course of cross examination that she is owning only the lands measuring 1.60 acres as found in the chitta and adangal extracts filed by her and the extent given in the same are correct and she is in possession and enjoyment of the said extent available in the above said revenue documents and further, she would also claim and admit that she is in possession and enjoyment of the property lying to the north of the east-west ridge. Therefore, as per the case of the plaintiff, though she claims to be owning 1.60 acres by virtue of Ex.A15, she is not very clear as to where exactly the said lands lies. However, she would admit that the said lands lies to the north of the east-west ridge. Such being the position, it is found that the plaintiff cannot lay any individual claim with reference to the east-west ridge. Therefore, when it is found as per the evidence of PW3, the plaintiff's husband, the present suit has come to be laid only for the dispute as regards the east-west ridge, when the east-west ridge is found to be not settled in favour of the plaintiff under Ex.A15 and when according to the plaintiff also she is in possession and enjoyment of 1.60 acres lying to the north of the east-west ridge, the claim of the plaintiff that she is also owning east west ridge on her own, by virtue of Ex.A15, as such cannot be countenanced.

16. As above seen, the commissioner, who had been appointed in this matter, has not measured as to what is the actual extent of the property lying in the enjoyment of the plaintiff and whether the plaintiff is in possession and enjoyment of 1.60 acres lying to the north of the east-west ridge. It is found that the suit survey number and the lands of others had been sub divided during the UDR scheme and as far as the suit survey

number 352/3 is concerned, it is admitted that the same has been sub divided as survey number 352/3A. There is no dispute with reference to the same. As above seen, when the plaintiff has admitted that the measurements given in the chitta and adangal extract filed by her are correct, the chitta extract filed in this matter marked as Ex.A18 and B9 would go to show that the suit property presently comprised under survey no.352/3A measures 0.61.5 hectares and so calculated even as found by the first appellate Court as well as the trial Court, the plaintiff is found to be in possession and enjoyment of only 151.9 cents lands and not 160 cents as claimed by her. It is further seen that the 8 cents of lands is shown to be located in survey number 352/3D belonging to the defendants. Therefore, on ground as per the sub divisions effected, it is found that the survey number to which the plaintiff claims title is found to be comprising only 1 acre and 52 cents and not 1 acre and 60 cents and when there is no material placed on record to show that at the time of the settlement deed Ex.A15, the plaintiff had obtained possession and delivery of the property after measuring the same, it is found that merely from the description of the property given in Ex.A15, it cannot be concluded that the plaintiff had been in possession and enjoyment of 1 acre and 60 cents as mentioned in the document. On the other hand, as per the measurements now effected and after the subdivision of the survey numbers in the locality, it is found that the plaintiff is found to be in possession and enjoyment of only 1 acre and 52 cents comprised in survey number 352/3A and not 1 acre and 60 cents as claimed by her. It is therefore found that the plaintiff is found to be in possession and enjoyment of only lesser extent than what has been described in the plaint and there is no material placed by the plaintiff to show that the sub divisions effected under the UDR scheme has been wrongly made and that she has been erroneously shown to be in possession and enjoyment of lesser extent than to which she is entitled to as per Ex.A15. When it is seen that the plaintiff has admitted the measurements given in the chitta and adangal extract filed by her reflect the correct and true possession and as per Ex.A18 itself when it is seen that she is in possession and enjoyment of only 0.61.5 hectares corresponding to 151.9 cents, the plaintiff's claim that she is in possession and enjoyment of the 1.60 acres in the suit survey number as such cannot be readily countenanced. There is no material placed on the part of the plaintiff to establish that the settled extent of 1.60 acres under Ex.A15 is in her possession and enjoyment right from the date of the settlement deed or in particular, at the time of the institution of the suit.

17. In the light of the above position, when there is no acceptable and convincing materials placed by the plaintiff to hold that she is in physical possession and enjoyment of 1.60 acres settled in her favour under Ex.A15 as claimed by her and

further, when the plaintiff has not placed any material to show that she had been settled the property inclusive of the east-west ridge and when according to the plaintiff she has been allotted the property only to the north of the east-west ridge and when there is no specific reference about the east-west ridge in the title deed of the plaintiff i.e., Ex.A15 as having been settled on her, it is seen that though the plaintiff is found to be entitled to 1.60 acres by virtue of Ex.A15, when the said extent is not shown to be in possession and enjoyment of the plaintiff as claimed by her, it is seen that the first appellate Court is not correct in granting the limited permanent injunction in favour of the plaintiff as regards the property lying to the north of east-west ridge when the plaintiff has failed to establish that she is in actual physical possession and enjoyment of the property lying to the north of the east-west ridge as claimed by her. Further, it is found that the first appellate Court in a strange manner finding that the plaintiff has failed to establish that she is in possession and enjoyment of 1.60 acres as put forth by her had not only granted the limited permanent injunction as regards the property lying to the north of east-west ridge in her favour, but also granted her the liberty to institute the suit for recovery of possession of the east-west bund as well as her other property lying to the south of the said ridge. As rightly put forth, if the plaintiff is found to be not in possession and enjoyment of the property as described in the plaint, the plaintiff cannot be granted the equitable relief of permanent injunction and if according to the plaintiff, the defendants had illegally encroached into the property belonging to her, the remedy available to the plaintiff is only to recover the same from the defendants by way of appropriate litigation and there is no need for any permission being granted by the Court with reference to the same to the plaintiff, which remedy should be resorted to by the plaintiff in the manner known to law.

18. In the light of the above discussions, it is found that the first appellate Court has erred in granting the relief of permanent injunction in favour of the plaintiff in respect of the lands which is lying to the north of the east-west ridge without the plaintiff establishing her case that the property lying to the north of the east-west ridge measures 1 acres and 60 cents and the same is in her possession and enjoyment. On the failure of the plaintiff establishing that she has been settled the property inclusive of the east-west ridge, accordingly, it is found that the plaintiff has failed to establish that she had a cause of action to institute the suit against the defendants as regards the relief of permanent injunction. When it is found that even as per the case of the plaintiff she is in possession and enjoyment of only the extent mentioned in the revenue records and that the measurements found in the revenue records are true and when the revenue records

placed by the plaintiff point out that she is in possession and enjoyment of only 159.9 cents, the first appellate Court fell in error in granting the relief of limited permanent injunction in favour of the plaintiff in respect of the suit property as such. Resultantly, it has to be held that though the plaintiff is found to be entitled to the plaint schedule property by virtue of Ex.A15 settlement deed, inasmuch as the plaintiff has failed to establish that the plaint schedule property as described, has been in her possession and enjoyment from the date of the settlement deed or particularly, on the date of the filing of the suit, it is found that the plaintiff, at the most, would be entitled to obtain the relief of declaration and the plaintiff is found to be not entitled to obtain the relief of permanent injunction as prayed for. Hence, the determination of the first appellate Court that the plaintiff is entitled to obtain the relief of limited permanent injunction as regards the property situated to the north of the east-west ridge as such cannot be sustained in the eyes of law and is liable to be set-aside. The substantial questions of law formulated in this second appeal are accordingly answered against the plaintiff.

19. In conclusion, the judgment and decree dated 08.02.2002 passed in A.S.No.32/2001 on the file of the Additional District Court, (Fast track Court No.4), Coimbatore at Tirupur, are modified and accordingly, the relief of permanent injunction granted by the first appellate Court in favour of the plaintiff and the liberty granted by the first appellate Court to the plaintiff to institute the suit against the defendants for recovery of possession of the lands lying to the south of the east-west ridge are set-aside and in other aspects the judgment and decree of the first appellate Court are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

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Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

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To

1. The Additional District Judge, (Fast tract Court No.4),
Coimbatore at Tirupur.

2. The District Munsif, Tirupur.

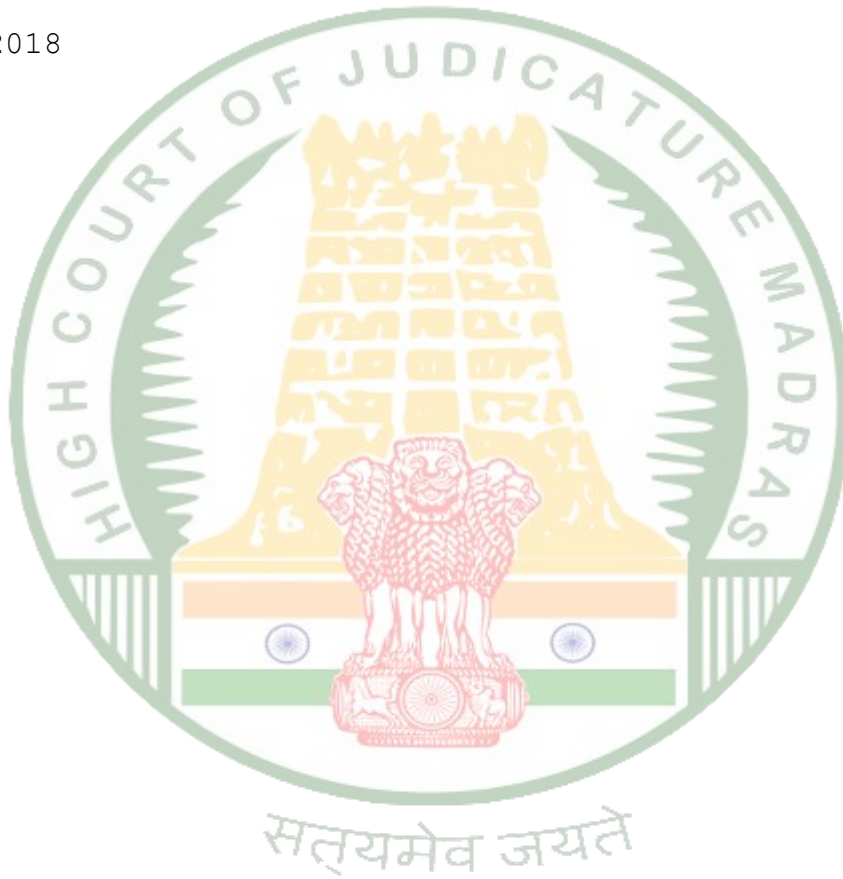
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+1cc to Mr.R.Saseetharan, Advocate sr.no.5434

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