

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 24.08.2018

Pronounced on: 14.09.2018

CORAM

THE HONOURABLE MS. JUSTICE P.T.ASHA

Second Appeal No.931 of 2003

1. Elumalai (died)
2. Ariyammal
3. Pavan Kumar
4. Pachiyappan (Minor)
5. Mahendran (Minor) ...Appellants/Defendant/Appellant

(Minors Appellant Nos.4 & 5 are represented by their mother Ariyammal 2nd Appellant. Appellants 2 to 5 were brought on record as LRs of the deceased sole appellant vide order of Court dated 19.03.2010 made in C.M.P. No.1196 to 1198 of 2009.)

Versus

Saminathan ... Respondent/Plaintiff

Prayer ::

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 22.04.2003 made in A.S. No.67 of 2002 on the file of Principal District Judge, Tiruvannamalai, confirming the judgment and decree dated 07.03.2002 made in O.S. No.2 of 2001 on the file of Additional District Munsif No.1, Tiruvannamalai.

For Appellants : Mr. R.Siddharth
for Mr.T.R.Rajaraman

For Respondent : Mr.R.Karthikeyan

J U D G M E N T

The Second Appeal arises against the reversing judgment and decree in A.S.No.67 of 2002 on the file of the Principal District Judge, Tiruvannamalai, in and by which the judgment and decree in O.S.No.2 of 2001 in the file of the Additional District Munsif No.I, Tiruvannamalai, was set aside. The appeal arise from a suit for declaration and injunction in respect of two items of the suit property, the defendant is the appellant before this court. The parties are described in the same array as in the suit. The dispute is with reference to the 2nd item of the suit property. The parties are referred to in the same array as in the suit.

2. The plaintiffs Case is as follows :-

(a) The plaintiff would contend that the suit properties are the properties of Arya Gounder, who died intestate 40 years prior to the filing of the suit. The said Arya Gounder had three sons, Pachaimuthu Gounder the father of the defendant, Narayanasamy Gounder the father of the plaintiff and Annamalai Gounder. The said Annamalai Gounder died 50 years prior to the filing of the suit leaving behind two sons Arumugam and Chinnapaiyan. It was the plaintiff's case that there was an oral partition between the sons of Arya Gounder and in the said oral partition the suit property and other properties were allotted to the plaintiff's father Narayanasamy. Since there was no document evidencing the partition joint patta stood in the name of all the sons of Arya Gounder. According to the plaintiff there were three Survey Numbers, i.e., S.No.149/5 measuring 0.62 acres, S.No.149/6 measuring 2.54 acres and S.No.149/7 measuring 1.35 acres, in all measuring 4.51 acres in Veluganandal Village, however the suit is restricted to S.No.149/6. It was the case of the plaintiff that since all the Survey Numbers were contiguous, for its beneficial enjoyment, the northern portion of S.Nos. 149/5 and 149/6 together measuring 1.65 cents was allotted to the plaintiffs father, 1.50 cents in the middle was allotted to Annamalai's sons and the defendants father was allotted the lands in 149/7.

(b) The plaintiff would further contend that Annamalai's sons have orally partitioned the property allotted to them amongst themselves 30 years ago and the lands in S.No.149/6 and other properties were allotted to Arumugam and Chinnapaiyan got the lands in other Survey numbers allotted to him. By a registered sale deed dated 17.10.1997 the plaintiff had purchased the middle portion from the said Arumugam, son of Annamalai and therefore by reason of this sale the suit property became the absolute property of the plaintiff and under the revenue updating scheme the patta was granted to the plaintiff. It was his case that the properties south of the suit property belonged to the defendant. Apart from raising the plea of ownership by title the plaintiff also pleaded adverse possession. It was his contention that prior to the suit the defendant had tried to trespass into the suit property and remove the pipe lines installed by the plaintiff which constrained him to file the suit.

3. The defendants Case is as follows :-

(a) Arya Gounder, the Grandfather of the plaintiff and the defendant had died only 10 years ago and not 40 years ago, as pleaded by the plaintiff. The defendant would contend that Arya Gounder owned the following properties:- 1) S.No.149/5 - 0.62 acres, 2) S.No.149/6 - 2.54 acres, 3) S.No.149/7 - 1.35 acres, 4) S.No.151/1 - 1.82 acres, in all an extent of 6.33 acres. The lands in S.No.149/5 was in the extreme north and the lands in S.No.149/6 formed the middle portion and to its south was the lands in S.No.149/7, south of the lands in S.No.149/7 there was

a road and abutting this road further south was situated the lands in S.No.151/1.

(b) The defendant would submit that on 21.12.1954, Annamalai Gounder had died leaving behind him surviving his sons namely Arumugham and Chinnapaiyan. After the death of Arumugham in the year 1960 an oral partition took place between Arya Gounder his sons Pachamuthu and Narayanasamy and grandsons Arumugham and Chinnapaiyan. Under this oral partition no property was allotted to Arya Gounder and the only condition imposed was that each of the sons and grandsons would take turns feeding and looking after Arya Gounder.

(c) It was the case of the defendant that all the four Survey Numbers were taken as one single unit and divided into three shares. Narayanasamy Gounder, the father of the plaintiff was allotted the entire lands in S.No.149/5 (0.62 acres) and the northern portion of S.No.149/6 measuring 0.29 acres. He was also allotted 1.21 acres in the southern portion of S.No.151/1, in all he was allotted an extent of 2.12 acres. The defendant's father Pachaimuthu Gounder was allotted 75 cents in the southern extent of S.No.149/6 and the entire lands in S.No.149/7 in all totally an extent of 2.10 acres. The sons of Annamalai Gounder were allotted the middle portion of S.No.149/6 measuring 1.50 acres; that is the lands between the land allotted to Pachaimuthu Gounder and Narayanasamy Gounder, and an extent of 61 cents in S.No.151/1, totally measuring an extent of 2.11 acres. Therefore, each branch was allotted around 2.11 acres and the partition was equal. This partition has been suppressed by the plaintiff and he has conveniently omitted to include the lands in S.No.151/1 in his narration.

(d) By a sale deed dated 01.07.1977, Annamalai Gounder's branch sold an extent of land in S.No.151/1 to one Krishnan Gounder. The boundaries in this sale deed would show the allotment to the plaintiff's father. Likewise, in the sale deed dated 17.10.1977 under which the plaintiff had purchased the share of Annamalai Gounder in S.No.149/6, the southern boundary is shown as the lands belonging to the defendant's father. The defendant would further submit that there is a well formed ridge separating the lands allotted to the plaintiff's father and the lands of the defendant in S.No.149/6 measuring 75 cents and the lands allotted to the share of the defendant's father was on a higher level than the lands enjoyed by the plaintiff. It is the defendant's case that this ridge was put up by his father to demarcate the two portions. The defendant further submitted that the patta granted under UDR scheme has been granted without inspection of the lands or a detailed enquiry.

4. The trial court after detailed examination of the oral and documentary evidence decreed the suit as prayed for excluding the extent of 75 cents in the southern end of S.No.149/6 and injunction was also granted in respect of the suit property excluding the 75 cents in S.No.149/6 belonging to the defendant. The said judgment was taken on appeal and the appellate court primarily relying upon the UDR patta, granted in favour of the plaintiff reversed the judgment and decree of the learned Additional District Munsif I, Tiruvannamalai and decreed the suit in entirety. It is this judgment, that is the subject matter of challenge before this court.

5. At the time of admission the following substantial questions of law were formulated by this court.

"1. When the evidence let in by the defendant coupled with the report and plan and admission of PW-1 that the division was equal still is the learned Principal District Judge right in granting a decree?

2. When there is evidence except a patta to prove possession over the disputed 2nd item and overwhelming evidence of possession produced on the side of defendant still is the learned Principal District Judge right in granting a decree for injunction?

3. Is not the judgment and decree of the learned Principal District Judge perverse when the findings rendered without legal evidence as well as non-consideration of material evidence?"

6. From the documents it is seen that the oral partition as narrated by the defendant has taken place giving each branch an equal moiety in the four Survey Numbers. P.W.1 the plaintiff in his cross examination has admitted to the same, although in his pleadings he would contend otherwise. The factum of the oral partition has been confirmed by D.W.2 Arumugam, the son of Annamalai Gounder, who is also the vendor of the plaintiff. In Ex.A1 while describing the 4 boundaries the southern boundary is shown as bounded by the lands of Pachamuthu Gounder (defendants father) and north by Narayanasamy's land (plaintiff's father) this would clearly prove that Annamalai Gounder's sons were allotted the middle portion in S.No.149/6.

<https://hcservices.ecourts.gov.in/HCServices/> Plaintiff had pleaded that the oral partition took place after the demise of Arya Gounder, whereas the defendant through cogent evidence has brought out the fact that Arya

Gounder was very much alive when the oral partition had taken place and this fact had subsequently been admitted by the plaintiff as P.W.1. P.W.1 would also admit the fact that in the oral partition Arya Gounder was not allotted any share, all of which would go to strengthen the case put forward by the defendants. In fact P.W.2 who was examined on behalf of the plaintiff, in his cross examination has clearly admitted that the plaintiff was only allotted 29 cents in the S.No.149/6.

8. Ex.B21 has been marked on the side of the defendants which is the order granting the UDR patta and upon which the plaintiff places great reliance. A reading of Ex.B21 demonstrates that there was no spot inspection prior to the grant of patta and the order of the Planning Officer is primarily only on hearsay. The trial court had also relied upon the Advocate Commissioner's report in which the Commissioner has clearly noted the existence of a ridge as pleaded by the defendant and in his report has clearly stated that such a ridge is not existence between the lands in S.Nos.149/6 and 149/7. It was based on these evidence and admissions of the plaintiff that the trial court has decreed the suit with exception of the extent 75 cents in S.No.149/6.

9. The Appellate Court while reversing this judgment has proceeded only on the basis that none of the parties were present at the time of the oral partition, totally ignoring D.W.2, who is a party to this oral partition and who has adduced evidence contradicting the claim of the plaintiff. The learned Principal District Judge has placed reliance upon Ex.B21 to allow the appeal and while doing so has failed to take into account the fact that the very order granting the UDR patta spells out that no spot inspection had taken place, which clearly casts a cloud of suspicion upon the document. The learned Additional District Munsif No.I, has also overlooked the fact that the plaintiff who has come forward with the suit has not let in any evidence apart from the patta to prove his title to the 2nd item of the suit property and the patta produced by him has not been granted in the manner known to law.

10. The witness examined on the side of the plaintiff, namely P.W.2 would admit that the suit 2nd item was not allotted to the plaintiff. The lower appellate court has erroneously cast the onus of proof on the defendant, since it is for the plaintiff to prove his case and succeed on the strength of his case and not the weakness of the defense.

11. The Hon'ble Supreme Court in the Judgment reported in 2014(2) SCC page 269, [Union of India and others Vs. Vasavi Co-operative Housing Society Ltd and others] held as follows:-

"It is trite law that in a suit for declaration burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff."

12. On consideration of the evidence and the pleadings it is clear that the Principal District Judge, Tiruvannamalai has erred in overturning the judgment and decree of the learned Additional District Munsif No.I, Tiruvannamalai despite the admission of P.W.1, regarding the oral partition and the extent allotted in the oral partition. I therefore answer the substantial questions of law in favour of the defendant/appellant. Considering, all of the above I am of the opinion that the judgment and decree of the Principal District Judge is substantially erroneous and based upon a total non consideration of the evidence available on record.

13. In the result the Second Appeal is allowed, the judgment and decree of the learned Principal District Judge, Tiruvannamalai in A.S.No.67 of 2002, dated 22.04.2003 is set aside and the judgment and decree of the Additional District Munsif No.I, Tiruvannamalai in O.S.No.2 of 2001, dated 07.03.2002 is confirmed. No Costs.

msvm

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1. The Principal District Judge
Tiruvannamalai.
2. The Additional District Munsif No.I,
Tiruvannamalai.
- 3.The Section Officer
VR Section,
High Court, Madras.

+1cc to Mr.T.R.Rajaraman, Advocate SR.NO.63997
+1cc to Mr.R.Karthikeyan, Advocate SR.NO.63607

CA(CO)

sm:26.10.2018

S.A. No.931 of 2003