

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :29.01.2019
Pronounced on :12.02.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No.1077 of 1998

1.Kandasamy Gounder (Deceased)
2.Sundarammal
3.K.Natarajan
4.Tamilarashi

... Appellants/Plaintiff

Appellants 2 to 4 brought on
record as LRs of the deceased sole
appellant vide order of court
dated 15.09.2010 made in
CMP.Nos.1624 to 1626 of 2009 in
S.A.No.1077 of 1998

Vs

1.Paramasiva Gounder ...1st Respondent/7th Defendant
2.Nallayammal (Deceased)
3.Palaniyappa Gounder
4.Kandayee Ammal (Deceased)
5.Kolandaivel ... Respondent 2 & 5/Defendants 1 & 4
6.Lakshmana Gounder (Deceased)
7.Perumal Gounder (Deceased)
8.Marappa Gounder ...Respondents 6 to 8/Defendants 6,8 & 9
9.L.Palanivel
10.L.Pushpa ... Respondents

R2 died memo dated 15.12.2017 is
recorded. RR4 & 5 are recorded as
LRs of the deceased R2 vide order
of court dated 20.12.2017 in
S.A.No.1077 of 1998

R4 Died memo dated 15.12.2017 is
recorded. R5 is recorded as LR of
the deceased R4 vide order of
court dated 20.12.2017 in
S.A.No.1077 of 1998

(R7 Died, Since no Relief is sought for, not necessary to implead LRS)

R6- Died,

RR9 & 10 brought on record as LRS of the deceased R6 vide order of court dated 27.08.2018 made in CMP.No.2978 to 2980 of 2018 in S.A.No.1077 of 1998

PRAYER: The Second Appeal filed under Section 100 of CPC, against the judgment and decree of the learned Subordinate Judge, Namakkal, in A.S.No.7 of 1991 dated 29.01.1998 in reversing the judgment and decree of the learned District Munsif, Rasipuram, in O.S.No.210 of 1981 dated 27.02.1991.

For Appellants	: Mr.N.Damodaran
For R1	: Mr.S.Sounthar for Mamta Pandey
For R8	:P.Mani
For RR3,5,9 & 10	:No appearance
RR2,4,6 & 7	: Died

JUDGMENT

The plaintiff in O.S.No.210 of 1981 on the file of the District Munsif Court, Rasipuram, is the appellant herein.

2. O.S.No.210 of 1981 had been filed by the plaintiff S.Kandasamy Gounder against nine defendants seeking a judgment and decree to set aside the decree in O.S.No.800 of 1959 and REP.No.81 of 1963 and the Court sale on the file of the District Munsif Court, Sankari and to declare the title of the plaintiff to the suit properties and order delivery of possession and for mesne profits at the rate of Rs.1,000/- per annum and for the costs of the suit. By judgment and decree dated 27.02.1991, the learned District Munsif, decreed the suit.

3.The Seventh defendant namely, Paramasiva Gounder filed A.S.No.7 of 1991 before the Subordinate Court, Namakkal. By judgment and decree dated 29.01.1998, the learned Sub Judge, Namakkal, allowed the appeal.

4.Challenging that judgment, the plaintiff had filed the present Second Appeal. The Second Appeal had been admitted on 22.12.1998, on the following three Substantial Questions of Law:

"1.Whether the lower appellate court erred in law and misdirected itself in non suiting the plaintiff/appellant by reversing the well considered judgment of the trial court when it is proved that the signature of the appellant/plaintiff is forged under Ex.A2 by examining PW3 Finger Print expert and by marking Ex.A15 report?

2.Whether the lower appellate court erred in law and misdirected itself in holding that the plaintiff/appellant had failed to prove fraud without properly adverting to and appreciating the evidence of PW1 to PW3 and Ex.A15?

3.Is not the lower appellate court as a final court of the fact and in reversing the judgment and decree of the lower court liable to consider and give reasons for setting aside the findings rendered by the trial court on each issues as contemplated under Order 41 Rule 31 of CPC?"

O.S.No.210 of 1981 (District Munsif Court, Rasipuram):-

5.The plaintiff S.Kandasamy Gounder had filed the suit against his mother Nallayammal, who was shown as the first defendant and other very close relatives, who were shown as the second to fifth defendants. The sixth and seventh defendants were purchasers of the property and the eight and ninth defendants were agreement holders. According to the plaintiff, the suit property was allotted to his share in a partition between himself and his elder brother by a registered partition deed dated 20.11.1957. In that partition deed, the first defendant was provided with annual maintenance till her life time at the rate of four bags of rice to be given every 30th day of Thai, according to Tamil year.

6.The plaintiff left the native place and went to Nagapattinam in 1958. He resided at Nagapattinam till 1971. He claimed that he did not have any contact with his native place.

In September 1971, the plaintiff claimed that he returned back to his native place and when he enquired about the suit property, the plaintiff came to know that his brother Kattianna Gounder had filed a suit in the name of the first defendant in O.S.No.800 of 1959 on the file of the District Munsif Court, Sankari, as if the plaintiff was in arrears of maintenance of Rs.100/- and a decree had also been obtained in the said suit. The plaintiff claimed that he had no knowledge about the said suit. It was stated that the first defendant had brought the suit property for court auction in pursuance of the decree in REP.No.81 of 1963 on the file of the District Munsif Court, Sankari. The property was sold in court auction on 07.11.1963 for Rs.1,250/- and the sale was confirmed on 12.12.1963 in favour of the second defendant, Palaniappa Gounder. The plaintiff claimed that all the transactions were fraudulent in nature and created at the instigation of brother Kattianna Gounder. It was stated that the second defendant had created a nominal sale deed on 23.02.1965 in favour of the sixth and seventh defendants. The plaintiff claimed that the said sale deed was not binding on him. In turn, the sixth and seventh defendants had entered into an agreement of sale to sell the suit property to the eighth and ninth defendants. It was claimed in the year 1963 that the suit property was worth more than Rs.35,000/-. The plaintiff had issued a notice on 27.11.1971. The sixth and seventh defendants sent a reply. It was claimed by the plaintiff that the decree and the Court auction are both void and a nullity. It was claimed that he used to sign as 'S.Kandasamy Gounder' but in the endorsement in the plaint in O.S.No.800 of 59 dated 15.12.1959, the signature was 'Kandasamy Gounder'. It was claimed that some other person had impersonated him. It was under these circumstances that the suit had been filed seeking the reliefs as stated above.

7.The seventh defendant filed a written statement which was adopted by the sixth defendant. In the written statement, it was claimed that the suit properties were charged for payment of maintenance to the first defendant as per the terms of the registered partition deed dated 20.11.1957. The first defendant was entitled to get four bags of rice every year from the plaintiff and his brother Kattianna Gounder. As the plaintiff did not pay the amount due by him, the first defendant filed O.S.No.800 of 1959 on the file of the District Munsif Court, Sankari. A decree was passed on admission. The first defendant executed the decree in E.P.No.81 of 1963. The property was brought to sale. It was sold on 7.11.1963 to the second defendant Palaniappa Gounder. The sale was confirmed on 12.12.1963. Delivery of possession was taken by the second defendant on 07.02.1964. The delivery was recorded by the Court and the Execution Petition was closed. There was a mortgage in

favour of Perianna Gounder. He exercised his rights and filed O.S.No.87 of 1961. He obtained a decree. He filed REP.No.126 of 1964 and brought the property for sale.

8.The second defendant sold portions of the property to the sixth and seventh defendants for Rs.10,000/-. The said Rs.10,000/- was paid to the decree holder/mortgagee/Perianna Gounder and receipt was obtained on 25.02.1965. Full and final satisfaction was recorded. It was claimed that the sale in favour of sixth and seventh defendants was true and valid. They also took possession. They have also improved the property. There was also a registered partition deed dated 10.05.1966 between the sixth and seventh defendants whereby, the properties purchased under the sale deed dated 23.02.1965 had been allotted to the seventh defendant. It was denied that the plaintiff resided at Nagapattinam from 1958 till 1971. It was claimed that he was aware of the suit in O.S.No.800 of 1959 and the Court sale in REP.No.81 of 1963. The Court auction purchaser was his own brother-in-law. It was claimed that the sixth and seventh defendants were bonafide purchaser for value without notice of any defect in title. It was also stated that the plaintiff had admitted his claim in O.S.No.800 of 1959 and the judgment was passed on his admission. It was stated that the decree was binding on the plaintiff. It was stated that the first defendant, mother of the plaintiff and the second defendant, brother-in-law of the plaintiff and the third and fifth defendants, legal representatives of the plaintiff's brother deliberately remained exparte in the suit. It was stated that the suit was also barred by limitation. It was claimed that the suit should be dismissed.

9.The plaintiff then filed a reply statement. In the reply statement, it was stated that the sixth and seventh defendants had personal knowledge about the absence of the plaintiff in the village from 1958 to 1971. It was reiterated that the plaintiff had no knowledge of the Court proceedings. It was claimed that the sixth and seventh defendants were not bonafide purchasers. It was claimed that the suit should be decreed.

10.The seventh defendant filed an additional written statement stating that the suit had not been properly valued and proper court fees had not been paid.

11.The sixth and seventh defendants filed a further additional written statement claiming that the plaintiff himself appeared before the District Munsif Court, Sankari, in O.S.No.800 of 1959 and had made an endorsement submitting to a decree. It was further stated that in the sale deed in favour of the sixth and seventh defendants, the wife of the plaintiff, had attested as a witness. It was therefore claimed that the

plaintiff had knowledge about the sale. It was therefore stated that the suit should be dismissed.

12.On the basis of the above pleadings, the learned District Munsif, Rasipuram, framed the following issues for trial:

- 1.Whether the decree in O.S.No.800 of 1959 has to be set aside?
- 2.Whether the auction held pursuant to R.E.P.No.81 of 1963 has to be set aside?
- 3.Whether the suit is barred in view of Section 47 CPC?
- 4.Whether the suit is maintainable?
- 5.Whether the sixth and seventh defendants are bonafide purchasers for adequate consideration?
- 6.Whether the sixth and seventh defendants have made improvements over the property and if so what is the value of the improvements?
- 7.Whether the suit is barred by the law of limitation
- 8.To what relief is the plaintiff entitled to?

13.The following additional issues were also framed for consideration:

- 1.Whether the suit is bad for not seeking to set aside the judgment in O.S.No.800 of 1959?
- 2.Whether the plaintiff had paid proper court fees?

14.During trial, the plaintiff Kandasamy Gounder, examined himself as PW1 and examined another witness Poojari Kandasamy Gounder as PW2. He also examined an handwriting expert C.V.Jayadevi as PW3. The seventh defendant Paramasiva Gounder examined himself as DW1. The plaintiff marked Exs.A1 to A17. Ex.A1 was the partition deed dated 25.11.1957. Ex.A2 was the plaint in O.S.No.800 of 1959. Ex.A4 was the copy of the notice dated 27.11.1971 and Ex.A6 was the reply notice dated 10.01.1972. Exs.A8 and A9 were the copies of the judgment and decree in O.S.No.800 of 1959. Ex.A10 was the sale deed by Palani Gounder dated 23.02.1965. Ex.A13 was the signature of the plaintiff in the endorsement in O.S.No.800 of 1959 dated 15.12.1959. Ex.A15 was the report of the PW3 dated 29.10.1983. Exs.A16 and A17 were the admitted and disputed signatures used for comparison by the handwriting expert. On the side of the

defendants Exs.B1 to B5 were marked. Ex.B1 was the auction sale certificate in R.E.P.No.81 of 1963 dated 12.12.1963. Exs.B2 and B3 were the delivery warrants dated 31.01.1964 and 07.02.1964. Ex.B4 was the full satisfaction memo in E.P.No.126 of 1964 in O.S.No.87 of 1961, Additional Sub Court, Salem. Ex.B5 was the partition deed dated 10.05.1966 between the sixth and seventh defendants.

15.On the basis of the oral and documentary evidence, by judgment dated 27.02.1991, the learned District Munsif, Rasipuram, primarily relied on the evidence of PW3, handwriting expert. The learned District Munsif, stated that the signature found in the endorsement in O.S.No.800 of 1959 of the plaintiff was not the signatures of the plaintiff. The certified copy of the document in O.S.No.800 of 1959 was used for comparison. It was claimed that the primary difference was that the first signature was signed as of 'S.Kandasamy Gounder' and the admitted signature was signed as 'Kandsamy Gounder'. It was also held that there was no proper service on the defendants in O.S.No.800 of 1959. It was therefore held that the decree in O.S.No.800 of 1959 had to be set aside and that the Court auction pursuant to the said decree were also to be set aside. Consequently, the learned District Munsif, decreed the suit.

A.S.No.7 of 1991 (Subordinate Court, Namakkal):-

16.Challenging that judgment, the Seventh defendant then filed A.S.No.7 of 1991. This appeal came up for consideration before the learned Sub Judge, Namakkal. By judgment dated 29.01.1998, the learned Sub Judge, framed necessary points for consideration and reappraised the evidence. The learned Sub Judge, however, found as a fact that, there were arrears of maintenance payable by the plaintiff to the first defendant, his own mother and also found that the judgment in O.S.No.800 of 1959 was passed only on the admission of the plaintiff. It was also found that the plaintiff had admitted that there was a charge over the property for due payment of maintenance. Moreover, PW3, handwriting expert had admitted in her evidence that she did not see the original signature for comparison and had given an opinion on the basis of an enlarged photocopy. She did not see the original signature. The learned Sub Judge therefore did not consider the evidence of PW3 as binding on the Court. The learned Sub judge also found that the court auction purchaser was the brother-in-law of the plaintiff. The subsequent sale in favour of the sixth and seventh defendants have actually been attested by the wife of the plaintiff. The learned Sub Judge therefore disbelieved the contention of the

plaintiff that he had no knowledge about the decree in O.S.No.800 of 1959, the court auction sale in favour of his brother-in-law and the subsequent sale in favour of the sixth and seventh defendants which document had been attested by his own wife. The learned Sub Judge allowed the appeal.

S.A.No.1077 of 1998:-

17.As stated above, the plaintiff then filed the present Second Appeal. The Second Appeal had been admitted on 22.12.1998, on the following three Substantial Questions of Law:

"1.Whether the lower appellate court erred in law and misdirected itself in non suiting the plaintiff/appellant by reversing the well considered judgment of the trial court when it is proved that the signature of the appellant/plaintiff is forged under Ex.A2 by examining PW3 Finger Print expert and by marking Ex.A15 report?

2.Whether the lower appellate court erred in law and misdirected itself in holding that the plaintiff/appellant had failed to prove fraud without properly adverting to and appreciating the evidence of PW1 to PW3 and Ex.A15?

3.Is not the lower appellate court as a final court of the fact and in reversing the judgment and decree of the lower court liable to consider and give reasons for setting aside the findings rendered by the trial court on each issues as contemplated under Order 41 Rule 31 of CPC?"

18.Pending the Second Appeal the plaintiff/appellant died and his legal representatives were brought on record as appellants 2 to 4. The second, fourth, sixth and seventh respondents also died and their legal representatives were also brought on record.

19.For the sake of convenience, the parties would be referred as plaintiff and defendants.

20.The first substantial question of law had been framed as if a finger print expert has an occasion to examine and compare the finger prints of the plaintiff in two different documents. As a matter of fact, PW3 was only a private handwriting expert. Even according to her, she had undergone training under late D.C.Veerappa, who was an Advocate and was claimed to be an expert. She had obtained certificate from G.T.Veerappa, Advocate and C.D.Banergaya, Expert, Nagpur. She is not an authorized handwriting expert. She had not formally studied any course to qualify as an handwriting expert. Her credentials are doubtful. She had given an opinion on the basis of comparing signatures in two Xerox copies. The entire evidence of PW3 has no worth and is not binding on this court. The evidence of the handwriting expert, if at all PW3 can be termed as an expert, is not a substantial evidence. It is only an opinion and it has to be corroborated by further evidence let in by the plaintiff. The plaintiff in this case have not let in any evidence to show that in the year 1963 he never signed as 'S.Kandasamy Gounder'. Consequently, with respect to the first substantial question of law, I hold that the Lower Appellate Court was correct in non-suiting the plaintiff by rejecting the evidence of PW3.

21.The second substantial question of law related to fraud. Fraud has to be pleaded and proved. Order 6 Rule 4 CPC is as follows:-

4.Particulars to be given where necessary:- In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

In the plaint, the plaintiff had not given the date or details of the fraud which is said to have been pleaded. He did not given the date on which he left to Nagapattinam and the date on which he returned from Nagapattinam. He did not disclose that the court auction purchaser, the second defendant was his own brother-in-law. He also did not disclose that the sale deed in favour of the sixth and seventh defendants had been attested by his own wife. The suit has to fail on the premise of deliberate suppression of relevant facts.

22.The third substantial question of law related to Order 41 Rule 31 CPC. A careful perusal of the Lower Appellate Court Judgment reveals that the Lower Appellate Court had framed the points for considerations as hereunder:

1.Whether the decree in O.S.No.800 of 1959 and the order in R.E.P.No.81 of 1963 have to be set aside?

2.Whether the sixth and seventh defendants are bonafide purchasers for adequate consideration?

3.Whether the suit is barred by limitation?

4.Whether the appeal is to be allowed?

5.To what other relief?

They are essential points to be decided in the appeal.

23.Consequently, I hold that the judgment and decree of the First Appellate Court has to be upheld and the Second Appeal has to be dismissed with costs. Accordingly, the Second Appeal is dismissed with costs. The judgment and decree of the learned Sub Judge, Namakkal, in A.S.No.7 of 1991 dated 29.01.1998 is confirmed and the judgment and decree of the learned Distirct Munsif, Rasipuram, in O.S.No.210 of 1981 dated 27.02.1991 is set aide.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To,

1.The District Munsif,
Rasipuram.

2.The Subordinate Judge,
Namakkal.

+1cc to Mr.N.Damodaran, Advocate Sr.12677

+1cc to Mr.K.Kuppusamy, Advocate Sr.12737

S.A.No.1077 of 1998

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srg 6/5/2019