



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 11.10.2018

Delivered on: 13.03.2019

WEB COPY

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THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.1422 of 2001

1.Ammasai

2.Sembulingam

... Appellants/Plaintiffs in
Trial Court

Vs.

Chinnasamy

...Respondent/D2 i Trial Court

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 02.03.2001 made in A.S.No.20 of 1999 on the file of the Principal Subordinate Judge, Vridhachalam, confirming the judgment and decree dated 12.02.1999 made in O.S.No.696 of 1986 on the file of the Principal District Munsif, Vridhachalam.

For Appellants : Mr.N.Mani Narayanan

For Respondent : No appearance
Set exparte

JUDGMENT

This Second Appeal has been filed by the plaintiffs against the judgment and decree passed by the Principal Subordinate Judge, Virdhachalam in A.S.No.20 of 1999 dated 02.03.2001 confirming the judgment and decree passed by the Principal District Munsif, Virdhachalam in O.S.No.696 of 1986 dated 12.02.1999.

2. The appellants herein had filed a suit in O.S.No.696 of 1986 on the file of the Principal District Munsif, Virdhachalam to declare that the suit property absolutely belongs to the second plaintiff and to restrain the defendants by means of permanent injunction from interfering with their peaceful possession and enjoyment of the same; alternatively for possession of the suit property. The learned Principal District Munsif, Virdhachalam, by the judgment and decree dated 12.02.1999 had dismissed the said suit without costs. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.20 of 1999 on the file of the Principal Subordinate Judge, Virdhachalam. The learned Principal Subordinate Judge, Virdhachalam by the judgment dated 02.03.2001 had dismissed the



said appeal without costs confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the plaintiffs have filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial Court.

3. The averments made in the plaint are in brief as follows:-

The suit property is measuring 2 1/2 cents of land. The suit property and the adjacent property which is situated on the northern side measuring 2 1/2 cents totally 5 cents were originally belong to one Arumuga Padaiyachi. Out of 5 cents, on the northern side, 2 cents belonged to the said Arumuga Padaiyachi as his ancestral property. Remaining 3 cents originally belonged to one Kesavan. The said Kesavan had mortgaged the said 3 cents by usufructuary mortgage for a sum of Rs.25/- on 06.09.1940 and handed over the possession of the said property to the said Arumuga Padaiyachi. Subsequently, in the year 1948, the said Kesavan had sold the said 3 cents to the said Arumuga Padaiyachi. Thereafter, even during the life time of the said Arumuga Padaiyachi, his sons Govindasamy and Kanjamalai orally partitioned, the entire 5 cents of land and in the said partition Govindasamy was allotted 2 ½ cents on the northern side and Kanjamalai was allotted 2 ½ cents on the southern side. From the date of said partition, the said Govindasamy and Kanjamalai were in exclusive possession of their respective share. The said Kanjamalai had sold his 2 ½ cents land with specific boundaries to the first plaintiff under a registered sale deed dated 21.08.1980. Since a mistake crept in the said document with regard to Survey number and total extent of the said survey number, subsequently on 31.10.1985 the said Kanjamalai had executed a rectification deed. Subsequently, in the oral partition which took place in the plaintiffs' family, the suit properties were allotted to the share of the second plaintiff. The defendants are not having any right over the suit property. Since the plaintiffs have been in possession and enjoyment of the suit property for several 12 years, they have perfected title by adverse possession also. Recently, the defendants tried to trespass into the suit property and hence, the plaintiffs were constrained to file the above suit for the aforesaid relief.

4. During the pendency of the suit property, the first defendant died. The second defendant alone contested the suit by filing the written statement.



5. The averments made in the written statement filed by the second defendant are in brief as follows:-

The allegations that the suit property and the adjoining property which is situated on the northern side measuring 2 ½ cents and totally 5 cents originally belonged to Arumuga Padaiyachi are all false. The allegations that out of 5 cents on the northern side, 2 cents belonged to Arumuga Padaiyachi as his ancestral property and the remaining the 3 cents belonged to one Kesavan and the said Kesavan created usufructuary mortgage in favour of the said Arumuga Padaiyachi and subsequently, the said Kesavan sold the said 3 cents in favour of Arumuga Padaiyachi in the year 1948, are all false. It is also false to state that the sons of Arumuga Padaiyachi namely, Govindasamy and Kanjamalai had orally partitioned the said 5 cents and in the said oral partition 2 ½ cents on the northern side was allotted to the said Goindasamy and 2 ½ on the southern side was allotted to the said Kesavan. It is also false to state that the said Kanjamalai sold his share in favour of the first plaintiff on 21.08.1980 and subsequently, a rectification deed was executed on 31.10.1985. It is also false to state that in the oral partition the suit property was allotted to the share of the second plaintiff. The plaintiffs never enjoyed the suit property at any point of time. The properties situated on the south of the suit property belong to the defendant's father ancestrally. The suit property originally belonged to one Sempayee. The said Sempayee had sold 3 cents of the land in favour of one Veeran. The said Veeran had sold 3 cents of land including the suit property in favour of the defendant's father Sempayee. From the date of purchase, the defendant's father had been in possession and enjoyment of the entire 3 cents. In the partition, the said 3 cents were allotted to the share of the second defendant. The second defendant had constructed a house and has been in possession and enjoyment of the same, in which the plaintiffs are not having any right. The second defendant and his predecessors in title have been in possession and enjoyment of the suit property for several 12 years, and thereby perfected title by adverse possession also. Therefore, the second defendant prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned Principal District Munsif, Virdhachalam, had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the first plaintiff examined himself as PW1 and they also examined one more witness as PW2. They have marked Exs.A1 to Ex.A28 as exhibits. On the side of the second defendant, the second defendant examined himself as DW1 and he also examined one more witness as DW2. He has marked Exs.B1 to Ex.B10 as exhibits.



7. The learned Principal District Munsif, Virdhachalam, after considering the materials placed before him found that the plaintiffs failed to prove their title over the suit property. He further found that the suit property is in possession of the second defendant. Accordingly, he dismissed the suit without costs. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.20 of 1999 on the file of the Principal Subordinate Judge, Virdhachalam. The learned Principal Subordinate Judge, Virdhachalam had dismissed the said appeal confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the plaintiffs have filed the present second appeal.

8. This Court, at the time of admitting the second appeal, has formulated the following substantial questions of law:-

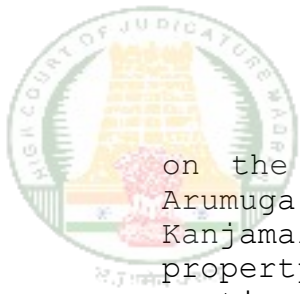
" 1. Whether the Courts below are legally right in not taking note of the facts mentioned in the boundary recitals in a registered document?

2. Whether the Courts below are right in ignoring the admission of fact by a witness, which will support the case of the other side?"

9. Heard, Mr.N.Mani Narayanan, the learned counsel for the appellants. Though the respondent after receipt of the notice initially entered appearance through counsel, subsequently, he remained exparte and hence, after hearing the arguments of the learned counsel for the appellants and perusing the records, judgment is being passed in the second appeal.

10. Substantial Questions of law 1 and 2 :

The learned counsel for the appellants has submitted that the Courts below failed to consider that in Ex.A2 dated 26.09.1940 itself, it is stated that on the south and east of the property which was mortgaged under the said document, Arumuga Padaiyachi's land is situated. He further submitted that since in Ex.A2 itself it is stated that Arumuga Padaiyachi had got land adjacent to the property covered under Ex.A2, the Courts below ought not to have held that the plaintiffs failed to prove that the said Arumuga Padaiyachi got ancestral property adjacent to the property mortgaged under Ex.A2 mortgage deed. He further submitted that very fact that the plaintiffs have produced the original usufructuary mortgage deed (Ex.A2) itself would show that the original mortgagor namely, Kesavan had sold the mortgaged property to the said Arumuga Padaiyachi. He further submitted that the oral and documentary evidence adduced



on the side of the plaintiffs would establish that the said Arumuga Padaiyachi and his sons namely, Govindasamy and Kanjamalai had been in possession and enjoyment of the said property along with their ancestral property peacefully and continuously for more than statutory period of 12 years and thereby they have perfected title by adverse possession also. He further submitted that the Courts below failed to consider that in the oral partition which took place in the family, the northern portion of 2 ½ cents allotted to the share of Govindasamy and southern portion of 2 ½ cents allotted to the share of Kanjamalai and subsequently, the said Kanjamalai had sold the said 2 ½ cents on the southern side to the first plaintiff under Ex.A1 sale deed. He further submitted that the second defendant is claiming right over the Suit property based on the sale deed dated 09.01.1961 executed by one Veeran in favour of the second defendant's father Semban. He further submitted that in the said sale deed itself, one of the boundaries mentioned as Govindasamy Padaiyachi's usufructuary mortgage land and the said land was purchased by the said Arumuga Padaiyachi and subsequently by the Plaintiffs and the same is the suit property. He further submitted that the oral and documentary evidence adduced by the Plaintiffs would clearly show that the suit property has been in possession and enjoyment of the Arumuga Padaiyachi and his sons from the date of Ex.A2 dated 26.09.1940 and therefore, the second defendant's father Semban could not have got title or possession of the suit property under Ex.A11. He further submitted that from the date of purchase of the said 2 ½ cents, the first plaintiff was in possession and enjoyment of the same and subsequently in the oral partition, the said property has been allotted to the share of the second plaintiff but the Courts below without appreciating the evidence in a proper prospective, had dismissed the plaintiffs' suit and hence, he prayed to allow the second appeal and set aside the judgment and decree passed by the Courts below and decree the suit as prayed for.

11. The suit property is admeasuring 2 ½ cents of vacant site situated in S.No.110/5 of Kotteri Village, Mangalampettai sub division bounded on the north by the second plaintiff's land; on the east by Sivanantham's land; south by Chinnasamy's house; west by the plaintiffs' house. According to the plaintiffs, one Kesavan got 3 cents in S.No.110/5 and the said Kesavan had mortgaged (usufructuary mortgage) the said property to one Arumuga Padaiyachi under a registered mortgage dated 26.09.1940 for a sum of Rs.25/-. Their further case is that subsequently in the month of Chitirai 1948, the said Kesavan had orally sold the said property to the said Arumuga Padaiyachi for a sum Rs.50/-. Their further case is that on the northern side adjacent to the aforesaid property, the said Arumuga Padaiyachi



already got 2 cents of ancestral property and from the date of the aforesaid mortgage, the said Arumuga Padaiyachi and his family members had enjoyed both the properties jointly. Their further case is that subsequently the sons of Arumuga Padaiyachi namely, Govindasamy and Kanjamalai had orally partitioned the said 5 cents and in the said oral partition, 2 ½ cents on the northern side was allotted to Govindasamy and 2 ½ cents on the southern side was allotted to Kanjamalai and subsequently, the first plaintiff had purchased the aforesaid Kanjamalai's share of 2 ½ cents under Ex.A1 sale deed dated 21.08.1980 and subsequently the survey number had been rectified on 31.10.1985 vide Ex.A3.

12. The case of the second defendant is that on 09.08.1944, after the death of the said Kesavan, his wife namely, Sembayee and her children had sold the property which is covered under Ex.A2 mortgage deed, in favour of one Veeran and the said Veeran in turn sold the said property under Ex.A11 dated 09.01.1961 in favour of the defendants' father namely, Semban and subsequently, in the oral partition, the said property was allotted to the share of the second defendant and hence, he is in possession and enjoyment of the same.

13. The learned counsel for the appellants, relying upon the recital found in Ex.B1 = Ex.B10 that "கோவிந்தசாமி பட்டையாச்சி போக்கியத்திற்கு தெற்கு " contended that the property which was mortgaged under Ex.A2 was not sold under Ex.B1 = Ex.B10. He further contended that the aforesaid recital would refer to the property which was mortgaged under Ex.A2. This Court is not able to accept the said contention, because it is not the case of the plaintiffs that the said Kesavan had mortgaged the property in favour of Govindasamy. As per Ex.A2 the said Kesavan had mortgaged the property only in favour of Arumuga Padaiyachi and therefore, from the recitals found in Ex.B1-Ex.B10, it cannot be inferred that the abovesaid boundary referred to the property mortgaged under Ex.A2.

14. In the plaint, the plaintiffs have stated that in the month of Chitirai 1948, the original mortgagee Kesavan had orally sold the mortgaged property in favour of Arumuga Padaiyachi. The first plaintiff while examining himself as PW1 has deposed reiterating the contention made in the plaint. It is to be pointed out that the first plaintiff had purchased the property only on 21.08.1980 and before that he was not at all connected with the said property and that being so, he could not have any personal knowledge about the alleged oral sale took



place in the year 1948. PW2 is son of the vendor of the first plaintiff and he also stated that in the year 1948, his grand father Arumuga Padaiyachi had purchased the suit property orally. He was examined before the trial Court on 15.09.1998 and at that time his age has been mentioned as 48, so, he would have born in the year 1950. So, even before his birth it was alleged that the property was sold and as such, his evidence also would not help the plaintiffs' case. No other witnesses examined on the side of the plaintiffs to show that in the year 1948, the original mortgagor Kesavan had sold the property to Arumuga Padaiyachi orally.

15. It is also to be pointed out that , if really the said property was sold to Arumuga Padaiyachi orally in the year 1948 and based on the same, mutations would have been made in the revenue records. The plaintiffs have not produced any revenue records like patta, chitta, etc., to show that the property had been in possession and enjoyment of the Arumuga Padaiyachi and his sons since 1948. It appears that since the original mortgage deed (Ex.A2) has been in possession of the first plaintiff's vendor Kanjamalai, who is being the son of the mortgagee Arumuga Padaiyachi, the said Kanjamalai had sold the suit property to the first plaintiff under Ex.A1 by saying that his father Arumuga Padaiyachi got the suit property under oral sale.

16. It is also to be pointed out that if really the property which was mortgaged under Ex.A2 had been clubbed with the ancestral property of Arumuga Padaiyachi and subsequently, the sons of the said Arumuga Padaiyachi namely, Govindasamy and Kanjamalai had orally partitioned the said properties and in the said oral partition the northern half was allotted to Govindasamy and southern half to as allotted to Kanjamalai, in Ex.A1 sale deed, the northern boundary should have been mentioned as Govindasamy's land but no such recital is found in Ex.A1. In the rectification deed (Ex.A2) also, only survey number changed, but boundaries and extent not changed.

17. As already pointed out that Ex.B1 = Ex.B10 would show that on 09.01.1944, the wife and children of the said Kesavan had sold including the property in favour of one Veeran and the said Veeran in turn vide Ex.A11 had sold the said property on 09.01.1961 in favour of the defendants' father Semban. The Courts below taking into consideration of all the aforesaid facts categorically found that the plaintiffs failed to prove that the original mortgagor Kesavan had orally sold the mortgaged property in favour of Arumuga Padaiyachi and on the



contrary, the second defendant had proved that his father had purchased the suit property from the lawful owners and he is also in possession of the suit property. In the said factual concurrent findings, this Court cannot interfere and therefore, the substantial questions of law are answered against the appellants.

18. In the result, the Second Appeal is dismissed. No costs.

Sd/-

Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

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To

1.The Principal Subordinate Judge,
Vridhachalam.

2.The Principal District Munsif,
Vridhachalam.

copy to
The Section Officer
VR Section
High Court Madras

S.A.No.1422 of 2001

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