

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.04.2019

PRONOUNCED ON:03.06.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1288 of 2006
and M.P.No.2 of 2006

Loganathan ...Appellant/Defendant
Vs.

1. Lakshmanan Alias Dasarathan
2. Govindan
3. Nandagopal
4. Gopi

...Respondents/Plaintiffs

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 13.09.2005 passed in A.S.No.8 of 2005 on the file of the Subordinate Judge Court, Ranipet, reversing the judgment and decree dated 05.08.2004 in O.S.No.98 of 1995 on the file of the District Munsif Court, Arakonam.

For Appellant : M/s.J.Jayalakshmi
for M/s. Paul and Paul

For Respondents : Mr.N.Manokaran
for M/s.G.Jeremiah

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 13.09.2005 passed in A.S.No.8 of 2005 on the file of the Subordinate Court, Ranipet reversing the judgment and decree dated 05.08.2004 passed in O.S.No.98 of 1995 on the file of the District Munsif Court, Arakonam.

The second appeal has been admitted on the following substantial questions of law.

a. Whether the lower appellate court was right in law in placing reliance on the Will marked as Ex.A5, to conclude the ownership of the property without establishing the alleged partition under which the testator gained title to the property?

b. Whether the lower appellate court was right in law in rejecting the finding of the Trial court regarding the partition effected

in favour of Murugesu Naicker, the predecessor-in-title of the appellant, without any valid reason?

c. Whether the lower appellate court ought to have drawn an adverse inference against the plaintiff for not examining Murugesu Naicker and Raman Naicker?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. For the sake of convenience, the parties are referred to as per the rankings in the trial court.

5. Suffice to state that the suit has been laid by the plaintiffs against the defendant for declaration, possession and mense profits.

6. Briefly stated according to the plaintiffs, the suit property belonged to their paternal grandfather Raju Naicker by way of registered sale deeds dated 29.12.1959 and 17.02.1972 and he had bequeathed the suit property in favour of the plaintiffs by way of a registered Will dated 22.04.1972 and in the oral partition effected between the Raju Naicker and his sons, the suit property and other properties had come to be allotted to the share of Raju Naicker as mentioned in the abovesaid Will and the plaintiffs were minors at the time of the execution of the Will and only recently the plaintiffs came to know about the execution of the Will in respect of the suit property by their grandfather and on verification, finding that the defendant is in the unlawful possession and enjoyment of the suit property and accordingly directed the defendant to surrender the possession of the suit property by way of a legal notice and instead of complying with the demand, the defendant repudiated the claim of the plaintiffs by sending a reply notice containing false allegations, hence according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs.

7. The defendant resisted the plaintiffs' suit contending that in the partition effected between Raju Naicker and his sons, the suit property was allotted to Murugesu Naicker and Murugesu Naicker sold the same to Raman Naicker and Raman Naicker had sold the same to one K.S. Shanmugam. Thereafter the abovesaid K.S. Shanmugam had sold the suit property to the defendant and accordingly it is stated that it is only the

defendant and his predecessors in interest are in the possession and enjoyment of the suit property and by way of their long and continuous possession had prescribed title also by way of adverse possession and therefore the plaintiffs are not entitled to claim any interest or title to the suit property and thereby sought for the dismissal of the suit.

8. In support of the plaintiffs' case, P.Ws.1 to 4 were examined. Exs.A1 to A14 were marked. On the side of the defendant, D.Ws.1 to 3 were examined. Exs.B1 to B16 were 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 the plaintiffs' suit. On appeal, the first appellate court was pleased to set aside the judgment and decree of the trial court and decreed the suit in favour of the plaintiffs as prayed for. Impugning the same, the present second appeal has been preferred.

10. It is not in dispute that the suit property and other properties originally belonged to the plaintiffs' paternal grandfather Raju Naicker. It is pleaded by the plaintiffs that the suit property in particular, had been acquired by Raju Naicker by way of the sale deeds dated 29.12.1959 and 17.02.1972. The abovesaid sale deeds are marked as Exs.A1 and A2. From Exs.A1 and A2, it is found that and as rightly put forth by the plaintiffs, the suit property had been acquired by Raju Naicker independently and accordingly the suit property is found to be the absolute property of Raju Naicker. In the pre-suit notice issued by the plaintiffs marked as Ex.A3, it has been clearly averred that the suit property is the absolute property of Raju Naicker and Raju Naicker had been exercising the absolute ownership over the same, and bequeathed the same in favour of the plaintiffs under the registered Will dated 22.04.1972. In the reply notice sent by the defendant marked as Ex.A4, the defendant had taken the defence that the suit property and other properties are the joint family properties of Raju Naicker and in the partition effected, the suit property had been allotted to Murugesu Naicker, S/o Raju Naicker and that Murugesu Naicker sold the same to Raman Naicker and Raman Naicker, in turn sold the same to Shanmugam and Shanmugam sold the same to the defendant. Therefore, for the first time, it is the defendant who had taken the plea that the suit property and other properties are the joint family properties of Raju Naicker and his sons and on the other hand, as above noted, when from Exs.A1 and A2 sale deeds, it is found that the suit property had been acquired by Raju Naicker independently and absolutely, it

could only be determined that the suit property is the absolute property of Raju Naicker and accordingly it could be further seen that Raju Naicker would be entitled to deal with the suit property as he desires.

11. No doubt, in the Will executed by Raju Naicker in favour of the plaintiffs marked as Ex.A5, there is a recital that the suit property had been allotted to the share of Raju Naicker. Even therein, there is no recital that the suit property had been treated as the joint family property. While effecting the partition between Raju Naicker and his sons, the suit property had been allotted to the share of Raju Naicker. Ex.A5 Will recites that when the partition had been effected in the family, the suit property had been allotted to the share of Raju Naicker along with other properties. Accordingly, left with no other alternative, it is found that the plaintiffs had been necessitated to plead that the suit property had been allotted to the share of Raju Naicker in the family partition. Even in the plaint, the plaintiffs have not pleaded that the suit property, as such, had been treated as the joint family property of Raju Naicker and his sons. However, the fact remains that though the parties claim that some partition had been effected between Raju Naicker and his sons and put forth that the family members effected the oral partition, neither the plaintiffs nor the defendant are able to place any concrete evidence as regards the properties available for the partition with the family, the mode of partition of the family properties and other properties and the allotment of various shares to the family members. When as above pointed out, the suit property had been acquired by Raju Naicker, in his independent capacity, in such view of the matter, accordingly it is found that when the family had effected the partition, he had chosen to take the suit property towards his share along with the other properties and accordingly described the same in the Will executed by him marked as Ex.A5. On the side of the defendant, in particular, there is no material to hold that the suit property had been treated and enjoyed as the joint family property by Raju Naicker and his sons. Merely because the suit property was also the subject matter of the partition effected between Raju Naicker and his sons, on that ground alone, it cannot be held that the sons of Raju Naicker had a pre-existing right to the suit property for seeking a right of share in the same at the time of the family partition.

12. In the light of the abovesaid factual matrix, when according to the defendant, the suit property is the joint family property of Raju Naicker and his sons and on the other hand, when the materials placed on record go to disclose that,

particularly Exs.A1 and A2, the suit property is the absolute property of Raju Naicker and accordingly Raju Naicker had the full right over the same and though there is no material found that the suit property had been allotted to Raju Naicker in the family partition, equally when there is no material on the part of the defendant that the suit property had been treated and enjoyed as the joint family property by the sons of Raju Naicker at any point of time, the only conclusion that could be arrived at is that the suit property belonging to Raju Naicker absolutely and on that reasonings, it is found that while effecting the family partition, the suit property had come to be allotted to Raju Naicker, as such and in such view of the matter, the case projected by the plaintiffs that the suit property is the property belonging to Raju Naicker has been rightly determined by the first appellate court, in the preponderance of probabilities. Contra to the abovesaid factual matrix, there is no proof as above pointed out on the part of the defendant to hold that the suit property had been treated and enjoyed as the joint family property by the sons of Raju Naicker and others. The factum that the suit property was also the subject matter of the family partition, on that score alone, we cannot infer that the suit property had been thrown into common hotchpot by Raju Naicker and the same had been enjoyed in common by Raju Naicker and his sons and accordingly the suit property is the joint family property as projected by the defendant. Other than the bare averment that the suit property is the joint family property, there is no proof placed on the part of the defendant to establish the same as above pointed out and in such view of the matter, the case of the defendant that the suit property had been allotted to the share of Murugesha Naicker and Rama Naicker in piecemeal, as such, cannot be readily accepted. When there is no proof worth acceptance on the part of the defendant that the suit property had been allotted to Murugesha Naicker and Raman Naicker as put forth, it is found that Murugesha Naicker and Raman Naicker would not be competent to alienate the suit property in favour of Shanmugam and resultantly, it is found that Shanmugam would not be legally competent to convey the same in favour of the defendant.

13. Accordingly, it is found that inasmuch as, the defendant is found to have obtained the sale deed from the persons not having a valid title to the suit property, it is seen that he has also taken the plea of adverse possession for sustaining his claim of title to the suit property. However, considering the materials placed on record by the defendant, particularly, when the defendant has not pleaded as to when and from what point of time, he and his predecessors in interest had been asserting title to the plaintiffs and Raju Naicker and when the materials

placed on record by the defendant are found to be only based upon the invalid sale deed dated 08.10.1990 and further accordingly when the Kists receipts and other revenue documents projected by the defendant, as such, cannot be readily accepted for sustaining the plea of adverse possession putforth by the defendant and when the defendant has failed to establish his open, continuous, uninterrupted possession and enjoyment of the suit property to the knowledge of the plaintiffs and Raju Naicker with animus possidendi beyond the statutory period, there is no question of acceding to the adverse title projected by the defendant.

14. The case has been projected by the defendant that the plaintiffs' father and one Mr. Vedha Naicker, the another son of Raju Naicker had attested sale deeds and therefore contended that the plaintiffs are estopped from questioning the title of the defendant qua the suit property. From the attestation of the documents by the plaintiffs' father, the same by itself, would not lead to the assumption or inference that he had attested the sale deeds concerned, after knowing the contents thereon in entirety. Furthermore, when it is found that the plaintiffs are claiming title to the suit property only based upon the Will executed in their favour by their paternal grandfather Raju Naicker and not claiming title to the suit property through their father, even assuming for the sake of arguments, that their father had attested the sale deeds as putforth by the defendant, the abovesaid factor would not in any manner, prevent or estop the plaintiffs for asserting their title and claim the suit property as per law, based upon Ex.A5 Will. Therefore, the attestation of the sale deeds by the plaintiffs' father would not dis-entitle the plaintiffs to claim right to the suit property based on Ex.A5 Will.

15. As regards the proof and validity of Ex.A5 Will, the plaintiffs had examined the attesor as P.W.2 and P.W.2 has clearly deposed about the execution of the Will Ex.A5 in favour of the plaintiffs by Raju Naicker out of his own volition and in a fit state of mind and clearly deposed about the execution of the same by Raju Naicker with the knowledge of the contents thereof and his attestation and the attestation of the other witness and the witnessing of their attestation by Raju Naicker and when his evidence in toto satisfied all the requirements necessary for the proof of the Will and despite the cross examination, nothing having been elicited from him to disbelieve his evidence in any manner, in such view of the matter, as determined by the first appellate court, the plaintiffs have also established the truth and validity of Ex.A5 Will executed by their paternal grandfather Raju Naicker in respect of the suit property .

16. Though there is some delay on the part of the plaintiffs to enforce the Will, that delay has been properly explained by the plaintiffs and immediately on coming to know of the Will in their favour, it is seen that they had asserted their claim of title to the suit property and in any event, the suit laid by the plaintiffs is based on title and when the defendant is found to be in unlawful possession and enjoyment of the suit property and as above discussed and pointed out, the defendant has failed to establish his claim of adverse title to the suit property or his claim of valid title to the suit property, based on the sale deed dated 08.10.1990 as well as his predecessors in interest, title to the suit property, in all, it is seen that as determined by the first appellate court, it is only the plaintiffs, who are entitled to the suit property based on Ex.A5 Will and when the plaintiffs are found to have established the entitlement of Raju Naicker to the suit property and his legal competency to execute the Will qua the same in favour of the plaintiffs and when the plaintiffs had established the truth and validity of Ex.A5 Will and when the defendant had failed to establish his claim of valid title and his predecessors in interest valid claim of title to the suit property and also failed to establish his adverse claim to the suit property, in all, I do not find any valid reason to interfere with the judgment and decree of the first appellate court for upholding the plaintiffs' case.

17. In support of his contentions, the plaintiffs' counsel placed reliance upon the decisions reported in

1. 2005 (1) CTC 11 [Janaki Devi Vs. R.Vasanthi and others]
2. 2003 (4) CTC 470 [Dr.Shantha Vs. Sharada]
3. 2005(5) CTC 207 [Pentakota Satyanarayana and others Vs. Pentakota Seetharatnam and others]
4. 2008 (4) CTC 589 [Muniammal Vs. Annadurai (deceased) and 7 others]
5. 2005 (1) CTC 11 [Janaki Devi Vs. R.Vasanthi and others]
6. AIR 1999 SC 1441 [Vidhyadhar Vs. Manikikrao and another]
7. 2003 (1) CTC 745 (DB) [K.A.Selvanachi and another Vs. Dr.S.R.Sekar and another]
8. 2018 (4) CTC 373 [Ramadoss Vs. Subbayan and another]

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

18. In the light of the above discussions, the substantial questions of law formulated in the second appeal are accordingly answered in favour of the plaintiffs and against the defendant.

19.In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Subordinate Judge,
Ranipet.

2.The District Munsif,
Arakonam.

Copy to: The Section Officer, VR Section,
High Court, Chennai.

+1 cc to M/s.Paul & Paul,Advocate Sr.No. 44962

+1 cc to M/s.P.Krishnan,Advocate Sr.No. 44639

AKM/05.12.19/8P-6C /

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