

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.07.2019

CORAM

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1118 of 2004

Dandabani Asari

... Appellant/1st Respondent/
Plaintiff

versus

1. Thanikachalam
2. Thananjayan
3. Sundaram
4. Mayakrishnan
5. Govindammal (Died)

... Respondents/Appellants/
Defendants

(4th respondent is recorded as legal representative of the deceased 5th respondent viz., Govindammal vide order dated 12.07.2019 made in S.A.No.1118 of 2004 as per memo dated 12.07.2019 are recorded in USR No.20228/19.)

Prayer:

Second Appeal is filed under Section 100 of code of Civil Procedure against the decree and judgment dated 15.11.2002 made in A.S.No.56 of 2002 on the file of the Additional District Court (Fast Track Court No.2), Cuddalore reversing the judgment and decree dated 29.11.1993 made in O.S.No.293 of 1991 on the file of Additional District Munsif Court, Cuddalore.

For Appellant : Mr.T.S.Baskaran

For Respondents : No Appearance

JUDGMENT

The plaintiff who was successful in his suit for declaration of his title and injunction over the suit property before the trial Court, but, lost the same before the first Appellate Court, has come forward before this Court in this second appeal.

2. The brief facts on which the plaintiff rests his cause of action are:

- Certain Nallathambi held a piece of agricultural land

measuring an extent of 38 cents as his ancestral property. Nallathambi was married twice. His first wife was Mahalakshmi, to whom the plaintiff was born. After the demise of Mahalakshmi, Nallathambi married the fifth defendant, and to them was born the fourth defendant.

- Be that as it may, the plaintiff had laid O.S.No.745 of 1961 against his father and the fourth defendant for partition. The said suit was decreed, and subsequently a final decree came to be passed. As per the final decree, the eastern 6 cents was allotted to the share of the plaintiff, and the western 16 cents was allotted to the share of the fourth defendant, and the middle 16 cents was allotted to Nallathambi.
- While so, the fourth defendant had sold the plot allotted to him in the partition suit to third parties under Ext.A.6, sale deed dated 19.03.1975.
- Subsequently, Nallathambi died in 1982. The plaintiff would now claim that on the demise of his father, plaintiff succeeded to the 16 cents allotted to Nallathambi in the aforesaid partition suit and in lieu of his share in the same, the fourth defendant was allotted some other properties of Nallathambi. It is on this footing the plaintiff became entitled to 6 cents on his own, and 16 cents obtained through his father, he laid the suit for declaration that he was entitled to 22 cents.

3. All the defendants contested the suit. The defendants would deny plaintiff's title to the middle 16 cents allotted to Nallathambi and that on the demise of Nallathambi, his plot of 16 cents devolved on the fourth and the fifth defendants, from whom defendants 1 to 3 had purchased 11 cents under Ext.B.2. The balance 4 cents continue to be with defendants 4 and 5.

4. Before the trial Court, both sides adduced oral and documentary evidence. The trial Court found merit in the plaintiff's case and decreed the suit. The first defendant moved the first appellate Court, with A.S.No.56 of 2002. The first Appellate Court reversed the decree of the trial Court on two grounds;

- A) That when the plaintiff laid the suit for declaration of his title, he had already sold the eastern 6 cents which was allotted to him in the partition suit to strangers, and therefore, having already parted with that 6 cents, plaintiff's suit for declaration of a plot of 22 cents including the 6 cents which he had already sold cannot be

maintained.

- B) That in the sale deeds executed by the plaintiff in favour of strangers as concerning the eastern 6 cents, the western boundary is shown not to be his property or his father's property but, that of the defendants.

5. Aggrieved by the decree of the first appellate Court, the plaintiff has now preferred this appeal. This appeal is admitted on the following substantial question of law;

'Whether the judgments and decrees of the courts below are sustainable in law, as the entire evidence which is relevant to decide the issue and the relevant question of fact applicable to the facts of the case were not taken into consideration?'

6.1 The learned counsel for the appellant submitted that the substantial facts in this case are admitted except for a small portion. The admitted part is that in the final decree in O.S.No.745 of 1961, the plaintiff was allotted the eastern 6 cents, and the middle 16 cents was allotted to his father Nallathambi, and western portion was allotted to the defendants 4 and 5. He further argued:

- The fact that the middle plot was allotted to the father will be borne out by the fact that the 4th defendant had sold his 16 cents obtained under the aforesaid final decree under Ext.A6 sale deed dated 19.03.1975 to certain Jayalakshmi Ammal. In the boundary description of the said property, the western boundary was shown to be Nallathambi's plot.
- Subsequently, Ext.B1-sale deed dated 07.11.1980 was executed by the plaintiff in favour of Amirthammal. In describing the property covered under Ext.B1-sale deed, the same is denoted as the eastern 6 cents of the middle plot.
- Ext.B2 is the sale deed, executed jointly by the defendants 4 and 5 in favour of Kandasamy Achari, father of the defendants 1 to 3. This details with 11 cents and the eastern boundary is shown to be that which belonged to the vendors. In Tamil, it is recorded as (எங்கள் வகையறா).

The learned counsel submitted this would only imply that the defendants 4 and 5 refer only to the family and not to themselves.

6.2 Turning to the First Appellate Court judgment, the learned

counsel submitted that the First Appellate Court dismissed the suit solely on the ground that the description as provided in the plaint are not clear enough to grant a decree, and that the plaintiff has not disclosed Ext.B1 sale deed. The learned counsel argued that the Court has ample power to pass a decree on the basis of facts proved.

7. Private notice through registered post has been served on the respondents, and they did not enter appearance before this Court. Their names are also repeatedly printed in the cause list.

8. The basic premise in this case is the final decree is passed in O.S.No.745 of 1961. As regards the plaintiff's assertion that he was allotted eastern 6 cents, there is no dispute from the defendants. The dispute is all about title to the middle 16 cents that was allotted to Nallathambi. The plaintiff does not plead here that the defendants 4 and 5 are not entitled to any share in this plot at all, but instead would plea that they were allotted some shares in some other property. This allegation was not proved by the plaintiff. This would imply that in the middle plot, the plaintiff and the defendants 4 and 5 would be entitled to equal shares.

9. As observed by the First Appellate Court, there is no degree of confusion as to where exactly the property in relation to which the plaintiff seeks title is located. However, it is an indisputable fact that the plaintiff is entitled to 6 cents which he had obtained under the final decree in O.S.No.745 of 1961 and another 5.3 cents towards his share in his father's 16 cents. In all, the plaintiff would be entitled to 11.3 cents. Out of this, 6 cents had already been sold. This would leave him to take the remaining extent in the middle plot, along with defendants 1 to 3. In this regard, it has to be found that the trial Court has made a categorical finding that the defendants too have not clarified how the plaintiff, one of the co-sharers is excluded from succeeding to the property of Nallathambi.

10. The first appellate court has short circuited the entire issue, which is plainly unacceptable. While it felt confused as to the extent of property in relation to which plaintiff has title, this court is able to demonstrate that it is not a difficult job, and that the first appellate court has missed an opportunity to do that which this court now does.

11. Taking into consideration the duration of this litigation since 1991, this Court does not want to drive the plaintiff to another litigation when his entitlement to 5.3 cents is established. Therefore, this Court grants a qualified decree declaring the title of the plaintiff to a bare 5.3 cents out of 22 cents as claimed in the suit. The identification of

this plot may have to be legal and this may require a suit either for partition or for demarcation or for recovery of possession as the case may be. Those view is left open for the present.

12. In conclusion, this appeal is partially allowed and the judgment and decree of the First Appellate Court, dated 15.11.2002 made in A.S.No.56 of 2002 is set aside and the plaintiff's title to 5.3 cents out of 22 cents scheduled in the plaint is hereby declared. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

tsg/ssn

To

1. The Additional District Court
(Fast Track Court No.2),
Cuddalore.
2. The Additional District Munsif Court,
Cuddalore.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.T.S.Baskaran, Advocate, S.R.No.59402

S.A.No.1118 of 2004

RSI (CO)
CS/30/11/2020

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