

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgment 25.10.2019	Date of Pronouncing Judgment 31.10.2019
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THE HONOURABLE MR. JUSTICE P.RAJAMANICKAM

S.A.No.2203 of 2004

AND

CMP.No.19403 of 2004

K.Archunan

...Appellant/2nd Defendant

Vs.

1.V.Rajamanickam

...Ist Respondent/Plaintiff

2.Pavayee

3.Subbaiyyan

4.Senthilkumar

5.Velusamy

...Respondents 2 to 5/LRS of
the Ist Appellant in A.S.46/2002

Prayer:- Second Appeal filed under Section 100 of the Civil Procedure Code, 1908 against the Judgment and Decree dated 27.04.2004 made in A.S.No.46 of 2002 on the file of the Principal District Judge, Namakkal, confirming the Judgment and Decree dated 28.03.1996 made in O.S.No.823 of 1994 on the file of the Principal District Munsif Court, Namakkal.

For Appellant : Mr.S.Senthil

For Respondents 2 to 5 : Mr.P.Valliappan
R1 - set exparte

J U D G M E N T

This Second Appeal has been filed by the second defendant against the Judgment and Decree passed by the Principal District Judge, Namakkal in A.S.No.46 of 2002 dated 27.04.2004, confirming the Judgment and Decree passed by the Principal District Munsif, Namakkal in O.S.No.823 of 1994 dated 28.03.1996.

2.The first respondent herein had filed a suit in O.S.No.823 of 1994 on the file of the Principal District Munsif, Namakkal to declare that he is the absolute owner of the suit property and consequently restrain the defendants from interfering with

his peaceful possession and enjoyment of the suit property by way of permanent injunction. The learned Principal District Munsif, Namakkal by the Judgment dated 28.03.1996 had decreed the suit as prayed for with costs. Aggrieved by the same, the defendants 1 and 2 filed an appeal in A.S.No.46 of 2002 on the file of the Principal District Judge, Namakkal. During pendency of the said appeal, the first defendant died and his legal representatives had been impleaded as respondents 2 to 5 in the first appeal. The learned Principal District Judge, Namakkal, by the Judgment dated 27.04.2004 had dismissed the said appeal confirming the Judgment and Decree passed by the trial Court. However, she directed the parties to bear their respective costs. Feeling further aggrieved, the second defendant has filed the present second appeal.

3.For the sake of convenience, the parties are referred to as described before the trial Court.

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

(a) The suit properties and other properties were belonging to the joint family consisting of the first defendant, the plaintiff and one Selvakumar. The plaintiff is the first son and the said Selvakumar is the second son of the first defendant. The first defendant has been in his capacity as the head of the joint family enjoying the suit properties and other properties as joint family properties. Since there was some misunderstanding among the family members, a panchayat was held and as per the decision taken in the panchayat, in the year 1975, the properties were orally partitioned. In the said oral partition, the suit property was allotted to the share of the plaintiff and the remaining properties were allotted to the first defendant and his second son Selvakumar. The first defendant has taken the share of the said minor Selvakumar also. From the date of the said partition, the parties were in separate possession and enjoyment of their respective shares by paying kist and house tax. The plaintiff was residing in the separate house where as the first defendant, his wife Pavayeeammal and their second son Selvakumar were residing in a separate house. The said Selvakumar died in the year 1990 without any marriage and after his death, his mother Pavayeeammal succeeded to his share.

(b) The first defendant for himself and on behalf of his minor second son Selvakumar had executed a registered mortgage deed on 13.11.1975 in favour of one Kalimuthu Gounder and obtained a loan in respect of the properties which were allotted to them in the oral partition. In the said mortgage deed, the plaintiff had signed as one of the attestors. Likewise on 13.11.1975, the plaintiff also mortgaged his share in favour of

one Duraisamy Gounder under a registered mortgage deed dated 13.11.1975 and obtained a loan of Rs.1500/-. In the said mortgage deed, the first defendant signed as one of the attestors and hence the first defendant is estopped from denying the rights of the plaintiff over the suit properties.

(c) On the ill-advise made by his son-in-law, the first defendant had sent a lawyer's notice on 14.04.1991 stating that he had bequeathed his properties including the suit property to his grand sons viz., Senthilkumar and Velusamy. After receipt of the said notice, the plaintiff enquired with the first defendant through mediators and at that time, the first defendant has stated that he has not executed any Will as alleged in the lawyer's notice and further he will not disturb the plaintiff's possession over the suit properties. On believing his words, the plaintiff has not taken any action. Subsequently, again on the ill-advise of his son-in-law, the first defendant had filed a suit in O.S.No.1157 of 1992 on the file of the District Munsif, Namakkal, against the plaintiff herein for the relief of declaration and permanent injunction and also filed an application in I.A.No.1740 of 1992 seeking interim injunction and in that application, ad-interim injunction was also granted. Immediately, the plaintiff herein had filed a counter statement in I.A.No.1740 of 1992 apprising the true facts and thereafter, the first defendant herein had withdrawn the said suit.

(d) The first defendant had executed a pro-note in favour of one Kalimuthu who is his close friend by putting antedate, based on the same, a suit was filed in O.S.No.320 of 1993 on the file of the Sub-Judge, Namakkal, and in that suit, an exparte decree was passed and thereafter an execution petition in E.P.No.165 of 1994 was filed and the entire property including the suit property was attached. Hence, the plaintiff herein had filed a claim petition in E.A.No.1220 of 1994 to raise the attachment. Immediately, the said Kalimuthu had reported before the Court that the entire decree amount has been realized and on recording the same, the said execution petition was dismissed and consequently, the claim petition was also dismissed. Since the first defendant could not succeed in the earlier proceedings, with the help of his close friend (second defendant) threatened the plaintiff on 23.11.1994 to vacate the suit property and hence on 25.11.1994, the plaintiff had sent a lawyer's notice to the defendants. After receipt of the said notice, the defendants sent a false reply notice on 03.12.1994 through their counsel. In the said reply notice, they had stated that on 04.10.1994 itself, the first defendant had sold the entire property including the suit property in favour of the second defendant for discharging the antecedent debts. The said sale deed is not supported by any consideration. Further, since already the

properties were divided orally and the suit property was allotted to the share of the plaintiff, the aforesaid sale deed will not bind upon the plaintiff. After issuing reply notice, again the defendants tried to dispossess the plaintiff from the suit property by force. Hence, the plaintiff was constrained to file the above suit for the relief of declaration and permanent injunction.

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

It is true that the first defendant is the father of the plaintiff. It is also true that the first defendant got another son by name Selvakumar and he died without any marriage and his mother Pavayee is the legal heir of the said Selvakumar. The suit properties are the self-acquired properties of the first defendant. The first defendant was not having any ancestral properties. The first defendant never acted as manager of the joint family. It is false to allege that in the month of October, 1975, there was a panchayat and as per the decision of the said panchayat, the properties were orally partitioned and the plaintiff was allotted the suit property. It is incorrect to say that on 13.11.1975, the first defendant had mortgaged his properties and in the said mortgage deed, the first defendant had admitted the partition. Further, the averments that the plaintiff had mortgaged the suit property to one Duraisamy under a registered mortgaged deed, in which, the first defendant signed as witness. Even assuming that the first defendant signed as witness in the said document and that would not bind upon the first defendant. The principle of estoppel will not apply. Already the first defendant had sent a notice to the plaintiff on 14.04.1991 and also filed a suit in O.S.No.1157 of 1992 and subsequently by considering the relationship, the said suit was withdrawn. It is true that the first defendant borrowed money from one Kalimuthu, but the said person is not a friend to the first defendant. The said Kalimuthu, based on the aforesaid promissory note had filed a suit in O.S.No.320 of 1993 on the file of the Sub-Judge, Namakkal and obtained a decree and filed an execution petition and thereafter the first defendant discharged the said debt. It is false to allege that on the ill-advice given by his son-in-law, the first defendant gave troubles to the plaintiff. The plaintiff is not having any right over the suit properties and he is not in possession of the same. It is also false to state that the first defendant with the help of second defendant tried to dispossess the plaintiff from the suit property. For discharging the loans, the first defendant sold the suit properties and other properties to the second defendant for proper consideration and possession also handed over to him. Since the plaintiff is the son and he was residing with the first defendant and taking advantage of the same, he paid house tax and kist and that would not confer any

right to him over the suit properties. Therefore, the first defendant prayed to dismiss the suit.

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

It is false to allege that the plaintiff, the first defendant and his second son Selvakumar had orally partitioned the properties in the month of October, 1975 and in the said oral partition, the suit properties were allotted to the share of the plaintiff and from that date onwards, he has been in possession and enjoyment of the suit properties. The second defendant is not aware of the fact that the plaintiff had mortgaged his share and the first defendant also mortgaged other properties admitting the oral partition. The first defendant, by virtue of the sale deed dated 17.10.1963, was the absolute owner of the suit properties and other properties, and from the date of purchase, the first defendant alone was in possession of the same. On 04.10.1994, the first defendant had sold the entire properties including the suit properties to the second defendant for valid consideration. Further, the second defendant is the bonafide purchaser for value without notice of any defect in the title. In pursuance of the aforesaid sale, the Tahsildar had passed an order to transfer patta to the name of the second defendant. Accordingly, patta was transferred to the name of the second defendant and the Chitta and Adangal also came in the name of the second defendant. From the date of purchase, the second defendant is in possession and enjoyment of the suit properties and other properties. The plaintiff never in possession of the suit properties. For the notice issued by the plaintiff, the second defendant had sent a suitable reply through his advocate and therefore the second defendant prayed to dismiss the suit.

7. Based on the aforesaid pleadings, the learned Principal District Munsif, Namakkal, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and he also examined two more witnesses as P.Ws 2 and 3. He had marked Exs.A1 to A16 as exhibits. On the side of the defendants, the first defendant was examined as DW1 and the second defendant was examined as DW2 and two more witnesses were examined as Dws.3 and 4. They had marked Exs.B1 to B30 as exhibits.

8. The learned Principal District Munsif, Namakkal, after considering the materials placed before him, found that the suit properties and other properties were treated as joint family properties; that there was a panchayat in the month of October, 1975; that as per the decision taken in the said panchayat, the family properties were orally partitioned between the first defendant and his sons and that in the said oral partition, the

suit properties were allotted to the share of the first defendant's elder son (plaintiff). He further found that the kist receipts and the house tax receipts produced by the plaintiff also would show that already oral partition took place. He further found that the Exs.A2 and A3 would also confirm the oral partition and in the said oral partition, the suit properties were allotted to the share of the plaintiffs. Accordingly, he decreed the suit as prayed for with costs. Aggrieved by the same, the defendants 1 and 2 filed an appeal in A.S.No.47 of 1996 on the file of the Sub-Judge, Namakkal. But subsequently, the said appeal was transferred to the Principal District Judge, Namakkal and re-numbered as A.S.No.46 of 2002. During pendency of the said appeal, the first defendant died and hence the respondents 2 to 5 were impleaded as his legal heirs. The learned Principal District Judge, Namakkal, had dismissed the said appeal confirming the judgment and decree passed by the trial court. Feeling aggrieved, the second defendant has filed the present second appeal.

9. This court at the time of admitting the second appeal has formulated the following substantial questions of law :

'(i) Whether the view of the courts below that merely because there was no specific denial regarding execution of the mortgage deed made by the first defendant, the vendor of the appellant herein, the document which has to be necessarily proved by examining the attesting witnesses will absolve the plaintiff from proving the document in such manner is correct in law?

(ii) Whether the view of the Lower Appellate Court that the appellant is not a bonafide purchaser for value is correct in law?

(iii) Whether the finding of the Lower Appellate Court that the appellant purchased the property during the pendency of the dispute between the plaintiff and the first defendant is correct in law?'

10. Heard Mr.S.Senthil, learned counsel for the appellant and Mr.P.Valliappan, learned counsel for the respondents.

11. Substantial Questions of law Nos. 1 to 3:

The learned counsel for the appellant/second defendant has submitted that the courts below failed to consider that the suit properties and other properties are self-acquired properties of the first defendant. He further submitted that the courts below failed to consider that there was no ancestral property and that there is no evidence to prove that the suit properties were

purchased from and out of income derived from any ancestral property. He further submitted that since the first defendant had purchased the suit properties and other properties under Ex.B2 sale deed, the said properties are the self-acquired properties of the first defendant and that being so, he is entitled to dispose of the same. He further submitted that the courts below failed to see that the plaintiff miserably failed to prove the alleged panchayat and oral partition. He further submitted that even though the plaintiff has pleaded that the oral partition took place in the month of October, 1975 till the date of filing of the suit, a separate patta was not granted in favour of the plaintiff in respect of the suit properties and the revenue records were not mutated and the said fact would show that the alleged oral partition is not true. He further submitted that since the plaintiff is the elder son of the first defendant, he was residing along with the first defendant and taking advantage of the same, he paid kists and house tax and no reliance can be made on the kist receipts and house tax receipts produced by the plaintiff. He further submitted that the courts below failed to consider that the first defendant while examining himself as DW1 gave an explanation that since Ex.A2 mortgage deed was prepared by the creditor, in which, he signed without knowing the contents of the said document. He further submitted that since the first defendant is an illiterate, he merely signed in Ex.A2, mortgage deed which was prepared by his creditor, without knowing the contents, no reliance can be placed upon the recitals made in the said document. He further submitted that Ex.A3 mortgage deed also was prepared by the plaintiff and only at his request, he signed as one of the witnesses without knowing the contents and hence it cannot be said that he is estopped from denying the contents of the said document. He further submitted that the second defendant had purchased the entire properties after verifying the original sale deed which stands in the name of the first defendant and encumbrance certificate for 12 years which does not reveal any encumbrance, and hence he should be treated as a bonafide purchaser without notice of the defect in the title. The courts below without considering the aforesaid facts in a proper perspective had upheld the claim of the plaintiff and hence he prayed to allow the second appeal and set aside the judgments and decrees passed by the courts below and dismiss the suit.

12. Per contra, the learned counsel for the respondents 2 to 5 has submitted that the oral and documentary evidence adduced by both the parties would clearly show that there was a panchayat and in pursuance of the panchayat's decision, the properties were orally partitioned and in the said oral partition, the suit properties were allotted to the share of the plaintiff/first respondent and the remaining properties were allotted to the share of the first defendant and his second son

Selvakumar. He further submitted that since the said Selvakumar died as a bachelor, his mother viz., Pavayee, second respondent herein, succeeded to the share of the said Selvakumar as sole legal heir, but suppressing the said facts, the first defendant had executed Ex.B1 sale deed in favour of the second defendant/appellant and therefore, he prayed to dismiss the second appeal.

13. It is an admitted fact that the plaintiff and one Selvakumar are the sons of the first defendant, Veerappa Gounder and the second respondent herein Pavayee. It is also an admitted fact that the family did not have any ancestral property. It is also an admitted fact that the first defendant had purchased the suit properties and other properties under Ex.B2 sale deed dated 17.10.1963.

14. According to the plaintiff, the said Veerappa Gounder (first defendant) and his two sons (plaintiff and one Selvakumar) constituted a joint family. His further case is that the properties which were purchased under Ex.B2 sale deed have been treated as joint family properties. His further case is that there was a panchayat in the month of October, 1975 and in pursuance of the panchayat's decision, the properties which were purchased under Ex.B2 have been orally partitioned and in the said oral partition, the suit properties were allotted to his share and the remaining properties were allotted to the share of the first defendant and the second son Selva Kumar.

15. The case of the defendants is that the first defendant never treated the properties as joint family properties. Their further case is that the alleged panchayat and oral partition are not true and hence the plaintiff cannot claim any right over the suit properties. Since the properties were purchased in the name of the first defendant under Ex.B2 sale deed, the burden is upon the plaintiff to prove that the said properties were treated as joint family properties. Further, since the plaintiff pleaded oral partition, the said partition also to be proved by the plaintiff.

16. In this case, to prove the oral partition, the plaintiff mainly relied upon Exs.A2 and A3. Ex.A2 is the registration copy of the mortgage deed executed by the first defendant for himself and also on behalf of his second minor son Selvakumar in favour of one Kalianna Gounder dated 13.11.1975. It is seen from the judgment of the first appellate court that the plaintiff gave a notice to the counsel for the first defendant to produce the original mortgage deed. But inspite of the said notice, the first defendant did not produce the original mortgage deed and hence the plaintiff had produced a registration copy of the said mortgage deed and marked as Ex.A2. A perusal of Ex.A2 shows that

the first defendant had categorically admitted that the properties covered under the said documents were obtained by him and his minor son Selvakumar through a partition. For proper appreciation, the relevant portion of the said document is extracted hereunder:

' 'ரூபாய் 1000/- க்கு ஆதாரம் 1975ம் வருஷம் நவம்பர் மாதம் 13ம் தேதி நாமக்கல் தாலுக்கா வள்ளிபுரம் கிராமம் வள்ளிபுரத்தில் இருக்கும் வேளாளர் பயிர் முத்துசாமி கவுண்டர் மகன் காளியண்ண கவுண்டர் ஆகிய தங்களுக்கு தாலுக்காடை கிராமம்டை யூலிருக்கும் உப்பிலயன் தோட்டம் டை டைமுத்துசாமி கவுண்டர் மகன் வீரப்பன்/1 1 இந்த 1 லக்கமிட்டவரின் மைனர் மகன் சுமார் 10 வயதுள்ள செல்வ குமார் 2. இந்த 2 லக்கமிட்டவருக்கு காட்டியன் தகப்பனும் போட்டிகளும் சவரட்டினை காட்டுமான 1 லக்கமிட்ட வீரப்பன் தனக்காகவும் மைனர்ருக்காகவும் எழுதிக்கொடுத்த ஆதாரக்கடன் பத்திரம் என்னவென்றால் இதன் கீழ் விவரிக்கப்பட்ட சொத்து எங்களுக்கு பாகம் மூலம் பாத்தியப்பட்டிருப்பதை தங்களுக்கு ரூபாய்,1000/- ஆதாரம் காட்டி இந்த ஆதாரத்துடன் பத்திரம் தங்கள் பெயருக்கு எழுதிக்கொடுத்து பெற்று கொண்ட துகை ரூபாய்.1000/- இந்த ஆயிரம் ரூபாயும் ' ' (Emphasis supplied).

17. Further, while describing the properties in the said mortgage deed, the first defendant had shown one of the boundaries as the plaintiff's property and also admitted that in the common well and motor pumpset, the plaintiff also got one-third share. So, it is clear that the first defendant had admitted that the properties were already divided and he mortgaged the properties which were allotted to him and also to his minor son Selvakumar in the oral partition. Further he recognised the plaintiff's share.

18. Ex.A3 is the mortgage deed executed by the plaintiff in favour of one Duraisamy Gounder dated 13.11.1975. In the said document, the first defendant signed as one of the attestators. In the said document also, it is stated that the plaintiff got his property through partition. Further, while describing the properties, one of the boundaries shown as the property belonged to the first defendant. So, it is clear that before executing Exs.A2 and A3, there must be a oral partition, and in the said oral partition, the properties which were mentioned in Ex.A2 were allotted to the share of the first defendant and his minor second son Selva kumar and the properties which were mentioned under Ex.A3 were allotted to the share of the plaintiff.

19. Though a separate patta was not granted in favour of the plaintiff in respect of the suit properties, Exs.A6 to A14 would show that the plaintiff had paid kist and house tax separately in respect of the suit properties. So, it is clear that the first plaintiff has been in exclusive possession of the suit properties from the year 1975 onwards.

20. Though the second defendant claimed that he purchased the entire properties without notice of any defect on the title of the plaintiffs, only after seeing the encumbrance certificate, he has not produced the said encumbrance certificate and marked as Exhibit. As per Section 3 of the Transfer of property Act, the previous mortgage created under Ex.A2 would be a constructive notice to the subsequent purchaser viz., second defendant. If really the second defendant had verified the encumbrance, it would have revealed the creation of Ex.A2 mortgage. Further, as already stated that Exs.A6 to A14 would show that the plaintiff is in exclusive possession of the suit properties and that being so, in view of the Explanation -II to Section 3 of the Transfer of Property Act, the possession also would be a notice of title. Since the plaintiff is in possession of the suit properties, the second defendant before purchase, would have made an enquiry as to under what capacity, the plaintiff is in possession of the suit properties. It appears that he has not made any enquiry and therefore, he cannot claim that he is a bonafide purchaser.

21. As already pointed out that Exs.A2, A3, mortgage deeds and Exs.A4 to 14 would show that the plaintiff is in possession of the suit properties and that being so, the second defendant would not have taken possession of the suit properties in pursuance of Ex.B1 sale deed. The trial court taking into consideration of all the aforesaid facts, came to the conclusion that the oral partition pleaded by the plaintiff has been proved and in pursuance of the said oral partition, the plaintiff is in possession and enjoyment of the suit properties and as such, he is entitled to the relief of declaration and permanent injunction. The first appellate court after analysing the evidence thoroughly concurred with the findings of the trial court and dismissed the appeal filed by the defendants. This court does not find any infirmity in the concurrent findings of the courts below. Accordingly, the substantial questions of law are answered against the appellant.

22. In the result, the second appeal is dismissed confirming the judgments and decrees of the courts below. Consequently, connected miscellaneous petition is closed. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

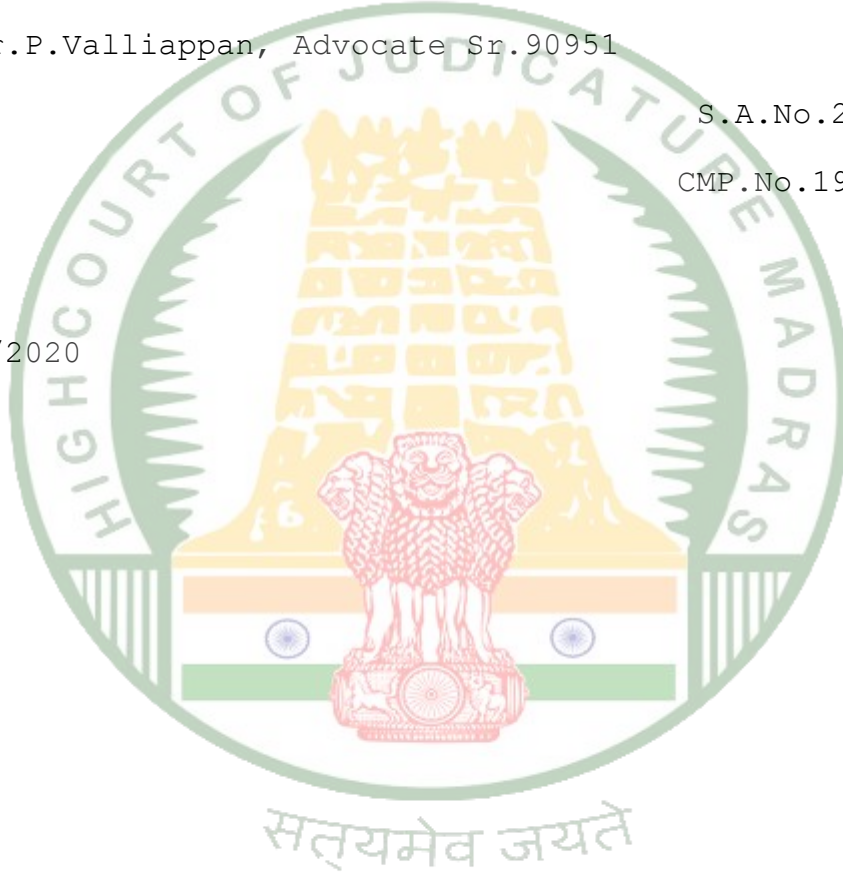
1.The Principal District Judge,
Namakkal.

2.The Principal District Munsif,
Namakkal.

+1cc to Mr.P.Valliappan, Advocate Sr.90951

S.A.No.2203 of 2004
AND
CMP.No.19403 of 2004

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srg 27/11/2020



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