



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 30.01.2019	Pronounced on: 07.02.2019
-------------------------	---------------------------

Coram:

The Honourable Dr.Justice G.Jayachandran

Second Appeal No.2206 of 2004

1. Chinnasamy,
S/o.Ramasamy Gounder.

2. Palaniappan,
S/o.Ramasamy.
Both are residing at
Bangalowkadu,
Vannankuttai,
Pakkanadu Village & Post,
Edappadi Taluk, Salem District.

... Appellants/Defendants

/versus/

1. Sellappan (died),
S/o.Kanda Mopan,
Pattankadu,
Vannankuttai,
Pakkanadu Village & Post,
Edappadi Taluk, Salem District.

2. S.Kandasamy,
S/o.Sellappan.

3. S.Vedivelan,
S/o.Sellappan.

RR2 & 3 are residing at Pakkanadu Village &
Post, Edappadi Taluk, Salem District.

4. Mrs. Kamala,
W/o.Chinnan,
D/o.Sellappan,
Munga Kuthu Near Post,
Office Steel Plant Main Gate,
Maramangalathupatti (Village),
Salem.

... Respondents/Plaintiffs

RR3 to 4 brought on record as LRs of the deceased sole

respondent vide order of Court dated 20.07.2018 made in C.M.P.No.405 to 407/2014 in S.A.No.2206 of 2004.

PRAYER: Second Appeal is filed under Section 100 of Civil Procedure Code, praying against decree and judgment dated 20.09.2004 in A.S.No.9 of 2004 on the file of Subordinate Court, Sankagiri reversing the decree and judgment dated 30.12.2003 in O.S.No.175 of 2002 on the file of District Munsif's Court, Sankagiri.

For Appellants : Mr.R.Subramanian

For R2 to R4 : Mr.N.Manokaran

For R1 : Died

J U D G M E N T

The Appellants are the defendants before the trial Court. The suit preferred by the plaintiff Sellappan who is now represented by his legal heirs as respondents 2 to 4 is that the suit property originally owned by one Kanda Moopan who is father of the plaintiff. It consist of land covered under S.No.269/1B, S.No.269/1D and S.No.269/1C. The plaintiffs are in peaceful possession and enjoyment of the suit properties. The land in S.No.269/1B and S.No.269/1D are agricultural land whereas, the land in S.No.269/1C is cart track. Suit properties were allotted to the plaintiffs as per oral partition between the plaintiffs and his brother Karuppannan, which took place 30 years ago. The plaintiff is entitled for $\frac{1}{2}$ share in the land S.No.269/1B and cart track right in S.No.269/1C. He is the absolute owner of the S.No.269/1D. The cart track leads to his land from Vannankuttai and Pakkanadu Road. Under the oral partition his brother Karuppannan was allotted land in S.No.269/1A. He is entitled for $\frac{1}{2}$ share in S.No.269/1B and right of passage in the Cart track at S.No.269/1C. On the death of Karuppannan, the properties devolved upon his two sons Narayanan and Kanagaraj. The properties which are subject matter of present suit was allotted to the shares of Narayanan. After the death of Narayanan, the property developed upon his three sons namely Kanagaraj, Selvam and Jayakumar. Since, Selvam died without marriage, the properties covered under S.No.269/1A and $\frac{1}{2}$ share in S.No.269/1B and the right of passage through cart track in S.No.269/1C came to the hands of the remaining two sons of Narayanan. Later, one of his sons Jayakumar sold his share to his other sons wife Revathy. Thus, Kanagaraj and his wife both together became the owners of the properties of the Karuppannan. From Kanagaraj and his wife Revathi the first defendant purchased the properties situated in S.No.269/1A and S.No.269/13 through sale deed dated 15.07.2002.

While selling their property in S.No.269/1A, S.No.269/1B and S.No.269/13, the first defendant had purchased the entire extent in S.No.269/1B, though his vendor had only $\frac{1}{2}$ share in the said property and also claims absolute right in the cart track in S.No.269/1C. Hence, the suit to declare that the plaintiff is the absolute owner of the suit property situated in S.No.269/1D and S.No.269/1C and also entitled for $\frac{1}{2}$ share in the properties situated in S.No.269/1B and to restrain the defendants from interfering with the peaceful possession and enjoyment of the suit properties particularly, the cart track in respect of S.No.269/1C.

2. It is contended by the plaintiff that the 1st defendant has no right in the cart track and he is entitled only $\frac{1}{2}$ share in the property bearing S.No.269/1B. Therefore, the suit for declaration to the said effect and permanent injunction restraining the defendants from interfering the peaceful possession of the plaintiff in respect of cart track in S.No.269/1C.

3. In the written statement filed by the first defendant, the contentions of the plaintiff are strongly denied. The defendant's case is that the land originally belongs to Kanda Mopan. It was divided by brothers orally. Karuppannan was allotted S.No.269/1A, S.No.269/1B and S.No.269/1C and 269/1D. Besides the properties in S.No.264/4F and in R.S.No.263/3. The plaintiff is the younger brother of Karuppannan. He was allotted property under S.No.269/1D along with an extent of 0.95.5 Hectares of land in S.No.262/4C and S.No.262/4E. The plaintiff has in his possession and enjoyment of the lands in S.Nos.269/1D, 262/4C and 263/4E under registered sale deed dated 15.07.2002 from Kanagaraj son of Narayanan and his wife Revathy. The defendants purchased the property under S.No.269/1A with an extent of 2.31 acres, in S.No.269/1B 0.03 cents extend of and in S.No.269/1C with an extent of 0.07.5 cents in S.No.262/4F 31 cents. The plaintiffs have laid underground pipe line from S.No.269/1D to S.No.262 through R.S.No.261 to draw water from his well situated in S.No.269/1D. Except that the plaintiffs has no right, title or enjoyment whatsoever in the properties in S.No.269/1A, 269/1B and 269/1C. When the plaintiff sought for permission to laid down the pipe line from his land situated in S.No.269/1D to his land in S.No.262 through the defendants property in S.No.269/1C and S.No.271/1E, the defendant refused. Since then the plaintiffs have become inimical. Taking advantage of the omission to mention S.No.269/1C in the sale deed of the defendant as well as his vendor, the plaintiff is creating records and has filed the present suit.

4. The specific case of the defendant is that the cart

track running in S.No.269/1C was formed only by the predecessor-in-title of the defendants to reach the land in R.S.No.269/1A from the road. The written statement of the 1st defendant adopted by the 2nd defendant.

5. Before the trial Court, the following issues were framed.

(i). Whether the land in S.No.269/1D and S.No.269/1C is an exclusive property of the plaintiff and in S.No.269/1B

whether the plaintiffs have $\frac{1}{2}$ share ?

(ii). Whether the plaintiff is entitled for declaration and injunction as prayed for ?

(iii). What relief the plaintiff is entitled?

6. Before the trial Court, 3 witnesses were examined in support of the plaintiff's case and 2 Exhibits were marked. On the side of the defendants, the defendants examined as DW.1. 3 Exhibits were marked. The Revenue records like Patta, F.M sketch, chitta are marked as Ex.E.1 to Ex.E.5.

7. After appreciating the evidence, the trial Court held all the three issues against the plaintiffs and dismissed the suit without cost. On dismissal of the suit, the plaintiffs have preferred the appeal before the Subordinate Court, Sankagiri. On re-appreciating the evidence and allowed the appeal granting the relief sought by the plaintiffs.

8. The lower Appellate Court has held that the division of the property inherited from Kanda Mopan between his sons Karuppanna and Sellappan were not denied. Under Ex.B.3 the Karuppannan has sold the property under in S.No.269/1A and part of S.No.269/1B to Kanagaraj and Revathy. From Ex.A.4, chitta it appears that Karuppanna Mopan and sellappan (plaintiff) have equal share in S.No.269/1B. While so, under Ex.B.1 dated 15.07.2002, the Karuppanna Mopan cannot alienate the remaining portion of the land in S.No.269/1B and deprive the share of the plaintiff in S.No.269/1B.

9. As far as the cart track in S.No.269/1C, the Lower Appellate Court has held that under Ex.B.3 Kanagaraj and Revathy has not purchased any land in S.No.269/1C. While so, they cannot alienate right in S.No.269/1C under Ex.B.2. Further, the Lower Appellate Court has pointed out that PW.3 Munusamy who is the party to Ex.B.3 has deposed that the plaintiffs have $\frac{1}{2}$ share in S.No.269/1B and S.No.269/1C. Therefore, the finding of the

Lower Appellate Court that without title deed the plaintiffs cannot seek relief of declaration merely based on Revenue document is incorrect. Having held so, the Lower Appellate Court granted the relief of declaration to the plaintiff in respect of S.No.269/1B and S.No.269/1C. Insofar as in S.No.269/1B, the Lower Appellate Court has declared $\frac{1}{2}$ share in favour of the plaintiff. It restrained the defendants from interfering the peaceful possession and enjoyment of the plaintiff and the cart track located in S.No.269/1C.

10. Having lost their case to the plaintiff in the appeal, the present Second Appeal is filed by the defendant, raising the following Substantial Questions of Law.

(i). Whether in law is not the appellate Court wrong in overlooking that the plaintiff has to succeed or fail on his own and cannot rely on the weakness of the defendants?

(ii). Whether in law is not the Lower Appellate Court wrong in failing to see that the plaintiff has not produced either title deeds or documents to prove his title?

(iii). Has not the Lower Appellate Court omitted to see the defendants has established their title and possession vide Exhibits B1 to B3?

11. The learned counsel for the appellants would submit that Ex.B1 to Ex.B.3 are documents which are sufficient to prove that the defendants are exclusive owners of S.No.269/1B and S.No.269/1C. While so, without any title deed or document to prove their title or share in S.No.269/1B and S.No.269/1C, the Lower Appellate Court has granted the relief of declaration merely based on the joint patta issued in the name of Karuppannan and the plaintiff Chinnasamy.

12. Further, the learned counsel for the appellants would submit that as far as the land in S.No.269/1D, the appellant have no quarrel with the title of the plaintiff. Whereas, the respondent have no share in S.No.269/1B or in the cart track situated in S.No.269/1C.

13. Per contra, the learned counsel for the respondents would submit that the appellants have admitted the oral partition between the sons of Kanda Mopan. There is no dispute in respect of the fact that land in S.No.269/1A was allotted to defendants and S.No.269/1D was allotted to the plaintiffs. The cart track under S.No.269/1C was left to the share of the plaintiff to have access to S.No.269/1D. Without

the access, the plaintiffs cannot have enjoyment of his property in S.No.269/1D. So, under the oral partition when there was division of properties among the brothers, it was specifically agreed by the parties that 0.01.5 Hectare of land in S.No.269/1B abutting the road will be shared by both the brothers to construct residential house. The cart track in sub-division No.269/1C will be used by the plaintiff to reach the land allotted to him in S.No.269/1D. Therefore, having appreciating the material evidence placed before it, the Lower Appellate Court has rightly allowed the suit and granted the decree of declaration. In support of its contention the learned counsel appearing for the respondents would also draw the attention of this Court, to the F.M. Sketch marked as Ex.X.2.

14. The learned counsel for the respondent referring the judgment of this Court in Natesa Gounder Vs. Raja Gounder and others reported in 2012(7) MLJ 813 contended that, even in the absence of document the right of the respondent to use the cart track in S.No.269/1C is to be protected applying the principle of Easement of necessity by implied grant.

15. The property in dispute was originally held by Kanda Mopan. He had two sons one by name Karuappannan and another by name Chellappan. Chellappan is the plaintiff in this case. The defendants claim the property through sale deeds executed by descendants of Karuappannan. Since, the property was earlier held by Kanda Mopan and thereafter, by his sons Karuappannan and Chellappan, joint patta was issued by the Revenue Department in the name of his successor-in-title for the entire property, which was later sub-divided, this one isolated piece of evidence cannot be sufficient to grant the relief of declaration of title. However, from the ocular evidence and F.M. Sketch it is established that a large extend of land has been divided between two brothers. The land allotted on the rear portion given access to reach it. Without access to reach the land allotted, the partition could not have been arrived. Admittedly, after the demise of Kanda Moopan his sons Karuappannan and Chellappan have divided the property among themselves orally. The parties have no dispute over this fact. The plaintiff contents that the land in S.No.269/1B was left to be enjoyed commonly and the land in S.No.269/1C was reserved for cart track for the exclusive enjoyment of the plaintiffs land. The descendants of Karuappannan are Revathy and Kanagaraj. They have initially sold their property in S.No.269/1A and S.No.269/1B alone in the sale deed Ex.B.1 dated 15.07.2002. Ex.B.1, sale deed dated 15.07.2002 executed by Kanagaraj and Revathy in favour of Chinnaasamy (first defendant). We find that out of three items of properties covered under the sale deed (S.No.269/1A, S.No.269/1B, S.No.262/4F). This Court finds that the S.D.No.269/1 has been altered as 269/1B. The letter "B" is

added in pen. Whereas, the other portions were typed. This addition to the sub-division of S.No.269/1 also found in the statement of value typed in page No.25 of the Ex.B.1.

16. Scrutinising Ex.B.2 sale deed dated 22.01.2003, it appears that Kanagaraj and Revathy have executed the sale deed in favour of Chinnasamy (first defendant) in respect of S.No.269/1C, which is the cart track according to the plaintiff. The F.M. Sketch marked as Ex.X.2 indicates that the said cart track fall on the south of S.No.269/1A. No boundaries for S.No.269/1A is shown in Ex.B.1 sale deed. In Ex.B.2, recital the vendor of the first defendant has mentioned that the land in S.No.269/1C has been left to be mentioned in the earlier sale deed Ex.B.1. Therefore, they executing a separate sale deed Ex.B.2. Whereas, Ex.B.2 has come into existence only after the plaintiff has filed the suit seeking declaration of his title in respect of cart track in S.No.269/1C.

17. The defendant has contended that taking advantage of omitting to mention the land in S.No.269/1C, the plaintiffs have filed the suit seeking declaration of exclusively title over the property. However the topography of the field proves otherwise. It clearly show that the Sub-division of the land in S.Nos.269/1A, 269/1B, 269/1C and 269/1D under the partition land in S.No.269/1D is allotted to the plaintiff and S.No.269/1A is allotted to the defendants. For the Cart track from the road to the land of plaintiff. The land being Sub-divided into S.No.269/1C. This F.M.Sketch show that S.No.269/1C is the portion left for access to the property in S.No.269/1D.

18. While so, the vendor of the 1st defendant had no title or right to alienate the land in S.No.269/1C. Ex.B.2 which was entered upon pending suit conveying title in respect of S.No.269/1C in favour of the 1st defendant is non est in the eye of law. As far as, the 3 cents of land covered under S.No.269/1B in which the plaintiff claims $\frac{1}{2}$ share, though the title deed is in favour of the 1st defendant, Ex.B.1 is with correction in the Survey number. But then, when there is no contra evidence to infer anything against the document, this Court is of the opinion that the plaintiff claims of $\frac{1}{2}$ share in S.No.269/1B lack evidence and without any basis.

19. Therefore, this Court confirms the judgment and decree passed by the Lower Appellate Court in respect of declaration of title over S.No.269/1D and S.No.269/1C as claimed by the plaintiff and also confirms the permanent injunction restraining the defendants from interfering the peaceful possession of the plaintiffs enjoying the cart track in S.No.269/1C. As far as the land covered under S.No.269/1B, the title passed on to the defendants vide Ex.B.1 has to be upheld

and to that extent the Appeal is partly allowed.

20. The decree and judgment passed by the Lower Appellate Court is modified to that effect:

1. Declaration in respect of S.No.269/1D and S.No.269/1C granted.
2. Injunction in respect of S.No.269/1C granted.
3. Declaration in respect of S.No.269/1B negatived.

20. In the light of the above fact, the Second Appeal is partly allowed on the above terms. No order as to costs.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

bsm

To

- 1.The Subordinate Court,
Sankagiri
- 2.The District Munsif's Court,
Sankagiri.
3. The Section Officer,
V.R. Section, High Court,
Madras.

+1cc to Mr.N.Manokaran, Advocate, S.R.No. 11062

+1cc to Mr.R.Subramanian, Advocate, S.R.No.11077

Second Appeal No.2206 of 2004

CNR (CO)
GN (07/05/2019)

WEB COPY