

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.01.2019

PRONOUNCED ON : 06.02.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.756 of 2004

- 1.Krishnan @ Krishnasamy (died)
- 2.Kuppusamy (died)
- 3.S.Chinnappan (died)
- 4.K.R.Palaniappan
- 5.Dakshinamoorthy
- 6.P.Jagathambal
- 7.C.Ponnusamy
- 8.K.C.Shanmugam

(Appellants 5 & 6 brought on record as LRs of the deceased 1st & 2nd Appellant respectively & Appellants 7 & 8 are brought on record as LRs of the deceased 3rd Appellant as per order of this Court dt:11.01.13, made in CMP 1025 to 1033 of 2012)

...Appellants/Plaintiffs

- 1.K.Natarajan
- 2.K.Chidambaram
- 3.Manoharan
- 4.Muthaiyan

5.Junior Engineer,
West O & M, T.N.E.B.,
Jaganathapuram Colony,
Erode - 9.

...Respondents/Defendants

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 17.06.2003 made in A.S.No.183/2002 on the file of the Principal District Judge, Erode confirming the judgment and decree in O.S.No.178 of 1995 dated 11.03.2002 on the file of the II Additional Subordinate Judge, Erode.

For Appellants : Mr.V.P.Sengottuvel

For RR1 and 2 : Mr.V.S.Kesavan

For RR3 to 5 : Given up

JUDGMENT

The plaintiffs are the appellants. The suit filed for declaration and injunction in respect of the property covered under sale deed dated 07.10.1969 or in alternate, plea of the partition and separate possession of 1/3rd share in the properties mentioned under 'B' schedule.

2.The Courts below have disbelieved the claim of the plaintiffs that they derive title through sale deed dated 07.10.1969 marked as Ex.A.1. Holding that the plaintiffs have failed to prove the execution of the sale deed, dismissed their suit. Further, the Courts below have also held that while claiming partition, the other alleged shareholders ought to have been arrayed as parties to the suit. Since, they are not parties to the suit was held to be bad for non joinder of necessary parties. Aggrieved by the concurrent findings of the Courts below, the plaintiffs are preferred the present second appeal.

3.The following substantial questions of law were framed for consideration at the time of admission.

"1.Have not both the courts below committed an error of law in not drawing a presumption under Sec.114 of the Evidence Act read with Sec.60 of the Registration Act regarding the execution and attestation of Ex.A.1 ?

2.Having not both the courts below committed an error of law in not properly appreciating the judgment reported in 2000 TNLJ 304 ?

3.Have not both the courts below committed an error of law in not considering admission made by the defendants 1 and 2 in the written statement

“தாவா சொத்தின் க,ச113 ப, ஏ 264 க,ச114 ப, ஏ 115 ஆக இரண்டு காணாகளிலும் மொத்தம் ப, ஏ 399 இதில் மேல்ப,றம் உள்ள ப, ஏ 199 1/2 பூமியை 5,6,1903 பழனி முதலி என்பவர் இந்த பிரதிவாதிகள் கொள்ளு தாத்தா நாச்சிமுத்து கவுண்டருக்கு விற்கப்பட்டு அவர் அனுபவித்து வந்தார்”

4. Have not both the courts below committed an error of law in dismissing the suit on the ground of non-joinder of parties especially the appellants alleged an oral partition to be taken place between their vendor's husband and their brothers the same was supported by documentary evidence under Ex.A.1 ?

5. Have not both the courts below committed an error of law in not properly considering Sec.90 of the Evidence Act regarding oral partition ?

6. Have not both the courts below committed an error of law in giving the finding in favour of the defendants on the basis of the resurvey settlement proceedings/patta proceedings which never created title over the suit property ?

4. For the sake of convenience, the parties are described as per their description and ranking in the plaint.

5. The brief facts, as stated in the plaint, are as follows:-

The plaintiffs purchased 66 ½ cents of land in Old Survey Nos.113 & 114 of Soorampatti Village from one Valliammal vide sale deed dated 07.10.1969. They were put in possession of the said property and enjoying the South Eastern corner of the property. The vendor of the plaintiffs got the property through oral partition held between the co-sharers. The property was re-surveyed and New S.Nos.56/3 and 56/4 were assigned to the land. While carrying out the re-survey, the authorities have wrongly entered the names of defendants 1 and 2 in respect of 'B' schedule property. When the plaintiffs came to know about the error, they placed their objection to the Special Tahsildar by way of representation dated 29.09.1988. Thereafter, the names of the plaintiffs were included in the patta along with the defendants 1 and 2. The property in S.No.56/3 which is under the enjoyment of the plaintiffs is mentioned as suit 'A' schedule property. In respect of 'B' schedule property, the plaintiffs are cultivating the field and kist to the Government is paid by the plaintiffs.

6. The defendants 1 and 2 are entitled for 1.33 acres in R.S.Nos.56/3 and 56/4. They have put up shed in their property and leased it to the defendants 3 and 4 to run the screen printing work. Electricity service connection was given to them by the fifth defendant. The defendants have allowed to lay water pipeline on the South Western portion of the suit 'B' schedule property to draw water from the well in R.S.No.56/4. Since, the

defendants are challenging the title of the plaintiffs, the suit for declaration and injunction regarding 'A' schedule property or in alternate to effect partition of the 'B' schedule property and hand over separate possession of 66 ½ cents of land.

7.The said plaint was contested by the defendants through the written statement alleging that the plaintiffs are not in possession of the suit property and they have no title and their names were not included in the patta, as claimed by them. Neither the plaintiffs nor their predecessor in title enjoyed the suit 'B' schedule property and they are not in joint enjoyment of the well and land appurtenant to it in R.S.No.56/4. The well is not in use for past 18 years. The property mentioned in 'B' schedule is not under the cultivation of the plaintiffs in Old S.Nos.113 & 114. The total extent of the land was 3.99 ½ acres out of which, 1.99 ½ acres on the Western side was sold to the grand father of the defendants 1 and 2 on 05.08.1903. Since then, the predecessor's in title and the defendants are enjoying the same. The balance 2 acres of land in the above said Survey Number held by third parties.

8.The defendants have not laid any pipeline in the suit property. The defendants 3 and 4 are not necessary parties to the proceedings. The defendants are not aware of the issuance of patta including the name of the plaintiffs after their objection to the Tahsildar.

9.The specific case of the defendants 1 and 2 in the written statement is that, the old survey number of the disputed property was S.Nos.113 (2.84 acres) and 114 (1.15 acres) totally, 3.99 acres. From out of that, the Western half to an extent of 1.99 acres was sold by Palani Muthu on 05.08.1903 to one Nachimuthu Gounder. On the demise of Nachimuthu Gounder, his three sons by name Kuppanna Gounder, Chengoda Gounder and Palani Gounder, inherited the property. On the demise of Kuppanna Gounder, his son and daughter got the property. The defendant is Kuppanna Gounder son. The 1/3rd share of the property out of 1.99 acres of land purchased by Nachimuthu Gounder came to the hands of the defendants 1 and 2 after the demise of their father. The other 1/3rd share allotted to Chengoda Gounder s/o Nachimuthu Gounder also devolved upon the defendants 1 and 2 after the death of Chengoda Gounder and his wife Ramayee in the year 1966. The remaining 1/3rd share given to Palani Gounder was in his possession and enjoyment till his life time. After the demise of Palani Gounder, it came to the hands of the defendants. Thus, claiming entire 1.99 acres of land, purchased by Nachimuthu Gounder from Palani Mudali under sale deed of the year Ex.B.1, the defendants 1 and 2 claims absolute right over the suit property.

10. In the additional written statement filed by the defendants 1 and 2, they have contended that the averment of the plaintiffs that they purchased 66 ½ cents from Valliammal w/o Palani Gounder vide sale deed dated 09.10.1969, is a fabricated one. The vendor of the plaintiffs did not have 1/8th share in the property. Without proper description and identification of the property in the suit schedule, they cannot seek for the relief as prayed. While claiming 1/8th share in the well, the plaintiffs have failed to disclose who are the other sharers holding 7/8 share. For non joinder of those sharers, the suit is bad for non joinder of necessary parties.

11. As a rejoinder, the plaintiffs have filed their reply to the additional written statement contending that the sale deed executed by Valliammal is a valid document. Valliammal derived title through her husband Palani Gounder. Who is one of the 3 sons of Nachimuthu Gounder. Valliammal being the wife of Palani gounder has right and title over 66 ½ cents of land the 1/3rd share of her husband. Hence, alienation of 66 ½ cents of land by Valliammal is valid and the sale deed is a genuine document.

12. The trial Court, on perusing the sale deed alleged to have been executed by Valliammal and marked as Ex.A.1, held that the execution of the said sale deed not been duly proved. Whether the mark found in Ex.A.1 was shown by Valliammal has become doubtful, since, the plaintiffs have not examined the witnesses to the document. One of the witness Arumugam who has been examined by the plaintiffs has not given clear evidence about the execution of the document. Since, the document was neither signed nor affixed with thumb impression of the executant, the line (fPuy;) drawn as claimed to be it drawn by Valliammal held to be suspicious. Further, the trial Court has held that as a wife of Palani Gounder, Valliammal is entitled for 1/3rd share but, the plaintiffs who claimed title over property through the deed of Valliammal have not proved that Ex.A.1 sale deed was genuinely executed by Valliammal. Further, when the total extent of the land is admittedly to be 3.99 acres surely, there are other co-owners of the property. Without impleading them as a party, the suit filed seeking partition as an alternate relief is not maintainable.

13. The First Appellate Court, on considering the appeal preferred by the plaintiff has reiterated the finding of the trial Court. Considering Ex.A.4 dated 24.10.1953 through which the plaintiffs claim that their predecessor in title Valliammal got title and right over the suit property, the First Appellate Court has held that the property mentioned in Ex.A.4 sale deed executed by Palani Gounder in favour of Valliammal is only 49 7/8 cents of land. The subject matter of the suit is 1/3rd share in 3.99 acres of land in S.Nos.113 & 114. When Valliammal had

only right to an extent of 49 7/8 cents, the plaintiffs have not explained either through document or through oral evidence how Valliammal had derived title to an extent of 66 ½ cents to convey the same to the plaintiffs under Ex.A1.

14.Further, while discussing about the sale deed - Ex.A.1, alleged to have been executed by Valliammal in favour of the plaintiffs, the absence of thumb impression or signature of Valliammal has caused doubt in the minds of the First Appellate Court as it happens to the trial Court. Failure on the part of the plaintiffs to prove the execution of Ex.A.1 by Valliammal and failure to examine the witness who identified Valliammal before the Registrar during registration of the document has casted doubt over the validity of the document. Pointing out non inclusion of necessary parties despite objected in the written statement, the First Appellate Court held that when an alternate relief of partition is sought, non inclusion of the remaining share holders render the suit bad for nonjoinder of necessary parties.

15.When the execution of the document is denied and doubted, the person who wants the Court to rely upon it is bound to adduce evidence to probablise his case and prove the document. Mere registration of document itself will not give authenticity about the genuineness of the execution or regarding content of the document. Presumption under Section 114 of the Indian Evidence Act, is only a rebuttable presumption and not a conclusive presumption. In this case, the defendants 1 and 2 had not only denied the valid execution of Ex.A.1 but also highlighted the suspicion circumstances surrounding the document Ex.A.1, particularly Valliammal has not signed or affixed her thumb impression. However, when it was presented for registration, her thumb impression has been obtained and the same has been identified by two persons. The plaintiffs have examined one of the attester of the document but not the person who has identified Valliammal affixing the thumb impression before the Registrar. In Ex.A.1, Valliammal has made only line (கீரல்), The reason for not obtaining her thumb impression not adduced by the plaintiffs or by P.W.2 who claimed to have been present when Valliammal made the line (கீரல்) in Ex.A.1. Whether Valliammal had drawn the line (கீரல்) knowing the content of the document or not, is also doubtful. More particularly, when under Ex.A.1, Valliammal has got only a lesser extent of land (49 7/8 cents) how she alienated 66 ½ cents of land also not duly explained away by the plaintiffs.

16.The defendants 1 and 2 have only admitted that the property held by Nachimuthu Gounder was enjoyed by his three sons each 1/3 shares. Later, 2 /3rd shares devolved upon the defendants 1 and 2. This does not mean that the balance 1/3rd

share should have been necessarily devolved upon Valliammal to alienate the same. More particularly, when Palani Gounder the husband of Valliammal had himself sold only 1/8 share out of 3.99 acres of land, (49 7/8 cents) to Valliammal under Ex.A.4 as early as in the year 1953.

17.In the above said circumstances, when there are joint owners having right over the suit property and admittedly when the plaintiffs seek for partition of the suit property, as an alternate plea, without impleading all the co-sharers, the suit is bad for non joinder of necessary parties. Hence, the substantial question of law formulated in the second appeal does not lead to any favourable answer to the appellants/plaintiffs. This Court finds no error of law in the finding of the Courts below.

18.In the result, the Second appeal is dismissed thereby confirming the concurrent judgments and decrees of the Courts below. There shall be no order as to costs.
jbm

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Principal District Judge,
Erode.

2.The II Additional Subordinate Judge,
Erode.

Copy to:-

The Section Officer,
V.R.Section,
High Court, Madras - 104.

+2cc to Mr.V.P.Sengottuvel, Advocate, SR.No.10116 & 10036
+1cc to Mr.V.S.Kesavan, Advocate, SR.No.10115.

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Kak(11/06/2019)