

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.06.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1507 of 2005
and CMP.19589 of 2005

1.A.R.Kothandapani Naidu

2.A.R.Deenadayalan

.... Appellants /Appellants / Defendants

Vs

1.Vatchala

2.Srinivasan

3.Meenakshi

.... Respondents / 2-4 respondents / LRs of plaintiff

Prayer :- Second Appeal filed under Section 100 of CPC, against the judgment and decree in A.S.No.70/2002 on the file of the Principal Sub Judge, Chengalpattu dated 27.04.2004 in confirming the judgment and decree in O.S.No.457/1993 on the file of the District Munsif Court, Chengalpattu, dated 31.07.2002.

For Appellants : Mrs.V.Srimathi
For Respondents : Mr.

JUDGMENT

The defendants in a suit for declaration of title and possession are the appellants herein, and they are unsuccessful both before the trial court that decreed the suit, as well as before the first appellate court which dismissed their appeal. Parties would be referred to by their rank before the trial Court.

2. The brief facts are :

- A certain Perumal Naidu owned a block of land in Paimash Nos.680 and 679. They were correlated to Survey No.32/1. Perumal Naidu had one daughter viz., Alamelu Ammal and two sons namely Lingaiah Naidu and Ramachandra Naidu. While so, under Ext.A-7 sale deed dated 27.05.1919, Perumal Naidu and his two sons divided the properties. In the said partition, Perumal Naidu was allotted 13 cents in Paimash No.680 and his two sons too were allotted a like share each. In the context of the present case, it is relevant to indicate that Ramachandra Naidu was allotted 3 cents in Paimash No.679.
- Subsequently, on 05.08.1920, Perumal Naidu had executed a Will bequeathing his share which he obtained under the aforesaid partition to his only daughter Alamelu Ammal. A copy of this Will is available on record as Ext.A2. Sometime in 1987, Alamelu Ammal died, and earlier to her death, her brother Ramachandra Naidu died in 1985.
- The plaintiff claims right under Alamelu Ammal, whereas defendants 1 and 2, as sons of Ramachandra Naidu claim title under the latter. According to the plaintiff, after Alamelu Ammal's death, under Ext.A-3 dated 05.11.1990, a partition had taken place. He would allege that in the property covered under Ext.A2 Will in favour of Alamelu Ammal, she had permitted her brother Ramachandra Naidu to put up a cow shed in the south. The portion occupied by the cow shed is about 2 cents and it

belonged to Alamelu Ammal. On her demise, when plaintiff required Ramachandra Naidu's sons, the defendants 1 and 2 herein, to handover him the vacant possession of the suit property, they declined to part with its possession. Hence, the plaintiff has laid a suit for declaration of his title over the two cents which is described as "B' schedule property in the plaint.

3. In the written statement, the defendants admitted that the Will in favour of Alamelu Ammal, but proceeded to contend that they are not disturbing plaintiff's possession over the property covered by Ext.A2. On the other hand, they would contend that the suit property is a part of Paimash No.679, in which, their father Ramachandra Naidu was allotted 3 cents under Ext.A7, partition deed dated 27.05.1919. They also pleaded that on 17.10.1982, a panchayat was held, in which both Alamelu Ammal and Ramachandra Naidu participated and they agreed to divide the property in Paimash No.680. The document evidencing the said panchayat was marked as Ext.B1.

4. The dispute went for trial and the parties have adduced oral and documentary evidence. Analysing and appreciating the evidence before it, the trial Court has held that D.W.1 in his evidence had deposed that north of 3 cents obtained by Ramachandra Naidu under Ext.A7, partition deed, there lies a portion of land and this belonged to Perumal Naidu. Since Perumal Naidu is the allottee of the eastern 13 cents in Paimash No.680, there cannot be any land belonging to Ramachandra Naidu, between the plot allotted to him in

Paimash No.679 and 680. This was confirmed by the first appellate Court as well. Aggrieved by the same, the appellants are before this Court.

5. This appeal was admitted on the following substantial questions of law :

- 1. Whether the Courts below are right in decreeing the suit for recovery of possession in the absence of the plaintiff failing to establish his right to the property?*
- 2. When the permissive occupation of the plaintiff had not been established, whether the suit for declaratory relief and recovery of possession ought not to fail?*

6.1 The learned counsel for the appellants argued that there is a huge variation in the description of the property, in that, in Ext.A2, the southern boundary of 13 cents plot allotted to Alamelu Ammal was shown to be a street. However, the 'B' schedule property over which the plaintiff now claims right is situated to the south of the street. Nowhere in any of the documents namely Ext.A7 or Ext.A2, was it indicated that Paimash No.680 is divided into two blocks, one to the north of the street and another to the south of the street. Even in the plaint, no valid explanation is given in constructing this boundary discrepancy nor the plaintiff has chosen to explain the same in his evidence. The plaintiff's case is built on his unilateral belief that the suit property is in Paimash No.680. However, inasmuch as the boundary description does not reconcile, it is necessary for the plaintiff to seek a decree for declaring his title to the property to the south of the street.

6.2 This apart, argued the learned counsel, that the defendants have produced Ext.B1, and it evidences as to how Alamelu Ammal and Ramachandra Naidu had divided the property in Paimash No.680. There is just no reference to the alleged cow-shed anywhere in the said document, and for all it matters, under Ext.B1, the shares allotted to Ramachandra Naidu and Alamelu Ammal had been shown to have been divided with specific boundaries and side measurements and this cannot be ignored.

6.3 Notwithstanding the fact that the defendants have introduced the factum of Panchatyat that had taken place on 11.10.1982, the plaintiff has chosen not to file any further pleadings, denying or disputing the same. Even in the cross-examination of D.W.1, the plaintiff has not chosen to dispute the same. This should necessarily mean that the parties who were only allotted a plot of 13 cents without any demarcating line under Ext.A7 have now proceeded to fix the boundaries under Ext.B1 in the manner indicated therein. When the entire property allotted to Alamelu Ammal has thus been exhausted in Ext.B1, there cannot be any claim over any other plot other than the one covered under Ext.B1 and the learned counsel made a further statement that the defendants are not interested in the properties so demarcated in Ext.B1 to identify the property of Alamelu Ammal.

7. The respondents have been served, but they have chosen not to appear.

8. The mater is one of identification of 'B' Schedule property. A rule of thumb

in deciding a civil suit is the rule of preponderance of probability, and this Court now looks for the dominant probability that emerges out of evidence available on either side. Here this Court finds merit in the submissions of the counsel for the appellants. In Ext.A2 -Will, the plot allotted to Alamelu Ammal was shown to be to the north of the street. If the entire 13 cents were to be on the north of the street, no portion thereof can exist to the south of the street. The second aspect is about Ext.B1 and here again, there is no reference to the portion said to have been in enjoyment of Ramachandra Naidu. There is not even a reference to that in the said document. In a Panchayat before the third party panchayatdars, which one may have to assume, that there might have existed some differences between the brother and the sister and when these issues are resolved, it is inconceivable that some right over a small portion of the property would let to remain outstanding. As the rule goes, the burden is on the plaintiff to establish his title to the 'B' schedule property and when faced with the challenge of identifying the property falling within Paimash No.680, this Court has to hold that the plaintiff has not proved his case to the satisfaction of this Court. Though the Courts below have entered a concurrent finding on facts, it needs to be stated that they have over simplified the issue by overlooking the location of the 'B' schedule property, which as already indicates is to the south of the street. They have also not adequately touched on Ext.B1, which has a strong bearing in deciding the dispute.

9. In the result, the appeal is allowed and the judgment and decree dated

27.04.2004 in A.S.No.70/2002 on the file of the Principal Sub Judge, Chengalpattu, confirming the judgment and decree in O.S.No.457/1993 on the file of the District Munsif Court, Chengalpattu, dated 31.07.2002 is hereby set aside. No costs. Consequently, connected miscellaneous petition is closed.

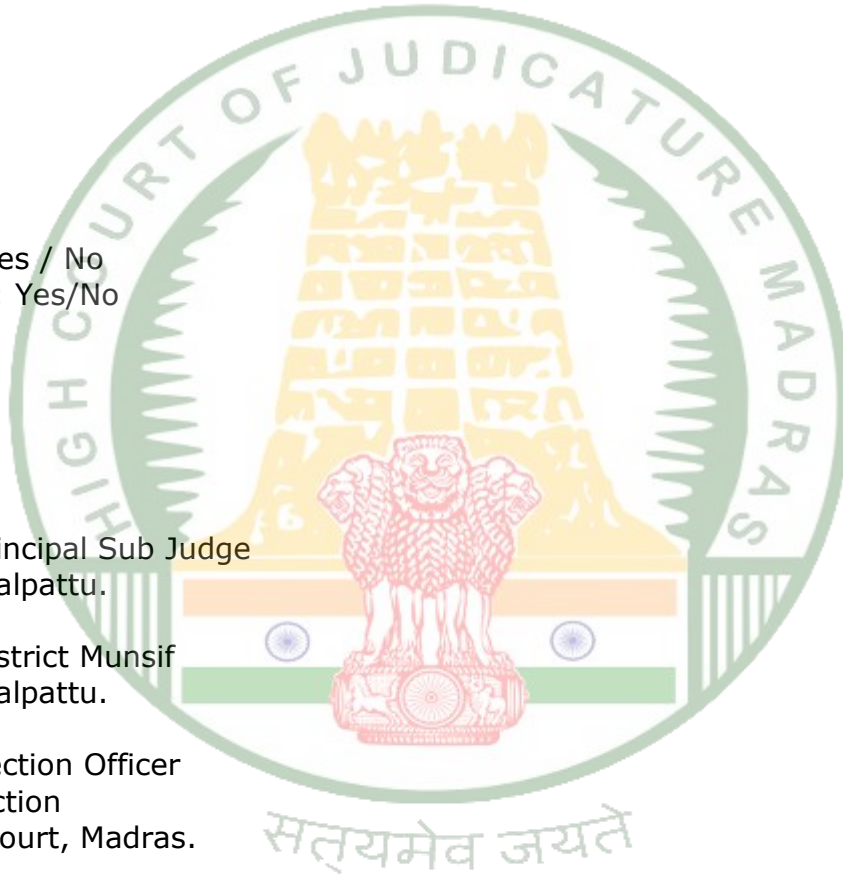
11.06.2019

Index : Yes / No
Internet : Yes/No

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To:

1. The Principal Sub Judge
Chengalpattu.
2. The District Munsif
Chengalpattu.
3. The Section Officer
VR Section
High Court, Madras.



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N.SESHASAYEE,J.,

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