

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.06.2019

DELIVERED ON : 08.08.2019

CORAM

THE HONOURABLE MS.JUSTICE P.T.ASHA

S.A.NO.163 OF 2013

AND

M.P.NO.1 OF 2013

1.Subramani
2.Valarmathi
3.Saroja

...Plaintiffs 1, 2 & 5/
Respondents 1, 2 & 4/Appellants

Vs

1.Venkatasamy
2.Chinnapillai

...Defendants 1 & 2/
Appellants/Respondents

PRAYER:

Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 06.06.2012 in A.S.No.16 of 2011 on the file of the learned Principal Subordinate Judge, Krishnagiri, reversing the Judgment and Decree dated 28.01.2011 in O.S.No.250 of 2006 on the file of the learned District Munsif, Krishnagiri.

For Appellants : Mr.S.Kanniah

For Respondents 1 & 2 : Mr.I.Hariharan
for Mr.V.Nicholas

JUDGMENT

The plaintiffs are on appeal before this Court against the Judgment in A.S.No.16 of 2011 of the learned Principal Subordinate Judge, Krishnagiri, reversing the Judgment and Decree of the learned District Munsif, Krishnagiri, in O.S.No.250 of 2006.

2.The suit O.S.No.250 of 2006 was instituted by the plaintiffs for a mandatory injunction directing the defendants 1

and 2 to remove the barbed iron fencing and a thatched hut put up by them in the suit schedule property and also for permanent injunction restraining them from interfering with the plaintiffs' peaceful possession and enjoyment of the suit property.

3.The parties are referred to in the same litigative status as in the suit.

4.The suit property is an extent of 3.96 cents i.e., 0.01.10 Ares comprised in Survey No.575/8 (Old Survey No.120 part) of Sokkadi Village, Krishnagiri, within the following boundaries bounded on the

East by	:	Rajan's house
West by	:	The plaintiffs' house in Survey No.515/8
South by	:	Pathway measuring 1 metre wide leading to the plaintiff's house.
North by	:	Krishnamurthy's house

and in this the vacant site measuring, 6.4 metres by East - West and 6.4 metres by North - South.

Plaintiffs' case:

5.The plaintiffs have come to Court contending that the property in question is their ancestral property. The 3rd plaintiff is the father of the 1st plaintiff and the 2nd plaintiff is the daughter of the 1st plaintiff. The plaintiffs would contend that as per the Act 1 of 1990, all the three of them would get an equal share in the suit property. On 25.07.1991, the patta in respect of the suit property stood in the name of the plaintiffs and the plaintiffs are in joint possession and enjoyment of the same. On the death of the 3rd plaintiff, the plaintiffs 4 and 5, who are the Widow and daughter, respectively, of the 3rd plaintiff were impleaded as parties to the proceedings. The plaintiffs would contend that the 5th plaintiff would not get any right to the properties since she was married much before the enactment of Act 1 of 1990.

6.It is the further case of the plaintiffs that the defendants 1 and 2 who are the relatives to the 1st plaintiff on his maternal side and were in no way connected to the suit property, had all of a sudden on 10.04.2006 at around 08.00 a.m. attempted to put up a barbed iron fencing and a thatched hut in

the suit property. The defendants 1 and 2 had taken the assistance of the anti-social elements, who had threatened the plaintiffs 1 to 3. The plaintiffs had attempted to thwart the highhanded actions of the defendants. The plaintiffs have also lodged a complaint to the District Collector on the very same day. On 20.04.2006, a Panchayat was held in which the defendants were advised to remove the fencing and the thatched hut and they had also agreed to do the same. However, this assurance was not translated into action and on 20.08.2006, the defendants attempted to trespass into the properties with their cattle and goat and this attempt was also successfully obstructed by the plaintiffs. Considering the repeated intervention by the defendants, the plaintiffs have come forward with the above suit.

Written Statement:

7.The defendants had filed a Written Statement inter alia denying the various allegations contained in the Plaint, particularly, that the suit property is the ancestral properties of the plaintiffs. The defendants would contend that on 16.06.1954, a portion of the suit property was purchased by one Marappa Gounder from Peyyappa Goundan. This property was purchased by the 3rd plaintiff and the defendants' father one Yeggadi Thatha Goundan under the Sale Deed dated 02.05.1959. Originally, the property did not contain a survey number. Thereafter, it was assigned by Survey No.515/5, partly in Survey No.515/6 and partly in Survey No.515/8. The father of the defendants had also purchased a vacant site from Peyyappa Goundan, S/o.Marappa Gounder under a Sale Deed dated 16.11.1959. The defendants would contend that it is this property that is the suit property and the said property is enclosed within the following boundaries;

East by	:	House of Peyappan
West by	:	The oni (வாய்க் கால்)
North by	:	The property of Periya Marappan and
South by	:	The property purchased by the defendants on 02.05.1959.

8.The defendants would contend that after the purchase on 02.05.1959, there was an oral partition between the 3rd plaintiff and Yeggadi Thatha Goundan, wherein the 3rd plaintiff was allotted the Western portion on the South and the entire Eastern portion of the property comprised in the Sale Deed dated

02.05.1959. The property that was allotted to the share of the 3rd plaintiff was comprised in Survey No.515/5 and it is in this property the plaintiffs' are residing. They would further contend that the Northern portion on the Western side and the entire Western portion were allotted to the share of Yeggadi Thatha Goundan, the father of the defendants. This property was comprised in Survey No.515/8 which is now the suit property. The patta which has been obtained by the plaintiffs in the year 1991 was behind back to the defendants and not binding on them and the defendants are behind in possession of the property.

Trial Court:

9.The parties had gone to trial on the following issues:

"(a)Whether the plaintiffs are entitled for declaration of title over the suit property?

(b)Whether the plaintiffs are entitled for mandatory injunction as prayed for?

(c)Whether the plaintiffs are entitled for permanent injunction as prayed for?

(d)To what other relief the plaintiffs are entitled to?"

10.On the side of the plaintiffs, the 2nd plaintiff had examined herself as P.W.1 and one Krishnamoorthy was examined as P.W.2 and an official from the Registrar's office was examined as P.W.3. Ex.A.1 to Ex.A.5 were marked on the side of the plaintiffs to establish their case. The defendants on the other hand examined the 1st defendant as D.W.1 and one Thathagappan as D.W.2 and marked Ex.B.1 to Ex.B.3.

11.The learned District Munsif, Krishnagiri, by his Judgment and decree dated 28.01.2011 decreed the suit primarily on the ground that the defendants had not proved their case and also on the ground that a reading of Ex.B.2 would indicate that the same does not relate to the suit property.

Appellate Court:

12.Challenging the said Judgment and Decree, the defendants had preferred A.S.No.16 of 2011 on the file of the learned Principal Subordinate Judge, Krishnagiri. The learned Principal Judge by her Judgment and Decree dated 06.06.2012 was pleased to set aside the Judgment and Decree of the learned District Munsif, Krishnagiri and allowed the appeal. The learned Judge has held that the plaintiffs had not proved their case and she has also drawn an adverse inference for the non examination of the 3rd plaintiff since it is the case of the defendants that the 3rd plaintiff and their father had together purchased a portion of the suit property and that there was an oral

partition between the two of them. This fact has also not been denied by the plaintiffs. The Lower Appellate Court was of the opinion that if the 3rd plaintiff has been examined on the side of the plaintiffs, the true facts would have been brought to the notice of the Court. Challenging this Judgment and Decree, the plaintiffs are now before this Court.

13.While admitting the Second Appeal, this Court was pleased to frame the following Substantial Questions of Law:

- (1)Whether the first appellate Court is justified in relying upon the oral partition of the suit property as pleaded by the respondents, when they have filed to show the extent of property so allotted to their share?
- (2)Whether the first appellate Court has committed an error in ignoring the patta granted for the suit Natham Poromboke lands by the Authorities under Ex.A.1 as early as on 25.07.1991?
- (3)Whether the first Appellate Court has committed an error in relying upon Ex.B.3 - Sale Deed dated 16.06.1954 even though the boundaries stated therein is contrary to the boundaries provided by the respondent along with the Written Statement?
- (4)Whether the first Appellate Court was correct in coming to its own conclusion, without setting aside the findings of the trial Court while decreeing the suit?.

Submissions:

14.Mr.S. Kanniah, learned counsel appearing on behalf of the plaintiffs would contend that the Appellate Court has totally ignored the revenue records standing in the name of the 3rd plaintiff which were clearly established the facts that the plaintiffs are in possession and enjoyment of the suit property. He would further argue that the only ground upon which the Appellate Court has proceeded to reverse the Judgment and Decree of the trial Court was that the plaintiffs had failed to examine the 3rd plaintiff. He would submit that the 2nd plaintiff being the granddaughter was aware of the facts and had adduced evidence to prove the case of the plaintiffs. He would further contend that Ex.B.2 does not relate to the suit property and therefore, the Lower Appellate Court has committed an error in stating that the suit property forms part of property subject matter of Ex.B.2. He would therefore argue that this erroneous appreciation of the fact has led to the reversal of the well considered Judgment and Decree of the trial Court and therefore, the same has to be necessarily set aside.

15.Mr.I.Hariharan, learned counsel appearing on behalf of Mr.V.Nicholas would contend that when the property was jointly purchased by the 3rd plaintiff and the father of the defendants in the year 1954 there were no Survey Numbers and it was only subsequently that the Survey Numbers have been assigned to the properties in question. He would further argue that in their Written Statement to the Plaint, the defendants had clearly traced out the devolution of the property purchased under Ex.B.2 and how the same had been partitioned between the parties, namely, the father of the defendants and the 3rd plaintiff. He would further argue that in the Written Statement, the defendants had clearly stated that the South Western portion and the entire Eastern portion of the property subject matter of the Sale Deed dated 02.05.1959 was allotted to the share of the 3rd plaintiff under the oral partition between himself and the defendants' father and assigned Survey No.515/5. The North Eastern portion including the Western portion was allotted to the share of the defendants' father and assigned as Survey No.515/8. It is this property that is the suit property.

16.The learned counsel would argue that having made such a categorical statement, the plaintiffs had not chosen to refute the same by filing a reply statement or by letting in oral evidence. The fact that they had not examined the 3rd plaintiff as a witness, particularly, when he is a party to the Sale Deed dated 02.05.1959 and the oral partition is fatal to the case of the plaintiffs and this Court should also draw an adverse inference of this non examination. The learned counsel would therefore argue that no exception can be taken to the Judgment and Decree of the Appellate Court and the same has to be confirmed.

Discussions:

17.Heard the learned counsels appearing on either side and perused the records including the copies of evidence both oral and documentary.

18.The plaintiffs had come forward originally with the case that the property in question was the ancestral property of the plaintiffs. The Plaint would proceed on the basis that the property had devolved upon the plaintiffs only by way of inheritance i.e., as an ancestral property. They have stated that the patta has been granted in the year 1991 which would prove their rights over the property. What had prompted the filing of the suit, according to the plaintiffs, is the act of the defendants in putting up the barbed iron fencing in the suit property and also a thatched hut. The plaintiffs has come forward with the case that the defendants have absolutely no interest or right in the suit property. The defendants in their

Written Statement have traced title to the suit property to the Sale Deeds dated 16.11.1959 and 02.05.1959 and to the oral partition between the 3rd plaintiff and the father of the defendants one Yeggadi Thatha Goundan. The contention of the defendants that in the oral partition, the property allotted to the 3rd plaintiff was comprised in Survey No.515/5 and the property allotted to the share of the defendants' father was allotted Survey No.515/8 has not been refuted by the plaintiffs.

19. On the contrary, the 2nd plaintiff as P.W.1 in her evidence had admitted that the property which she felt to be the share of the 3rd plaintiff was situated in Survey No.515/5 in entirety. She has further admitted during the cross examination that it is in this Survey Number that their house has been constructed and they are living and with reference to which, the Property Tax has been paid. The property which is the subject matter of the suit is situated in Survey No.515/8. Therefore, on the very admission of the 2nd plaintiff as P.W.1, it is clear that the plaintiffs have no right, title or interest in Survey No.515/8 and that the parties are in enjoyment of their respective shares as per the oral partition entered into between the plaintiffs and the defendants' father.

20. The cause of action for the suit for filing the suit was an act on the part of the defendants in fencing the property and putting up a thatched hut on 10.04.2006. However, in Ex.A.2 the complaint to the District Collector, the plaintiffs have come forward with the case that the disturbance by the defendants was when the plaintiffs had attempted to get their lands surveyed by the Surveyor. In the Complaint, they have stated that every time an attempt was made the same was disturbed by the defendants, who would not permit the Surveyor to survey the lands. They have further stated that the plaintiffs had attempted to put up a thatched hut. The Plaint does not contain any of these details. The revenue documents that have been produced on the side of the plaintiffs relate only to Survey No.515/5. That apart, it is only from the year 1991 that the plaintiffs have produced patta whereas in the suit they would contend that it is their ancestral property.

21. As observed by the Appellate Court, non examination of the 3rd plaintiff is to the detriment of the plaintiffs, particularly, when the entire Written Statement proceeds on the basis that the 3rd plaintiff and their father had jointly purchased the property and had thereafter orally partitioned the properties. The plaintiffs have kept away the best evidence from the Court and therefore, adverse inference should necessarily be drawn against the plaintiffs.

22.From the evidence of P.W.1, it is clear that the plaintiffs are very much aware that the property to which they have a right is comprised in Survey No.515/5 and not the suit property which is comprised in Survey No.515/8. The Substantial Questions of Law are therefore answered against the plaintiffs.

The Second Appeal is therefore dismissed, confirming the Judgment and Decree in A.S.No.16 of 2011 on the file of the learned Principal Subordinate Judge, Krishnagiri. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

mps

To

1. The Principal Subordinate Judge,
Krishnagiri.
2. The District Munsif,
Krishnagiri.

+lcc to Mr.S.Kanniah, Advocate, S.R.No.67941
+lcc to Mr.V.Nicholas, Advocate, S.R.No.68327

S.A.No.163 of 2013
and
M.P.No.1 of 2013

RJI (CO)
CS/24/01/2020