

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.11.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.466 of 2014

Ammavasi Gounder

..Appellant/Respondent/Plaintiff

Vs.

1.Padma
2.Murugesu Gounder
Veerabadra Pandithar (Died)
3.The State of Tamil Nadu
Rep. by the Collector,
Thiruvannamalai.

4.The Tahsildar,
Taluk Office, Polur.

5.The Sub-Registrar, Polur.

6.The Secretary,
Primary Co-Operative Bank, Polur.

7.Natarajan

8.Jayalakshmi

9.Settu

10.Chinnaponnu

11.Maragadham

..Respondents/Respondents 2, 4-12/Defendants 1,2,5-7

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree dated 30.01.2014 made in A.S.No.43 of 2007 on the file of the learned Subordinate Judge, Arni reversing the judgment and decree dated 15.03.2007 made in O.S.No.19 of 1999 on the file of the learned District Munsif, Polur.

For Appellant : Mr.V.Lakshminarayanan

For Respondents: Mr.B.Gopalakrishnan for R1
Mr.N.Manikandan, Government Advocate
for R3 & R4
Mr.T.M.Pappiah, Spl.GP for R5.

J U D G M E N T

The plaintiff, in O.S.No.19 of 1999 who succeeded before the trial court in obtaining a decree for declaration of his title and permanent injunction, upon the same being reversed by the lower appellate court has come up with this Second Appeal.

2. According to the plaintiff, the suit properties belonged to one Murugesu Gounder S/o. Kariya Gounder, who sold an extent of 1 acre 30 cents in S.No.271/4 to one Veerabadra Pandithar under the sale deed dated 13.08.1986. The said Veerabadra Pandithar in turn sold the property purchased by him under the sale deed dated 13.08.1986 to the plaintiff on 02.04.1997. It is the further case of the plaintiff that S.No.271/4 was subdivided as 271/4B2, 273/1B, 273/1D and 273/2B2. The extent of properties in these survey numbers as set out in the plaint is as follows:-

S.No.271/4B2	-	0.35 acres
S.No.273/1B	-	0.80 acres
S.No.273/1D	-	0.03 acres
S.No.273/2B2	-	0.02 ½ acres

3. It is also the further contention of the plaintiff that the 1st defendant Murugesu Gounder/ Vendor of Veerabadra Pandithar filed a suit in O.S.No.127 of 1997 seeking declaration and permanent injunction against the plaintiff, the 2nd defendant viz., Veerabadra Pandithar and the Sub-Registrar, Polur in respect of the suit properties. However, he did not prosecute the said suit and withdrew the same.

4. Thereafter, it appears that the 1st defendant had sold an extent of 89½ cents in S.No.273/1 within specific boundaries under the sale deed dated 09.07.1998 in favour of the 3rd defendant. According to the plaintiff, the property sold under the sale deed dated 09.07.1998 [marked as Ex.A5] is the property that forms part of the property sold by the 1st defendant to the 2nd defendant Veerabadra Pandithar under the sale deed dated 13.08.1986 which was in turn purchased by the plaintiff under the sale deed dated 02.04.1997 under Ex.A2. Claiming that he came to know about the subdivision only when he approached the Authorities for grant of patta, the plaintiff came forward with the suit.

5. The suit was resisted by the 3rd defendant contending that an extent of 2 acres 61 cents in S.No.271/4 out of 3 acres 49 cents and an extent of 1 acre 71 cents in S.No.273/1 out of 3 acres 42 cents originally belonged to one Kariya Gounder. The said Kariya Gounder, under a settlement deed dated 07.10.1973 settled the properties in favour of his two sons Chinnapaiyan and Murugesu Gounder [1st defendant].

6. The said Murugesu Gounder on 09.07.1998 sold an extent of 85½ cents in S.No.273/1 which has been subdivided as S.No.273/1B to the 3rd defendant. The 3rd defendant would also claim that the theory of subdivision propounded by the plaintiff is not correct. According to the 3rd defendant, she has purchased an extent of 85 ½ cents in S.No.273/1, which now bears S.Nos.273/1B, 273/1D and 273/2B2. It is also claimed that the revenue records have also been mutated in her name upon the said purchase. Therefore, the plaintiff is not entitled to the relief of declaration and permanent injunction as prayed for.

7. At trial, the plaintiff was examined as PW1, he had also examined PW2 to PW6 on his side and Ex.A1 to Ex.A17 were marked. The 3rd defendant was examined as DW1 and Ex.B1 to Ex.B6 were marked.

8. The trial court upon appreciation of the evidence, found that the case of the plaintiff is acceptable based on the conclusion that the 3rd defendant has not proved possession of the property. The trial court also found from the boundary recitals in Ex.A1, Ex.A2 and Ex.A5 viz., the sale deeds dated 13.08.1986, 02.04.1997 and 09.07.1998, that the case of the plaintiff that the property in S.No.271/4 has been subdivided as shown in the plaint is more probable. On the said conclusion, the trial court decreed the suit.

9. Aggrieved the 3rd defendant preferred an appeal in A.S.No.43 of 2007. Pending appeal, the 2nd defendant in the suit viz., Veerabadra Pandithar died and his legal representatives were impleaded as respondents 8 to 12.

10. Upon re-consideration of the oral as well as the documentary evidence, the lower appellate court found that the plaintiff, who has purchased an extent of 1 acre 30 cents in S.No.271/4 under the sale deed dated 02.04.1997 is now attempting to lay a claim over the land in S.No.273/1 under the guise of subdivision pleaded by him. The lower appellate court also found that the plaintiff has miserably failed to prove the subdivision pleaded by him. It was also found that the plaintiff has not correlated Old S.No.271/4 with the New survey numbers.

11. The lower appellate court also found that the revenue records including the A-Register would show that S.No.273/1 always stood in the name of the 1st defendant Murugesu Gounder and after execution of the sale deed in faavour of the 3rd defendant, mutation has been effected and patta has been issued to the 3rd defendant. On the aforesaid conclusions, the lower

appellate Judge disbelieved the case of the plaintiff regarding subdivision of the property.

12. The lower appellate court also concluded that the plaintiff is entitled to 1 acre 30 cents in S.No.271/4 and the decree of the trial court was modified granting a declaration in respect of 1 acre 30 cents in S.No.271/4 in favour of the plaintiff. Permanent injunction was also granted restraining the defendants from interfering with the plaintiff's possession of 1 acre 30 cents of the land in S.No.271/4. The lower appellate court however found that the plaintiff has not established his title to the 85 ½ cents of land comprised in S.No.273/1B, 273/1D and 273/2B2. Aggrieved the plaintiff has come up with this Second Appeal.

13. The following questions of law have been framed at the time of admission:-

1. Whether the lower appellate court is justified in ignoring the boundary recitals that binds the first and third defendants as much the plaintiff?
2. Whether the withdrawal of the suit in O.S.No.127 of 1997 on the file of the District Munsif Court, Polur would not operate as estoppel against the defendants 1 and 3 from asserting ownership to the property?
3. Whether the non-examination of the 1st defendant and Chinnaaswamy not fatal to the case of the 3rd defendant and whether their non-examination should not have compelled the court to draw adverse inference against the case of the 3rd defendant?

14. I have heard Mr.V.Lakshminarayanan, learned counsel appearing for the appellant, Mr.B.Gopalakrishnan, learned counsel appearing for the 1st respondent, Mr.N.Manikandan, learned Government Advocate for the respondents 3 to 4 and Mr.T.M.Pappiah, learned Special Government Pleader appearing for the 5th respondent. The other respondents though served are not appearing either in person or through counsel duly instructed.

15. Mr.V.Lakshminarayanan, learned counsel appearing for the appellant pointing out the boundary recitals in Ex.A1, Ex.A2 and Ex.A5 would contend that the 1st defendant Murugesu Gounder had sold the same property that he had sold under Ex.A1 dated 13.08.1986 again to the 3rd defendant under Ex.A5 dated 09.07.1998. He would also draw my attention to the boundary

recitals in the settlement deed executed by Kariya Gounder dated 07.10.1973 marked as Ex.B2 to show that the boundaries of 1 acre 71 cents of land in S.No.273/1 settled by Kariya Gounder on his sons viz., Chinnapaiyan and Murugesu Gounder are vastly different from the boundaries set out in Ex.A5, which according to the 3rd defendant conveys a half share in S.No.273/1. It is also the contention of the learned counsel for the appellant that when there are discrepancies between the boundaries and the survey number it is the boundaries that would prevail.

16. Unfortunately, for the appellant, this was not the case projected or pleaded before the courts below. In the plaint, the plaintiff has come up with a specific case that S.No.271/4 has been subdivided as set out into four different survey numbers. The plaintiff has miserably failed to establish this case of subdivision which is the back bone of the plaint. There is anomaly in the pleadings of the plaintiff regarding subdivision. If the case of the plaintiff that S.No.271/4 has been subdivided into 271/4B2, 273/1B, 273/1D and 273/2B2, then, the total extent must be about 1 acre 30 cents and not 1 acre 20 ½ cents which is shown as the suit property.

17. Secondly, if the survey number is subdivided, the main Survey number will remain the same and only the subdivision numbers will differ. Even as per the case of the plaintiff, S.No.271/4 has been subdivided as 273/1B, 273/1D and 273/2B2. This plea of the plaintiff is highly improbable.

18. From Ex.B4 dated 12.01.1996, it is seen that the subdivisions in S.Nos.273/1B, 273/2A1 and 273/2A2 were effected even on 12.12.1995, that is prior to the purchase by the plaintiff under Ex.A2 sale deed. The Village A-Register produced shows that S.No.273/1D, which is subject matter of the suit stands in the name of one Arumuga Gounder and S.No.273/1B stands in the name of the 3rd defendant. Thus, the revenue records would conclusively establish that the 3rd defendant had been in possession of the property.

19. The extent of land in S.No.273/1 as per the settlement deed Ex.B3 is 3 acres 42 cents, while the extent of the land in S.No.271/4 is about 3 acres 49 cents. The plaintiff has not placed acceptable material to prove the claim that S.No.271/4 has been subdivided into various extents.

20. In so far as the title of the 1st defendant is concerned, it could be seen from the sale deeds that the 1st defendant had sold an extent of 1 acre 30 cents in S.No.271/4 to Veerabadra Pandithar who in turn sold the property to the plaintiff. The 1st defendant had again in 1998 under Ex.A5 sold 85 ½ cents in S.No.273/1. The title of the 1st defendant to 85 ½

cents in S.No.273/1 and 1 acre 30 cents in S.No.271/4 is not disputed by either of the parties. It is not contended that the boundaries, being same would prevail over the survey number and the extent.

21. The theory boundaries would prevail over the extent can be applied only when there is a dispute between the extent sold and the boundaries. It is also a settled law that the boundaries will prevail over the extent only when the extent could not be ascertained with certainty and there is doubt about the extent of land sold.

22. In the case on hand, the counsel for the appellant seeks to extend the theory to include a difference in the survey numbers. I do not think that the theory is so elastic that it could be extended even to mistakes in survey numbers.

23. It should also be pointed out that it is not the case of the plaintiff that there is a mistake in survey number either in his sale deed or in the sale deed executed in favour of the defendant. The plaintiff has come up with a singular case of subdivision. Having failed to prove that, the plaintiff cannot now buttress the claim with a new ground of mistake in survey numbers, without any foundation of pleading, to contend that the boundaries would prevail over the extent and the other mistakes in the sale deed and therefore he is entitled to 1 acre 30 cents of land within the boundaries in the sale deed dated 02.04.1997 executed by the 2nd defendant in his favour. Therefore, the 1st question of law is answered against the appellant.

24. As regards the 2nd question of law, the plaint in O.S.No.127 of 1997 has been filed as Ex.A4. A perusal of the plaint reveals that the 1st defendant had filed a suit disputing the sale deed dated 02.04.1997 and he has claimed title in respect of three different survey numbers of properties, which are not subject matter of Ex.A2 sale deed dated 02.04.1997. Even then the said suit has been withdrawn as not pressed. There has been no decision on the ownership of the 1st defendant in the said suit. Even assuming that the said withdrawal would preclude the 1st defendant from instituting fresh suit, the same would not prevent the 3rd defendant who is purchaser from the 1st defendant from defending the claim of title made by the plaintiff in the present suit, since there had been no decision on merits of the claim. Hence, the 2nd question of law is also answered against the appellant.

25. It is the plaintiff who has come to court seeking declaratory relief and it is for him to establish his title. The plaintiff cannot succeed by pointing out the weakness in the defence. The 3rd question of law is exactly that whether the

non- examination of the 1st defendant Murugesu Gounder or the husband of the 3rd defendant Chinnaswamy cannot be held to be fatal to the case of the defendant, since the lower appellate court had very clearly found that the 1st defendant singularly failed to prove his title over any land in S.No.273/1.

26. In view of the conclusions reached, all the questions of law are answered against the appellant and the appeal fails and it is accordingly dismissed. However, in the circumstances there will be no order as to costs.

Sd/-

Assistant Registrar

//True copy//

Sub Assistant Registrar

dsa

To

- 1.The Subordinate Judge, Arni.
- 2.The District Munsif, Polur.
3. The Section Officer, V.R. Section,
High Court of Madras, Chennai 600 104.

+1cc to Mr.B.Gopalakrishnan, Advocate SR.No.95665

+1cc to Mr.V.Raghavachari, Advocate SR.No.96358

+1cc to Government Pleader SR.No.95752

S.A.No.466 of 2014

NRL (CO)

GMV (27/08/2020)

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