



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 01.08.2019

CORAM

THE HONOURABLE **MR. JUSTICE S.S.SUNDAR**

S.A. (MD)No.85 of 2018

and

C.M.P. (MD)Nos.1808, 5461 and 9850 of 2018

WEB COPY

P.Vadamalai Ammal

... Appellant/Appellant/Defendant

Vs.

O.Meenakshi Sundaram

... Respondent/Respondent/Plaintiff

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, 1908, to set aside the judgment and decree, dated 06.03.2017 passed in the appeal in A.S.No.71 of 2014 on the file of the Subordinate Court, Theni, confirming the judgment and decree, dated 04.09.2014 passed in the suit in O.S.No.359 of 2004 on the file of the District Munsif-cum-Judicial Magistrate Court, Bodinayakkanur.

For Appellant

:Mr.J.Bharathan

For Respondent

:Mr.S.Anand Chandrasekara

for Mr.P.Muthuvijaya Pandian

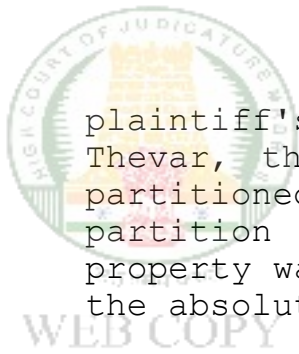
JUDGMENT

The defendant in the suit in O.S.No.359 of 2004 on the file of the Subordinate Court, Theni, is the appellant herein.

2.The respondent herein, as plaintiff, filed the suit in O.S.No.359 of 2004 before the Subordinate Court, Theni, for declaration of title and consequential permanent injunction in respect of the suit property. The suit property has been described as a property, measuring to an extent of 1.92 acres of land in S.No.861/2 in Vandithoppu Pulam, Bodinayakkanur Taluk. Though the suit property described with reference to four boundaries, the discrepancies are evident from the description itself, as the eastern boundary of the property shown as East-West road and the western boundary is given twice without mentioning the north side.

3.The case of the plaintiff is as follows:

3.1.The suit property originally belonged to one Thalaimalaiyan and that he mortgaged the schedule property to the father of plaintiff, by name, Ottakara Thevar, dated 05.11.1931. The said mortgage is an usufructuary mortgage. As per the mortgage deed, the mortgagor should redeem the property within 5 years. Since the mortgagor had not redeemed the suit property within the time stipulated, the property became the absolute property of



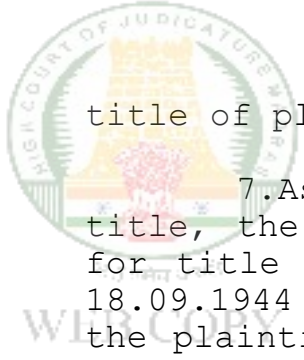
plaintiff's father. After the death of plaintiff's father, Ottakara Thevar, the suit property and other joint family properties were partitioned within the family members of the plaintiff by a partition deed, dated 28.05.1987. Under this partition, the suit property was allotted to the plaintiff. Hence, the plaintiff became the absolute owner of the suit property.

3.2.The plaintiff's father name, which was continued in revenue records, was changed in the Updating Registry in 1980's. The plaintiff is in possession and paying tax in respect of the suit property in her name. Stating that the defendant made an attempt to enter into the suit property, the suit came to be filed in November'2004.

4.The appellant/defendant filed a detailed written statement, disputing the plaintiff's claim of title. Apart from denying the averments and the sources of title pleaded by the plaintiff, the case of the defendant is that the suit property originally belonged to one Suruliappan, who sold the same to one Petchiammal and that her brother, by name, S.Ramiah, purchased the plaint schedule property along with the property in S.No.849/1 in and by a sale deed, dated 09.10.1967 from the legal heirs of Petchiammal. It is further stated that the defendant's brother took possession of the suit property immediately after the sale and he was in exclusive possession and enjoyment of the same. It is stated further that even before the purchase by his brother, the defendant's family had ancestral property in S.No.860/1C and 860/1C2, which was in their possession. It is stated that the defendant's brother died on 27.03.2002 leaving behind the defendant as his sole legal heir.

5.The plaintiff also filed a reply statement to the written statement filed by the defendant. After completing pleadings, the trial Court framed issues relating to title and permanent injunction. The plaintiff examined himself as PW-1 and another person as PW-2 and marked Ex-A1 to Ex-A9. The defendant examined herself as DW-1 and examined another person as DW-2 and marked Ex-B1 to Ex-B6, apart from Ex-X1 to Ex-X6 as Court documents.

6.The trial Court, on the basis of mortgage deed, produced as Ex-A1, dated 05.11.1937, came to the conclusion that the document, being the old document, can be relied upon to decide the title. Since the plaintiff has produced revenue records to show his exclusive holdings of suit property before and after settlement, the trial Court came to the conclusion that the property, which is the subject matter of the suit, was the property in paimash No.837, as it was referred to in Ex-A1. The lower Court also relied upon Ex-A5, namely, partition deed, dated 28.05.1987. It is further found that the documents produced as Ex-A6 serious and Ex-A7 settlement and adangal extract would show that the property was registered in the name of plaintiff's father. Thus, the trial Court upheld the



title of plaintiff.

7.As regards documents filed by the defendant to prove her title, the trial Court was of the view that the defendant's claim for title is on the basis of a subsequent document, Ex-B1, dated 18.09.1944 which cannot be accepted as a valid document to challenge the plaintiff's right, which flows from a prior document of title, under Ex-A1, dated 05.11.1931. After holding that the plaintiff is entitled to title, the trial Court decreed the suit. Aggrieved by the same, the defendant preferred an appeal in A.S.No.71 of 2014 before the Subordinate Court, Theni. The lower appellate Court also agreed with the findings of the trial Court and dismissed the appeal. Since the trial Court has elaborately discussed all the issues and considered all the documents filed by the parties before the trial Court, the lower appellate Court did not deal with the issues elaborately. As a matter of fact, the issues were not considered and discussed independently, as it is expected from the appellate Court, being the final Court of facts.

8.A petition filed by the appellant for reception of additional document was also dismissed by the appellate Court. The additional documents filed by the appellant in the course of appeal was also referred to by the lower appellate Court. Though the documents would show that patta stands in the name of one Suruliappan, the defendant's predecessor-in-interest, the lower appellate Court rejected the documents by stating that no explanation was offered as to how the name of Suruliappan appeared in the patta. The lower appellate Court further held that the defendant has not proved as to how the suit property originally belonged to Suruliappan by producing any old document of title. Accordingly, the lower appellate Court dismissed the appeal filed by the defendant. Aggrieved by the same, the above second appeal has been filed.

9.In the memorandum of grounds, the appellant has raised the following substantial questions of law:

"a)When the first appellate Court being the last Court of facts, can it hold that the trial Court had rendered its judgment after considering the evidence and can it refuse to independently discuss and analyse the facts, oral and documentary evidence by itself?

b)Whether the mortgage (Othi) deed, dated 05.11.1931 (Ex-A1) is a valid title deed, when the clause giving absolute title to the mortgagee on failure of the mortgager to redeem within the time fixed amounts to a "clog on redemption" and hence invalid?

c)Whether the unregistered and unstamped partition deed, dated 25.08.1987 (Ex-A5) can give a valid title to the respondent/plaintiff when it is inadmissible in evidence in view of Section 17(1) (b) and Section 49 of the



Registration Act, 1908, because, the recitals show that deed itself creates division of property?

d) Whether the unregistered and unstamped partition deed, dated 25.08.1987 (Ex-A5), apart from being unregistered, is not "duly stamped" and hence inadmissible in evidence and cannot be looked into for any purpose under Section 35 of the Indian Stamp Act, 1899?

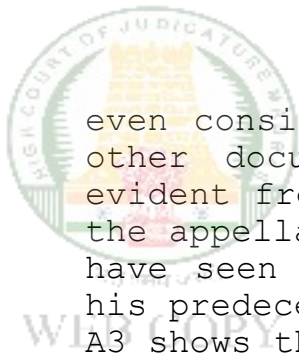
e) When the mortgage (Othi) deed, dated 05.11.1931 (Ex-A1) refers to the suit property by Paimash number, whereas, it is now identified by survey number and there is no correlation proved between them, is it proper to hold that it relates to the suit property?

f) When no reason is given for not producing the original mortgage (Othi) deed dated 05.11.1931 (Ex-A1) and for the production of its registration copy alone, is it legally admissible in evidence in view of Section 65 of the Indian Evidence Act, 1872?

g) Whether the Courts below are correct in deciding title in favour of the respondent/plaintiff, simply because the documents produced by him is earlier in point of time than the documents produced by the appellant/defendant?"

10. Though the document, Ex-A1 shows that the mortgagor was entitled to 1/3 of 5 Kuzhi, equivalent to 3 Acres, the respondent filed a suit claiming title to an extent of 1.92 Acres in S.No.861/2. It is submitted by the learned Counsel for the appellant that the document, Ex-A1, does not refer to any survey number. The property described in the document, Ex-A1 was with reference to paimash No.837. However, the suit property is in S.No.861/2. The learned Counsel therefore, submitted that though the plaintiff filed a document, Ex-A3, that is not a correlation register and that the said document cannot be relied upon to prove that the property, that was marked as Ex-A1, is relating to the suit property. He also relied upon the entries in Ex-A3 to demonstrate that it is not a document to prove correlation, since document, Ex-A3 reflects only the revenue records, as per holdings, as per settlement accounts and as per re-settlement accounts. It is also pointed out that there is no corresponding paimash to S.No.861/2 as paimash No.837 has been correlated to various survey numbers and a sub-division of paimash cannot be presumed as the inam estates before abolition of Zamin, were the property of landholder and the survey by landholders/intermediaries was for the purpose of collecting rent from Ryots. It is not in dispute that the suit property is in S.No.861/2.

11. The learned Counsel for the appellant then submitted that the revenue records and other documents filed by the defendant pertaining to the suit property were not considered. It is also the grievance of the appellant that the lower appellate Court has not

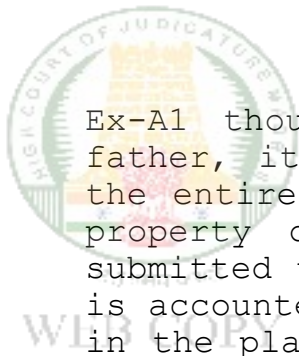


even considered the fact that the defendant has produced patta and other documents, like, kist receipts over a period of time as evident from the documents marked as Ex-A3. The learned Counsel for the appellant also submitted that the lower appellate Court ought to have seen that no patta was granted in favour of the plaintiff or his predecessor-in-interest. It is to be seen that the document Ex-A3 shows that the father of plaintiff, namely, Ottakara Thevar, s/o. Sundaresan, was the registered holder of land in S.No.860 alone.

12.The property comprised in S.No.861/2 has been shown as a property corresponding to Old S.No.839/4 (it must be paimash number) and the said property is registered in the name of one Suruli Servai vide patta No.377 and others. It is stated that revenue accounts establishes that the property in S.No.861/2 was never registered as one belonged to the father of plaintiff, as the owner in the earlier records. The learned Counsel for the appellant further submitted that the Courts below have concurrently held title in favour of plaintiff only on the basis of document, Ex-A1, without looking into the correlation and without considering the documents filed by the defendant. The learned Counsel further submitted that the identity of the property with reference to boundary description as found in plaint is impossible. He further stated that same boundary description found in Ex-A1 has been given in the plaint and no attempt was made by the plaintiff during the course of trial explaining the discrepancies.

13.As against the submission of learned Counsel for the appellant, the learned Counsel for the respondent would submit that there is no dispute with regard to the identity of property and there is no plea in the written statement filed by the defendant with regard to the issue now raised by the appellant, by stating that the survey number was referred to in the document Ex-A1 and that paimash No.837 is not corresponding to suit survey number. The learned Counsel then relied upon Ex-B1, dated 18.09.1944. It is the document of title relied upon by defendant. As per Ex-B1, paimash number referred to is only 837. The learned Counsel further stated that Ex-A1 is in respect of 1.1/4 Kuzhi, namely, 75 cents, as per the property description found in Ex-B1. However, the defendant has produced, Ex-B2, dated 09.10.1967, which is in respect of an extent of 1.27 Acres in S.No.849/1 and an extent of 1.40 acres in S.No.861/2. Since Ex-B2 traces title of defendant only by referring to Ex-B1, it is contended by the learned Counsel for the respondent that the defendant's case that she is entitled to 1.40 acres in S.No.861/2 is contrary to her own document. It is further pointed out that in the written statement, the defendant did not claim any right under document Ex-B1 and that only during evidence, Ex-B1 was marked.

14.The learned Counsel for the appellant submitted that the plaintiff though pleaded title on the basis of Ex-A1, he is also entitled to one share of his father. He submitted that the document

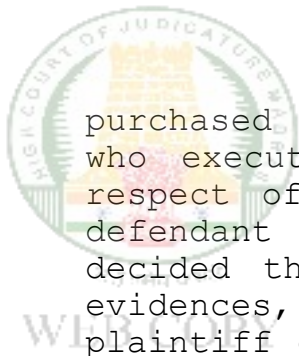


Ex-A1 though was not in respect of the property of plaintiff's father, it indicates that the plaintiff's father had 1/3 share in the entire property and that his own property lies adjacent to the property dealt with under Ex-A1. The learned Counsel further submitted that the claim of plaintiff for more extent in the plaint is accounted by Ex-A1 itself. Though it is not specifically pleaded in the plaint, the learned Counsel submitted that the Court has to consider the documents and the pleadings conjointly, so as to appreciate the context, in which the plaint was drafted. The learned Counsel also pointed out that document Ex-A7 series and other documents would certainly prove continuous possession of the plaintiff and his predecessors-in-interest in respect of the suit property. The learned Counsel also relied upon Ex-A7 series and the oral evidence of defendant's witnesses in support of his arguments. From the evidence of DW-1, it is pointed out that the defendant also admitted that the plaintiff's predecessor-in-interest had title in respect of 1.40 Kuzhi. It is also admitted by the parties in the course of evidence that the document conveyed under Ex-B1 is in respect of 75 cents alone.

15.The appellant also filed a petition under Order 41 Rule 27 of CPC for reception of additional documents. The additional documents filed by the appellant are old revenue records. For example, the first document was the patta issued to the defendant's predecessor-in-title in respect of Sthala No.837. The learned Counsel pointed that Sthala No.837 is referable to paimash number. The tax paid to the Zamin for Fasli 1352-1353 would show that the defendant's predecessor-in-interest were paying rent to the Zamin in respect of property in dispute.

16.The payment of rent by the appellant to the erstwhile Zamin was not specifically pleaded in the written statement. However, the fact that the property was in the holding of ryots and the ryots were paying rent to Zamin during the relevant point of time cannot be disputed. The additional documents may have some relevance. However, the appellant has to prove not only the relevance, but also the genuineness of the document. An opportunity should also be given to the respondent to raise their plea with regard to these additional documents. Having regard to the pleadings and documents now relied upon by the parties before this Court, this Court is able to cull out the following facts which are not in dispute:

16.1.The plaintiff filed the suit on the basis of mortgage deed, under Ex-A1. That document is only in respect of 1 acre (or 95 cents) and the plaintiff has not explained how he is entitled to seek declaration of title to an extent of 1.92 acres in S.No.861/2 corresponding to old paimash No.837. Similarly, the defendant, who has pleaded title on the basis of Ex-B1, seeks title to an extent of 1.40 acres. It is also admitted that the plaintiff's brother



purchased the property under Ex-B2, dated 09.10.1967. The person, who executed Ex-B2 derived title under Ex-B1, which is only in respect of 75 cents. This discrepancy was not accounted by the defendant before the lower Court. Though the Courts below have decided the question of title on the basis oral and documentary evidences, the Courts below have simply accepted the case of the plaintiff on the basis that Ex-A1 is prior in point of time. This cannot be a valid reason, when two parties claim title on the basis of two different sources. The burden lies on the plaintiff to prove his title.

17.As a matter of fact, it is admitted that the plaintiff has not produced original mortgage deed and the document produced as Ex-A1 is only a certified copy of mortgage deed. Apart from that, when old documents are filed by rival claimants tracing their title through different sources, the question of title cannot be tested on the basis of age of documents. In a case like this, the source of title has to be ascertained based on other materials and revenue documents. In this case, the extent of property in paimash No.837 is admittedly one third of 5 Kuzhi, ie., around 1 Acre. The defendant could claim title only in respect of an extent of 75 cents in paimash No.837 as per Ex-B1. Hence, it is possible for accommodating the claim of both sides. This can be done only, if further opportunity is given to both sides to lead evidence to prove their title and enjoyment. The plaintiff did not plead that his father had title as a co-owner in respect of any portion of suit property. The Courts below have not considered the documents in a proper perspective as pointed out above. The discrepancy in the description of document is not explained. Hence, the judgment and decree of the Courts below are liable to be set aside and the matter has to be remanded. The additional documents filed are original patta and kist receipts issued by erstwhile Zamin. The appellant though has satisfied this Court for reception of these documents as additional evidence, their authenticity, genuineness, proof, admissibility, relevance, etc., have to be proved in the manner known to law.

18.Having regard to the facts and circumstances of this case and in view of the decision of this Court to accept the additional documents, this second appeal is allowed and the judgment and decree dated 06.03.2017 passed in the appeal in A.S.No.71 of 2014 on the file of Subordinate Court, Theni, confirming the judgment and decree, dated 04.09.2014 passed in the suit in O.S.No.359 of 2004 on the file of the District Munsif-cum-Judicial Magistrate, Bodinayakkanur, are set aside. C.M.P.(MD)No.9850 of 2018 is allowed and the documents are received as additional evidence. The matter is remitted to the trial Court.

19.The learned District Munsif, Bodinayakkanur is directed to dispose of the suit after giving sufficient opportunities to both sides, in the manner indicated in this judgment. The plaintiff as



well as the defendant are permitted to file their replication as well as additional written statement. However, the said replication and the additional written statement should be confined to additional documents, that are now permitted to be marked.

20.The documents which are permitted to be marked as additional documents received by this Court shall form of the records and Registry is directed to ensure the safe custody of those documents and transmission of those documents along with records as expeditiously as possible, preferably within a period of 3 weeks from today. The learned District Munsif, Bodinayakkanur, is directed to dispose of the suit in O.S.No.359 of 2004 within a period of six months from the date of receipt of records.

21.Accordingly the second appeal and C.M.P.(MD)No.9850 of 2018 are allowed and remitted. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS III)

// True Copy //

Sub Assistant Registrar(CS)

cmr
To

- 1.The Subordinate Judge, Theni.
- 2.The District Munsif-cum-Judicial
Magistrate, Bodinayakkanur.

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+1 cc Mr.P.MUTHUVIJAYAPANDIAN ,Advocate, SR.No. 79741

S.A. (MD)No.85 of 2018
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