

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 09.11.2020

Judgment Delivered on : 19.11.2020

CORAM

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Second Appeal No.1123 of 2009

Krishnasamy Appellant/Plaintiff

Vs.

1. Rajakannu

2. Magimaidoss Respondents/Defendants

PRAYER: The Second Appeal has been filed under Section 100 of Civil Procedure Code against the judgment and decree passed in A.S.No.30 of 2008 dated 27.07.2009 on the file of the II Additional Sub Court, Villupuram, reversing the judgment and decree passed by the II Additional District Munsif Court, Ulundurpet, in O.S.No.487 of 2004 dated 27.03.2007.

For Appellant : Dr.A.Thiyagarajan, Senior Counsel
for Mr.S.Ramesh Kumar

For Respondents : Mr.T.Dhanya Kumar

J U D G M E N T

The present Second Appeal is directed against the judgment of the First Appellate Court, which has reversed the judgment and decree of the trial Court and dismissed the suit filed for declaration of title, mandatory injunction and possession with mesne profits.

2. The case of the appellant, who is the plaintiff in the suit is that, the suit schedule property in S.No.4/8 at Madhampattu Village, Ulundurpet Taluk, originally owned and enjoyed by his great grand father namely, Koothan. By way of oral partition, Kuppusamy and Subburayan, sons of Koothan, divided the property. Each of them got 20 ½ cents from total extent of 41 cents. 'A' Schedule property on North was allotted to Subburayan, who is the father of the plaintiff. The other

sharer Kuppusamy who got the property on South sold his portion to one Subbiah Naidu vide Sale Deed dated 24.08.1966.

3. Later Subramanian, son of Kuppusamy, sold 3 cents in S.No.4/8 to one Raja Kannu, the first defendant in the suit. Though the said 3 cents fell within the share of the plaintiff's father, he did not object to the said sale effected on 01.09.1969, but, purchased 4 ½ cents from Raja Kannu (first defendant) under Sale Deed dated 07.08.1970. After selling 4 ½ cents to the plaintiff's father, the first defendant had only 1 ½ cents retained with him. However, the first defendant encroached upon the land of the plaintiff and laid foundation for construction of house. Hence, the suit for declaration, possession and mandatory injunction to remove the construction put up in the 'B' Schedule property and for mesne profit. The suit was resisted by the first defendant stating that it is liable to be dismissed for improper description of property and for vexatious relief without reasonable and probable cause.

4. Contrarily the defendants traced the title over the property to the extent of 4 cents in S.No.4/8B from his ancestors. S.No.4/8 was the property of Alavan admeasuring a total extent of 51 cents. The said Alavan is the great grandfather of the first defendant. Alavan had three sons by name Koothan, Muruvan and Ayyakannu. The plaintiff is a descendant of Koothan and the first defendant is a descendant of Ayyakannu. After the demise of Alavan, the property was enjoyed by his sons. 70 years prior to the suit, by oral partition, 51 cents of land in S.No.4/8B at Madhampattu Village was divided between Ayyakannu and Koothan. 9 cents on the Northern portion and 4 cents on the Southern portion was allotted to Ayyakannu. Balance 38 cents was allotted to Koothan, who is the grand father of the plaintiff. The other son of Alavan was allotted the property in Arumpattu Village.

5. Out of 38 cents allotted to Koothan, one of his sons, Subburayan sold 10 cents to one Namachu in the year 1938. On 21.06.1939, the father of the first defendant sold away 9 cents to one Savurimuthu. In 1966, Kuppusamy, who is the Senior Paternal Uncle of the plaintiff sold away 20 ½ cents to one Subbiah Naidu. 6 cents of land was sold by Subramanian, son of Kuppusamy to the first defendant. Thus, out of 38 cents allotted to Koothan, already 36 ½ cents was alienated by the branch of Koothan. Out of 13 cents allotted to Ayyakannu, 9 cents was alienated. Remaining 4 cents was retained by the plaintiff and his brother Murugesan. 20 ½ cents sold by Kuppusamy to Subbiah Naidu in the year 1966 was purchased by Subburayan, the father

of the plaintiff in the year 1967 through an oral sale. The plaintiff has title and possession in respect of 20 ½ cents and 11 ½ on the Southern portion. 11 ½ cents has been sub-divided. The 4 cents held by Ramalingam, the father of the first defendant was partitioned between his sons. The first defendant being the elder son was allotted 2 cents. The other sons Murugesan and Deva Rajan were allotted 1 cent each. Later Murugesan sold his 1 cent to the other brother Deva Rajan on 21.01.1992. The first defendant and his brother Deva Rajan have constructed thatched house in their respective portions and obtained service connection and have enjoyed continuously.

6. The defendants decided to remove the thatched house and put a terrace building in the 4 cents of the land and laid foundation on 11.02.2004. The plaintiff and his Senior Paternal Uncle have property adjacent to the defendants' land on the eastern portion. The exact extent of 'A' Schedule property in Re-Survey No.4/8 B3 is 11 ½ cents, it is not 20 ½ cents as alleged by the plaintiff in his Plaint Schedule. 20 ½ cents in Re-Survey No.4/8 B2 includes 9 cents of land allotted to the predecessor of the first defendant.

7. It is also contended by the defendants that Subburayan, the father of the plaintiff had another wife by name Thayarammal and she is a necessary party to the suit. Besides claiming exclusive title in respect of 4 cents of the land, which is part of the 'B' Schedule property, the defendants also in alternate pleaded adverse possession and prescriptive title being in enjoyment of the 4 cents of the land for more than 100 years. The trial Court upon considering the rival pleadings, framed the following issues:-

1. Whether the plaintiff is the absolute owner of suit 'B' Schedule property or not?
2. Whether the plaintiff is entitled the relief of Declaration and recovery of possession with respect to suit 'B' Schedule property or not?
3. Whether the plaintiff is entitled to the relief of Permanent Injunction and Mandatory Injunction as prayed for or not?
4. To what other relief the plaintiff is entitled too?

8. On the side of the plaintiff, the plaintiff and Subbiah Naidu were examined as P.W.1 and P.W.2 and 38 Exhibits were marked as Exs.A1 to A38. On behalf of the defendants, the first

defendant was examined as D.W.1 and two other witnesses namely, Devaraju and Jayaraman were examined as D.W.2 and D.W.3. and 34 Exhibits were marked as Exs.B1 to B34.

9. The trial Court considering Ex.A1, Sale Deed executed by Kuppusamy in favour of Subbiah Naidu (P.W.2), dated 24.08.1966, Ex.A2, Sale Deed executed by Subramanian in favour of Rajakannu (first defendant), Ex.A3, Sale Deed executed by Rajakannu, the first defendant in favour of Subburayan, and boundaries mentioned in these three Sale Deeds, has held that the plaintiff has proved his title over 'A' and 'B' Schedule property, other exhibits namely, patta receipts and house tax receipts marked as Exs.A4 to A29, has proved his possession and enjoyment. The documents relied on by the defendants were held not relevant to the suit property. The trial Court, particularly, observing that the first defendant is the Purchaser under Ex.A2 Sale Deed and thereafter, he has sold an extent of 4 ½ cents to the plaintiff's father under Ex.A3, held that therefore, the first defendant is entitled only to the remaining 1 ½ cents of land in the said survey number.

10. Aggrieved by the judgment and decree of the trial Court allowing the suit, the appellant preferred the First Appeal before the Subordinate Court, Villupuram, in A.S.No.30 of 2008.

11. On re-appreciating the evidences, the First Appellate Court had reversed the finding of the trial Court stating that the plaintiff has failed to establish that Koothan had 41 cents of land in S.No.4/8B through whom he claims right over the suit property. Nor the plaintiff has proved the oral partition among the sons of Koothan. The property mentioned in 'A' Schedule and 'B' Schedule are contiguous property. The plaintiff has not established through revenue records regarding the extent of land in S.Nos.4/8 B3 and 4/8 B2. While the rival claimants traced the title through different source and different extent, non-examination of Revenue Officials to ascertain the actual extent available in the field is fatal to the plaintiff's case. Also taking exception for not seeking for appointment of an Advocate Commissioner to inspect the physical feature of the suit property and file a report, the First Appellate Court allowed the appeal and dismissed the suit holding that the plaintiff failed to establish that the land in S.No.4/8B was sub-divided into S.Nos.4/8 B2 and 4/8 B3 as for the extent mentioned and claimed.

12. The First Appellate Court has also observed that it is an admitted case of the plaintiff that Subburayan son of Kuppusamy, who is the Paternal Uncle of the plaintiff erroneously sold 6 cents of the land allotted to the plaintiff's father to the first defendant under Ex.A2 and the same was not objected by his father. This transaction had taken place on 01.09.1969. After that, the plaintiff's father has recognised the title of the first defendant and had purchased 4 ½ cents from the first defendant. Therefore, the Lower Appellate Court has held that if out of 20 ½ cents allotted to him in the partition between him and Subburayan and if erroneously Subburayan had sold 6 cents of his portion and the same had not been objected by him, the father of the plaintiff will be holding only 14 ½ cents out of 20 ½ cents allotted. Subsequently, he had purchased 4 ½ cents from the first defendant, then the total extent of the land held by the plaintiff and his father will be 19 cents only. The plaintiff cannot claim title for 20 ½ cents having acquiescence to alienating 6 cents on 01.09.1969 in favour of the first defendant.

13. The appeal is filed challenging the reasons given by the First Appellate Court for reversing the finding of the trial Court and dismissing the suit.

14. The learned Senior Counsel appearing for the appellant would harp on the reasoning given by the trial Court and on the fact that the first defendant has admitted the purchase of 6 cents of land from Subramanian, son of Kuppusamy under Ex.A2 dated 11.09.1969 and had sold 4 ½ cents to Subburayan, the father of the plaintiff under Ex.A3 dated 07.05.1970. While so, there can be only 1 ½ cents left with the first defendant and he cannot have claim over 4 cents of land. The claim of the first defendant Rajakannu that he and his brother holding 4 cents of land in S.No.4/8 has no basis. While the trial Court has rightly correlated the description of the property in the title deeds and the lay of the property, the First Appellate Court has unnecessarily entertained doubt over the title as well as possession rejecting kist receipts, house tax receipts and Ex.A1 to Ex.A3. The First Appellate Court has gone tangential and contrary to the documentary evidence and dismissed the suit reversing the well considered judgment of the trial Court.

15. Per contra, the learned counsel for the respondents would state that the suit is for declaration and mandatory injunction. The plaintiff, who seeks the relief of declaration

of title and mandatory injunction ought to have proved his case with cogent and appropriate evidence. His claim over the suit property tracing right through Koothan itself has not been established through proper evidence. Merely based on Ex.A1 to Ex.A3, the right in respect of the 'B' Schedule property which is a part of a larger extent cannot be ascertained. The Lower Appellate Court has rightly pointed out the fallacy in the plaintiff's case and held that Ex.A1 to Ex.A3, which are between 1966 to 1970 cannot confer any title to the plaintiff over the suit property when the titles are traceable through one Alavan and not through Koothan, son of Alavan.

16. The counsel for the respondents would further state that the genealogy tree extracted in the written statement and the fact that the total extent of S.No.4/8 was 51 cents when it was held by Alavan and divided between his three sons, namely, Koothan, Muruvan and Ayyakannu, the plaintiff being the descendant of Koothan and the first defendant being descendant of Ayyakannu, the lack of clarity in the case of the plaintiff and failure to produce relevant revenue documents has led to dismissal of the suit.

17. Further, the counsel would submit that the trial Court without applying its mind had totally rejected the exhibits relied on by the defendants, which would show that the father of the first defendant on his own as descendants of Alavan had right in a portion of S.No.4/8. The fact of division among the sons of Alavan, 70 years prior to the suit was ignored by the trial Court. The said error and omission was taken note by the First Appellate Court for dismissing the suit and hence, he would submit that there is no question of law involved in this appeal and the findings of fact by the Lower Appellate Court are final and this Court has less scope to interfere under Section 100 of C.P.C.

18. On considering the rival submissions made by the counsel on both sides and the impugned judgment of the Lower Appellate Court, this Court holds that the trial Court's finding confining with Ex.A1 to Ex.A3 to hold in favour of the plaintiff is incorrect. The trial Court has miserably failed to appreciate the pleadings as a whole and the evidence let in by either side. When the admitted facts in this case that S.No.4/8 was held by the ancestor of the contesting party and it was sub-divided subsequently and sold to third parties at various points of time under Ex.A1 to Ex.A3, Ex.B1 and Ex.B2, the complete neglect of 'B' series documents particularly, Ex.B1 and Ex.B2, which are Sale Deeds executed in respect of 10 cents of land sold by brother of the plaintiff in favour of Namachu from and out of 51 cents in S.No.4/8 and Ex.B2, dated 21.06.1939 executed by

Ramalingam (father of the first defendant) in favour of Savurimuthu, in respect of 9 cents of land in S.No.4/8 probabilises more the case of the defendants that 51 cents of land in S.No.4/8 was later divided among the branch of Koothan and Ayyakannu as 38 cents and 13 cents respectively. 4 cents now held by the first defendant and his brother was derived from their grand father. Kist receipts, patta, receipts of electricity connection and house tax receipts, which were marked as Ex.B3 to Ex.B28 were not given due consideration by the trial Court, whereas, the First Appellate Court has considered the entire evidence on record and has arrived at the conclusion that the plaintiff has miserably failed to identify the exact lay and location of his property. The vague reference of survey number and extent without proper derivation of title has led to dismissal of the suit by the Lower Appellate Court.

19. On scrutiny of the evidence, this Court concurs with the view of the Lower Appellate Court and dismisses this Second Appeal. Since the facts are favouring the respondents and no substantial question of law involved in this case for consideration. Accordingly, the Second Appeal is dismissed. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1. The II Additional Sub Court,
Villupuram.
2. The II Additional District Munsif Court,
Ulundurpet.
3. The Section Officer,
VR Section,
High Court, Madras.

+1cc to M/s.S.Ramesh Kumar, Advocate Sr.37304

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