

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.01.2020

DATE OF VERDICT : 05.02.2020

CORAM

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

S.A.NO.408 OF 2003

1. Antony (Died)
2. Arokkiyadoss
3. Michael
4. Chinappan
4. Loordhu Mary
5. Arokia Mary

... Appellants/Respondents/
Plaintiffs

(Appellants 5 and 6 brought on record as Lrs of the Deceased 1st Appellant vide order of this Court dated 11.11.2009 and made in C.M.P.No.3379 to 3381 of 2007 in S.A.No.408 of 2003)

(Appellants 2, 3, 5 and 6 transposed as Respondents 2 to 5 vide order of this court dated 20.03.2017 and made in C.M.P.No.1949 of 2009 in S.A.No.408 of 2003)

1. Chinnapparaj (Died)
2. Arokkiyadoss
3. Michael
4. Loordhu mary
5. Arokia Mary
6. Kahiya Mary
7. Helan Jeapridha
8. Fernand Arokia Irudhayaraj

... Respondents/Appellants/Defendants/
LR's of the deceased 4th Defendant

(Appellants 2, 3, 5 and 6 transposed as Respondents 2 to 5 vide order of this court dated 20.03.2017 and made in C.M.P.No.1949 of 2009 in S.A.No.408 of 2003)

(Respondents 6 to 8 brought on record as LRs of the deceased first respondent vide order of this Court of dated 20.03.2017 and made in C.M.P.No.1256 and 1257 of 2012 in S.A.No.408 of 2003)

Prayer:-

This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 24.04.2002 made in A.S.No.56 of 2000 on the file of the Additional Sub Court, Cuddalore, reversing the judgment and decree dated 10.08.2000 made in O.S.No.656 of 1996 on the file of the Principal District Munsif Court, Cuddalore.

For Appellants : Mr.Nilopher
For Ms.R.Meenal

For Respondents
R1 , R5 : Died

For R2 to R4 : Not ready in notice

For R6 to R8 : Ms.Usha Raman

JUDGMENT

This second appeal is directed as against the judgment and decree dated 24.04.2002 made in A.S.No.56 of 2000 on the file of the Additional Sub Court, Cuddalore, reversing the judgment and decree dated 10.08.2000 made in O.S.No.656 of 1996 on the file of the Principal District Munsif Court, Cuddalore.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The case of the plaintiffs in brief is as follows :-

3.1. The suit is filed for declaration and recovery of possession and mandatory injunction. The plaintiffs 1 & 3,4 and the father of the second plaintiff are brothers. They born to one Mudiappan and after the demise of their father and demise of the father of the second defendant, there was a partition in the family properties by a partition deed dated 25.05.1979. The plaintiffs are parties to the said partition and in which, the suit A schedule property was allotted to the first plaintiff and the suit B schedule property was allotted to the second

plaintiff and the suit C schedule property was allotted to the third plaintiff and the suit D schedule property was allotted to the fourth plaintiff.

3.2. The entire suit schedule property belonged to the plaintiffs and the southern most portion was allotted to the first plaintiff and next northern portion was allotted to the second plaintiff and next northern portion was allotted to the third plaintiff and northern most portion was allotted to the fourth plaintiff. In each of their share their respective houses were located western side of the suit property. The entire suit property comprised in Survey No.625/4. Eastern side of the suit property is lying vacant. The patta was also issued for the suit schedule property in Patta No.506.

3.3. While being so, there was a misunderstanding between the plaintiffs 1 and 3 on the one hand and the plaintiffs 2 and 4 on the other hand, in respect of the some other property. Therefore the plaintiffs 1 and 3 instigated the defendant to cause obstruction to the enjoyment of the suit property by the plaintiffs 2 and 4 and they were compelled to institute the suit against the plaintiffs 1 and 3 and defendant in O.S.No.1125 of 1991, on the file of the District Munsif Court, Cuddalore for injunction. At the time of filing the suit, the plaintiffs 2 and 4 were under impression that the suit property comprised in Survey No.625/2. Further the suit was not filed for entire property and to only for the northern portion of the suit property.

3.4. After filing the said suit, the defendant herein trespassed into the suit property and also put up a thatched house. Therefore, the plaintiffs 2 and 4 lodged police complaint and thereafter they came to understand that the suit property comprised in survey No.625/4 and not in survey No.625/2. It is also disclosed in the Advocate Commissioner's report. Thereafter, with the leave of the trial Court, the plaintiffs 2 and 4 withdrawn the suit in O.S.No.1125 of 1991 to file fresh suit and filed the present suit. In fact, the defendant has admitted the title of the plaintiffs in respect of the suit property in survey No.625/4 in his written statement and as such he estopped from denying the title of the property comprised in Survey No.625/4. Now all the plaintiffs are joint together and filed this suit.

4. Resisting the same, the defendant filed written statement and stated that his grate grandfather one Gnanamuthu had two sons viz., Iganasi and Savarimuthu and the said Iganasi had a daughter named Pichammal. She had four sons, who are none other than the plaintiffs 1,3 & 4 herein. The second plaintiff is her grandson born through her another son viz., Jacob. The

plaintiffs' as well as the defendant's grand father Gnanamuthu was in possession of the 16 cents and on partition between the two sons viz., Iganasi and Savarimuthu each one of them entitled to get 8 cents. Savarimuthu had four sons and one daughter, in which the defendant is the son of one Nathan i.e, the third son of the said Savarimuthu. The defendant has entitled for 8 cents, since the other sons of the said Savarimuthu had no issues. For the entire property, the patta was issued in favour of grandfather Savarimuthu. Therefore, the plaintiffs are entitled only for six cents comprised in Survey No.625/4, in which they also constructed their respective houses.

4.1. He further submitted that the grandfather Savarimuthu had constructed two thatched houses and he was living there. After his demise, defendant and his father are in exclusive possession of the suit property. The defendant is paying all revenue dues in respect of the suit property in the name of his mother and he also put up fencing in and around the suit property. Therefore, the defendant also entitled for prescribed title by adverse possession to the suit property since, he is in possession of the suit property over the statutory period.

4.2. In fact the plaintiffs 2 and 4 already filed a suit in O.S.No.1125 of 1991 for declaration and injunction. In the said suit, the Advocate Commissioner was appointed and he measured the suit property with the help of surveyor and filed his report. Accordingly, the possession and enjoyment of the defendant in the suit property was categorically proved. Further, the plaintiffs 1 and 3 filed their written statement in the said suit in O.S.No.1125 of 1991 stating that only this defendant is in possession and enjoyment of the suit property. Therefore, the plaintiffs never used the backyard of the suit property and the defendant is entitled to 8 cents in survey No.625/4. Therefore he prayed for dismissal of the suit.

5. On the side of the plaintiffs, they examined P.W.1 and were marked Ex.A.1 to Ex.A.11. On the side of the defendant, he examined D.W.1 & D.W.2 and were marked Ex.B.1 to Ex.B.15. Based on the material produced on record and considering both the oral and documentary evidence adduced by the respective parties and also the submissions made, the trial Court decreed the suit filed by the plaintiffs as prayed for. Aggrieved by the same, the defendant preferred an appeal suit in A.S.No. 56 of 2000 and the first appellate Court allowed the appeal and dismissed the suit filed by the plaintiffs. Aggrieved by the same, the plaintiffs preferred this present second appeal.

6. At the time of admission of this second appeal on 01.04.2003, the following substantial questions of law were formulated for consideration:-

"(i) Whether in law the lower appellate Court is right in overlooking the specific admissions of the respondent in his deposition as well as in Ex.B.14 written statement with regard to the appellants title to the suit property while allowing the appeal, thus contravening the provision of Section 17 and 18 of the Indian Evidence Act?

(ii) Whether in law the lower appellate Court was right in failing to see that the prior suit for injunction was withdrawn on obtaining Court's permission to file the present suit on the same cause of action and that even otherwise a suit for declaration of title is maintainable?

(iii) Whether in law the lower appellate Court as the final Court of facts and evidence was right in allowing the appeal without giving adequate reasons and without adverting to the documents and the oral evidence as contemplated in Order 41 Rule 31 of the Code of Civil Procedure?"

7. Heard Mr.Nilopher, learned counsel appearing for the appellants/plaintiffs and Ms.Usha Raman, learned counsel appearing for the respondents/defendant.

8. The suit is filed for declaration, injunction and mandatory injunction to remove the super structure put up by the defendant in the suit property. Originally the land ad measuring 16 cents owned by one Arulan. He had one son Gnanamuthu. The said Gnanamuthu gave birth two sons viz., Iganasi and Savarimuthu. The plaintiffs are belonging to Iganasi family and the defendant is belonging to Savarimuthu family. From the share of the Iganasi, the plaintiffs are entitled to have each two cents and on the side of the defendant, he is entitled for the entire share of the said Savarimuthu to an extent of 8 cents. There is no quarrel about their share and only dispute is whether their share is in survey No.625/2 or 625/4.

9. The plaintiffs 2 and 4 already filed suit in O.S.No.1125 of 1991 for permanent injunction as against the plaintiffs 1 & 3 and the defendant in respect of the property comprised in survey No.625/2. After filing an Advocate Commissioner's report, the plaintiffs 2 and 4 withdrawn the said suit with liberty to file fresh suit, since they came to understand that their land comprised in survey No.624/4 and not

in survey No.625/2. Further stated that in the partition deed dated 25.05.1979, which was marked as Ex.A.2, wrongly mentioned as survey No.625/2. Accordingly they were permitted to withdraw the suit with liberty to file a fresh suit.

10. In the earlier suit in O.S.No.1125 of 1991, the plaintiffs 1 and 3 were shown as defendants. Now all the brothers as well as the son of the deceased brother filed the present suit against the defendant for declaration, injunction and mandatory injunction. According to the plaintiffs, pending the earlier suit, the defendant trespassed into the suit property and put up a thatched house. In fact in the earlier suit, the Advocate Commissioner was appointed and his report was marked as Ex.B.15. Accordingly, the defendant put up the thatched house in the suit property. The earlier suit was filed for permanent injunction insofar as the property comprised in Survey No.625/2 ad measuring 2 cents out of 8 cents, only in favour of the second plaintiff viz., the fourth plaintiff herein. Thereafter the plaintiffs joint together and filed this suit for declaration in respect of their shares ad measuring 8 cents out of 16 cents comprised in Survey No.625/4.

11. In the earlier suit in O.S.No.1125 of 1991, the plaintiffs 1 & 3 and the defendant herein are the defendants 1 to 3, in which, the defendant 1 & 2 filed separate written statement and third defendant filed separate written statement, which were marked as Ex.B.13 and Ex.B.14 respectively. Ex.B.14 was filed by the defendant herein in which, he categorically admitted as follows :-

"4. This defendant submits that their grate grandfather Gnanmuthu had two sons Ignasi and Sowrimuthu. Ignasi had a daughter named Pichammal. Her sons are the second defendant Anthony, Jacob, first defendant Michel and the second plaintiff Chinnappan. the 1st plaintiff is the son of Jacob. Gnanmuthu was in possession of 0.16 cents in survey No.625/2, 625/3 and 625/4. He divided the 0.16 cents in survey between his sons Ignasi and Sowrimuthu by means of oral partition. They began to enjoy 0.08 cents each even during the life time Gnanamuthu. S.No.525/2 - 0.08 cents fell to the share of Sowrimuthu and 625/3 and 625/4 went to the share of Ignasi. Sowrimuthu had 4 sons namely late Anthony, late Nathar, late Selvam, late Chinnappan and one late daughter Sheela Mary. This defendant is the son of late Nathar.

5. This defendant submits that the patta to the suit property stands in the name of

his grandfather Sowrimuthu and the patta No. to the suit property is 473 in S.No.625/2 - 0.08 cents."

12. Admittedly, 8 cents comprised in Survey Nos.625/3 and 625/4 allotted in favour of Iganasi viz., the grandfather of the plaintiffs. However in the written statement filed by the defendant in the present suit, he categorically admitted that plaintiffs are entitled to each two cents in survey No.625/4 and in another paragraph, the defendant stated that the plaintiffs are only entitled to survey No.625/4 ad measuring 6 cents, in which, they were constructed houses and the six cents are divided equally among them. Even in the deposition of the defendant, he categorically deposed that the plaintiffs are residing in their respective share out of 8 cents. In respect of other share of 8 cents, he put up two thatched houses. Though the defendant marked house tax receipts in the name of his mother in Ex.B.7 to Ex.B.11, those are pertaining to the year after 1997 i.e., subsequent to the suit. Further Ex.B.2 extract of adangal issued in the name of the defendant's grandfather for the pasali years 1375 to 1382, which is also pertaining to the year 1999. Therefore, the defendant failed to mark any of the document to show that he was in possession and enjoyment of the suit property. Whereas Ex.A.9 and Ex.A.10, the Chitta extract issued in favour of the plaintiffs and proved their title over the suit property. Therefore, the trial Court rightly concluded that the plaintiffs are entitled for the prayer for declaration, permanent injunction and mandatory injunction insofar as the suit property concerned against the defendant.

13. Whereas the first appellate Court based on the Commissioner's report & plan, which was marked as Ex.B.15 concluded that the defendant is in possession and enjoyment of the suit property. Earlier suit filed by the plaintiffs 2 and 4 herein only for permanent injunction in respect of the property ad measuring 2 cents comprised in survey No. 625/2. In the said property, the defendant put up thatched house. In the said suit the Advocate Commissioner was appointed and he filed the report that the defendant put up a thatched house. Whereas, the present suit is filed for declaration in respect of the property comprised in Survey No.625/4 ad measuring 8 cents.

14. To support of his argument, the learned counsel appearing for the respondents/defendant cited the following reported judgments :-

1. 1998 L.W. 606 - V.Muthiah Pillai (died) and ors Vs. Vedambal and ors
2. 1999 -3-LW.621 - Arumugha Thevan Vs. Melavasaga Thevar and ors
3. 93 LW 317 - Gopi Pillai Vs. Dr.Swamy

The principles of law outlined in the above said decision are taken into consideration and followed as applicable to the case on hand.

15. It is also seen that except the fourth plaintiff, other plaintiffs are transported as respondents in this second appeal. In supporting the case, the defendant himself stated that, the sole fourth plaintiff is entitled to his share of 2 cents in the suit property. It is also categorically admitted by the sole defendant in the suit as such, the first appellate Court concluded against the evidence on record. Therefore, the finding of the first appellate Court is perverse and against the evidence, as such this Court has no other option to interfere with the findings of the first appellate Court. Accordingly, all the substantial questions of law formulated by this Court are answered in favour of the plaintiffs and as against the defendant.

16. In fine, the second appeal stands allowed and the judgment and decree dated 24.04.2002 made in A.S.No.56 of 2000 on the file of the Additional Sub Court, Cuddalore, is hereby set aside and resultantly, the judgment and decree dated 10.08.2000 made in O.S.No.656 of 1996 on the file of the Principal District Munsif Court, Cuddalore is restored. No order as to costs.

Sd/-
Assistant Registrar(CO-MDU)

//True Copy//

Sub Assistant Registrar

rts

To

1. The Additional Sub Judge, Cuddalore.
2. The Principal District Munsif, Cuddalore

Copy To

The Section Officer,
V.R.Section, Madras High Court, Chennai.

+lcc to Mr.R.Subramanian, Advocate, S.R.No.9286
+lcc to Ms.Usha Raman, Advocate, S.R.No.8995

S.A.No.408 of 2003

GJ(CO)
CS/15/12/2020