



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : **29.01.2020**
CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A. (MD)No.407 of 2015
and
M.P. (MD) .No.1 of 2015

Rajumary,
through her power of attorney,
A.Philip Berchmans Raj .. Appellant/Respondent/Plaintiff

Vs.

1.Vellathai
2.Thangamani .. Respondents/Appellants/Defendants

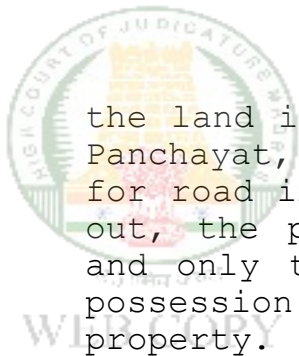
Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908, against the Judgment and decree dated 25.07.2014, passed in Appeal Suit No.64 of 2013 and Cross Objection in A.S.No.64 of 2013, by the learned Additional Subordinate Judge, Tirunelveli, reversing the Judgment and decree, dated 19.10.2012, passed in Original Suit No.340 of 2007, by the learned II-Additional District Munsif, Tirunelveli.

For Appellant : Mr.S.Balasubramanian
For Respondents : Mr.M.P.Senthil

JUDGMENT

The plaintiff in O.S.No.340 of 2007, who succeeded partially in obtaining the relief of permanent injunction alone in the suit in O.S.No.340 of 2007 instituted by her seeking the relief of declaration of title and permanent injunction, upon its reversal by the lower Appellate Court in A.S.No.64 of 2013, has come up with this second appeal.

2. According to the plaintiff, the suit property originally belonged to the family of one Eanamuthu Konar and his heirs. The said Eanamuthu Konar and his heirs have sold an undivided 9 acres 60 cents out of the total extent of 12 acres 20 cents in various survey numbers under the sale deed, dated 12.05.1980. It is the further case of the plaintiff that there was an oral partition effected and in the said partition, the plaintiff was allotted the entire 2 acres 80 cents in Survey No.139/1, apart from other properties in other survey numbers. The plaintiff had alienated certain portions of the properties to Louis, Mangala Mary and Rajeswari in the year 1985. As regards the remaining property, the plaintiff took steps to convert



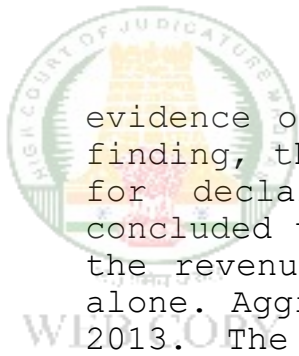
the land into housing sites and after obtaining permission from the Panchayat, plotted out the property and also surrendered a portion for road in the lay out to the Panchayat in 1986. After such laying out, the plaintiff had sold various extents to various purchasers and only three plots comprising an extent of 14.38 cents were in possession of the plaintiff. The said three plots is the suit property. Claiming that the defendants, who are utter strangers to the suit property are attempting to interfere with the possession of the plaintiff by creating fraudulent revenue documents, the plaintiff had sought for declaration of title and for permanent injunction.

3. The suit was resisted by the defendants contending that the alleged oral partition pleaded by the plaintiff is not true. According to the defendants, their predecessors in interest Lakshmana Thevar, had purchased an undivided extent of 70 cents in Survey No.139/1 and other properties under sale deed, dated 27.11.1980 from Piramudaiya Konar, who was a sharer along with the vendors of the plaintiff. On 07.06.1993, the said Lakshmana Thevar, namely, the purchaser under sale deed, dated 27.11.1980, sold an extent of 49 cents out of 70 cents in favour of one Muruga Thevar. The property, which was in possession of Muruga Thevar, was purchased by the defendants from his power agent by sale deed, dated 28.04.1999. Right from the date of the sale deed, the defendants were in possession of the suit property. They had also sold the portions of the property to various persons. It was also contended that the mutation of revenue records effected was challenged and eventually the patta granted to the plaintiff was also cancelled by the revenue authorities. The non-disclosure of the said fact was projected as a defence to deny the claim of the plaintiff for declaration and injunction. It was also claimed that having purchased the property as an undivided property, the plaintiff cannot unilaterally claim a portion and seek for declaration and injunction.

4. At trial, the power agent of the plaintiff was examined as PW.1 and one Shanmugasubramanian was examined as PW.2. On the side of the plaintiff, Exhibits A1 to A11 were marked. On the side of the defendants, Durai Velan, the power agent of the defendants was examined as D.W.1 and Exhibits B1 to B7 were marked.

5. The trial Court, on consideration of the evidence on record, concluded that the plaintiff has failed to prove the oral partition set up by her. The trial Court also concluded that the sale deed, dated 07.06.1993, executed by Lakshmana Thevar in favour of Mururga Thevar, marked as Ex.B3, was invalid as it is registered outside the State.

6. The trial Court refused to grant the relief of declaration on the ground that Lakshmana Thevar was entitled to undivided 70



evidence of a concluded partition between the parties. On the said finding, the learned trial Judge rejected the claim of the plaintiff for declaration of title. The learned trial Judge, however, concluded that the plaintiff has established her possession based on the revenue records and granted the relief of permanent injunction alone. Aggrieved, the defendants preferred an appeal in A.S.No.64 of 2013. The plaintiff preferred a cross-objection as against the rejection of the relief of declaration. The lower Appellate Court confirmed the findings of the trial Court to the effect that the plaintiff has not proved the oral partition. On the said finding, the lower Appellate Court had dismissed the cross objection filed by the plaintiff.

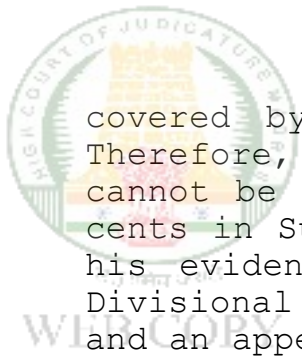
7. On the main appeal, the lower Appellate Court found that the power agent of the defendant, as DW.1, has admitted that though mutation was effected, the said orders were cancelled on appeal. The lower Appellate Court found that the revenue records, namely, Ex.A2-Patta alone cannot be taken into account to prove the possession of the plaintiff, since the same is obtained just a few days prior to the filing of the suit. On the said conclusion, the lower Appellate Court allowed the appeal and dismissed the suit in its entirety. Aggrieved, the plaintiff is on second appeal.

8. Notice of motion was ordered on 07.08.2015, pursuant to which the respondents have entered appearance.

9. I have heard Mr.S.Balasubramanian, learned counsel for the appellant and Mr.M.P.Senthil, learned counsel for the respondents.

10. Mr.S.Balasubramanian, learned counsel for the appellant would vehemently contend that the lower Appellate Court was not right in dismissing the entire suit. According to him, when the defendants have purchased a specific portion of the property under Ex.B4, they cannot contend that there has been no partition effected and the entire property remained undivided. It is the further contention of the learned counsel that the sale deed, dated 07.06.1993, executed by the Lakshmana Thevar in favour of Muruga Thevar having been registered at Parasala, Kerala, is not a valid document. Therefore, the defendants, who have purchased from Muruga Thevar under Ex.B4, dated 28.04.1999, would not derive any title. It is the further contention of the learned counsel that Ex.A2-Patta stands in the name of the plaintiff and therefore, the title of the plaintiff should have been upheld by the Courts below, since the oral partition pleaded by her stood proved by the fact that patta has been granted to her in respect of Survey No.139/1.

11. Contending contra, Mr.M.P.Senthil, learned counsel for the respondents would submit that the plaintiff has singularly failed to prove the oral partition. Even Ex.A2-patta is not for the entire extent of land in Survey No.139/1. Drawing my attention to Ex.A2, learned counsel would contend that the total extent of land

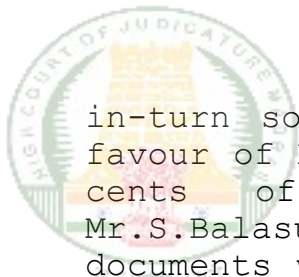


covered by Ex.A2 is only 93 ares, equal to 2 acres 30 cents. Therefore, according to Mr.M.P.Senthil, despite Ex.A2, the plaintiff cannot be said to be the owner of the entire extent of 2 acres 80 cents in Survey No.139/1. It is his further submission that PW.1 in his evidence has admitted that in the appeal before the Revenue Divisional Officer, the patta granted to the plaintiff was cancelled and an appeal was filed against the same before the District Revenue Officer, which was also dismissed.

12. Regarding the registration of Ex.B3, Mr.M.P.Senthil would contend that the registration was prior to the amendment of Section 28 of the Registration Act and introduction of Section 28-B by the Tamil Nadu Amendment Act in 1995 and therefore, the document cannot be held to be automatically invalid. It has to be shown that the property shown to be existing within the jurisdiction of the Parasala Sub-Registrar Office was either fictitious or the vendor Lakshmana Thevar did not have title to the said property. He would also point out that there has been no cross-examination of PW.1 by the plaintiff to that effect. Therefore, according to her, the trial Court was not right in concluding that the document is invalid *per se*.

13. I have considered the rival submissions.

14. Admittedly, the plaintiff has purchased the undivided extent of 9 acres 60 cents in 5 different survey numbers under the sale deed-Ex.A1, dated 12.05.1980, from Villimuthu Konar and others, as legal heirs of Enamuthu Konar. According to the plaintiff, there was a partition and she was allotted 9 acres 60 cents, which included the entire 2 acres 80 cents in Survey No.139/1. The case of the defendants is that the oral partition is not true. Even on 07.11.1980, Piramudaiya Konar executed a sale deed in favour of Lakshmana Thevar under Ex.B2 conveying the undivided extent of 70 cents in Survey No.139/1 in his favour. The said Lakshmana Thevar had alienated a portion of the property purchased by him on 07.11.1980 vide Ex.B3-sale deed, dated 07.06.1993 in favour of one Muruga Thevar. The said Muruga Thevar had in-turn sold the property to the defendants under sale deed, dated 28.04.1999, marked as Ex.B4. Therefore, according to Mr.M.P.Senthil, there had been no oral partition and the plaintiff cannot claim that she is entitled to the entire extent of 2 acres 80 cents in survey no.139/1. The plaintiff would rely upon only Ex.A2-Patta in proof of the alleged oral partition, wherein, separate patta has been granted in respect of Survey No.139/1 for an extent of 93 ares alone, which is equivalent to 2 acres 30 cents. Ex.A2 also does not fully support the contention of the plaintiff. It is seen that the said document has been issued on 13.07.2007 and the suit has been filed on 19.07.2007. Admittedly, the total extent of the property in survey No.139/1 is 2 acres 80 cents. Out of the 2 acres 80 cents, one of the sharers, namely, the Piramudaiya Konar had sold an undivided 70 cents as early as on 07.11.1980 in favour of Lakshmana Thevar, who



in-turn sold the said property under Ex.B3, dated 07.06.1993 in favour of Muruga Thevar. The said Muruga Thevar had in-turn sold 49 cents of land in Survey No.139/1 to the defendants. Mr.S.Balasubramanian, citing the boundary recitals in these documents would contend that the fact that the defendants have also sold specific portions of the property within 4 boundaries, would go a long way to show that there was infact a partition.

15. I am unable to agree with the learned counsel. Once, the plaintiff comes to the Court with a specific case of oral partition and allotment of specific extent of land out of a larger extent, it is for the plaintiff to prove the partition in the manner known to law. A oral partition cannot be presumed. There must be strong and cogent evidence to prove such oral partition. One method of proof of oral partition is by showing mutation of the revenue records. Of course, Ex.A2-Patta , would to an extent, support of the claim of the plaintiff that there has been a partition, but the very content of Ex.A2 runs counter to the claim of the plaintiff that the entire 2 acres 80 cents in survey No.139/1 was allotted to her. As regards the other properties, there is no evidence to show that there was any mutation of revenue records. As already stated, the plaintiff had purchased an undivided extent of 9 acres 60 cents in five different survey numbers. There is no evidence as to what was the allotment made to the plaintiff in the other survey numbers except one order effecting Sub-division of the property that has been marked as Ex.A6. Even though, Ex.A6, dated 14.03.1985 shows that there was sub-division of an extent of 2 acres 33 cents in Survey No.137/1A2, as in Survey Nos.137/1A2A and 137/1A2B, sub-division has been effected between Muthiah Konar, Philip and the plaintiff. It is not known as to whether Piramudaiya Konar and other legal heirs of Enamuthu Konar were put on notice about the said sub-division, because the said Piramudaiya Konar has not alienated any land in Survey No.137/1A2, as on date of Ex.A6-the patta transfer order, dated 14.03.1985. Both the Courts below have considered the evidence and come to a factual conclusion that the plaintiff has miserably failed to prove the oral partition.

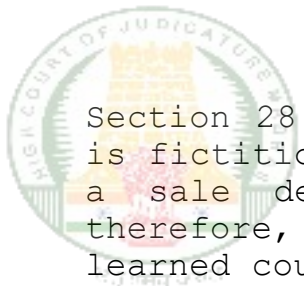
16. No doubt, Mr.S.Balasubramanian, learned counsel for the appellant would contend that the fact that the defendants have also alienated the property within 4 boundaries would show that there was in-fact an oral partition. Mere fact that the parties were enjoying and had alienated the properties within the specific boundaries, that cannot by itself establish an oral partition in order to exclude one of the sharers from enjoyment of the property in one survey number. The claim of the plaintiff that she was allotted the entire 2 acres 80 cents in Survey No.139/1 at the oral partition has been rebutted by valid documentary evidence, namely, Exs.B2, B3 and B4, sale deeds where Piramudaiya Konar and his successors in interest have dealt with some extent of the property in Survey No.139/1. Therefore, I am unable to agree with the learned counsel for the appellant that the Courts below were wrong in concluding



that the plaintiff has not proved oral partition. On the submission of the learned counsel regarding injunction, the trial Court, of course, found that the plaintiff is entitled to injunction, since patta stands in her name. The trial Court has over-looked an important fact that the Patta-Ex.A2 is not for the entire extent of Survey No.139/1. It has been given only for 96 ares, which is equal to 2 acres 30 cents. The defendants claimed only 49 cents out of 2 acres 80 cents. Therefore, the patta itself probablises the case of the defendants that they were in possession of 49 cents of land, which they have sold to various persons after the filing of the suit. The trial court has completely over-looked the fact that Ex.A2 is for a lesser extent and not for the entire extent as claimed by the plaintiff. The plaintiff having failed to prove the oral partition, has not produced revenue records to prove that she has been in possession of the entire extent of the property. Of course, the plaintiff had executed a gift deed in favour of the Panchayat under Ex.A11 on 27.09.2000. The said gift deed by itself cannot be construed as an evidence of possession by the plaintiff of the disputed 49 cents of land. The lower Appellate Court has concluded that the plaintiff, who has chosen to seek a declaration of title and injunction on the basis of the said title, cannot fall back upon mere possession and seek injunction. Once it is found that the partition has not been established, the plaintiff and the defendants would become co-owners and as such, permanent injunction as against co-owners can be granted only in extraordinary circumstances. There was no pleading of such extraordinary circumstances in the case on hand. I therefore, see no error or perversity in the judgment of the lower Appellate Court and I, therefore, conclude that the plaintiff is not entitled to the decree of permanent injunction also. The third contention of the learned counsel is that the sale deed, dated 07.03.2000, was invalid in as much as it is registered in Parasala, Kerala State. In fact, no pleading as to the effect that such sale deed registered at Parasala, Kerala, is invalid and there is nothing in the cross-examination of DW.1 to suggest that the validity of the document was challenged on the ground that the registration of the document at Parasala, Kerala amounted to fraud in registration.

17. Prior to the introduction of Section 28-B of the Tamil Nadu Amendment Act, a person, who is challenging the document should show that either the property is fictitious or the vendor under the sale deed did not have title to the property situated within the jurisdiction of the office of the Sub Registrar, where the document is registered. Such evidence is totally absent in the case on hand. There was no suggestion put to DW1 to the effect that the property mentioned in Ex.B3 as situated at Parasala is fictitious or that the vendor of the defendants did not have title to the property.

18. I have considered the scope of Section 28 of the Registration Act in ***D.Vijayalakshmi vs. V.Hariselvan & Others (SA.297/2014)***. I have concluded that prior to the amendment of



Section 28 in the year 1995, unless it is proved that the property is fictitious or that the vendor did not have title to the property, a sale deed registered outside the State would be valid. I therefore, see no difficulty in rejecting the said contention of the learned counsel for the appellant.

19. In view of the above, I do not see any question of law much less Substantial Question of law to enable me to entertain this appeal. The appeal therefore fails and it is dismissed without being admitted. Considering the circumstances of the case, there shall be no orders as to costs.

Sd/-

Assistant Registrar

// True Copy //

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Sub Assistant Registrar(CS)

PJL

To

1. The Additional Subordinate Court,
Tirunelveli
2. The IInd District Additional Munsif,
Tirunelveli

Copy to:

The Section Officer,
Vernacular Section, (2 copies)
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.M.P.SENTHIL, Advocate (SR-3831[F] dated 30/01/2020)

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