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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.09.2021

CORAM

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

S.A.No.919 of 2008

1. Ayyasamy Udyar (died)
2. Manickam
3. Veermani
4. Shanthi
5. Murugan
6. Ramesh
7. Minor Irusappa
8. Minor Chinnadurai

...Appellants

Appellants 7 and 8 represented by their grand mother Manickam.

Appellants 2 to 8 brought on record as LRs of the deceased sole appellant vi.z, Ayyasamy Udyar vide order of court dated 01.11.2011 made in CMP No.16885/2019 in S.A. No.919/2008.

Vs.

1. Munusamy
2. Karuppayya

...Respondents

Prayer : Second Appeal filed under Section 100 of CPC, 1908 against the decree and judgment dated 14.09.2007 passed in A.S. No.83 of 2005, on the file of the Sub Court, Kallakuruchi, partly reversing decree and judgment dated 20.01.2005 passed in O.S. No.75 of 1999, on the file of the I Additional District Munsif, Kallakuruchi.

For Appellants : Ms.G.Sumitra

For R1 : Mr.P.Valliappan

R2 : No Appearance



JUDGMENT

The unsuccessful plaintiff before both the courts below has filed the present second appeal. During the pendency of this appeal, the appellant died. Therefore, his legal heirs were impleaded as appellants 2 to 8.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and in appropriate places, their ranking in the present appeal would also be indicated.

3. The case of the plaintiff is that the suit properties were his ancestral properties and patta Ex.A1 was also issued in favour of his father late Irusappa Udayar in respect of the suit properties and other properties. The plaintiff, being the legal heir of late Irusappa Udayar, took possession of the properties. According to him, the first defendant, with an illegal intention of destroying the ridge between the properties of the plaintiff and the defendants, is attempting to interfere with the plaintiff's possession over the suit properties and hence the suit for declaration of plaintiff's title to the suit properties and for a consequential relief of permanent injunction restraining the defendants, their men and agents from interfering with his (plaintiff's) peaceful possession and enjoyment of the suit properties.

4. The suit was resisted by the defendants on the ground that the plaintiff is entitled to only 2/3 share in the suit properties. Their further contention is that the suit properties originally belonged to three brothers, namely, Ramasamy Udayar, Irusappa Udayar and Ponnusamy Udayar, each entitled to 1/3 share in the suit properties as well as other properties and that since Ponnusamy Udayar was declared insolvent, his share was purchased by the plaintiff. Thus, the plaintiff is entitled to have 2/3 share in the suit survey number. According to the defendants, after the death of Ramasamy Udayar, his wife Panjali Ammal executed a registered Will dated 19.08.1986 in the name of her grand sons, namely, Rajamanickam and Oomadurai, born to her son Thangavelu, who in turn executed a sale deed dated 13.08.1998 (Ex.B2) in favour of the second defendant in respect of their share in survey Numbers 119/1, 119/4, 119/7 to 119/13. It is also their case that Thangavelu and his sons executed a sale deed in respect of 0.05 cents in the suit property in favour of the second defendant and thus the plaintiff is entitled to only 0.10 cents in the suit property.



5. On the basis of the above pleadings, the trial court framed necessary issues and after full contest, dismissed the suit filed by the plaintiff on the following grounds. .

- 1) The plaintiff does not have any right to the entire extent of 0.15 cents in the suit properties.
 - 2) The plaintiff, even without any pleadings in the plaint, has stated in the proof affidavit that there was an oral partition between Ramasamy Udayar, Irusappa Udayar and Ponnusamy Udayar even during the year 1969 and in the said partition the entire extent in suit survey number was allotted to the share of the plaintiff's father.
 - 3) The plaintiff has not proved the alleged oral partition between the three brothers.
 - 4) It was also admitted by the plaintiff that patta Ex.A1 stood in the name of plaintiff's father as he was the eldest brother in the family.
 - 5) Ex.A1 to Ex.A13, which are the revenue records, shall not declare the title of the plaintiff to the entire extent of 0.15 cents in suit survey number and the father of the plaintiff was entitled to only 0.07 cents (0.05 + 0.02 cents). Since there is no clear boundary description in respect of the plaintiff's property, the plaintiff cannot be granted a declaration and permanent injunction as prayed for by him.
6. Aggrieved over the same, the plaintiff filed an appeal in A.S. No.83 of 2005 before the Subordinate Court, Kallakuruchi, and the first appellate court held that when the trial court has observed that the plaintiff has title over 0.07 cents in suit survey number and also identified the same as the property east of the property measuring 0.05 cents mentioned in Ex.B5 sale deed, it ought not to have dismissed the suit in toto. Therefore, the first appellate court decreed the suit by declaring the plaintiff's title to 0.07 cents in suit survey number and also granted permanent injunction restraining the defendants from interfering with his (plaintiff's) possession over 0.07 cents.



7. Now the second appeal is filed by the plaintiff on the ground that when the defendants themselves had admitted that the plaintiff is entitled to 0.10 cents in suit survey number, both the courts below had committed an error and the first appellate court was wrong in decreeing the suit only with regard to 0.07 cents. The substantial questions of law framed in the second appeal are as follows:

- 1) Whether the lower appellate court was right in requiring the appellant to prove title to the suit property, when there was no denial by the respondents to decree the suit with respect to 10 cents out of 15 cents?
- 2) Whether Ex.A1 (patta) is a valid document to prove possession of the suit property?

8. At the outset, it may be observed that the plaintiff is entitled to 0.05 cents in the suit survey numbers, which, according to both the parties, is the 1/3rd share of plaintiff's father. A certified copy of the sale deed Ex.B4 executed by the official receiver in favour of the plaintiff's father, shows that the plaintiff's father purchased 1/2 share in suit survey No.119/5 of Kurur village, Kallakuruchi Taluk, measuring 0.04 cents (suit survey numbers). Thus, the plaintiff is entitled to 0.07 cents in survey No.119/5. But, the contention of the learned counsel appearing for the appellant is that since the defendants had admitted plaintiff's title to 0.10 cents in suit survey No.119/5, the first appellate court had committed an error by decreeing the suit only with regard to 0.07 cents. She also adverted the attention of this court to the recitals in Ex.B4 and contended that what was conveyed to the plaintiff's father in survey No.119/5 of Kurur village, Kallakuruchi Taluk, is 0.04 cents and not 0.02 cents as held by both the courts below. A perusal of entire Ex.B4 clearly shows that only 1/2 share in survey No.119/5 measuring 0.04 cents was conveyed to the plaintiff's father. It is pertinent to point out that the suit is filed by the plaintiff for a declaration of his title to the suit properties and for a consequential relief of permanent injunction. The plaintiff has to prove his title to the suit properties by adducing acceptable evidence.

9. Incidentally, the plaintiff in his evidence as P.W.1, had deposed that there was a partition even during the year 1961 and that the suit property was allotted to the share of his father. It is seen from the plaint that there is no specific pleading with regard to the above aspect. However, both the courts below had analysed this particular evidence of P.W.1 even without any pleading. In fact, it was argued before the first appellate court that since the defendants are third parties to the



partition, no pleading is necessary with regard to the partition that took place in the family of the plaintiff. The first appellate court, in its judgment dated 14.09.2007, has observed thus:

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"19. The plaintiff is bound to prove the partition and also to specify, what are the shares, specifically allotted to his family by way of oral partition. According to the plaintiff's proof affidavit, he admits that since 1970 his father had been in exclusive enjoyment of the property and also patta had been issued. Similarly other brother also if oral partition pleaded is true, would enjoy the properties allotted to them exclusively. But, on the side of the defendant, Ex.B4 has been marked. Ex.B4 is, certified copy of sale certificate given by the Joint II Sub-Registrar, Kallakurichi during the year 1974. On perusal of Ex.B4, the properties stated to be with the Official receiver are all shown as undivided property. And on perusal of each description of property, only 1/3rd share of Ponnusamy Udayar has been brought for sale. Hence, as per the evidence of the plaintiff, if only oral partition had been effected during the year 1969, and if the entire suit property had been allotted to the share of plaintiff's father Irusappa Udayar, who is alleged to have been in exclusive possession and enjoyment of the suit property, why 1/3rd share of the suit property has been brought for court sale, with regard to Ponnusamy Udayar's share? Each and every description of property in Ex.B4, relates only to 1/3rd share of Ponnusamy Udayar. Hence, the contention of the plaintiff is that, since 1970, the properties were exclusively enjoyed by way of partition has been negated by Ex.B4, which is dated 1974. Hence, the version of the defendant that, 1/3rd share in each property was allotted to each brother has become a more probable situation in view of Ex.B4. Moreover, plaintiff's father Irusappa Udayar has purchased 0.02 cents in suit Survey No.119/5, when Ponnusamy Udayar's share had come for court sale. If Irusappa Udayar has been allotted the entire suit property, why he has not taken any steps to remove the suit item from sale by the official receiver. In contra, he has purchased the 0.02 cents. There is no pleading or evidence on the side of the plaintiff to explain the reason for purchase of 0.02 cents by way of court sale. Hence, the plaintiff is estopped from pleading that each of the brother were not allotted 1/3rd share in the suit property. Moreover, why the plaintiff's father has not taken any



steps also there is no explanation to transfer the patta in his name since 1969 to 1982?
....."

The above observation of the first appellate court is based on sound reasoning and I do not find any cause to interfere with the same. The first appellate court further observed in paragraph 28 that the lower appellate court should not have dismissed the suit in toto since as per oral and documentary evidence adduced on both sides, the plaintiff is entitled to 0.07 cents including the property of 0.02 cents on the eastern side of 0.05 cents mentioned in Ex.B5 sale deed. The contention of the appellant/plaintiff is that based on the admission made by the defendant, declaration of his title to 0.10 cents should be granted in his favour. Such an argument cannot be accepted in the light of the fact that the plaintiff's father purchased only 0.02 cents out of 0.04 cents in survey No.119/5 of Karur Village and as per the partition between the brothers, he is entitled to another 0.05 cents in the suit survey number. The plaintiff knows the extent of property, which his father purchased through Ex.B4 and this document was not also filed on his side. On the contrary, a certified copy of the sale deed dated 28.11.1974 (Ex.B4) executed by the official receiver in favour of the plaintiff's father was filed only on the side of the defendants. The plaintiff's father purchased 0.02 cents in Survey No.119/5 in the court auction sale consequent upon the declaration of one of his brothers as insolvent. Therefore, the plaintiff cannot seek for a declaratory decree for more extent than what he is entitled to. The observations of the first appellate court are perfectly in order and in view of the same, the substantial questions of law 1 and 2 are answered against the appellant.

10. In the result,

- i. the second appeal is dismissed. No costs.
- ii. the decree and judgment dated 14.09.2007 in A.S. No.83 of 2005, passed by the learned Subordinate Judge, Kallakuruchi, are upheld.
- iii. the decree and judgment dated 20.01.2005 in O.S. No.75 of 1999, passed by the learned Additional District Munsif, Kallakuruchi, are set aside.

Sd/-
Assistant Registrar

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Sub Assistant Registrar



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1. The Subordinate Judge,
Kallakuruchi.

2. The I Additional District Munsif,
Kallakuruchi.

3. The Section Officer,
VR Section,
High Court, Madras.

+1cc to Mr.P.Valliappan, Advocate, S.R.No.44623

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