

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	12.07.2021
Pronounced On	23.07.2021

CORAM

THE HON'BLE **MR.JUSTICE C.SARAVANAN**

S.A.No.752 of 2012

and

M.P.No.1 of 2012

(Through Video Conferencing)

1.Jayammal

2.D.Chandrasekar

3.D.Suresh Babu

4.D.Sudhakghar

... Appellants

Vs.

1.P.Ethiraj

2.Tahsildar,

Gudiyattam, Vellore District.

... Respondents

This Second Appeal filed under Section 100 of the Code of the Civil Procedure, against the Judgment and Decree dated 30.11.2011 made in A.S.No.3 of 2011 on the file of the Subordinate Judge, Gudiyattam, in so far as dismissing the suit with reference to title and mandatory

injunction and partly allowed the Judgment and Decree dated 28.10.2010 made in O.S.No.235 of 2006 on the file of the District Munsif Court, Gudiyattam.

For Appellants : Mr.V.Ayyadurai, Senior Counsel

For First Respondent : Mr.K.A.Ravindran

J U D G M E N T

The appellants are the plaintiffs before the District Munsif Court at Gudiyatham (hereinafter referred to as Trial Court) in O.S.No.235 of 2006. The suit was filed by the appellants herein for declaration, permanent injunction and mandatory injunction to direct the second respondent Tahsildar to alter the Patta issued in the name of the first respondent. The Trial Court had decreed the suit based on the evidences and the deposition of the parties.

2. On further appeal in A.S.No.3 of 2011 filed by the first respondent, the Subordinate Judges Court at Gudiyatham (hereinafter referred to as First Appellate Court) has partly allowed the appeal vide impugned Judgment and Decree dated 30.11.2011 in A.S.No.3 of 2011 by modifying the Judgment and Decree of the Trial Court by restricting

the relief of the appellants for permanent injunction alone. As far as the relief for declaration of title and for mandatory injunction to direct the second respondent Tahsildar to alter the Patta is concerned, the First Appellate Court has come to a conclusion that the appellants have not proved that there were other legal representatives of late Thimmaiya Naidu. Therefore, the relief cannot be granted to the appellants.

3. The operative portion of the impugned Judgment and Decree reads as under:-

- i. The plaint is silent about the relationship of Ist plaintiff with the deceased Thimmaiya Naidu. No legal heir Certificate was filed. Anyhow court assumes that Ist plaintiff is the daughter of deceased Thimmaiya from the long cause title para of the plaint.
- ii. The plaint is silent about the any other legal heir/legal representatives of the deceased Thimmaiya Naidu, i.e. whether the Ist plaintiff is having sisters or brothers. Because the plaint does not consist word "only daughter of deceased Thimmaiya Naidu.
- iii. If suppose some other children of deceased Thimmaiya Naidu is there, then how the Ist plaintiff and wife of deceased Thimmaiya Naidu by name Muthilammal alone jointly execute will

in respect of the suit property. The reason of not adducing evidence regarding 'legal heir ship' of deceased Thimmaiya Naidu by plaintiffs is best known to them.

iv. Suppose the Ist plaintiff is having any brother and sister, children if any of those brothers and sisters and all children if any of Ist plaintiff are having right by birth in the suit property unless the property of the deceased Thimmaiya Naidu is partitioned among his legal heir / legal representatives as the property in the hands of Ist plaintiff and the wife of the deceased Thimmaiya Naidu is the ancestral property / co-partionary property.

v. No one can alienate the ancestral property / co-partionary property through will. So will executed by the Ist plaintiff and her mother is a void will as they are not competent to execute that will in favour of some of the grandsons of Ist plaintiff, so, based on void will plaintiffs 2 to 5 cannot be declared as title holder of entire suit property it will result in granting of exclusive ownership to her. She is not the exclusive owner, she is only the joint owner if she is having some brothers and sisters. If she is not having some brothers and sisters, then also she is not exclusive owner, because her children are vested with the right of title in the suit property by birth itself. The Ist plaintiff who is P.W.1 is not a 'only issue' to her parents and she is also having several issues. This is evident from deposition of cross examination of P.W.1 which runs as follows:-

“vdJ kfd;fs; \$yp Ntiy nra;fpwhHfs> vdJ kfd;fs;
uhkhGuk; vd;w Chpy; \$yp Ntiy nra;fpwhHfs;>

vdF;F 3 kfd;fs; cs;sdH> vdf;F xU kfs; cs;shH>
,e;j tof;fpid ehDk;> vdJ Ngud;fSk; NrHe;J jhf;fy;
nra;Js;Nshk;. Nkw;gb Ngud;fs; vdJ kfd; top
Ngud;fs; MFk;. vdJ xU kfd; JHthrY kw;nwhU
kfd; Kdpuh[p ,d;ndhU kfd; ngaH jw;NghJ vdf;F
,uz;L kfd;fs; jhd; cs;sdH vd;W khw;wp
\$WfpwhH. vdJ kfs; ngaH Nfhtp;jk;khs; MFk;. Nfhtp;jk;khtpd; fztH ngaH tujuh[Y MFk;. vd;id
jtpu kw;w thjpf; vdJ jha; khkhtpd; Ngud;fs;
MFk;. vdf;Fk; mtHfs; Ngud;fs; jhd; MFk;.”

“ehd; vdJ jha; je;ijahUf;F xNu kfs; MNtd;.”

P.W.1 has stated merely "xNu kfs;". She has not stated that she is only issue to her parents. There is possibility for existence of any male issues to her parents.

“vdJ kfs;fis mioj;J tprhhpj;jhy; cz;ik njhpAk; vd;why; rhpjhd;.”

From the above evidence of P.W.1 during cross it is very clear that she and her mother alone are not only owners of the suit property. They are only joint owners along with others. They are not exclusive owners. So, they are not competent to execute will as already mentioned. So, the said will is void. If the holding of will by this court that Ex.A7 Will is a void one due to the incompetence of the testators is wrong holding then also all plaintiffs cannot be declared as a title holders of the suit property. The reason is that, the following recitals is available in the Ex.A7 Will.

“vq;fs; ,UtH fhyj;jpw;F gpwF ePq;fs; %tUk;
ifg;gw;wpf; nfhz;L rkghfkhf gfpHe;J nfhz;L”.

As per the above recitals the Will comes into force only after the death of both testators. General rule of law of Will is that, unless the Will contains a recitals "as above" then only Will will come into operation with respect to undivided portion of the bequeathed property of one of the testator who died. So, 2 to 4 plaintiffs cannot be declared as title holders. The trial court which failed to hold the Will is a void one, also failed to note out the above mentioned recitals of "Will".

Based on the above mentioned points this court comes to a conclusion that this Court is right in holding that the 1st plaintiff and her mother are not the exclusive owners, consequently plaintiffs 2 to 4 also have no exclusive right over the suit property, because of all heirs of the deceased Thimmaiya Naidu becomes joint owners of the suit property. Unless any partition is effected between themselves 'any one person' or group of persons of the deceased Thimmaiya Naidu's family cannot be declared as exclusive owners of the suit property. If this court declared the plaintiffs 1 to 4 are the title holders of the suit property jointly, it will create a big problem between the family members, because suit property is a property which is to be partitioned among all the family members of Thimmaiya Naidu. So, at any costs plaintiffs 1 to 4 cannot be declared as title holders of suit property. But no doubt all the family members of deceased Thimmaiya Naidu are the joint owners and so they are having joint title over the suit property. Usually possession will follow title. So, based on Ex.A1 the family members of Thimmaiya Naidu are the joint title holders and also they are in joint possession of the suit property. These better

possession cannot be defeated by the possession of Ist defendant who is claiming possession with respect to encroached portion of 89 ½ Cents which belongs to family members of deceased Thimmaiya Naidu based on Ex.B1 Patta. The validity of the entire extent of Ex.B1 was not accepted by defendant No.2 who issued that Ex.B1 as mentioned earlier. Hence being the joint owners, right of joint possession of plaintiffs 1 to 4 should be protected by this Court by granting relief of permanent injunction restraining the Ist defendant, his men, agents from trespassing into the suit property because Ist defendant is a third party to the suit property.

The above analysis will result in dismissing the relief of declaration. Ex.B2 and B3 are mere receipts for telephone bill payment, tax receipts. No Survey number of suit property. Nothing are available in Ex.B2 and B3. Evidence of Summon witnesses D.W.2 and D.W.3 does not help in any way to the defendant's case. So, point for consideration No.2 and 3 are answered that the suit in O.S.No.235/2006 is dismissed with respect to the relief of declaration of interest, right, title in the suit property; suit in O.S.No.235/2006 is decreed with respect to the relief of permanent injunction as prayed for.

4. Appearing on behalf of the appellants, Mr.V.Ayyadurai, the learned senior counsel submitted that the Appellate Court has exceeded the jurisdiction by meandering on issues which were not at all under dispute before the Trial Court. He submits that the Appellate Court has wrongly assumed that there could be other legal representatives of the

first appellant's father Thimmaiya Naidu and therefore the Judgment and Decree of the Trial Court granting relief of declaration and mandatory injunction has been wrongly reversed by the First Appellate Court.

5. Appearing on behalf of the first respondent, Mr.K.Ravindran, learned counsel submits that Ex.B1-Patta filed by the first respondent before the Trial Court demonstrates that the first respondent has been in possession of the suit schedule property and that the first respondent as an encroacher had exercised hostile possession over the suit schedule property and therefore it was mandatory on the part of the appellants to have filed the suit for recovery of possession instead of filing the suit for declaration, permanent injunction and mandatory injunction. He further submits that it was not open for the First Appellate Court to have expand the scope of the lis. He further submitted that the second appellant worked as a coolie when the well was dug on the encroached area and therefore there was acquiescence on the part of the appellants and therefore the impugned Judgment and Decree of the First Appellate Court is liable to be confirmed. He therefore prays for dismissal of this appeal.

6. The learned counsel for the first respondent justifies the impugned Judgment and Decree and submits that the impugned Judgment and Decree was well-reasoned and requires no interference. He further submits that the appellants ought to have filed a suit for recovery of possession of the suit schedule property. The first respondent is admittedly in possession of the suit schedule property, as is evidence from the Patta marked before the Trial Court. Under these circumstances, he prayed for dismissal of this appeal.

7. By way of rejoinder, the learned senior counsel for the appellants submits that the first respondent has neither pleaded nor let in any evidence to substantiate that the first respondent is in possession of the suit schedule property and therefore this defence which has been raised in this appeal for the first time can be countenanced.

8. That apart, the learned senior counsel reiterates that the second respondent Tahsildar has himself admitted that Ex.B1 was wrongly granted to an extent of 23.5 cents in favour of the first respondent. Hence, he prayed for allowing this appeal.

9. I have heard the learned counsel for the appellants and the learned counsel for the first respondent. I have perused the impugned Judgment and Decree passed by the First Appellate Court and the Judgment and Decree passed by the Trial Court.

10. The Trial Court had framed the following issues for consideration based on the pleadings and the documents:-

- i. Whether first plaintiff (first appellant herein) is the title holder and entitled to declaration as prayed for?
- ii. Whether the defendants (respondents) are to be restrained by means of permanent injunction?
- iii. Whether the second defendant (second respondent) is to be directed to issue patta by way of mandatory injunction as prayed?
- iv. To what other relief ?”

11. The above issues were framed based on the averments in the plaint that the father of first appellant late Thimmaiya Naidu and late Thippaiya Naidu, the brother of late Thimmaiya Naidu (the paternal uncle of first appellant) had jointly purchased an total extent of 1.79 acres in the year 1947 vide Ex.A1 dated 01.08.1947. The said property was equally divided between them and vide Ex.A2 dated 14.07.1958, Thippaiya

Naidu sold his share of 89.5 Cents of land to Saminatha Naidu and Subramani Naidu vide Ex.A2 dated 14.07.1958 who in turn had sold the property to the first respondent vide Ex.A3 dated 06.05.1986. Thus, the first appellant's paternal uncle Thippaiya Naidu sold indirectly the land to the first respondent.

12. The first respondent had set up a defence before the Trial Court that though he obtained legal title only to an extent of 89.5 cents of land on the strength of Ex.A3 dated 06.05.1986 from the predecessors of the first respondent the Saminatha Naidu and Subramani Naidu, they were already enjoying the possession of 23.5 Cents out of 89.5 cents of land which was allotted to first appellant's father namely Thimmaiya Naidu.

13. It was further case of the first respondent that the second appellant namely D.Chandrasekaran had worked as a coolie when a well was dug on allegedly encroached land and therefore it was not open for the appellants to file the above suit for the above relief.

14. In the written statement, it has been categorically stated that the

suit was filed with a view to usurp the well dug by the first respondent. The Trial Court after considering the evidences on record, has answered all the issues in favour of the appellants which has been partly reversed by the First Appellate Court on further appeal filed by the first respondent. The respondents have not filed any appeal against the impugned Judgment and Decree of the First Appellate Court upholding the relief granted to the appellants for permanent injunction.

15. The First Appellate Court has concluded that the late Thimmaiya Naidu the father of the first appellant may have other legal heirs who are entitled to a share in the land that was retained by late Thimmaiya Naidu and therefore, it would be unfair to uphold the Judgment and Decree of the Trial Court granting the other relief for declaration and mandatory injunction.

16. In the light of the above, the substantial questions of law that arises for consideration in this appeal is whether the First Appellate Court was correct in modifying the Judgment and Decree passed by the Trial Court by setting aside the relief granted to the appellants for mandatory

injunction and for declaration and/or whether it was still mandatory on the part of the appellants to have filed a suit for recovery of possession of the property in the light of the admission of the second respondent Tahsildar in the written statement that Ex.B1 Patta was wrongly issued to the first respondent.

17. I have considered the arguments advanced by the learned counsel for the appellants and the learned counsel for the first respondent. I have perused the evidence on record and the impugned Judgment and Decree passed by the First Appellate Court and the Judgment and Decree passed by the Trial Court.

18. The First Appellate Court has committed an error in concluding that the first appellant is not the only legal of the late Thimmaiya Naidu and that possibly there could be other legal heirs who were entitled to a share in the property. The First Appellate Court failed to note that dispute was between the appellants and the first respondent alone. It is not the case of the first respondent that there are other legal heirs of late Thimmaiya Naidu who were entitled to a share in the said schedule

property. Therefore, it was unnecessary for the First Appellate Court to get into issues which were not in dispute between the parties.

19. The second respondent has also confirmed in the written statement that the Ex.B1 Patta was issued in favour of the first respondent by mistake. That being the case, the Patta granted to the first respondent was liable to be cancelled. Therefore, the Patta is to be granted to the first appellant who is admittedly the daughter of original land owner late Thimmaiya Naidu. Since the land admittedly belongs to the father of the appellant, there shall be a declaration as prayed for. In case there are other legal heirs of late Thimmaiya Naidu, their name can be included in the part at a later point of time by the second respondent after enquiry.

20. The declaration of title which is being upheld by this Judgment in favour of the first appellant shall be treated as declaration of title in favour of all the legal heirs of late Thimmaiya Naidu. The first appellant shall hold the property in trust for all the legal heirs of the late Thimmaiya Naidu and in case they come forward to claim their shares, it shall be decided independently.

21. Therefore, this court of is the view that the substantial questions of law are to be answered in favour of the appellants. Accordingly, this appeal filed by the appellants deserves to be allowed and is hereby allowed. No cost. Consequently, connected Miscellaneous Petition is closed.

23.07.2021

Internet : Yes/No
Index : Yes / No
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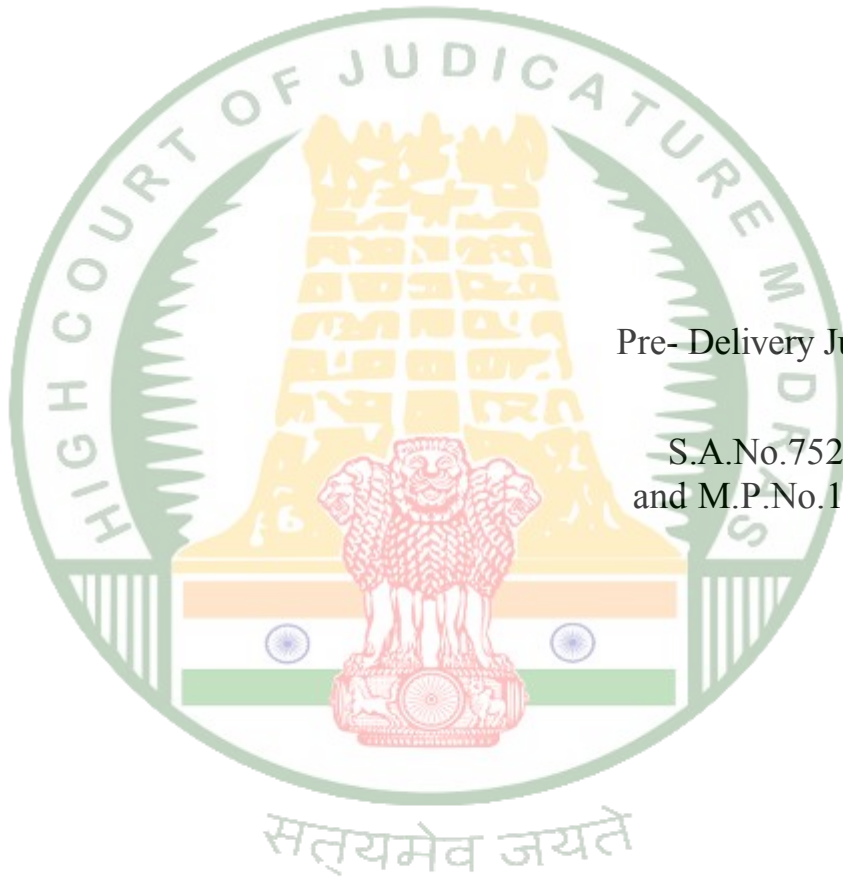
- 1.The Subordinate Judges Court,
Gudiyattam.
- 2.The District Munsif Court, Gudiyattam.
- 3.The Section Officer,
V.R.Section, Madras High Court.

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