



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.09.2021

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.646 of 2009

and

M.P. (MD)No.1 of 2009

and

C.R.P. (NPD) (MD)No.1167 of 2009

S.A. (MD)No.646 of 2009:

- 1.Perumal Naicker (Died)
- 2.Saroja
- 3.Palraj
- 4.Krishnamoorthy
- 5.Santhi
- 6.Maharani
- 7.Anusuyadevi
- 8.Guruvammal
- 9.Sathyamoorthy

... Appellants

(Appellants 2 to 9 are brought on record as LRs of the deceased 1st appellant vide order dated 25.08.2021 made in C.M.P. (MD)Nos.6869 to 6871 of 2021 in S.A. (MD)No.646 of 2009 by GRSJ)

Vs.

Vijayendren

... Respondent

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 15.04.2009 passed in A.S.No.53 of 2008 on the file of the Sub Court, Aruppukottai, confirming the judgment and decree passed in O.S.No.163 of 2003 dated 01.08.2008 on the file of the District Munsif Court, Aruppukottai.

For Appellants : Mr.D.Malaichamy

For Respondent : Mr.S.Natarajan

C.R.P. (NPD) (MD)No.1167 of 2009:-

- 1.Perumal Naicker (Died)



2.Saroja
3.Palraj
4.Krishnamoorthy
5.Santhi
6.Maharani
7.Anusuyadevi
8.Guruvammal
9.Sathyamoorthy

... Petitioners

(Petitioners 2 to 9 are suo motu impleaded as LRs of the deceased 1st Petitioner vide order dated 25.08.2021 made in C.R.P. (MD) No.1167 of 2009 by GRSJ)

Vs.

Vijayendren

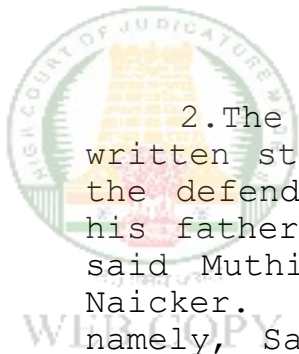
... Respondent

Prayer : Civil Revision Petition filed under Section 115 of Civil Procedure Code, to set aside the fair and decreetal order dated 15.04.2009 passed in I.A.No.134 of 2008 in A.S.No.53 of 2008, on the file of the Sub Court, Aruppukottai arising out of O.S.No.163 of 2003 on the file of the District Munsif Court, Aruppukottai.

For Petitioner : Mr.D.Malaichamy
For Respondent : Mr.S.Natarajan

JUDGEMENT

The defendant in O.S.No.163 of 2003 on the file of the District Munsif Court, Aruppukottai is the appellant in this second appeal. The suit was for declaration that the plaintiff is the owner of the suit properties and for consequential relief of permanent injunction restraining the defendant from in any way interfering with the plaintiff's possession and enjoyment of the suit properties. The suit schedule properties are five in number. They are comprised in S.Nos.72/7, 76/1A, 92/4, 95/2 and 76/1E in Nochikulam village, covered under Patta No.73. The case of the plaintiff is that the suit properties originally belonged to his paternal grandfather namely, Gurusamy Naicker. Gurusamy Naicker had three sons namely, Periya Perumal Naicker, Nadu Perumal Naicker and Chinna Perumal Naicker. The plaintiff is the son of the second son namely, Nadu Perumal Naicker. The elder son namely, Periya Perumal Naicker was a bachelor and he died issueless. The third son of Gurusamy Naicker namely, Chinna Perumal Naicker had executed a release deed dated 30.07.2002 (Ex.A3) in favour of the plaintiff. Nadu Perumal Naicker passed away prior to the filing of the suit. Thus, the suit properties came to vest in the plaintiff. Since the defendant was staking a rival claim and also interfering with his possession and enjoyment, the plaintiff had to file the said suit.



2.The suit claim was resisted by the defendant. He filed written statement controverting the plaint averments. The case of the defendant was that the suit properties originally belonged to his father-in-law namely, Muthiah Naicker, S/o.Poochi Naicker. The said Muthiah Naicker had a brother by name Chinnappan @ Poochi Naicker. The said Chinnappan @ Poochi Naicker had two daughters namely, Saroja and Guruvammal. Muthiah Naicker is said to have taken Saroja as his adoptive daughter. The defendant/Perumal Naicker married both the daughters namely, Saroja and Guruvammal. The defendant would claim title over the suit properties through his in-laws. He would state that his father-in-law executed a Will in favour of Saroja and that is how, the properties came to vest in him.

3.Based on the divergent pleadings, the trial Court framed the necessary issues. The plaintiff/Vijayendren examined himself as P.W.1 and two other witnesses were also examined on his side. Exs.A1 to A6 were marked. The defendant examined himself as D.W.1 and his wife/Saroja was examined as D.W.2 and Exs.B1 to B22 were marked. Six documents were produced by third parties, they were marked as Exs.X1 to X6.

4.After a consideration of the evidence on record, by judgment and decree dated 01.08.2008, the trial Court decreed the suit as prayed for. Aggrieved by the same, the defendant filed A.S.No.53 of 2008 before the Sub Court, Aruppukottai. The first appellate Court by the impugned judgment and decree dated 15.04.2009 dismissed the appeal and confirmed the decision of the trial Court. Challenging the same, this second appeal came to be filed.

5.The second appeal was admitted on the following substantial questions of law:-

"(i)Whether the Courts below are correct in upholding the title of the respondent over the suit properties by relying on Exs.X1 and X2 and the oral evidence of DW2 as to boundaries since the same are against the well settled principles of law that the plaintiff should prove his case on his own and he cannot pick holes in the defense?

(ii)Whether the Courts below are right in holding that Ex.A1 would act as estoppel since,

(a) the same is not pleaded in the plaint;

(b) the same does not contain the description of the suit properties;

(c) the author deposed that it was executed by him under threat;

(d) the same does not satisfy the requirements of Section 115 of the Law of Evidence; and



(e) the mere admission that some other person is the owner of a certain property, when in fact that other persons has no title at all, he will not denude himself of ownership of the property which really vests in him;

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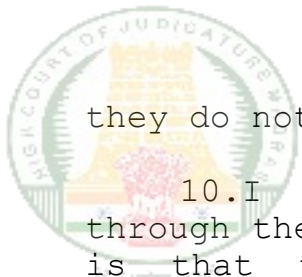
(iii)Whether the Courts below are right in decreeing the suit on the strength of Ex.X1 and X2 without deciding the fact that Ex.X1 refers to which of the suit properties and Ex.X2 refers to which of the suit properties?"

6.In the appeal suit, the defendant filed a petition under Order 41 Rule 27 of Civil Procedure Code for reception of additional evidence and the same was dismissed by the first appellate Court. Questioning the same, the defendant filed C.R.P.(NPD)(MD)No.1167 of 2009. Since the second appeal as well as the civil revision petition are interlinked, they are heard and disposed of together.

7.During the pendency of these proceedings, the defendant passed away and his legal representatives have been brought on record both in the second appeal as well as in the civil revision petition.

8.The learned counsel appearing for the legal representatives of the original appellant reiterated all the contentions set out in the memorandum of grounds and he called upon this Court to answer the substantial questions of law in favour of the appellants and set aside the impugned judgments and decrees and dismiss the suit. The case of the plaintiff is that the suit properties were purchased by his paternal grandfather namely, Gurusamy Naicker under Exs.X1 and X2. A mere perusal of the same, according to him, would show that no survey numbers are mentioned and there is nothing to show that the suit properties are covered thereunder. On the other hand, the title documents marked by the defendant would show that the suit properties were purchased by his father-in-law namely, Muthiah Naicker. He would further state that when the plaintiff had filed the instant suit for declaration and permanent injunction, the burden lay entirely on him but the Courts below have chosen to decree the suit by picking holes in the defense. He would also state that if only the additional evidence had been received, it would have shed considerable light on the true controversy. The primary function of any Court is to render justice. But in the case on hand, the first appellate had chosen to go by technical considerations for declining to receive additional evidence. His further contention is that the plaintiff had not adduced any evidence to show that he is possession of the suit properties.

9.Per contra, the learned counsel for the respondent submitted that the impugned judgments and decrees are well reasoned and that



they do not call for any interference.

10.I carefully considered the rival contentions and went through the evidence on record. The specific stand of the plaintiff is that the suit properties were purchased by his paternal grandfather under third party exhibits namely, Exs.X1 and X2. It is true that in those two documents, which are dated 22.05.1950 and 10.10.1946, the survey numbers have not been given but the four boundaries have been clearly spelt out. D.W.2/Saroja through whom, the defendant is staking his claim categorically admitted the correctness of the four boundaries set out therein. Thus on a cumulative appreciation of these two documents in the light of the categorical admission made by D.W.2, the Courts below have concurrently rendered a finding that the suit properties are very much covered under two those documents namely, Exs.X1 and X2. The said concurrent finding is not only not perverse but well founded. I do not find any reason to interfere with the said finding. On the other hand, both the documents projected by the defendant do not have any relation whatsoever with the suit properties. I went through the contents of Exs.B3 as well as B4. Ex.B3 pertains to S.No.92/3 while Ex.B4 pertains to S.No.76/7. I have already extracted the suit schedule items. It can be seen that none of the survey numbers mentioned in the suit schedule have any relation to the properties covered under Exs.B3 and B4. That is why, the Courts below came to the conclusion that both the documents projected by the defendant do not advance his case. The conclusion arrived by the Courts below are well founded and they do not call any interference.

11.In this second appeal, the appellants tried to introduce a new case. It was contended that a part of the suit properties covered under Ex.X2 was sold by Gurusamy Naicker to Muthiah Naicker. But a mere look at the pleading would show that this was never the case of the defendant. The defendant nowhere pleaded that the plaintiff's grandfather had sold a part of the suit properties in favour of the defendant's father-in-law. In fact, I would have overlooked the omission in the pleading, if the document concerned had already been brought on record. When the defendant had failed to mark any such document before the trial Court, the first appellate Court was justified in coming to the conclusion that an additional evidence that is not consistent with the pleadings cannot be allowed to be introduced in evidence at the appellate stage. In the case on hand, it is not a case of mere inconsistency. On the other hand, the defendant is setting up an entirely new case. That is why, I sustain the objection raised by the learned counsel appearing for the respondent herein. Looked at from any angle, no case for interference has been made out. The substantial questions of law are answered against the appellants.



12.In the result, the second appeal and the civil revision petition are dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

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/ /2021

Sub Assistant Registrar(CS)

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Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

- 1.The Sub Court,
Aruppukkottai.
- 2.The District Munsif Court,
Aruppukkottai.

Copy to:

The Record Keeper, (2C)
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.D.MALAICHAMY, Advocate (SR-29938[F] dated 22/09/2021)

+1 CC to M/s.S.NATARAJAN, Advocate (SR-29989[F] dated 23/09/2021)

S.A. (MD) No.646 of 2009

and

C.R.P. (NPD) (MD) No.1167 of 2009

22.09.2021

DJ(CO)

KB(07.10.2021) 6P 7C