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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 11.01.2022

Judgment Pronounced on : 21.01.2022

CORAM :

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

S.A.No.1049 of 1997

1.Kandasamy Mudaliar (Died)

.... 2nd Defendant / 2nd Respondent /
Appellant

2.Anjali Ammal

3.Saroja (Died)

4.Subramanian

5.Savithri

6.Saravanan

7.Selvi

8.Balakrishnan

9.Latha

10.Santhi

.... Appellants

(Appellants 2 to 7 are brought on record as L.Rs. of the
deceased sole appellant, Vide order dated 14.08.2003,
made in CMP.Nos.20387 & 20388 of 2001)

(Appellants 8 to 10 are brought on record as L.Rs of the
deceased third appellant, viz., Saroja, Vide order dated
08.11.2019, made in CMP.Nos.11838 to 11840/2018)

Vs

1. Muthu Mudaliar, S/o.Somu Mudaliar (Died)

Murugesha Mudaliar, S/o.Somu Mudaliar (Died)

... Plaintiffs 1,2 / Appellants /
Respondents

2.Murugesha Mudaliar, S/o.Raju Mudaliar

... 1st defendant /1st respondent

3.Balasubramanian

... 3rd defendant/ 3rd respondent

L.Rs. of 2nd Plaintiff / 2nd Appellant :

4.Saraswathi

5.Karunanidhi



6.Anbalagan

7.Latha

8.Tamilarasi

9.N.Ezhilarasi

10.M.Swaminathan

11.S.Sundaram

12.M.Annadurai

13.Thangamani

14.P.Amutha

.... Respondents

(Respondents 8 to 14 are brought on record as L.Rs of the deceased

R1 viz., Muthu Mudaliar Vide order of Court dated 08.11.2019 made in CMP.No.171 to 173/2011 in SA.No.1049/1997)

Respondents 8 to 14 are set exparte

Prayer : Second Appeal filed under Section 100 of CPC against the judgment and decree of the learned Subordinate Judge, Ariyalur, dated 19.1.1996, made in A.S.No.70 of 1992, reversing the decree and judgment of the learned District Munsif, Ariyalur, dated 30.08.1991, made in O.S.No.12/1983.

For Appellants : Mr.P.Dinesh Kumar
for M/s.Sarvabhauman Associates

For Respondents : Mr.R.Balasubramanian [R5]

Mr.S.Ramachandran [R4, R6 & R7]
(No Appearance)

JUDGMENT

The second defendant who was successful in resisting a suit for declaration of title and for permanent injunction along with other defendants before the trial Court in O.S.No.12/1983, but suffered a reversal in the first appeal preferred in A.S.No.70/1992, has approached this Court with this second appeal. Parties would be referred to by their ranks before the trial Court.

2. The rival pleadings on either side can be briefly stated:

- There is substantially a square plot that jointly belonged to four brothers namely Nallathambi, Appavu, Ponnusamy and Duraisamy. This larger property was divided into four smaller square plots, with two on the north and two on the



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south. These plots had been numbered from the north-eastern corner plot as plot No.1 and the successive plots are numbered in anti clock-wise direction. Accordingly, plot No.2 was to the immediate south of plot no:1, followed by plot No.3 which is to the west of Plot No.2. And the last plot No.4 is the north-western plot. It lies to the north of Plot No.3 and west of Plot No.1. Ext.A-1 rough plan throws some details on it. These four plots were respectively allotted to Appavu (plot no:1), Ponnusamy (plot no:2), Duraisamy (plot no:3) and Nallambalam (plot no:4).

- The suit property herein is plot No.3, which, as mentioned above, was originally allotted to Duraisamy. It is bounded on the east by plot No:2 (allotted to Ponnusamy), and on the north by plot No:4 (allotted to Nallambalam). In the plaint, the suit property (plot No:3) is said to measure 960 sq.f.t.
- Duraisamy had a son Manickam. Manickam in turn had two daughters viz., Thaiyalnayagi and Visalakshi.
- Uptill this point there is no dispute. According to the plaintiffs, they along with the third defendant had jointly purchased plot No:3 from Thaiyalnayagi & Visalakshi under Ext.A-2 sale deed dated 25-08-1982.
- Defendants 1 and 2 would contend that Manickam Mudaliyar had mortgaged the property to a certain Thangavel Mudalaiyar (who as per the evidence is stated to be the grand nephew of Duraisamy (grandson of Duraisamy's brother Nallambalam)).
- Manickam Mudaliyar sometime in 1937 had orally sold the suit property to Thangavel Mudaliyar for a sale consideration of Rs.90. Thereafter under Ext.B4 sale deed dated 09-02-1970, Thangavel Mudaliyar had sold the suit property to the first defendant, who in turn had sold it to the second defendant Vide Ext.B3 sale deed dated 03-01-1983. While the plaintiffs claim that Exts B-3 and B-4 sale deeds were fraudulent documents, defendants 1 and 2 contend that Thaiyalnayagi and Visalakshi did not have any title in the suit property for them to convey it to the plaintiffs and the third defendant Vide Ext.A-2 sale deed 25-08-1982, since Thaiyalnayagi's father Manickam Mudaliyar himself had parted with his title orally to Thangavel Mudaliyar.
- According to the plaintiffs (who originally laid the suit with the third defendant) they had fenced the suit property and that it was destroyed by the first defendant. This was followed by a police complaint and exchange of notices in Ext.A8 dated 25-09-1982 from the plaintiffs to the first defendant and Ext.A-9 reply dated 12-10-1982 from the latter to the former.
- The suit was promptly laid, where the contention as earlier narrated have been pleaded.



3.1 The dispute went to trial. During trial the first plaintiff examined himself as P.W.1, while the first defendant examined himself as D.W.1. Both sides examined their respective vendors also. While the plaintiffs examined their cousin cum one of their vendors Thaiyalnayagi as P.W.2, the first defendant examined his vendor Thangavelu Mudaliar as D.W.2. Besides, the defendants 1 and 2 examined a certain Kothai Ammal as D.W.3. Yet another witness which is critical to the case of the defendant is one Marimuthu Mudaliyar, who was examined as D.W.5. Their role will be made relevant at the appropriate places in this judgment. Of the documentary evidences, Ext.A-4 to A-6 sale deeds involving adjacent plots are relevant, and they are dated between 26-05-1933 and 20-10-1936. In this sale deeds one of the boundaries was shown as Manickam's property.

3.2 The trial Court believed the version of the defendants and in particular, it relied on the evidence of D.W.2, D.W.3 and D.W.4 and Exhibits-Ext.B7 and Ext.B9, to non-suit the plaintiff.

3.3 When the matter reached the first Appellate Court at the instance of the plaintiffs, the first Appellate Court took a different view, when it held that Exts.A-4 to Ext.A-6 deal with properties adjacent to the suit property, wherein, the plaintiff's vendor's father Manickam was shown as the owner, and decreed the suit.

4. Challenging the decree of the first Appellate Court, the second defendant has come before this Court with this appeal. This appeal is admitted for considering just one substantial question of law :

"Has the lower appellate court misconstrued the ambit of Ext.B1, sale deed dated 26.5.1933 in giving preference to Ex.A2 filed on behalf of the plaintiff?"

5. The learned counsel for the appellant / second defendant argued :

- a) The first Appellate Court has egregiously erred in relying exclusively on Ext.A-4, Ext.A-5 and Ext.A-6, all are dated between 1933 to 1936, and conclusively held that the suit property belonged to Manickam, and thus negated the defendants' plea of oral sale by Manickam to Thangavelu Mudaliyar. In this regard, it is significant to note that Thangavelu Mudaliyar as D.W.2 asserted that he had orally purchased the property sometime in 1930 to 1936. At the time when he deposed, he was 82 years, and given the fact that he was deposing about the fact some 60 years after it was alleged to have taken place (the oral sale), some provision must be made for lapses in memory. After all, it is an oral sale and since the value is below Rs.100/-, it



need not even be registered. Hence it was not possible that the vendors in any of the sale deeds in Ext.A4 nor Ext.A5, Ext.A6 might not have known about the sale to Thangavel.

- a)** Whether Thangavelu Mudaliyar had purchased the property, or is there a preponderating probability that he could have purchased Plot No.3 from Manickam, need to be inferred from other attending circumstances. Here at least two documents are critical :

(i) A plot of property to the immediate south of the suit property belong to a certain Kothai Ammal, and she sold this plot to the first plaintiff's wife Kanagammal under Ext.B-9, dated 05-07-1961. In this property, the northern boundary was shown as Thangavelu's property. When this document was confronted to the first plaintiff, when he was examined as P.W.1, he only attempted to wriggle out of the situation and pretended that he did not know anything about the document. However, he did not deny that his wife never had a property to the south of the suit property. To prove Ext.B-9, the defendants have examined the vendor of the document, Kothai Ammal as D.W.3. She categorically speaks to the participation of the first plaintiff in the execution of Ext.B9, sale deed in favour of latter's wife Kanagammal. Indeed, Ext.B-9 itself records that the sale consideration was paid to the vendor only by the first plaintiff, and that he was the identifying witness before the Sub Registrar.

(ii) The next document pertains to the plot to the east of the suit property. This is referred to as plot No:II and this plot was originally allotted to Ponnusamy. On his demise, it devolved on Marimuthu Mudaliyar, who is the grandson of Ponnusamy. He sold this plot no.2 to a certain Athimoola Padayachi, Vide Ext.B7 sale deed, dated 08-09-1969. This Marimuthu Mudaliyar was examined on the side of defendants as D.W.5. In this document, the western boundary, which admittedly is plot No.3, was described as Thangavelu Mudaliyar's property.

It will be seen Ext.A-2 under which the plaintiffs claim title, is dated some 13 years from Ext.B-7 sale deed, and some 21 years from Ext.B-9 sale deed.

- b)** Turning to the evidence of P.W.2, first, she is the cousin of the plaintiffs and also their vendor. To negate the allegation of oral sale by her father Manickam Mudaliyar to Thangavelu Mudaliyar, she would depose that she was taking



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care of the affairs of Manickam in 1930. She was 80 years when she deposed in 1991, which implies that she should have born sometime in 1911. She had deposed that she was married when she was 16 years old, which implies she should have been married in or about 1927. It is therefore, inconceivable that the father would have handed over his reins to his young married daughter at a time when women were not adequately empowered, more so, when her father Manickam Mudaliar was not shown to have suffered any incapacity to manage his affairs.

Summing up his arguments, the learned counsel submitted that if the rule of preponderance of probability is to guide a conclusion to this dispute, then it should strongly tilt in favour of the defendants/appellants.

6. The primary thrust of 5th respondent /plaintiffs counsel was that the axile of defendant's case is the alleged oral purchase by Thangavel Mudaliyar from Manickam Mudaliyar. Thangavel Mudaliyar had examined himself as D.W.2. While the defendants 1 and 2 have fixed the year of this purchase in 1937, D.W.2 wobbles between 1930 to 1936 to 1937. If the theory of D.W.2's oral purchase of property becomes unreliable in evidence, then it ought to be an advantage to the plaintiff. Secondly, the fact that Thangavel Mudaliyar's property is shown as a boundary to the plot transacted in Exts.B7 as denoting the suit property cannot be conclusive since boundary-description given in a third-party document cannot be determinative of the title of the property.

7. The question raised to be answered is the merit of the sale deed (Ext.A-2) may have to supercede the effect of Ext.B-1 (=Ext.A-4 sale deed) for deciding the title to the suit property. If an analysis of the evidence produced by the defendants, after Exts A-4 = Ext.B-1, then Ext.A-5 and Ext.A-6 = Ext.B-2, they are all dated between 1933 and 1936, and deal either with plot No:4 or plot No:2, as the case may be. In them, one of the boundaries to the property transacted thereunder necessarily had to be plot No:3, and in referring to the same in describing the plots dealt with under any of these documents, the same was referred to as Manickam Mudaliar's property. This is true, and indeed has been admitted even if the allegations in the written statement is reckoned. As already indicated, according to the contesting defendants, Thangavel Mudaliyar had purchased plot 3 orally (suit property) from Manickam Mudaliyar only in 1937. The point is if sale to Thangavel Mudaliyar is true? While the substantial question deals with two documents, one dated in 1933 (Ext.B-1), the other is dated in 1982 (Ext.A-2, the very sale deed under which plaintiffs claim title). Now, in between 1933 and 1982 were there any evidence to show that Thaiyalnayagi (P.W.2) and her



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11. A cumulative assessment of the evidence on record preponderates a probability that Thangavel Mudaliar had purchased the suit property, and this fact was known to the



first plaintiff himself.

12. Turning to the substantial question per se, it involves a document dated in 1933 (Ext.B-1). This is a sale deed pertaining plot 4, whose southern plot is the suit property. In describing the property sold thereunder by its boundaries, the southern boundary was given as Manickam Mudaliyar's property. This was true as in 1933, since according to the defendants plot 3 was sold to D.W.2 only in 1937. Therefore, it should be understood in the context of the proved facts, in conjunction with other evidence available on record but not in isolation.

13. This Court finds that the first appellate Court has egregiously erred in appreciating the evidence and has ignored those evidence which create a strong probability of the case of the defendants 1 and 2. It requires to be interfered with.

14. In conclusion, this appeal is allowed and the decree and judgment of the learned Subordinate Judge, Ariyalur, dated 19.1.1996, made in A.S.No.70 of 1992, reversing the decree and judgment of the learned District Munsif, Ariyalur, dated 30.08.1991, made in O.S.No.12/1983, is set aside. No costs.

Sd/-

Assistant Registrar(CS-I)

//True Copy//

Sub Assistant Registrar

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To:

1. The Sub Court
Ariyalur.
2. The District Munsif Court
Ariyalur.
3. The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.Sarvabhauman, Advocate, S.R.No.3869

S.A.No.1049 of 1997

AD(CO)
CT(06/04/2022)