



S.A.No.691 of 2013

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T.V.THAMILSELVI, J.

This matter was taken up for hearing under the caption “For Clarification” today at the instance of the learned counsel for the appellant.

2. The learned counsel for appellant would submit that this Court by an order dated 07.11.2022 allowed the above Second Appeal and also issued direction. However, in para-10 of the order, instead of mentioning “the Second Appeal is allowed”, it was wrongly mentioned as “Second Appeal is dismissed”. Hence, the matter is listed today.

3. Heard the contentions of learned counsel for appellant and perused the order.

4. Considering his submissions, the paragraph-10 of the order is clarified as follows:

In Para 10 at Page 9

“10. In the result, this Second Appeal is allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed. ”



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5. Registry is directed to incorporate above correction in the Order of this Court in S.A.No.691 of 2013 dated 07.11.2022 and issue fresh order copy to the appellant.

21.04.2023

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2022

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

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1.Rupavathi
2.Sambasiva Gounder
3.Kumaravel
3. Govindaraj
4.Manickavel Gounder

... Appellants

Vs.

Chidambaram

...Respondent

PRAYER: This Second appeal filed under Section 100 of the Code of Civil Procedure Judgement and Decree dated 19.03.2013 made in A.S No.103 of 2011 on the file of Sub Court, Vellore, Vellore District reversing the Judgement and Decree dated 01.04.2011 made in O. S No.1057 of 2009 (Vellore D.M.C O.S No.426 of 2000) on the file of the Court of the District Munsif, Katpadi, Vellore District.

For Appellants : Mr.T.Dhanyakumar

For Respondent : Mr.M.P.Jayaprakash



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JUDGMENT

The appellants herein are the defendants in Suit O.S No. 1057 of 2009 on the file of the District Munsif Court, Vellore filed by the respondents herein/ plaintiff for the relief of declaration and delivery of possession of the suit properties by stating that the suit properties are allotted to his share as per the oral partition held between him and his brothers along with his father Duraisamy, he constructed thatched house in item No. 1 of the suit property and enjoyed other agricultural properties in which the defendants has no rights and caused interference and attempted to transfer the patta in their name. Hence, the suit.

2. Defendant contested the suit by stating that the first defendant is the sister of the plaintiff, the suit property belongs to his father Duraisamy and as per the Oral partition the suit properties allotted to the first defendant and she enjoyed the property for more than 30 years and their daughter was given marriage to the plaintiff family. Due to misunderstanding his father/plaintiff filed this vexatious suit. Before the the Trial Court both the parties adduced evidence and documents were marked on the side of the plaintiff as Ex.A1 to Ex.A5 and on the



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defendant side Ex.B1 to B16 were marked .

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3. On considering the oral and documentary evidence as well as the facts the Trial Court held that the plaintiffs not proved that the suit property belong to him as per the oral partition. On the other hand the first defendant established that the suit properties are under her enjoyment for more than 30 years and the revenue records also stands in her name. Accordingly the suit was dismissed.

4. Aggrieved over the same, the plaintiff's preferred an appeal in A.S No. 103 of 2011 on the file of the Sub Judge , Vellore, contending that the Trial has not appreciated the evidence adduced on either side of the plaintiff and erroneously not appreciated the Ex.A4 dated 15.10.1980 produced on the side of the plaintiff to prove the allotment of the suit property in his share. The first appellate Judge separately analysed the facts and evidence and record, finally concluded that the suit property belongs to the plaintiff. Though it is under the enjoyment of defendant and plea of aversion possession claimed by the defendant as such is not maintainable. Accordingly, the appeal is allowed by set aside the order of the Trial Court granted relief of declaration in favour of the plaintiff.

5. Challenging the same, the defendants preferred this second



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appeal submitted that the lower appellate Court failed to note that the suit properties were allotted to the first defendant in a oral partition took place about 45 years ago and failed to take note of the Ex.B1 is stands in the name of the first defendant. Besides, she proved her possession of the property more than 35 years and the same was admitted by the plaintiff in respect of all these evidence erroneously lower appellate Court held that the defendants enjoyed the property with no right and the findings rendered by the lower appellate Court is totally misconception of law and facts. Accordingly, prayed to set aside those findings. This Court admitted the second appeal with the following questions of law:

1. Whether the Judgement of the Lower Appellate Court is vitiated inasmuch as it failed to consider the entire pleadings and evidence for allowing the appeal and decreeing the suit filed by the plaintiff?
2. Whether the oral and documentary evidence can be let in without pleadings and also contrary to the pleadings and even if let in can be relied on by the lower appellate Court for allowing the appeal?
3. Whether in any event the plaintiff is entitled to decree for declaration and possession over the suit properties on the failure of the defendants to prove their case?

6. The brief facts of the case are as follows:

The suit property originally belongs to Munich Ammal @



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Muniammal who is paternal grand mother of the plaintiff as a self acquired property, after her demise her three sons Duraisamy Gounder (father of the plaintiff) Munusamy Gounder and Ponnusamy Gounder partitioned the said property on 07.06.1951, wherein A schedule property including suit property allotted to the plaintiff's father Duraisamy Gonder. During his life time, his three sons portioned the suit property orally and with regard to other properties including suit property of the family there was oral partition, wherein suit property was allotted to the share of the plaintiff, and he enjoyed the property by constructing the house in the first item of the suit property but the first defendant attempted to create patta in her name with regard to the suit properties and also tress passed. Hence the suit.

7. The first defendant is the sister of the plaintiff admits that suit property belongs to her father Duraisamy Gounder. But denied that same was allotted to the plaintiff as per oral partition held between them. on the other hand, she contend that his father given the suit properties to her as Sethanam and more than 35 years she possessed and enjoyed the suit properties along with her family properties thereby she perfected right over suit property.



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8. Heard both sides. Both the parties admitted that the suit property originally belongs to their father Duraisamy Gounder. As, the plaintiff approached the Court for declaration and recovery of possession burden is on him to prove that the suit property was allotted to him through oral partition. Strangely during the pendency of the suit plaintiff marked as Ex. A.4/Koorchit dated 15.10.1980 contending that there was oral partition between the Duraisamy Gounder and his sons, as rightly pointed out by the Court below there is no pleading in the plaint with regard to the alleged partition between the Duraisamy and his sons at the time of filing of the suit. Furthermore, as per the plaintiffs contention the oral partition effected along with his father Duraisamy and his brother. But as per the recitals in Koorshit/Ex.A4 his father Duraisamy Gounder was not a party to the said document. So, conduct of the plaintiff reveals that contrary to the plea with regard to allotment of the property he relied the Koorchit nor he established any material to that effect the suit property allotted his share and same is under his enjoyment. Furthermore, in the entire pleadings he is not disclosed that first defendant is his sister.



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9. On the other hand, first defendant submitted that her father gave these properties to her by oral partition at the time of her marriage since 1963 itself She/1st defendant is in possession and enjoyment of the suit properties. During the cross examination plaintiff admits that she occupied the suit property. But all these 35 years the plaintiff has not taken any steps to vacate her from the property. Moreover, as per the plaint pleadings plaintiff stated that the first defendant is attempted to trespass into the suit properties which is contrary to his own evidence. The first defendant claimed that she is in enjoyment of the property for more than 35years this fact also not been denied by the plaintiff. Furthermore, she produced revenue records, patta Ex.B1, kist receipt, electricity bill which shows that the suit properties are under her long possession and enjoyment for about more than 35 years. The suit was filed in the year of 2009 but Ex.B2 reveals that from the year 1992 itself 1st defendant is in enjoyment of the suit property. Furthermore, P.W.1 during his cross examination admitted that the defendants are enjoying the suit property for past 30 years. On seeing the plaint pleadings just prior to the filing of the suit as if defendant attempted to encroach the property is contrary to his own evidence, but the lower appellate Court



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without appreciating the admission made by the plaintiff in his evidence during trial erroneously held that suit property is belong to the plaintiff.

As discussed above, the plaintiff failed to establish that the suit property was allotted to him by way of oral partition. Furthermore, the lower appellate Court not appreciated fact that the defendant is in possession of the property for more than 35 years. It is settled proposition that plaintiff has to prove his case by relying his own evidence and should not fall upon weakness of the defendant but the lower appellate Court without appreciating this legal proposition erroneously held that defendants' are not entitled to claim the suit property based on claim of adverse possession though it is not a case of both parties. Thus the plaintiff failed to establish that the suit property allotted to him through oral partition, the defendants proves that for more than 35 years the suit properties enjoyed by her. Accordingly questions of law are answered. Hence the findings of the lower appellate Court is set aside and findings rendered by the Trial Court is confirmed. Accordingly suit is dismissed.

10. In the result, the Second Appeal is dismissed. There shall



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be no order as to costs. Consequentially connected miscellaneous petition
is closed.

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To

1. The Sub Court, Vellore, Vellore District.
2. The District Munsif, Katpadi, Vellore District.
3. The Section officer,
V.R. Section.

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07.11.2022