



S.A(MD).No.421 of 2009

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.11.2022

CORAM: JUSTICE N.SESHASAYEE

S.A(MD).No.421 of 2009
and
M.P.(MD) Nos.1 & 2 of 2009
and
M.P.(MD) No.1 of 2014
and
C.M.P.(MD) No.8147 of 2016

1.Murugan
2.Pandian
3.Dharmaraj

... Appellants/Respondents 1 to 3/
Defendants 1 to 3

Vs

1.Alagu Thuraichi (Died)
2.Janaki
3.Saravanan
4.Vivekanandan
5.Bavani
6.Sunitha

... 1st Respondent/Appellant/Plaintiff

... Respondents 2 to 6/
Respondents 4 to 8/
Defendants 5 to 9

7.Dr.K.Subbiah
8.Raja
9.Ravi

... Respondents 7 to 9/
LR's of the 1st respondent

***[Respondents 7 to 9 are brought on record as LR's of the deceased 1st respondent vide order dated 18.03.2016 made in M.P(MD).No.1 of 2015 in S.A.No.421 of 2009]
[R2 to R6 are given up and Memo USR.No.3008/2009 is recorded vide order dated 10.07.2014 made in S.A(MD).No.421 of 2009]***



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Prayer: Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 23.04.2009 made in A.S.No.8 of 2008 on the file of the Principal Sub Court, Tenkasi, reversing the judgment and decree dated 27.11.2007 made in O.S.No.189 of 2004 on the file of the Additional District Munsif Court, Tenkasi.

For Appellants : Mr.K.Muraleedharan

For Respondents : Mr.V.Sasikumar for R7 to R9

: R1 – Died

: R2 to R6 – Given up

JUDGMENT

Defendants 1 to 3 in O.S.No.189 of 2004 are the appellants herein. The suit was laid for declaration of plaintiff's title and for ancillary relief of injunction. The trial Court dismissed the suit but before the first appellate Court, the plaintiff was successful in A.S.No.8 of 2008. Hence, the second appeal at the instance of defendants 1 to 3. For narrative convenience, the parties would be referred to by their rank before the trial court.

2.1 The case of the plaintiff is that:

- The dispute is over a vacant plot of 52 cents in Survey No.711/2 of



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Kulasekarapatti Village. The plaintiff claims title to this property.

- A certain Velaichamy Nadar and one Ponnusamy Nadar were entitled to 1.56 acres in Survey No.711/2. On 12.05.1953 vide Ext.A.1, they sold the property to one Ramasamy Thevar.
- Ramasamy Thevar had a daughter Thiruvarangam and a son named Raja alias Periasamy Thevar. On the demise of Ramasamy Thevar, the property he had purchased under Ext.A.1 devolved on his daughter. Thiruvarangam had three daughters namely the plaintiff, one Ramalakshmi and another Gnana Poongothai. There was an oral partition among the sisters in which the plaintiff was allotted middle 52 cents. This is the suit property herein.
- Be that as it may, certain Kuthala Nadar @ Dharmaraj Nadar had laid a suit in O.S.No.149 of 1951 for partition. This suit appears to deal with several properties and item No.2 in Schedule-III in that suit is the property in Survey No.711/2. That suit came to be dismissed, aggrieved by which, Kuthala Nadar had preferred A.S.No.544 of 1953 before this Court. On 02.08.1957 vide Ext.A.5, this suit came to be compromised in which Kuthala Nadar was stated to have been allotted $\frac{1}{2}$ share in Survey No.711/2.



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- While the plaintiff claims an independent $\frac{1}{2}$ share under Ext.A1, she faced certain uncertainty to her title. Hence, she chose to purchase 52 cents from Kuthala Nadar under Ext.A2, sale deed dated 06.02.2001.

When the plaintiff faced certain obstruction to her title, she laid the suit.

2.2 The suit was contested by the defendants 1 to 3. They trace their title to a source independent and alien to the source of title of the plaintiff. Their case is that:

- A certain Karuvel Nadar and Chellaiah Nadar were entitled to 1.50 acres in Survey No.711/2. On 27.04.1960, vide Ext.B.16, they sold the property to one Arumuga Pandiya Nadar.
- Arumuga Pandiya Nadar however, chose to share the property he had purchased under Ext.B.16 with his brother Jayapalan Nadar vide a partition dated 21.08.1971 (the document is not produced).
- So far as 75 cents which Arumuga Pandiya Nadar had obtained is concerned, there was a partition between him and his two sons namely Ramanathan Nadar and Shanmuganathan Nadar. This partition had taken place on 06.05.1985 in which Shanmuganathan Nadar was allotted



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eastern 25 cents and Ramanathan Nadar was allotted the next adjacent 25 cents and further west was allotted to Arumuga Pandiya Nadar (this partition deed is not produced). While so, on 28.08.1985 under Ext.B.4, sale deed, Shanmuganathan Nadar had sold his 25 cents to one Rajagopal Nadar. This Rajagopal Nadar had sold the said 25 cents to defendants 1 and 2 vide Ext.B5, sale deed dated 15.06.1987.

- Turning to Ramanathan's share of 25 cents, on 30.09.1985, vide Ext.B.8, he sold the same to one Sundar Raj, who in turn, sold it to the third defendant vide Ext.B.9, sale deed dated 27.11.1985.
- Turning to 75 cents that was allotted to Jayapalan Nadar, he is stated to have sold 30 cents to the 4th defendant vide sale deed dated 11.06.1987 (the sale deed is not produced). The balance 45 cents is retained by Jayapalan Nadar.

2.3. Pending suit, the 4th defendant died and his legal representatives were not brought on record. Hence, the suit was declared abated as against the 4th defendant. Jayapalan Nadar had passed away prior to filing of the suit and his heirs were impleaded as defendants 5 to 9.



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3.1 The dispute went to trial Court and before the trial Court, both sides adduced oral and documentary evidence. For the plaintiff, the plaintiff examined one Subbaiya as P.W.1. For the defendants, the third defendant examined himself as D.W.1 and they have examined one Bhumani as D.W.2 and the 6th defendant examined himself as D.W.3. While the plaintiff has produced Ext.A.1 to Ext.A.11, the defendants have produced Ext.B.1 to Ext.B.17. The trial Court appointed a Commissioner and a Surveyor for local inspection whose reports and plans were taken on record as Ext.C1 to Ext.C5.

3.2 On appreciating the evidence, the trial Court dismissed the suit and it's line of reasoning is:

- (a) That the plaintiff has not proved her possession either under Ext.A.1 or under Ext.A.2;
- (b) That she has not impleaded her sister Ramalakshmi; and
- (c) That the burden is on the plaintiff to establish her case and the plaintiff did not establish it.



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4. Aggrieved by the said decree, the plaintiff preferred a first appeal in A.S.No. 8 of 2008 where the fortune turned in her favour. The line of reasoning of the first appellate Court is that:

- (a) As between the plaintiff and the defendants, the plaintiff has traced her title from Ext.A.1, dated 12.05.1953 whereas the defendants traced title only from Ext.B.16, dated 27.04.1960; and
- (b) Ext.C.1, Commissioner's report shows that the suit property is a vacant land and possession always follow title in case of open land.

Hence this second appeal at the instance of defendants 1 to 3. The appeal was admitted for considering the following substantial questions of law:

“(i) Whether the Lower Appellate Court is right in decreeing the suit by relying upon the Ex.A.5 when the plaintiff has failed to examine the executant of the Ex.A.2 to prove the title of the suit property?”

“(ii) Whether the Lower Appellate Court is right in holding that the suit property is a vacant site by relying upon the Ex.C1 to C3 when those documents are against the admission of the plaintiff under Ex.B1, Ex.B.10 to Ex.B.13, Ex.C4 & C5? and

“(iii) Whether the Lower Appellate Court is right in not considering the Ex.A11 judgment and decree in suit O.S.No.589



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of 1982 in which the legal heirs of the Ramasamy Thevar have admitted the title of the Defendant's predecessor?"

5.1 The learned counsel for the appellants made the following submissions:

- The defendants were able to establish their title cogently from Ext.B.16, dated 27.04.1960 and Ext.B.4 and Ext.B.5, under which defendants 1 and 2 claim title over 25 cents and also Ext.B.8 and Ext.B.9 by which the 3rd defendant claims another 25 cents. This 50 cents is the very property over which the plaintiff asserts title. Followed by the same, mutation in the revenue records was also effected as is proved by Ext.B.6 series of *kist* receipts for the years 1988, 1993, 1996 and 2002. Besides, the 3rd defendant had applied for and obtained Ext.B.10, building plan and had put up a construction there. He has been paying property tax for the said building as could be seen from Ext.B.13.
- This apart, the plaintiff's sister Ramalakshmi, who according to the plaintiff was the allottee of the western 52 cents, instituted a suit for declaration of her title and for recovery of possession in O.S.No.229 of 2004 against the present 3rd defendant. That suit came to be dismissed and has since attained finality. Indeed in that suit, Ramalakshmi traced her title to the suit property exactly on the same set of facts by which the



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present plaintiff also claims title to the suit property herein. Even though the plaintiff might not be a party to O.S.No.229 of 2004, inasmuch the Court of competent jurisdiction has decided against the tracing of title by Ramalakshmi in O.S.No.229 of 2004, it cannot be ignored in entirety and it would be a relevant fact under Sec. 13 and Sec. 11 of the Indian Evidence Act.

- Turning to the Commissioner's report, the Commissioner cannot enter any finding as to the possession and indeed the Commissioner's report was objected to by the contesting defendants. Even though the Commissioner was not cross examined to discredit his report on the basis of the objection filed by the contesting defendants, yet the Commissioner's report is only one of the pieces of evidence before the Court and it is not conclusive as to the facts it disclose.
- This apart, the plaintiff has produced Ext.A.11, judgment in O.S.No.589 of 1982. This suit was laid by one Rosammal, a third party to the present suit against several persons. The subject matter of that suit relates to S.No.713. In that suit, Arumuga Pandiya Nadar, the purchaser under Ext.B.16 was arrayed as the 9th defendant and the judgment shows that he in his written statement had asserted title not only over S.No.713,



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but also over S.No.711/2. This would indicate that Arumuga Pandiya Nadar had asserted title even as early as 1982 and it will also be relevant under Section 13 of the Indian Evidence Act.

- Turning to the plaintiff's case, the plaintiff has relied on Ext.A.1 to establish her title. However, there is no evidence to show that the vendors of Ramalakshmi ever had any title to the property. Indeed the vendors of Ramalakshmi were not even made parties to the suit in O.S.No.149 of 1951. This title document comes from nowhere. The plaintiff however relies not only on Ext.A.1, but also on Ext.A.2, a sale deed that she had obtained from the plaintiff in O.S.No.149 of 1951. O.S.No.149 of 1951 laid for partition was dismissed by the trial Court, but it was partially allowed by this Court. Ext.A.5, dated 02.08.1957 shows that the plaintiff in O.S.No.149 of 1951 was allotted undivided half share in S.No.711/2. This according to the plaintiff was purchased by her under Ext.A.2, dated 06.02.2001.
- What is significant herein is that prior to the execution of Ext.A.2, the plaintiff and her two sisters issued Ext.B.1, suit notice dated 29.08.2000 *inter alia* against defendants 1 to 3, and in this suit, the plaintiff and her sisters trace their title to Ext.A.1, sale deed and also to a registered



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partition between them said to have taken place on 07.07.1976. This partition deed was not produced. But what is significant is that Ext.A.2 was obtained only after Ext.B.1-notice was issued. The plaintiff therefore cannot claim any title under Ext.A.2 and necessarily she has to confine her title to Ext.A.2 and the partition deed which she did not produce.

5.2 The learned counsel for the appellants added that in order to establish that Arumuga Pandiya Nadar to whom defendants 1 to 3 trace their title, he had even mutated the patta in his favour pursuant to Ext.B.16-sale deed. This document though could not be produced before the Courts below, the same has now been made available vide M.P.(MD) No.1 of 2014 and other documents.

6. Per contra, the learned counsel for the plaintiff adopted a line of argument which formed the line of reasoning of the first appellate Court. He also submitted that he has produced the decree in O.S.No.149 of 1951 on the file of the Sub Court, Tirunelveli. It is from this decree, Ext.A.5 judgment came to be passed in A.S.No.544 of 1953 to which reference has already been made.



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7. It is a case where the plaintiff and defendants 1 to 3 claim title to the same property from two different sources of title. While the plaintiff claims title to her property under Ext.A.1-sale deed followed by a partition and also to Ext.A.2-sale deed dated 06.02.2001, defendants 1 to 3 trace their title to Ext.B.16-sale deed in favour of one Arumuga Pandiya Nadar. This Court necessarily needs to evaluate which of the two vendors involved herein had better title to the property or who had exercised right of ownership pursuant to the sale deeds involved in this litigation. However, the property appears to be a vacant land which implies, the presumption that possession may follow title would have general application. However, this can be rebutted as to how parties have conducted their affairs in relation to the property in question. It is in this context, the patta said to have been issued to Arumuga Pandiya Nadar from whom defendants 1 to 3 trace their title is relevant.

8. In investigating the title as to which of the two vendors under Ext.A.1 or Ext.B.16 should be preferred, both the documents are not useful to the Court, as they do not recite how the vendors in each of the documents became entitled to. And, there is a third character, the vendor under Ext.A2. Did he has a title to convey? Interestingly neither of the vendors of the plaintiffs or the



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defendants are parties to O.S.149 of 1951. Therefore, what will be the effect of Ext.A2? As outlined earlier, how parties conducted in relation to the property may throw light for tilting the probability as between the parties.

10. The learned counsel for the appellants submitted that the land is no more a vacant land, and both the defendants are in occupation of the same. Indeed the 3rd defendant had put up some construction in his portion and defendants 1 and 2 are drawing lines to their property through this property. This is refuted by the learned counsel for the plaintiff, who alleged that they have put up the construction only in the portion allotted to Ramalakshmi, which is on the west of the suit schedule property. This is an aspect of fact which the first appellate Court may now address.

11. This Court, therefore, considers it appropriate to allow the second appeal and remand the matter back to the first appellate Court for ascertaining the title of the three different vendors which requires some additional evidence. Hence, this Second Appeal is allowed, the judgment and decree dated 23.04.2009 made in A.S.No.8 of 2008 on the file of the Principal Sub Court, Tenkasi, reversing the judgment and decree dated 27.11.2007 made in O.S.No.189 of



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2004 on the file of the Additional District Munsif Court, Tenkasi, is set aside and the matter is remanded back to the Principal Sub Court, Tenkasi, before which both sides may produce such necessary oral and documentary evidence to support their respective title whereinafter, the Court may dispose of the matter in terms of the principle stated in ***K.S.Thankam Vs Sakthidharan*** [2022 (5) CTC 180] and ***Tuticorin Diocesan Trust Association Vs Thavamani and others*** [2003 (1) CTC 478]. This Court also fixes the schedule for disposal of the appeal as below:

- (a) The parties are directed to appear before the Principal Sub Judge, Tenkasi, on 19.12.2022;
- (b) Both sides are directed to produce any documentary evidence which they want to rely on within a period of three months from 19.12.2022;
- (c) The Principal Sub Judge, Tenkasi, is required to record the evidence of both sides on the new documents within a period of one month thereafter;
- (d) The appeal should be disposed of within the next one month; and
- (e) The Principal Sub Judge, Tenkasi, is required to stringently follow the timeline herein provided.



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12. Since this Court has now granted opportunity to both sides to produce documentary evidence before the Court, this Court considers it necessary to close M.P.(MD) No.1 of 2014 and C.M.P.(MD) No.8147 of 2016. Accordingly, they are closed. No costs. The documents both the sides have produced are directed to be returned to them to facilitate them to produce the same before the Principal Sub Court, Tenkasi. The Registry is directed to forward the lower Court records forthwith to the Principal Sub Court, Tenkasi to reach it before 12.12.2022. M.P.(MD) Nos.1 and 2 of 2009 are closed.

28.11.2022

Index : Yes/No

Internet : Yes

ssb/abr

Note: Issue order copy on 08.12.2022

To

1. The Principal Sub Court,
Tenkasi
2. The Additional District Munsif Court,
Tenkasi.
3. The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.



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N.SESHASAYEE, J.

abr/ssb

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