



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.117 of 2010

WEB COPY

Chelladurai ... Appellant / Appellant / Plaintiff

-Vs-

1.Vanamamalai Perumal

2.Murugan ... Respondents / Respondents / Defendants

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 31.10.2006 in A.S.No.139 of 2006 on the file of the I Additional Sub Judge, Tirunelveli partly reversing the Judgment and decree dated 24.02.2006 in O.S.No.120 of 2002 on the file of the Additional District Munsif Court, Nanguneri.

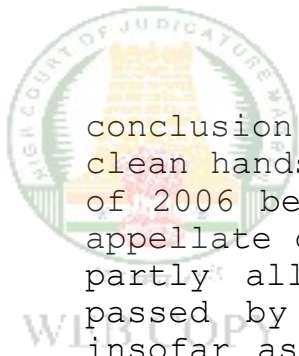
For Appellant : Mr.A.Arumugam

For Respondents : Mr.H.Arumugam

JUDGMENT

The plaintiff in O.S.No.120 of 2002 on the file of the Additional District Munsif Court, Nanguneri is the appellant in this second appeal.

2. The appellant filed the said suit seeking the relief of declaration and permanent injunction. Though the suit schedule comprises two items, the dispute is regarding only the first item. That is why, the first appellate court decreed the suit insofar as the second item is concerned. The defendants have also not questioned the same by filing any cross appeal. As regards the suit first item, according to the plaintiff, it belonged ancestrally to one Nambi Konar and the said Nambi Konar sold the same to one Shanmuga Sundaram under Ex.A1-sale deed dated 19.04.1989 and the said Shanmuga Sundaram sold the same to the plaintiff under Ex.A2 dated 14.02.1991. The defendants filed written statement controverting the plaint averment. Based on the divergent pleadings, the trial court framed the necessary issues. The plaintiff examined himself as P.W.1. Nambi Konar was examined as P.W.2. Two other witnesses were marked on his side. Ex.A1 to Ex.A7 were marked. The first defendant Vanamamalai Perumal examined himself as D.W.1. Ex.B1 to Ex.B4 were marked. Through witnesses, as many as five documents were marked. The trial court by judgment and decree dated 24.02.2006 dismissed the suit after coming to the



conclusion that the plaintiff has not approached the court with clean hands. Aggrieved by the same, the plaintiff filed A.S.No.139 of 2006 before the I Additional Sub Court, Tirunelveli. The first appellate court by the impugned judgment and decree dated 31.10.2006 partly allowed the appeal and modified the judgment and decree passed by the trial court and granted relief to the plaintiff insofar as the second item is concerned. Not satisfied with the same, this second appeal has been filed. Though the second appeal was filed way back in the year 2010, only notice was ordered and it has not been admitted till date.

3. The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds and called upon this Court to formulate the substantial question of law and admit the second appeal and take it up 'for disposal' later.

4. Per contra, the learned counsel appearing for the respondents submitted that no substantial question of law arises for consideration and pressed for dismissal of the second appeal.

5. I carefully considered the rival contentions and went through the evidence on record.

6. As pointed out by the learned counsel appearing for the respondents, the suit first item was purchased by two brothers namely Enan and Subbiah under Ex.B1 dated 26.09.1951. Nambi Konar is the son of Enan. The first defendant Vanamamalai Perumal is none other than the son of Subbiah Konar brother of Enan. Therefore, Enan would have only $\frac{1}{2}$ share over the suit first item. By no stretch of imagination, Nambi Konar could have claimed right or interest over the entire suit first item. This is one aspect of the matter. Since Nambi Konar is said to have led a irresponsible life, he had executed Ex.B2-release deed dated 17.10.1985 in favour of his wife and children. The second defendant Murugan is none other than the son of Nambi Konar. It is evident that Ex.B2 was drafted by none other than Shanmuga Sundaram / vendor of the plaintiff. Having been a scribe in the release deed (Ex.B2), he could not have subsequently sold the suit first item under Ex.A2 in favour of the plaintiff. When Shanmuga Sundaram purchased the suit first item under Ex.A1, he knew fully well that Nambi Konar had no subsisting interest or right or title in suit first item. The person who had divested himself of all right or interest or title over the suit first item sold the property to Shanmuga Sundaram under Ex.A1 who in turn sold the property to the plaintiff under Ex.A2 dated 14.02.1991.

7. The plaintiff originally projected the case that even though the suit first item belonged to both Enan and Subbiah Konar, there was oral partition between the two brothers and the suit first item was allotted to Enan, from whom, Nambi Konar got the property.



Having taken such a plea, the burden to prove the same lay only on the plaintiff. To prove oral partition and allotment of the suit first item in favour of Nambi Konar, the plaintiff examined Nambi Konar as P.W.2. Unfortunately, for the plaintiff, Nambi Konar turned hostile. He was cross examined by the plaintiff himself. In the cross examination, Nambi Konar fared worse. Of-course, the learned counsel appearing for the appellant is right in his contention that the testimony of Nambi Konar cannot be taken as admission so as to bind the plaintiff. That was because Nambi Konar ceased to have the interest over the suit property, when the suit was filed. That apart, Nambi Konar was also declared as hostile witness by the plaintiff himself. Even though the testimony of Nambi Konar cannot be taken as admission so as to bind the plaintiff, still, it is very much an evidence which can be taken note of by the courts below. Even if Nambi Konar's evidence is eschewed, the burden to prove lay only on the plaintiff. In as much as, the plaintiff could not prove his case as regards the suit first item, the first appellate court was justified in dismissing the suit as far as the first item is concerned. No substantial question of law arises for consideration. The second appeal is dismissed. No cost.

Sd/-

Assistant Registrar(CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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To

- 1.The I Additional Sub Judge, Tirunelveli.
- 2.The Additional District Munsif Court, Nanguneri.

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The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.(2 copies)

+1 CC to M/s.H.ARUMUGAM, Advocate (SR-12923[F] dated 18/03/2022)

Judgment made in
S.A.(MD)No.117 of 2010
16.03.2022

sp(CO)

TR(18.04.2022) 3P 6C