



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 01.03.2022

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.459 of 2010

WEB COPY

Arulappan

... Appellant / Respondent /
Defendant

Vs.

Selvi T.Kamalammal

... Respondent / Appellant /
Plaintiff

Prayer: Second appeal filed under Section 100 of C.P.C., against the Judgment and Decree passed in A.S.No.83 of 2004 dated 15.07.2009 on the file of the II Additional Subordinate Judge, Nagercoil Camp at Kuzhithurai reversing the Judgment and Decree passed in O.S.No.478 of 1995 dated 18.08.2004 on the file of the II Additional District Munsif, Kuzhithurai.

For Appellant : Mr.H.Lakshmi Shankar

For Respondent : Ms.J.Anandhavalli

J U D G M E N T

The defendant in O.S.No.478 of 1995 on the file of the II Additional District Munsif, Kuzhithurai, is the appellant in this second appeal.

2. The respondent herein filed the said suit for partition. The case of the plaintiff is that the suit property was the subject matter of O.S.No.273 of 1975 filed by one Abraham. In the suit, one Retnamony was shown as the third defendant. He pleaded adverse possession in respect of 25 cents of item No.2 of the said suit schedule. Accepting the said defence, the suit filed by Abraham was dismissed. He filed A.S.No.168 of 1978. The appellate Court also held that by adverse possession, Retnamony had perfected his title over the said 25 cents. On 20.09.1988, the said Retnamony conveyed his 25 cents which is a part of the present suit property in favour of the plaintiff herein. The suit property measures 1 acre and 44 cents in Old Survey No.3934 / Resurvey No.237 / 1, 2, 5 and 6 in Arumanai Village, Vilavancode Taluk, Kanyakumari District. The remaining extent belongs to the appellant herein. Since the suit property had not been partitioned, the present suit came to be instituted to divide the property by metes and bounds and for allotting 25 cents of land in favour of the plaintiff.



3. The appellant herein filed written statement controverting the plaint averments. Based on the divergent pleadings, the Trial Court framed the necessary issues. The plaintiff Kamalammal examined herself as P.W.1 and marked Ex.A.1 to Ex.A.20. The defendant Arulappan examined himself as D.W.1. Yovel was examined as D.W.2. Ex.B.1 to Ex.B.31 were marked. An Advocate Commissioner was appointed and his report and plan were marked as Court Exhibits 1 and 2. After consideration of the evidence on record, the Trial Court by judgment and decree dated 18.08.2004 dismissed the suit. Challenging the same, the plaintiff filed A.S.No.83 of 2004 before the Sub Court, Kuzhithurai. By the impugned judgment and decree dated 15.07.2009, the first appellate Court granted preliminary decree holding that the plaintiff is entitled to undivided 25 cents of land in the suit property. Challenging the same, this second appeal came to be filed by the defendant.

4. This second appeal was admitted on 27.05.2010 on the following substantial questions of law:-

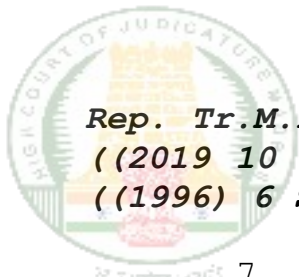
" 1. When admittedly Retnamony had conveyed his right, title and possession under Ex.B.5 dated 14.06.1965 in favour of Muthupillai who in turn sold his right under Ex.B.11 dated 07.08.1978 to the defendant, whether the alleged sale deed Ex.A.4 dated 20.09.1988 by Retnamony in favour of the plaintiff in respect of the same property conveyed under Ex.B.5 is valid.

2. Whether the contention of the defendant is barred by *res judicata* by virtue of some observation in Ex.A.1 and Ex.A.2 judgments when the vendor of the defendant was a defendant in the previous suit and that suit was dismissed.

3. Whether the lower appellate Court is right in ignoring Ex.B.5 and Ex.B.11 sale deeds, Ex.B.13 patta, Ex.B.19 Adangal, Ex.B.14 to Ex.B.18 and Ex.B.28 of Ex.B.31 tax receipts, while deciding the first appeal which is a final Court of fact."

5. The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellant and set aside the impugned judgment and decree passed by the first appellate Court and restore the decision of the Trial Court.

6. Per contra, the learned counsel appearing for the respondent submitted that no substantial question of law arises for consideration and called upon this Court to dismiss the second appeal. The learned counsel appearing for the respondent filed written statement in support of her contentions. She relied on **1. Union of India V. S.Narasimhulu Naidu (LL 2021 SC 408)**, **2. Jagdish Prasad Patel (Dead) through LRs and another V. Shivnath and others ((2019) 6 SCC 82)**, **3. K.R.Mohan Reddy V. M/s.Net Work Inc**

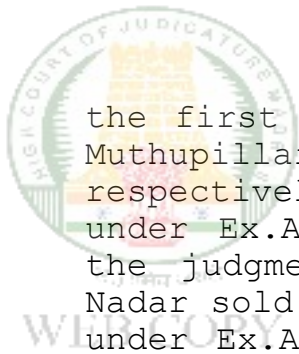


Rep. Tr.M.D. ((2008) 1 MLJ 1253), 4. Prahlad Pradhan V. Sonu Kumhar ((2019 10 SCC 259) and 5. Smt.Sawarni V. Smt.Inder Kaur and Others ((1996) 6 SCC 223).

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

8. The suit property was originally owned by one Velayudhan Pillai and Padmanabha Pillai. On 15.12.1913, they mortgaged the entire suit property in favour of one Nalamudayan Gabriel (Ex.B.20 / Ex.B.21). This was assigned by the mortgagee in favour of one Gnanapoo Vedapoo on 15.03.1920 under Ex.B.22 / Ex.B.23. The mortgagee under Ex.B.22 / Ex.B.23 is none other than the grandmother of the plaintiff. On 31.10.1962, Vedappoo assigned the mortgage in favour of Muthupillai under Ex.B.1 / Ex.B.2. In the meanwhile, Velayuthan Pillai and Padmanabha Pillai sold the suit property measuring 1 acre and 44 cents to four brothers, namely, Retnamony, Yesudhasan, Abraham and Palayyan who are the sons of Gnanathambi under Ex.B.26 and Ex.B.27 on 17.01.1934. The sale was subject to the mortgage. On 24.06.1940, Gnanathambi and Retnamony Nadar (father and son) created an othi in respect of 25 cents out of 1 acre and 44 cents in favour of one Velayudhan Kumaravelu and Ponnammal. On 01.07.1944, assignment of the said othi was made in the name of Chellammal, W/o.Abraham under Ex.A.13 / Ex.A.14. Chellammal mortgaged the same in favour of one Raman Nadar on 19.06.1947 under Ex.A.11 / Ex.A.12. Further assignment was made in favour of Podiyan Devadhasan. The said Devadhasan made a further assignment in favour of Nesamony Nadar on 22.06.1953 under Ex.A.15 / Ex.A.16. Nesamony Nadar made an assignment in favour of Dhasamma / the plaintiff's mother on 03.05.1961 under Ex.A.17 / Ex.A.18. Dhasamma released the mortgage in favour of Retnamony Nadar on 08.11.1961 under Ex.A.19 / Ex.A.20.

9. While so, on 26.04.1965 Palayyan one of the four sons of Gnanathambi and Vedapoo sold 36 cents of land out of 1 acre and 44 cents in favour of Muthupillai under Ex.B.3. Retnamony Nadar also sold 36 cents of land out of 1 acre and 44 cents on 14.07.1965 in favour of Muthupillai under Ex.B.5. Abraham Nadar sold 30 cents of land out of 1 acre and 44 cents under Ex.B.7 dated 13.12.1965 in favour of Muthupillai. Yesudhasan Nadar sold 36 cents of land out of 1 acre and 44 cents in favour of Muthupillai under Ex.B.9 dated 18.04.1966. Abraham Nadar and his children filed O.S.No.273 of 1975 on the file of the III District Munsif, Kuzhithurai, seeking the relief of partition and redemption. Dhasamma figured as the second defendant. Retnamony figured as the third defendant. Muthupillai figured as the seventh defendant. The said suit was dismissed by judgment and decree dated 02.01.1978. The said judgment has been marked as Ex.A.1. Questioning the same, the plaintiffs filed A.S.No.168 of 1978 before the Sub Court, Kuzhithurai. The first appeal was dismissed on 08.07.1981. It has been marked as Ex.A.2. In



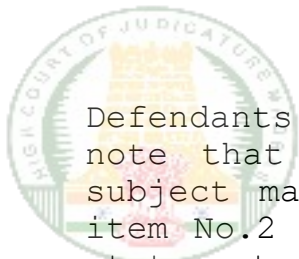
the first appeal, Muthupillai remained ex-parte. In the meanwhile, Muthupillai and Abraham Nadar sold 1 acre and 38 cents and 6 cents respectively under a single sale deed in favour of the appellant under Ex.A.5 dated 17.08.1978 and Ex.B.11 dated 07.08.1978. After the judgment and decree of the first appellate Court, Retnamony Nadar sold 25 cents of land in favour of the plaintiff on 20.09.1988 under Ex.A.4. On the strength of Ex.A.4, the present suit in O.S.No.478 of 1995 came to be filed.

10. The vehement contention of the learned counsel appearing for the respondent is that vide judgment dated 08.07.1981 in A.S.No.168 of 1978(Ex.A.2) it had been categorically held that on 08.11.1973 Retnamony Nadar's title over 25 cents of land in the suit property became perfect by adverse possession. Since Muthupillai was also a co-defendant in the said suit, the said finding became binding on Muthupillai also. Abraham Nadar and others executed Ex.A.5 in favour of the present appellant only on 17.08.1978. Muthupillai was therefore not competent to sell 1 acre and 38 cents in the property. He was competent to sell only 1 acre and 13 cents.

11. There is no dispute that the principle of res judicata can operate between co-defendants also. The Hon'ble Supreme Court in the decision reported in **1995 (3) SCC 693 Mahboob Sahab Vs. Syed Ismail & Ors.** had held that to apply the said principle between the co-defendants, the following four conditions must be satisfied:-

- "(1) there must be a conflict of interest between the defendants concerned;
- (2) it must be necessary to decide the conflict in order to give the reliefs which the plaintiff claims;
- (3) the question between the defendants must have been finally decided; and
- (4) the co-defendants were necessary or proper parties in the former suit. "

12. Even a casual reading of the written statement filed by G.Retnamony in O.S.No.273 of 1975 on the file of the III Additional District Munsif, Kuzhithurai would show that there was absolutely no conflict between Retnamony Nadar and Muthupillai. As already pointed out, the suit property was purchased by four brothers, namely, Retnamony, Yesudhasan, Abraham and Palayyan. The plaintiff is the daughter of Yesudhasan. Retnamony is none other than her uncle. All the four brothers had executed four individual sale deeds in favour of Muthupillai. Palayyan executed Ex.B.3 dated 26.04.1965 conveying 36 cents of land. Retnamony Nadar also likewise conveyed 36 cents of land under Ex.B.5. Abraham sold 30 cents under Ex.B.11 / Ex.B.12 dated 07.08.1978. He also sold the remaining extent of 6 cents of land on 17.08.1978 under Ex.A.5 in favour of the appellant. Yesudhasan, the father of the plaintiff also sold 36 cents of land in favour of Muthupillai under Ex.B.9 dated 18.04.1966. That is why, when Abraham Nadar filed a suit for partition and redemption,



Defendants 2 to 6 filed joint written statement. It is relevant to note that O.S.No.273 of 1975 related to quite a few items. The subject matter of the present proceedings was mentioned as plaint item No.2 in O.S.No.273 of 1975. The third defendant filed written statement not only for himself but also covering the case of Muthupillai. The defendants contended that the plaintiffs' right to redeem the property stood extinguished by adverse possession claimed by the third defendant from 08.11.1961 onwards. The seventh defendant / Muthupillai also filed written statement and the substance of the same has been summarised in the judgment in O.S.No.273 of 1975 as follows:-

" The 7th defendant is interested in plaint item 2 only which measures 1 acre 44 cents. This item belonged to 1st plaintiff and defendants 3 to 5 under a sale deed dated 04.06.1109. On 31.10.1962 the 7th defendant got an assignment of mortgage of 1089 with respect to plaint item No.2 from Gnanapoo Vedapoo and came into possession of item 2. Defendants 3 to 5 sold their 3/4th right in plaint item 2 under sale deeds dated 14.06.1965, 18.04.1966 and 26.04.1965 respectively to 7th defendant. With respect to the 1/4th share ie., 36 cents the 1st plaintiff executed a renewal mortgage in favour of 7th defendant on 09.11.1962 for Rs.350/-. Out of the 36 cents mortgaged by the 1st plaintiff he sold 30 cents to 7th defendant under sale deed dated 13.12.1965, In this sale deed there is direction to surrender 6 cents on payment of Rs.50/- to 1st plaintiff. 1st plaintiff has not claimed redemption of this 6 cents and as such he is not entitled to redeem 6 cents in item 2 from the 7th defendant. The averments that 7th defendant is in possession of 25 cents as mortgagee is denied. The 7th defendant is in possession of 1 acre 38 cents as owner and 6 cents as mortgagee of 1st plaintiff. Plaintiffs are not entitled to partition of 31 ½ cents in item 2. 1st plaintiff is entitled to partition of only 6 cents in item 2 subject to the mortgage right of the 7th defendant under the mortgage dated 09.11.1962. Plaintiffs are not entitled to extinguishment of mortgage right with respect to item 2. In case partition is allowed 7th defendant is entitled to partition of 1 acre 38 cents in plaint item 2 and the remaining 6 cents belongs to the 1st plaintiff subject to the mortgage of 7th defendant. Hence, the suit must be dismissed with costs of this defendant."

13. The third defendant Retnamony did not contest the aforesaid stand taken by Muthupillai, the seventh defendant therein. It is safe to assume that Retnamony endorsed the said stand of Muthupillai. That is because, Muthupillai had purchased 1 acre and 38 cents of land under four sale deeds from the four brothers individually. The learned trial Munsif in his judgment dated 02.01.1978 in O.S.No.273 of 1975 also noted that Abraham Nadar had executed a mortgage in favour of Muthupillai in respect of his 1/4th share in item No.2 measuring 36 cents and subsequently he had sold



away 30 cents in item No.2 to the seventh defendant himself. A further finding was specifically rendered that the suit item No.2 (present suit property) totally measures 1 acre and 44 cents. The first plaintiff (Abraham Nadar) and defendants 3 to 5 (Retnamony, Dasan and Palayyan) who are the sons of the first defendant Gnanathambi were entitled to equal shares. Each of them was entitled to 36 cents and defendants 3 to 5 already alienated the entire 3/4th right to the seventh defendant. While the first plaintiff Abraham Nadar sold away 30 cents of land to Muthupillai, it was observed that if at all the plaintiff can claim only right over the remaining extent of 6 cents over which Muthupillai had the mortgage right. In other words, the plaintiffs can have claim over 6 cents of land subject to the mortgage right of the seventh defendant. With such categorical findings, the suit came to be dismissed. The appeal filed by the plaintiffs in A.S.No.168 of 1978 was also dismissed by the first Appellate Court. The decree and judgment of the Trial Court was confirmed and the appeal was dismissed. While dismissing the same, a passing observation was made that Retnamony Nadar had confirmed his title over 25 cents by adverse possession. Based on the strength of such a passing observation, Retnamony Nadar executed Ex.A.4 sale deed dated 20.09.1988 in favour of the present plaintiff. The entire case of the plaintiff is anchored on the aforesaid observation. Actually, the benefit of the said finding will enure in favour of the seventh defendant Muthupillai therein. Retnamony Nadar had absolutely no title or interest in the suit property on account of his earlier alienation in favour of Muthupillai under Ex.A.4. Therefore I have no hesitation to answer the substantial questions of law in favour of the appellant.

14. The impugned judgment and decree passed by the first appellate Court is set aside and the decision of the trial Court is restored. This second appeal is allowed. No costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

PMU

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1. The II Additional Subordinate Judge,
Nagercoil Camp at Kuzhithurai.
2. The II Additional District Munsif,
Kuzhithurai.

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02/03/2022)

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