

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 12.09.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) No.221 of 2011

1.Kunnudaiyan (Died)	... 1 st Appellant/Appellant/ Plaintiff
2.Sirumbaye	
3.Manickam	
4.Chinnaponnu	
5.Palaniyammal	
6.Sankar	
7.Marimuthu	... Appellants 2 to 8/ LRs of deceased 1 st Appellant

[Appellants 2 to 7 – Brought on record as LR's of the deceased sole appellant vide order dated 27.06.2022 made in C.M.P.(MD) Nos.5251, 5253, 5254, 5257, 5258 and 5259 of 2022 in S.A.(MD) No.221 of 2011]

Vs

1.Karuppa Naicker (Died)
2.Annadurai
3.Ganesan
4.Kanniyappan

5.Murugesan

6.Anandavalli

... Respondents/Respondents/
Defendants

7.Sankar

8.Veerammal

9.Rengasamy

10.Ponnar

11.Anand

12.Ilanjiyam

... Respondents 7 to 12/
LRs of deceased R1

***[Respondents 7 to 12 – Brought on record as LRs of the
deceased R1 vide order dated 10.08.2022 made in C.M.P.
(MD) Nos.5257 to 5259 of 2022 in S.A.(MD) No.221 of 2011]***

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 20.09.2010 made in A.S.No.48 of 2009 on the file of the Subordinate Court, Kulithalai, by confirming the judgment and decree dated 04.12.2008 made in O.S.No.184 of 2002 on the file of the District Munsif Court, Kulithalai.

For Appellants : Mr.Raghuvaran Gopalan
for Mr.S.Kadarkarai

For Respondents : Mr.G.Sridharan for R2 to R12

JUDGMENT

The plaintiff in O.S.No.184 of 2002 on the file of the District Munsif Court, Kulithalai, having lost the suit for declaration of title and for certain ancillary relief of injunction, successively both before the trial Court and also before the first appellate Court in A.S.No.48 of 2009 on the file of the Subordinate Court, Kulithalai, is the appellant herein. For narrative convenience, the parties are referred to by their rank before the trial Court.

2.1. The plaintiff has come forward with a straight forward case. On 11.11.1923, Vide Ext.A.2, a block of 2.30 acres spread over of S.No.158/2B to S.No.158/2H was purchased in the name of certain Veera Nayakkar. On his demise, this property devolved on his only son, the plaintiff herein. The defendants are the heirs of some of his first cousins and they claimed title to part of the property. Hence, the suit was laid. The suit property is disclosed as 1.15 acres which is half of the extent purchased under Ext.A.2.

2.2. The further case of the plaintiff is that since the defendants are his close relatives, they being the descendants of his paternal uncle Annavi Nayakkar, he had permitted them to enjoy the property. However, taking advantage of the same, they had mutated the patta in their name. On getting to know about the same, the plaintiff moved to the revenue officials for re-mutating the patta, but he was directed to approach the civil Court. In the meantime, he issued Ext.A4-notice dated 23.07.2002 on the defendants and that was replied Vide Ext.A7 dated 03.08.2002, wherein the defendants have taken certain untenable contentions such as that the property was joint family property of both Veera Nayakkar, father of the plaintiff and former's brother Annavi Nayakkar, that some 16 years prior to Ext.A7-notice there was an oral partition of the property in which western half came to be allotted to Veera Nayakkar's branch, and eastern half was allotted to Annavi Nayakkar. Disputing this narrative of the defendants, the plaintiff has laid the suit.

3. In the written statement filed by the first defendant, adopted by the rest, it is alleged that the suit property is not the exclusive property of Veera Nayakkar, as alleged by the plaintiff. Veera Nayakkar's father was one

Kunnudaiyan. He had another son Annavi Nayakkar. Their contention is that Ext.A.2 was purchased in the name of Veera Nayakkar from and out of the income from the joint family properties. And their further case was along the allegations disclosed in Ext.A-7 reply notice. Indeed Muniyan, one of the co-sharers of the eastern 1.15 acres Vide Ext.B4, dated 14.06.1979 had sold his undivided share to his brother Palani Nayakkar, under whom defendants 2 and 3 now claim. They deny that they were the permissive occupants of the property, and also claim prescriptive title over the suit property by adverse possession.

4. The dispute went to trial, before which the plaintiff had examined himself as P.W.1 and he also examined one Malaiyalan as P.W.2. The plaintiff had produced Ext.A1 to Ext.A7, some of which have already been introduced in the narration above. For the defendants, the first defendant had examined himself as D.W.1 and also examined one Sebastian as D.W.2. The defendants have produced Ext.B-1 to Ext.B-85, of which barring a few all others are either land tax receipts/house tax receipts or receipt for payment for electricity. The trial Court had also appointed a Commissioner. His

reports are taken on record as Ext.C1 and Ext.C2. Indeed he was examined, but surprisingly as P.W.3 when it ought to be C.W.1. The plaintiff had also taken some steps to have the Officials of the survey department to produce some records and to speak about it and they were examined as P.W.4 and P.W.5. On appreciation of evidence, the trial Court chose to dismiss the suit, which later came to be confirmed by the First Appellate Court in A.S.No.48 of 2009. Hence, the second appeal.

5. The appeal is not admitted yet. Heard both sides. What cannot be disputed is that a block of 2.30 acres was purchased in the name of the plaintiff's father Veera Nayakkar Vide Ext.A2. This document refers to the survey number of the property conveyed as 271. The extract of Correlation Register marked as Ext.A8 before the First Appellate Court shows that the old resurvey No.271 is correlated to S.No.158/2.

6. The point involved is whether there was an oral partition between Veera Nayakkar and his brother Annavi Nayakkar. This point was raised Vide Ext.A7, reply notice issued by the defendants where they assert that though

the property was purchased in the name of Veera Nayakkar, he being the eldest male member of the family comprising Veera Nayakkar and his brother Annavi Nayakkar, it was held by him as the coparcenary comprising both. Necessarily, the burden is on the defendants to establish and enable this Court to infer that there could be an oral partition as alleged by them on applying the rule of preponderance of probabilities.

7. The defendants have produced Ext.B7 to Ext.B21, of all which are land tax receipts either in the name of the first defendant or in the name of the father of the defendants 2 and 3. Earliest of the document is dated in 1971. It is not as if these revenue records were procured shortly prior to the institution of the suit, but at least three decades prior to that. This definitely creates a probability that possibly there might have been a partition between Veera Nayakkar and Annavi Nayakkar. Onus necessarily shifts to the plaintiff now to rebut it, but there is hardly any document that dislodges this probability. The plaintiff however did not produce any material to shift the onus back to the defendants. The probability therefore gets crystallized and it preponderates the possibility of the truth of the defendants' case. This

precisely is the line of reasoning of the Courts below. This Court is not overwhelmed by the volume of documents that the defendants have produced, but the nature of some of these documents and also the time they relate.

8. In fine, this Court does not find anything to interfere. Accordingly, this Second Appeal is dismissed. No costs.

12.09.2022

Index: Yes/No

Internet: Yes

abr/ta

To

- 1.The Sub Judge, Kulithalai.
- 2.The District Munsif, Kulithalai.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.

S.A.(MD) No.221 of 2011

N.SESHASAYEE, J.

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S.A.(MD) No.221 of 2011

12.09.2022