



S.A(MD).No.5 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.07.2022

CORAM: **JUSTICE N.SESHASAYEE**

S.A(MD).No.5 of 2012
and M.P(MD).No.1 of 2012
and M.P(MD).No.1 of 2014

M.Paramasivam

.... Appellant/Respondent/Plaintiff
Vs.

K.Rajendran

.... Respondent/Appellant/Defendant

Prayer :Second Appeal is filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 29.10.2010 in A.S.No.188 of 2006 on the file of the learned Principal Subordinate Court, Trichirappalli reversing the judgment and decree dated 30.06.2006 in O.S.No.1766 of 1997 on the file of the learned II Additional District Munsif in charge of III Additional District Munsif, Trichirappalli.

For Appellant : Mr.P.Vinoth
For Respondent : Mr.Antony Arulraj

JUDGMENT

The plaintiff, who was successful before the trial Court in O.S.No.1766 of 1997, which he laid for declaration of his title over the suit property and also for ancillary reliefs, but suffered a reversal before the Appellate Court



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in A.S.No.188 of 2006, is the appellant herein. For narrative convenience, the parties are referred to as per their rank before the trial Court.

2. The plaintiff's case:

- The suit property is described as a vacant site measuring 450 sq.ft., in Survey No.192/2A and 850 sq.ft., in Survey No.193/1E. They lie as a single plot with a combined extent of 3.0 cents. This property originally belonged to the family of one Karuppanna Muttaraiyar and his brothers. On 17.08.1941, under Ext.A.1, there took place a partition between Karuppanna Mutharaiyar and his brothers Murugan and another. In this partition, the above referred property was allotted to the share of Karuppanna Mutharaiyar in 'B'-Schedule to the partition deed.
- Karuppanna Mutharaiyar was married twice. His first wife was Kesammal, to whom was born Maruthamuthu. Maruthamuthu married Arasayee Ammal and they had a daughter Sarasu @ Saraswathi Ammal. In other words, Arasayee is the daughter-in-law of Karuppana Mutharaiyar and Sarasu is his grand-daughter through the line of his first wife. The other wife of Karuppannan Mutharaiyar is Peruma.



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- On the demise of Karuppannan Mutharaiyar, Kesammal and their son Maruthamuthu inherited half share in the property which equally devolved on the heirs of Maruthamuthu, Sarasu and Arasayee.
- While so, under Ext.A.2, dated 30.12.1996, Arasayee and Sarasu sold the suit property to the plaintiff.

This completes the plaintiff's narration as to the derivation of his title. As he faced some obstruction to his title over the suit property from the defendant, a suit for declaration that Ext.A.2, sale deed, is a valid one and also for few ancillary reliefs was laid.

3.1 Admitting Ext.A.1, partition deed, between Karuppanna Muthiriyar and his brothers Murugan Muthiriyar and another, the defendant contends that notwithstanding the partition, in which Karuppannan Muthiriyar was allotted two plots comprising of 7 cents and 3 cents in Sy.No.193/1 as B-Schedule in items 3 and 4 in Ext.A.1, they were enjoyed only by Murugan Muthiriyar and his sons Malayalam Muthiriyar, Kathanmuthu and Maruthai Muthiriyar. They have prescribed title to these items of property by adverse possession. Indeed, Murugan Muthiriyar was issued patta in patta No.121,



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and property tax too was being paid. While so, one of the grand-sons of Murugan Muthiriyar, namely Veerasamy had sold the suit property under Ext.A.6=Ext.B.13, dated 13.05.1994 to a certain Akilambal, who in-turn, had sold the same to the defendant under Ext.A.5=Ext.B.15, sale deed dated 21.05.1997.

3.2 In the meanwhile, the plaintiff's wife Eswariammal had purchased 7 cents from Arasayee Vide Ext.B.4, sale deed, dated 26.06.1977. This document deals with B-Schedule item 3 in Ext.A.1, partition deed. While this being the state of affairs, the plaintiff has come out with a suit by suppressing certain material facts. The plaintiff has purchased the suit property, to repeat B-schedule item 4 in Ext.A.1, when over this property his vendor Arasayee and her daughter Sarasu @ Saraswathi did not have any right. Ext.A.2, sale deed, in favour of the plaintiff is therefore a sham document and the plaintiff does not derive any title under it.

3.3 The description of the suit property is also not correct. While the property purchased by plaintiff's wife Eswariammal comes under Ry.No. 193/1E, the suit property falls under Sy.No.192/2A3. This apart in Ext.A.2, sale deed in favour of the plaintiff, the 3 cents property, now in question, is



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described in II Schedule as item 1 and 2. Item 1 in Ext.A.2 deals with 1 cent in Sy.No.192/2A, whereas, the remaining 2 cents is in Sy.No.193/1E.

Arasayee and her daughter had no *locus-standi* to sell the property in Sy.No. 192/2 or 192/2A. The plaintiff has purchased the property only to disturb the title of the defendant. As already stated, even after Ext.A.1, partition, Murugan Muthiriyar, after him his son Kathan Muthiriyar and after his son Veerasamy were in continuous and uninterrupted possession and in enjoyment of 2 cents in Sy.No.193/1E and 1 cent in Sy.No.192/2A3 and they were enjoying to the knowledge of plaintiff Arasayee and her daughter. Even if the Courts were to come to the conclusion that Arasayee and her daughter are entitled to half share in the suit property then, the plaintiff ought to work out his remedy in O.S.No.177/1977.

4. The pleadings being what they are, there are a few evidentiary aspects which now requires some introduction:

- The suit property is described as B schedule item 4 in Ext.A.1, partition, and it was allotted to Karupanna Muthiriyar. This is not disputed.
- Karupanna Muthiriyar was married twice, first to Kesammal and Peruma. Arasayee and Sarasu referred to above claimed under



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Kesammal's branch. Karupanna Muthiriyar had children born to him through his second wife Peruma. Peruma's branch however are not before the Court.

- While so, Arasayee had laid O.S.No.279 of 1965 for partition of 8 items of properties against Peruma's branch. It is a dispute *inter se* between heirs of Karupanna Muthiriyar through his two wives. In that suit Arasayee had included only B-Schedule item 3 in Ext.A.1 measuring 7 cents as suit property item No.8. There is no dispute with regard to item 3. The relevant documents available on record are Ext.B.27, written statement, Ext.B.2, judgment and Ext.B.28, decree, passed in the suit.
- Arasayee daughter Sarasu came up with another suit in O.S.No.126 of 1968, but it is not very germane to this suit.
- Having contested in O.S.No.279 of 1965 and O.S.No.126 of 1968 and lost them, Peruma's branch instituted O.S.No.177/1977 for partition. By now Arasayee had already sold B-Schedule item 3 in Ext.A.1 property to the present plaintiff's wife Eswariammal under Ext.B.4,



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sale deed, dated 26.06.1977. She was impleaded as 6th defendant in O.S.177 of 1977. She filed a written statement, but did not go to prove her case. However, her vendor Arasayee, who was arrayed as the third defendant in that suit, had filed her written statement, and pleaded that the suit in O.S.No.177 of 1977 was barred by *res-judicata* in view of the findings of the Court in O.S.No.179 of 1965. She entered the box and also supported the title of Eswariammal. That suit however, came to be decreed. Aggrieved by the same, Arasayee along with her daughter Sarasu preferred a first appeal in A.S.No.111 of 1980. The First Appellate Court reversed the decree of the trial Court and dismissed the suit on the solitary ground of *res-judicata*, in view of the earlier decree in O.S.No.279 of 1965. There was a further appeal by Peruma's branch before this Court in SA.No. 1719 of 1981 and that came to be dismissed by this Court. The related documents are Ext.B5, Ext.B.6, Ext.B7, Ext.B.8, Ext.B.9 and Ext.B.29 to Ext.B.36.

5. It is in this backdrop, the present suit went to trial, and before the trial Court both the plaintiff and the defendant examined themselves respectively as P.W.1 and D.W.1. Besides, the plaintiff also examined P.W.2-an



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attestator to his Ext.A.2, sale deed. On his side, the plaintiff produced Ext.A.1 to Ext.A.9, of which, the relevant documents are already introduced. The defendant had produced Ext.B.1 to Ext.B.36 and most of the critical documents have already been referred to.

6. After appreciating the evidence before it, the trial Court chose to decree the suit. The trial Court took the view that the plea of adverse possession cannot be pleaded against the co-owner, which implies Murugan cannot claim adverse possession against his brother Karuppanna Muthiriyar and that the decree passed in O.S.No.279 of 1965 and O.S.No.177/1977 would not operate as *res-judicata*. Aggrieved by the decree, the defendant preferred the first appeal in A.S.No.188/2006. This appeal came to be allowed on the ground that Arasayee and Sarasu, the vendors under Ext.A.2, have abandoned the suit property inasmuch as they have not included item 4 in Ext.A.1 in O.S.No.279 of 1965. The Court also held that the issue raised by the plaintiff is barred by *res-judicata*. Aggrieved by the same, the plaintiff is now before this Court.

7. This Second Appeal is now admitted for considering the following substantial questions of law:



“(a) Was the finding of the First Appellate Court sustainable when the defendant has not adequately pleaded abandonment of right by the vendor of Ext.A.2 over the suit property?”

“(b) When the suit property was not even the subject matter of O.S.No.279 of 1965 was not the Appellate Court in error in applying the doctrine of res-judicata to non-suit the plaintiff?”

“(c) Should not the First Appellate Court consider that abandonment and res-judicate cannot co-exist?”

8. The learned counsel for the plaintiff/appellant made the following submissions:

- The plaintiffs traces their title to Ext.A.1 and this is not disputed. Under Ext.A.1, Karuppanna Muthiriyar was allotted B-Schedule property and the property now in question is described as self acquired properties item No.4 in SF.No.193/1. The other rival claimants to this property are the heirs of Karuppanna Muthiriyar through his second wife Peruma. It is true that there was an earlier round of litigation in O.S.No.279 of 1965 and O.S.No.177 of 1977 filed for partition as between the heirs of Karuppanna Muthiriyar



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through two branches of his heirs through his two wives. While in O.S.No.279 of 1965, the present plaintiff did not include item No.4, in O.S.No.177 of 1977 the plaintiffs therein (Karuppannan, Maruthai and Minor.Nagarathinam) have included it. It is true that the plaintiffs have filed the written statement in O.S.No.177 of 1977 contending that no property such as that was available for partition. Now, if at all a plea of *res judicata* can be invoked, it must be between the parties to the litigation and not to a stranger to the litigation. Therefore, the decree passed in O.S.No.279 of 1965 or the pleadings of the plaintiffs in the written statement in O.S.No.177 of 1977 bind the other parties, but not any strangers.

- Even the case of the defendant is not that Murugan Muthiriyar became the heir of his brother Karuppanna Muthiriyar, but only claims title by adverse possession. This implies that they primarily admit the title of the plaintiff to the suit property. When the defendant does not claim under Karuppanna Muthiriyar, doctrine of *res-judicata* can never be applied.
- Turning to the abandonment of claim, if at all there is an abandonment of claim, and should there accrue any advantage that it



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may produce, then it is available only to the heirs of Karuppanna Muthiriyar through his second wife and not to any stranger. Indeed, in O.S.No.177 of 1977, the plaintiffs, namely Karuppannan and his brothers therein had pleaded for partition and that was accepted by the first appellate Court in A.S.No.111 of 1980, which arose from O.S.No.177 of 1977, as could be seen from Ext.B.6 and Ext.B.7. This plea of abandonment, if at all it is available, it is available only to the plaintiffs in O.S.No.177 of 1977, and it cannot be taken advantage of by strangers to the property more so after the finding of this Court S.A.No.1790 of 1981.

- Thirdly, there has been heavy reliance on the Revenue Sub-division during UDR scheme, but no revenue authority has right to divest title in updating register of land records during updating, to the extent it ignores the pre-existing right and title of any landholder.
- Turning to the defendant's plea of adverse possession, when they admitted title, the burden is on him to establish the same. The property still continues to be a vacant land and no hostile act to the knowledge of the plaintiff had ever taken place. It can never be



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considered that the defendant has established the title by adverse possession.

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9. Per contra, the learned counsel for the defendant/respondent submitted that:

- The plaintiff obtained a title under Ext.A.6=Ext.B.18. This is the sale deed executed by Veerasamy in favour of Akilammal, in which two of the grandchildren of Karuppanna Muthiriyar through his second wife, have signed as his attestor.
- Secondly, in O.S.No.177 of 1977 Peruma's branch have included the suit property, in which the present plaintiff as defendant has filed the written statement contending that there are no properties available for partition. The present stand now taken by the plaintiff goes contrary to the stated position in the earlier litigation.
- Thirdly, in O.S.No.126 of 1968, which was laid by Sarasu, the eastern boundary of the item No.8 property is shown to be Murugan's property. This Murugan is none other than the brother of Karuppanna Muthiriyar, under whom the plaintiff claimed and the



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defendant is claiming through Murugan's grandson-Veerasamy.

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- This apart none of the earlier litigations are disclosed by the plaintiff.

10. The rival contentions are carefully weighed. Let each of the contentions be considered on their independent merit.

- First, this Court may consider the last of the contentions for the defendant/respondent. True, this Court was introduced to at least three earlier litigations, namely O.S.No.279 of 1965, O.S.No.126 of 1968 and O.S.No.177 of 1977. These litigations are between the two branches of Karuppanna Muthiriyar through his two wives. None of these legal proceedings within the branch of Karuppanna Muthiriyar will have anything to do with the plaintiff's claim of title against a stranger, unless any of the judgments passed in anyone of the suits can be considered as judgment in rem or something that would constitute *res judicata* or amount to issue of estoppel, there is no need to refer to any of these legal proceedings.
- The next aspect is about the contention of the respondent that Sarasu had conceded that the suit property did not belong to her and relies on



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the eastern boundary description of item 8 property in O.S.No.126 of 1968, more particularly, the delivering list therein marked as Ext.A.

24. If this argument is to be countenanced, then this document must be correlated to Ext.A.1, partition deed, under which, Karuppanna Muthiriyar and Murugan Muthiriyar have obtained title to their respective properties. In Ext.A.1, Murugan Muthiriyar was allotted A-Schedule property, in which he was given 18.5 cents, out of 68 cents in S.No.193/1. The boundary description of this property shows that both the eastern and western boundary are noted as the property allotted to Karuppanna Muthiriyar. If this is further analysed, Murugan's property lies to the west of Karuppanna Muthiriyar's plot. If Ext.A.24 in O.S.No.126 of 1968 is now perused, it merely reflects what is already stated in Ext.A.1, Schedule-A merely says Murugan's property is to the west of Karuppanna Muthiriyar's property. Therefore, if the suit property which is described as B-Schedule item 4 in Ext.A.1 is understood in the context of this boundary description, then Ext.A.4 does not seem to give any advantage to the defendant to build an argument founded on it.



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- Turning to the pleas of abandonment and *res judicata* are concerned, this Court does not want to elaborate much on it, since it accepts the argument advanced by the learned counsel for the appellant in *toto*.

After a careful evaluation, this Court answers the substantial questions of law in favour of the plaintiff/appellant.

11. In fine, this Second Appeal is allowed by setting aside the decree and judgment of the first appellate Court in A.S.No.188 of 2006 on the file of the learned Principal Subordinate Court, Tiruchirappalli and restore the decree of the trial Court passed in O.S.No.1766 of 1997. No costs. Consequently, connected Miscellaneous Petitions are closed.

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Index : Yes/No

Internet: Yes/No

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To

1. The Principal Subordinate Judge, Trichirappalli.
2. II Additional District Munsif, Trichirappalli.
3. III Additional District Munsif, Trichirappalli.
4. The Section Officer,
VR Section,
Madurai Bench of Madras High Court, Madurai.



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