



S.A.No.435 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.02.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.435 of 2021
and
C.M.P.No.8439 of 2021

M.Parvathi

... Appellant

Vs.

1. Devaraj
2. Rajendran
3. Balakrishnan

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C. to set aside the judgment and decree dated 15.04.2019 in A.S.No.23 of 2016 on the file of the Additional Subordinate Court, Chengalpattu, confirming the judgment and decree dated 03.03.2016 in O.S.No.103 of 2010 on the file of the District Munsif, Chengalpattu.

For appellant : Mr.D.Murthy

JUDGMENT

The plaintiff in the suit in O.S.No.103 of 2010 is the appellant before this Court. Though two appeals viz., A.S.No.22 of 2016 and



A.S.No.23 of 2016 arise out of the above referred suit, common judgment has been passed by the learned Additional Subordinate Judge, Chengalpattu, in and by which, the learned Judge has upheld the judgment dated 03.03.2016 passed by the learned District Munsif, Chengalpattu, in O.S.No.103 of 2010. However, while confirming the judgment in the suit, an error has crept into the judgment in A.S.No.22 of 2016 inasmuch as the learned Lower Appellate Judge has ordered to set aside the judgment and decree in O.S.No.103 of 2010.

2. The facts which are essential for appreciating the issues of the case are set out hereinbelow.

FACTS OF THE CASE:

2.1. The plaintiff had filed the above suit for permanent injunction against the defendants, their men and agents. It was the contention of the plaintiff that the suit property was the ancestral property of one Elumalai Naicker who was in possession and enjoyment of the property till his death on 27.05.2001. Elumalai



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Naicker died leaving behind his sons *viz.*, E.Mani and E.Gunasekar, as his legal representatives and they became entitled to the suit property.

After the death of Elumalai Naicker, his sons had orally partitioned the properties and the suit property was allotted to the share of one E.Mani.

2.2. The said E.Mani had put up construction over the suit property and was in enjoyment of the same. He has also been assessed to property tax in respect of the suit property. Thereafter, under a registered settlement deed dated 21.04.2008, the said Mani had settled the suit property in favour of his wife *viz.*, Parvathi (the plaintiff herein). The settlement deed is an irrevocable one and it is noteworthy that the brother of E.Mani *viz.*, E.Gunasekar had attested the document as witness. After the execution of the settlement deed, the plaintiff is in actual physical possession and enjoyment of the suit property.

2.3. While so, the defendants who had no right to the suit property were attempting to interfere with her peaceful possession and enjoyment during the last week of February 2010, and the same was



successfully prevented by the plaintiff. However, she apprehends that the defendants would again renew their attempts and therefore, she has come forward with the above referred suit.

2.4. The first defendant had filed a written statement which was adopted by the defendants 2 and 3 *inter alia* contending that in the suit Survey Number, there was a punja land measuring an extent of 20 cents. This land belonged to one Manickka Naicker. Manickka Naicker had 4 sons viz., Elumalai Naicker, Shanmugha Naicker, Ponnuranga Naicker and Mari Naicker. On the death of Manickka Naicker, his 4 sons acquired title to the property. They had effected a partition of the property in the suit Survey Number 40 years prior to the filing of the suit and in the said partition, the northern-most 5 cents in the S.No.397/7 was allotted to the share of Elumalai Naicker. South of Elumalai Naicker's share, Shanmugam Naicker (the defendants' father) was allotted 5 cents. Further, south of Shanmugam Naicker's property, Ponnuranga Naicker was allotted 5 cents and the southern-most 5 cents was allotted to Mari Naicker. After the said partition, the properties



have been in possession and enjoyment of the respective sharers.

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2.5. It is the case of the defendants that Elumalai Naicker had 3 sons *viz.*, Mani, Jayaraman and Gunasekaran and 3 daughters *viz.*, Lakshmi, Parvathi and Rajeswari. Therefore, the extent of 5 cents which was allotted to Elumalai Naicker devolved equally upon his six children. The defendants would submit that this extent of 5 cents is demarcated by ridges in its southern boundary and over these ridges, the plaintiff had planted trees. Elumalai Naicker had constructed his house with the cement sheet roofing and had dug a well for drinking water purpose. The plaintiff's husband Mani would be, therefore, entitled to 1/6th share in this property.

2.6. The first defendant would submit that his father Shanmuga Naicker has been in enjoyment of the 5 cents immediately south of the land of Elumalai Naicker till his death on 02.05.1991. Shanmuga Naicker died leaving behind his surviving wife Maniyammal and three sons *viz.*, defendants 1 to 3 herein. The defendants would submit that



the plaintiff and her husband who have no title to the extent of 10 cents attempted to trespass into the defendants' property and with this intent, they had created the settlement deed in respect of the 10 cents. The settlement deed in respect of the 10 cents is, therefore, not binding on the defendants. The defendants are entitled to the 5 cents south of the property allotted to Elumalai Naicker and they are in the possession and enjoyment of the same. Therefore, they sought for the dismissal of the suit.

TRIAL COURT:

3. The learned District Munsif, Chengalpattu, had framed the following issues.

“1. Whether the suit property belongs to the plaintiff and he is in possession and enjoyment of the suit property?

2. Whether the plaintiff is entitled for permanent injunction as prayed for?

3. To what relief if any the plaintiff is entitled for?”



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4. The plaintiff had examined herself as P.W.1 and marked Exs.A1 to A7 and one Shankar as P.W.2 through whom no documents have been marked. The first defendant had examined himself as D.W.1 and marked Exs.B1 to B2.

5. Thereafter, on considering the evidence on record, the learned Judge had come to the conclusion that the plaintiff's husband Mani had not established his right to the extent of 10 cents. The learned Judge also held that the documents filed on the side of the plaintiff does not specify the extent of the property in their enjoyment and that apart, P.W.1 had admitted that the defendants were in possession of the suit property which was allotted to them orally. The learned Judge, therefore, decreed the suit in respect of 2,180 sq.ft. of the suit property ie., 5 cents only as the plaintiff has not established her right to the extent of 10 cents.

6. Challenging that portion of the said judgment, the defendants had filed an appeal in A.S.No.22 of 2016 and the plaintiff



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has filed an appeal in A.S.No.23 of 2016. The learned Judge also concurred with the findings of the Trial Court and held that there was no document to show the right or enjoyment of the plaintiff's husband to the extent of 10 cents and the plaintiff was entitled only to the 5 cents under the oral partition.

7. The learned Judge, therefore, dismissed the appeal filed by the defendants and the appeal filed by the plaintiff as well. However, after the dismissal of the appeals filed by the defendants and the plaintiff, the learned Judge has set aside the entire judgment in O.S.No.103 of 2010 passed by the District Munsif, Chengalpattu.

8. Aggrieved by the same, the plaintiff is before this Court.

9. Heard the learned counsel for the appellant and perused the materials available on record.



DISCUSSION:

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10. Admittedly, the total extent in the suit survey number was 20 cents and it belonged to Manickka Naicker who had died intestate. Therefore, his 4 sons would automatically become entitled to 1/4th share in the suit property ie., an extent of 5 cents each. The plaintiff had not been able to prove her right to another extent of 5 cents in the suit survey number and both the Courts below have rightly disallowed the claim of the plaintiff. Both the Courts below have also concurred on this issue.

11. The Lower Appellate Court, while dismissing the appeals, had also proceeded to set aside the entire judgment in O.S.No.103 of 2010 passed by the District Munsif, Chengalpattu. This runs contrary to the findings of the Lower Appellate Court. This is an error. The appellant could have simply filed an application under Section 152 of C.P.C. to get the mistake rectified/corrected. However, she has proceeded to file an appeal. The appellant has not made out any other error in the judgments in the appeals. Consequently, this second appeal



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has to be dismissed, however, liberty is granted to the appellant to move an application under Section 152 of C.P.C. to rectify the error in the judgment in A.S.Nos.22 and 23 of 2016, wherein, the learned Judge has erroneously set aside the judgment and decree of the Trial Court by stating as follows.

“....the judgment and decree dated 03.03.2016, passed by the learned District Munsif at Chengalpattu in O.S.No.103/2010 is hereby set aside.”

Accordingly, this second appeal stands dismissed with the above liberty and connected C.M.P. stands closed. No costs.

27.02.2024

Index : Yes/No

Speaking order/non-speaking order

ssa

To

1. The Additional Subordinate Judge, Chengalpattu.
2. The District Munsif, Chengalpattu.
3. The Section Officer, V.R.Section, High Court, Madras.

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P.T.ASHA, J.,

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