



S.A. No.243 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.11.2024

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

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1. Elumalai
2. Sarasu
3. Lakshmi
4. Amsa
5. Kannagi

... Appellants

Vs.

1. Perumal
2. Dharuman
3. Boopalan

.. Respondents

PRAYER : Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the judgment and decree dated 20.12.2022 made in A.S.No.12 of 2020 on the file of Sub-Judge, Gingee confirming the judgment and decree dated 15.03.2019 passed in O.S.No.340 of 2009 on the file of Addl. District Munsif, Gingee.



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For Appellants : Mr.N.Suresh

For Respondents : No appearance

JUDGMENT

Challenging the concurrent findings of the courts below rendered in A.S.No. 12 of 2020 by the Sub-Judge, Gingee arising out of trial court findings in O.S.No.340 of 2009 on the file of Addl. District Munsif, Gingee, this Second Appeal was preferred by the plaintiffs 2 to 6.

2. For the sake of convenience, the parties are denoted as per the ranking in the suit.

3. Before the trial court, the plaintiffs 1 and 2 have filed a suit for the relief of declaration and permanent injunction in respect of suit property with an extent of 1 acre in new Survey No.82/8A against defendants 1 to 3. All the defendants contested the suit. Considering both side submissions, the trial court dismissed the suit stating that the plaintiffs have not proved



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their title with the suit property. Against which, they have preferred an appeal in A.S.No. 12 of 2020, wherein the first appellate court independently analysed the facts and evidence on record and dismissed the appeal by confirming the findings of trial court. Challenging the concurrent findings of the courts below, the plaintiffs have preferred this Second Appeal.

4. The case of plaintiffs 1 and 2 is that originally, an extent of 1 acre in Survey No.82/2 was belonging to one Ganga Gounder, from whom, the plaintiffs' father Ramasamy purchased the said extent of 1 acre on 26.08.1942 through a sale deed marked as Ex.A1. After the purchase, the mutation of records was made and the plaintiffs' father enjoyed the property as he purchased the property. During his life time, their father orally divided the entire extent of 1 acre and allotted 33 cents each to his three sons Swaminathan, Thoppala gounder and Ranganathan (1st plaintiff therein). One of his son Ranganathan, 1st plaintiff herein and his son is the 2nd plaintiff. While so, the 1st plaintiff exchanged 33 cents from his brother Thoppala gounder through a settlement deed dated 25.01.1990 and the said



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document is marked as Ex.A2. Accordingly, he is entitled to 66 cents in suit survey number and the remaining extent of 33 cents was allotted to the share of 1st plaintiff's brother viz., Swaminathan, who died intestate leaving behind his four sons viz., Elumalai, Govindasamy, Kannan and Kathirvelu. However, there was a oral partition between the said four sons. Accordingly, 7 ½ cents was allotted to Kannan and Kathirvelu (totally 15 cents) and the remaining 17 cents was allotted to another son Govindasamy in the suit survey number and another son Elumalai was not given share in the suit survey number, on the other hand, he was given property situated at Annamangalam Village. Therefore, three sons of Swaminathan entitled for the said 33 cents. Accordingly, the 1st plaintiff purchased 15 cents from Kannan and Kathirvelu through a sale deed dated 25.05.1994 marked as Ex.A4 and the remaining extent of 17 cents has also been purchased by him from Govindasamy through a sale deed dated 27.12.1999 marked as Ex.A5. Therefore, nearly about 99 cents in two survey numbers was purchased by him and though it was mentioned as 1 acre in the parent title deed Ex.A1, as on date, 99 cents was purchased by 1st plaintiff. While so, the 1st defendant attempted to claim 5 cents in the suit survey number said to be



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purchased from Elumalai, son of Swaminathan through a sale deed dated 23.08.1993. Based on that, he attempted to cause interference. Hence, the present suit was filed.

5. The contention of plaintiff is that in survey No.82/8, total extent of 1 acre, the vendor of 1st defendant viz., Elumalai was not given any share while division of property held between Elumalai and his brothers. So also, the purchaser/1st defendant has no right and title over the property, since his vendor has no right and title. Therefore, the plaintiffs 1 and 2 have filed a suit for the relief of declaration to declare the sale deed stands in the name of 1st defendant dated 23.08.1993 as invalid and consequential relief of permanent injunction. The 1st defendant contested the suit stating that he purchased 5 cents from his vendor Elumalai through a sale deed dated 23.08.1993 and he denied the plaintiffs' claim over the property and also raised objections stating that in the documents relied on by the plaintiff viz., Ex.A2 to Ex.A5, only 95 cents alone was mentioned. Therefore, more than 95 cents, the 1st plaintiff is not entitled to any right and title. Accordingly, he is entitled for only 5 cents in suit survey number. Therefore, he prayed to



dismiss the suit.

6. Considering both side submissions, the trial court framed issues and considering the evidence on record and finally held that the plaintiffs 1 and 2 failed to establish that the property was allotted to Elumalai in Annamangalam village as per the oral partition held in their family and also not been examined brother of Elumalai/vendor of defendant, which is fatal to the claim of plaintiffs and also held that before the purchase made by the 1st defendant in the year 1993 subdivision was already held. Accordingly, 5 cents purchased by the 1st defendant is in new Survey No.82/8G, on the other hand, when the 1st plaintiff purchased the property from other legal heirs of Swaminathan, from the year 1994 to 1999 subdivision numbers was not properly mentioned. Therefore, the documents relied on by the 1st plaintiff without mentioning the subdivisions would not support the case of plaintiffs. Therefore, the plaintiffs 1 and 2 have not proved their right and title over the property. Accordingly, the suit was dismissed.

7. Challenging the said findings, an Appeal Suit was filed in A.S.No.12 of 2020 before the Sub-Court, Gingee, wherein the first appellate



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judge independently analysed the evidence on record as well as documents and on considering the same, finally held that the plaintiffs 1 and 2 have not proved their right and title that 1st plaintiff's father is entitled for 1 acre and also not established the subdivision of the property, besides, they have also not proved that 1st defendant, Vendor/Elumalai was given property at Annamangalam village not tallying with the suit survey number, thereby the appeal was dismissed confirming the findings of the trial court.

8. Challenging the concurrent findings of court below, the plaintiffs have preferred this Second Appeal and the same was admitted on the following substantial question of law :-

“1) Was not the first appellate court egregiously erred in relying on Ex.B1 to Ex.B3, the revenue records in favour of the defendant's father to supersede the effect of Ex.A1 to Ex.A5 especially when D.W.1 has categorically admitted the title of the plaintiff based on these document?”

2) Whether the judgment of the court below is liable to be set aside when it has not followed the provision of Order 41 Rule 31 of C.P.C. to frame separate points for consideration and to deal



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with the same separately?

3) Whether the courts below have rendered erroneous judgment in that when the 1st defendant has projected a case under Ex.B1 that he had purchased 5 cents from Elumalai, son of Saminatha Kounder, without examining the vendor, the defendants sustain their plea relating to 5 cents?

9. Notices were issued to the respondents/defendants, but the respondents 1 and 2 have refused to receive the notice and notice was served on with 3rd respondent. Therefore, service held sufficient with respect to respondents 1 and 2 and despite service of notice, none appeared on the side the 3rd respondent. The learned counsel for appellants argue that before the trial court, the plaintiffs 1 and 2 have proved their right and title over the property by producing all the parent documents and other consequential title deeds marked as Ex.A1, A2, A4 and A5, but without appreciating the documents, the courts below erroneously concluded that suit property with an extent of 1 acre belongs to the plaintiffs has not been proved as such is totally illegal, unjust and liable to be set aside. In fact, the sale deed Ex.A1



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itself proves that father of 1st plaintiff viz., Ramasamy purchased one acre in the year 1942 in Old Survey No.82/2 and new Survey No.82/8 with four boundaries, but the trial court erroneously held that 95 cents on ground alone as such is illegal and the same is liable to be set aside. He would also submit that the 1st defendant, who is a third party to the plaintiffs' family claiming 5 cents in the suit property said to be purchased by Elumalai, who was not given any share in the suit survey No.82/8 and if at all, any valid purchase made by 1st defendant, he ought to have summoned his vendor Elumalai, but the trial court erroneously casted burden of proof on the side of plaintiff for the non-examination of Elumalai and dismissed the plaintiffs' claim as such is erroneous and liable to be set aside. The learned counsel would also pointed out that the sale deed made by the plaintiff of the year 1994 and 1999 marked as Ex.A4 and Ex.A5 not been challenged by the 1st defendant all these years, without which he would not claim any right and title over the suit survey number based upon his sale deed. But, the courts below failed to appreciate the said fact. Hence, he prayed to set aside the findings.



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10. Heard and considered submissions of learned counsel for appellants and perused the materials available on record.

11. On perusal of records, it reveals that Ex.A1 is the sale deed of the year 26.08.1942 he purchased one acre with four boundaries with old Survey No.82/2, thereafter, according to 1st plaintiff, during the life time of his father Ramasamy, his three sons viz., 1st plaintiff and his brother Swaminathan and Thoppala Gounder were equally allotted with 33 ½ cents. Thereafter, he made a exchange with his another brother Thoppala Gounder through the document Ex.A2 dated 25.01.1990. On perusal of Ex.A2 document, in old survey No.82/8, 33 cents was exchanged in favour of 1st plaintiff and the landed property is 0.95 cents and the remaining 5 cents meant for Well and other amenities attached to the land of plaintiffs. In that document, new subdivision of the property was also mentioned as 82/8G, 82/8H, 82/8I along with Well, 1/3rd share in the Well was exchanged in favour of 1st plaintiff's father in respect of suit Survey No.82/8. The plaintiffs 1 and 2 claiming right based on the sale deed marked as Ex.A4



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and A5. In respect of 33 cents, it was allotted to 1st plaintiff Ranganathan and the plaintiffs contended that the said Swaminathan has four sons viz., Kannan, Kathirvelu, Govindasamy and Elumalai. There was a oral partition in their family. Three sons alone were allotted with 33 cents. Another son Elumalai, the properties were allotted at Annamangalam Village and not with suit survey No.82/8. Thereafter, the 1st plaintiff purchased the said 33 cents from Swaminathan's three sons Kannan, Kathirvelu and Govindasamy through a sale deed through Ex.A4 and Ex.A5 of the year 1994 and 1999. On perusal of those documents, with specific four boundaries, the said 33 cents was allotted to 1st plaintiff. So, based on all those documents, the 1st plaintiff is able to establish that his father Ramasamy gounder purchased originally 1 acre of the land in suit Survey number and thereafter, it was divided among his two sons and 1st plaintiff purchased the entire extent from other brother and legal heirs of another son. The sale deeds reveal that 95 cents are agricultural land and 5 cents are referred to Well and other amenities. But, the trial court without appreciating the evidence on record, erroneously held that subdivisions have not been mentioned in the sale deeds relied on by the 1st plaintiff, thereby disputing the extent and identity



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of the property. In fact, one of the subdivisions were mentioned , but it was not taken into consideration by the trial court. The extent of property is ought to be tallied with Ex.A1 parent document and boundaries relied in Ex.A4 and Ex.A5 shows that already properties were divided among the family members of Swaminathan. Therefore, the plaintiffs 1 and 2 have proved that he is entitled for the suit property through a sale deeds marked as Ex.A1, Ex.A2, Ex.A4 and Ex.A5. But the courts below failed to appreciate the documents relied on by the plaintiffs. The findings of the trial court reveals that the plaintiffs failed to examine the vendor of 1st defendant viz., Elumalai is fatal to the proceedings. But, admittedly, the sale deeds Ex.A4 and A5 reveal that Elumalai brothers were enjoyed the property with specific boundaries along with other property. Therefore, the burden is casted upon the 1st defendant to prove that his vendor Elumalai was allotted share in Old suit survey number by examining him, but he failed to examine Elumalai, thereby he has not proved the same. Therefore, the plaintiffs are entitled for right and title as per the sale deed dated 23.08.1993 marked as Ex.A3. Admittedly, father of 1st plaintiff Ramasamy owned 1 acre is an undisputed fact. Ex.A1 document also have been proved the suit extent. The



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subsequent documents Ex.A2, Ex.A3 and Ex.A4 proved the plaintiffs' claim. But the courts below relied the revenue records Ex.B1, Ex.B2 and Ex.B3 are the Patta as well as subsequent sale deed and on relying those documents, dismissed the plaintiffs' claim as such is unjust for the reason that Ex.A1 sale deed is related to the year of 1942. Moreover, D.W. 1 also admits that based on Ex.A1 document, the plaintiffs proves the right and title. Therefore, the courts below committed an error in dismissing the suit by relying the revenue records produced on the side of defendants as such is erroneous one without considering Ex.A1, Ex.A2, Ex.A4 and Ex.A5 as such is liable to be set aside. Accordingly, the question of law (1) is answered.

12. In respect of framing of issues by the trial court, the question of law raised by the appellant, but on perusal of issues, the trial court framed four issues including the title claimed by the 1st defendant. So, there is no error in framing the issue under Order 41 Rule 31. In respect of issue no.2, according to the appellants, the first appellate judge failed to frame issue properly while deciding the issue. But, on perusal of the findings of the first appellate court, there is no specific point for consideration to frame issue, thereby he failed to comply Order 41 and Rule 31. Accordingly, the findings



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of the courts below are liable to be set aside, thereby question of law No.2 is answered.

13. In respect of question of law No.3, according to 1st defendant, the 1st plaintiff purchased 5 cents from his father Elumalai, but as per the contention of plaintiffs, Elumalai was not allotted with any share in the suit survey numbers and also established through the sale deeds Ex.A4 and Ex.A5, it was purchased from other co-owner. Therefore, the burden is casted upon the 1st defendant to examine his vendor, but he failed. But, the trial court erroneously took the liability on the plaintiff to examine the said Elumalai is unjust for the reasons as discussed above. Accordingly, the findings rendered by the courts below is liable to be set aside. Therefore, the plaintiffs proved their claim, but it was not properly appreciated by the courts below. Hence, the findings of the courts below is liable to be set aside.

14. Normally, the appellate court would not interfere with the facts and findings of the courts below ,but when it is erroneous one, this Court is entitled to interfere with the findings. Moreover, the evidence and documents were not properly appreciated by the courts below. Therefore,



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the findings rendered by the courts below is interfered. Accordingly, this Second Appeal is allowed and the findings rendered by the courts below is set aside. Suit is decreed as prayed for. No costs.

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Index : Yes / No
Internet : Yes / No
Speaking/Non-speaking order
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To

Sub-Judge,
Gingee.



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T.V.THAMILSELVI, J.

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