



S.A.No.868 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.03.2024

PRONOUNCED ON : 04.06.2024

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.868 of 2021
and
C.M.P.No.16561 of 2021

Arasakumar

... Appellant

V.s

1.C.Kuppusamy

2.K.Palanisamy

3.K.Karuppusamy

... Respondents

Prayer: Second Appeal is filed under Section 100 of C.P.C to set aside the judgement and Decree made dated 14.06.2021, made in A.S.No. 04 of 2019 on the file of Hon'ble Principal District Judge, Tiruppur in confirming judgement and Decree dated 11.09.2018 made in O.S.No.140 of 2010 on the file of Hon'ble Subordinate Judge, Dharapuram.



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For Appellant : Mr.N.Manokaran for Mr.N.Ponraj
For Respondents : Mr.S.Ramesh for Mr.Guruprasad

[for R.3]

: R.1 and R.2, served - No appearance

JUDGEMENT

The unsuccessful plaintiff before the Courts below has filed the suit O.S.No.140 of 2010 on the file of the Sub Court, Dharapuram in respect of two items of properties both comprised in R.S.No.67/2, Old Survey No.500 in patta No.1159 of Kongoor Village. The 1st item of the property is an extent of 32 cents together with a well. The 2nd item is another extent of 32 cents. Both of which are portions from out of the total extent of land measuring 6.13 acres.

2. The above suit has been filed for the following reliefs:-

a) To cancel the sale deed dated 03.05.2010 registered as Document No.4818 of 2010 executed fraudulently by defendants 1 and 2 in favour of the 3rd



defendant;

b) To declare that the suit properties are the properties of the plaintiff; and

c) For an injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the suit schedule properties.

3. The facts are set out herein below briefly with the parties being referred to in the same ranking as before the Trial Court.

Plaintiff's Case:

4. It is the case of the plaintiff that that the larger extent of the suit schedule properties belonged to his great grandfather one Samy Gounder. The said Samy Gounder owned an extent of 1.28 acres in the larger extent of land. The said Samy Gounder had four sons, Kuppanna Gounder, Periya Chellapa Gounder, Chinna Chellapa Gounder and Arumuga Gounder.



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5. It is the case of the plaintiff that on 15.02.1991 there was an oral partition amongst the four sons of the said Samy Gounder and each were allotted an extent of 32 cents from out of the total extent of 1.28 acres. The plaintiff claims under Periya Chellapa Gounder. It is his case that his father, Kuppusamy had inherited the 32 cents that had fallen to the share of Periya Chellappa Gounder, father of Kuppusamy. It is his further case that 7 years prior to the filing of the suit, Kuppusamy, the plaintiff's father had dug a well and installed a 10 H.P. power oil engine and laid pipes in the suit schedule property.

6. The plaintiff would further submit that his father had thereafter settled the property that fell to his share in favour of the plaintiff under a registered settlement deed dated 01.10.2009. This settlement was in relation to the 1st item of the suit schedule property. The 2nd item of the suit schedule property was purchased by the



plaintiff under a registered sale deed dated 19.10.2009 from Velusamy and Kumarasamy, sons of Kuppanna who is the brother of Kuppusamy and another son of Samy Gounder.

7. The plaintiff would further submit that on 13.09.1977, the 1st defendant, his father Periya Chellapa Gounder and his brothers had partitioned their property under a registered partition deed. Under this deed, the B schedule therein which is situate in the south eastern corner measuring 62 cents was allotted to the share of the 1st defendant. To the west of this 62 cents the 1st defendant had purchased Punja lands measuring an undivided extent of 84 cents under a sale deed dated 02.12.1987.

8. It is the further contention of the plaintiff that on 15.02.1991 when the lands in S.No.500 was partitioned between the sharers measured and demarcated, this extent of 84 cents was also measured and demarcated by well defined boundaries. The plaintiff would

submit that between the suit 2nd item of the property and this 84 cents of land there is an old fence running east west. The plaintiff would submit that defendants 1 and 2 have no right title or interest to the suit schedule properties. However, on account of recent differences of opinion between defendants 1 and 2 and the plaintiff's father, Kuppusamy, defendants 1 and 2 have trespassed into the suit 1st item of the property and are attempting to stake a claim to the well that is situate in the extreme north western portion of the 1st item of the suit property. Further, they have executed a sale deed in favour of the 3rd defendant in which they have included this well as well.

9. The plaintiff would further contend that this document would not clothe the 3rd defendant with any right as the same is a sham and nominal document and the plaintiff continues to be in exclusive possession and enjoyment of the well. On the basis of this fraudulent sale deed, from 01.07.2010, the defendants have been attempting to stake a claim over the suit properties. Therefore, left with no other



alternative the plaintiff has come forward with the suit in question.

Written statement of the 1st defendant:-

10. The 1st defendant had filed a written statement inter alia contending that the suit property does not belong to the plaintiff. He would submit that Samy Gounder did not own any portion in the suit schedule survey number and that no oral partition had taken place amongst the sons of the said Samy Gounder as alleged by the plaintiff. He would further submit that the plaintiff and his father had earlier filed a suit O.S.No.293 of 2006 on the file of the District Munsif Court, Dharapuram for the very same relief in which it is contended that the well has been dug 5 years prior to the filing of the suit. However, in the earlier suit, there is absolutely no whisper about any electricity connection as now pleaded. On 02.12.1987, the 1st defendant had purchased 84 cents in the southern portion from the legal representatives of Kuppanna Gounder.

11. The 1st defendant would further submit that his wife is none



else than the plaintiff's paternal aunt (sister of the plaintiff's father).

The 1st defendant would submit that she is the necessary party to the proceedings and by not impleading her, the suit is bad for non-joinder of necessary parties. He would therefore submit that the plaintiff's father had no right to execute the settlement deed in favour of the plaintiff for the entire extent. He would submit that he had sold this 84 cents to the 3rd defendant. The 1st defendant would submit that the plaintiff has no cause of action in respect of the suit properties. He would also state that the suit properties are a portion of the 84 cents purchased by him. He therefore prayed that the suit be dismissed.

Written statement of the 3rd defendant:-

12. The 3rd defendant would submit that the very pleading of the plaintiff is false. He would submit that Samy Gounder had 5 sons and not 4 sons as pleaded and that the legal representatives of the 5th son, Kumarasamy Gounder has not been made party to the suit and therefore the suit is bad for non-joinder of necessary parties. The 3rd

defendant would further submit that the plaintiff has not produced any document or revenue documents to show that the property belonged to Samy Gounder and was in his possession and that his legal representatives have orally partitioned the properties.

Trial Court:-

13. The Trial Court had framed the following issues:-

1. Whether the defendants 1 and 2 have no right over the suit properties?

2. Whether the sale deed No.4818/2010 executed by D1 and D2 in favour of D3 is a fraudulent one?

3. Whether the description of the suit property is correct?

4. Whether the suit is bad for non-joinder of necessary parties?

5. Whether the plaintiff is stopped by Law?



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6. Whether the suit is maintainable in law?

*7. Whether the plaintiff is entitled for
cancellation of sale deed dated 03.05.2010?*

*8. Whether the plaintiff is entitled for
declaration and permanent injunction as prayed
for?*

9. To what other relief?

14. On the side of the plaintiff, 3 witnesses were examined and Ex.A.1 to A.24 were marked. On the side of the defendants, 2 witnesses were examined and Ex.B.1 to B.8 were marked. The Commissioner's Report and Plan were marked as Ex.C.1 and C.2.

15. The learned Trial Judge had observed that the plaintiff has come to Court seeking a declaration and injunction. Therefore, the onus primarily lies upon him to prove his case. This assumes importance since the case of the defendant are that the suit property is



a part of the 84 cents of the land that the 1st defendant had purchased.

The plaintiff claims title through Samy Gounder who he has pleaded owned an extent of 1.28 acres. However, not a single document has been produced to show Samy Gounder's enjoyment or right to the extent of 1.28 acres. Not even a single revenue document has been marked and the only two documents which have been put forward to show possession is Ex.A.1 and Ex.A.2 standing in the name of the plaintiff.

16. The learned Trial Judge had also observed that prior to Ex.A.1 and Ex.A.2 there is no revenue documents standing in the name of either Samy Gounder or his 5 sons. The learned Trial Judge also observed that there is no mention about the well in the earlier suit O.S.No.293 of 2006. The learned Judge had observed that the suit is bad for non-joinder of necessary parties since the wife and children of Kumarasamy Gounder one of the sons of Samy Gounder have not been impleaded as a party to the proceedings. Ultimately, the learned Trial



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Judge had dismissed the suit.

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Lower Appellate Court:-

17. Challenging the same the appellant had filed A.S.No.4 of 2019 on the file of the Principal District Judge, Tiruppur.

18. The Lower Appellate Judge had taken serious note of the fact that the plaintiff has not cared to mention about the earlier suit O.S.No.293 of 2006 which the learned Judge observed was a clear case of suppression. That apart, the documents which the plaintiff had produced to prove his case are all created post the filing of the earlier suit O.S.No.293 of 2006.

19. The learned Lower Appellate Judge had also observed that apart from not proving Samy Gounder's right to the properties the plaintiff has also not produced the settlement deeds which he claimed have been executed by his parents amongst themselves which would

have thrown light on the factum of the well having been put up by the plaintiff's father. Ultimately, the learned Lower Appellate Judge by his judgment and decree dated 14.06.2021 had confirmed the judgement and decree passed by the Trial Court and dismissed the appeal.

20. Challenging the same the plaintiff has filed the above Second Appeal and the same has been admitted on the following substantial questions of law:-

“1) Whether the Courts below erred in overlooking the admission made in the evidence of D.W1, especially when the admission would lend support to the plea of oral partition?

2) Have not the Courts below committed an error in ignoring the mis description in the extent and boundaries given in the impugned sale deed (Ex.B1) with that of Ex.B2 ?



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*3)Whether the judgment of Courts below are perverse in giving undue importance to an inadvertent omission to refer O.S.No.293 of 2016 in the present suit in the absence of any intention to conceal the same on the part of plaintiff as held in **2017(1) CTC 323(SC)**?*

Submissions:-

21. Mr.N.Manoharan appearing on behalf of Mr.Ponraj learned counsel for the appellant would submit that the findings of the Courts below that the plaintiff has not proved the oral partition is without any basis. The Courts below have totally overlooked Ex.A.1 which is the settlement deed executed in favour of the plaintiff and the description of the four boundaries would clearly confirm the partition pleaded by the plaintiff. The Courts below have also ignored the evidence of P.W.1 to P.W.3 who have clearly and categorically deposed that the suit 1st item of property is an ancestral property and P.W.2 is one of

the sons of Samy Gounder. The Courts below have also overlooked the evidence of P.W.3 where he has submitted that there are no earlier documents in respect of the 1st item of the suit schedule property. He would further submit that the partition between the parties is further confirmed on a perusal of Ex.A.2 sale deed in favour of the plaintiff by the sons of Kuppana Gounder who is one of the sons of Samy Gounder.

22. The learned counsel would draw the attention of this Court to Ex.A.21 = Ex.B.3 partition deed executed between the family members of Palani Gounder who are the vendors of the 1st defendant in Ex.B.2. In this partition deed dated 28.07.1984 the western boundary of the C schedule property is shown as Samy Gounder's property. Further, a perusal of this document would show that the total extent available in S.No.500 is an extent of 12.42 acres. He would also draw the attention of the Court to Ex.A.8 which is the partition deed between Samy Gounder's sons. Under this deed, the plaintiff's



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grandfather has been allotted an extent of 75 cents in S.No.500. He would further draw the attention of the Court to Ex.A.9 sale deed executed by Chinna Chellapa Gounder, one of the sons of Samy Gounder in favour of Karuppathal the wife of Arumuga Gounder particularly to the 4 boundaries given for the extent of 32 cents which has been conveyed in S.No.500 from out of a total extent of 12.06 acres. He would contend that a mere perusal of these documents would clearly show that there has been a partition amongst the sons of Samy Gounder. He would submit that under the sale deed executed in favour of the 1st defendant an extent of 84 cents has been conveyed to the 1st defendant. The property is described within 4 boundaries. The sale deed refers to an earlier deed dated 30.07.1984 whereas the parent document (which has been marked as Ex.A.21) does not contain the four boundaries for the extent of 84 cents but boundaries have been given in respect of the larger extent of 1.12 acres. He would further submit that under Ex.A.4 which is a sale deed dated 03.05.2010 executed by defendants 1 and 2 in favour of the 3rd



defendant, the four boundaries are totally different. The deed refers to the decree in O.S.No.293 of 2006 as being a source of title for the vendor therein, namely, Kuppusamy and Palanisamy. The learned counsel would submit that after the sale in favour of the 3rd defendant the suit O.S.No.293 of 2006 which was dismissed for default has been restored and the suit is posted for trial.

23. The learned counsel would draw the attention of the Court to certain admissions of the defendant as D.W.1. D.W.1 has stated that the plaintiff's grandfather, Periya Chellapa Gounder was also entitled to 32 cents of ancestral property in S.No.500 which under Ex.A.9 dated 29.01.1991 was sold to Karuppathal, the wife of Arumugan Gounder. He has also admitted that Karuppathal was entitled to 64 cents i.e; 32 cents ancestral property and 32 cents by way of a sale. He has also admitted to the fact that Arumuga Gounder's father Samy Gounder was entitled to an extent of 1.28 acres ancestrally in S.No.500 which had been partitioned under Ex.A.8 dated 17.09.1987.



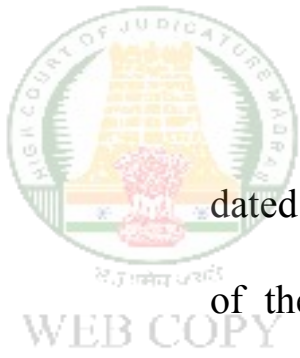
Therefore, the learned counsel would submit that in the light of all these documents which clearly show the partition amongst the sons of Samy Gounder, the findings of the Courts below that the plaintiff has failed to prove Samy Gounder's right to the property and the partition is without any basis and he would submit that both the Courts below had not considered the documents from the right perspective.

24. The learned counsel would submit that the findings of the Courts below that there has been a suppression on the part of the plaintiff with regard to the filing of the earlier suit is also erroneous. He would rely upon the judgement of the Hon'ble Supreme Court reported in **2017 (1) CTC 323- Harjas Rai Makhija (D) thr. L.Rs. Vs. Pushparani Jain and Ors.** wherein the learned Judge has observed that when there is an allegation of fraud there must be an enquiry into the same. He would submit that a mere concealment or non-disclosure without an intent to deceive would not render the decree obtained as fraudulent and the onus is on the other side to



show that the concealment and non-disclosure has been done with an intent to defraud. He would submit that the defendants have not been able to establish that the non-disclosure of earlier suit O.S.No.292 of 2006 has not been made with an intent to deceive or defraud the defendants.

25. Per contra, Mr.S.Ramesh for Mr.Guruprasad, learned counsel appearing on behalf of the respondents would counter the said argument by contending that the plaintiff who has come forward with a contention that there was an oral partition amongst the sons of Samy Gounder in which the property has been allotted to his grandfather in the year 1991 has not proved the said partition. On the contrary, a partition deed of the year 1987 has been filed as Ex.A.8. Even in Ex.A.1 settlement deed executed by his father in his favour, there is no reference to the partition between the settlor's father and his brothers. On the contrary, the settlement deed refers to a document



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dated 10.03.2004 registered as Document No.758 of 2004 on the file of the Sub Registrar, Dharapuram. The settlement deed does not describe the nature of this deed. That apart, the settlement deeds said to have been executed by the settlor in favour of his wife and his wife back to him have not been produced by the plaintiff. The reference to the document dated 10.03.2004 in Ex.A.1 is to the settlement deed executed by the settlor's wife in his favour. Therefore, the document under which the plaintiff claims title to the 1st item of the property does not refer to the fact that the property belonged to Samy Gounder and that Samy Gounder's sons had entered into a partition *inter se* amongst themselves. Further, the plaintiff as P.W.1 has admitted that he has not referred to this settlement deeds said to have been executed by his father in favour of his mother and his mother back to his father in his plaint. He has also in his evidence as P.W.1 admitted that in none of the earlier documents there is a reference to the well. He had also admitted that he had already instituted a suit O.S.No.293 of 2006 with reference to the suit 1st item of the property in which he had



obtained an ex parte decree against which the defendants had filed an application for setting aside the ex parte decree which is also pending.

26. Further, even in Ex.A.2 Sale deed executed by the sons of Kuppanna in favour of the plaintiff, there is no reference to the partition of the year 1991. On the contrary, title is traced through a patta. In his cross examination, P.W.1 has admitted that he has not objected to the 1st defendant purchasing the 84 cents in the year 1987. The plaintiff has also admitted that he is aware of the fact that with reference to this extent of 84 cents the 1st defendant has entered into an agreement of sale on 17.04.2009. He has gone on to further admit that he has no objection to the 1st defendant selling the property that he has purchased but, however, the objection is to the fact that the property of the plaintiff has also been sold. However, the plaintiff has not stated which portion of the property belonging to him has been included in this document. He would further submit that under Ex.A.8 partition deed the plaintiff's grandfather has been allotted 75 cents in



S.No.500 and the 4 boundaries to this extent is shown as north by east west Itteri, east by the property falling to the share of Chellapa Gounder, south by property falling to the share of Kandasamy Gounder and west by the property falling to the share of Arumuga Gounder which is totally different from the pleading of the plaintiff in his plaint wherein it is the case of the plaintiff that it is only 32 cents that has been allotted to his share.

27. The learned counsel would also draw the attention of the Court to the evidence of P.W.2 who has admitted that the well in the 1st item of the suit property is also being enjoyed by the defendants as well. Further, P.W.3 in his cross examination has stated that 84 cents of the suit property has been purchased by the 1st defendant but however denies that he is in possession of the same. He would submit that the plaintiff who has come forward with a particular case has failed to prove the same and the Courts below have rightly dismissed the same. He would therefore pray that this Court may also confirm



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the judgement and decree of the Courts below.

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28. Heard the counsels on either side and perused the records.

Discussion:-

29. The plaintiff has filed the above suit to declare the sale deed executed by defendants 1 and 2 in favour of the 3rd defendant as null and void on the ground that the property which was sold to the 3rd defendant is the property that belongs to the plaintiff under Ex.A.1 and Ex.A.2. He traces his title through an oral partition dated 15.09.1991 amongst the four sons of Samy Gounder. He would submit that Samy Gounder owned an extent of 1.28 acres in S.No.500 and this extent of 1.28 acres have been divided amongst the four sons each being entitled to an extent of 32 cents. He claims a right to the property through his father Kuppusamy who in turn claims a right through his father, Periya Chellapa Gounder. However, in Ex.A.1 settlement deed executed by Kuppuswamy in favour of the plaintiff



there is no reference either to Samy Gounder or to the partition dated 15.09.1991. Though the plaint in the suit O.S.No.293 of 2006 had not been filed before the Trial Court, a copy of the same had been produced by the appellant himself. A perusal of which would indicate that in the pleadings therein the plaintiff has categorically admitted that an extent of 1.46 acres in S.No.500 has been allotted to the share of the 1st defendant herein and only 32 cents has been allotted to the share of the plaintiff. The oral partition pleaded is said to be between 8 persons including the plaintiff and the 1st defendant and not only amongst the sons of Samy Gounder as alleged in the instant suit. That apart, the plaintiff had pleaded a partition on 15.09.1991 but the plaintiff has produced Ex.A8 regarding partition deed of the year 1987, to which there is no reference in the plaint.

30. In the plaint in the suit O.S.No.293 of 2006, there is reference to a settlement deed being executed by the 1st plaintiff in favour of his wife, Karuppathal on 27.01.2004 and Karuppathal in



turn settling the property back on her husband, the 1st plaintiff under a settlement deed dated 10.03.2004. The plaint refers to the well in the northern corner of the 32 cents of land. The earlier suit is only with reference to the 1st item of the suit schedule property. While that suit was pending, the present suit has been filed and simultaneously evidence is going on in the said suit. The filing of the earlier suit O.S.No,293 of 2006 does not find a mention in the plaint filed in the instant suit which is clearly a case of suppression and which the Courts below have rightly found to be a suppression.

31. The plaintiff has not filed any documents to show the ownership of Samy Gounder to the said land and there is no documents to prove his continued possession and enjoyment of the suit properties at least from the date of the oral partition of the year 1991. The plaintiff who claims to have purchased the property from Kuppanna Gounder' sons under Ex.A.2 has not produced any documents to show the revenue records standing in the name of his



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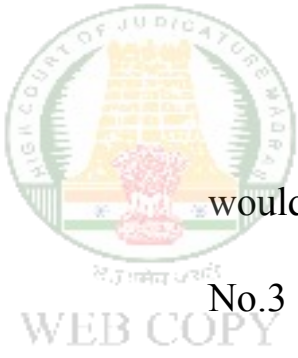
vendors.

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32. The suit is one for a declaration and it is for the plaintiff to prove his title to the property. The plaintiff has contended that the well was dug just 7 years prior to the institution of the suit. However, the Advocate Commissioner's Report Ex.C.1 clearly shows that the well in question is a very old one. That apart, the Advocate Commissioner has also taken note of the fact that the water from the well is running to all the lands of the plaintiff. Whereas, the plaintiff has contended that from 2010 he was being prevented from taking water to his other lands. The plaintiff as P.W.1 has admitted that he was aware about the sale in favour of the 1st defendant even in the year 1987 and that he has no objection to the sale in favour of defendants 1 and 2. It is an axiomatic principle of law that the plaintiff has to win on the strength of his case and not on the weakness of the defense. The plaintiff has not been able to prove either his title or the title of his predecessor-in-title to the property

and coupled with the fact that he has admitted that he was aware about the sale in favour of defendants 1 and 2 as early as in the year 1987, the plaintiff cannot now question the subsequent sale executed in favour of the 3rd defendant in respect of the property which was purchased by the 1st defendant under Ex.A.20 = Ex.B.2. Therefore, the Substantial Question of law Nos. 1 and 2 are answered against the plaintiff.

33. The contention of the plaintiff that the omission to refer to the earlier suit O.S.No.293 of 2006 is inadvertent cannot be countenanced since in the written statement the defendants had pleaded about the suppression and the plaintiff has not chosen to amend his plaint or to file a copy of the plaint in the suit O.S.No.293 of 2006 along with the plaint filed in the instant suit and there appears to be a deliberate attempt to suppress the filing of this suit. This suppression does not appear to be an inadvertent one. Therefore, the judgement which has been relied upon by the counsel for the appellant



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would not come to his rescue and the Substantial Question of Law

No.3 is also answered against the plaintiff.

34. In fine, the above Second Appeal stands dismissed. No costs.

Consequently, the connected Miscellaneous Petition is closed.

04.06.2024

Index: Yes/No

Speaking order/non-speaking order

Neutral Citation :Yes/No

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To,

1. The Principal District Judge, Tiruppur.
2. The Subordinate Judge, Dharapuram
3. The Section Officer,
V.R.Section,
High Court, Madras.



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P.T.ASHA, J.,

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