



Second Appeal Nos.26 and 28 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.06.2024

CORAM :

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

Second Appeal Nos.26 and 28 of 2019
and C.M.P.No.437 and 568 of 2019

S.A.No.26 of 2019

- 1.Chockalingam (Died)
- 2.Lakshmi Ammal
- 3.Gowri Shankar
- 4.Arunagiri
- 5.Vijaya

(Appellant No.1 died, Appellants 3 to 5 are brought on record as LR's of the deceased A1 viz chockalingam vide court order dated 05/06/2024 made in CMP No 7143 of 2019 in SA.No. 26 of 2019 by VLNJ)

.... Appellants

-Vs-

Mahimai

.... Respondent

Prayer : Second Appeal under Section 100 of C.P.C., against the judgment to set aside the judgment and decree in A.S.No.22 of 2005 dated 24.11.2005 on the file of the Subordinate Judge, Madurantakam, confirming the judgment and decree in O.S.No.85 of 2002 dated 24.09.2004 on the file of the District Munsif, Madurantakam.

For Appellants

: Mr.B.Gopalakrishnan



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S.A.No.28 of 2019

Lakshmi Ammal

... Appellant

-Vs-

Mahimai

... Respondent

Prayer : Second Appeal under Section 100 of C.P.C., against the judgment to set aside the judgment and decree in AS No.23/2005 dated 24.11.2005 on the file of Subordinate Judge, Madurantakam, confirming the judgment and decree in OS No.24/97 dated 24.09.2004 on the file of the District Munsif, Madurantakam.

For Appellant : Mr.B.Gopalakrishnan

J U D G M E N T

These Second Appeals arise out of a suit for declaration and injunction filed by the appellant against one Mahimai in O.S.No.24 of 1997 and a suit filed Mahimai as against the appellants herein in O.S.No.85 of 2002.

For the sake of convenience, the parties will be referred to as per their ranking in the suit.

2. O.S.No.24 of 1997 was filed seeking for declaration of the plaintiff's title to the suit properties, and for permanent injunction restraining the defendant from interfering with the peaceful possession and enjoyment of the plaintiff over



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the suit schedule mentioned property, and for a direction to the defendant to pay the plaintiff a sum of Rs.15,000/- as damages for removal of Velikaathan trees which are grown over the suit schedule mentioned properties together with interest.

3. The case of the plaintiff is that the properties belong to one Lingendra Pandaram and his brother Sivalinga Pandaram. Since Lingendra Pandaram was the elder brother, the property was purchased in his name. During an oral partition that had taken place between Lingendra Pandaram and Sivalinga Pandaram, the suit schedule mentioned property to an extent of 66 cents fell to the share of Sivalinga Pandaram. Sivalinga Pandaram was enjoying the property. On his death, the property was enjoyed by his daughter Kannammal who sold the property to the present plaintiff. She would state that she has not only a title by virtue of the purchase, but has prescribed title to the property by adverse possession. Since the defendant Mahimai had connived with the jurisdictional Village Administrative Officer and transferred the patta to the suit property in his name, she would plead that on the strength of the order obtained by him on that basis in O.S.No.397 of 1996 on the file of the District Munsif Court at Chengalpattu, he had trespassed into the property and had removed the trees. Hence the suit.



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4. The defendant entered appearance and filed his written statement.

According to him, the suit properties were self-acquired properties of Lingendra Pandaram and he had purchased the same by way of a registered sale deed on 15.12.1912. On the death of Lingendra Pandaram, his wife Kokila and five daughters were enjoying the property. His daughters are Jagadambal, Bakkiammal, Jayalakshmi, Deivanai and Kamakshi. As Deivanai and Kamakshi had died, Deivanai's sons Ganesan and Shanmugam were in enjoyment of the same. The legal heirs of Lingendra Pandaram had sold the property in favour of one Perumal Mudaliar on 12.03.1981, who had in turn sold the property to the present defendant on 10.02.1986. As the husband of the present appellant viz., Chokkalingam was giving unnecessary trouble to Perumal Mudaliar, he filed O.S.No.819 of 1981 on the file of the District Munsif Court at Chengalpattu. This suit was subsequently numbered as O.S.No.390 of 1982 on the file of the District Munsif Court at Madhurantagam which ended in an exparte order on 23.10.1986. The defendant would plead that the plaintiff has no right, title and interest over the property and sought for dismissal of the suit.

5. On the basis of these pleadings, the learned trial Judge framed the following issues:

1. Whether the plaintiff is entitled for declaration ?
2. Whether the plaintiff is entitled to permanent injunction?
3. Whether the plaintiff is entitled to damages of Rs.15,000/-?



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4. To what relief?

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6. On behalf of the plaintiff, she examined herself as P.W.1 and one Munusamy as P.W.2. She marked Exs.A1 to A4. On the side of the defendant, he examined himself as D.W.1 and marked Exs.B1 to B6.

7. On the basis of the oral and documentary evidence let in before him, the learned District Munsif came to the conclusion that the plaintiff had not proved her title to the property and dismissed the suit.

8. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No.23 of 2005 before the learned Subordinate Judge at Madhurantakam. In and by way of a judgment dated 24.11.2005, the learned appellate Judge concurred with the findings of the learned trial Judge and dismissed the appeal.

9. Against the concurrent judgments of the Courts below, the present Second Appeals have come up before me. The Second Appeals have not been admitted and are posted before me for admission. There was considerable delay in numbering the appeals and hence, though the judgment and decree is of the year 2005, it has come before me only now for the aforesaid purpose.

10. Mr.B.Gopalakrishnan would submit that the property is a joint family



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property of Lingendra Pandaram and Sivalinga Pandaram and he would further plead that the purchase was made in the name of Lingendra Pandaram on account of the fact that he was the elder brother. He would further plead that by virtue of an oral partition, the property purchased by the brothers was divided into two equal halves and the eastern half of 66 cents out of 1.32 cents fell to the share of Sivalinga Pandaram. Sivalinga Pandaram had only one daughter by name Kannammal and Kannammal had executed a sale deed in favour of the plaintiff 50 years ago in the year 1973. According to him, since the purchase was made utilising the joint family assets, though the property stands in the name of Lingendra Pandaram, it has to be treated only as joint family property and Sivalinga Pandaram should have a share, which in turn fell to Kannammal and therefore the plaintiff is entitled to declaration of title.

11. He would further point out that the very same defendant had initiated O.S.No.397 of 1996 seeking the relief of declaration and injunction against Chockalingam on the file of the District Munsif at Madhurantakam, which came to be decreed. He would state that Chockalingam preferred an appeal in A.S.No.2 of 2000 and the appeal came to be allowed, dismissing the suit filed by the defendant as a plaintiff. He would point out that the Second Appeal preferred by the present defendant in S.A.No.1714 of 2000 came to be disposed of on 18.03.2002 holding that it is for the defendant to file a fresh suit after



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impleading proper and necessary parties to such proceedings. On the basis of the evidence given in the previous suit viz., O.S.No.397 of 1996 as well as the decree of the Court he would argue that his vendor is entitled to a share in the property and therefore he is entitled to the decree of declaration of title.

12. He further pointed out that the sale deed in favour of the defendant was not executed by all the legal heirs of Lingendra Pandaram and therefore the title of the defendant is defective. He would plead that as the revenue records stand in the name of both his vendor and the vendor of the defendant, I have to draw a conclusion that they have common share in the property and hence the dismissal of the suit by the Courts below is erroneous.

13. Insofar as the other Second Appeal viz., S.A.No.26 of 2019 is concerned, the pleadings are identical. That was a suit filed by the defendant herein as against the present plaintiff and her husband Chockalingam. He sought for declaration of his title and for injunction over the suit properties. The said suit was decreed and the appeal preferred by the present plaintiff and her husband Chockalingam was dismissed.

14. Though the claim and counter claim are identical, the trial Court tried



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the suits separately and by a judgment dated 24.09.2004 dismissed the suit filed by the present appellant upholding the suit filed by the present respondent. The same was the fate with respect to the first appeal preferred against the judgment and decree in O.S.No.24 of 1997 and O.S.No.85 of 2002. Since the parties in the suit and appeal are common, I heard both the Second Appeals together.

15. Insofar as S.A.No.28 of 2019 is concerned, the first plea of Mr.Gopalakrishnan is that the property is a joint acquisition of Lingendra Pandaram and Sivalinga Pandaram. He would plead that the purchase was made from joint family assets. The position of law is settled with respect to the plea taken by the purchaser that his vendor had a share in the property as it was a joint family acquisition. The position is this, that the burden is on the plaintiff / appellant to prove that there existed a joint family and in addition the burden is also on the plaintiff to prove that the joint family had sufficient nucleus to purchase the property. In case the plaintiff fails to prove either, then he is not entitled for a decree of declaration.

16. Looking at the facts of the present case, the plaintiff had not examined anyone in order to substantiate that Lingendra Pandaram and Sivalinga Pandaram lived together in a joint family. He has also not let in any



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evidence in order to substantiate the case that the joint family had sufficient nucleus for the purchase of the property. It is here I have to turn to the vehement plea of Mr.Gopalakrishnan as regards the evidence given in O.S.No.397 of 1996 filed by Mahimai as against Chockalingam. Mr.Gopalakrishnan would attempt to read the evidence that had been given in the previous suit in the present case. I went through the list of documents and exhibits that had been filed by the plaintiff. I do not find the statement / evidence given by parties in the previous proceeding being marked as exhibits in the present case.

17. In order to bring a statement made by a person in a previous proceeding as relevant fact in a subsequent case, it is the duty of the plaintiff to satisfy the requirement of Section 33 of the Indian Evidence Act. In terms of Section 33, the plaintiff ought to have proved before the Court that the person who gave the evidence in the previous proceeding is either dead or cannot be found or incapable of giving evidence or kept out of the way by the adverse party or if his presence cannot be obtained without an amount of delay or expense. An additional condition is that the adverse party should have been given an opportunity to cross examine the person who deposed in the case.

18. The extract of the judgment in S.A.No.1714 of 2000 would show that



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all the necessary parties had not been made parties to the suit. When the plaintiff had not even attempted to mark those evidence after satisfying the Court in terms of Section 33 of the Indian Evidence Act, I am afraid, in Second Appeal I cannot receive those evidence. The condition precedent for the said partition ought to have been proved before the trial Court and the plaintiff having taken a chance and had gone on with the trial dispensing with the pre-requisites of Section 33, I cannot permit the plaintiff to fill the gap in the second appeal.

19. Now turning to Ex.A1 sale deed, which is relied upon by the plaintiff viz., the sale deed executed by Kannammal, daughter of Sivalinga Pandaram in favour of the present plaintiff is concerned, both the Courts below had the benefit of going through the document. In the said document, nowhere it has been stated that Kannammal has a share by virtue of the partition between her father and his elder brother. If the plea that has been taken by the plaintiff is true, the very document would read that Kannammal had obtained the property by virtue of the partition between the brothers. All that the document would read is that Kannammal is in அனுபவம் / enjoyment of the property. Therefore, I am unable to accept the plea of the plaintiff that the acquisition by the brothers were on behalf of the joint family consisting themselves and their respective families and that her vendor has a share in the same.



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20. In the light of the above discussion, nothing further needs to be done in the present Second Appeal but to confirm the judgment of the Court below in O.S.No.24 of 1997 dated 24.09.2004 and A.S.No.23 of 2005 dated 24.11.2005. In fine, the Second Appeal No.28 of 2019 stands dismissed. No costs.

21. Now turning to the other appeal in S.A.No.26 of 2009, this arises out of a suit for declaration of title filed by Mahimai against the appellant and her husband. The case of Mahimai is clear and categorical. He had purchased the property on 10.02.1986 from one Perumal Mudaliar. Perumal Mudaliar had purchased the property from Bakkiammal and Jayalakshmi, the daughters of the original owner Lingendra Pandaram. As Chockalingam had interfered with his possession, he presented O.S.No.397 of 1996 on the file of the District Munsif Court at Madhurantakam. The said suit was decreed and the appeal was allowed, which in turn came up before this Court in S.A.No.1714 of 2000. The Second Appellate Court closed the Second Appeal giving liberty to the plaintiff to file a fresh suit after impleading all the necessary parties. He would plead that as the appellants sought to interfere with his possession, he was constrained to file the suit in O.S.No.85 of 2002 for declaration of title and for injunction.



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22. On being served with summons, the present appellants filed a detailed written statement. They would plead the same story as in their suit in O.S.No.24 of 1997. On the basis of these pleadings, the learned trial Judge framed the following issues:

1. Whether the plaintiff is entitled for declaration and for permanent injunction?
2. Whether the existence of joint family between Lingendra Pandaram and Sivalinga Pandaram pleaded in the written statement is true?
3. Whether the alleged purchase by the defendant is true and valid?
4. Whether the alleged possession by the defendant is true?
5. To what relief the plaintiff is entitled for ?

23. The plaintiff in the suit Mahimai entered the witness box and marked Exs.A1 to A21. On the side of the defendants, the second defendant Lakshmi Ammal examined two witnesses viz., herself, one Munusamy and marked Exs.B1 to B4.

24. In this case, the plea was the existence of a joint family between Lingendra Pandaram and Sivalinga Pandaram. As pointed out in the other Second Appeal, neither the existence of the joint family was proved nor was the existence of nucleus in the joint family proved for the purpose of purchase of the property in the name of Lingendra Pandaram. Therefore, the sale deed that stands in the name of Lingendra Pandaram would have to be treated as self-acquisition. On his death, his wife Kokila and legal heirs / daughters succeeded



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to the same. They had sold the property to Perumal Mudaliar on 12.03.1981.

Perumal Mudaliar had in turn sold the property in favour of Mahimai under Ex.A17 on 10.02.1986. In absence of the proof of joint family and nucleus required thereof, the plaintiff Mahimai has proved his continuous title and traced it to Lingendra Pandaram. Therefore, the courts below came to the conclusion that Mahimai had proved his title to the property and decreed O.S.No.85 of 2002. An appeal preferred therefrom in A.S.No.22 of 2005 has also been dismissed.

25. The arguments of the appellants having been rejected by me in the other appeal, I need not re-state the whole particulars again. The reasoning given for dismissal of S.A.No.28 of 2019 applies to S.A.No.26 of 2019 as well. Consequently, I am of the clear view that no question of law arises for me to consider. The plaintiff had not substantiated her case by way of evidence. As I am restricted by the scope of Section 100 of C.P.C., I am not in a position to re-appreciate the evidence that Mr.Gopalakrishnan wants me to do, the Second Appeals stand dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

20.06.2024

Index : Yes/No



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Neutral Citation : Yes/No
Speaking Order / Non-speaking order
KST

V.LAKSHMINARAYANAN, J.

KST

To

- 1.The District Munsif
Madhurantakam.
- 2.The Subordinate Judge
Madhurantakam.

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