

(2015) 03 MAD CK 0171
In the Madras High Court
Case No : S.A. (MD) No. 1571 of 1993

Alagarsamy and Others

APPELLANT

Vs

Andianandam and Others

RESPONDENT

Date of Decision : 16-03-2015

Acts Referred:

Citation : (2015) 4 MLJ 601

Hon'ble Judges : Pushpa Sathyanarayana, J.

Bench : Single Bench

Advocate : J. Barathan, for the Appellant

Final Decision : Allowed

Judgement

Pushpa Sathyanarayana, J.—The defendants 1 and 2 are the appellants in a suit for declaration and injunction.

2. The case of the plaintiffs is that originally, the properties belong to one Andiyappa Thevar, who died in the year 1950, leaving behind his two sons Sangili Thevar and Ganapathy Thevar. There was a partition between them in the year 1958. The plaintiffs are the children of Ganapathi Thevar and the defendants are the children of Sangili Thevar. Sangili Thevar died in the year 1960 and the plaintiffs father Ganapathi Thevar died on 6/11/1987. According to the plaintiffs, their father had left a Will dated 14/9/1987.

3. It is the case of the plaintiffs that from the year 1958, the plaintiffs father was in enjoyment of the suit property and thereafter, the plaintiffs have been in enjoyment of the lands situate in S.Nos. 162/2 and 162/7 to an extent of 2.86 acres. The suit schedule properties also were irrigated from a well situate in S.No.162/6 in which the plaintiffs and the defendants have got the equal share. While so, as if the defendants wanted to exchange the lands belonging to their mother Kuruvammal with that of the plaintiffs and as the plaintiffs refused, the suit had been filed by the plaintiffs for declaration and permanent injunction.

4. The suit was resisted by the defendants on various grounds. The defendants had admitted the execution of the Will by Ganapathi Thevar dated 14/9/1987 in favour of his children. The defendants further denied the right of the plaintiffs in S.Nos.162/7. According to the defendants, after the death of the original owner Andiyappa Thevar, the properties were partitioned as per the custom prevalent in the village. Accordingly, the elder son Sangili Thevar, who is the father of the defendants was allotted the eastern half share in S.Nos. 162/1, 162/3, 162/4, 162/5 and 162/7 A an extent of 2.86 acres. The younger brother viz., Ganapathy Thevar, who is the father of the plaintiffs herein were allotted S.Nos.162/2, 162/7 B and 162/8 an extent of 2.86 acres and accordingly, the parties have been in enjoyment of the properties.

5. The defendants therefore, denied that the said partition happened in the year 1944 and not as contended by the plaintiffs in 1958. In support of his contention, the defendants also had produced several mortgage deeds for having dealt with the properties as that of their own. Originally, in the UDR scheme, the entries were entered wrong which was taken advantage of by the plaintiffs. But the defendants pointing out the mistake in the UDR scheme and got the mistake rectified and the plaintiffs were allotted 162/7 B and 162/7A. As the sub-division was made, the parties were also given the patta and the sketch. While so, the plaintiffs have come up with the false statements and filed the above suit.

6. The demand of exchange of lands are all denied by the defendants. The defendants also have grown 40 coconut trees in S.No.162/7A which is being suppressed by the plaintiffs. As the plaintiffs have got no cause of action for the suit, the defendants prayed for dismissal of the same.

7. Before the trial Court, on the side of the plaintiffs, P.Ws.1 to 3 had been examined and Exs.R.1 to R.26 had been marked and on the side of the defendants, D.Ws.1 to 3 had been examined and Exs.B. 1 to B.22 had been marked.

8. The trial Court, decreed the suit in so far as S.No.162/2 is concerned, and decreed with regard to the eastern portion in S.No. 162/7 and dismissed the suit regarding the western portion of S.No. 162/7. Aggrieved by the same, the plaintiffs had preferred A.S. No.50 of 1992 on the file of the Sub-Court, Srivilliputhur.

9. The lower Appellate Court, allowed the appeal declaring the plaintiffs as the owners of the lands situate in 162/7 also. Aggrieved by the same, the above Second Appeal has been filed.

10. At the time of admission, the following substantial questions of law are framed:-

"1. When Ganapathi Thevar, the father of the plaintiffs has attested Exs.B.3 and B.5 mortgage deeds with the knowledge of its contents whether the plaintiffs as the successor-in-interests of Ganapathy Thevar are estopped from disputing the

title of the defendants 1 and 2 to the western half of S.F. No.162?

2. Whether the plaintiffs are entitled to the declaration of their title to a property which is not bequeathed under Ex.A.1 Will?

3. Whether the issue of patta in 1986 in favour of Ganapathy Thevar and its implied waiver by Ganapathy Thevar in Ex.A.1 Will amount to equitable estoppel?

4. Whether the grant of patta or refusal to grant patta has got any impact on title and whether the grant of a patta and the subsequent payment of kists by the plaintiffs for two years prior to the filing of the suit on the basis of such patta can be said to establish the title of the plaintiffs to the suit properties when the defendants 1 and 2 are there as rival claimants putting forward title to the same?"

11. The learned counsel appearing for the appellant is present. Despite service of notice, the respondents 2, 3, 5 and 6 is not entered appearance either in person or through counsel and their names had been printed in the cause list.

12. The first contention of the learned counsel for the appellants is that the four boundaries of the plaint schedule suit properties are not described in the plaint and the lower Appellate Court failed to see that P.W.1 had admitted that the plaintiffs are entitled to only 2.86 acres whereas in the plaint, they have asked for 2.94 acres.

13. Secondly, the plaintiffs have claimed their right under the partition deed of the year 1958 alleged to have been taken place between Sangili Thevar and Ganapathi Thevar. But they have not produced any documentary evidence to prove the said partition and also the alleged sub-division in S.No.162 in the year 1975.

14. Thirdly, the plaintiffs have made their claim based on Ex.A.1 Will dated 14/9/1987, under which the properties are bequeathed to the plaintiffs by their father Ganapathi Thevar. The properties have been described as eastern half measuring 2.86 acres out of 5.72 acres. While so, the description in the suit property is not in consonance with the description of properties in Ex.A.6 as Ex.A.6 has come into existence after the filing of the suit.

15. Whereas the appellants/defendants had placed their reliance on Exs.B.1 to B.5 in which the properties have been dealt with by the wife of Sangili Thevar and the defendants. Therefore, the plaintiffs cannot claim any title to any other land excepting the lands bequeathed under Ex.A.1. Ex.B1 is a mortgage deed dated 31/1/1944 and Ex.B.2 is also a mortgage deed dated 14/11/1950 under which the said Sangili Thevar had mortgaged the western half measuring 2.86 acres out of 5.72 acres in S.No.162. This would evidence that the plaintiffs father had been dealing with the property on the western side even from the year 1944 and they have been in possession of the property. The above said documents have not been considered by the lower Appellate Court in their proper perspective. Similarly, Ex.B.3 dated 16/12/1955 and Ex.B.4 dated 1/8/1960

which is an endorsement on Ex.B.3. The description of properties in these mortgage deeds also refers only to the western half in S.No.162. Ex.B.5 is dated 9/8/1976 which is a mortgage deed wherein the first defendant had mortgaged the property in favour of the Co-operative Agricultural Bank. In all these documents, the defendants and their father Sangili Thevar had dealt with the property as that of their own. In Exs.B.3 and 4, the father of the plaintiffs, Ganapathi Thevar had signed as witness in those documents. In the property description in Ex.B.5, the eastern boundary is shown as Ganapathi Thevar Punja. Even in Ex.B.5 also, the father of the plaintiffs had signed as witness. In the same Bank, the father of the plaintiffs also had mortgaged the property of the eastern half in 5.72 acres in S.No.162 in which the western boundary is shown as that of the appellants.

16. A consideration of the above said documents in the proper perspective would reveal clear that the western half of the property was allotted to the share of the defendants father who had been dealing with it as that of their own and the eastern half share went to the plaintiffs father. When the father of the plaintiffs himself has only bequeathed the admitted extent as per Ex.A.1 Will, the plaintiffs are not entitled to claim over and above what they are actually entitled to. The mistake in the entry in the UDR patta has been taken advantage of by the plaintiffs which was later corrected in the year 1975 and separate patta and plan had been issued in favour of the respective parties.

17. In view of the same, the plaintiffs are estopped from claiming more than what they are entitled to in the suit. The other documents produced by the plaintiffs from Exs.A.13 to A.26 are all relating to the period after suit. Therefore, the same cannot be taken note of.

18. The plaintiffs having failed to establish their title independent of the defendants evidence is not entitled to a decree. The questions of law are answered in favour of the appellant. Accordingly, the judgment of the Appellate Court is set aside and the judgment of the trial Court is restored.

19. In fine, the second appeal is allowed and the order passed in A.S. No.50 of 1992 by the Sub-Judge, Srivilliputhur is set aside and the judgment passed in O.S. No.512 of 1989 by the District Munsif, Srivilliputhur is restored. No costs.