
(2009) 04 MAD CK 0322
In the Madras High Court
Case No : A.S. No. 332 of 2000

Nallasivam Gounder and Others

APPELLANT

Vs

Subramaniam and Others

RESPONDENT

Date of Decision : 30-04-2009

Acts Referred:

Citation : (2009) 6 MLJ 852

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : A.K. Kumaraswamys 1 and 2 and A.R. Nixons 3 to 5, for the Appellant; T. Murugamanickam for Respondents 1, 2, 4, 5 and 7, for the Respondent

Final Decision : Dismissed

Judgement

S. Rajeswaran, J.—This Appeal is filed against the judgment and decree passed by the Principal Subordinate Judge, Erode in O.S. No. 141 of 1994 dated 14.07.2000.

2. The defendants 9 to 13 in O.S. No. 141 of 1994, on the file of the Principal Subordinate Judge, Erode, are the appellants before this Court. They are aggrieved by the judgment and decree of the trial court dated 14.7.2000 decreeing the suit filed by the plaintiff in O.S. No. 141 of 1994, who is the first respondent before this Court.

3. The facts are as follows:

The first respondent herein, as plaintiff, filed O.S. No. 141 of 1994 for partition of the suit schedule property, for permanent injunction and also for cost. According to the first respondent/plaintiff, the suit schedule properties are situated in Erode measuring a total extent of 3.66 cents. Initially, the suit schedule properties were owned by Karuppanna Gounder and Kuppanna Gounder equally; when both of them were in possession and enjoyment of the suit schedule property, Karuppanna Gounder sold his undivided half share i.e. 1.83 cents to his son

Nachimuthu Gounder by a sale deed dated 26.3.1942. The remaining half share should go to the legal heirs of Kuppanna Gounder. The plaintiff is the son of Nachimuthu Gounder. Accordingly, both the plaintiff and defendants 1 to 8 are the joint owners of the properties. The plaintiff is entitled to half share and defendants 1 to 8 are entitled to the remaining half share.

4. The suit has been filed for partition as all of them could not enjoy the property jointly. It was also stated by the plaintiff in the plaint that defendants 1 to 8 in the suit sold their undivided share to the defendants 9 to 13 and therefore, defendants 9 to 13 were added as parties in the suit.

5. The suit was resisted by defendants 2 and 3 by filing a written statement wherein it was stated that the total extent of the suit schedule property shown in the plaint as 3.66 cents is not correct. According to them, the plaintiff's father Nachimuthu Gounder purchased 1.0 acre and 83 cents from the total extent and thereafter on 7.6.1982, he settled the property in favour of the plaintiff. The property is being enjoyed by all of them according to their convenience and the western side of the property is in possession of defendants 2 and 3. They also sold their share to the defendants 9 to 13 and therefore, they have nothing to do with the suit and the suit is to be dismissed. A similar written statement was filed by the defendants 4, 5 and 7.

6. The 9th defendant filed a separate written statement which was adopted by defendants 10 to 13. According to the 9th defendant, in 1956 itself, Karuppanna Gounder and Kuppanna Gounder partitioned the suit schedule properties. Out of the total extent of lands, some of the lands are good lands and some others contained rocks. Therefore, Karuppanna Gounder and Kuppanna Gounder partitioned the properties by taking into account the good lands and rocky lands and accordingly, Kuppanna Gounder was allotted 1.95 acres and Karuppanna Gounder was allotted 1.73 acres at the time of partition. After partitioning the property, a fence was also put up and both of them enjoyed their separate properties. After the death of Kuppanna Gounder, the legal heirs of Kuppanna Gounder partitioned their extent of 1.95 acres by a registered partition deed. According to the 9th defendant, after purchasing the property from the legal heirs of Kuppanna Gounder, he has spent a sum of Rs. 50,000/- for developing the lands which was well known to the plaintiff. Having kept quiet and even after knowing that the property was purchased by defendants 9 to 13, the plaintiff did not object to the development of the lands and therefore, the suit is to be dismissed.

7. The trial court on the basis of the above pleadings framed the following issues:

1. Is it true that there was a partition in 1959?
2. Whether the suit is barred by limitation?
3. Whether the suit is bad for non-joinder of necessary parties?
4. Whether the plaintiff is entitled to a decree of permanent injunction?

5. Whether the plaintiff is entitled to the relief as prayed for?

6. To what other reliefs?

8. The trial court held that there was no partition in 1959 as contended by defendants 9 to 13 and the suit is not barred by limitation. It further held that the suit is also not bad for joinder of necessary parties and the plaintiff is entitled to the relief as prayed for. Accordingly, the trial court granted a preliminary decree in favour of the plaintiff by allotting one share (half share) to the plaintiff in the total extent of the suit schedule property. The trial court also granted a decree of permanent injunction restraining the defendants 9 to 13 from altering the physical features of the suit schedule property till the properties were divided permanently. Aggrieved by the judgment and decree of the trial court, the above appeal has been filed by defendants 9 to 13 in the suit.

9. Heard the learned Counsel for the Appellants and the learned Counsel for the first respondent/plaintiff. I have also gone through the entire documents available on record.

10. The learned Counsel for the appellants submits that Exhibit A1 ? Sale deed dated 26.3.1947 was executed before the oral partition, but, the settlement deed dated 7.6.1982 (Ex.-A2) mechanically followed the description of property found in Ex.-A1 losing sight of the oral partition that has taken place in the intervening time. Therefore, according to him, the reliance placed by the trial court on Ex.A2 is misconceived and therefore, the findings of the trial court that there was no partition in the year 1959 are not correct and are liable to be set aside. He further adds that the plea of adverse possession has not been properly adverted to by the trial court, in the light of the judgment reported in AIR 1972 MAD 467 (Imbramsa Rowther (Minor) and Ors. v. S.K. Meerasa Rowther and Ors.). He further urges that the plaintiff knows very well that the property was purchased by defendants 9 to 13, who developed the property by levelling the plots with bulldozers for the purpose of laying the plots as House sites and selling them. Under such circumstances, it is a clear case of the plaintiff being estopped from denying the title of the defendants 9 to 13 or their vendors to the specific plots sold. He further states that there is a serious lacuna in the description of the property and therefore, the plaintiff/first defendant could not be given the relief of partition on the basis of the description of the suit property as it stands now.

11. Per contra, the learned Counsel for the first respondent/plaintiff submits that abundant evidence was available before the trial court to come to the conclusion that there was no partition in the year 1959 as contended by the 9th defendant. He further submits that no proof was let in to show that the description of the suit property is wrong and even otherwise, wrong description of the property will not stand in the way of the plaintiff in getting his relief. He further submits that there is no merit in the argument of the learned Counsel for the appellants on the ground of promissory estoppel, adverse possession and claim of ouster against the plaintiff. He further pointed out that only the appellants 1 and 2

(defendants 9 and 10) alone argued the appeal through their Counsel and the other appellants 3 to 5 (defendants 11 to 13) have not come forward with any arguments and therefore, it is deemed that they are not contesting the appeal. Hence, he prayed for the dismissal of the appeal.

12. I have considered the rival submissions carefully with regard to facts and citation.

13. The only issue that arises for consideration is whether the trial court has rightly decreed the suit or whether the judgment and decree of the trial court is to be interfered with or not.

14. Before the trial court, the plaintiff was examined himself as P.W.1 and Exhibits A1 to A7 were marked on his behalf. The 9th defendant examined himself as D.W.1 and one Palaniswamy was examined as D.W.2 (7th defendant) and exhibits B1 to B4 were marked on their behalf. The report of the Commissioner and his sketch were marked as Exhibits C1 and C2.

15. It is not in dispute that the suit schedule properties were owned by Kuppanna Gounder and Karuppanna Gounder and both of them owned and possessed the lands jointly. It is also not in dispute that the plaintiff is claiming through Karuppanna Gounder and defendants 1 to 8 are the legal heirs of Kuppanna Gounder. Karuppanna Gounder sold his undivided share in the property to his son Nachimuthu gounder on 26.3.1942, by a sale deed, which is marked as Ex.A1. Thereafter, Nachimuthu Gounder settled the very same property to his son Subramaniam (plaintiff) by executing a Settlement deed dated 7.6.1982 (Ex.A2). According to defendants 1 to 8, they partitioned the property among themselves on 24.12.1959, which is marked as Ex.B1. It is also not in dispute that defendants 1 to 8, who are the legal heirs of Kuppanna Gounder sold their properties to the defendants 9 to 13. The case of the plaintiff is that there was no partition between Kuppanna Gounder and Karuppanna Gounder at any point of time. But, the case of defendants 9 to 13 was that both Karuppanna Gounder and Kuppanna Gounder partitioned the property even before 1959 and only thereafter, that too, on the basis of Ex.B1, the legal heirs of Kuppanna Gounder partitioned their share and enjoyed the same. Their share was purchased by defendants 9 to 13 and therefore, according to defendants 9 to 13, the plaintiff could not claim the relief of partition as already there was a partition even before 1959 between Kuppanna Gounder and Karuppanna Gounder. It is also contended by defendants 9 to 13 that as the legal heirs as well as Kuppanna Gounder enjoyed the property separately which was well known to the plaintiff, the doctrine of ouster and the principles of adverse possession would dis-entitle the plaintiff from claiming any relief. Further, they pointed out that as there was no objection raised by the plaintiff to the purchase made by the defendants 9 to 13 and their development of the lands, the plaintiff is estopped from filing the suit for partition.

16. It is not in dispute that the defendants 1 to 8 did not come forward to

continue the suit proceedings even though a written statement has been filed. It is also not in dispute that the defendant 7 was examined on behalf of defendants 9 to 13 as D.W.2.

17. The trial court has rightly adverted to the fact that as defendants 9 to 13 purchased the property from the legal heirs of Kuppanna Gounder, they would not be in a position to know about the previous partition and enjoyment of the original owners and their family members. Therefore, the trial court placed its reliance on D.W.2 who is the 7th defendant and who is the grandson of Kuppanna Gounder. D.W.2 in his cross examination stated that he did not know that he was the 7th defendant in the suit even though he knew that the suit was filed by the plaintiff. But, he filed a written statement in the suit, wherein he admitted that there was no previous partition. Thus, what was spoken to by D.W.2 in his oral evidence is contrary to what was stated in his pleadings. Therefore, the trial court has correctly rejected his evidence.

18. Ex.A1 will prove that Karuppanna Gounder sold 1.83 acres of land to his son Nachimuthu Gounder. A perusal of Ex.A1 will show that there was no partition between Kuppanna Gounder and Karuppanna Gounder and they enjoyed the property jointly. This was also confirmed by Ex.A2 which is the Settlement deed executed by Nachimuthu Gounder in favour of the plaintiff Subramaniam. Though it was argued by the learned Counsel for the appellants that Ex.A2 does not show the real facts as it simply copied Ex.A1 with regard to the details of the property, there was no evidence let in, in support of this contention. In fact, the written statement filed by D1 and D8 would also show that there was no prior partition and the fore-fathers jointly enjoyed the property according to their convenience.

19. Therefore, I am concurring with the findings of the trial court that there was no prior partition before 1956 as contended by defendants 9 to 13.

20. I am also agreeing with the findings of the trial court with regard to Ex.B1 as it does not clearly establish that there was a partition between the eldest members of the family and therefore, I am also of the considered view that Ex.B1 will not prove the case of the defendants 9 to 13 that there was a prior partition between Kuppanna Gounder and Karuppanna Gounder.

21. After going through the entire evidence let in on behalf of the defendants, i.e. Ex.B1 and B4, I am of the considered view that they do not establish the case of defendants 9 to 13 and once it is proved that there is no prior partition before 1956 as contended by defendants 9 to 13, then the plaintiff is definitely entitled to the relief of partition. I am also of the considered view that there is no sufficient material made available by the defendants to prove the plea of adverse possession and the doctrine of ouster. In fact, the trial court has rightly observed that the defendants 9 to 13 have failed to produce the sale deeds under which they purchased the properties from D1 and D8. Further, D.W.1 (9th defendant) in his cross examination admitted that he did not know as to how the property was enjoyed by the family members and also he did not know how Karuppanna

Gounder and Kuppanna Gounder became the owners of the lands. In view of the oral evidence of D.W.1 and D.W.2 and their pleadings, the trial court has rightly come to the conclusion that the doctrine of ouster could not be put against the plaintiff. That apart, the trial court has also correctly decided the issue of promissory estoppel as the pleadings of the defendants in this regard are not matched with proper evidence. The trial court has also adverted to the contention of the defendants that the property was not properly identified and rightly decided the issue against them. Even otherwise, as rightly contended by the learned Counsel for the first respondent, that cannot be put against the plaintiff in claiming his relief.

22. Thus, the above issue is answered in favour of the plaintiff and against the appellants, as I am of the considered view that the trial court has rightly decreed the suit in favour of the plaintiff. The decision relied on by the learned Counsel for the appellants reported in AIR 1972 MAD 467 (cited supra), is clearly distinguishable on facts and the same is not useful to the case of the appellants.

23. In the result, I do not find any merits in the above appeal and accordingly, the appeal is dismissed and the judgment and decree of the trial court is confirmed. No cost.