

(2011) 01 MAD CK 0220

In the Madras High Court

Case No : Second Appeal No. 1198 of 2002

Y.R. Dharmalingam, (died), Vimala, Praveen and Selvi Preetha
Vs
Masiammal and Y.S. Ravi

APPELLANT

RESPONDENT

Date of Decision : 19-01-2011

Acts Referred:

Citation : (2011) 01 MAD CK 0220

Hon'ble Judges : M. Duraiswamy, J

Bench : Single Bench

Advocate : S. Vadivel Murugan, for the Appellant; A. Bobblie, for the Respondent

Final Decision : Dismissed

Judgement

M. Duraiswamy, J.—The above Second Appeal arises against the judgment and decree in A.S. No. 5 of 1999 on the file of the District

Court, Nilgris at Uthagamandalam modifying the judgment and decree in O.S. No. 143 of 1996 on the file of the District Munsif Court, Coonoor.

2. The Appellants 2 to 4 are the legal representatives of the deceased first Appellant, who was the Defendant in the suit. The Respondents are the

legal representatives of the deceased Plaintiff.

3. The Plaintiff filed the suit in O.S. No. 143 of 1996 on the file of the District Munsif Court, Coonoor for permanent injunction.

4. The brief case of the Plaintiff is as follows:

According to the Plaintiff an extent of 57 cents in Survey No. 251 of Yedappalli Village in Coonoor Taluk originally belonged to two branches of

families. One branch headed by the Plaintiff's father's father, Y.P. Bellie Gowder and the other headed by Nanthi Gowder. The two branches

effected an oral partition of the said extent of 57 cents in to two halves. Each

brach was enjoying their respective share of 28.5 cents of land without any hindrance from any third parties for the past 70 years. During the life time of the said Y.P. Bellie Gowder, he conveyed an extent of 2 cents of land in Survey No. 251 to one J. Matha Gowder, an extent of 0.05 cents of land to one J. Birman and an extent of 2.5 cents of land to one Ram Bellie. Thus the said Y.P. Bellie Gowder had sold an extent of 9.5 cents to three different parties out of his share of 28.5 cents in Survey No. 251. The said Y.P. Bellie Gowder died intestate leaving behind his only son namely Y.B. Boja Gowder, the father of the Plaintiff. The said Y.B. Boja Gowder was in peaceful possession and enjoyment of an extent of 19 cents in the suit Survey Number and died intestate leaving behind his two sons namely Y.B. Sankaran and Y.B. Krishnamurthy. The Plaintiff and his brother namely Y.B. Krishnamurthy effected oral partition and divided the property equally between them. Thus each is entitled to 9.5 cents. The Plaintiff has been in physical possession and enjoyment of his share of 9.5 cents of land in suit Survey Number with specific boundaries without any hindrance from any one. The Plaintiff's brother, Y.B. Krishnamurthy who is no more now has sold his entire share of 9.5 cents during his life time to third parties. After alienation the Plaintiff's brother had an extent of 1.5 cents of land in Survey No. 251/3. However he had again sold an extent of 2-1/4 cents of land in the suit survey number to Y.S. Nataraj though he had possessed only an extent of 1.5 cents. However the purchaser took possession of only 1.5 cents of land in the suit survey number. According to the Plaintiff he is in peaceful possession and enjoyment of his share of land in Survey No. 251/3 as absolute owner. The Defendant appears to have purchased an extent of 5 cents of land in the suit survey number from the said Y.B. Krishnamurthy, the brother of the Plaintiff. The Defendant has no right of any kind in the suit property. When the Plaintiff was making preparation for construction of a house in the suit property the Defendant attempted to disturb the Plaintiff's work and proclaimed that he would disturb the Plaintiff's construction work. In these circumstances, the Plaintiff filed the suit.

5. The brief case of the Defendants are is as follows:

According to the Defendants, Survey No. 251 measures an extent of 3.73 acres. After the sub division of the said survey number into S. No.

251/3, the two branches of family became entitled to 52 cents each and not 57 cents. There was no partition between the Plaintiff and his brother

Y.B. Krishnamurthy. The suit property is in joint ownership of both the Plaintiff and his brother Y.B. Krishnamurthy and their successors in interest

including the Defendant. The Defendant has got right, title and interest over the suit property. The suit, as framed by the Plaintiff is not maintainable.

The Plaintiff is not in physical possession and enjoyment of his alleged share of 9.5 cents of land in Survey No. 251/3 with specific boundaries. The

Defendant legally purchased 5 cents of land on 11.09.1992 from late Y.B. Krishnamurthy. Since the date of purchase, the Defendant is in

possession of the said extent of 5 cents in Survey No. 251/3. There is no necessity for the Defendant to trespass into his own property. The

Plaintiff ought to have filed a suit for partition. The Plaintiff has not come to the Court with clean hands for the grant of equitable relief of injunction.

In these circumstances, the Defendants prayed for dismissal of the suit.

6. Before the Trial Court on the side of the Plaintiff, two witnesses were examined and 30 documents Ex.A1 to Ex.A30 were marked and on the

side of the Defendants, three witnesses were examined and 22 documents Ex.B1 to Ex.B22 were marked. The Court documents were marked as

Ex.C1 and Ex.C2. The Trial Court after taking into consideration the original and documentary evidence of both sides decreed the suit.

7. Aggrieved over the judgment and decree of the Trial Court, the Defendant preferred an appeal in A.S. No. 5 of 1999 on the file of the District

Court, Nilgiris at Uthagamandalam. The Lower Appellate Court after taking into consideration the material available on record modified the

judgment and decree of the Trial Court by restricting the decree to 6.1/4 cents of land. Aggrieved over the judgments and decrees of the Courts

below, the Defendants have filed the above second appeal.

8. Heard Mr. S. Vadivel Murugan, learned Counsel appearing for the Appellants and Mr. A. Bobblie, learned Counsel appearing for the

Respondents.

9. At the time of the admission of the above second appeal, the following substantial question of law arose for consideration:

Whether the courts below are right in coming to the conclusion that the oral partition between the Respondent and the vendor of the Appellant

took place, when the oral partition was not proved by any evidence or in a manner known to law.

10. On a careful consideration of the materials available on record and the submissions made by both the counsel, it could be seen that the Plaintiff

had filed the suit for permanent injunction in respect of an extent of 9.5 cents of land in Survey No. 251/3. According to the Respondent/Plaintiff

when he was making preparation for construction of a house in the suit property the Defendant/Appellant attempted to disturb his construction

work. Therefore he filed the suit. However the Defendant contended that he purchased an extent of 5 cents under Ex.B3 sale deed dated

11.09.1992 from Y.B. Krishnamurthy, brother of the Plaintiff. Therefore he is entitled to the said 5 cents of land and the Plaintiff has no right or

title in respect of the said land. According to the Appellant/Defendant since the date of purchase he has been in possession and enjoyment of the

said 5 cents of land.

11. It is not in dispute that there is a house in the suit property. P.W.2, the Engineer was examined to prove that the house was constructed by the

Plaintiff. Though the Defendant disputed the contention of the Plaintiff with regard to oral partition between the Plaintiff and his brother, on a

perusal of Ex.A3 sale deed dated 01.12.1986 it is clear from the recital that there was an oral partition between the brothers prior to the execution

of the said sale deed. The suit was filed in the year 1996. Therefore there cannot be any motive for making a mention in Ex.A3 sale deed which is

of the year 1986. The suit was filed ten years after the execution of Ex.A3 sale deed. The Plaintiff mainly relied upon Ex.A2 to Ex.A6 sale deeds

to prove his possession. The Defendant rely upon Ex.B1 to Ex.B3 documents to prove his possession. The Plaintiff and Defendant not only dispute

the possession of each other but also dispute the title of each other.

12. According to the Plaintiff he has been in possession of 9.5 cents and the Defendant's father Y.B. Krishnamurthy had sold his 9.5 cents of land

under different sale deeds. Therefore after alienations he is not in possession of the suit property. The Panchayat Commissioner was examined as

D.W.3. However the evidence of D.W.3 does not help the case of the Defendant in any manner. However since the Plaintiff is in possession of the

house property, the Lower Appellate Court has rightly modified the judgment and

decree of the Trial Court by restricting the decree to an extent of

6.25 cents in the suit property. The Lower Appellate Court also rightly gave liberty to the parties to file a suit for declaration to establish their title.

13. In these circumstances, I find no ground much less substantial question of law to interfere with the judgment and decree of the Lower Appellate

Court. The second appeal is liable to be dismissed. Accordingly the second appeal is dismissed. However, there shall be no order as to cost.