

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.12.2009

CORAM:

THE HONOURABLE MS.JUSTICE R.MALA

S.A.No.280 of 2003

Mannu Gounder

.. Appellant/Respondent/Plaintiff

Vs.

1. Balasubramanian
2. Rangasamy
3. Purappalammal
4. Dhanam
5. Jayam

.. Respondents/Appellants/Defendants

Second Appeal filed U/sec.100 of C.P.C. against the judgment and decree dated 31.12.2002 in A.S.No.148 of 2000 on the file of the Additional District Court, Villupuram, against the judgment and decree dated 24.8.2000 in O.S.No.957 of 1995 on the file of the Principal District Munsif Court, Ulundurpet.

For appellant : Mr.S.Parthasarathy,
Senior Counsel for
M/s.Sarvabhauman Associates

For respondents: Mr.N.Suresh

JUDGMENT

The appellant-plaintiff has filed the Second Appeal against the judgment and decree dated 31.12.2002 in A.S.No.148 of 2000 on the file of the Additional District Court, Villupuram, reversing the judgment and decree dated 24.8.2000 in O.S.No.957 of 1995 on the file of the Principal District Munsif Court, Ulundurpet.

2. The averments in the plaint are as follows:

The suit property and other properties originally belonged to the plaintiff's father Chinnakesava Gounder. Till his death, he was in possession and enjoyment of the same. He was having two wives, the first wife is Chinathayee Ammal and the second wife is Marimuthu Ammal. Chinnakesava Gounder got a son by name Mannangatti Gounder, through his first wife. After the death of his first wife, Chinnakesava Gounder married Marimuthu Ammal as the second wife. Marimuthu Ammal gave birth to the plaintiff through Chinnakesava

Gounder. After the death of Chinnakesava Gounder, both the plaintiff-Mannu Gounder and Mannangatti Gounder are enjoying the property. They then divided the property by way of oral partition and they enjoyed their respective shares. Since Mannangatti Gounder died, his two sons, the defendants 1 and 2 are enjoying the property. The suit property is in possession and enjoyment of the plaintiff. The suit property's old Patta Number is 681 and new patta number is 1230. Since the plaintiff has been enjoying the suit property for more than 31 years, he prescribed title by adverse possession. The plaintiff has raised sugarcane crops in the suit property. Without right and interest, the defendants attempted to interfere with the peaceful possession and enjoyment of the plaintiff along with his brother-in-law, the third defendant, which was prevented. Hence, the plaintiff is constrained to file the suit for declaration and injunction. During the pendency of the suit, the defendants 4 to 6 were impleaded as the legal heirs of the deceased Mannangatti Gounder.

3. The gist and essence of the written statement filed by the defendants 1 and 3 are as follows:

The suit property and other properties belong to Chinnakesava Gounder and his son Mannangatti Gounder, who was born through his first wife. They are enjoying the property as joint family property. Chinnakesava Gounder died intestate leaving behind the plaintiff and the defendants and also the daughters Dhanam, Jayam and Alamelu. After the death of chinnakesava Gounder, the plaintiff-Mannu Gounder, Mannangatti Gounder, Dhanam, Jayam, Alamelu, Marimuthu Ammal succeeded to the property and they were enjoying the property as joint family property. In the year 1964, there was oral partition between Mannangatti Gounder and the plaintiff-Mannu Gounder. But it is false to contend that the suit property has been allotted to the share of the plaintiff. He was never in possession. In each and every item, half share has been allotted to Mannangatti Gounder and half share has been allotted to the plaintiff. In suit S.No.496/6, total extent is 2 acres 29 cents and in that northern 1 acre 84 cents belonged to the joint family, southern 45 cents belong to one Vedagiri Gounder, Chinnathu Gounder, Muruga Gounder, Narayana Gounder and Sanyasi Gounder and they divided the property and each having 9 cents in the property. In the southern 1 acre 84 cents, 67 cents have been allotted to the share of Mannangatti Gounder and northern 1 acre 17 cents have been allotted to the share of the plaintiff in the oral partition. Till his lifetime, Mannangatti Gounder was in possession and enjoyment of the southern 67 cents. After his death, his wife Purappammal and sons, who are the defendants 1 and 2 and daughters Dhanam, Jayam are in possession and enjoyment of the same and paying the kist of the property. The suit property's old patta No.681 and from Fasli 1382 onwards, patta has been changed, which was in the name of Mannangatti Gounder, and it stands in the name of the plaintiff's mother Marimuthu Ammal, Vedagiri Gounder and others as joint patta. The plaintiff wanted to

grab the property and he got patta in his name in the patta under the Land Possession Registration Welfare Scheme. So, the first defendant has given petition before the Deputy Tahsildar and then only patta has been changed in the name of the plaintiff, first defendant and others. So, the plaintiff is never in possession of the suit property for the past 31 years. He has not prescribed title by adverse possession. The plaintiff has obtained interim order of injunction and he is in possession and after the injunction has been vacated, the defendants 1 and 2 recovered the possession of 67 cents and they are in possession and enjoyment of the same. So, there is no cause of action for the suit. The document filed for raising of sugarcane crops is not pertaining to the suit property. The second defendant is mentally challenged person and so, the suit against him is void. The third defendant is unnecessary party for the proceeding and so, the suit is barred for misjoinder of necessary party. Hence, the defendants 1 and 3 prayed for dismissal of the suit.

4. The trial Court, after considering the averments, both in the plaint and in the written statement, has framed 11 issues and considering the oral evidence of P.Ws.1 and 2, D.Ws.1 and 2, Exs.A-1 to 30 and Exs.B-1 to B-8, decreed the suit as prayed for in the plaint. Against that, the defendants preferred A.S.No.148 of 2000. The learned Principal District Judge, Villupuram, after hearing the arguments, framed two points for determination and allowed the appeal and set aside the judgment and decree passed by the trial Court. Against that, the present Second Appeal has been preferred by the appellant-plaintiff.

5. At the time of admission of the Second Appeal, the following substantial questions of law were framed for consideration:

"(i) When the oral partition is not disputed, whether the lower appellate Court is correct in reversing the judgment of the trial Court which has been based upon correct application of law of evidence relating to burden of proof?

(ii) Whether in law the plaintiff can be non-suited without the defendants proving their case upon whom the burden and onus of proof lay?

(iii) Is not the judgment of lower appellate Court vitiated on account of misapplication of law relating to burden and onus of proof?

(iv) Whether in law the lower appellate Court can ignore the well established principle in law that in civil cases importance should be given to probabilities of the case especially when the defendants have not let into prove their case?"

6. The appellant as plaintiff filed the suit for declaration of title and injunction in respect of the suit property in S.No.496/2006, stating that originally, the property belonged to one

Chinnakesava Gounder. He was having two wives, first wife is Chinnathayee Ammal and her son is Mannangatti Gounder and the second wife is Marimuthu Ammal and the appellant-plaintiff is the son of Marimuthu Ammal and after the death of Chinnakesava Gounder, there was oral partition between Mannangatti Gounder and Mannu Gounder. In the oral partition, his share of the property has been allotted to him and from the date, he was in possession and enjoyment of the same. Since the defendants who are the children of the deceased Mannangatti Gounder and wife Purappal Ammal, had attempted to interfere with the possession and denied his title, he has come forward with the suit for declaration and injunction.

7. The respondents as defendants resisted the suit stating that it is true that the total extent of the suit survey number is 2 acres 29 cents, which have been divided among the family members and others. In the oral partition, northern portion has been allotted to the plaintiff-Mannu Gounder, the appellant herein and so, the defendants are in possession of the suit survey number and prayed for dismissal of the suit.

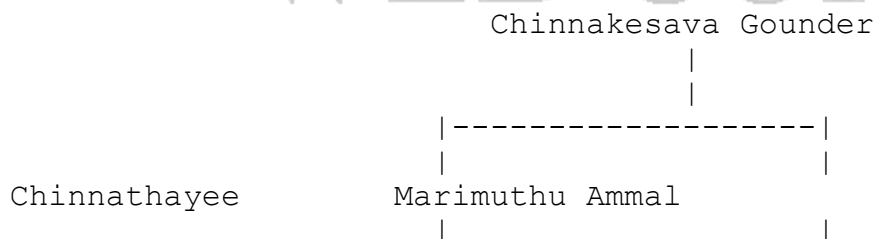
8. The trial Court, after framing necessary issues and considering the oral and documentary evidence, decreed the suit. Against that, the defendants preferred appeal. The learned first appellate Judge has come to the conclusion that in the evidence of P.W.1, Mannu Gounder, he himself admitted that in the oral partition, each was given their respective shares. He also fairly conceded and filed documents. His mother has executed a settlement deed as per Ex.A-2 in favour of his children in respect of 50 cents. Out of remaining cents, 45 cents belong to Vedagiri Gounder and others, which was divided among them equally. So, considering the evidence, the first appellate Court has set aside the judgment and decree passed by the trial Court, allowed the appeal and dismissed the suit. Against that, the present Second Appeal has been preferred by the appellant-plaintiff.

9. Learned Senior Counsel appearing for the appellant-plaintiff would contend that the suit property and other properties originally belonged to Chinnakesava Gounder and he was having his first wife Chinnathayee. It is admitted fact that after the death of the first wife-Chinnathayee, Chinnakesava Gounder married Marimuthu Ammal and through him, she gave birth to Mannu Gounder, the appellant-plaintiff. The learned Senior Counsel for the appellant-plaintiff would further contend that there was oral partition among the family members. The appellant-plaintiff is in possession and enjoyment of his share of the property from the date of partition. The appellant-plaintiff also filed joint patta Ex.A-3, standing in the name of mother and in that, it was stated that the property is hereditary and the appellant-plaintiff filed kist receipts Exs.A-4 to A-6 and Exs.A-10 to 13, all standing in the name of Mannu Gounder, the appellant-plaintiff. Exs.A-7 to A-9 kist receipts stand in the name of

Marimuthu Ammal, who is none other than the mother of the appellant-plaintiff. 'A' register has been marked as Ex.A-14. In that, it was stated that the entire extent belong to Sanyasi and Mannu and patta has been changed to No.1230. The appellant-plaintiff also paid kist, and the kist receipts have been marked as Exs.A-15 and 16. Adangal also has been marked as Ex.A-29. He raised sugarcane crops in the property. He sent the sugarcane to the Mill. The receipts of sugarcane sent have been marked as Exs.A-17 to 28. The trial Court has considered all these aspects in proper perspective and decreed the suit, whereas the first appellate Court has miserably failed to consider the adangal and Exs.A-3 to A-30 and dismissed the suit stating that the appellant-plaintiff has not proved his title to the suit property. Learned Senior Counsel appearing for the appellant-plaintiff submitted that the judgment and decree of the first appellate Court are perverse and prayed for setting aside the judgment and decree passed by the first appellate Court.

10. Per contra, learned counsel for the respondents-defendants would contend that it is true that originally, the property belonged to Chinnakesava Gounder and after his death, as per Ex.A-1, Marimuthu Ammal has executed a release deed and she retained 'A' schedule properties. In 'A' schedule properties, she retained 50 cents in suit S.No.496/6 out of 2 acres 29 cents and subsequently she executed a settlement deed in favour of children of Mannu Gounder under Ex.A-2 out of the remaining 1.79 cents, Vedagiri Gounder and others are having 45 cents. In Ex.A-14--'A' register, it was stated that the property stands in the name of Sanyasi and Mannu. Balance 1.34 cents had been divided equally between Mannangatti Gounder, the father of the respondents and Mannu Gounder, the appellant-plaintiff. So, each is entitled to only 67 cents. Ex.A-29 is for the Fasli 1383 to 1403 and it stands in the name of Kesava Gounder, Marimuthuammal and Sanyasi, for the respective Faslis. Moreover, P.W.1, the appellant-plaintiff in his evidence has fairly conceded that they have divided the property equal half share and so, the first appellate Court has considered these aspects in proper perspective and came to the correct conclusion. Learned counsel for the respondents-defendants relied upon the decision of this Court reported in 2000 MLJ 118 (Ravi Vs. Vellathan). He prayed for dismissal of the Second Appeal.

11. It is relevant to note the genealogy between the parties as follows:



	Mannangatti		Mannu Gounder (plaintiff)	
	=			
	Purappal Ammal			
	D4			

Balasubramanian	Arumugam	Rangasamy	Dhanam	Jayam
D1	D2	D3	D5	D6

12. It is true that other than the suit property, the family owns some other properties. Admittedly, as per Ex.A-1, 'B' Schedule properties have been given to Mannangatti and Mannu Gounder by Marimuthu Ammal. She retained 'A' schedule properties. In 'A' schedule properties, one of the items is in the suit property S.No.496/6, 50 cents, out of 2 acres 29 cents. Subsequently, she executed a settlement deed in favour of her grandsons through Mannu Gounder on 3.5.1980 in respect of 'A' schedule property mentioned in Ex.A-1. Ex.A-3 patta stands in the name of Marimuthu Ammal as per which, it was patta No.681. In that, it was stated that it was hereditary property.

13. Learned counsel for the respondents-defendants relied upon the decision of this Court reported in 2000 MLJ 118 (cited supra), wherein, it was held as follows:

"7. The Apex Court had an occasion to deal with similar issue in *Ram Saran v. Ganga Devi*, A.I.R. 1972 SC 2685, and in *Vinay Krishna v. Keshav Chandra*, A.I.R. 1993 S.C. 957. In these decisions, the Apex Court has come to the conclusion that where the defendant is in possession of some of the suit properties and the plaintiff in his suit does not seek possession of those properties but merely claims a declaration that he is the owner of the suit properties, the suit is not maintainable."

14. It is admitted fact by both sides that there was a partition between both families in the year 1964. So, in that partition, 67 cents have been allotted to Mannangatti Gounder, who in turn executed a settlement deed in favour of the first respondent under Ex.B-1 on 25.10.1972. The remaining 67 cents alone are in possession and enjoyment of Mannu Gounder. The respondents-defendants also filed Ex.B-2 which related to the period from Fasli 1382 to 1398. In that, Faslis 1382 to 1394, it stands in the name of Kesava Gounder and 1395 to 1398 stands in the name of Sanyasi. The respondents-defendants filed document Ex.B-3 patta transfer order. In that, the name has been given as Sanyasi, S/o Chinnathu Gounder, Mannu S/o Kesavan and V.Kuppasamy. The kist receipts have been marked as Ex.B-4 to B-8.

Even though the trial Court came to the conclusion that the appellant-plaintiff is the owner of the property, but the first appellate Court, on appeal, has considered the evidence of P.W.1 and came to the conclusion that the entire suit 1 acre is not allotted to him in the oral partition.

15. It is pertinent to note that P.W.1 in his evidence, at page 5, has fairly conceded as follows:

".... எனக்கும், மண்ணாங்கட்டிக்கும், குடும்ப சொத்துகள் சம்பந்தமாக நடந்த வாய்மொழி பாகப்பிவினையில் குடும்ப சொத்துக்களில் எனக்கும், மண்ணாங்கட்டிக்கும் சரிபாதியாக பிரித்துவிட்டார்கள். மண்ணாங்கட்டி கவுண்டர் இறந்து 15 வருடங்கள் ஆகிறது."

Further, he fairly conceded that he has not filed any document to show that he is in possession and enjoyment of 1 acre. In his evidence, he has further stated as follows:

"... 1 ஏக்கரை நான் தான் அனுபவித்து வருகிறேன் என்பதற்கு அடங்கல் எதுவும் தாக்கல் செய்யவில்லை."

In his evidence, he has fairly conceded that after partition, Mannangatti Gounder has executed the settlement deed in respect of 67 cents in the suit survey number, which came into existence after partition between both. He further stated that, "... வழக்கு சர்வே நெம்பரில் 67 செண்டை மண்ணாங்கட்டி கவுண்டர் முதல் பிரதிவாதிக்கு செட்டில்மெண்ட் எழுதிவைத்துள்ளார். அந்த செட்டில்மெண்ட் ஏற்பட்டது எனக்கும் மண்ணாங்கட்டிக்கும் பாகம் பிரிந்த பிறகு ஏற்பட்டதாகும்" Even though in his evidence he has stated that in suit survey number, no extent has been given, P.W.1 Mannu Gounder (plaintiff) himself admitted that Mannangatti has executed the settlement deed in favour of his son Balasubramanian, the first respondent-first defendant in the year 1972. But till the appellant-plaintiff filed the suit, he has not taken any steps to file the suit for declaration. But he filed the suit only in the year 1995. It is pertinent to note that Exs.B-5 to B-8 came into existence after the suit, but Ex.A-29 adangal shows the name of Kesava Gounder and Sanyasi. The appellant-plaintiff examined P.W.2 and his evidence is not helpful.

16. Per contra, the respondents-defendants have examined two witnesses, one Rangasamy was examined as D.W.1 and the first defendant was examined as D.W.2. They fairly conceded the partition and considering the evidence of witnesses and documentary evidence, it clearly shows that during the partition, only 67 cents in northern portion alone have been allotted to the share of the appellant-plaintiff. In the above circumstances, the appellant-plaintiff has not proved that he is the absolute owner of the suit property, i.e. one acre and he also failed to prove his possession. It is well settled principle of law that the plaintiff must prove his case. Here, the plaintiff has not proved his case. Hence, the first appellate Court has considered all the aspects in proper perspective

and came to the correct conclusion that the appellant-plaintiff has failed to prove his title to the suit property and also the possession. Hence, the judgment and decree of the first appellate Court do not warrant any interference and they are unassailable and liable to be confirmed.

17. In the result, the Second Appeal is dismissed. The judgment and degree passed by the first appellate Court are hereby confirmed. The suit in O.S.No.957 of 1995 is dismissed. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

CS

To

1. The Additional District Judge, Villupuram.
2. The Principal District Munsif, Ulundurpet.
3. The Section Officer, V.R. Section, High Court, Madras.

1 cc To Mr.N.Suresh, Advocate, SR.71235

1 cc To M/s.Sarvabhauman Associates, SR.71111

S.A.No.280 of 2003

SSN(CO)
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