



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

<i>Reserved on</i>	<i>Pronounced on</i>
02.04.2019	12.07.2019

CORAM:

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THE HONOURABLE MR.JUSTICE **R.PONGIAPPAN**

S.A. (MD) No.586 of 2009
and
M.P. (MD) No.1 of 2009

1. Arumugaperumal (died)
2. Alagusundarraaj
3. Poomari
4. Subbulakshmi
5. Madasamy
(Appellants 2 to 5 are brought on record
as legal heirs of the deceased sole appellant
vide order dated 16.03.2016) ... Appellants

versus

1. Thayumanaswamy (died)
2. Thamizholi
3. Paramasivam
4. Madasamy
5. T.Shamugavadivu
6. T.Balamurugan
7. Chitra
8. T.Subramanian
(Respondents 5 to 8 are brought on record
as legal heirs of the deceased first respondent) ... Respondents

Second Appeal filed under Section 100 of C.P.C. against the Judgment and Decree dated 13.11.2008 made in A.S.No.29 of 2006 on the file of the learned Subordinate Judge, Srivilliputtur, confirming the Judgment and Decree dated 07.12.2005 made in O.S.No.749 of 2004 on the file of the learned Principal District Munsif, Srivilliputtur.

For Appellants: Mr.M.Ashok kumar

For R2 and R4 : No appearance

For R3 : Dismissed for default vide Court order dated 09.07.2018

For R5 to R8 : Mr.M.Thirunavukkarasu

**JUDGMENT**

This appeal is directed against the concurrent findings made in O.S.No.749 of 2004 on the file of the District Munsif, Srivilliputtur and in A.S.No.29 of 2006 on the file of Subordinate Judge, Srivilliputtur.

2. Before the trial Court, the first respondent Thayumanaswamy filed a suit in O.S.No.749 of 2004 and seeking the relief of declaration declaring that the second schedule property is a common property of the plaintiff and defendants and also for the relief of injunction, restraining the 1st defendant from interfering with his peaceful possession and enjoyment of the suit schedule property. Apart from the above two reliefs, the plaintiff further prayed for the relief of mandatory injunction, directing the first defendant to remove the water pipe and electricity box fitted in the A, D Wall.

3. A counter claim has been filed by the first defendant for the relief to declare the A, D wall in the plaint plan as a common wall of the plaintiff and 1st defendant and for permanent injunction restraining the plaintiff from interfering with his peaceful enjoyment of A, D wall as a common wall and also for mandatory injunction to remove the 2nd schedule property of the counter claim which has been shown in the A, D wall in the Commissioner's Plan and also for costs.

4. The learned Principal District Munsif, Srivilliputtur, by Judgment and Decree dated 07.12.2005, came to a conclusion that the plaintiff has proved his case and passed a decree in favour of the plaintiff as prayed for. Further, she dismissed the counter claim filed by the first defendant.

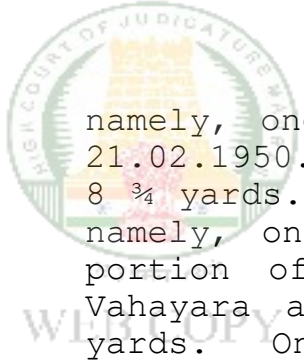
5. Against the said finding, the first defendant filed an appeal before the learned Subordinate Judge, Srivilliputtur. By Judgment and Decree dated 13.11.2008, the learned Subordinate Judge, Srivilliputtur, dismissed the appeal after confirming the findings arrived at by the trial Court.

6. Aggrieved over the same, the appellant/first defendant filed this appeal seeking the relief to set aside the decree passed by the Courts below.

7. For the sake of convenience, the parties are referred to as, as described before the Trial Court.

8. The averments made in the plaint, in short, are as follows:

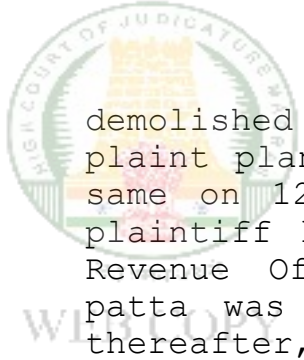
(i) The second schedule property is part and parcel of the first schedule property. The first schedule property belongs to the family of the plaintiff. The northern portion of the plaint schedule property was purchased by the father of the plaintiff,



namely, one Madasmy Tharaganar from Gurusamy Moopanar Vahayara on 21.02.1950. The east-west extension of the property purchased is 8 $\frac{3}{4}$ yards. Later on, in the year 1953, the brother of plaintiff, namely, one Natarajan purchased the eastern part of the southern portion of the plaint schedule property from Gurusamy Moopanar Vahayara and the east-west extension of the said property is 5 yards. On the same date, the said Natarajan has also purchased the western part of the southern portion of plaint schedule property from Gurusamy Moopanar Vahayara and the east-west extension of the said property is 5 yards. Later on, after the demise of the father of the plaintiff, the plaintiff and his brother, on 17.09.1965, entered into a partition in respect of the family properties. In the partition, the plaint schedule properties were allotted to the plaintiff as his share.

(ii) The plaintiff was a Government employee and he was working out of the locality. In the year 2000, he came to the Village and in the year 2001, he put up a construction in the first plaint schedule property. The constructed portion in the 1st schedule property is 23 $\frac{1}{2}$ feet in east-west and 38 $\frac{1}{2}$ feet in south-north. During the time of construction, he left the 2nd schedule property as a vacant site. The first schedule property has been shown in the plaint plan as A, B, C, D and the 2nd schedule property has been shown as A, D, E, F. The house of 1st defendant is shown in the plaint plan as M, N, E, H and the house of 2nd defendant is shown as M, N, F, F1, M1, O, B. The house of the 4th defendant is shown as P, O, G, M. After putting up a construction in the plaint schedule property, the 1st defendant approached the plaintiff and sought his permission to install electricity connection as well as water connection in the A, D wall temporarily. The plaintiff orally permitted him to install the same with a condition that it should be removed at the time of putting up a construction in the A, D wall. After some days, the 1st defendant started to claim right over the first schedule property and on 18.03.2004, the plaintiff filed a petition before the Tahsildhar and seeking the relief to cancel the patta granted in favour of the 1st defendant with respect to the second schedule property. On 19.03.2004, the 1st defendant tried to put up a construction in the 2nd schedule property and he put up a cement platform about 1 feet height in the southern portion of the said property.

(iii) As the 1st defendant claimed exclusive right over the 2nd schedule property, the plaintiff cancelled the permission given to him to install electricity connection as well as water connection in the A, D Wall. In this regard, he has sent a legal notice to the 1st defendant on 20.03.2004. For the said notice, the first defendant sent reply notice. As the first defendant tried to put up illegal construction in the second schedule property, a telegram was also sent to him and the same has also been replied by the 1st defendant similarly. As the 2nd defendant



demolished the common wall which has been shown as F, N, in the plaint plan, the plaintiff sent a legal notice and objected to the same on 12.04.2004. A complaint has also been preferred by the plaintiff before the Tahsildhar and the same was enquired by the Revenue Officials, by inspecting the spot and they found that patta was granted wrongly in the name of the 1st defendant and thereafter, the Tahsildhar cancelled the same and ordered that the 2nd schedule property is a common lane of the plaintiff and the defendants. Although the plaintiff has claimed exclusive right in the 2nd schedule property on the basis of the order of Tahsildhar, so as to avoid litigation, he agreed to keep the 2nd schedule property as a common lane to him and the defendants. In spite of that, the 1st defendant refused to remove the encroachments made by him in the 2nd schedule property. Hence, the present suit has been laid to declare the 2nd schedule property as a common lane for the plaintiff and defendants and also for mandatory injunction to remove the encroachments found in the A, D Wall as well as in the 2nd schedule property.

9. The averments made in the written statement filed along with counter claim by the 1st defendant is as follows:

(i) The plaintiff has no right over the second schedule property. It is the exclusive property of the first defendant. It is false to say that the father of the plaintiff purchased the northern portion of 1st and 2nd schedule property vide a sale deed dated 21.02.1950. It is also false to say that the 2nd schedule property along with adjacent portion was purchased by the brother of the plaintiff. The vendor had no right to alienate the 2nd Schedule property in favour of plaintiff's brother Natarajan. It is true that one Madasamy is the father of the 1st defendant and the east-west measurement on the northern side of the property is 26 ½ feet and east-west measurement on the southern side is 30 feet. In fact, the 2nd schedule property and the western wall of the plaintiff is a common wall to the plaintiff and the defendants and at no point of time, the 2nd schedule property was part and parcel of the 1st schedule property. It is also false to say that the plaintiff left 2nd schedule property as a vacant land while constructing his house. In fact, while at the time of constructing the house, there was a panchayat and in the Panchayat arranged by either parties, it was decided that the western wall has to be kept in common to both. So that, the first defendant installed water connection as well as electricity connection in the said wall. The wall on the southern side of the house of 1st defendant is annexed with the common wall. In such circumstances, the plaintiff has no manner of right to claim over the 2nd schedule property as an exclusive one. Further, no permission was granted by the plaintiff for fixing the electricity connection and water connection. It is false to allege that the patta granted to the 1st defendant was cancelled by the Tahsildar. In fact, the plaintiff put up a construction by encroaching the southern lane of the 1st schedule properties. Furthermore, the defendants 2



to 4 are not necessary parties to the suit and as such, the suit is bad for misjoinder of parties. Further, the suit is hit by law of limitation. Hence, the suit has to be dismissed and the counter claim has to be allowed.

10. The averments made in the reply statement filed by the plaintiff are as follows:

It is false to allege that a common wall is on the eastern side of the 2nd schedule property. It is false to allege that there was a panchayat, wherein, A.D. wall was ordered to be kept in common. The 1st defendant has no manner of exclusive right in the 2nd schedule property. Only to maintain the wall in the 1st schedule property, the plaintiff left the 2nd schedule as a vacant site. The 1st defendant has not traced out his title. The electricity as well as water connections were fitted with the A, D wall only with the permission of this plaintiff. All the encroachments in the Plaintiff Schedule property were made after institution of suit. Only after due enquiry, the Tahsildar cancelled the patta stands in the name of the 1st defendant. It is false to allege that there is a bathroom in the 2nd schedule property. Further, there is no cause of action for the counter claim. The description of property for the counter claim is a false one. It is false to allege that the southern lane of the plaintiff schedule property was encroached by the plaintiff. The 1st defendant has no manner of right over the southern lane. In fact, it belongs to plaintiff as well as the southern owner, namely one Subramania Moopanar. The construction was made before 10 years. Hence, the counter claim is liable for dismissal.

11. Based on the above pleadings, the learned Principal District Munsif, Srivilliputtur, framed necessary issues and tried the suit. Before the trial Court, on the side of the plaintiff, the plaintiff examined himself as P.W.1 and marked 18 documents as Exs.A1 to A18. On the side of the defendants, two witnesses were examined as D.W.1 and D.W.2. However, no exhibits have been marked on the side of the defendants. Apart from the document exhibited on the side of the plaintiff, the report and plan submitted by the Advocate Commissioner were marked as Exs.C1 to C4.

12. Having considered all the materials placed before him, the learned Principal District Munsif, Srivilliputtur, came to a conclusion that the plaintiff has proved his case. Ultimately, she granted a decree in favour of the plaintiff and declared that the second schedule property is a common pathway to the plaintiff and the defendants and also granted permanent injunction restraining the first defendant from interfering with his peaceful possession and enjoyment of the suit schedule properties.

13. In the appeal, the said finding arrived at by the trial Court was confirmed and the appeal filed by the first defendant was dismissed.



14. Feeling aggrieved over the same, the first defendant in the suit has filed this second appeal.

15. At the time of admitting the second appeal, this Court formulated the following three substantial questions of law:

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a. Whether a decree for mandatory injunction be granted to the plaintiff relying upon his statement that oral permission granted earlier has been revoked by him in the absence of any documentary proof for the same?

b. Whether relief can be granted to a person more than what he is entitled through the title deeds, merely based upon the oral evidence?

c. Whether the revenue deeds confer title to a person in the absence of valid document to show the title to the property?

16. During the pendency of this second appeal, the first defendant/appellant Arumugaperumal died and hence, his legal representatives were impleaded as parties to the proceedings as appellants 2 to 5. Similarly, the plaintiff/first respondent Thayumanaswamy also died and hence, his legal representatives were also brought on record as respondents 5 to 8.

17. At the time of hearing the arguments, there is no representation on behalf of respondents 2 and 4. Further, it appears from the records that the appeal was dismissed vide order dated 09.07.2018, insofar as the 3rd respondent is concerned.

Substantial Questions of Law No.1

18. Before the Trial Court, the plaintiff has claimed that as per the document dated 21.02.1950, 08.09.1953 and 08.09.1953, which was marked as Exs.A2 to A4 respectively, the suit first schedule property was purchased by his father and brother. In this regard, there is no dispute on the side of the first defendant.

19. It is the case of the plaintiff that the suit second schedule property is a part and parcel of the first schedule property. The said contention raised by the plaintiff was disputed on the side of the first defendant by saying that the suit second schedule property is the absolute property of the first defendant.

20. Now, in order to settle the said issue, it is necessary to see the documents relied on by the plaintiff. Before the trial Court, apart from Exs.A2 to A4, a partition deed executed among the brothers of the plaintiff was marked as Ex.A5. Only in the said document, the measurement of the suit property was mentioned as stated in the plaint.



21. Now, on going through the description of the property found in the plaint which reads as follows:

தபசில் சொத்து விபரம்

1. விருதுநகர் மாவட்டம், இராஜபாளையம் தாலுகா, மேலராஜகுலராமன் கிராமம், சத்திரப்பட்டி புதுத் தெரு சர்வே எண்.1684/22 கதவு, எண்.5/10 உள்ள காரை வீட்டிற்கு மால்

வடக்கு - புதுத் தெரு
தெற்கு - பொதுச்சந்தும் சுப்பிரமணிய முப்பனார் வீடும்
கிழக்கு - தென்வடல் பஜார் தெரு
மேற்கு - பொதுச்சந்தும்

இதற்குள் கிழமேல் 23 1/2 அடியும், தென்வடல் 38 1/2 அடியும் மேற்படி காரை வீட்டில் ஜன்னல், மின் இணைப்பு, தண்ணீர் குழாய் இணைப்பு, போர்வெல் சேர்த்து தபசில் சரி.

இதன் வரைபடத்தின் எ.பி.ச.டி என்று காட்டப்பட்டுள்ளது ஏ.டி.சுவரில் 1ம் பிரதிவாதியால் பொறுத்தப்பட்டுள்ள தண்ணீர் குழாய் மின் இணைப்பு, மின் பெட்டியும் சேர்த்து சரி.

2வது தபசில்

மேற்படி கிராமம், மேற்படி தெரு, சர்வே எண்.1684/21 உள்ள பொதுச்சந்துக்கு மேல்

வடக்கு - புது தெரு
தெற்கு - பொதுச்சந்தும், சுப்பிரமணிய முப்பனார் வீடும்
கிழக்கு - 1வது தபசில் சொத்து
மேற்கு - 1, 2 பிரதிவாதிகள் வீடு.

இதற்குள் கிழமேல் 3 அடி தென்வடல் 38 1/2 அடியும் சேர்த்து தபசில் சரி.

இதனை வரைபடத்தின் எ.டி. இ.எப். என்று காட்டப்பட்டுள்ளது. இதில் 1ம் பிரதிவாதியால் ஆக்கிரமிப்பு, செய்து எழுப்பியுள்ள கதவு, நிலை கல்கட்டு சுவர், சிமெண்ட் திண்டும், ஏ.ஊ. சுவரில் உள்ள மின் இணைப்பு, தண்ணீர் குழாய் மின் பெட்டியும் சேர்த்து சரி.

22. So, as per the description of the property found in the plaint, the measurement of the entire first schedule property is 23 ½ feet in east-west, 38 ½ feet in south-north and the measurement of the second schedule property is 3 feet in east-west and 38 ½ feet in south-north. On the other hand, on going through the description of the property found in Ex.A2-sale deed, it appears that the property purchased by the father of the plaintiff is 8 ¾ yards in east-west and 6 ½ yards in south-north. Further, as per Ex.A4, the east-west length of the property purchased by the brother of the plaintiff is only 15 feet (5 yards), but, in otherwise, with respect to the length of south-north, there was no dispute among the plaintiff and the first defendant. Before the trial Court, the learned Principal District Munsif, Srivilliputtur, appointed an Advocate Commissioner and thereafter, the report and plan filed by the Advocate Commissioner were marked as Exs.C1 to C4. As per the report submitted by the Advocate Commissioner, the measurement of the property now claimed by the plaintiff is 7.58 metre, i.e. equivalent to 26 feet.

<https://hcservices.ecourts.gov.in/hcservices>, on a comparative study, the measurement mentioned by the Advocate Commissioner is entirely different from the measurement claimed by the plaintiff. The plaintiff claimed



the property in accordance with Exs.A2 to A4. On the other hand, the prevailing circumstances (i.e. the measurement) of the suit land is more than the measurement claimed by the plaintiff in the plaint.

24. It is admitted on either side that the suit second schedule property is having Survey No. of 1684/21 and first schedule property is having a separate Survey No.1684/22. If really, both the properties purchased by the plaintiff are one and the same, there is no necessity for subdividing the same into two parts, which shows that the plaintiff claimed right over the suit schedule properties more than the right what he is having.

25. However, the Courts below came to a conclusion that the suit second schedule property is a common property of the plaintiff and first defendant. Now, on considering the said findings with the measurement found in the sale deeds, it cannot be said that the plaintiff is having right over the suit second item of the property.

26. Further, it is to be noted that in Ex.A2, the western boundary of the property, which purchased by the father of the plaintiff was mentioned as மாடசாமி முப்பனார் வீட்டுக்கும் பொதுகவருக்கும் கிழக்கு. Similarly, in Ex.A4, it was mentioned as பெ.மாடசாமி முப்பனார் வீட்டுக்கும் பொதுகவருக்கும் கீழ். Now, considering the boundary mentioned in Exs.A2 and A4, if really the properties were purchased from the house of the first defendant, there is no necessity to mention the common wall as one of the boundaries. So, mentioning the common wall as one of the four boundaries will disclose that the said wall is common to both the plaintiff and defendants. More than that, if really the plaintiff purchased the suit first schedule property along with the second schedule of property, since the second schedule of property is a pathway, necessarily, the plaintiff has to fix a door or a window in the second schedule of property. But, as per the report submitted by the Advocate Commissioner, the common wall (A, D wall) is not having any windows or doors. So, the prevailing circumstances clearly probalize the fact that a portion situated on the eastern side of the north-south common wall alone was purchased by the plaintiff. But, without considering the said fact, the Courts below came to the conclusion that second schedule property is a common property of the plaintiff and defendants. In other words, it is admitted on either side that the electricity fittings and water connection are fixed by the first defendant on the western side of the common wall.

27. In this aspect, the learned counsel appearing for the appellants contended that since the common wall is common to both the plaintiff and the first defendant, being the co-owner to the A, D wall, the first defendant is having the right to fix the same in

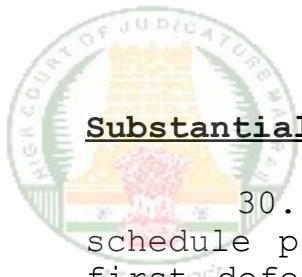


the said wall. On the other hand, the learned counsel appearing for the plaintiff contended that the said wall was constructed by the plaintiff alone and hence, the first defendant is not at all having any right to fix the electricity fittings in the said wall. In this regard, the first defendant stated in his evidence that for constructing the said wall, panchayat was held and as per the direction of Panchayat, he paid Rs.15,000/- towards his share. In support of the said evidence, D.W.2, who is one of the Panchayatdar, has also stated that Panchayat was held as stated by D.W.1. Even though he has stated in the chief examination as above, during the time of cross examination, D.W.1 has stated that no document is available to show that he paid Rs.15,000/- as his share. In the said circumstances, it is to be noted that if really the panchayat was held with regard to the construction of the said wall, definitely, the parties would have entered into a memorandum and the same would have been signed by the Panchayatdar. Further, there is no necessity to mention the said A, D wall as the western boundary in the sale deeds (Exs.A2 and A4). So, the evidence given by the first defendant with regard to the same cannot be accepted.

28. In this regard, P.W.1 has not claimed that the said wall is constructed by him. But, he has stated that only by considering the relationship between himself and the first defendant, he orally permitted the first defendant to fix the electricity fittings. The said evidence was denied as false one by the first defendant. Hence, it is the duty of the plaintiff to prove the said contention. But, in order to substantiate his claim, the plaintiff has not produced any relevant documents. So, the contention raised by the plaintiff that the A, D wall is his absolute property, is not correct. Even though the plaintiff revoked the permission given to the first defendant by advocate notice and this Court decides that the A, D wall is a common wall, permission cancelled by the plaintiff is in no way helpful to the case of the plaintiff. Accordingly, substantial question of law No.1 is answered.

Substantial Question of Law No.II

29. As already discussed, the measurement found in the title deed is entirely different from the measurement claimed by the plaintiff. Even though Ex.A5-partition deed is in favour of the plaintiff, considering the fact that only after purchasing A schedule property vide sale deeds Exs.A2 to A4, the plaintiff and his brother entered into partition. Under such circumstances, mentioning the east-west measurement as stated in the plaint is contrary to the measurement found in Exs.A2 to A4. So, the relief prayed by the plaintiff cannot be granted for the reason that he claims more than what he is entitled. Accordingly, substantial question of law is answered.

**Substantial Question of Law No.III**

30. It is admitted on either side in respect of second schedule property, in earlier, the patta stood in the name of the first defendant. Only on application filed by the plaintiff, the revenue authorities conducted an enquiry and cancelled the said patta, on 21.04.2004. The said order was marked as Ex.A16. While at the time of passing the order, the Tahsildhar, Rajapalayam, quoted the survey no.1684/2 is a common lane, in which, the plaintiff and the first defendant are having the right to use the same.

31. However, it is a settled position that the entires made in the revenue records does not confer any title in the absence of any valid documents.

31. In this case, the plaintiff has claimed right over the second schedule property on the ground that the Tahsildhar, Rajapalayam, cancelled the patta, which stands in the name of first defendant. As already stated, the entries made in the revenue records though reflect the possession, but, does confer any title over the property. So, the claim made by the plaintiff that the revenue records are in his favour, is no way helpful to the case of the plaintiff.

32. Accordingly, the findings arrived at by the Courts below are modified as follows:

The A, D wall mentioned in the plaint is a common property of the plaintiff and the first defendant. The B schedule property is the absolute property of the 1st defendant. However, the plaintiff is entitled to enter into the B schedule property for repairing the A, D wall after giving one week prior notice to the first defendant. In respect to the relief of mandaotry injunction, the appeal is allowed.

33. In the result, the Second Appeal is partly allowed as above, by modifying the findings rendered by the Courts below. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

Sub Assistant Registrar(CS)



To

1. The learned Subordinate Judge,
Srivilliputtur.

2. The learned Principal District Munsif,
Srivilliputtur.

Copy to:

The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+1 CC to M/s.M.THIRUNAVUKKARASU, Advocate (SR-75093[F] dated
12/07/2019)

**Judgment made in
S.A. (MD) No.586 of 2009
12.07.2019**

AM/SAR/09.08.2019/ 11P 6C