

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.08.2020

PRONOUNCED ON : 08.09.2020

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1239 of 2009 and
M.P.No.1 of 2009

(Heard through video conferencing)

1.Vembayee Ammal
W/o Ramasami Gounder,
Thiruppayar Village,
Vridhachalam Taluk.

2.Ramasami Gounder,
S/o Alagappa Gounder,
Thiruppayar Village,
Vridhachalam Taluk.

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Appellants

1.Singaravelu Udayar
S/o Amasami Udayar,
Erappayur Village,
Vridhachalam Taluk.

2.Samidurai Udayar
S/o Ramasami Udayar,
Erappayur Village,
Vridhachalam Taluk.

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Respondents

Prayer:- This Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree of the learned Additional

Subordinate Judge, Vridhachalam dated 19.06.2009 made in A.S.Nos.46 and 48 of 2008 partially reversing the judgment and decree of the learned District Munsif, Vridhachalam dated 15.04.2005 in O.S.No.425 of 2005 thereby decreeing the suit in O.S.No.425 of 2004.

For Appellants :Ms.G.Sumitra

For Respondents :M/s.V.Ayyadurai, Senior Counsel

JUDGMENT

The appellants herein are the defendants before the trial Court. Alleging encroachment by them suit filed for declaration and recovery of possession by the plaintiffs. The trial Court granted the relief of declaration and dismissed the possessory relief stating that the plaintiffs failed to prove the extent, manner and measurement of the encroachment.

2.Both parties went on appeal. The plaintiffs challenged the disallowed relief of recovery of possession. The defendants challenged the decree of declaration. The first appellate Court vide its common judgment, allowed the plaintiffs appeal and dismissed the defendants appeal. As a result, the plaintiffs succeeded in entirety. Against the common judgment in two appeals viz A.S.Nos.

46 and 48 of 2008 (on the file of Additional Subordinate Judge, Virdhachalam), the defendants filed a composite single second appeal challenging two decrees passed in the common judgement.

3.At the time of admission, the respondents herein (plaintiffs in the suit) raised objection about filing single Second Appeal against two decrees. This Court vide detailed order dated 06/12/2010 held that, in the factual scenario, allowing the defendants to file single Second Appeal against the common judgment and two decrees is justified.

4.The subject matter of the suit is a property of 182 Sqm in RS.No.45/1 (new survey No 197/14) at Thirupayar village, Nallur Panchayat Union, Veppur held by Vaidiyanatha Udaiyar. He died intestate leaving his two sons viz., Ramasamy Udaiyar and Thangavel Udaiyar. About 65 years ago, they divided the property into 91 Sqm each under a oral partition and started enjoying the same. The plaintiffs are sons of Ramasamy Udaiyar. The defendants are the purchasers of 810 sqft vacant site from the sons of Thangavel Udaiyar.

5.The case of the plaintiffs is that, in the oral partition, the property was divided into two half. Taking into consideration of the street running along the Northern boundary of the property and their other property on the South of the suit property, to enjoy the street on the North, division was made East – West to suit the convenience of both the brothers. The portion on the East was allotted to Thangavel Udaiyar. The portion on the West was allotted to Ramasamy Udaiyar. They were enjoying their respective properties till their death. The plaintiffs inherited the Western portion from their father Ramasamy Udaiyar after his death in the year 1977. The Eastern portion, after the death of Thangavel Udaiyar devolved on his sons Seetharaman and Paramasivam. In the year 1992, the defendants purchased a portion of the Thangavel Udaiyar share from his sons Seetharaman and Paramasivam. Till 2005, the plaintiffs were enjoying the suit property without any let or hindrance. The defendants who purchased the property in the year 1992 from the descendants of Thangavel Udaiyar, taking advantage of the mis-description of the boundaries in their sale deed, manipulated to get patta for the entire property. When this came to the notice of the plaintiffs, they objected and the patta so issued was cancelled. Presently, joint patta for the S.No 197/14 in the name of the plaintiffs and the defendants have been issued. Taking advantage

of the absence of the plaintiffs in the village, the defendants have encroached upon the plaintiffs portion of the land and had put up fence preventing the access of the plaintiffs to their southern property. Hence, the suit for declaration of title and recovery of possession was filed by the plaintiffs.

6.The defendants admitting the source of the title from Vaidiyanatha Udaiyar, contested the suit stating that, during the oral partition between the sons of vaidyanatha Udaiyar, a lane measuring East West 6 feet and North South 30 feet was set apart on the Eastern side for common usage. On the East of this common lane, Thangavel Udaiyar was allotted East- West 27 feet and North-South 30 feet land. South to the common lane and Thangavel Udaiyar portion, Ramasamy Udaiyar portion lies. On the south of the Ramasamy portion, Thangavel Udaiyar have other property. On the south of this property, there is another lane. After the demise of Thangavel Udaiyar, his sons Seetharaman and Paramasivem sold 810 sqft of land under sale deed dated 09/06/1992. Since then, they are in possession and enjoyment of the suit property. Initially, they had a cattle shed in that portion. Later in 1997, they constructed a house and it is assessed to tax since then. The plaintiffs have no right in that portion. They have

right only on further South of the lane lying south of their property.

7. Based on the pleadings, the trial Court framed the following issues:-

“1. Whether there was a partition between Ramasamy and Thangavel about 65 years ago and the suit property was allotted to Ramasamy ?;

2. Whether Thangavel was allotted 27 feet x 30 feet on the North of the suit property ?;

3. Whether the defendants trespassed ver the suit property in the year 2005 ?;

4. Whether the plaintiffs are entitled to the relief as prayed for ? and

5. To what relief ?”

8. Two witnesses on either side were examined. Two exhibits, Ex.A-1 and A-2 were marked by the plaintiffs. Four exhibits, Exs.B-1 to B-4 were marked by the defendants.

9.Except Ex.B-2 - sale deed dated 09/06/1992 on which the defendants claim right and title in respect of the disputed land, all other documents namely Exs.A-1, A-2 and B-1 are not in respect of the suit property but the properties around the suit property mentioning the property of the plaintiffs as one of its boundaries. These documents have rendered a little assistance to the Court to ascertain the exact nature of the location. Particularly, the existence of a common lane claimed by the defendants and referred as boundary in the defendants document Ex B-2.

10.The trial Court held that, as contented by the plaintiffs, in all probabilities, the property of Vaidyanatha Udaiyar should have been divided by East and West between his sons to have access by both parties to the street on the North. The plea of the defendants is improbable because, had the property divided Northern half and Southern half, the party who is allotted the Southern half will be deprived of the access to the street on the North. The alleged common lane of 6 feet width on the South could not have been accepted, no body would have consented for such an inequitable division. The trial Court having held so, granted

the relief of declaration. However, declined to grant the relief of recovery of possession since, the plaintiffs failed to provide evidence in respect of encroachment by providing a rough sketch or they should have sought for Commissioner inspection of the site to note down the physical features.

11.The plaintiffs preferred appeal in A.S.No.46 of 2008 against the disallowed portion of the relief. The defendants filed A.S.No.48 of 2008 against the declaration decree.

12.The lower appellate Court confirmed the finding of the trial Court in respect of declaration relief and reversed the dismissal of the possessory right. The lower appellate Court held that, the plaintiffs have proved that the vendors of the defendants had sold the plaintiffs portion to the defendants with wrong description. The defendants have admitted that they are in occupation of that portion and had constructed a house on it. Since, the relief sought for in respect of the recovery of the entire suit property on which the defendants occupying without title, the defendants are encroachers in the eye of law. Therefore, the plaintiffs are entitled to the consequential relief of recovery of possession also.

13.The learned counsel for the appellants submitted that, the lower appellate Court erred in holding the mode of division as claimed by the plaintiffs after observing that except the oral evidence of PWs-1 and 2, there is no material to prove the mode of division as claimed by the plaintiffs. The documentary evidence in the form of Exs.A-2 and B-1 would go a long way to show the mode of division was as claimed by the defendants only. The lower appellate Court erred in granting decree for possession which was negated by the trial Court assigning reasons. The defendants purchased the property in the year 1992. Constructed house on it in the year 1997 and enjoying it within the knowledge of the plaintiffs. However, the suit was filed 13 years after the purchase, therefore, the appellate Court ought not to have granted the possessory relief.

14.The parties admit that the whole extent of the property is a grama natham. R.S.No.45/1 (new S No. 197/14) was held by one Vaidyanatha Udaiyar and after his demise, the same was devolved on to his two sons Ramasamy Udaiyar and Thangavel Udaiyar. They divided the property among themselves equally 65 years ago. The dispute after 65 years of its division has cropped up

when the defendants obtained the patta for the entire property in their name. When the plaintiffs came to know about this erroneous mutation of revenue record, it was objected by the plaintiffs and got rectified. This fact is proved through Ex A-1.

15.Seetharaman and Paramasivam who are the sons of Thangavel Udaiyar had sold 810 sqft of land to the first defendant under the sale deed on 09/06/1992. The defendants claim right over the suit property under Ex B-2. A month before this transaction, on 06/05/1992, Seetharaman and Paramasivam had sold 1219 sqft of land in the same survey number to one Ponnusamy under Ex A-2. The said Ponnusamy was examined as PW-2. In this sale deed, the second defendant Ramasamy Udaiyar is one of the witnesses. Pending suit, the said Ponnusamy had purchased two pieces of property (609 sqft + 500 sqft) in S.No.45/1 under Ex.B-1 on 15/12/2006 from another Thangavel Udaiyar s/o Subburaya Udaiyar. Invariably, in all these documents, while describing the boundaries, the plaintiffs property is shown as one of the boundaries.

16.Seetharaman and Paramasivam who are the sons of Thangavel Udaiyar

are the common vendors to Ponnusamy and Vembayee ammal under Exs.A-2 and B-2 respectively. Under Ex.A-2 Ponnusamy has purchased 1219 sq ft from Seetharaman and Paramasivam on 06/05/1992. Under Ex.B-2, Vembayee ammal (first defendant) had purchased 810 sqft of land on 09/06/1992. Except in Ex B-2, in none of the other documents, the existence of private lane is mentioned. Only in the title deed of the defendants Ex B-2, a private lane is referred as Eastern boundary. Being a witness to Ex A-2, Ramasamy (DW-2) in the cross examination admit that the eastern boundary of the property is described as a lane, but there is no lane in existence. This contradiction between the document and the pleadings relied by the defendants had im-probablised the case of the defendants that the property of Vaidyanatha Udaiyar was divided North- South.

17.The plaintiffs have demonstrated before the Court that the sale deed Ex.B-2 relied by the defendants is fraught with mis-description and taking advantage of that, the defendants have discretely mutated revenue records and got patta for entire extent of 182 Sqmt though they purchased only 810 sqft. The plaintiffs being the descendants of Vaidhyanatha Udaiyar their ½ share in the property is undisputed. The advantage of having access from the East –West Road

on the Northern side is possible only if the parties divide the property East –West. There is no contrary evidence to show that one of the parties accepted for access from a 6 feet lane on the southern end.

18.Though the defendants had purchased the property with mis-description in the year 1992, his attempt to put up construction alleged to have happened in the year 1997. The suit is filed in the year 2005. Even before that the plaintiffs have protested the erroneous mutation of revenue records and had got it corrected. As pointed by this Court earlier, in the collateral proceedings regarding filing of single appeal against two decrees, this Court has accepted the view expressed by the learned counsel for the appellants that, in this case the factual matrix, the relief of declaration is main relief and the relief of possession is the consequential one.

19.This Court is able to visualise the fact that the defendants had introduced Ex.B-1 during the cross examination of PW-2 to impress the Court that their Vendors father Thangavel Udaiyar had property south of the suit property which was sold to PW-2 on 15/12/2006 under Ex B-1. The scrutiny of the exhibits

reveals the vendor Vaidyanatha Udaiyar son was not the Thangavel Udaiyar, but it is Subburaya Udaiyar son Thangavel Udayar. The executants of this sale deed are Thangavel Udaiyar s/o Subburaya Udaiyar and his minor son Sivasankar. The house tax receipts Exs.B-3 and B-4 are relied by the defendants to show their possession of the property since 1997. These receipts are dated 10/03/2000 and 10/01/2002. These receipts are after the mischievous mutation of patta for entire property in the name of the defendants. Therefore, this cannot be an evidence to hold their possession was since 1997 and got perfected by the time the plaintiffs filed the suit for delivery of possession.

20.The dispute is primarily regarding the mode of division by the joint owners. The plaintiffs have by preponderance of probabilities established that the mode of division was by East – West. The Courts below have concurrently held that the plaintiffs are entitled for the declaration to that effect. Regarding possession, the case of the defendants rightly not found acceptable by the lower appellate Court since, Ex B-2 upon which the defendants rely does not carry proper description and their possession over the suit property could not be based on this document hence, they are only encroachers. The defendants who could not

establish their title in respect of the suit property are bound to be evicted in the absence of proof for perfection of the defective title by other means.

21. Accordingly, this Court holds that there is no substantial questions of law for formulation in this second appeal. Therefore, confirms the lower appellate common judgement and decrees passed in A.S.Nos.46 and 48 of 2008 dated 19/06/2009.

22. In the result, the second appeal is dismissed. No order as to costs. Consequently, connected miscellaneous petition is closed.

jbm

Index: Yes/No

Speaking order/non speaking order

To

*1. The Additional Subordinate Judge,
Vridhachalam.*

*2. The District Munsif,
Vridhachalam.*

*3. The Section Officer,
V.R. Section, High Court, Madras.*

14/15

08.09.2020

G.JAYACHANDRAN.J.,

jbm



Pre Delivery Judgment in
S.A.No.1239 of 2009

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