



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 16.08.2021

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.130 of 2008

and

M.P. (MD)Nos.1 and 2 of 2008

Vikranth ... Appellant/ Appellant/2nd Defendant
Vs.
1.Regan ... 1st Respondent/1st Respondent/Plaintiff
2.Somanathan ... 2nd Respondent/2nd Respondent/1st Defendant

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 29.11.2007 passed in A.S.No.41 of 2005 on the file of the Subordinate Court, Kuzhithurai, confirming the judgment and decree dated 27.09.2004 passed in O.S.No.77 of 2001 on the file of the Principal District Munsif Court, Kuzhithurai.

For Appellant : Mr.T.Arul,
For Mr.R.Nandakumar.

For Respondents : Mrs.J.Anandhavalli for R1
No appearance for R2

JUDGEMENT

The second defendant in O.S.No.77 of 2001 on the file of the Principal District Munsif Court, Kuzhithurai is the appellant in this second appeal. The first respondent herein namely., Regan filed the said suit seeking the relief of partition and separate possession of 24 ¼ cents of land in the suit schedule property or in the alternative, a decree of demarcation of 24 ¼ cents of land immediately north of southern most 6 cents of land in the schedule property. The appellant herein filed his written statement controverting the plaint averments. Based on the divergent pleadings, the trial court framed the necessary issues.

2.The plaintiff examined himself as P.W.1 and marked Exs.A1 to A6. The first defendant examined himself as D.W.1 while the appellant herein examined himself as D.W.2. On the side of the defendants, Exs.B1 to B11 were marked. An advocate commissioner was appointed and he submitted his report and plan, which were marked as Exs.C1 and C2.



3. After a consideration of the of record, by judgement and decree dated 27.09.2004, the learned trial Court passed the following decree:-

"1. As per the Ext.C2 plan in R.S.No.336/9B and 19A with an extent of 24 ¼ cents be and hereby is demarcated in the suit property of CDYXEF to the plaintiff."

4. Aggrieved by the same, the appellant herein filed A.S.No. 41 of 2005 before Sub Court, Kuzhithurai. By the impugned judgement and decree dated 29.11.2007, the appeal was dismissed and the decision of the trail Court was confirmed. Questioning the same, this appeal came to be filed.

5. The second appeal was admitted on the following substantial question of law:-

"Whether the findings of the Courts below are perverse on account of non-consideration of the materials available on record including the report and plan submitted by the Advocate Commissioner?"

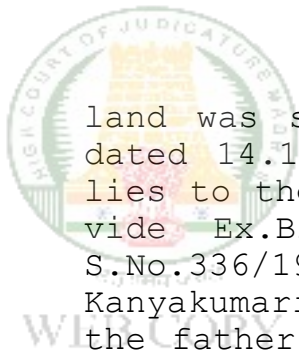
6. After hearing the learned counsel on other side, the following additional substantial questions of law were framed on 05.08.2021:-

"(i) Whether the suit for demarcation is maintainable in the facts and circumstances of this case?"

(ii) Whether the suit can be said to be time barred in view of Section 14 of the Tamil Nadu Survey and Boundaries Act, 1923? and

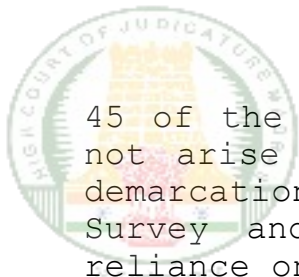
(iii) Whether the Courts below ought to have seen that the plaintiff has omitted to value the suit as per Section 45 of the Tamil Nadu Court-Fees and Suits Valuation Act?"

7. The learned counsel appearing for the appellant pointed out that the trial Court had negatived the prayer for partition as common ancestry regarding title or joint possession on ground has not been established. The only question for consideration is whether the plaintiff could have maintained a suit for demarcation. The case of the plaintiff is that his father had purchased 30 ¼ cents of land in old Survey Nos.1557A and 1557B vide Ex.A3/sale deed dated 06.05.1974 and that 6 cents of land out of the purchased property was sold in favour of the first defendant vide Ex.B1/sale deed dated 13.12.1995 and the remaining 24 ¼ cents of



land was settled in favour of the plaintiff vide gift deed/Ex.A1 dated 14.12.1995. The property settled in favour of the plaintiff lies to the north of what was sold in favour of the first defendant vide Ex.B2 and to the south of the property comprised in S.No.336/19. The learned counsel would point out that re-survey in Kanyakumari district was completed in the year 1996 itself. That the father of the plaintiff was aware of the re-survey exercise is apparent from the recitals of Ex.B1. He should have therefore, filed a suit within 3 years as contemplated under Section 14 of the Tamil Nadu Survey and Boundaries Act 1923. He has not done so. Therefore, on the face of it, the suit was barred by limitation. He also would point out that the plaintiff has not valued suit under Section 45 of Tamil Nadu Court-Fees and Suit Valuation Act. His primary ground of attack was that even though the antecedent title deeds may show a larger extent of land, the position on ground varied. Even though the appellant's father had purchased 45 cents of land from his vendor in the year 1980 under Ex.B5, what was actually available to him on ground was only 37 cents of land. When the plaintiff's father vide Ex.B1/sale deed dated 13.12.1995 conveyed 6 cents of land in favour of the first defendant, in the schedule to the document, he would state that R.S.No.336/9 comprises only 11 $\frac{1}{4}$ Acres of land. (Equal to 28 $\frac{3}{4}$ cents). But when he executed a settlement deed on the very next day in favour of the plaintiff, the plaintiff's father proceeded to convey 24 $\frac{1}{4}$ cents of land in R.S.No.336/9 apart from 6 cents already sold to the first defendant. When according to the plaintiff's father R.S.No.336/9 contains only 28 $\frac{3}{4}$ cents of land, after selling 6 cents of land in favour of the first defendant, he could have gifted only 22 $\frac{3}{4}$ cents of land in favour of the plaintiff. He could not have conveyed 24 $\frac{1}{4}$ cents of land in favour of the plaintiff. The learned counsel for the appellant also submitted that the plaintiff had failed to file the co-relation statement. He would also point out that it was the appellant's father, who had purchased the property to the north of the plaintiff's father's land vide Ex.B5 dated 20.11.1980. The appellant's father had passed away in the year 2000. The suit was filed a few months after the demise of the appellant's father. The appellant had specifically pointed out in his written statement that the property purchased vide Ex.B5 had devolved not only on the appellant but also on his mother and two other siblings. Therefore, a contention was taken that the suit was not maintainable for non-joinder of necessary parties. The learned counsel for the appellant submitted all these aspects were not at all taken into by the learned trial Court. He called upon this Court to answer the substantial questions of the law in favour of the appellant and set aside the impugned judgments and decree in toto.

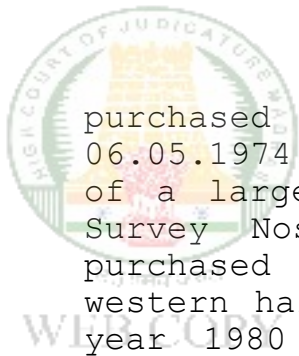
8.Per contra, the learned counsel for the contesting respondent submitted that the plaintiff had not at all filed the present suit under Section 14 of the Tamil Nadu Survey and Boundaries Act 1923 and that therefore, the question of paying Court fee under Section



45 of the Tamil Nadu Court-Fees and Suit Valuation Act, 1995 will not arise at all. Her specific contention is that the suit for demarcation can lie independently of Section 14 of the Tamil Nadu Survey and Boundaries Act 1923 and in this regard she placed reliance on the decision reported in **(1999) 3 MLJ 778 (Gnanaprakasam Vs. Smitha and Others)**. The learned counsel for the contesting respondent would point out that the title in respect of 30 $\frac{1}{4}$ cents of land purchased by the plaintiff's father/Nallathambi Nadar is not in dispute. The advocate commissioner after conducting a special inspection filed his report and plan, which were marked as Exs.C1 and C2. The advocate commissioner had categorically mentioned that the plan as well as report were prepared based on the measurement plan submitted by the appellant himself. The advocate commissioner had stated that old Survey Nos.1557A and 1557B correspond to R.S.Nos.336/9 and 336/19 and had found that 64 $\frac{1}{2}$ cents of land were available on ground as per re-survey. The learned counsel would strongly contend that the parties have gone to trial on the understanding that the measurement set out in the commissioner's report and plan is correct and that therefore, it is not open to the appellant to seek to revisit those issues in this second appeal. She also would point out that there is no merit in the appellant's counsel's contention that only a suit for declaration should have been filed. In this regard, she placed reliance on the decision reported in **2020-2-LW 317 (Arulmighu Velukkai Sri Azhagiya Singaperumal Devasthanam Vs G.K.Kannan and Others)**. The denial of title has to be bonafide. A bald denial of title is not sufficient. If the defendants deny the plaintiff's title, then the burden of proof is on him to show as to how the plaintiff is not having the title. She would also contend that there is no merit in the appellant's counsel's contention that the suit is bad for non-joinder of necessary parties. According to her, the appellant had sufficiently represented the estate of Arumuga Nadar and since there is substantial representation, the plaintiff ought not to be non-suited on this ground. She submitted that it is a well settled principle of law that on the ground of non-joinder, the plaintiff cannot be non-suited. She also submitted that the Court fee paid by the plaintiff was correct. She drew my attention to Section 6(2) of the Court-Fees and Suit Valuation Act, 1965. During the relevant time, the Court fee payable on a suit for demarcation was Rs.37/- only. Since the plaintiff had paid a higher Court fee seeking the relief of partition and since relief was sought in the alternative, there was no need to remit any Court fee for the relief of demarcation. She submitted that the Courts below have correctly approached the issues and no case has been made for interference.

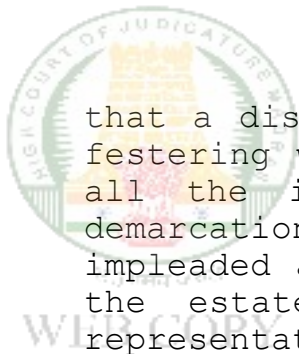
9.I carefully considered the rival contentions and went through the evidence on record.

10.The plaintiff's father namely., Nallathambi Nadar had



purchased 30 $\frac{1}{4}$ cents of land from one Indira vide Ex.A3 dated 06.05.1974. What was purchased by the plaintiff's father was part of a larger extent of 1 Acre 21 cents of land comprised in old Survey Nos.1533, 1554, 1555, 1557A and 1557B. The property purchased by the plaintiff's father fell on the southern side of western half. What was purchased by the appellant's father in the year 1980 under Ex.B5 was to the immediate north of what was purchased by the plaintiff's father. In other words, what was purchased by the appellant's father/Arumuga Nadar was on the northern side of the western half of the aforesaid extent of 1 Acre 21 cents of land. Now let us go by the plaintiff's case. The plaintiff would state that old Survey Nos.1557A and 1557B correspond to R.S.Nos.336/9 and 336/19. From the title deeds of both the parties, it is seen that old Survey No.1557A measured 50 cents while old Survey No.1557B measured 11 cents. Thus they both together measured 61 cents. From the commissioner's report, it is seen that R.S.No.336/9 measured 27 $\frac{1}{2}$ cents while R.S.No.336/19 measured 37 cents. Thus, according to the commissioner, these two would add upto 64 $\frac{1}{2}$ cents of land. From the single circumstance one can very easily note apparent discrepancy. That is why I find considerable merit in the contention of the appellant's counsel that if only a co-relation statement has been filed, such a confusion would not have arisen. I have no hesitation to hold that the commissioner was clearly wrong in coming to the conclusion that R.S.Nos.336/9 and 336/19 would comprise 64 $\frac{1}{2}$ cents of land on ground. It cannot be so.

11.As rightly pointed out by the learned counsel for the appellant, the suit for demarcation was filed after the demise of Arumuga Nadar. Arumuga Nadar had passed away on 25.10.2000. The present suit was filed on 19.02.2001. The parties are neighbours. The plaintiff obviously knew that Arumuga Nadar was survived by his widow wife and three children. Of course, the learned counsel for the contesting respondent would strongly contend that the plaintiff faced interference only at the hands of the appellant and that therefore, it was enough that the appellant alone was shown as contesting defendant. I am not able to accept this contention. The plaintiff has not filed a suit for injunction. The plaintiff has filed a suit for demarcation. It is well settled law that in a suit for demarcation, all the interested parties will have to be shown as defendants. The theory of substantial representation can be pressed into service only in a pending suit a defendant dies and all the legal representatives are not brought on record. Even then, the party invoking this theory will have to show that a due diligence enquiry was undertaken and that to their knowledge all the persons had been brought on record. In the case on hand, in the written statement itself, the appellant had pointed out that the suit is bad for non-joinder of necessary parties. The plaintiff should have therefore immediately taken steps to implead the other persons. Tomorrow they can certainly contend that the decree obtained against the appellant herein will not bind them. A Court of law must ensure



that a dispute is given a final quietus and it is not left like a festering wound. Just as a suit for partition will have to fail if all the interested parties are not impleaded, in a suit for demarcation also all the interested parties will have to be impleaded as defendants. It is not the case of the plaintiff that the estate of Arumuga Nadar was partitioned among the legal representatives and that the property immediately to the north the plaintiff's land was allotted to the appellant's share. When that is not case projected by the plaintiff, the suit obviously is bad for non-joinder of necessary parties.

12.Though I hold that the suit for demarcation filed by the plaintiff is very much maintainable and that it is not hit by limitation, it is suffering from the aforesaid fundamental defect. However, I shall not non-suit the plaintiff on this ground. Interest of justice requires that the plaintiff is given one more opportunity to remedy the defects pointed out.

13.In this view of the matter, the first substantial question of law is answered in favour of the plaintiff. It is not necessary to answer the other substantial questions of law. The impugned judgments and decrees are set aside. The matter is remitted to the file of the trial court. It is for the plaintiff to implead the other legal representatives of Arumuga Nadar and also file the correlation statement.

14.With these directions, the second appeal is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

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Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1.The Sub Court,
Kuzhithurai

<https://hcservices.ecourts.gov.in/hcservices/>



2.ThePrincipal District Munsif Court,
Kuzhithurai.

Copy to:

The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.J.ANANDHAVALLI, Advocate (SR-26439[F] dated 16/08/2021)

+1 CC to M/s.R.NANDAKUMAR, Advocate (SR-26593[F] dated 17/08/2021)

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