



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 16.02.2021

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A.(MD)No.541 of 2012

and

C.M.P.(MD)No.6577 of 2020

WEB COPY

P.Anthonyraj ...Appellant/Appellant/Plaintiff

Vs.

1.Jeyapandian

2.Natarajan

3.Pitchaimani

... Respondents/Respondents/Defendants

PRAYER: This Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 28.10.2011 passed in A.S.No.74 of 2006 by the Sub Court, Thoothukudi, confirming the judgment and decree dated 28.02.2006 passed in O.S.No.53 of 2002 by the District Munsif Court, Sathankulam and set aside the same.

For Appellant : Mr.G.Prabhu Rajadurai

For R1 : Mr.M.C.Swamy
for Mr.G.Rajaram

For R2 : Mr.Sivathilakar

For R3 : Mr.R.T.Arivukumar

JUDGMENT

As against the concurrent findings of the Courts below dismissing the suit filed for declaration and recovery of possession, the present second appeal has been filed.

2. For the sake of convenience, the parties are referred to herein, as per their rank before the Trial Court.

3.The brief facts, leading to the filing of this Appeal Suit, are as follows:-

The suit property originally belonged to one Poanniah Nadar. He had two sons namely, Pandi Nadar and Arichandra Nadar. After the demise of the said Ponniah Nadar, his sons, Pandi Nadar and Arichandra Nadar have partitioned the property on 30.05.1947. Since Arichandra Nadar died issueless, his share also devolved on Pandi Nadar and Pandi Nadar was in possession and enjoyment of the property. After the demise of Pandi Nadar, his children (plaintiff and one Ponraj, brother of the plaintiff) and his wife have partitioned the property on 30.06.1996 under a registered partition deed. In the said partition, the suit property for an extent of 4



cents in Survey No.58/5 was allotted to the mother of the plaintiff, namely Veerakaliammal. The brother of the plaintiff, Ponraj was allotted 2 cents in Survey No.58/5. The mother of the plaintiff had executed a gift deed in respect of her share allotted in the said partition on 12.03.1997 in favour of the plaintiff. The brother of the plaintiff has sold the property allotted to him in favour of the second defendant. The first defendant in the suit has no right whatsoever in the suit property. Taking advantage of the absence of the plaintiff, the defendants 1 to 3 tried to make encumbrance into the property. Thereafter, on 27.04.2002, the defendants trespassed into the property. Hence, the suit.

4. Before the trial Court, on the side of the plaintiffs P.W.1 and P.W.2 were examined and Exs.A1 to A9 were marked and on the side of the defendants D.W.1 to D.W.4 were examined and Exs.B1 to B10 were marked and Ex.C1 and C2 were also marked. Based on the materials and evidences, the trial Court dismissed the suit.

5. The first defendant has filed a written statement contending that he is in possession and enjoyment of 1 cent of land in the suit property for more than 40 years. On 02.08.1999, he has purchased the said land from the plaintiff's brother. Besides it is the contention of the first defendant that the uncle of the plaintiff, Arichandra Nadar has adopted him. He further contended that the suit is bad for non-joinder of Ponraj as a party to the suit, brother of the plaintiff.

6. The second defendant has also filed a written statement admitting that 6 cents of the suit property originally belonged to one Ponniah Nadar and after his death, his sons have partitioned the property. The second defendant has purchased 2 cents of the property by way of sale agreement. dated 20.05.1989 from the brother of the plaintiff. It is the contention of the second defendant that the land purchased under the said agreement is situated in the middle of 90 cents in Survey No.58/5.

7. The third defendant filed a written statement denying the case of the plaintiff and submitted that he has already filed a suit against the second defendant in O.S.No.320 of 1991. The said suit was decreed in his favour and he took delivery of two cents.

8. Based on the above pleadings, the trial Court has framed the following issues:-

1.Whether the suit properties are belonged to the plaintiffs?

2.Whether the plaintiff is entitled for the relief of injunction?

3. Whether the second defendant is entitled for the second scheduled property?

4. Whether the suit is estopped by earlier judgment?



5. Whether the suit is bad for non-joinder of necessary party?

6.To what other reliefs?

9. The trial Court having found that the suit property was allotted to the mother of the plaintiff and the same was gifted in favour of the plaintiff, non-suited the plaintiff mainly on the ground that the plaintiff's brother one Ponraj was not impleaded as a party in the suit. The trial Court further held that one of the electricity receipt was in the name of the second defendant and the plaintiff has not established the identity of the property. The First Appellate Court has also confirmed the same. Hence, the present appeal has been filed.

10. While admitting the second appeal, the following substantial questions of law were framed:-

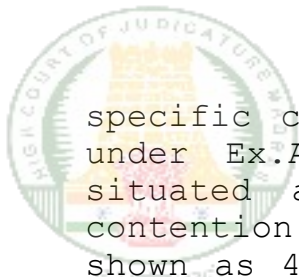
1.Whether the Courts below are correct in law in overlooking the registered deeds of conveyance in Ex.A1, Ex.A2 and Ex.A10 under which the devolution of title over the suit property in favour of the plaintiff was established particularly when the said documents are not disputed?

2.Whether the Courts below are correct in law in dismissing the suit for not impleading the plaintiff's brother Ponraj under whom the defendants claimed particularly when the said Ponraj had no subsisting interest in the suit property?

11. The learned counsel appearing for the appellant vehemently contended that the Courts below have not appreciated the documentary evidence in a proper manner. The title in respect of 6 cents of land is not disputed by the defendants. The mother of the plaintiff was allotted 4 cents and the brother of the plaintiff was allotted 2 cents in the suit property under Ex.A2. The mother of the plaintiff, under Ex.A10 has settled the entire 4 cents allotted to her in favour of the plaintiff. The plaintiff's brother Ponraj has also sold the said 2 cents in favour of the second defendant under Ex.A6, dated 08.02.1996.

12. It is the contention of the third defendant that he is in possession of a portion, which is shown as 'O P J D1' as shown in the plan. His further contention is that the suit property is 4 cents and identity of the same is not disputed. The appellant and the third defendant have also filed a memo of compromise stating that the third defendant is not claiming any right over the property.

13. The case of the second defendant is that he has purchased the property to an extent of 2 cents under Ex.A6. It is the



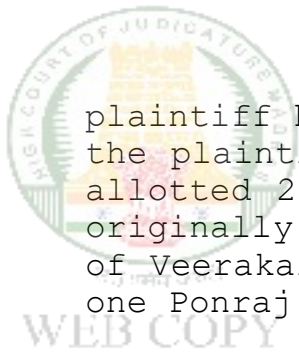
specific case of the second defendant that the property purchased under Ex.A6 is not situated within the suit property. It is situated adjoining to the suit property. It is the further contention that under Ex.A6 itself, one of the boundaries has been shown as 4 cents. Therefore, his contention is that the plaintiff is certainly entitled to declaration and recovery of possession in respect of 4 cents of land, which is in occupation of the first defendant, who has no title whatsoever. Though the first defendant claims title on the basis of possession as well as the title deed from one Ponraj, the said Ponraj had no title over the property and the title deed executed by him did not convey any title to the property, because he has already conveyed 2 cents under Ex.A6 to the second defendant. Therefore, Ex.B1 did not convey any title to the property in favour of the first defendant. These facts has not been considered by the trial Court.

14. The learned counsel for the defendants submitted that the first defendant is in possession of 1 cent of land. He has purchased the same under Ex.B1 and he is using that land as easementary right to reach other places and the plaintiff has not established the identity of the properties and the Courts below dismissed the suit mainly on the ground of non-joinder of necessary parties. Therefore, his contention is that when the identity of property was not established, the suit for declaration and recovery of possession is not maintainable. The second defendant submitted that identity of the properties has not been established. The Courts below have correctly found that that plaintiff is not entitled to any declaration and non-suited the plaintiff.

15. Heard the learned counsel appearing on either side.

16. When the materials perused, it is clear that the suit has been filed for declaration and recovery of possession in respect of the land to an extent of 1,700 sq.ft., which is below 4 cents in survey No.58/5. Though two properties have been shown as two items in the suit property, perusal of the Commissioner report makes it very clear that the suit property in both items were described as 'A B C D' and 'E F G H', that is one portion in the same plan and not the entirety. The same makes it clear that only one portion of property in that plan comprises the suit property for an extent of 1700 sq. ft. Northern side of the property shown in the plan is not in dispute.

17. It is not disputed by the parties that an extent of 6 cents, originally owned by one Ponniah Nadar. He had two sons, namely Pandi Nadar and Arichandra Nadar and they have partitioned the suit property and each allotted with 3 cents under Ex.A1 in the year 1947. It is the specific case of the plaintiff that Arichandra Nadar died issueless, therefore, his share devolved on his brother Pandi Nadar. After the death of Pandi Nadar, his wife and two

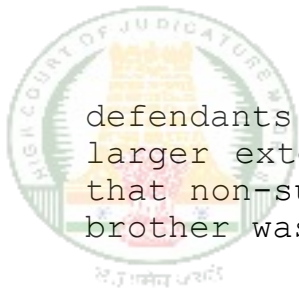


plaintiff have partitioned the suit property, in which the mother of the plaintiff was allotted 4 cents and brother of the plaintiff was allotted 2 cents. Ex.A2, makes it very clear that out of 6 cents, originally owned by Ponniah Nadar, 4 cents were allotted in favour of Veerakaliammal, mother of the plaintiff and 2 cents in favour of one Ponraj.

18. The contention of the plaintiff is that one of the son of Ponniah Nadar, died issueless and the same is not in dispute. Such view of the matter, it has to be presumed that his share also devolved on his only brother Pandi Nadar. After the death of Pandi Nadar, the above property dealt by his legal heirs under Ex.A2, wherein 4 cents were allotted to the wife of Pandi Nadar, mother of the plaintiff and Ponraj, brother of the plaintiff was allotted with the remaining land roughly about 2 cents under Ex.A2. The brother of the plaintiff has sold that land for an extent of 762 sq.ft. in favour of the second defendant under Ex.A6. Boundaries in Ex.A6 makes it very clear that the property sold to the second defendant is situated in the eastern side of the property allotted to the mother of the plaintiff under Ex.A2. Therefore, the above document makes it very clear that the property purchased under EX.A6 is the property situated in eastern side of 4 cents allotted under Ex.A2. Though the suit is also filed as against D.W.3, now it is submitted by both sides that the property in enjoyment of the third defendant is not situated within the area identified by the Commissioner as the suit property. Further, the third defendant has also filed a suit as against the second defendant and got decree and enforced the same and recovered possession of the property now referred as 'O P D1 J'. In fact a Wall has also been constructed.

19. As far as the above aspect is concerned, a memo has been filed indicating that the plaintiff is not claiming any right over the third defendant. In fact, the third defendant is not residing in the suit property and only the brother of the plaintiff is residing in the northern side of the suit property as could be seen from the Commissioner's report and also the memo.

20. Be that as it may, the contention of the second defendant is that he has purchased the property to an extent of 762 sq.ft. and as already held, in the suit property, 4 cents allotted to the mother of the plaintiff under Ex.A2. The main contention of the plaintiff is that the second defendant encroached the same at the relevant point of time. Therefore, he sought relief. When the identity of the property is not in dispute and the property of the second defendant was purchased under Ex.A6 and he is on the east of the property and the same cannot be taken advantage by the second defendant to contend that he is entitled to the suit property. Therefore, merely because of one electricity bill was in the name of the second defendant at the time of the Commissioner's visit that itself cannot be a ground to non-suit the title of the plaintiff, which has been proved under Exs.A1 and A2, A10 documents and the



defendants also not disputed the title and lie of 6 cents in a larger extent. Such view of the matter, this Court is of the view that non-suiting the plaintiff, merely on the ground that one of the brother was not impleaded as a party, cannot be countenanced.

21. It is to be noted that one Ponraj, brother of the plaintiff was allotted 2 cents under Ex.A2. He has dealt the same under Ex.A6. Therefore, as far as the suit property is concerned, he is not entitled for any relief and his right over some extent is also dealt by him. Such view of the matter, when the title is vested with the plaintiff, his brother is not necessary for the suit. It is not the case of the defendants that the properties are still undivided among the brothers. Therefore, his presence is not required. Such view of the matter, merely on the ground of non-impleading one of the brother, who has already dealt the property separately, which was allotted under Ex.A2, the suit cannot be dismissed.

22. As far as the first defendant is concerned, his contention is that he is in possession of the property for more than 40 years. To prove that possession, no documents whatsoever has been filed by the first defendant. He has taken three different stands in the written statement, that are (i) he has prescribed easmentary right over the suit property, (ii) he has purchased the property (iii) he is a adopted son of Arichandra Nadar. As far as his first and third contentions are concerned, absolutely there is no evidence. To substantiate the purchase, he has relied upon Ex.B1 dated 02.08.1989. On perusal of the same, it reveals that the first defendant appears to have purchased 1 cent in the suit property from Ponraj, brother of the plaintiff. It is to be noted that Ponraj was allotted only 2 cents under Ex.A2. He has also dealt his share under Ex.A6 in favour of the second defendant. When he has already exhausted his share, he had no title to the remaining properties to deal with the same. Therefore, merely on the basis of Ex.B1, the defendant could not get any title over the property. Therefore, merely on the basis of Ex.B1, the first defendant cannot seek recovery of possession and there is no dispute with regard to the title of the properties. Therefore, it cannot be stated that identity of the property has not been established by them. Even, the Commissioner report makes it very clear that there is no dispute with regard to northern part of the suit property namely, second item as referred above in the Commissioner report.

23. The third defendant is also not claiming any right over the southern portion shown in the Commissioner report. The property purchased by the second defendant also lies on the east of the suit property as per Ex.A6. Therefore, merely on the basis of some tax receipts in the name of the second defendant of the year 2003, which came into existence after filing of the suit under Ex.B2 and B3 and electricity receipts said to have been paid in the year 1998, when



the above period, it cannot be stated that the title of the plaintiff is not established and the plaintiff cannot be non-suited. The Courts below without going into these documents have non-suited the plaintiff merely on the ground of non-joinder of necessary parties. As already indicated, the brother of the plaintiff exhausted his right in the property under Ex.A6. He had no subsisting interest in the property. Therefore, his presence is no way required for effective adjudication of the suit, which has not been taken into consideration by the trial Court. Therefore, even the presence of the plaintiff's brother is no way helpful to the Court to decide the issue and it cannot be stated that without his presence, no effective adjudication could be done by the Court. Such view of the fact, this Court holds that the findings of the trial Court is nothing but without appreciation of the documents and principal of law. Accordingly, the points are answered.

24. In the result, the suit is decreed as against the first and second respondents for declaration and recovery of possession and the suit is dismissed as against the third defendant, in view of the compromise recorded between them. Memo of compromise between the appellant and the third defendant shall also form part and parcel of the decree and judgment. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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ENCL : Xerox copy of Compromise Memo.

To

1.The Sub Court, Thoothukudi.

2.The District Munsif Court, Sathankulam

Copy to:

The Section Officer,

Vernacular Records,

Madurai Bench of Madras High Court,

Madurai.(2c)

+1 CC to M/s.G.PRABHU RAJADURAI, Advocate (SR-5722[F] dated 17/02/2021)

+1 CC to M/s.R.MANIMARAN, Advocate (SR-5837[F] dated 18/02/2021)

S.A.(MD)No.541 of 2012

16.02.2021

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