



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 06.12.2021

DELIVERED ON : 09.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A(MD) .Nos.116 and 117 of 2005

WEB COPY

Harichandra Nadar
S/o.Ayothi Ramasamy Nadar

...Appellant/Appellant
/Plaintiff in S.A.No.116 of 2005
&

... Appellant/Appellant
/Defendant in S.A.No.117 of 2005

Vs

1.Kandhasamy Asari (died)

...Respondent/Respondent
/Defendant in S.A.No.116 of 2005
&

...Respondent/Respondent
/Plaintiff in S.A.No.117 of 2005

2.Arunachala Vadivu

3.Arunaselvi

4.Manikandan

5.Mariappan

6.Muthumari

7.Murugan

...LR of the respondents in both Appeal.

(R2 to R7 are brought on record as legal heirs of the deceased 1st respondent vide order dated 25.02.2019 made in CMP(MD)No.8277 to 8279 of 2018 and CMP(MD) No.8280 to 8282 of 2018 in SA(MD)No.116 & 117 of 2005).

COMMON PRAYER: Second Appeals are filed under Section 100 of Civil Procedure Code, against the judgment and decree of the learned Principal District Judge, Tirunelveli dated 28.09.2004 in A.S.Nos.187 and 186 of 2003 confirming the decree and judgment of the learned Principal Subordinate Judge, Tenkasi, dated 12.06.2003 in O.S.Nos.260 and 217 of 2000.

(In both second appeals)

For Appellant : Mr.Ananth C.Rajesh
Advocate
for Mr.M.S.Jawaharlal
Advocate

For R2 to R7 : Mr.S.Ramesh @ Ramaiah
Advocate



COMMON JUDGMENT

The plaintiff in O.S.No.260 of 2000 on the file of the Principal Subordinate Court, Tenkasi is the appellant. The plaintiff filed a suit for declaration of title and permanent injunction. The said suit was dismissed. As against the same, the plaintiff filed A.S.No.187 of 2003 on the file of the Principal District Court, Tirunelveli. The appeal was also dismissed. Challenging the said concurrent finding, the present second appeal in S.A(MD).No.116 of 2005 has been filed by the plaintiff.

2.The defendant in O.S.No.217 of 2000 on the file of the Principal Subordinate Court, Tenkasi, is the appellant. The plaintiff filed a suit for declaration of title, permanent injunction and mandatory injunction. The suit was decreed. As against which, the same defendant filed A.S.No.186 of 2003 before the Principal District Court, Tirunelveli. The appeal was dismissed. As against the same, S.A.(MD).No.117 of 2005 has been filed by the plaintiff.

3.The plaintiff in O.S.No.217 of 2000 namely Kandhasamy Asari had prayed for declaration and permanent injunction on the allegation that he has purchased the suit schedule properties under Exhibits A1 and A2 sale deeds. He had further contended that the suit schedule properties along with other properties were originally owned by one Ayothi Ramasamy Nadar who died leaving behind the defendant namely Harichandra Nadar and two sons namely Deivasigamani Nadar and Arumugam Nadar. At the time of partition, the defendant(Harichandra Nadar) was allotted the eastern most portion abutting north-south road and other brothers namely Deivasigamani and Arumugam were allotted back portion. In order to reach the properties allotted to the other brothers namely Deivasigamani Nadar and Arumugam Nadar, the 3rd schedule property was left out as a pathway. Hence, the defendant does not have any right, title or possession over the 3rd schedule property. The plaintiff further contended that the defendant had enclosed his property within a compound wall leaving out the 3rd schedule pathway. The plaintiff further contended that during the life time of Deivasigamani and Arumugam, overhead electric lines were drawn through the said pathway and underground water connections were also drawn through the 3rd schedule property. Hence, the defendant does not have any right over 3rd schedule property.

4.On the other hand, the said Deivasigamani and Arumugam alone had right over the 3rd schedule property. The plaintiff further contended that the said Arumugam had given up his share in the item No.1 in exchange of some other properties in favour of Deivasigamani Nadar. Thus, the said Deivasigamani became the



absolute owner of the item nos.1 and 2 in the suit schedule properties along with 3rd schedule property. The plaintiff further contended that the said Deivasigamani has executed Exhibits A1 and A2 sale deeds on 27.08.1997 in his favour and he became the absolute owner of the suit 3rd schedule property. He further contended that the defendant had constructed a wall obstructing the 3rd schedule property after filing of the suit and hence, he also prayed for a mandatory injunction for removal of the offending construction in the 3rd schedule property.

5.The defendant filed a written statement contending that though the suit schedule properties were jointly owned by the defendant along with Deivasigamani Nadar and Arumugam Nadar. At the time of partition, the 3rd schedule property was allotted to his share and he is the absolute owner of the said property. The defendant further contended that the present plaintiff is having property on the southern side of the joint family property and he is having an access to another main road located on the southern side. He further contended that neither the said Deivasigamani nor Arumugam had any right over the 3rd schedule property. The defendant further contended that he has raised the compound wall even prior to the filing of the suit.

6.The plaintiff in O.S.No.260 of 2000 is the defendant in O.S.No.217 of 2000. O.S.No.260 of 2000 was filed with a prayer for declaration that the the suit property is the absolute property and for permanent injunction restraining the defendant from disturbing his possession. The plaintiff had further contended that in the partition among his brothers namely Deivasigamani Nadar and Arumugam Nadar, the suit schedule property was allotted to the share, neither the defendant nor his vendor had any right over the suit schedule property at any point of time.

7.The plaintiff had further contended that Exhibits A1 and A2 relied upon by the defendant are forged documents and they cannot be relied upon. The plaintiff further contended that he was granted patta for the suit schedule property in Patta No.34 and his brother Deivasigamani was granted Patta for the 2nd schedule property in Patta No.430 and hence, the defendant who is the purchaser from his brother is not entitled for the suit schedule property.

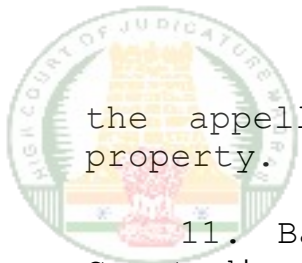
8.The defendant in the suit in O.S.No.260 of 2000 filed a written statement (plaintiff in O.S.No.217 of 2000) reiterating his allegation in the plaint in O.S.No.217 of 2000.

9.Both the suits were tried jointly by the trial Court. The trial Court considered Exhibits A1 and A2 sale deeds in favour of the plaintiff in O.S.No.217 of 2000 and also considered the rough



sketch filed by the plaintiff under Exhibit A3. Based upon the above said documents, the trial Court came to the conclusion that the 3rd schedule property belonged to Deivasigamani and Arumugam and the defendant Harichandra Nadar did not have any right over the suit 3rd schedule property. The trial Court also found that since the present plaintiff has purchased the suit schedule property from the co-sharers, the purchaser will also be entitled to the 3rd schedule property. The trial Court also found that the whole of the properties originally belonged to the ancestors of the Harichandra Nadar and later got fragmented in which the defendant Harichandra Nadar was allotted the portion abutting north-south road and other brothers were allotted the back portion. The trial Court also found that the properties allotted to the share of Deivasigamani and Arumugam had access to the main road only through the 3rd schedule property and there was no other access to the said brothers. Based on the said findings, the trial Court decreed the suit in O.S.No.217 of 2000.

10.The trial Court also found that the plaintiff in O.S.No.260 of 2000 has not produced any document to prove that he is the absolute owner of the suit schedule property. Except the pleadings, no other document has been produced by the plaintiff to establish his title and possession over the suit schedule property. The trial Court also found that the plaintiff in O.S.No.260 of 2000 has not proved that the property allotted to him includes the 3rd schedule property. The trial Court also found that the brother of Harichandra Nadar had drawn overhead electric lines and also underground water pipe line through the 3rd schedule property to reach the back portion. These facts will indicate that the plaintiff Harichandra Nadar in O.S.No.260 of 2000 did not have any right or title over the suit schedule properties. Based on the above said findings, the trial court decreed the suit in O.S.No.217 of 2000 and dismissed the suit in O.S.No.260 of 2000. The said Harichandran Nadar filed A.S.Nos. 186 and 187 of 2003 before the Principal District Court, Tirunelveli. The First Appellate Court concurred with the findings of the trial Court and held that except 3rd schedule property, there is no other access to the property of the Deivasigamani. The First Appellate Court also found that the contention of the appellant Harichandran Nadar that there is an alternative pathway on the northern side of the property is not factually correct. The First Appellate Court also found that the a single property when it is partitioned into three, the properties allotted on the back side will have to be granted access to reach the main road through some common passage. When the appellant is not able to establish that there is an alternative pathway, the case of the respondents has to be believed that the 3rd schedule was allotted to Deivasigamani and Arumugam. The First Appellate Court also found that since the property of the appellant is located abutting north-south road,



the appellant does not have any right over the 3rd schedule property.

11. Based on the above said findings, the First Appellate Court dismissed both the appeals. Challenging the above concurrent findings, the present second appeals have been filed.

12.The second appeals were admitted on the following substantial question of law"

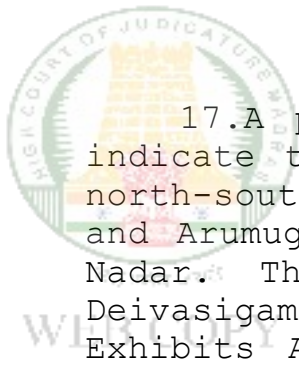
"(i)Whether the lower appellate Court is correct in deciding the proof of title on the basis of boundaries and evidences in favour of the plaintiff, while observing that no documentary proof was filed by either side, without taking into consideration of Ex.B4 to B6?

13.The learned counsel for the appellant has filed a written submission to the effect that Exhibits A1 and A2 sale deeds relating to 3rd item of the property have been created fraudulently. The brothers of the appellant namely Deivasigamani and Arumugam does not have any right or possession over the 3rd schedule property and hence, the sale deed executed by them is not valid in the eye of law.

14.Per contra, the learned counsel for the respondent contended that the respondent has established his title to the 3rd schedule property under Exhibits A1 and A2 and also by way of examining P.W.1 and P.W.2. He further contended that the Commissioner's report and plan will also indicate that there is no other pathway to have access to the 1st and 2nd schedule properties. The learned counsel further contended that the appellant has not produced any document to establish his absolute right over the suit schedule property. Hence, he prayed for dismissal of both second appeals.

15.I have considered the submissions made on either side.

16.It is not in dispute that a larger portion was originally jointly owned by three brothers namely, Harichandra Nadar, Deivasigamani Nadar and Arumugam Nadar. It is also not in dispute that three brothers entered into a partition in the year 1980 in which items nos.1 and 2 were allotted to share of Deivasigamani Nadar and Arumugam Nadar. While the other brothers Harichandra Nadar was allotted the front portion having direct access to the north-south main road. There is no dispute with regard to the extent or allotment of share in favour of the Deivasigamani and Arumugam. The parties have also agreed that Arumugam has given up his share in the suit schedule property in exchange of other properties in favour of Deivasigamani.



17.A perusal of rough sketch and commissioner's report will indicate that Harichandra Nadar was allotted a property abutting north-south main road. The other brothers namely, Deivasigamani and Arumugam were allotted properties on the west of Harichandra Nadar. The properties that were allotted to the share of Deivasigamani were later purchased by Kandhasamy Asari under Exhibits A1 and A2. Now, the purchaser namely Kandhasamy Asari claims that except 3rd schedule property, there is no other access to reach north-south main road.

18.On the other hand, the said Harichandra Nadar contends that there is a road on the northern side of the property allotted to Deivasigamani and Arumugam. Hence, the purchaser can use the said road.

19.Now the first issue to be considered is whether the property allotted to the share of Deivasigamani and Arumugam had access on the northern side of the property or the 3rd schedule property is the only access to reach north-south main road. The learned counsel for the appellant (Harichandra Nadar) contends that there is a reference about a road on the northern side of the property under Exhibit B3, a Will executed by one Malaiyammall in favour of the Ayothi Ramasamy Nadar.

20.It is needless to point out that Malaiyammall is the mother of three brothers namely Harichandra Nadar, Deivasigamani Nadar and Arumugam Nadar and Ayothi Ramasamy Nadar is their father. According to the appellant, since Exhibit B3 Will refers to a road on the northern side, the 3rd schedule property was not left out as a pathway for the Deivasigamani and Arumugam. During the cross examination, the appellant has admitted that except in Exhibit B3 Will, there is no reference about the road on the northern side in any one of the documents. The appellant is also not able to produce any revenue records to the effect that there was a road on the northern side of the joint family property. On the other hand, the appellant admits in his deposition that the northern side of the property is in occupation of some private parties and they have put up some construction. The Commissioner's report and plan also indicate that the northern side of the joint family property is in occupation of the private parties and there is no road as contended by the appellant. Hence, it is clear that, by some mistake, under Exhibit B3, a reference of a road on the northern side of the joint family property has been made.

21.When the Court has come to the conclusion that there is no other access to reach the main road for the allotment made to Deivasigamani and Arumugam, the next issue that arises for consideration is whether 3rd schedule property was allotted to them.



22.The deposition of the plaintiff clearly establishes that the 3rd schedule property was not allotted to the plaintiff. The appellant was allotted the eastern most portion abutting the main road. According to the deposition, the appellant has compounded his property even in the year 1986 by leaving out the 3rd schedule property. Even as per deposition of the appellant, overhead electric lines and underground pipeline have been drawn through the 3rd schedule property even during the life time of the said Deivasigamani Nadar and Arumugam Nadar.

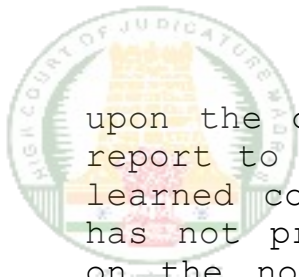
23.The learned counsel for the appellant further contended that the 3rd schedule property was allotted to the share of the appellant in a oral partition between the brothers. The appellant has not produced any oral or documentary evidence to establish his title over 3rd schedule property. On the other hand, the location and lie of the property will clearly indicate that the plaintiff was not allotted 3rd schedule property and it was allotted to the share of Deivasigamani and Arumugam.

24.So, viewed from any angle, the appellant does not have any title or possession over the 3rd schedule property. When 1st, 2nd and 3rd items absolutely belong to the Deivasigamani, he is legally entitled to convey the same under Exhibits A1 and A2 in favour of Kandhasamy Asari who is the plaintiff in O.S.No.217 of 2000.

25.A perusal of Exhibits A1 and A2 will clearly indicate that the 3rd schedule property was actually conveyed in favour of Kandasamy Asari. Hence, it is clear that the Kandasamy Asari has got title and possession over the 3rd schedule property.

26.When Kandasamy Asari is the absolute owner of the 3rd schedule property, the present appellant is not entitled to put up any construction in the 3rd schedule property. The appellant is also not entitled to open any doorway facing the 3rd schedule property. After obtaining interim injunction in the suit filed by him in O.S.No.260 of 2000, the appellant has constructed a common wall obstructing the 3rd schedule property. The commissioner's report will clearly indicate that the offending construction has been put up only pending suit. Hence, the respondent has prayed for a mandatory injunction for removal of the offending construction.

27.The learned counsel for the appellant further contended that the Courts below have erroneously relied upon the boundary recitals in favour of the plaintiff without considering Exhibits B4 to B6. Admittedly, the suit property is the ancestral property of the appellant's family, the brothers have partitioned the same orally. In these circumstances, the Courts below have to only rely



upon the oral evidence, boundary recitals and the Commissioner's report to arrive at a finding and the same cannot be faulted. The learned counsel further contended that the First Appellate Court has not properly considered the existence of alternative pathway on the northern side of the property allotted to the share of Deivasigamani and Arumugam. In fact, the First Appellate Court has properly considered Exhibit B3 Will which is the only document in which there is a reference about the street on the northern side. In fact, the appellant in his deposition has deposed that the northern side street is available only to the northern side of property of Deivasigamani and Arumugam and it is not available to the north of the property allotted to him. That apart, the appellant has not produced any revenue records or other public records to establish that there was a public street on the northern side. Even the appellant had admitted in his deposition that the northern side is fully occupied by the construction made by the third parties and there is no public street on the northern side. The Advocate Commissioner's report and plan also strengthen the fact that there is no public street on the northern side. Hence, the 2nd substantial question of law that the First Appellate Court has not considered the existence of alternative pathway is not legally sustainable.

28.The trial Court as well as the Appellate Court have carefully perused the pleadings, oral and documentary evidence and arrived at a conclusion that there is no alternative pathway on the northern side of the joint family property and at the time of partition, 3rd schedule was allotted to the share of the Deivasigamani Nadar and Arumugam Nadar. From the said Deivasigamani Nadar and Arumugam Nadar, the respondent has purchased the said 3rd schedule property under Exhibits A1 and A2. On the other hand, the appellant has not established his plea that the 3rd schedule absolutely belongs to him.

29.In view of the above said discussions, this Court does not find any illegality or irregularity in the judgment and decree of the Courts below. The substantial question of law is answered as against the appellant in both the second appeals. Accordingly, both second appeals are dismissed. No costs.

Sd/-

Assistant Registrar (RECORDS)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)



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 Principal District Judge,
Tirunelveli
- 2.The Principal Subordinate Judge,
Tenkasi

Copy to

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+2 CC to M/s.S.RAMESH @ RAMAIAH, Advocate (SR-37879, 37880[F] dated 09/12/2021)

+1 CC to M/s.M.S.JAWAHARLAL, Advocate (SR-38295[F] dated 13/12/2021)

S.A(MD) .Nos.116 and 117 of 2005
09.12.2021

PK(CO)
SB(19.01.2022) 9P 8C