



S.A.No.644 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 12.09.2022

PRONOUNCED ON: 20.10.2022

CORAM

THE HON'BLE Ms.JUSTICE P.T.ASHA

S.A.No.644 of 2020

and

C.M.P.No.13318 of 2020

Gajalakshmi

...Appellant/2nd respondent/2nd defendant

Vs.

1. Singaram

2. Desinghu

... Respondents/Appellant & Respondents 1, 3 to
7/Plaintiff & Defendants 1, 3 to 6 & LR of Govindasamy.

3. P.Baskar

4. P.Dayalan

5. The Block Development Officer,
Panchayath Union,
Kurinjipadi,
Kurinjipadi Taluk,
Cuddalore District.



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6. Vasantha

...Respondents/Appellant & Respondents 1, 3 to
7/Plaintiff & Defenants 1,3 to 6 & LR of Govindasamy.

PRAYER :- This Second Appeal is filed under Section 100 of the C.P.C, against the judgment and decree dated 18.12.2019 passed in A.S.No.72 of 2016 on the file of the II Additional Subordinate Judge, Cuddalore, reversing the judgment and decree dated 06.08.2016 passed in O.S.No.70 of 2011 on the file of the Additional District Munsif Court, Cuddalore.

For Appellants : Mr.R.Gururaj

For Respondents : Mr.Muralidharan [R.1]
: Dr.S.Suriya, AGP [R.5]

J U D G M E N T

The 2nd defendant is the appellant before this Court challenging the concurrent judgment and decree passed in the suit O.S.No.70 of 2011 on the file of the Additional District Munsif Court, Cuddalore pursuant to the judgement and decree of the II Additional Sub Judge, Cuddalore in A.S.No.72 of 2016. The facts are briefly set out herein below with the parties being referred to in the same ranking as before the Trial Court.



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2. The plaintiff had filed O.S.No.70 of 2011 for the following reliefs:-

i) Pass a decree declaring the title of the plaintiff to the suit "A" schedule and "B" schedule properties; and

ii) pass a decree for recovery of possession of suit "A" and "B" schedule properties free from the obstruction of defendants 1 to 5 through process of crust.

3. The properties which are the subject matter of the suit has described herein below:-

DESCRIPTION F PROPERTY

"A" SCHEDULE

Cuddalore Regn. District, Kurinjipadi Sub Reg. at Kalkunam Village, Survey NO.465/19 East West 5 feet and North-South 110 feet.



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Boundaries:-

North of Street, East of Singara Padayatchi's house site (plaintiff),
West of Govindasamy's house site and South of Kuppa Padayatchi's
house site.

"B" SCHEDULE

Cuddalore Regn. District, Kurinjipadi Sub Reg. at Kalkunam
Village, Survey No.465/19 East West 12 feet and North-South 110 feet.

Boundaries:

West of Singara Padayatchi's house site (plaintiff), North of Street,
East of Desingu's house site and South of Kuppa Padyatchi's house site.

"C" SCHEDULE

Cuddalore Regn. District, Kurinjipadi Sub Reg. at Kalkunam
Village, Survey No.465/19 East West 15 feet and North-South 110 feet.

Boundaries:

North of Street, West of "A" Schedule property East of "B"



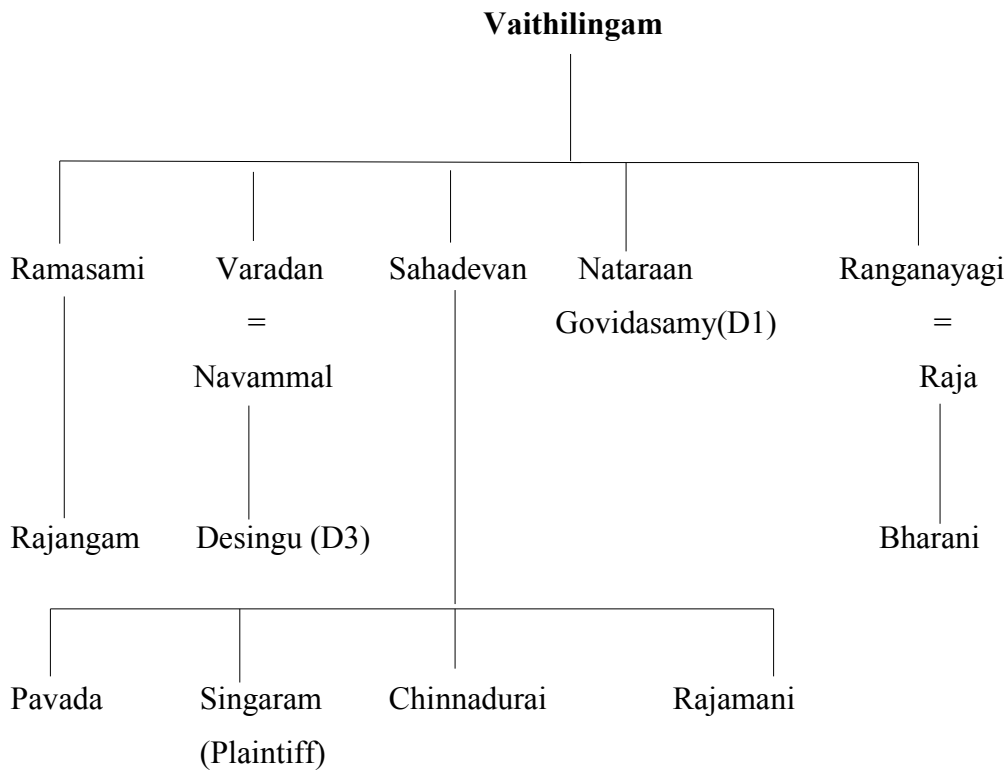
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Schedule property South of Kuppa Padayatchi house site.

4. The Genealogy in respect of the family of Sahadevan is extracted herein below so as to understand the relationship between the parties.

Genealogy:-





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Plaintiff's Case:-

5. It is the case of the plaintiff that on 14.11.1951, the plaintiff's father had purchased the "A" and "B" schedule properties along with other extent of properties. From the date of the purchase, he has been in possession and enjoyment of the same. In the year 1967, his father died intestate leaving behind him surviving the plaintiff and his three brothers, Pavadai Padayatchi, Chinnadurai Padayatchi and Rajamani Padayatchi. On 11.07.1974, the plaintiff's brothers had sold their shares to the plaintiff and since then, the plaintiff is in exclusive possession and enjoyment of the property. Defendants 1 and 3 are the sons of the plaintiff's junior and senior paternal uncle. Four years ago, the plaintiff had moved to Kurinjipadi. Defendants 1 and 3 being close relatives of the plaintiff requested permission from the plaintiff to extend their house for their convenient enjoyment as the property which they owned was of a smaller extent. The plaintiff, therefore, permitted them to occupy the "A" and "B" schedule of properties. The suit "C" Schedule property which is situated between "A" and "B" schedule property remained in the

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plaintiff's possession. The defendants while taking possession of the property had assured the plaintiff that they would hand over the vacant possession of the same as and when demanded by the plaintiff. However, contrary to the undertaking, the defendants attempted to put up a concrete house by availing the benefits of the Tamil Nadu Government Scheme, as if they were the exclusive owners of the said plots and had applied to the 6th defendant for the allotment in their name.

5.1. On coming to know about the said move the plaintiff had issued a legal notice to defendants 1 and 3 and 6 directing defendants 1 and 3 to hand over possession and requesting the 6th defendant to desist from accepting the request of defendants 1 and 3 for putting up a new construction. Meanwhile, the 1st defendant executed a settlement deed in favor of the 2nd defendant in respect of the "A" schedule property and although the 1st defendant was entitled to only 2 cents, he had fraudulently obtained the patta for a larger extent. Likewise, the 3rd



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defendant had executed a settlement deed in favour of defendants 4 and 5 in respect of the "B" schedule property. The plaintiff would contend that defendants 1 and 3 had no right to the "A" and "B" schedule property and consequently had no right to settle the properties on defendants 2, 4 and 5.

Written Statement filed by Defendants 1 and 3:-

6. The 1st and 3rd defendants had filed a written statement which was adopted by the defendants 2, 4 and 5. It is their case that the sale deed dated 14.11.1951 did not pertain to the suit property. The total extent of land in Old Survey No.465/19 was an extent of 12.50 acres. The sale deed covers east-west 32 feet and north-south 95 feet and the boundaries that are given therein do not relate to the suit items. Raja Padayachi and Kathayee Ammal did not have any right over the property sold.



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6.1. Further they would submit that there is no proof to show possession with the plaintiff. They would further submit that the sale by the plaintiff's brothers in his favour is of no consequence and would grant no right to the plaintiff. On the contrary, it is their contention that one Sellayi had owned sites in two places in Survey No.465/19, under sale deed dated 19.04.1940, she had sold an extent of 45 feet east-west and 96 feet north-south to one Ranganayaki, the daughter of Vaithilingam and the sister of the plaintiff's father.

6.2. The said Sellayi under another sale deed dated 09.03.1944, had sold 29 feet east-west and 96 feet north-south to the husband of the said Ranganayaki, and Navammal, the 3rd defendant's mother jointly. These sale deeds had taken place prior to the sale in favour of the Sahadevan. The further case of the defendants is that though different shares had been purchased, the sharers had sat down with Panchayatdars and orally effected a partition thereafter under an unregistered deed dated 11.04.1970, the oral division was reduced into writing under which each



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son of Vaithilingam, barring his daughter had partitioned the property with each branch getting an extent of 17 feet east-west and 51 feet north-south in Survey No.465/19. The said deed was signed by all the four sharers and on behalf of the plaintiff his elder brother Pavadai had signed the same. By a sale deed dated 14.04.1972, Rajangam, who is the son of the eldest son of the Vaithilingam had sold his share to the 1st defendant and left the premises. Therefore, the properties belong to the 1st defendant, 3rd defendant and the plaintiff's family.

6.3. It is also the case of the defendants that the properties that fell to the share of the 1st defendant was comprised in Survey No.239/14. The 3rd defendant's property in Survey No.239/12 and the plaintiff's property in Survey No.239/13. Although, the plaintiff and his brothers were entitled only to a quarter share under the sale deed executed by his brother in his favour. The sale has been effected with reference to a 3/4th share. The defendants would submit that the plaintiff had wanted them to



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purchase his share as it is sandwiched between the shares of the 1st defendant and the 3rd defendant. Since they were not willing to purchase the property, this motivated suit has come to be filed.

Trial Court:-

7. The learned Additional District Munsif, Cuddalore had framed the following issues which is translated into English from the vernacular are as follows:-

"1. Whether the sale deed dated 14.11.1951 is a true and valid document?

2. Whether the sale deed dated 11.07.1974 is a true and valid document?

3. Whether the defendants 1 and 3 are in occupation of the suit A and B schedule properties under the permission of the plaintiff?

4. Whether the plaintiff has a right to the Schedule A



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and B properties?

5. Whether the plaintiff is entitled to a decree of declaration and recovery of possession?

6. To what other reliefs is the plaintiff entitled to?"

7.1. An additional issue has been framed at the time of the judgment on the basis of the arguments advanced by the plaintiff and the defendants which reads as follows:-

"Whether the plaintiffs have prescribed title to the suit property by adverse possession?"

7.2. The plaintiff had examined himself as P.W.1 and marked Ex.A.1 to E.x.A.12. The defendants on the other hand had examined himself as D.W.1 and one Mani, Subramanian and Amartyalingama as D.W.2, D.W.3 and D.W.4 respectively.



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7.3. The learned District Munsif, Cuddalore on considering the evidence both oral and documentary, partly allowed the suit by granting the relief of declaration and denying the relief in so far as it related to the recovery of possession on the ground that the plaintiff has not described the extent of the encroachment.

Appellate Court:-

8. Aggrieved by the said judgment and decree, denying the prayer for recovery of possession, the plaintiff had filed A.S.No.72 of 2016, on the file of the II Additional Subordinate Court, Cuddalore. The defendants had not challenged the decree for declaration granted in favour of the plaintiff and the learned Subordinate Judge by his judgement and decree dated 18.12.2019 was pleased to allow the Appeal by stating that once the plaintiff has proved the title to the property, and it has been accepted by the Court, the plaintiff is automatically entitled to the relief for recovery of possession. This short judgment and decree has been taken up on appeal before this Court.



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9. When the appeal had come for admission, this Court had not admitted the same but had directed notice to the respondents. The respondents have also been served and the parties have appeared before this Court.

Submissions:-

10. Mr.R.Gururaj, learned counsel appearing on behalf of the 2nd defendant would canvass an argument that the plaintiff who has come to Court seeking declaration and recovery of possession has not identified the property which according to him has been encroached by the defendants. The suit is silent about the survey numbers and the buildings constructed thereon. In the absence of this plea, the Trial Court has rightly rejected the relief with reference to the recovery of possession, since from a reading of the plaint the Court could not arrive at a conclusion as to the extent of the encroachment and the property in which the encroachment had taken place.



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10.1. He would further submit that except for the legal notice under Ex.A.3, the plaintiff has not let in any evidence to show the extent of the property that has been encroached upon/trespassed into by the defendants. On the contrary, the defendants have produced the patta granted to them and he would submit that there is absolutely no pleading on the extent of encroachment done by the defendants and in view of the above, the Trial Court was right in rejecting the relief of recovery of possession.

10.2. He would further contend that the 2nd defendant who alone has challenged the judgment and decree of the Lower Appellate Court can challenge the decree for declaration at this stage also and in support of the same would rely upon the judgment reported in ***AIR 1974 (SC) 1126 - Smt. Ganga Bai Vs. Vijay Kumar and Others***. He would also rely upon the judgement of the Supreme Court reported in ***AIR 1955 (SC) 481 - Sahu Madho Das and others Vs. Mukand Ram and another***. He



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would submit that the judgement of the Lower Appellate Court is an absolutely non-speaking and does not give reasons for setting aside the judgement of the Trial Court with reference to the relief of recovery of possession.

11. Per contra, Mr. Murlidharan, learned counsel appearing on behalf of the respondent would submit that the appellant cannot seek to re-agitate the issue regarding the description of properties, identity of properties etc., since the Trial Court had after considering the evidence in detail had rendered a finding that the plaintiff is entitled to a declaration of his title to the suit property. Therefore, the Trial Court had confirmed that the suit property belonged to the plaintiff. This has not been challenged by the defendants by filing a cross-appeal or an independent appeal. He would rely on the judgment of this Court reported in **2021 (5) law weekly 905 - Sivanathan S/o. Bhaskaran Vs. Kunjukrishnan Panicker (died) & other**, where this Court had held that where there is an appeal and a cross-appeal the withdrawal of the appeal is not a fetter to the cross-appeal being heard. However, unless there is a challenge, the



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Court cannot suo motu grant a decree.

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11.1. He would submit that the appellant had suffered a decree for declaration against which they had not filed a cross-appeal before the Lower Appellate Court and now in the course of argument the counsel for the appellant had questioned the same. Therefore, the present argument that this Court can still go into the question of title is puerile. He would submit that once the Court comes to the conclusion that the properties belonged to the plaintiff, the decree for possession should automatically follow.

11.2. He would rely upon the Judgment of the Hon'ble Supreme Court reported in *AIR 1991 SC 395 - Smt. Gitarani Paul Vs. Dibyendra Kundu alias Dibyedra Kumar Kundu* which has also been cited before the Lower Appellate Court. He would therefore submit that the appeal does not contain any substantial question of law and nor has the 2nd defendant made out a case that the judgment and decree of the Lower



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Appellate Court suffers from a material irregularity.

12. Heard counsels on either side.

Discussion:-

13. The suit after a hot contest has been decreed in part. The Trial Court has declared the properties described as "A", "B" and "C" in the suit schedule as that of the plaintiff. The suit schedule describes the property in a great detail together with their measurements and boundaries. It is not the contention of the plaintiff that a small portion of the schedule "A" and "B" properties had been encroached. On the contrary, their contention is that the defendants have been put in possession of the "A" and "B" schedule property in its entirety and that they are refusing to vacate these properties and it is this extent that is stated to be the encroached area. The plaintiff has claimed a right over the "A" and "B" schedule property which has been granted. In the plaint the plaintiff would submit as follows:-

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" In course of time the plaintiff shifted his family to Kurinjipadi about 4 year back and at that time defendants 1 and 3 being the close relatives of plaintiff requested him to permit them to extent their house for convenient enjoyment as they own smaller extents and accordingly the plaintiff permitted defendants 1 and 3 to occupy the suit "A" and "B" schedule properties respectively. As such defendants 1 and 3 in permissive occupation of "A" and "B" schedule property described hereunder"

" On coming to know of the same the plaintiff has caused a notice to be issued to defendants 1 and 3 and 6 directing them to surrender possession of the suit, property and also requested the 6th defendant not to allot or sanction concrete houses."



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13.1. Therefore, it is clearly evident that the plaintiff has come to the Court with a case that the "A" schedule property and the "B" schedule property which are described with measurements are the extent in which the defendants had put in possession and which they are now refusing to hand over possession. The defendants have not challenged the decree for declaration. This Court in the judgment reported in **2021 (5) law weekly 905 - Sivanathan S/o. Bhaskaran Vs. Kunjukrishnan Panicker (died) & others** has observed that; even in cases where an appeal has been withdrawn and the cross-appeal is pending the Court is bound to hear the cross-appeal, though the Second Appeal has been withdrawn. However, in the case on hand, the defendants have not filed a cross-appeal, therefore, the decree for declaration has reached finality.

13.2. The Trial Court had dismissed the suit with reference to the relief of recovery of possession on the ground that the plaintiff has not described the extent of encroachment. The discussion stated supra would show that the plaintiff has clearly and categorically given the measurements of the "A" and "B" schedule properties which according to

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her was the extent in which the 1st and the 3rd defendants were put in possession and which they now refuse to vacate despite request and despite an undertaking given by them to vacate the same. Since the defendants had not challenged the decree for declaration of title, it can be safely observed that the Lower Appellate Court has correctly allowed the appeal.

13.3. In the judgement reported in ***AIR 1991 SC 395 - Smt. Gitarani Paul Vs. Dibyendra Kundu alias Dibyedra Kumar Kundu***, the learned judges had stated as follows:-

" In the face of clear pleadings and the evidence on record the High Court was wrong in reaching the conclusion that there was no pleadings and evidence regarding dispossession. Even otherwise in the face of the finding of the Courts below that the appellant-plaintiff had proved her title it was not necessary for the High Court to go into the question of ascertaining the date of dispossession. We, therefore, do not agree with the reasoning of the High Court and set aside the same.



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13.4. Therefore, considering the fact that the appellant has not been able to show any perversity in the judgment of the Lower Appellate Court since the Second Appeal also does not give rise to any substantial question of law, the Second Appeal is dismissed. However, there shall be no order as to costs. Consequently, the connected Miscellaneous Petition is closed.

20.10.2022

Index : Yes / No
speaking Order : Yes / No

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To,

- 1.The Additional District Munsif Court, Cuddalore.
2. The II Additional Subordinate Judge, Cuddalore.
3. The Block Development Officer,
Panchayath Union, Kurinjipadi,
Kurinjipadi Taluk, Cuddalore District.
- 4.The Section Officer,
V.R.Section,
High Court, Madras -104.



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P.T.ASHA, J.,

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Pre-delivery Judgment in
S.A.No.644 of 2020
and C.M.P.No.13318 of 2020

20.10.2022