



S.A.(MD) Nos.99 & 521 of 2010

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.07.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) Nos.99 and 521 of 2010
and M.P.(MD) No.1 of 2010

S.A.(MD) No.99 of 2010 :

1.R.Paramasivan (Died)	... 1 st Appellant/Appellant/ Defendant
2.Theivanai	
3.Murugan	
4.Samuthiravelu	
5.Kadarkarai Pandian	
6.Ganesan	
7.Vallithai	... Appellants 2 to 7/ LRs of deceased 1 st Appellant

[Appellants 2 to 7 – Brought on record as LR's of the deceased sole appellant vide order dated 21.06.2022 made in C.M.P.(MD) Nos.4696 and 4697 of 2022 in S.A.(MD) No.99 of 2010]

-VS-

1.E.Paramasivan (Died)	... 1 st Respondent/Respondent/ Plaintiff
2.Lakshmi	
3.Hepsi Prisillal	
4.Selvam	
5.P.Jaisingh	... Respondents 2 to 5/ LRs of deceased 1 st Respondent



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[R2 to R5 – Brought on record as LR's of deceased sole respondent vide order dated 03.09.2020 made in C.M.P.(MD) No.6583 of 2017 in S.A.(MD) No.99 of 2010]

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 20.11.2008 made in A.S.No.46 of 2007 on the file of the Sub Court, Sankarankovil, confirming the judgment and decree dated 22.01.2007 made in O.S.No.7 of 2004 on the file of the District Munsif cum Judicial Magistrate Court, Sivagiri.

For Appellants : Mr.R.T.Arivu Kumar

For Respondents : Mr.D.Nallathambi – for R2 to R5

S.A.(MD) No.521 of 2010 :

1.Paramasivan (Died)	... 1 st Appellant/Appellant/ Defendant
2.Theivanai	
3.Murugan	
4.Samuthiravelu	
5.Kadarkarai Pandian	
6.Ganesan	
7.Vallithai	... Appellants 2 to 7/ LRs of deceased 1 st Appellant

[Appellants 2 to 7 – Brought on record as LR's of the deceased sole appellant vide order dated 21.06.2022 made in C.M.P.(MD) Nos.4696 and 4697 of 2022 in S.A.(MD) No.521 of 2010]



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-VS-

Velayutham

... Respondent/Respondent/Plaintiff

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 06.01.2010 made in A.S.No.49 of 2009 on the file of the Sub Court, Sankarankovil, confirming the judgment and decree dated 26.03.2009 made in O.S.No.185 of 2004 on the file of the District Munsif cum Judicial Magistrate Court, Sivagiri.

For Appellants : Mr.R.T.Arivu Kumar

For Respondent : Mr.Ramesh Alias Ramiah

COMMON JUDGMENT

1.1. These two second appeals spring from two independent suits in O.S.No.7 of 2004 and O.S.No.185 of 2004 on the file of the District Munsif cum Judicial Magistrate Court, Sivagiri. The only connecting cord between these two suits is that the defendant is common in both the suits, and he has raised separate counter claims in both the suits based on a sale deed dated 03.02.2000 which came to be marked as Ext.B-1 in O.S.No.7 of 2004 and



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Ext.B-4 in O.S.No.185 of 2004. Both the suits were tried separately, judgments were delivered at different points of time, separate first appeals were preferred and those first appeals were also decided separately at different points of time. These appeals are now heard together essentially because (a) the first appellant/defendant's defence in both the suits and also cause of action in his counter claim are based on a sale deed dated 03.02.2000; and (b) that reliance has been placed heavily on the oral evidence recorded in O.S.7 of 2004 in the other suit in O.S.185 of 2004, which were marked Exts.A 12 to A 15. Therefore, how the defendant has positioned himself in one suit may have a bearing on the other suit.

1.2 For narrative convenience, the parties are referred to by their rank before the trial court.

A. O.S.No.7 of 2004 (S.A.(MD) No.99 of 2010) :

2. The material facts of this case are:

- This suit was laid by one E.Paramasivan for bare injunction. The suit



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property is described as a property comprised in R.Sy.No.1000/14, measuring an extent of 3 cents with specific boundaries. In the counter claim, the property in relation to which it is preferred is stated to be comprised in S.No.1000/15. The counter claim describes two items of properties, of which declaration of title and for injunction was sought as regards the property described in the second schedule.

- If boundaries are an indicator for identifying a plot of property, where the boundaries of the Schedule-I property in the counter claim of the defendant tallies with the boundaries of the suit property are the northern and the western boundaries. In the suit, the plaintiff gives the eastern boundary as Velayudham's property and the southern boundary as the property belonging to Oorkavalan. In the counter claim, the defendant gives the eastern boundary of Schedule-I property as belonging to one Esakku and the southern boundary as the property of one Gurusamy. This apart, the defendant describes Schedule-I property as a plot measuring 16.5 ft. east-west x 42.25 ft.



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north-south. The Schedule II property is described as part of the Schedule I property, and from the boundary description given, it appears that this plot forms part of the western portion of Schedule-I property, but no side measurements are specifically given for this property.

- The dispute went to trial, and the trial Court dismissed the suit on the ground that the plaintiff has not adduced evidence to identify the suit property candidly. Turning to the defendant's counter claim, it proceeded to dismiss it also on the ground that the defendant has not clearly identified the second schedule property in relation to which he claims declaration of title by its side measurements.
- Challenging the decree, the plaintiff preferred A.S.No.34 of 2007. On his part, the defendant preferred A.S.No.46 of 2007. The cause title to the appeal memorandum of A.S.No.46 of 2007 does not indicate that it was directed against the decree dismissing the counter claim as it merely stated that the appeal is preferred against the decree in



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O.S.No.7 of 2007. The Registry of the first appellate Court returned the appeal memorandum for including the schedules of property as provided in the counter claim of the defendant. This was done. Now irrespective of how the cause title appears, this Court might have to treat A.S.No.46 of 2007 as an appeal only against the dismissal of the counter claim of the defendant. This is because when the suit was dismissed, there is no need for the defendant to file an appeal to challenge the decree passed in the suit.

- Both A.S.No.34 of 2007 and A.S.No.46 of 2007 came to be dismissed by a common judgment of the learned first appellate Judge, vide judgment dated 20.11.2008.

3. In this suit for injunction, the plaintiff lost the suit essentially because he could not identify his property. As outlined earlier, the defendant lost his counter claim because he could not identify his plot within the first schedule property candidly. To expatiate it, the principal reason as to why the defendant had lost his counter claim before the trial court was essentially



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owing to his failure to provide the very side-measurements to Schedule II property. It appears, after the trial court had passed its decree, defendant became adventurous to take a perilous leap into the wild world of illegality and found to have clandestinely introduced side-measurements to the boundary description of II schedule property in the counter claim, which the first appellate Court was spot on to discover, and had held that what the defendant attempted was gross fraud on the judicial process. To get over it, the defendant had not seen to have filed any affidavit before the first appellate Court to the effect that the said finding of the learned first appellate Judge *vis-a-vis* this finding was wrong.

4. Challenging the decree dismissing his appeal in A.S.No.46 of 2007, the defendant has preferred S.A.(MD) No.99 of 2010. The plaintiff chose not to litigate further, but only defends S.A.(MD) No.99 of 2010. This appeal is admitted for considering the following substantial question of law:

“1) Whether the Courts below are correct in dismissing the counter claim in the suit, when the plaintiff's claim over the suit is dismissed?”



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2) Whether the Courts below are correct in negating the claim of the appellant where it has come to the conclusion that the respondent is not entitled to the suit property which is also covered under the counter claim.”

B. O.S.No.185 of 2004 (S.A (MD) No.521 of 2010):

5.1 The facts involved in this suit are:

- This suit was laid by a certain Velayudham (against the same defendant) for declaration of his title and for certain ancillary relief of injunction *vis-a-vis* the suit property.
- The suit property is described as Plot No.80 in Natham Survey No. 875/1 with a house bearing Old Door No.32C correlated to New Door No.30. The said plot is stated to lie to the south of VOC street, to the East of E.Paramasivan's (the plaintiff in O.S.No.7 of 2004) property.
- According to the plaintiff, the suit property was originally under the occupation of certain Gurusamy which had been assigned to him by the government under Ext.A1, dated 06.04.1991, that he had put up a



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house bearing door No:32C (new No:30) in that plot, that he had obtained electricity connection in his name, that he later mortgaged the property Vide Ext.A8 mortgaged deed, dated 14.11.1995, that on 11.03.1999 Vide Ext.A-2 he had sold the property to the plaintiff. The defendant however, had purchased the said property along with other property situated to the west of the suit property under Ext.B 4 sale deed dated 03.02.2000, from a certain Eswaran, who had no title to convey the same to the defendant.

- Turning to the case of the defendant, he admits that Gurusamy, under whom the plaintiff claims title, was in possession, but alleges that the suit property belonged to one Eswaran, under whom Gurusamy was working as an agricultural labourer. According to him, the house bearing door No:32C was assessed to property tax only in the name of the said Eswaran. While so, Eswaran inducted the plaintiff as a tenant, and even at the time of Ext.B-4 sale, the plaintiff was only a tenant of the suit property. So far as the alleged title of Gurusamy to the suit property is concerned, in 1976 Gurusamy had been assigned a



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plot of land by the Government, in which the government had later constructed a house under its housing scheme, and hence that Gurusamy was not even eligible to obtain patta in 1991. While so, Gurusamy requested Eswaran to sell the property to him, but the latter refused. This apart, after the defendant had purchased the suit property with other property under Ext.B-4, the plaintiff had laid a suit for bare injunction in O.S.143 of 2000 against this defendant before the Sub Court, Sankarancoil. This suit was partly decreed by the trial court, challenging which the defendant had preferred A.S.138 of 2002 before the First Additional District Court, Tirunelveli, and that on 28.02.2003 that came to be allowed vide Ext.B-3 judgement. Ext.B-5 is the related decree. In effect O.S.143 of 2000 laid by the plaintiff was dismissed vide Ext.B-6 judgement and Ext.B-2 decree. Thereafter, the plaintiff sought time till December, 2003, for vacating the house, but later he refused to vacate it. Hence the defendant issued Ext.B-12 notice dated 30.04.2004 to the plaintiff, but the latter did not respond to it. Inasmuch as the plaintiff has raised the same



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issue as involved in O.S.143 of 2000 again, this suit is barred by *res judicata*.

- On the same set of pleadings and on the strength of Ext.B4 sale deed, the defendant preferred a counter claim. The counter claim describes two schedules of properties: The Schedule I is described as a plot measuring 33 feet East-West x 42.25 feet North-South with a house bearing Door No.32C of which the Schedule II property is a part, and this is described as a plot measuring 5.2 feet along its northern boundary, 5 feet along the southern boundary, 13 feet on its western boundary, and 12 feet along the eastern boundary. And, vide his counter claim the defendant seeks recovery of possession of the Schedule II property from the plaintiff.

5.2 If further narration is paused, and the property described in the counter claim of the defendant in both the suits are considered, in O.S.No.7 of 2004, he claims some portion on the West of the property and in O.S.No.185 of 2004, he claims a specific plot on the East of the property.



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6. The dispute in O.S.No.185 of 2004 along with the counter claim raised by the defendant went to trial and post trial, the trial Court decreed the suit and dismissed the counter claim. The line of reasoning of the trial court is that:

- The defendant had admitted the possession of the suit property by Gurusamy. And, Ext.A-1 patta shows that Gurusamy was assigned the suit property. The defendant has set up title in one R.Eswaran, but has not been able to establish the latter's title to sustain Ext.B-4 sale deed.
- Turning to the plea of *res judicata*, the plaintiff has lost O.S.143 of 2000 before the first appellate court in A.S.138 of 2002 essentially because of certain discrepancy in describing the suit property. This apart, in A.S.138 of 2002, the first appellate court did not venture to investigate the plaintiff's title to the suit property.

7.1 The defendant preferred a single first appeal in A.S.No.49 of 2009



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against both the decree passed in the suit as well as in the counter claim.

The first appellate Court concurred with the reasoning of the trial court and dismissed the appeal, which implies that the counter claim of the defendant was dismissed again.

8. Challenging the decree of the first appellate court, the defendant has come forward with S.A.(MD) No.521 of 2010. And, it was directed only against the decree of the first appellate court in the suit but not against the counter claim. This is gathered from the Court fee paid by the present appellant.

9. Heard both sides in both the appeals. While S.A.(MD) 99 of 2010 was admitted and substantial questions were framed, S.A.(MD) 521 of 2010 is not even admitted. As outlined earlier, in O.S.No.7 of 2004, the defendant claims declaration of title over the western portion of the property covered under Ext.B-1 whereas in O.S.No.185 of 2004, he claims recovery of possession over a small portion on the east.



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10. The total extent which the defendant claims to have purchased under Ext.B-4 is stated to be 3.21 cents. In O.S.7 of 2004 the Schedule-II property in the counter claim is shown to be a vacant plot, whereas, the II schedule property in O.S.No.185 of 2004 is shown to include a house bearing Door No.32/C. Interestingly, Ext.B-4 seems to convey a certain plot in Sy.No.1000/15 whereas in both the suits, the property is stated to be in S.No.1000/14. However, natham survey number is given as 875/1.

11. So far as S.A.(MD)99 of 2010 is concerned, the first appellate court in its common judgement in A.S.34 of 2007 and A.S.46 of 2007 had entered a categorical finding that since the dismissal of the suit in O.S.7 of 2004 along with the counter claim of the defendant/appellant herein, the defendant had clandestinely corrected the boundary description of Schedule II property in the counter claim. To recall, the trial court had dismissed the counter claim essentially because the defendant had not identified the Schedule II property by its side-measurements. This finding is not



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specifically challenged, nor was any arguments heard. What the defendant had attempted is a plain fraud on judicial process, and that precisely was his undoing. Anyone who opts unfair methods for a success in a litigious pursuit does not deserve to succeed.

12. This apart the defendant is seen oscillating viz-a-viz the source of his title in both the suits and this will be dealt with later. The same defendant comes up with two alternative case for his source of title. In O.S.7 of 2009, the defendant pleads that neither the plaintiff (Paramasivam) nor his father Eswaran had any right to any property anywhere near the suit property, whereas in O.S.185 of 2004, he rests the title in Eswaran, the father of the plaintiff in O.S.7 of 2004. And, he manages to plead diametrically contradicting facts surprisingly based on a single sale deed 03.02.2000 (marked as Ext.B.1 in O.S.7 of 2004, and as Ext.B4 in O.S.185 of 2004). Very obviously his game plan lets him down, and it has to.



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13. This apart, there is yet another reason as to why the defendant cannot succeed in his appeal in S.A.(MD) 521 of 2010. Whereas the defendant preferred a single first appeal in A.S.49 of 2009 as against both the decree in O.S.185 of 2004 and also against the decree dismissing his counter claim, he had chosen to challenge only the decree of the first appellate court confirming the decree of the trial court passed in the suit, but did not choose to prefer any appeal against the decree of the first appellate court dismissing his counter claim. Necessarily this will operate as *res judicata* viz-a-viz the finding on the plaintiff's title.

14. Some arguments were advanced that the decree passed in Ext.B-6 (O.S.No.143 of 2000) will operate as *res judicata* and bars the Court from trying the issue of plaintiff's title in O.S.185 of 2004. As has been correctly found by the trial court, the plaintiff has lost his suit for bare injunction in O.S.No.143 of 2000 due to a wrong description of the western boundary of the suit property therein. And, the first appellate court vide its Ext.B3 judgement in A.S.138 of 2002 did not even venture to investigate the title of



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the plaintiff. It necessarily implies that neither the subject matter of both the suits are same, nor was there a finding on plaintiff's title in the earlier suit. It therefore follows, rule of *res judicata* cannot have any application here.

15. In the result, both the second appeals are dismissed and the judgments and decrees in A.S.A.No.46 of 2007 and A.S.No.49 of 2009 on the file of Sub Court, Sankarankovil, confirming the judgments and decrees dated 22.10.2007 and 26.03.2009 made in O.S.No.7 of 2004 and O.S.No.185 of 2004 respectively on the file of District Munsif cum Judicial Magistrate Court, Sivagiri are set aside. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes/No

Internet : Yes

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To:

- 1.The Sub Court, Sankarankovil.
- 2.The District Munsif cum
Judicial Magistrate Court, Sivagiri.



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