



S.A.No.647 of 2009

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:22.09.2023

Delivered on: 10.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.B.BALAJI

S.A.No.647 of 2009

Sabari Karthikeyan

... Appellant

Vs.

1.Venkitasubramaniam

2.Lakshmi Narashimha Gupta

3.S.Sarangapani(deceased)

4.S.Prema

5.P.Uma Maheswari

... Respondents

(R5 brought on record as
LR of the deceased R3 vide
order of Court dated 17.06.2016
made in C.M.P.No.1104 to 1106/16
in S.A.No.647/2009)

PRAYER: Second Appeal filed under Section 100 of C.P.C against the judgment and decree dated 15.11.2008 made in A.S.No.14 of 2006 on the file of Sub-Court, Udumalaipettai in reversing the judgment and decree dated 20.10.2004 made in O.S.No.298 of 1998 on the file of District Munsiff, Pollachi.



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For Appellant : Mr.T.V.Ramanujun, Senior Counsel
for
Mr.K.P.Suresh Kumar

For Respondents : Mr.S.Vijaya Kumar, Senior Counsel
for
Mr.P.C.Harikumar, for R1 and 2

No Appearance for R4 and 5

JUDGMENT

The 1st defendant in O.S.No.298 of 1998 is the appellant in the present Second Appeal. The respondents 1 and 2 herein as plaintiffs, filed the said suit seeking a relief of declaration of their title over the suit property and for a consequential permanent injunction to restrain the appellant herein from interfering with the peaceful possession and enjoyment of the suit property at the hands of the plaintiffs.

2. The case of the plaintiffs, in brief:

2(i) The plaintiffs are brothers. The suit property amongst other items were ancestral properties of the plaintiffs. On 29.07.1975, the properties were divided amongst the grand father, father and paternal uncle of



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the plaintiffs, in and by a registered partition deed. According to the plaintiffs, the suit property, along with other items of property, stood allotted to the share of one P.B.Subramaniam, paternal grand father of the plaintiffs, being referred to as A in the partition deed dated 29.07.1975. Properties referred as B&C to the said partition deed were allotted the share of the father of the plaintiffs and their paternal uncle respectively. An extent of 2.78 acres comprised in S.F.No.290/1 was allotted to their grandfather, P.B.Subramaniam, who executed a registered Will on 31.07.1975, bequeathing the property in favour of his grandsons viz., the plaintiffs herein.

2(ii) It is the further case of the plaintiffs that the father of the plaintiffs and their paternal uncle entered into a partition deed on 24.03.1983, dividing the properties allotted to them under the earlier partition deed dated 29.07.1975. After the demise of the grandfather of the plaintiffs, his Will came into force and the plaintiffs have derived absolute title in the suit property. According to the plaintiffs, the property in S.F.No.290/1 was subdivided as S.F.No.290/14 and patta was also issued in their respective names. According to the plaintiffs they are in physical possession and



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enjoyment of the suit property and under the partition deed 24.03.1993 between the father of the plaintiffs and uncle Sarangapani, an extent of 2.43 acres in S.F.No.290/1 alone was allotted to the said Sarangapani and he is not entitled to any further extent in S.F.No.290/1. According to the plaintiffs, the grandfather of the defendant who was an influential person in the locality has obtained a sale deed dated 28.09.1995 from Mr.Sarangapani, the uncle of the plaintiffs in the name of the defendant, then a minor. The claim of the plaintiffs is that an extent of 25 cents comprised in S.F.No.290/14 was included in the said sale deed with a view to unjustly enrich the purchaser and when the vendor was not entitled to said extent of 25 cents in S.F.No.290/14, the sale deed in respect of the 25 cents was invalid in the eye of law. As the defendant was trying to annexe his property with the said 25 cents, the plaintiffs have been constrained to move the Court seeking the reliefs of declaration and consequential permanent injunction to restrain the defendant from interfering with the plaintiffs' peaceful possession and enjoyment of the suit property.



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3. The 1st defendant filed a written statement stating that the plaintiffs do not have any right or interest to claim the property described in the suit schedule in the light of the partition deed dated 29.07.1975 amongst the father of the plaintiffs, his brother and grandfather P.B.Subramaniam and the subsequent partition deed dated 24.03.1983 between the plaintiffs' father and his brother, Sarangapani. According to the 1st defendant, Sarangapani obtained 2.43 acres in S.F.No.290/1 and that the predecessor in interest of the said Sarangapani got a further 3.43 acres of land in S.F.No.290/1 which was succeeded to by the plaintiffs' father and Sarangapani's father. According to the 1st defendant, the partition deed dated 29.07.1975 was not a complete partition and the same is established by recitals in the subsequent partition deed dated 24.03.1983. Further, according to the 1st defendant, there was no separate partition in division of the entire property available in S.F.No.290/1 and the well and pathways were kept common even after the partition and therefore, the plaintiffs cannot rely on the two partition deeds dated 29.07.1975 and 24.03.1983 for claiming title over the suit property. The Will relied on by the plaintiffs is also invalid and it was executed in suspicious



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circumstances and the 1st defendant called upon the plaintiffs to prove the Will in accordance with law as the same was not even recognised by the father of the plaintiffs and the uncle Sarangapani, under whom the plaintiffs are claiming title under the subsequent partition deed. Further, according to the 1st defendant, Sarangapani was owning 4.86 acres of land and further undivided share in the land comprised in S.F.No.290/1.

4. According to the 1st defendant, the plaintiffs are not in enjoyment of 2.78 acres as alleged and there is no proof of sub division of S.F.No.290/1 as 290/14 as unilaterally claimed by the plaintiffs. Further, according to the 1st defendant, the proceedings of the Tahsildar would not bestow title to the suit property. The allegations with regard to the grandfather of the 1st defendant being influential and including 25 cents in addition to 2.43 acres in the sale deed in order to make unjust enrichment are all stoutly denied.

5. The plaintiffs are aware that the 1st defendant has been in possession for the past three years and that his lessee, one Ramar is carrying on timber



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trade under the name of Sabari Karthikeyan Timbers and contending that there is no cause of action for filing the suit, the 1st defendant sought for dismissal of the suit.

6. The 2nd defendant Sarangapani filed a separate written statement where he relied on the Will dated 31.07.1975 executed by father P.B.Subramaniam and in favour of the plaintiffs. Curiously, the 2nd defendant claimed that the properties in 'B' schedule to the property were allotted to his share and after the plaintiffs became majors, they have been in enjoyment of the suit property deriving right under the Will. The 2nd defendant also stated in the written statement that he signed the sale deed dated 28.09.1995 believing that the properties belonging to him alone would have been incorporated and that the 2nd defendant never intended to include the suit property belonging to the plaintiffs.

7. Before the Trial Court, the 1st plaintiff examined himself as P.W.1 and the 2nd defendant was examined as P.W.2. P.B.Subramaniam and



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Dhandapani were examined as P.W.3 and P.W.4 and on the side of the plaintiffs Ex.A1 to A15 were marked. On the side of the defendants, the 1st defendant was examined as D.W.1 and Kandasamy, Jeganathan, Raman and Subramaniam were examined as D.W.2 to D.W.5 and marked Exs.B1 to B.12. Commissioner's report and plan were marked as Court Exhibits C1 and C2.

8. The Trial Court rightly finding that the dispute was only pertaining to 25 cents in S.F.No.290/14, proceeded to assess the oral and documentary evidence adduced by the respective parties and finding that in a earlier suit in O.S.No.125 of 1975, the Will had been held to be invalid, no rights could flow under the same and consequently the plaintiffs cannot claim right over the suit properties, when their claim also vested only on the said Will. The Trial Court also found that the 1st defendant purchased the property on payment of the entire sale consideration to the 2nd defendant under Ex.B1 sale deed and if really Ex.B1 sale deed had been obtained by fraud as claimed by the 2nd defendant in his written statement, in the light of the admitted fact that



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2nd defendant had not taken any steps to challenge the said sale deed would only result in discarding the pleadings and evidence of the 2nd defendant. The Trial Court also found that on the basis of the partition deed dated 29.07.1975 marked as Ex.A1 and subsequent partition deed dated 24.03.1983, the plaintiffs and their paternal uncle were enjoying their properties in common and not separately as claimed by the plaintiffs. The Trial Court also found that the patta would not confer any title to the plaintiffs and the 1st defendant also established through Advocate commissioner's report that the 1st defendant alone was in physical possession of the suit property. The Trial Court also found that when the plaintiffs had disputed only an extent of 25 cents in S.F.No.290/14, relief could not be claimed over the entire extent covered by S.F.No.290/14 and under Ex.A.15 viz., 145 proceedings initiated by the Revenue Authorities specific extent with boundaries in S.F.No.290/14 have been mentioned and the 1st defendant was also evicted from the property and in such circumstances, the suit as framed by the plaintiffs was held to be not maintainable.



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9. The plaintiffs preferred an Appeal in A.S.No.14 of 2006 and before the First Appellate Court an application was filed under Or.41 R.27 C.P.C., seeking to mark additional documents and the First Appellate Court has allowed the said application and marked additional documents Ex.A16 to A20 and taking into consideration the said additional documents, the First Appellate Court has reversed the findings of the Trial Court and decreed the suit as prayed for by the plaintiffs. Aggrieved by the said reversing findings rendered by the First Appellate Court, the present Second Appeal is at the instance of the 1st defendant.

10. At the time of admission of the Second Appeal the following substantial questions of law have been framed:

“ (a) Whether the Lower Appellate Court can dispose of the interlocutory application filed under Or.41, R.27 even before disposing of the Appeal as the same is against the law laid down by this Hon'ble Court that the petition for leading of additional evidence and the appeal shall be disposed of jointly, reported in 2001 4 CTC 624?

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(b) Whether the Lower Appellate Court has properly appreciated the evidentiary value of the Will, when there is specific finding by the Trial Court that there is no mentioning of the schedule of the property in the Will marked as Ex.A2?

11. I have heard Mr.T.V.Ramanujun, learned Senior Counsel for Mr.K.P.Suresh Kumar, learned counsel for the Appellant and learned Senior counsel Mr.S.Vijayakumar for Mr.P.C.Harikumar, learned counsel for respondents 1 and 2. I have also perused the original records received from the Lower Court. I have also carefully perused the judgments on which reliance is placed by the learned Senior counsel for the appellant.

12. It is not in dispute that in respect of S.F.No.290/1, there was a partition in the year 1975. The Trial Court basically relied on the fact that the Will projected by the plaintiffs in Ex.A2 had held to be not proved and invalid in the earlier suit filed for partition by one of the sisters viz., Surya Prabha who was the daughter of Subramaiaam Chettiar. However, in appeal filed against the judgment and decree in the said suit viz., O.S.No.125 of

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1975 as well as O.P.No.31 of 1976 pertaining to the Will dated 31.07.1975 executed by Subramaniam Chettiar in Transfer AAO.No.402 of 1978 and Appeal No.179 of 1977, a compromise was brought about between the parties in the said Appeal and the Will dated 31.07.1975 executed by late P.B.Subramaniam Chettiar was agreed to be true, valid and binding upon the appellants viz., Chakrapani and Sarangapani and the respondent viz., Surya Prabha their sister. The First Appellate Court taking into account the said judgment and decree passed by this Court, consequent to a compromise arrived at between the parties, proceeded to reverse the findings of the Trial Court as the Will has been held to be valid and put it against the appellant herein and decreed the suit.

13. Learned Senior Counsel appearing for the appellant would contend firstly that the approach of the First Appellate Court was erroneous and not in accordance with the accepted practice and procedure to be followed by Courts while admitting additional evidence and secondly, even though the Will dated 31.07.1975 had been agreed by the parties to the *lis* in Appeal No.179 of

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1977 before a Division Bench of this Court in earlier partition suit proceedings, the same would not bind the appellant in the present proceedings and the plaintiffs would have to have independently proved the Will in the manner known to law, before becoming entitled to any relief basing their right under the said Will. Thirdly, he would contend that the plaintiffs having come to Court seeking the relief of declaration are obliged to plead, prove and establish their case before becoming entitled to the declaratory relief. The learned Senior counsel would invite my attention to the description of the property in the plaint. The same is extracted for easy reference:

“ திருப்பூர் ரிடிடு, நெகமம் சப்ரிஸ்டீக்ட்,
பொள்ளாச்சி தாலுகா, பெரிய நெகமம்
கிராமத்தில் க.ச. 290/14 நெ. காலை 1/1
உறக்கடேர் 1-13-0க்கு 1/1ஏ.2.73க்கு தரம்
ரூ.3.81 மேற்படி பூமிகள், த & பூமியிலுள்ள,
மாவடை, மரவடை, வழிநடை தடபாத்தியம்
சகிதம், புது சப்டிவிசன்படி க.ச. 290/14
பு.ஏ. 2.79.”

and point out that the schedule was bereft of necessary particulars viz.,



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boundaries and also was silent about the timber business that was being carried on in the said property which was also confirmed by the report of the Advocate Commissioner. Finally, he would also state that there was no proof of the sub-division as claimed by the plaintiffs and assignment of sub-division under 290/14 for which the plaintiffs have not filed any acceptable correlation materials whatsoever. He would further contend that patta is not a document of title and irrespective of the fact whether the defendants were able to establish their title on interest to 25 cents, it was the burden of the plaintiffs who approached the Court to prove that they were entitled to 2.78 acres in S.F.No.290/14.

14. Learned Senior counsel would rely on the following judgments.

(i) ***Alamelu Ammal and Anr Vs. S.Rani and Ors***, reported in (2018) 17 SCC 740 regarding the proper course to be adopted while admitting additional evidence before the First Appellate Court.

(ii) ***Union of India and Ors Vs. Vasavi Co-operative Housing Society Ltd and Ors***, reported in (2014) 2 SCC 269 for the proposition that in



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a suit for declaration of title and possession, burden of proof is only on the plaintiff irrespective of whether the defendants prove their case or not and when the plaintiffs are unable to establish their own title, then they have to non suited even if the title set up by the defendants is found against the defendants and that weakness of a case set up by the defendant would not be a ground to grant relief to the plaintiff. In the said case, the Hon'ble Supreme Court has also reiterated the legal position that Revenue records will not confer title.

(iii) In the judgment of this Court in ***N.Ravi & Ors Vs. S.K.Thirunavukkaras (died) and Ors***, reported in ***2015-2-L.W.-613***, this Court dealt with the correct procedure to be adopted by the First Appellate Court while considering an application under Or.41 R.27 C.P.C.

15. Per contra, learned Senior counsel appearing for the respondents 1 and 2 would state that the appellant had purchased 2.79 acres out of which 2.43 acres was comprised in S.F.No.290/1B2 and 25 cents was comprised in S.F.No.290/14 and the appellant has not been able to show as to how his



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vendor viz., the 2nd defendant is entitled to 25 cents, which according to the respondents 1 and 2 was compromised in S.F.No.290/14 and belonging to them. He would further contend that the vendor of the appellant had title only to 2.43 acres and nothing more and therefore he had no right to convey 25 cents which was forming part of the plaintiffs' property. Learned Senior counsel also would invite my attention to the evidence of D.W.2 who admitted to the factum of settlement reached before this Court and where the Will was held to be valid and proper.

16. The suit has been laid by the respondents 1 and 2 seeking declaration of their title to an extent of 2.79 acres in S.F.No.290/14. The plaint schedule does not set out the boundaries to the said extent of 2.79 acres to which the plaintiffs' title is sought to be declared. Even the S.F.No.290/1 which according to the plaintiffs have been sub-divided as S.F.No.290/14 is also not mentioned. Equally, the existence of the superstructure which is under lease to one Ramar who has also been examined before the Trial Court as D.W.4 is also not available in the schedule. It is the specific case of the



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plaintiffs that S.F.No.290/1 was sub-divided as S.F.No.290/14. However, no iota of evidence has been let in by the plaintiffs to show any correlation between S.F.No.290/1 and 290/14. Ex.A4-Patta mentions the survey number only as S.F.No.290/14. It is now trite law that patta which is a Revenue record, does not confer title to the property covered by such patta/Revenue document. Dehors such revenue records, the burden is on the plaintiff who approaches the Court seeking the relief of declaration of title to establish his title. The patta also does not come to the aid of the plaintiffs in so far as the non-correlation between S.F.No.290/1 and S.F.No.290/14. Therefore, I am unable to rely on Ex.A4 to hold that the plaintiffs are having good marketable and valid title over 2.79 acres comprised in S.F.No.290/14.

17. Though the learned Senior counsel for the respondents 1 and 2 revolved his arguments mainly harping on the aspect of the appellant not proving his title for 25 cents as his vendor was entitled only to an extent of 2.43 acres, in view of the dictum of the Hon'ble Supreme Court, even if the defendant is unsuccessful in establishing the title set up by him in defence to



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a suit for declaration of title, the burden would still remain only on the plaintiffs' shoulders to independently prove their case. Unfortunately, there is not an *iota* of evidence produced by the respondents 1 and 2 to establish their right in respect of S.F.No.290/14. Even if the argument of the learned Senior counsel appearing for the respondents is taken into factor, the suit has not been laid for any right to be declared in so far as the 25 cents, but it is for the entire extent of 2.79 acres comprised in S.F.No.290/14. Therefore, the necessity of pleading and proving that the plaintiffs have absolute right, title and interest in respect of an extent of 2.79 acres comprised in S.F.No.290/14 lies entirely on the plaintiffs viz., the respondents 1 and 2 herein. Even in so far as their claiming right under the Will of their grandfather dated 31.12.1975, the First Appellate Court erred in placing reliance on the compromise arrived at an independent partition suit filed by one Surya Prabha against her siblings who were all children of Subramaniya Chettiar, the Testator. Even if the parties to the said partition suit had given up the challenge to the Will in question, when the plaintiffs have filed the suit for declaration of title, it was incumbent for them to independently prove the Will



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in the presence of the defendant who was resisting their title to the suit property. Admittedly, Will Ex.A2 has not been proved in a manner known to law and the First Appellate Court fell in error in placing reliance on the said Will to confer title on the respondents 1 and 2 merely because the Will had been accepted in a different suit for partition, without noticing that the defendant was not a party to the said suit and even in the said partition suit, the decree was only on a compromise and the Will was never proved in the said proceedings in a manner known to law. The procedure adopted by the First Appellate Court in admitting the additional evidence is also clearly against the mandate of Order 41 Rule 27 & 28 C.P.C and the additional documents could not have been right away admitted and relied on, without requiring the appellants therein to prove the same in the presence of the opposite party therein, meeting out a case of admissibility and proof, after cross examination by the opposite party. Thus, the First Appellate Court erred in admitting the additional documents without taking recourse to evidence as required under Rule 48 of Order XXI of the C.P.C.



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18. Further, the Advocate Commissioner who was appointed also inspected the property and also found the lessee of the appellant to be in physical possession of the same. There is no mention of any timber wood business being carried on by the appellant or his lessee in the plaint. The learned Senior counsel for the respondents would submit that when the property was used for storing wooden logs, there were only movable / removable items and therefore non mentioning of the same in the plaint schedule can never be held to be fatal to the case of the plaintiffs. However, I am unable to accept the said submission of the learned Senior counsel for the respondents for the simple reason that the plaintiffs have come to Court with a specific case that they are in legal possession of the suit property and while seeking the declaratory relief sought for in their favour, they also prayed for a permanent injunction to restrain the appellant herein from interfering with their peaceful possession and enjoyment of the suit property. Thus, when such a prayer has been sought for by the respondents 1 and 2, it was only natural that they had to establish by acceptable and cogent, oral and documentary evidence that they were in physical possession of the suit



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property. For this reason, the respondents have rendered themselves disentitled even to the relief of permanent injunction.

19. I have also independently perused the evidence of attesting witnesses P.W.3 and P.W.4 and their evidence does not inspire confidence in the mind of the Court, in the light of the circumstances surrounding the execution of the said Will. Further, in any event, the Will does not contain any specific description of the suit property. There is not even a Schedule set out to the Will. The said Will was marked as Ex.B4 in O.S.No.125 of 1975 on the file of the Sub-Court, Udumalpet and the said Court discussed the evidence adduced before it threadbare and came to a conclusion that the said Will was not executed by the Testator out of his free will and volition. That apart, I have independently assessed the evidence of P.W.3 and P.W.4, one of the two attesting witnesses and an identifying witness and also the available oral evidence adduced in O.S.No.125 of 1975 and I'm unable to satisfy my judicial conscience that the Will in Ex.B.4 has been proved to be a true and valid testamentary instrument. In the appeal filed against the said suit in



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O.S.No.125 of 1975, the parties only arrived at a settlement and the well-considered findings of the Trial Court were not reversed. Even the Trial Court, in the present proceedings found that the witnesses were interested witnesses and when in earlier proceedings the same Will had been held to be invalid, no right or title can be claimed under the same. Unfortunately, the First Appellate Court reversed the said findings without even discussing the evidence on record and by just merely placing reliance on the compromise arrived at in the appeal proceedings. Even otherwise, the evidence of P.W.3 and P.W.4 does not in any way help the plaintiffs validate their title to the suit property in S.F.No.290/14.

20. Further, P.W.2's evidence that the properties were kept in common and even after the two partition deeds, only improbably the case of the plaintiffs that their father and 2nd defendant were enjoying the properties allotted to them separately and not jointly. Though the 2nd defendant has filed written statement supporting the plaintiffs' case, the fact that the 2nd defendant has not challenged the sale deed executed by him on the ground



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that an extent of 25 cents was conveyed under the same and the same belongs to the plaintiffs only goes to show that the 2nd defendant has chosen to take strides with the plaintiffs in the present litigation. If he was really taken for a ride and an excess extent of 25 cents had been sold, it is not natural to believe that such a vendor would remain silent for all times to come and casually informed the Court in later proceedings that he believed that only his property was being conveyed to the purchaser.

21. Further, the Trial Court has also discussed his evidence elaborately and found that he executed the document only after reading the entire contents of the same. D.W.2 and D.W.5 have also spoken about due execution of the sale deed in favour of the appellant and also passing of sale consideration to the 2nd defendant.

22. The Trial Court had rightly rejected the evidence of P.W.2 as being unbelievable and having no evidentiary value. The Trial Court has also found that in the proceedings initiated U/s. 145 of the Crl.P.C, the 1st defendant was



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evicted and that the said proceeding was initiated only at the instance of the plaintiff. The said complaint pertains only to S.F.No.290/14 and pursuant to Sec. 145 proceedings, the property vested with the RDO which was also admitted to by the plaintiffs.

23. At the risk of repetition, in a suit for declaration of title and for a consequential relief of permanent injunction, the plaintiffs have to plead and prove their case and cannot rely on the failure of the defendant to establish the defence set up. Here, the specific case of the plaintiffs was that they were the owners of an extent of 2.79 acres in S.F.No.290/14. They have not been able to prove even the basic correlation required to show that S.F.No.290/1 was sub-divided as S.F.No.290/14 and that the extent comprised in S.F.No.290/14 was an extent of 2.79 acres. Reliance is placed only on the patta Ex.A4 issued by the Tahsildar and admittedly the same not being a document of title, it will not in any way assist the plaintiffs in their establishing their right to the relief of declaration of title and consequential relief of permanent injunction. Even in so far as the allegations of possession



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being with the plaintiffs, it has come out in evidence that the plaintiffs are not in physical possession of the suit property as claimed by them in the suit. Further, the schedule to the Suit is also bereft of necessary particulars, especially boundaries and original survey numbers to show a clear nexus between the present survey number claimed S.F.No.290/14 for an extent of 2.79 acres and S.F.No.290/1. When the plaintiff approaches the Court seeking a relief of declaration of title and/or permanent injunction to protect possession or prevent alienation of the suit property, it is absolutely necessary to give the boundaries of the property in and over which the relief is sought for and in the absence of specific boundaries, the Court would only be at a disadvantageous position to grant an effective and executable decree which would naturally work to the detriment of the plaintiffs.

24. Even though the appellant/1st defendant has purchased the additional 25 cents over and above what was allotted to his vendor under the partition deed, in the light of the settled legal position, especially the ratio laid down by the Hon'ble Supreme Court in *Union of India and Ors Vs. Vasavi*



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Co-operative Housing Society Ltd and Ors, the burden proof, in a suit for declaration of title and possession would be only on the plaintiff, irrespective of the fact whether the defendant proves his case or not.

25. In view of the above discussion, I answer the substantial questions of law in favour of the appellant and I am constrained constrained to interfere with the judgment and decree of the First Appellate Court and restore the judgment of the Trial Court. In fine, the Second Appeal is allowed. However, there shall be no order as to costs.

10.11.2023.

Internet:Yes
Index:Yes/No
Neutral Citation:Yes/No
Speaking/Non-speaking order
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To

1. The Sub Judge,
Udumalaipettai.
2. The District Munsiff,
Pollachi.

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Pre-delivery Judgment in
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