



C.M.S.A(MD)No.6 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 24.03.2023

Delivered on : 28.04.2023

CORAM

THE HONOURABLE MR. JUSTICE K.MURALI SHANKAR

C.M.S.A.(MD)No.6 of 2021

and

C.M.P.(MD)No.392 of 2021

Thirumalaiappan : Appellant/Appellant/Petitioner/
Objector/ 3rd party

Vs.

1.Thulasiammal

2.Perumalsamy

3.Renuga : 1to 3 Respondents/ 1to 3 Respondents
1to 3 Respondents/Petitioners & Decree
Holder/Plaintiffs

4.Mahalakshmiammal :4th respondent/4th respondent/4th respondent
Judgment Debtor & Respondent/Defendant

Prayer : This Civil Miscellaneous Second Appeal is filed under Order 21 Rule 97 & 101 r/w Section 100 of C.P.C, against the fair and decreetal order, dated 17.12.2020 passed in C.M.A.No.8 of 2017 on the file of the Sub Court, Kovilpatti, confirming the fair order and decreetal order, dated 22.09.2017



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passed in E.A.No.77 of 2012 in E.P.No.24 of 2010 in O.S.No.42 of 1996 on the file of the District Munsif Court, Kovilpatti.

For Appellant : Mr.T.R.Jeyapalam

For R1 to R3 : Mr.S.Kadarkarai,

For R4 : No Appearance

JUDGMENT

The Civil Miscellaneous Second Appeal is directed against the order passed in C.M.A.No.8 of 2017, dated 17.12.2020, on the file of the Sub Court, Kovilpatti, confirming the fair order and decreetal order in E.A.No.77 of 2012 in E.P.No.24 of 2010, dated 22.09.2017, passed by the District Munsif, Kovilpatti.

2. Admittedly, the respondents 2 and 3 are the son and daughter of the first respondent and the appellant/3rd party/Objector is the son of the fourth respondent/judgment debtor.

3. The respondents 1 to 3 have laid a suit in O.S.No.42 of 1996 against the fourth respondent/defendant on the file of the District Munsif Court, Kovilpatti, claiming the reliefs of declaration that (i) the suit 2nd and 3rd



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schedule properties belong to the respondents 1 to 3/plaintiffs; (ii) for permanent injunction restraining the fourth respondent/defendant from interfering with the peaceful possession and enjoyment of the suit schedule properties; (iii) for recovery of possession of the suit 2nd schedule property and (iv) for mandatory injunction for removal of encroachment made by the fourth respondent/defendant in the suit 2nd and 3rd schedule properties.

4. The fourth respondent/defendant filed her written statement and after commencement of trial and when the case was posted for P.W.1 cross examination, the defendant had remained ex-parte and at her instance, the same was subsequently set aside. When the matter was again posted for P.W.1 cross examination, the fourth respondent had allowed the suit to be decreed ex-parte on 10.09.2001 and subsequently, her application for setting aside the ex-parte decree was allowed on costs and again on 20.09.2002, ex-parte judgment and decree were passed and the application of fourth respondent in I.A.No.809 of 2003 for setting aside the same, was ordered to be dismissed.

5. The respondents 1 to 3/plaintiffs have then laid the execution petition in E.P.No.59 of 2003, for executing the decree for mandatory injunction and during pendency of the same, the fourth respondent has again



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filed an application in I.A.No.4 of 2005, to condone the delay of 456 days and that the application in I.A.No.4 of 2005 was ordered to be dismissed on 08.11.2005. Aggrieved by the order of dismissal, the fourth respondent has preferred a revision in C.R.P.(MD)No.1140 of 2005 and the same was allowed with costs, condoning the delay in filing the CMA and subsequently, C.M.A.No.2 of 2007 was taken on file and the same was disposed of on 14.10.2009 and aggrieved by the said dismissal, the fourth respondent has preferred another revision in C.R.P.(MD)No.1632 of 2010 and that this Court vide order dated 08.12.2011, dismissed the revision.

6. The respondents 1 to 3 have laid another execution petition in E.P.No.24 of 2010 and during the pendency of the above execution petition, the present appellant has filed an objection petition in E.A.No.77 of 2012 under Order 21 Rule 97 C.P.C. The appellant by alleging that the appellant and his brother were/are the owners of the schedule properties and hence, the judgment and decree passed in O.S.No.42 of 1996 against the fourth respondent are not binding on the petitioner and his brother that was in force on the date of her husband's death on 10.03.2005 and that the fourth respondent/defendant had no right, title or interest in the schedule property as per law, has claimed that he should not be sent out of the petition mentioned



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property and to dismiss the execution petition in E.P.No.24 of 2010 in

WEB O.S.No.42 of 1996.

7. It is his further contention that the plaintiffs have claimed and obtained reliefs with respect to the property measuring 25 feet on north-south, but their predecessors in title had purchased the property measuring $8 \frac{3}{4}$ Carpenter cubit on north-south i.e., 24 feet 2 inches and that the respondents 1 to 3 are not entitled to claim more than that extent and as such, the decree for the larger extent cannot be executed.

8. The respondents 1 to 3/plaintiffs have filed their counter statement raising serious objections to the claim put forth by the third party/ Objector and whereunder, it has been stated that since the Objector's father Ramasamy @ Rangasamy had died intestate in 2005, the fourth respondent being the wife of deceased Rangasamy is a class-I legal heir as per Section 8 of Hindu Succession Act; that the petitioner along with his brother and mother were residing in the said property; that the Objector's mother had contested the suit initially and subsequently, remained ex-parte thrice and her efforts for setting aside the ex-parte decree were ended in failure and that therefore, the fourth respondent/Judgment Debtor has setup his son and filed the above



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application under Order 21 Rule 97 C.P.C; that since the fourth respondent had hurriedly made constructions in the third week of October 1995 in the common wall belonging to the respondents 1 to 3/plaintiffs and since she had also encroached 1 ½ feet land, the respondents 1 to 3 were forced to file the above suit and that the 3rd party/Objector's claim and the objections raised for executing the decree are legally unsustainable. The fourth respondent/defendant has filed a counter statement in support of her son/third party/Objector. During enquiry, the third party/Objector examined himself as P.W.1 and exhibited 6 documents as Ex.P.1 to Ex.P.W.6. On behalf of the respondents 1 to 3, the first respondent has examined herself as R.W.1 and exhibited one document as Ex.R.1. The fourth respondent has adduced neither oral nor documentary evidence.

9. The learned District Munsif, upon considering the evidence both oral and documentary and on hearing the arguments of both the sides, has passed an order, dated 22.09.2017, dismissing the petition filed under Order 21 Rule 97 and 101 C.P.C. Aggrieved by the order of dismissal, the third party/Objector has preferred an appeal in C.M.A.No.8 of 2017 and the learned Subordinate Judge, Kovilpatti, considering the materials available on record and on hearing the arguments of both the sides, has passed the impugned



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order, dated 17.12.2020, dismissing the appeal and thereby confirming the fair and decreetal order passed by the District Munsif, Kovipatti, dated 22.09.2017. Challenging the dismissal of the appeal, the third party/Objector has come forward with the present Civil Miscellaneous Second Appeal.

10. The learned counsel for the appellant would contend that the Courts below have miserably failed to consider the fact that the fourth respondent is noway related with the property in dispute and the plaintiffs wantonly omitted the real owners of the property; that the fourth respondent was only having right of residence as per law applicable at the time of death of her husband; that since the appellant's father had died intestate, the appellant and his brother have become the owners of the property in dispute and that therefore, the decree obtained by the respondents 1 to 3 without impleading the real owners of the property, but only against the fourth respondent, who was not having any right, title, interest over the property, are not binding on the appellant and his brother and the same remains inexecutable.

11. The learned counsel for the appellant would further contend that the respondents 1 to 3 have claimed reliefs to a property measuring 25 ½ feet on north-south, but in the sale deed under Ex.P.2, the plaintiffs' predecessor in



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title had purchased a property measuring 8 $\frac{3}{4}$ carpenter cubit (கச்சமுழம்) only, which comes to 24 feet 2 inches; that the plaintiffs have absolutely no right to claim more extent in north-south boundary than the extent shown in their parent title deed, dated 05.10.1920 and that the Courts below have failed to consider the extent of properties shown in Ex.P.1 and Ex.P.2 purchased by the predecessor in title of the appellant as well as the respondents 1 to 3.

12. The Substantial Questions of Law formulated by this Court are :

(i) When the parent title deed of the respondents 1 to 3 herein/plaintiffs/decree holders, dated 05.10.1920 (Ex.P.2) clearly establish that they are entitled to north-south 8 $\frac{3}{4}$ carpenter cubit (24.2 feet), whether the decree in O.S.No.42 of 1996 obtained by the respondents 1 to 3 herein for north-south 25 $\frac{1}{2}$ feet is executable against the appellant.?

(ii) Whether the plaintiffs/respondents 1 to 3/decree holders can obtain an ex-parte decree in O.S.No.42 of 1996 on the file of the District Munsif Court, Kovilpatti as against the fourth respondent herein/sole defendant, who is no way related with the property in dispute and the building lying immediate north to the plaintiff's property and hence, the framing of suit is improper and the decree passed therein is inexecutable. ?



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13. As already pointed out, the respondents 1 to 3 in their plaint has shown the suit properties in three schedules. The first schedule relates to the land measuring 57 feet east-west and 25 ½ north-south and the building constructed therein at Oothupatti Village of Kovilpatti Taluk. The second schedule relates to the property measuring 1 ½ feet on the north-south and 57 feet on east-west situated on the south of the defendant's (4th respondent) property and the third schedule relates to the property measuring 1 ½ feet north-south and 57 feet east-west and the constructions made therein at a height of 12 feet.

14. It is pertinent to note that the respondents 1 to 3 have subsequently mentioned that the suit items 2 and 3 of schedule properties are part of the first schedule property. The main contention of the appellant is that one Sankarappa Naicker, father-in-law of the first respondent and grand father of the respondents 2 and 3 had purchased the property situated on the south of the appellant's property; that the said Sankarappa Naicker had purchased the said property from one Kupppammal vide sale deed dated 05.10.1920 under Ex.P.2 wherein, property measuring 8 ¾ carpenter cubit on north-south and 57 feet east-west is shown, but, the respondents 1 to 3 by suppressing the Ex.P.2



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sale deed and the measurements shown therein, has filed the suit as if they were owning land measuring 25 ½ feet on north-south, 57 feet on east-west; that the respondents 1 to 3 had no right to claim more extent than the extent purchased under Ex.P.2 and that therefore, the very decree obtained with respect to the property measuring 25½ feet on north-south is not valid and inexecutable.

15. As rightly contended by the learned counsel for the appellant, the Trial Court, Executing Court as well as the Appellate Court have failed to consider the sale deed, dated 05.10.1920 under Ex.P.2 and the extent of the property purchased by the predecessors in title of the respondents 1 to 3 therein. As rightly pointed out by the learned counsel for the appellant, in Ex.P.2 sale deed, Sankarappa Naicker from whom, the respondents 1 to 3 are claiming title to the properties, had purchased the property measuring 8 ¾ carpenter cubit north-south and 19 feet east-west.

16. Admittedly, 8 ¾ carpenter cubit, on conversion to feet, comes to 24 feet 2 inches.



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17. It is evident from the records that when the above measurements were pointed out to the respondents 1 to 3, the learned counsel for the respondents 1 to 3 submitted that they would restrict their claim to the measurements shown in their parent sale deed i.e., 8 $\frac{3}{4}$ carpenter cubit, which would be equivalent to 24.06 feet, this Court by recording the above submission of the learned counsel for the respondents 1 to 3 and in order to find out whether the respondents 1 to 3 have any right over any piece of land on the north of northern wall, since north-south extent of the property of respondents 1 to 3 was reduced by roughly at about 1 $\frac{1}{2}$ feet, appointed an Advocate Commissioner to measure the suit property on the basis of the affidavit filed by the second respondent on behalf of the respondents 1 to 3 taking the north-south measurement as 8 $\frac{3}{4}$ feet carpenter cubit and decided to file a report with plan.

18. It is evident from the records that the second respondent has filed an affidavit on behalf of the respondents 1 to 3 stating that the respondents 1 to 3 are claiming title only to the extent of 25 $\frac{1}{2}$ feet on the north-south based on the patta, which was decreed and as such, the respondents 1 to 3 are entitled to 8 $\frac{3}{4}$ carpenter cubit (குச்சுமுழம்) and that therefore, the respondents 1 to 3 had undertaken to abide and restrict to the



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said extent of 8 $\frac{3}{4}$ carpenter cubit north-south as per sale deed in document No.3034 of 1920, dated 08.10.1920 on the file of the Sub Registrar, Kovilpatti. Though the respondents 1 to 3 have claimed north-south extent to the tune of 25 $\frac{1}{2}$ feet, considering the north-south measurement shown in the parent title deed under Ex.P.2, they have restricted their relief with respect to the property measuring 8 $\frac{3}{4}$ carpenter cubit, which would be equivalent to 24 feet 2 inches. Since the respondents 1 to 3 have restricted their claim, the objections of the appellant with regard to the executability of the decree deserves to be rejected.

19. Now turning to the next main contention of the appellant that the fourth respondent has no right, title or interest over the property except the right to reside therein; that the appellant and his brother have become the absolute owners of the property and that the respondents 1 to 3 without impleading the real owners of the property, has impleaded the fourth respondent, who is not having any right or title over the suit property and that therefore, the decree obtained against the fourth respondent is not binding on the appellant and the same is inexecutable.



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20. The learned counsel for the appellant would contend that originally the property was belonging to one Thirumalaiammal, who sold the same to Thirumalaiappan paternal grand father of the appellant vide sale deed dated 08.10.1920; that the said Thirumalaiappan had died leaving behind his two sons Ramasamy @ Rangasamy father of the appellant and Barathazvar. When the said two sons of Thirumalaiappan had divided the properties of their father orally and in the oral partition, the petition schedule property and some other properties fell to share of the appellant's father that he was enjoying the property till his death on 10.03.2005 leaving behind the appellant and his brother and his wife/fourth respondent ; that the properties purchased by the Thirumalaiappan and Sankarappa Naicker were only thatched houses and they had constructed the terrace houses, having a compound wall in between two houses; that the respondents 1 to 3 are claiming the common wall as their exclusive wall, filed a suit in O.S.No.42 of 1996 against the fourth respondent and the suit was decreed ex-parte against the fourth respondent, who had no right, title or interest in the schedule property as per law that was in force on the date of death of her husband and that the judgment and decree passed in O.S.No.42 of 1996 are not binding on the appellant and his brother.



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21. As rightly pointed out by the learned counsel for the respondents

1 to 3, even before purchase by Thirumalaiappan on 08.10.1920, the predecessor in title of the respondents 1 to 3 Sankarappa Naicker had purchased the property situated on the south of Kuppammal's property on 05.10.1920 and only subsequently, the said Thirumalaiappan had purchased the property situated north of the property purchased by Sankarappa Naicker.

22. The appellant in the petition filed under Order 21 Rule 97 C.P.C., has taken a stand that since his father Ramasamy @ Rangasamy had died intestate, the property came to be owned by the wife fourth respondent and sons, appellant and one Soundarajan and the relevant passages is extracted hereunder :

“4. மேற்படி மனுதாரின் தகப்பனார் 10.03.2005 தேதியில் தனது மக்களான மனுதாரர் மற்றும் சௌந்தரராஜ் மற்றும் மனைவியான 4 ம் எதிர்மனுதாரர் ஆகியோர்களை மட்டும் வாரிசுகளாக வைத்துவிட்டு intestate ஆக இறந்துபோய்விட்டார். பின்னர் நிறைவேறுதல் மனுவில் கண்ட 3வது தபசில் பொதுகவர் மற்றும் அதற்கு வடக்கே வீட்டையும் மேற்படி ரெங்கசாமி நாயக்கரின் வாரிசுகளாக மேலே கண்ட நபர்கள் கூட்டாக பாத்தியப்பட்டு அனுபோகம் செய்து வருகிறார்கள்.



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But, in the subsequent paragraph, it has been stated that the appellant's mother fourth respondent was only having right to residence and she was not having any right or interest over the same.

23. At the time of arguments, the learned counsel for the appellant would further contend that the property was earlier owned by the appellant's father Ramasamy @ Rangasamy; that the said Ramasamy @ Rangasamy was very much alive when the suit was filed by the respondents 1 to 3 in the year 1996; that the respondents 1 to 3 have not chosen to file the suit against the said Ramasamy @ Rangasamy and that the suit came to be filed against the fourth respondent, who is having no right at all. No doubt, as rightly contended by the learned counsel for the appellant, the appellant's father and the husband of the fourth respondent had died on 10.03.2005, but the decree in O.S.No.42 of 1996 came to be passed on 20.09.2002.

24. As rightly contended by the learned counsel for the respondents 1 to 3, the fourth respondent has not raised any objections for non impleading her husband, nor taken any plea that she was not having any right or interest over the property. The appellant himself has produced a patta issued by the Special Tahsildar, Land Development Scheme in the year 1983, wherein patta



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was issued in favour of Rangasamy, fourth respondent, wife of Rangasamy Naicker and Barathazwar brother of the said Rangasamy Naicker. The appellant has not offered any reason for the issuance of patta in favour of the fourth respondent also.

25.As rightly contended by the learned counsel for the respondents 1 to 3, even according according to the appellant, his father Rangasamy Naicker had died intestate, that as per Section 8 of Hindu Succession Act, the fourth respondent being the wife, the appellant and Rangaraj being the sons of the deceased Rangasamy Naicker are entitled to succeed the property and as such, the contention of the appellant that the fourth respondent was only entitled to right of residence as per law that was in force on the date of death of her husband i.e., in 2005, is devoid of merits and the same is liable to be rejected.

26. Though the appellant has been alleging that himself and his brother are the owners of the property, he has not offered any reason or explanation for excluding her mother, fourth respondent. It is pertinent to note that the appellant in his evidence would admit that the fourth respondent has been residing in the petition mentioned property and the kist were issued in favour of his mother. He would further admit that himself, his brother and



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mother had been enjoying the property jointly. He would also admit that he was residing in the petition mentioned property along with his mother and brother. Though the appellant has alleged that he was not in talking terms with his mother, he has not elaborated any thing further.

27. As rightly pointed out by the learned counsel for the respondents 1 to 3, in the petition filed under Order 21 Rule 97 C.P.C., the petitioner has shown the property situated on the north of the plaintiff's property. As already pointed out, it is the specific case of the respondents 1 to 3 that the wall situated in between the properties of the plaintiffs and the defendant belongs to the plaintiffs and the defendant had encroached the land measuring 1 ½ feet on the north of the said wall and made constructions therein. Though the appellant has been alleging that the wall is a common wall belonging both to the plaintiffs and his family, he has not produced any iota of evidence to substantiate the same.

28. It is pertinent to note that admittedly, the first item of suit property is the property owned by the respondents 1 to 3 and the other two items are with respect to the wall situated in between two properties and the constructions made therein.



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29. As rightly contended by the learned counsel for the respondents 1 to 3, since the defendant alone taking advantage of the absence of plaintiffs, had encroached the land of the plaintiffs and made constructions, they were constrained to file the suit against the fourth respondent and as such, the question of adding the appellant or his brother does not arise at all.

30. The learned Advocate Commissioner appointed by this Court had inspected the property and filed a report with plan and wherein, it has been stated that the property of respondents 1 to 3 is very old and the constructions of other side is younger than the respondents' constructions; that the distance between north-south wall on the terrace is 22 feet 2 inches and in the middle distance between north-south is 21 feet 8 inches and that on the western side the distance between north-south wall is 22 feet 4 inches. As rightly contended by the learned counsel for the respondents, the defendant had taken part in the Court proceedings from 1996 onwards till the dismissal of the revision on 08.12.2011.

31. The appellant in his cross examination would admit that before filing of the petition, he was residing in the property with his mother. As



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already pointed out, the appellant had specifically admitted that himself his brother and mother have been enjoying the property jointly.

32. Considering the above, as rightly contended by the learned counsel for the respondents, the contention of the appellant that he was not aware of the Court proceedings, is very hard to believe. On considering the entire facts and circumstances, this Court has no hesitation to say that the fourth respondent has lost her legal battle and as such, the decree passed in O.S.No.42 of 1996, dated 20.09.2002 had attained finality and that therefore, she has set up her son to file the above application under Order 21 Rule 97 C.P.C to delay the proceedings and thereby prevent the decree holder from realizing the fruits of decree.

33. Considering the above, the order of the learned Subordinate Judge in dismissing the appeal and thereby confirming the order of Executing Court cannot be found fault with. Hence, this Court concludes that the Civil Miscellaneous Second Appeal is absolutely devoid of merits and the same is liable to be dismissed. Considering the facts and circumstances and the nature of the stand taken by the appellant, this Court is of the further view that the appellant must be mulcted with cost.



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34. In the result, the Civil Miscellaneous Second Appeal is dismissed with costs. Consequently, connected Miscellaneous Petition is closed.

28.04.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes/No
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To

- 1.The Judge Sub Court, Kovilpatti,
- 2.The District Munsif, Kovilpatti.



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K.MURALI SHANKAR, J.

das

Pre-delivery order made in
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and
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