



S.A.(MD).No.7 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 28.07.2023

CORAM:

THE HONOURABLE MR.JUSTICE C.KUMARAPPAN

S.A.(MD)No.7 of 2017

C.Thuraipandian ... Appellant/Respondent/Plaintiff

-vs-

A.Baby ... Respondent/Appellant/Defendant

PRAYER: Second Appeal is filed under Section 100 of C.P.C, against the judgment and decree dated 02.12.2014 made in A.S.No.68 of 2014 on the file of the I Additional Subordinate Judge at Nagercoil reversing the judgment and Decree dated 15.03.2014 made in O.S.No.123 of 2010 on the file of the Principal District Munsif, Nagercoil.

For Appellant : Mr.M.Arjun Varman

For Respondent : Mr.P.Thiagarajan

JUDGMENT

The present Second Appeal has been filed by the appellant under Section 100 of C.P.C, against the judgment and decree dated 02.12.2014 made in A.S.No.68 of 2014 on the file of the I Additional Subordinate Judge



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at Nagercoil reversing the judgment and Decree dated 15.03.2014 made in O.S.No.123 of 2010 on the file of the Principal District Munsif, Nagercoil.

2. The plaintiff is the appellant before this Court. He has filed the suit for the relief of declaration, mandatory injunction and for permanent injunction.

3. For the sake of convenience, the parties will be referred to as per the litigative status before the trial Court.

4. According to the plaintiff, originally the suit property belongs to one Vedanayagam Nadar, and the said Vedanayagam Nadar has five children. Out of them, plaintiff is the grand son of Vedanayagam Nadar through his son Chellaiah Nadar and the defendant is the grand daughter of Vedanayagam Nadar through his another son Anbaiya Nadar. The plaintiff further submits that the legal heir of Vedanayagam Nadar divided the property by virtue of partition deed, dated 21.05.1953. In such partition, the second schedule property, namely, two cents of passage was commonly allotted to all the share holders. But the defendant has put up obstruction in the common passage by



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putting up a wall measuring about 5 feet and also erected a gate. Therefore, the plaintiff filed the suit for the relief of declaration and for the mandatory injunction.

5. The defendant in her written statement has disputed the very existence of the suit common passage. The defendant would submit that the suit property is the 2nd schedule property of the partition deed dated 21.05.1953. As per the partition deed dated 21.05.1953, the second schedule property was allotted to the defendants father. Hence, she being the sole legal heir, the same absolutely belongs to her. The defendant further submits that though the plaintiff claims the above suit schedule property as the common passage, he has not impleaded the persons those who have lands on the northern side of the defendant's land. Therefore, she would submit that apart from other ground the suit is also liable to be dismissed, on the ground of non-joinder of necessary parties.

6. Before the trial Court, the plaintiff has examined four witnesses and marked 12 documents. Whereas, on behalf of the defendant, she herself examined as D.W.1, and 11 documents were marked. The Commissioner was



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also examined as the Court witness and four documents were marked as Court documents.

7. After considering the either side submission, evidence and perusing the material on records, the trial Court by relying upon the revenue records, ultimately decreed the suit.

8. Aggrieved with the above order, the defendant preferred the first appeal in A.S.No.68 of 2014. Wherein, the first appellate Court has reversed the finding of the trial Court, vide judgment, dated 23.02.2015 on the ground that the very suit is hit by the principle of non-joinder of necessary parties, and ultimately allowed the appeal. Aggrieved with the order of the first appellate Court, the plaintiff is now before this Court, in the second appeal.

9. This Court after hearing either side has framed following the substantial questions of law on 12.01.2017:

a. Whether the judgment and decree of the First Appellate Court is vitiated for non consideration of the oral and documentary evidence in proper perspective?



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b. Whether the first appellate court erred in law and mis-directed itself in reversing the judgement of the trial Court overlooking the oral and documentary evidence?

c. Whether the first appellate Court had correctly appreciated the facts and law?

d. Whether the commission report of the Advocate Commissioner is not an instrument of execution?

e. Whether the first appellate Court had considered the fact that survey No.73/11 is a pathway as per revenue records?

f. Whether the Advocate Commission report filed before the learned trial Court is considered and its findings are taken on file before the learned first appellate Court? And

g. Whether the first appellate Court had taken the wrong stand of Doctrine of Acquiescence and had adversely considered its perspective?.

10. The learned counsel appearing on behalf of the appellant/plaintiff would submit that the first appellate Court had completely failed to make note of the reference in respect of passage namely, the second schedule property of Ex.A1. It is also the submission of the learned counsel for the appellant that



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when there are revenue records, and when such revenue records classified suit schedule property qua S.F.No.73/11 as a passage, and that when the defendant has not objected such classification, the very reversal finding by the first appellate Court is without any basis and contrary to law. It is also the submission of the learned counsel for the appellant that the very order of the first appellate Court, reversing the finding on the ground of non-joinder of necessary parties, is irrational. The appellant further contended that since because there is no passage on the north of the defendant's property, it doesn't mean that the allotment made in Ex.A.1- Partition deed in respect of common passage would vanish. Hence, he prayed to allow the second appeal.

11. Per contra, the learned counsel for the respondent/defendant would submit that the first schedule property of the partition deed, is nothing but the defendant's property which includes the second schedule property mentioned in the suit. Therefore, even according to the Ex.A1- Partition deed, the passage, which is mentioned as the second schedule property in the suit, is not at all a common passage and it was exclusively allotted to the defendant. He further submits that though the plaintiff contends that there is a passage in S.F.No.73/11, on the north of the said passage, admittedly no passage exist.



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He would further submit that, though the revenue records, classified the sub division S.F.No.73/11 as a passage, the same won't prevail over the partition deed namely, Ex.A1. Hence, he prayed to dismiss the appeal.

12. This Court has given anxious consideration to the submissions of the learned counsel on either side.

13. The crest and trough of the appeal is, whether the second schedule property is a common passage or not? In this regard, the learned counsel appearing for the respondent would invite the attention of this Court in respect of Ex.A1. Wherein, the translated version of Ex.A1 is annexed in the Typed Set. In which Page No.3 the relevant recitals are referred. The same is as follows:

“1 ம் நம்பர் வஸ்துவில் கிழக்கணையா
தென்வடலாக இரண்டு சென்று பாதையிட்டு பாதை
உட்படவுள்ள புரயிடத்தில் கிழமேல் பங்கு ஒன்றுக்கு
(8½) எட்டரை சென்று புரயிடமும்□.

(Extracted as it is)



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14. From a reading of the above recitals, we could easily infer that the 8 ½ cents, which was allotted to the defendant includes the two cents of passage. Whereas this interpretation was strongly disputed by the learned counsel for the appellant, by inviting a recital in Page No.5 of the typed set of papers, wherein it refer as:

“1-ம், 2-ம் நம்பர் வஸ்துக்களில்
கிழக்கணைய தென்வடலாக இட்டிருக்கும் பாதைகள்
எல்லாம் பொதுவே பாதையாக நாம் உபயோகித்து
கொள்ள வேண்டியது கூடாதே. 3 முதல் 6 வரை
வஸ்துக்களிலும் 7 அவரவருடைய பாக வஸ்துவுக்கு
போக்குவரத்துக்காக பொதுவே பாதையிட்டு
போக்குவரத்துக்கு உபயோகித்து கொள்ள
வேண்டியதும் ஆகும்.□

(Extracted as it is)

In this regard, the learned counsel for the appellant would submit that the passage, which referred to in the second schedule property, belongs to the plaintiff and defendant jointly.

15. But, the learned counsel for the respondent strongly objected the contention and would submit that, in the translation which has been submitted before the trial Court, there is no such word, “1-ம்□. This court refers the



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translation of Ex.A1, filed before the trial Court, where the word “1-10” didn't find a place.

16. But, the learned counsel for the appellant with great deft prayed this Court to see the Ex.A1, being the registration copy of the partition deed, and would submit that there is a reference “1-10” finds a place, Therefore, he would vehemently contend that a mistake has crept in, in the translation of Ex.A1, and the same could have been corrected at the second appeal stage. But this Court could not find such word “1-10”, with in Ex.A1 – partition deed with certainty. Further it is pertinent to mention here that, the appellant has not raised such grounds in this appeal. Similarly no substantial question of law regarding defective translation has been taken in the present second appeal. Therefore, this Court is of the view that such argument could not be raised at the second appeal stage and without any substantial question of law. Thus, this Court is not in a position to agree with the argument of the learned counsel for the appellant.

17. Similarly the learned counsel for the appellant has stressed up this Court to peruse the revenue records Ex.A.12- Adangal and would contend



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that, the suit property has been classified as passage. But, it is settled principle of law that the revenue records will not confer any right where the documents for title exist. Here the partition deed Ex.A.1- also denotes the same is passage. But according to the recital of Ex.A1, the said passage absolutely belongs to defendant In this regard it is useful to refer the following rulings reported in ***AIR 1989 SC 1809 (Corporation of Bangalore City V.M.Papaich)***

18. However, the learned counsel for the appellant relied upon the judgment of this Court reported in 2018 1 CW 529 (J.Jagadesh vs. Tahsildar Modakurichi Taluk) and would submit that when the revenue records refers “Nilaviyal Vandi Pathai”, then as per the Revenue Standing Order 26(15), such land mark pathway, which has been used by the public as a way, has to be treated as a public pathway. The relevant portion of the judgement is as follows:

“6.The learned counsel appearing for the petitioner has submitted that subject matter of the cart track is situated in R.S.No.215/9 and patta for the said land stands in the name of the petitioner's father and five others. He further submitted that the petitioners forefathers have formed the said cart track in the patta land for reaching other properties and as such the second



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respondent has no right to use the said land as pathway to reach his property. He further submitted that neither the petitioner nor his predecessors in title have handed over the said property to the local panchayat and hence even the panchayat cannot claim any right over the said property. He further submitted that even assuming that the subject matter of the land is a Government land, since there is a bona fide dispute with regard to the title, the said dispute cannot be decided in a summary enquiry contemplated under Section 7 of the Tamil Nadu Encroachments Act, 1905.

11. The subject matter of the land is situated in R.S.No.215/9 measuring 0.06.0 Hectres, it roughly comes about 15 cents. In the extract of A Register filed by the second respondent, it is stated that the land situated in R.S.No.215/9 is a Nilaviyal Vandi Pathai. In the field map also, it is shown as cart track. The petitioner also admitted in his affidavit which has been filed in support of the present writ petition that the subject matter is a cart track. So, it is clear that the subject matter is a cart track and the same is running in a patta land and the same has been shown as Nilaviyal Vandi Pathai in the Revenue records and also marked in the plan.

12. At this juncture, it would be relevant to refer Revenue Standing Order 26(15) which reads thus:



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15.Encroachments on plan-marked details:-- A plan-marked channel or pathway running in a patta land is a Government land. Eviction of encroachment in such lands need be invoked only in cases where the encroacher has interfered with the plan marked detail so as to close its entrance to and exit from his lands. In the case of pathways and cart tracks which have been used by the public till recently, the ryot should not be allowed to shift the course of the details to suit his own convenience. However, such diversions of plan marked channel from its original course, with a view to consolidate his holding or to facilitate irrigation of the portions which would be otherwise severed need not be treated as encroachment.

18.In the decision cited by the learned Special Government Pleader (i.e.,) N.M.Ganeshan Vs. The Commissioner, Sathyamangalam Municipality (supra) also it is clearly held in para -6 as follows:

6. It is not disputed by the appellant that the land in question is classified in the revenue records as “Nilaviyal Chandu” and it meant for general public for their use as a public street. The respondent Municipality is one of the wings of the Government and is empowered to protect the public lands from being encroached.

So the aforesaid decision will squarely apply to the facts of this case.”



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19. However, on harmonious reading of the reported judgment, it is the case where such classification of land has been used by public at large, and that the Government has been treating such land as a public passage. Only in the above factual matrix, the High Court has held that such encroachment can be removed. But, in our case, it is the specific case of the plaintiff that the said passage is only between the plaintiff and the defendant and it is not his case that this passage is public passage and has been used by public at large. Therefore, this Court is of the view that the above ruling has no application to the facts of the instant case.

20. The learned counsel for the appellant has also relied upon the judgment of the Hon'ble Supreme Court reported in **2010 (7) MLJ 153 (Mumbai International Airport Pvt Ltd., vs. Regency Convention Centre and hotels Pvt. ltd., and others)**, and would submit that the non- impleadment of the owner of the property on the northern side of the suit property cannot be a ground to non-suit the plaintiff.



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21. It is true that the learned first appellate Court by referring such non-impleadment reversed the finding of the trial Court and allowed the appeal. The first appellate Court also relied upon the judgment of the Hon'ble Supreme Court reported in **2010 (7) MLJ 153 (Mumbai International Airport Pvt Ltd., vs. Regency Convention Centre and hotels Pvt. ltd., and others)** and paragraph Nos.8 and 9 are extracted hereunder:

“8. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order I Rule 10(2) of Code of Civil Procedure ('Code' for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

"Court may strike out or add parties.



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(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the question involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party. A 'necessary party' is a person who ought to have been



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joined as a party and in whose absence no effective decree could be passed at all by the Court. If a 'necessary party' is not impleaded, the suit itself is liable to be dismissed. A 'proper party' is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in disputes in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

9. The learned counsel for the appellants relied upon the following observations of a two-Judge Bench of this Court in [Sumtibai v. Paras Finance Co.](#) [2007 (10) SCC 82] to contend that a person need not have any subsisting right or interest in the suit property for being impleaded as a defendant, and that even a person who is likely to acquire an interest therein in future, in appropriate cases, is entitled to be impleaded as a party:



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"Learned counsel for the respondent relied on a three-Judge Bench decision of this Court in Kasturi v. Iyyamperuma [2005(6) SCC 733]. He has submitted that in this case it has been held that in a suit for specific performance of a contract for sale of property a stranger or a third party to the contract cannot be added as defendant in the suit. In our opinion, the aforesaid decision is clearly distinguishable. In our opinion, the aforesaid decision can only be understood to mean that a third party cannot be impleaded in a suit for specific performance if he has no semblance of title in the property in dispute. Obviously, a busybody or interloper with no semblance of title cannot be impleaded in such a suit. That would unnecessarily protract or obstruct the proceedings in the suit. However, the aforesaid decision will have no application where a third party shows some semblance of title or interest in the property in dispute.....It cannot be laid down as an absolute proposition that whenever a suit for specific performance is filed by A against B, a third party C can never be impleaded in that suit. If C can show a fair semblance of title or interest he can certainly file an application for impleadment."

This Court has no quarrel with the above settled legal principle. However,



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this Court on different reasons, more particularly based in Ex.A1, Partition deed hold that the suit property is not the common passage between the plaintiff and the defendant. Therefore, above ruling has no applicability for deciding this Second Appeal.

22. There is also another angle to this case. Even in the the normal circumstances the sharer on the rear portion alone need passage to reach their property. Whereas, in our case, the appellant property situate on the frontage of the main road, and admittedly direct access to the public road. Therefore, in all circumstances and probabilities, the passage would become the separate property of the defendant. The above conclusion also been fortified from the reading of the Ex.A1-partition deed. Therefore, this Court could not find the existence of any substantial questions of law.

23. In the result, this Second Appeal is dismissed. There shall be no order as to costs. Consequently, the connected Miscellaneous Petition is closed.

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NCC : Yes/No

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Index : Yes / No
Internet : Yes / No
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To

1. The I Additional Subordinate Judge,
Nagercoil.
2. The Principal District Munsif,
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