



S.A(md)No.2057 of 2003

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 13.12.2023

CORAM

THE HONOURABLE MRS.JUSTICE R. KALAIMATHI

S.A.No.2057 of 2003

Thavasi

... Plaintiff/Respondent/Appellant

-Vs-

1.Palaniappan
2.Parameswari

... Defendants/Appellants/
Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 14.09.2003 made in A.S.No.64 of 1999 on the file of the Sub-Court, Padmanabhapuram, reversing the judgment and decree, dated 29.04.1999 made in O.S.No.254 of 1996 on the file of the Principal District Munsif, Eraniel.



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For Appellant : Mr.P.Thiyagarajan
For R1 and R2 : Mr.V.M.Balamohan Thambi

J U D G M E N T

Being aggrieved by the judgment and decree of the first appellate Court viz., the Sub-Court, Padmanabhapuram, in A.S.No. 64 of 1999, the sole plaintiff has preferred this second appeal.

2.Parties are indicated as per their litigative status and ranking referred to before the trial Court.

3.According to the plaintiff Thiru.Thavasi, S/o.Perumal Nadar, the suit property is situated at Colachal Village at Kalkulam Taluk, measuring an extent of 18 cents in old S.No.9088A / R.S.No. 89, originally belonged to Maria Viyagappan Nadar. He sold the said property to his father Perumal Nadar for valid consideration through a sale deed, dated 06.12.1954. After the death of his father Perumal



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Nadar, the suit property devolved upon his legal heirs viz., his wife Arumaikannu and his sons Anbayyan, Murugan and the plaintiff herein. The partition took place between the wife and sons of Perumal Nadar through a partition deed, dated 14.03.1989. The plaintiff further claims that the suit property is allotted to him in the said partition. It is found in 'C' schedule item No.3 and since then, he has been in peaceful possession and enjoyment of the suit property. Patta, Revenue tax assessment stands in his name. On 28.07.1996, the defendants and their men, taking undue advantage of the absence of the plaintiff in the locality, trespassed into the southern portion of the suit schedule property and put up a thatched shed. The first defendant has created a fraudulent gift deed in the name of his wife, the second defendant, with a view to defeat the legitimate claim of the plaintiff. The said execution of the gift deed created suspicion on the plaintiff's title and possession over the suit 'A' schedule property. Hence, the suit for declaration of title over the 'A' schedule property and for mandatory injunction to remove the unauthorized



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shed in 'B' schedule property and for permanent injunction restraining the defendant from disturbing the peaceful possession and enjoyment over the 'A' schedule property.

4. Whereas the defendants claim that the plaintiff is neither has title to the suit property nor in possession of the suit property. The suit property does not lie as a single plot, as alleged. Rather it lies in two plots. The south eastern 4.250 cents belongs to the first defendant and he is residing there and the suit property has got boundary fences on all the four sides, which are aged about more than 50 years. The remaining portion of the suit survey number is in the possession of Arumughom, Thankavel, vettivel sons of Chellakan of Kalimar and Veeramoni, Ramanathan, Velayudhan, Sorimuthu, Arjunan and Sami Nadar of Subramonian Nadar of Kalimar. The suit property does not belong to Maria Viyagappan Nadar and he was never in possession of the suit property. The plaint details are denied in toto. The grave yards belong to the ancestors of the persons



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whose names are mentioned above. The first defendant has purchased 4.250 cents from the rightful owner in the year 1980 and since then, he is in possession of the suit property and the right of the plaintiff is lost. He has prescribed title to the suit property by adverse possession at least from 27.02.1116 M.E.

5. Based on the rival contentions, the following issues were framed by the trial Court:

(1) Whether the plaintiff has been in possession and enjoyment of the plaint 'A' schedule property

(2) Whether the defendant has encroached and put up 'B' schedule thatched shed as alleged in the plaint.

(3) Whether the plaintiff has lost title over the south eastern 1 ¼ cents due to adverse possession by the defendant.

(4) Whether the plaintiff is entitled to the relief of mandatory and permanent injunctions as prayed for.

(5) What other reliefs is the plaintiff entitled to.



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The following additional issue was framed:

Whether the plaintiff is entitled to the plaint 'A' schedule property?

6.At trial, the plaintiff has examined himself as P.W.1 and one Kadakkaraiyandi, was examined as P.W.2. Exs.A1 to A16 were marked. Exs.A1 and Ex.A2, are the sale deed, dated 06.12.1954, executed by Maria Viyagappan Nadar in favour of the plaintiff's father Perumal Nadar and Ex.A2 is the translated copy of Ex.A1. Ex.A3 is the partition deed, dated 14.03.1989 executed between the legal heirs of Perumal Nadar. Exs.A4 to A13 are the tax receipts. Exs.A15 and A16 are the sale deed of the predecessor in title of the plaintiff viz., Parvathi and the translated copy of the said sale deed, dated 07.04.1953. On the defendants' side, the first defendant has examined himself as D.W.1. Exs.B1 to B15 were marked. Exs.B1 and B2 are the Othi Kuzhikkanam deed, dated 30.10.1067M.E. Ex.B2 is the translated copy of Ex.B1. Exs.B3 and B4 are the sale



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deed, dated 27.02.1116M.E, executed by Jones in favour of Thammakkari,(Ex.B4 is the translated copy of Ex.B3). Ex.B5 is the sale deed, dated 31.11.1116M.E executed by Thammakkari in favour of Chokkalingam Nadar.

7.The trial Court, after evaluating the evidence, held that the first defendant has not produced even a single document to prove the direct relationship with 'A' schedule property that is old Survey No.9088A, correlated to Resurvey No.N89 and held that the plaintiff is entitled to the suit 'A' schedule property and the plaintiff has not lost title over the south eastern 4.250 cents due to adverse possession by the defendants and concluded that the defendants have encroached and put up 'B' schedule thatched shed and the reliefs sought for were granted in favour of the plaintiff.

8.Aggrieved, the defendants preferred an appeal before the Sub-Court, Padmanabhapuram, in A.S.No.64 of 1999.



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9.The first appellate Court, after hearing both sides arguments, upon consideration of the evidence, concluded that Ex.A1-sale deed is not a valid one and no witness was examined in respect of the said sale deed and the extent of the property allotted to the plaintiff Thavasi was not believed by the first appellate Court. In view of the above, the first appellate Court observed that in Ex.B8 consent letter given by the first defendant to the Village Committee dated 20.07.1996 as the plaintiff's brother is also one of the signatory in the document. It held against the plaintiff holding that only the defendants are in possession of the suit property and the appeal was allowed by dismissing the suit in O.S.No.254 of 1996. Against the said judgment, now the plaintiff is on the second appeal.

10.The learned counsel Mr.P.Thiyagarajan, who is appearing for the appellant/plaintiff would strenuously argue that the title is traced in the plaint. It is his further argument that the suit property was purchased by his father Perumal Nadar and after his



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death, the suit property devolved upon his legal heirs viz., his mother and his three brothers. He would further contend that all the four of them partitioned the properties of Perumal Nadar and the suit property was allotted to the plaintiff Thavasi, which finds place in 'C' schedule as item No.3. He would also further contend that though the first defendant has traced out the title for the suit property with incorrect particulars and in Exs.B1, B3 and B5, the details of the property did not tally with the plaint schedule of property. Hence, the trial Court has rightly rejected the documents of the defendants. As regards Ex.A1- sale deed, dated 06.12.1954, Section 90 of the Indian Evidence Act, 1872, comes to play and to buttress his arguments, the judgment rendered in **Lakhi Baruah-Vs-Padma Kanta Kalita**, reported in **(1996) 8 SCC 357** was referred to. He would also contend that non-examination of vendor is not fatal to his case and to strengthen his argument, the judgment of this Court in **Tuticorin Diocesan Trust Association-Vs-Thavamani**, reported in **(2003) 2 CTC 478** was referred to.



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11. Whereas the learned counsel Mr.V.M.Balamohan Thambi, appearing for the respondents 1 and 2/defendants 1 and 2 would vehemently contend that without the prayer for recovery of possession, the suit is not maintainable and the judgment of this Court rendered in ***Arjunan-Vs-D.Kethu Munuswamy @ Munuswamy and Another***, reported in ***(2011) 5 MLJ 58*** was referred to.

12. To support his contention, the judgment of the Hon'ble Apex Court in ***Joseph Severance and others-Vs-Benny Mathew and others***, reported in ***(2005)7 SCC 667***, was referred to.

13. The following substantial questions of law arise for consideration:-

(1) When the documents namely Exs.A2 and A3 coupled with the report and plan of the commissioner establish title and possession of the plaintiff, is the learned



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subordinate Judge right in dismissing the suit.

(2)When the evidence let in by the plaintiff coupled with the report and plan of the Commissioner established that the shed had been put only just prior to the filing of the suit, is the learned Subordinate Judge right in refusing the relief of mandatory injunction.

14.Ex.A15-Sale deed, dated 07.04.1953, executed by Parvathi Nadachi, in favour of Maria Viyagappan, and the sale deed, dated 06.12.1954(Exs.A1 and A2) executed in favour of Perumal Nadar are marked to show that the plaintiff's father purchased the property. P.W.1- during his cross-examination, would also admit that his father's vendor Maria Viyagappan, son is alive and the son of Maria Viyagappan has not been examined in respect of Ex.A1 sale deed.



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15.The learned counsel appearing for the appellant drew the attention of this Court that the sale deed viz., Exs.A.15 and A16 are original title deeds and they are 30 years old.

16. In order to appreciate the same, Section 90 of the Evidence Act, is extracted hereunder:

“Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person’s handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

17.The object of the Section 90 is to make it easier for the purpose who relies upon the very old documents, who has to prove the said documents in order to prove their case. When the document



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is of 30 years old if it is produced from proper custody can be read in evidence without there being formal procedure, as presumption can be drawn about the execution by the person by whom, it purports to have been executed. Therefore, as per the judgments referred to above, he is entitled to invoke Section 90 of the Evidence Act.

18.Ex.A1-sale deed, dated 06.12.1954, was executed by Maria Viyagappan Nadar in favour of Perumal Nadar. It is the case of the plaintiff that after the life time of his father, the suit property and the other properties devolved upon the legal heirs of his father viz., his mother Arumaikannu and three sons of Perumal Nadar. The plaintiff would further claim that all the legal heirs partitioned the properties by way of partition deed, dated 14.03.1989(Ex.A3) and the suit property was allotted to him which finds a place in C schedule, as item No.3. Therefore, no doubt, original sale deed viz., Ex.A1 has been produced through proper custody.



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19. In this regard, it is relevant to refer to the observation made by the Hon'ble Supreme Court in **Lakhi Baruah and Ors., case**, as mentioned supra. It has been held that the deed of sale was not sought to be proved by leading evidence about the valid execution of the same or payment of consideration by Pushpa Kanta in favour of Holiram by examining proper witnesses. But an attempt was made to prove the execution of the sale deed with the aid of Section 90 of the Evidence Act. Since the alleged sale deed is more than 30 years old on the relevant date, presumption of due execution of same flowing from Section 90 was relied upon. It has been further held that “ in order to obviate such difficulties or improbabilities to prove execution of an old document, Section 90 has been incorporated in the Evidence Act, which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised if the documents in question is produced from proper custody.”



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20.The law is well settled that the presumption can be availed under Section 90 of the Indian Evidence Act 1872, in case of original document of the 30 years old. In **Lakhi Baruah and Ors.,- Vs-Padma Kanta Kalita and Ors.**, reported in **1996 8 SCC 357**, wherein the Hon'ble Supreme Court held that presumption under Section 90 of the Evidence Act, 1972, does not apply to a copy or a certified copy even though 30 years old.

21.The principle underlying this Section is that if a private document is of 30 years old or more if it is produced from proper custody and if it is on its face free from suspicion, the Court may presume that the document was signed or written by the person whose signature it appears or in whose handwriting it purports to be and it has been duly attested and executed, if it purports so to be. The object behind this Section is that it will be very difficult to prove the execution, handwriting or signature of very old documents. Of course, it is a rebuttable presumption. Ex.A1, sale deed, dated



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06.12.1954 is admittedly more than 30 years old document.

22.Though no witness was examined in order to prove Ex.A1-sale deed, still as per Section 90 of Indian Evidence Act, the presumption of due execution of Ex.A1 flows from Section 90, as the original document, which is more than 30 years old and produced from proper custody viz., from the plaintiff. The suit is laid for the relief of declaration of title, for mandatory injunction to remove the unauthorized shed in 'B' schedule and for permanent injunction restraining the defendants from disturbing the peaceful possession and enjoyment of the 'A' schedule property.

23.Ex.A15 is the Parent deed, dated 07.04.1953, in respect of the suit property. On a thorough perusal of the sale deeds Exs.A15, A16 and the partition deed Ex.A3, the suit property details with extent is mentioned.



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24. Whereas the learned counsel appearing for the defendants drew the attention of this Court that the first defendant has also proved his title to the southern portion of 4.250 cents through Exs.B1 to B7 documents. The suit property is situated at Colachal Village, Kalkulam Taluk, Kanyakumari District in old S.No. 9088A/R.S.No.89 measuring an extent of 18 cents. Whereas in Ex.A7, sale deed, which stands in the name of the first defendant in S.No.9088 B.

25. The Document Number of Ex.A15 is also mentioned in Ex.A1-sale deed viz., document No.871. Therefore, I have no hesitation to hold that the suit survey number do not tally with the defendants documents.

26. The learned counsel appearing for the respondents/defendants would strongly contend that the suit was filed for the relief of mandatory injunction, without seeking for the



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relief of recovery of possession, is not maintainable. In order to substantiate his arguments, the judgment of the Hon'ble Supreme Court in ***Joseph Severance and Others-Vs-Benny Mathew and Others***, reported in ***(2005) 7 Supreme Court Cases 667***, wherein the suit is between licensor and licence to construct a cinema theatre for the specific period with liability to surrender vacant possession on expiry of the licence period. It was held that the licensor has to file the suit with promptitude and if it is shown that within a reasonable time a suit for mandatory injunction has been filed with a prayer to direct the licensee to vacate the premises, the suit will be maintainable. It was further held that if the suit is belatedly filed ex-licensee may be treated as a trespasser and the licensee will have to sue for recovery of possession.

27.The facts of this case will not apply to the present case. More so, the suit on hand, was filed for the declaration of title, for permanent injunction and for mandatory injunction. Therefore, I find



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no force in the argument of the learned counsel appearing for the respondents.

28.Originally, the Resurvey Number of the suit property is R.S.No.89, whereas, in Ex.B7, Resurvey Number is mentioned as 47.

29.At the instance of the plaintiff, an Advocate Commissioner was appointed to note down the physical features of the suit property and the Advocate Commissioner's report and plan are marked as Exs.C1 and C2. The Advocate Commissioner's report reads as follows:

“In the plaint B schedule property there is a thatched shed is about 4 to 6 months old prior to my first visit: On the southern side of the 'B' schedule property there is an old Kasala which is made with soil about 2 feet height, the age of the sale is about 25 years old: Around the thatched shed there is a small kasala made



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with soil about 1 feet height: In these kasala's pappali trees were recently planted: On the southern side of B schedule property there is a old kasala is found in. H.I. Line: there are 9 graves are available in the 'A' schedule property.

30.The details are correlated with the rough sketch, wherein the suit properties are demarcated as 'A' schedule and 'B' schedule and the thatched shed is shown in the Southern side of 'A' schedule property and burial dooms are found which were also affirmed by P.W1 during his cross-examination. Since because, patta of the first defendant find place in 'A' schedule property, he cannot claim that B schedule property belongs to him.

31.The first appellate Court has observed that the difference in the extent of land allotted to the sons of Perumal Nadar are not uniform and it was taken as a ground to non suit the plaintiff. There is no law that in partition the sharers have to be allotted with same



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extent of property. The allotment of share depends upon many factors. For example, it so happens a sharer may not be allotted any share. At the same time, a sharer may be allotted a small portion etc. Therefore, the observation of the first appellate Court as mentioned supra, is bereft of any logic.

32. That apart, Ex.B8 is the consent letter given by the land holders in order to lay a pathway in the presence of village Committee members. Ex.B7 was marked contending that the first defendant Palaniappan was one of the person from whom consent was obtained to lay a pathway. On a perusal of Ex.B8 consent letter, Resurvey No.89 is found in the property details. It was the contention of the learned counsel for the respondents that the brother of the plaintiff viz., P.Murugan has also signed as one of the Village Committee Member would go to show that the suit property belongs to the first defendant. Since because the suit survey number is dealt with in Ex.B8, dated 20.07.1996 that will not clothe with any legal



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right and that the first defendant can never take advantage of the same.

33.The learned counsel appearing for the respondents raised a strong note that the suit is bad for non-joinder of necessary parties and to that effect, no issue was framed by the trial Court, despite the plea taken in the written statement. To that effect, written statement reads that in the suit survey number so many persons are in occupation. So many names of the persons have been mentioned. The extent of the suit property is 18 cents. Candid case of the plaintiff is that the whole extent of suit property viz., 18 cents was purchased by the father of the plaintiff herein from one Maria Viyagappan through Ex.A1. The entire extent of the suit survey number may be more than the suit extent. The persons, who are connected to the suit property alone have to be arrayed as defendants. Though the plea of non joinder of necessary parties was taken in the written statement, the trial Court has not framed as an issue based on the



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above said reasons, it cannot be found fault with.

34. With regard to 'A' schedule property based on Ex.A1- sale deed, presumption is drawn in favour of the plaintiff, as the document is more than 30 years old and produced through proper custody. Apart from the original documents, kist receipts have also been marked. It is well established principle of law that the title follows possession. As regards the prayer for mandatory injunction, it is amply proved from the evidence of P.W1, D.W1, Ex.C1, Advocate Commissioner's report and Ex.C2-plan of the Advocate Commissioner, the defendant has encroached into 'B' schedule property and put up a thatched shed. The entire suit property viz., 18 cents belong to the plaintiff is clearly established as mentioned supra. Therefore, the plaintiff is entitled for the relief of declaration of title and for permanent injunction and for mandatory injunction in respect of 'B' schedule property. Based on the aforesaid discussion, the substantial questions of law are answered in favour of the



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plaintiff.

35.In fine, the Second Appeal stands allowed and the judgment and decree of the first appellate Court stands dismissed. The judgment and decree passed in O.S.No.254 of 1996 stands confirmed. No costs.

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NCC:Yes/No

Index:Yes/No

Internet::Yes/No



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To

1.The Sub-Court,
Padmanabhapuram.

2.The Principal District Munsif,
Eraniel.

3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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R. KALAIMATHI,J.

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