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S.A.Nos.1149 & 1150 of 2003

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.02.2024

CORAM

THE HONOURABLE Mr. JUSTICE **G.ARUL MURUGAN**

S.A.Nos.1149 & 1150 of 2003

Thilagavathi

... Appellant in both S.As

vs.

1.Sundaraj alias Mani
2.Kulandaiswamy
3.Parimaladevi
4.Arukkaniammal
5.Umadevi
6.Thulasimani
7.Mani
8.Kulandaivelu

...Respondents in both S.As

Prayer in both S.As:- Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 07.02.2002 in A.S.Nos.159 & 171 of 2001, respectively, passed by the learned II Additional District Judge, Erode, confirming the judgment and decree dated 29.06.2001 in O.S.Nos.91 & 92 of 1997, respectively, passed by the learned District Munsif-cum-Judicial Magistrate, Kodumudi.

For appellant in both S.As : Mr.S.Frangkelin
and Mrs.T.R.Gayathri
for M/s.Sarvabhauman Associates



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For R3 in both S.As : Ms.K.Megala for
Mr.M.Manokaran

For R1, R2, R4 & R8 : No appearance
For R5 to R7 : No such address

COMMON JUDGMENT

The unsuccessful plaintiff in O.S.No.92 of 1997 is before this Court on appeal and she is also the first defendant in O.S.No.91 of 1997.

2. The second appeal in S.A.No.1149 of 2003 is filed challenging the common judgment and decree dated 07.02.2002 in A.S.No.171 of 2001 on the file of the II Additional District Court-cum-Judicial Magistrate, Kodumudi, confirming the common judgment and decree dated 29.06.2001 in O.S.No.91 of 1997 on the file of the District Munsif-cum-Judicial Magistrate, Kodumudi.

3. The Second Appeal in S.A.No.1150 of 2003 is filed challenging the common judgment and decree dated 07.02.2002 in A.S.No.159 of 2001 on the file of the II Additional District Court-cum-



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Judicial Magistrate, Kodumudi, confirming the common judgment and decree dated 29.06.2001 in O.S.No.92 of 1997 on the file of the District Munsif-cum-Judicial Magistrate, Kodumudi.

4. Since both the Second Appeals arise out of a common judgment and decree, these Second Appeals are considered and decided by this common judgment.

5. For the sake of convenience, the parties are referred to according to their ranking as before the Trial Court in O.S.No.91 of 1997.

The brief facts, which gave rise to these Second Appeals, are as under:

6. According to the plaintiffs, the lands measuring 0.72.0 hectares in R.S.No.99/2 of Pasur village, absolutely belonged to the plaintiffs and it is their ancestral property and that the plaintiffs 2 and 3 have partitioned their family properties under a registered partition deed



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dated 06.10.1993 in Ex.A1. Subsequently, they had subdivided the lands in R.S.No.99/2 into R.S.No.99/2A and 99/3B. The plaintiffs were in possession and enjoyment of the properties by paying kist to the Government. Therefore, according to the plaintiffs, on the southern side of their lands, there is an east west highways road proceeding from Pasur village to Vellode. The plaintiffs were using the said east west highway to have access to their lands. As the owners of the properties, the plaintiffs have right to have access to the highway from all points of boundaries of their lands.

7. According to the plaintiffs, around July 1996, the defendants, all of a sudden, encroached and put up a thatched shed, as per the portions marked in plan along with the plaint. When the plaintiffs questioned the same, the defendants, only sought some time to remove the encroachment. However, later, they refused to remove the encroachment and started to put up constructions. Since the defendants proceeded with partial construction, the plaintiffs came up with the suit for permanent injunction restraining the defendants from encroaching the road and putting up any further construction and also for mandatory



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injunction to direct the defendants to remove the obstructions made by them as per the plan annexed with the plaint.

8. The first defendant filed a separate suit in O.S.No.92 of 1997 apart from resisting the suit by filing a written statement. This defendant admits that the suit property is a salai poramboke. According to this defendant, one Pachiammal, the mother-in-law of the first defendant, took possession of the suit properties before 35 years and put up a thatched shed and was living along with her son Natarajan. Apart from the thatched shed, she eked out their livelihood by putting up a petty shop and tea stall. After the marriage of her son Natarajan, her daughter-in-law i.e., first defendant took charge of the family affairs and she was running a petty shop in a thatched shed. According to the first defendant, her husband died 15 years ago and she has been paying house tax and also business tax to the panchayat. The Tamil Nadu Electricity Board has sanctioned power service connection to the shed, put up by the defendant and all these show that the first defendant is in possession of the suit property. Further, since the thatched shed became very old, she dismantled and put up a fresh shed on 05.09.1997. Further, the suit



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property is a salai poramboke and it belongs to the Government and the Government themselves have recognised the possession and enjoyment of the first defendant and therefore, the plaintiffs have no right to disturb the possession of the first defendant and therefore, she came up with the separate suit for bare injunction.

Evidence and documents:

9. Both the suits were taken up for joint trial. During trial, the third plaintiff examined himself as P.W.1 and examined one Vadivel as P.W.2 and marked Exs.A1 to A6. On the side of the first defendant, the first defendant examined herself as D.W.1 and examined one Thiagarajan as D.W.2 and marked Exs.B1 to B9.

10. An Advocate Commissioner was appointed and the Advocate Commissioner's report and plan were marked as Exs.C1 and C2.

Findings of the Trial Court:

11. After analysing the documents and evidence, the Trial Court



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decreed the suit in O.S.No.91 of 1997 and dismissed the suit in O.S.No.92 of 1997. The Trial Court found that in fact, out of 4 defendants, the 2nd and 3rd defendants in the suit remained *ex parte* and also the 4th defendant has not filed any documents. Further, even though the first defendant alone claimed the possession of the suit property for nearly 35 years, she has not filed any documents to establish the fact that she was in possession and enjoyment of the suit property for such a long period. The first defendant filed only one document in Ex.B1, which is the B memo issued to the first defendant in the year 1982. Therefore, the Trial Court found that the first defendant has not established that she had been in possession and enjoyment of the property for nearly 35 years. The Trial Court also found that when admittedly, the plaintiffs are the owners of the patta lands and their lands are situated on the highway on two sides, the plaintiffs have right to access their property from the highway from all points of the property.

12. Aggrieved by the judgment and decree of the Trial Court, the first defendant had filed two separate first appeals in A.S.Nos.159 of 2011 and 171 of 2011 on the file of the II Additional District Court,



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Erode. The Lower Appellate Court, after reappraising the evidence, by a common judgment and decree dated 07.02.2002, dismissed both the appeals. The Lower Appellate Court found that when the space in between the highway and the plaintiffs' lands is the road margin, which is a salai poramboke, the defendants cannot be allowed to encroach the property as the plaintiffs' right to have access to their property from all points, will be naturally affected and they will be put to loss. Aggrieved by the concurrent finding of facts, the first defendant is before this Court with above two Second Appeals.

Substantial questions of law:

13. This Court, by order dated 01.08.2003, framed the following substantial questions of law:

“1. Whether the Courts below are right in law in granting a decree for mandatory injunction to remove the suit superstructure which was put up long prior to the statutory period in view of the doctrine of acquiescence as laid down in (a) A.I.R. 1981 Mad.220 (b) AIR 1977 Mad. 342 (c) A.I.R 1965 Mad. 318?

(ii) Whether the respondents have got locus standi



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and right to remove the superstructure put up in the poromboke property, which belongs to the revenue, particularly when the appellant, who is the owner of the superstructure can protect it against all except the owner by virtue of Sec. 110 of Evidence Act vide 1996 TLNJ 378?

(iii) Whether the Lower Appellate Court is right in law in not applying the principles laid down by this Court in 1996 3 MLJ 520?

(iv) Whether the suit for mandatory injunction based on false cause of action is maintainable in law?"

Submissions on both sides:

14. The learned counsel for the first defendant/appellant argued that the case of the plaintiffs is that the encroachment was made only in the year 1997, whereas this defendant had filed documents in Ex.B1, which shows that the first defendant had been in possession of the property from the year 1982 and further, since the plaintiffs had not taken any action within a period of 3 years from the date of knowledge, the suit is not maintainable in view of limitation.



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15. The learned counsel further argued that since this defendant has not encroached upon the portion of patta lands of the plaintiffs, no cause of action is accrued for the plaintiffs to maintain the suit.

16. The learned counsel further contended that the Government has recognised the possession of this defendant and has also effected the electricity service connection. When admittedly, the suit property belongs to the Government, the plaintiffs have no right to institute the suit in respect of the suit property and further, the suit initiated by the plaintiffs, without making the Government as a party, is not maintainable and the suit is bad for non-joinder of the necessary parties.

17. The learned counsel further contended that even though the plaintiffs are having their easementary right to have access to their property, admittedly, access to their property is not been blocked in all sides. Even from the plan attached with the plaint and also the Advocate Commissioner's report, it could be seen that the plaintiffs are having access to the properties at least in some points from the highway and therefore, it cannot be said that entire access of the plaintiffs to their



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properties has been blocked. The learned counsel further contended that when between the road and the plaintiffs' lands, a large space, which according to her, 30 feet is available, the first defendant, being a landless person, has occupied the portion and put up a hut and running a petty shop, which will not be detrimental to the interest of the plaintiffs and the plaintiffs cannot maintain the relief of mandatory injunction, when this defendant has the possessory right over the suit property. The learned counsel further contended that both the Courts below have erroneously arrived at a finding of fact that the Government is not a necessary party and further, have failed to see that the defendants are in possession of the Government poramboke lands and their possession has been recognised and therefore, the finding of fact arrived at by both the Courts below are not based on the materials available on record and perverse and therefore, sought for interference of this Court in these Second Appeals.

18. Per contra, the learned counsel appearing for the plaintiffs/respondents contended that admittedly, the plaintiffs are the owners of the patta lands and it is their ancestral property, which was



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only partitioned among the co-parcener through the partition deed in Ex.A1. The plaintiffs' lands are abutting the highway and the plaintiffs are having every right to access their property from all the points and the defendants, who are, admittedly, encroachers, cannot be allowed to encroach part of the highway, whereby blocking the access to the property affecting the easementary right of the plaintiffs, as the access to the properties will be blocked and also the value of the lands will be lost. The learned counsel further contended that even though the first defendant, has claimed to be in possession of the suit property for a period of nearly 35 years, she has not filed any documents to establish the same. As rightly found by the Courts below, only the documents in Ex.B1 is in the year 1982 and therefore, the claim made by the first defendant cannot be sustainable.

19. The learned counsel further argued that when they have not claimed any relief as against the Government, the Government is not a necessary party and they have come up with the suit, only since the defendants put up a hut, which they tried to convert into a permanent construction, thereby, affecting the rights of the plaintiffs to have free



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access to their properties. The learned counsel further contended that when the rights of the plaintiff to the properties are affected, naturally, they get the cause of action as against the defendants, who tried to defeat the rights of the plaintiffs by making encroachment. The learned counsel further contended that both the Courts below have rightly arrived at a finding of fact, which does not require any interference and therefore, sought for dismissal of this Second Appeal.

20. This Court has given its anxious consideration to the submissions made on both sides and perused the materials on record.

Analysis of the submissions:

21. Admittedly, the plaintiffs are the owners of the property measuring 0.72.0 hectares in R.S.No.99/2A and R.S.No.99/2B. The ancestral properties which are belonging to the plaintiffs, have been partitioned among them through the registered partition deed in Ex.A1. The lands of the plaintiffs are situated at north of the highway running through Pasur to Vellode and also the suit property is situated abutting



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the road on the other side. The plaintiffs have filed documents in Exs.A2 to A3 to show their possession and enjoyment of the above extent of lands. It is the case of the plaintiffs that the defendants encroached into the suit property around July 1996 and put up a thatched shed on several places abutting the highway by blocking the access to the plaintiffs' properties to the highway.

22. According to the plaintiffs, the defendants tried to remove the thatched shed and also attempted to put up a permanent construction whereby, they were constrained to file the suit for injunction restraining their further encroachment and construction and also for mandatory injunction to remove the constructions already made.

23. It is the case of the defendants that the first defendant's mother-in-law was in possession and enjoyment of the suit property for the past 35 years and she had been living there along with her son Natarajan. Thereafter, the first defendant, who married Natarajan, had been running the petty shop and tea stall and is in possession and enjoyment of the suit property. Further, her husband died 15 years ago



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and she is in enjoyment of the property by paying necessary taxes to Pasur Town Panchayat and also she was taxed for the shop run by her. The first defendant claimed that since the electricity service connection has been effected for the hut put up by her and the taxes have been charged by the Panchayat, the Government has recognised her possession and therefore, the first defendant is entitled to be in enjoyment of the suit property unless and until any steps are taken by the Government and when admittedly, no encroachment has been made into the patta lands of the plaintiffs, they cannot maintain the suit.

24. It is seen that two of the defendants had been set *ex parte* and one defendant has not filed any documents. From the documents filed by the first defendant in Ex.B1 i.e., B memo issued in the name of the first defendant in the year 1982, she established the fact that she had put up the hut and she was in enjoyment of the property from the year 1982. However, the first defendant, even in her plaint, has clearly admitted that the suit property is a salai poramboke and it is not a revenue poramboke which does not belong to the revenue department. When admittedly, the suit property is a highway and it is classified as a



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salai poramboke, the road margin ought to be maintained free from encroachments. It is only when the encroachments made become hindrance to the public, the Government are initiating appropriate proceedings for removing encroachments. However, in the case on hand, it could be seen that almost major portions of the highway, which are abutting the properties of the plaintiffs, have been encroached upon. It could be seen from the plan and the report filed by the Advocate Commissioner in Exs.C1 and C2 that the first defendant had occupied nearly an extent of 10.50 feet for the hut and nearly an extent of 36 feet for the shop and also, it could further be seen that there is a thatched shed, which is running into 48 feet and 15 feet, respectively. The plan and the report filed by the Advocate Commissioner in Exs.C1 and C2 respectively, clearly reveal that now almost major portions of the salai poramboke abutting the highway on the side of the lands to the plaintiffs have been encroached upon and the huts have been put up. Further, from the Advocate Commissioner's report, it could be seen that the suit property is under construction, which establishes the fact that the defendants have already started putting up permanent constructions in the encroachment made by them on the road margin. These facts amply



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make it clear that already the access of the plaintiffs for their lands from the highway is blocked and the plaintiffs, as the owners of the lands, have right to access to the highway from their properties at all points.

25. When the plaintiffs have come up with the suit for injunction as against the defendants, who admittedly are the encroachers and the plaintiffs have not claimed any relief as against the Government, as rightly held by the Courts below, the Government is not a necessary party in the suit. When the rights of the plaintiffs are only disturbed and infringed by the actions of the defendants by putting up huts by encroaching highway area and thereby, blocking the access to the properties of the plaintiffs through the highway, they have rightly instituted the suit as against the defendants alone.

26. The first defendant had not been in possession of the property for a period of 35 years as claimed by her and even in the documents filed by the first defendant, it could be seen that the B memo issued in Ex.B1 is only in the year 1982 and hardly, the first defendant had been in possession and enjoyment of the property for only 10 years



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and therefore, the claim that the first defendant had been in possession for 35 years and the plaintiff, being silent, cannot now question due to acquiescence has not been established. Therefore, the first question of law is answered against the appellant.

27. As it has been observed earlier, when the defendants have put up encroachments abutting the highway thereby blocking the rights of the plaintiffs to have access to their properties from the highway from all points of the properties, necessarily, the plaintiffs have the right to institute the suit as against the defendants who are encroachers, since the right of the plaintiffs is affected. Therefore, the plaintiffs have the *locus standi* to initiate the suit as against the defendants in respect of the suit property which is admittedly, a salai poramboke i.e., highway. As such, the other questions of law 2 to 4 are also answered against the appellant and in favour of the respondents. The concurrent finding of fact arrived at by the Courts below are based on materials available on record and there is no perversity or illegality.



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28. In such circumstances, these Second appeals are dismissed.

There shall be no order as to costs.

27.02.2024.

Internet : Yes

Index : Yes/No

Speaking order/Non-speaking order
apd

To

1. The II Additional District Judge, Erode.
2. The District Munsif-cum-Judicial Magistrate, Kodumudi.
3. The Section Officer, V.R.Section, High Court, Madras.



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