



SA.No.1585 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.07.2024

PRONOUNCED ON: 11.07.2024

CORAM

THE HON'BLE Mr.JUSTICE C.KUMARAPPAN

S.A.No.1585 of 2010

and

MP.No.1 of 2010

Galaway Seelan (Died)

2. S.Nirmala

3. Merlin Ruby

4. Jasper Samson Prakash

(Appellants 2 to 4 are brought on record as LR's of deceased
sole appellant vide order dated 08.11.2022 made in
CMP.Nos.3923, 3931, 3928/2022)

... Appellants

- Vs -

1. Champalal (deceased)

2. K.Sankaran

(Since the 2nd respondent is not necessary party,
he has given up)

3. C.Kishnanlal

4. C.Madanlal

5. C.Kamalchand

6. Ujjal Bai

7. Santhosh Bai

(R3 to R7 brought on record as LR's of the deceased
first respondent vide order dated 16.03.2018 made in
CMP.Nos.4867 to 4869/2016)

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code
against the judgment and decree dated 30.07.2010 made in A.S.No.20/2008



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on the file of the Sub Court, Tambaram reversing the judgment and decree dated 28.10.2008 made in O.S.No.296/2004 on the file of the District Munsif Court, Tambaram.

For Appellants : Mr.V.Raghavachari
Senior Counsel
for Ms.V.Srimathi

For Respondents : Mr.R.Thiyagarajan
for R3 to R5
R1-Died
R2-Given up
R6 & R7- No Appearance

J U D G M E N T

By the order of My Lord The Hon'ble Acting Chief Justice dated 25.06.2024, this Second Appeal was taken up for hearing before this Court.

2. The plaintiff was the sole appellant herein. After the demise of the sole appellant, appellants 2 to 4 who are the legal representatives of the sole appellant, were arrayed as the appellants 2 to 4. The defendants 1 and 2 were arrayed as respondents 1 and 2. After the demise of the first respondent/defendant, his legal heirs were arrayed as respondents 3 to 7 in the Second Appeal.

3. For the sake of convenience, the parties will be referred to according to their litigative status before the Trial Court.



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4 (a). The brief facts which give rise to the instant Second Appeal is that the suit property was originally belongs to one A.R.Devasahayam Pillai and his wife Mrs.Mary Jane Devasahayam. They have sold the suit property in favour of Mrs.Kamala Prakash in the year 1949 by virtue of a Sale deed dated 20.04.1949. The said Kamala Prakash has got 4 sons by name P.V.Prabhu, Galaway Seelan (this plaintiff), Jeevan Prakash and Sugirdanesan. While so, the said Kamala Prakash died on 28.05.1988 leaving behind her sons as legal representatives to succeed her estate. This plaintiff submits that, since the defendants were interfering with the possession and enjoyment of the plaintiff, on his behalf and on behalf of the other legal heirs of late Kamala Prakash, has instituted the instant suit against these defendants.

4 (b). According to this plaintiff, the suit property was resurveyed and a new survey number was assigned as 266/1A1A2A and its corresponding town Survey number is 42. It is the submission of the plaintiff that he and his brothers have been in continuous possession and enjoyment of the said property. While so, the defendants, who are the utter strangers and in no way connected to the property, have attempted to interfere with their possession. Such interference necessitated this plaintiff to prefer a police



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complaint. Whereas, the police have advised the plaintiff to institute a suit, which necessitated this plaintiff to file the instant suit seeking the relief of permanent injunction restraining the defendant from interfering in his peaceful possession and enjoyment of the suit property.

5 (a). The said suit was resisted by the first defendant by contending that the instant suit is bad for non-joinder of necessary parties as the other legal heirs of late Kamala Prakash has not been arrayed as a party. This defendant has pleaded ignorance in respect of the purchase of the property by the plaintiff and the relevant survey number assigned to the suit properties. However, it is the contention of this defendant that he has purchased the property by virtue of a Sale Deed dated 13.01.1972 of an extent of 11 cents comprised in S.F.No.266/1A1A2A1. Whereas the property said to have been purchased by the plaintiff's mother is comprised in SF.No.266/1A1A2A. Therefore, this defendant submits that the plaintiff without knowing the factual position and without knowing the boundaries of his mother's property rushed to this Court with incomplete, inchoate and imperfect details.

5 (b). It is also the contention of this defendants that the description of the property mentioned in the plaint is misleading and incorrect and does not reflect the correct description as mentioned in the plaintiff's mother's Sale



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Deed dated 20.04.1949. It is also the contention of this defendant that the instant suit for bare injunction without seeking the relief of declaration is not maintainable. It is also the specific contention of this defendant that he has been in possession and enjoyment of the property comprised in S.F.No.266/1A1A2A1. This defendant further submits that there is no cause of action to the plaintiff. This defendant further submits that according to the recent sub division, the survey number of the defendants' property is 266/9 and the patta number is 3179. Hence, the first defendant submits that the instant suit is devoid of merits and liable to be dismissed.

6. The 2nd defendant has also resisted the suit by filing a separate written statement. Wherein, he contended that he has not instigated anyone to interfere with the possession of the plaintiff. The 2nd defendant further submits that the plaintiff has not measured the suit property with the assistance of the Government Surveyor. This defendant submits that the plaintiff has encroached upon the surrounding lands and put up a compound wall in a high handed manner. It was also the contention of this defendant that he has been dragged unnecessarily to the Civil litigation. Hence, prayed to dismiss the suit.



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7. Before the Trial Court, the plaintiff has examined 2 witnesses as PW1 and PW2, and marked 15 documents as Exs.A1 to A15. On behalf of the defendants, 2 witnesses were examined as DW1 and DW2 and 6 documents have been marked as Exs.B1 to B6. As Court documents, 9 documents have been marked as Exs.C1 to C9. Similarly, as a third party document, 4 documents have been marked as Exs.X1 to X4.

8. The Trial Court, after having considered the oral and documentary evidence, has arrived at a conclusion that even as per the documents filed by the defendants, the suit property had been in physical possession and enjoyment of the plaintiff, and that the same could be vindicated through the description of property referred to in Ex.A1-Sale Deed, and through the sale deed of the defendants. Wherein the plaintiff's mother's name has been referred, while describing the boundaries of the defendants' land. Therefore, the Trial court has decreed the suit as prayed for.

9. Aggrieved with the said finding, the first defendant preferred the First Appeal before the First Appellate Court. Whereas, the First Appellate Court, without there being any reference in Ex.B6 as to the S.F.No.266/1A1A2A1, found that on the west of the plaintiff's land the property belongs to the defendants in S.F.No.266/1A1A2A1 exist. The First



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Appellate Court has also held that the absence of linear measurement in the title deed of the plaintiff, would also probablise that the suit property has also includes S.F.No.266/1A1A2A1. Thus, ultimately allowed the appeal by dismissing the suit.

10. Aggrieved with the judgment of the First Appellate Court, the plaintiff preferred the instant Second Appeal.

11. On hearing both the parties, this Court has formulated the following substantial question of law:-

a) Whether the Lower Appellate Court has not committed a serious error of law in totally misconstruing the pleadings and evidence?

b) Whether the Lower Appellate Court is right in reversing the well considered judgment of the Trial Court on mere presumption that the Appellant is attempting to grab the property of the 1st respondent which was not the case of the 1st respondent himself?

12. The learned Senior Counsel Mr.V.Raghavachari appearing on behalf of the appellants would submit that admittedly there is no dispute in respect of the ownership of the plaintiff's over the suit property. Whereas, the defendants only disputes the identity. The learned Senior Counsel would



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further contend that, even according to the admission made by the defendants, the plaintiff's property situate in SF.No.266/1B and during resurvey, the same was assigned resurvey number in 266/1A1A2A corresponding to the town Survey No.42. The learned Senior Counsel would further contend that, it is the specific case of the defendants that, their property situate in S.F.No.266/1A1A2A1. Whereas the very existence of such survey number has not been substantiated by the defendants. However, in spite of such factum, the First Appellate Court has presumed and assumed certain things and without any evidence, held that there could have been a resurvey no.266/1A1A2A1, which would belong to the defendants. Such approach of the First Appellate Court is perverse and the same is without there being any foundation.

13. The learned Senior Counsel would further contend that the First Appellate Court has misread certain documents and wrongly found that the suit property is not in possession of the plaintiff. It is the further contention of the learned Senior Counsel that, when the defendants have not disputed the title of the plaintiff, there is no necessity for the plaintiff to seek for the relief for declaration. In this regard, the learned Senior Counsel relied upon



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the judgments in (i) *A.Subramanian and another Vs. R.Pannerselvam* reported in (2021) 3 SCC 675; (ii) *K.M.Krishna Reddy Vs. Vinod Reddy and another* reported in (2023) 10 SCC 248; and (iii) *Muddasani Venkata Narasaiah* reported in (2016) 12 SCC 288. Apart from that, he also relied upon the judgment of the Hon'ble Supreme Court in *Tirumala Tirupati Devasthanams Vs. K.M.Krishnaiah* reported in (1998) 3 SCC 331, wherein it was held that when the plaintiff's title is admitted, then it must be presumed that he has been in possession and enjoyment of the property.

14. Per contra, the learned counsel Mr.R.Thiyagarajan, appearing for the defendant would contend that the instant suit is liable to be dismissed on the ground of non-joinder of necessary parties. It was also contended by the learned counsel for the defendants that when the defendants dispute the plaintiff's right over the suit property, the plaintiff ought to have prayed for the relief of declaration. Whereas in the instant suit, such relief has not been sought for, hence the learned counsel for the respondents would contend that on this score, the suit is liable to be dismissed. It was also contended by the learned counsel for the defendants that the First Appellate Court has rightly re-appreciated all the material documents and has arrived at a finding that the plaintiff has wrongly described the property. Therefore, contended that in the



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instant suit, the plaintiff cannot have any relief in respect of the suit property.

It is the further contention of the defendants that the suit property has been wrongly described in contravention to the property referred to in the plaintiff's sale deed. Therefore, the learned counsel would contend that the judgment of the First Appellate Court is well merited and does not deserve any interference by this Court. Hence, prayed to dismiss this Second Appeal.

15. I have given my anxious consideration to either side submissions.

16. The first and foremost submission put forth by the learned counsel for the defendants is that the suit is bad for non-joinder of the parties. In this regard, the learned counsel would invite the attention of this Court that the suit property was originally belongs to one Mrs.Kamala Prakash, and that she has got 4 sons by name P.V.Prabhu, Galaway Seelan (the plaintiff), Jeevan Prakash and Sugirdanesan. Whereas, the instant suit has been filed by one among them viz., Galaway Seelan.

17. In this regard, the learned Senior Counsel for the plaintiff would contend that this suit is not against the right of the plaintiff or *inter se* dispute and that the suit has been instituted only to protect the property for and on behalf of all the legal heirs. In this regard, he has relied upon the judgments of this Court in *Nachal and others Vs. C.Arjunan and others* reported 1996



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(1) **CTC 650**. Wherein, this Court has held that, when one co-owner while admitting the rights of the other co-owners, can institute a suit restraining the 3rd party trespassers from interfering with the possession and enjoyment of the property. Therefore, this Court is of the firm view that the finding rendered by the Trial Court that the suit as framed is maintainable, is liable to be accepted.

18. The next limb of the submissions made by the learned counsel for the defendants is that, the plaintiff has included the property of the defendants while describing the suit property. Therefore, contended that the plaintiff is not entitled for an injunction. However, the defendants have fairly admitted that the plaintiff is the owner of the property comprised in Survey No.266/1A1A2A and its old survey no.266/1B. It is the specific case of the defendants that, he is the owner of the property in S.F.No.266/1A1A2A1. Therefore, it is the contention of the defendants that without verifying the correct boundary, the plaintiff has approached the suit.

19. The learned counsel for the defendants, by relying upon the judgment of the Hon'ble Supreme Court in *Anathula Sudhakar Vs. P.Buchi Reddy (dead) by LRs. and others* reported in (2008) 4 SCC 594 would



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contend that, when there is a dispute with regard to the title over the suit property, the mere suit for injunction without seeking the relief of declaration is not maintainable. As already stated, the defendants are not disputing the title of the plaintiff in the property comprised in resurvey No.266/1A1A2A and old Survey No.266/1B. On the other hand, it is the specific case that the defendants are the owner of the other Survey No.266/1A1A2A1. Therefore, on the face of it, the defendants have not disputed the title of the plaintiff. In this regard, the learned Senior Counsel appearing on behalf of the plaintiff by relying upon the judgments in *A.Subramanian's* case [cited supra], *K.M.Krishna Reddy's* case [cited supra] and *Muddasani Venkata Narsaiah's* case [cited supra], has contended that when there is no dispute with regard to the title, there is no necessity for the party to seek for the relief of declaration on paying the higher Court fees. Therefore, this Court could not find any infirmity in framing of the suit, only with the relief of bare injunction.

20. Coming to the description of property, the learned counsel for the defendants would contend that, the description of property found in the plaint is altogether different from the description of property referred to Ex.A1-Sale



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Deed viz., title deed of the plaintiff. In this regard, the learned counsel would invite the attention of this Court in respect of the western boundary. According to Ex.A1-Sale Deed, the western boundary shown as A.R.Devasahayam's family land. Whereas in the plaint, it has been referred that on the western side, a land belongs to A.R.Devasahayam's family and Cart passage. By emphasising the word 'Cart passage', the learned counsel for the defendants would contend that the description found in the plaint is referring all together different property, other than the property mentioned in Ex.A1-Sale Deed.

21. In this regard, this Court deems it appropriate to refer that, the plaintiff's and the defendants' predecessor-in-title have purchased their respective properties from same person qua one Devasahayam Pillai and his wife Mrs.Mary Jane Devasahayam. Admittedly, they owned larger extent of 3 acres 41 cents in S.F.No.266, which could be seen from Ex.A1-Sale Deed. The above Ex.A1-Sale Deed is of the year 20.04.1949 and the suit has been instituted on 31.08.2004 almost after a period of 55 years. Even while seeing Ex.B6, which is the topo sketch for the entire extent of S.F.No.266, we could see that the above SF number has been subsequently subdivided into various



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sub divisions. Therefore, as rightly observed by the Trial Court, at the time of purchase of the property during 1949, there would not have been any passage on the western side of the suit property. But one thing certain that those properties belong to Devasahayam's family, who was the original owner.

22. Therefore, the mere reference of Cart Passage in subsequent sale deed of the plaintiff will in no way alter the reference made in Ex.A1-Sale Deed that on the west Devasahayam's property exists. To put it in other words, during 1949, this Cart Passage must be the property belongs to Devasahayam. Therefore, the contention put forth by the learned counsel for the defendants that the plaintiff has wrongly described the suit property contrary to their Sale Deed, cannot be accepted at all.

23. The defendants have been very much relying upon Ex.B6. According to them, in Ex.B6, red lined portion is the defendants' property. Whereas green marked portion belongs to the plaintiff. More curiously, Ex.B6 is the Xerox copy, wherein the defendants themselves made such red and green lining. Fortunately and serendipitously, Ex.B6 is the topo sketch of S.F.No.266. The red portion mentioned in Ex.B6 does not have any separate sub division number and it is a part of 266/1B. But the First



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Appellate Court has held that there is a straight line dividing 1B. Therefore, on the west of the said line is nothing but the defendants' property viz., 266/1A1A2A1. Admittedly, even according to the findings of the First Appellate Court, with reference to S.F.No.266/1A1A2A1, there are no records.

24. But, the defendant during his cross examination has categorically admitted that the plaintiff's property situate in S.F.No.266/1B. This Court is fully convinced with the submissions made by the learned Senior Counsel for the appellant/plaintiff that even according to the defendants' document Ex.B6, the red portion also comes within S.F.No.266/1B. This could be further validated and vindicated through Ex.C9 viz., the Commissioner's report. Wherein S.F.No.266/1B assigned a resurvey No.266/1A1A2A and its corresponding Town Survey number is 42. This aspect has not been seriously disputed by the defendants. Whereas, the plaintiff has independently established such factum by filing Ex.A5-letter given by the Inspector of Town survey. Ex.C9-report is tallies with Ex.A6, which is the sketch for Town Survey No.42. The Trial Court, after having considered all these aspects, has found that the defendants' property situate on the west of the plaintiff's property.



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25. According to the defendants, the resurvey number of their property is 266/1A1A2A1. However, admittedly there are no records to show about the existence of such survey number. On the other hand, the plaintiff has established his ownership in respect of 266/1B and its corresponding resurvey no.266/1A1A2A. Further, the corresponding Town survey number for the above SF number is 42, which has been rightly described in the plaint. Here, the Revenue records, such as Kist receipt-Ex.A13 of the year 1958 stands in the name of the original owner Kamala Prakash. Further, the letter received from the Taluk Office in Ex.A3, and also SLR copy-Ex.A8 stands in the name of the plaintiff and his brother. Thus, these documents emphatically, indubitably and impregnably establish the plaintiff's possession over the suit property. Whereas the First Appellate Court on the basis of presumption and assumption, and also without having any documents and evidence and also contrary to the available documents, has arrived at a perverse finding that the plaintiff has not established his right over the property and wrongly described the same. This Court could very well interfere with such perverse finding under Section 100 of CPC. Hence, the perverse finding rendered by the First Appellate Court is liable to be interfered with.



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26. It is also the contention of the learned counsel for the defendants that in the plaintiff's Sale Deed-Ex.A1, there is no linear measurement. As rightly contended by the learned counsel for the defendants, admittedly there is no reference about the linear measurement in Ex.A1-Sale Deed. But the same cannot be construed as a deliberate one so as to encroach upon the property of the defendants. As a matter of fact, on the very same day, the same original vendor Devasahayam and his wife sold the other portions to one Vedhamanidoss, and such sale deed has been marked as Ex.X2. Even in the said Sale Deed, there is no linear measurement.

27. But what is common in both the documents is that, they took North-Eastern portion of the property for a sale and they sold to one Alexandar Solomon, Vedhamanidoss and to the plaintiff's mother Kamala Prakash. The southern-most property appears to have been belongs to Alexandar Solomon, and on the north Vedhamanidoss's property, and on the further north, the plaintiff's mother Kamala Prakash's property situate. It is an admitted case that the plaintiff's property comprised in old SF.No.266/1B, which could be easily identifiable through Ex.B6 as well as Ex.X3.



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28. It is pertinent to mention here that under Tamil Nadu Survey and Boundaries Act, if any dispute in respect of the boundary of any survey number, the party must challenge the same within a period of three (3) years from the date of knowledge. While looking at the document, even prior to the purchase of the defendants, since 1958 the sub division was exist for SF No.266/1B. Therefore, even otherwise under Section 13 of The Tamil Nadu Survey and Boundaries Act, the boundaries of SF.No.266/1B must be taken as a conclusive proof. For ready reference, Section 13 of The Tamil Nadu Survey and Boundaries Act is extracted hereunder:-

“13. When the survey of any land or boundary which has been notified under section 5 has been completed in accordance with the orders passed under section 9, 10 or 11, the survey officer shall notify the fact in the district gazette and a copy of such notification shall be posted in the village chavadi, if any of the village to which the survey relates; unless the survey so notified is modified by a decree of a civil court under the provisions of section 14, the record of the survey shall be conclusive proof that the boundaries determined and recorded therein have been correctly determined and recorded.”



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29. Therefore, even the non reference of linear measurement cannot be a ground to deny the relief to the plaintiff. Further, such defence loose its significance in the above background.

30. Thus, in view of the above detailed discussion, the substantial question of law are answered in favour of the appellants.

31. In the result, this Second Appeal is allowed by setting aside the judgment and decree of the First Appellate Court and restoring the decree of the Trial Court. There shall be no order as to costs. Consequently, connected MP is also closed.

11.07.2024

kmi

Index : Yes

Speaking Order : Yes

NCC : Yes

To

1. The Sub Court,
Tambaram.

2. The District Munsif Court,
Tambaram.



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C.KUMARAPPAN, J

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