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S.A.No.701 of 2005

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 12.03.2024

CORAM

THE HON'BLE MR. JUSTICE **G.ARUL MURUGAN**

S.A.No.701 of 2005

A.T.Jayakumar

... Appellant

Vs.

1.Jambulingam (Died)

2.Kalaiselvan

3.J.Panneerselvam

4.J.Shanthi

... Respondents

(Sole Respondent died. RR2 to 4 brought on record as LR's of deceased sole respondent vide order of court dated 15/03/2023 made in CMP.No.14044, 14045 and 14046 of 2018 in SA.No.701/2005 (RHJ))

PRAYER: Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 08.11.2004 made in AS.No.145 of 2003 on the file of the Additional Sub Court, Tindivanam, confirming the



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judgment and decree dated 13.11.2003 made in O.S.No.390 of 1998 on the file of the Additional District Munsif, Tindivanam.

For Appellant : Mr.S.Mukunth Senior Counsel for
Mr.Venkataswamy Babu

For R1 : Died
For R2 to R4 : No Appearance

JUDGMENT

The defendant in the suit is before this Court on appeal. This second appeal is filed challenging the judgment and decree dated 08.11.2004 in AS.No.145 of 2003 on the file of the Additional Sub Court, Tindivanam, confirming the judgment and decree dated 13.11.2003 in OS.No.390 of 1998 on the file of Additional District Munsif. Tindivanam. Pending appeal, the sole respondent died. Respondents 2 to 4 were impleaded as legal heirs.

2. For the sake of convenience, the parties are referred to as per the ranking before the trial court.



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The Brief facts in the plaint:

3. According to the plaintiff, the suit property measuring an extent of 0.11 cents in S.No.270/13 absolutely belongs to the plaintiff. Originally the suit properties belonged to the plaintiff and his brother Subramani Mudaliyar. His brother died in the year 1975, and his share was inherited by his wife Rathinammal and his daughter Velammal. Thereafter, in the partition deed dated 04.08.1981, the properties were partitioned and the suit property was allotted to the share of the plaintiff, and the plaintiff is in possession and enjoyment of the suit property by paying the necessary kist. On the north of the suit property, the house and lands belonging to the defendant, and his brother are situated. Beyond the lands, Gramanatham in S.No.269/12 belonging to the plaintiff is also situated. The plaintiff has been in enjoyment of all those properties. While so, in the year 1993, the defendant filed OS.No.573/1993 claiming the right to the extent of 10 feet x 66 feet, and the same was dismissed. When the defendant constructed the house in



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1994, he illegally encroached into the portion of land measuring 18 X 23 feet in the lands belonging to the plaintiff, marked as A,B,C,D in the plaintiff plan. Since the defendant failed to vacate the encroachment made by him, the plaintiff has come up with the suit for declaration and recovery of possession.

4. The defendant resisted the suit by filing the written statement contending that the suit property originally belonged to one Muthukrishna Mudaliyar, who had two sons, Rajamanickam and Munusamy. Rajamanickam died in the year 1946, leaving behind his wife Rajammal, and his daughter Pushpavathy. Likewise Munusamy Mudaliar died leaving behind his wife Chinnakannu and his two sons Balasubramani and Jambulingam. All of them lived as the joint family and they were in enjoyment of the suit property. There was an oral partition in the family in the year 1940, and in the oral partition, an extent of 0.3.1/2 cents was allotted to the share of Rajamanickam Mudaliyar. After the death of

Rajamanickam Mudaliyar in the year 1951, his wife Rajammal was in



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enjoyment of his 0.3 ½ cents and by a sale deed dated 03.10.1958, she sold the lands measuring 0.13 cents in S.No.270/10 and 0.3 1/2 cents in Survey No.2707/13 cents in favour of the defendant's father Thirunavukkarasu Mudaliyar. Revenue documents have been mutated, and pursuant to his death, the properties were in enjoyment of his 8 sons. Thereafter, pursuant to the partition made between the defendant's father and his brothers on 21.04.1969, the properties measuring 0.3 ½ cents in S.No.270/13 were allotted to the share of the defendant's father. Further, in respect of the suit property, the suit in O.S.No.573/93 was filed and as against the judgment, the defendant has also preferred appeal. The defendant is not in encroachment of the land measuring 18 x 23 sq.feet and sought for dismissal of the suit.

Evidence and Documents:

5. During trial, the plaintiff examined himself as PW.1 and marked Ex.A.1 to A.4. On the side of the defendant, the defendant was examined as DW.1 and Ex.B.1 to B.9 were marked. In the suit, Advocate



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Commissioner was appointed and his report and plan were marked as Ex.C1 and Ex.C2.

Findings of the Court below:

6. After analyzing the evidence and documents, the trial court decreed the suit. The trial court found that when the defendant claim right over the suit property having been purchased by his father in Ex.B.1, the certified copy of decree in Ex.A.2 in the suit filed by the plaintiff and his brother as against the defendant's vendor shows that the defendant's vendor has lost the title to the suit property. As such, the plaintiff established the title in the suit property, and the consequent recovery of possession is also ordered. Aggrieved, the defendant filed appeal in AS.No.145/03 on the file of Additional Subordinate Judge, Tindivanam. The Lower Appellate Court, after reappraising the evidence, dismissed the appeal. Aggrieved by the same, the defendant is before this Court on appeal.



Substantial Questions of law:

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7. This Court by order dated 08.11.2005 admitted the appeal and framed the following substantial question of law:

“1. Whether the suit as framed is maintainable without executing the decree in O.S.No.19 of 1959 which is also for possession of the same property?

2. Whether the learned Appellate Court was right in law in not advertng to the fact that the possession of the appellant had become adverse possession from 22.08.1960 namely the date of the decree in Os.No.19 of 1959.”

Submission made by the learned counsel for the Appellant

8. Mr.Mukunth, the learned Senior Counsel appearing for the appellant vehemently argued that in the oral partition that took place in the year 1940, the suit properties were partitioned. The 3 ½ cents of land in the suit property came to the share of Rajammal, wife of Rajamanickam and she sold the same, along with 13 cents of land in Survey No.270/10 in favour of the defendant's father as early as on



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03.10.1958 in Ex.B.1. After the death of defendant's father, the defendant along with 7 brothers entered into the partition deed on 24.01.1969 in Ex.B.4 in which the properties purchased by his father in Ex.B.1, particularly the 0.3 ½ cents in the suit were allotted to the share of the defendant.

9. The learned Senior Counsel further contended that as the defendant became the absolute owner of the 3 ½ cents in the suit property, he put up construction and the plaintiff has no manner of right in respect of 3 ½ cents conveyed in favour of the defendant's father, which has now been allotted to the share of the defendant.



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10. The learned Senior Counsel further argued that the courts below mainly placing reliance on Ex.A.2, the compromise decree passed in OS.No.19/1959, has come to the conclusion that the plaintiff is the owner of the suit property.

11. The learned Senior counsel further contended that since the compromise entered into in Ex.A.2 was not acted upon, it necessitated the defendant to file the suit in OS.No.326/1963 for specific performance. The suit was decreed in Ex.B.7, and the defendant got the property measuring 13 cents in Survey No.270/10. The learned Senior counsel further argued that the courts below relied on the Advocate Commissioner Report and plans in Ex.C1 and Ex.C2, which found that the portion of the suit property measuring 0.3 1/2 cents is in possession of the defendant having constructed a building. But however, they came to the conclusion that since the plaintiff has established the title, the defendant is found to deliver possession in respect of 3 1/2 cents in the suit property after demolishing the house.



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12. The learned Senior counsel further argued that when the defendant, through documents, established the ownership in respect of 3 ½ cents in the suit property, the courts below have not appreciated the



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documents in proper prospective and erroneously decreed the suit and sought for allowing this second appeal.

13. Even though the respondents have been served and the names are also printed in the cause list and there is no appearance on the side of the respondents.

14. Heard the learned counsel appearing for the appellant and perused the material available on record.

Analysis:

15. Admittedly, the suit properties along with other properties originally belonged to one Muthukrishnan. After his demise, the properties were inherited by two sons, Rajamanickam and Munusamy. It is the case of the plaintiff that the plaintiff and one Balasubramani, being the sons of Munusamy, inherited the properties that were allotted to the share of their father through oral partition in the year 1940. According to



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the plaintiff, he and his brother being in possession and enjoyment of the property, executed a partition deed in Ex.A1 on 04.08.1981. In the partition, the suit property was allotted to the share of the plaintiff.

16. On the contrary it is the case of the defendant that the suit properties were allotted to the share of Rajamanickam and he died in the year 1951 and the property was inherited by his wife Rajammal. As daughter Pushpavathy died in the year 1946, Rajammal alone became entitled to the property. By a sale deed dated 03.10.1958 in Ex.B.1, 13 cents in Survey No.270/10 and 3 ½ cents in Survey No.270/13 out of 11 cents of suit property was sold in favour of the defendant's father in 03.10.1958. After the defendant's father died on 14.04.1987, the sons inherited the properties. The 8 sons of Thirunavukkarasu Mudaliyar got the 3 ½ cents in the suit property which was allotted in favour of the defendant's father based on partition deed in Ex.B.4. Therefore, according to the defendant, the 18 x 23 square feet of lands which is alleged to have been encroached by the defendant is not correct and he is



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the owner of 3 ½ cents in the suit property through the sale deed in Ex.B.1 and the partition deed in Ex.B.4.

17. The perusal of the decree in Ex.A2, reveals that the suit in OS.No.19 of 1959 has been filed by the plaintiff Jambulingam and his brother Balasubramanian against Rajammal, who is the defendant's vendor and also Thirunavukkarasu Mudaliyar, the defendant's father. The suit has been filed for a declaration to declare the title in respect of 2 items of the properties, 13 cents in S.No.270/10 and 11 cents in S.No.270/13. In the suit, a compromise has been arrived at, and in the compromise, the parties agreed that 11 cents in S.No.270/13 belonged to the plaintiff and his brother, and the title has been declared. In the same suit it was also decided that Rajammal will convey the extent of 13 cents in S.No.270/10 alternatively, and the sale deed executed by Rajammal to the defendant's father in respect of 3 ½ cents in S.No.270/13 was declared void. Therefore, even the defendant's father and their vendor have, in the suit in Ex.A.2, lost their title in respect of 3 ½ cents in the suit property,



and therefore the contention of the defendant that he is entitled to the suit property in view of the partition executed among the brothers cannot be sustained.

18. Further, it could be seen that as the conveyance was not completed, the defendant filed the suit for specific performance in OS.No. 326/1963 and obtained the decree in Ex.B.7, whereby 13 cents of land in S.No.270/10 had been conveyed in favour of the defendant. From the documents in Ex.A.2 and Ex.B.7 and the partition deed executed in Ex.A.1, it is clear that the plaintiff has established his title to the suit property and the defendant has no right to claim the extent of 3 ½ cents out of the suit property.

19. Further from the report filed by the Advocate Commissioner in Ex.C1 and C2, it has been found that the defendant had encroached into the extent of 18 x 23 feet into the suit property belonging to the plaintiff and the courts below have rightly come to the conclusion that the plaintiff



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has established his title to the suit property and also found that the defendant encroached the portion as mentioned in the plan. When the plaintiff has established his title, the defendant is bound to demolish the encroached portion and hand it over to the plaintiff.

20. In view of the above findings, the substantial questions of law are answered against the appellant and in favour of the respondent. The courts below have arrived at the finding of fact based on the documents available on record and are not perverse.

21. Therefore, the second appeal stands dismissed. However, there is no order as to costs.

12.03.2024

drl

Index : Yes / No

Speaking / Non-speaking

Neutral Citation : Yes / No



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To

1. The Additional Sub Court, Tindivanam.
2. The Additional District Munsif, Tindivanam.

G.ARUL MURUGAN,J.

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