



S.A. No. 1066 of 2013

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.10.2024
Pronounced on : 18.11.2024

CORAM

THE HONOURABLE MR.JUSTICE N.SENTHILKUMAR

S.A. No.1066 of 2013
and
M.P.No.1 of 2013

1.Ummal Bajria
2.Sirujudeen
3.Bairoji Banu

... Appellants

Versus

1.Ummal Hasanath
2.Sarpunnisa
3.Munaivar Nisa
4.Majinisa
5.Thajinminna
6.Bajarudeen

...Respondents

Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree dated 06.07.2013 made in A.S. No.23 of 2012 on the file of the Principal Subordinate Court, Myladuthurai, reversing the judgment dated 04.02.2011 made in O.S. No.67 of 2007 on the file of the District Munsif Court, Sirkali.

For Appellants : Ms. V.V. Sathya



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For Respondents : Mr. B. Jawahar for R1 to R5
: No Appearance (notice served) for R6

J U D G M E N T

The appellants are the defendants 1, 2 & 4 in the original suit in O.S.No.67 of 2007. The 3rd defendant in the suit is the 6th respondent herein. The appellants are aggrieved by the Judgment and Decree dated 06.07.2013 made in A.S.No.23 of 2012 on the file of the Principal Subordinate Court, Myladuthurai, reversing the judgment and decree dated 04.02.2011 made in O.S.No.67 of 2007 on the file of the District Munsif Court, Sirkali.

2. The respondents 1 to 5 herein are the plaintiffs, who are the daughters of one Mohammed Saali Rauther. The defendants are the legal heirs of the said Mohammed Saali Rauther's brother. The first defendant/Ummal Bajria is the wife of one Assan Mohammed. The defendants 2 and 3/ Sirujudeen & Bajarudeen, are the sons of the 1st defendant/Ummal Bajria. The 4th defendant/Bairoji Banu is the daughter of the first defendant/Ummal Bajria.

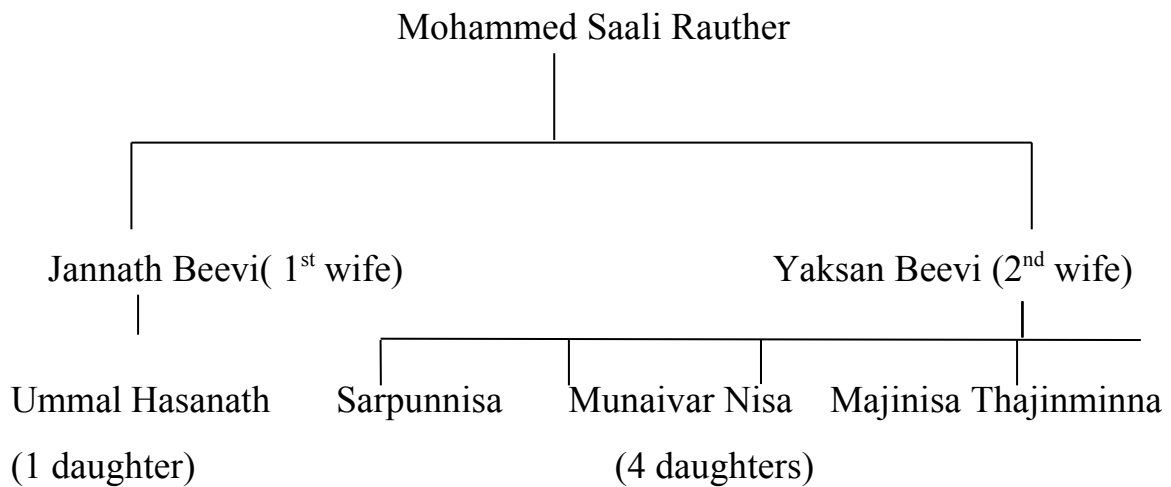


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3. For the sake of convenience, the parties are referred as plaintiffs and defendants as mentioned in the suit.

4. The suit was filed for recovery of possession of the suit property with a direction to remove the superstructure put up by the defendants.

5. The case of the plaintiffs is that their father late Md. Saali Rauther originally owned the property in S.No.262C/24 in Manganam Pattu Village, Sirkazhi Taluk to an extent of 0.64 ½ cents. He obtained this land by way of family partition on 14.07.1943. The present suit was instituted in respect of land in S.No.262C/24 to an extent of 10 cents out of 64 ½ cents. The said Md. Saali Rauther died in the year 1967, leaving behind two wives and five daughters as his legal heirs. The detailed genealogy is hereunder:-





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6. According to the plaintiffs, on 19.09.1997, the said Md. Saali Rauther had executed a sale deed in favour of the first defendant/Ummal Bajiriya in respect of land in S.No.262C/24 to an extent of 6 cents and sold an extent of 48 ½ cents of land in S.No.262C/24 to one Ayisha Beevi, who is not a party to the suit. After the demise of the said Ayisha Beevi, her son Abdul Rahman took over the property and the same was bequeathed to his son Mohammed Iliyaas. Thereafter, the said 48 ½ cents of land was handed to one Kunju Vagaiyara by way of lease on 02.09.1999.

7. According to the plaintiffs, by virtue of the partition, which took place on 14.07.1943, the said Md. Saali Rauther had received 64 ½ cents of land, out of which, he executed sale deeds in respect of land to an extent of 54½ cents (6 + 0.48 ½) to the first defendant and Ayisha Beevi respectively. The remaining 10 cents of land is the property in dispute in the present suit. The plaintiffs contended that on 25.03.2001, the defendants and late Asan Mohammed deliberately trespassed into the suit schedule property and illegally leveled the property.



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8.The plaintiffs further contended that the defendants 1 to 4 in O.S.No.67 of 2007 and the said Asan Mohammed filed a suit in O.S.No.76 of 2001 before the District Munsif Court at Sirkazhi as against the plaintiffs 4 and 5 namely, Majinisha and Thajilminna. The said suit in O.S.No.76 of 2001 was filed for permanent injunction to restrain the defendants therein from disturbing the plaintiff's peaceful possession and enjoyment of the properties in various survey numbers including S.No.262C/24. The plaintiffs further contended that they had filed the present suit only in respect of 10 cents of land in S.No.262C/24. However, the defendants had claimed an extent of 57 kuzhi in O.S.No.76 of 2001 which was pending at the time of filing the present suit by the plaintiffs/respondents herein.

9.The plaintiffs viz., Ummal Hasanath, Sarpunnisa, Munaivar Nisa, Majinisa and Thajinminna contended that the defendants viz., Ummal Bajria, Sirujudeen, Bajarudeen and Bairoji Banu have no right in respect of the suit property and the defendants had encroached the suit property. Therefore, the plaintiffs had filed the present suit for recovery of possession and removal of



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superstructure put up by the defendants in the suit property.

10.The Trial Court vide judgment and decree dated 18.04.2007 granted permanent injunction in respect of other survey numbers and rejected the suit in respect of S.No.262C/24 by observing that the defendants herein had purchased only 6 cents in the said survey number. The defendants in O.S.No.76 of 2001 filed A.S.No.59 of 2008 before the Principal Subordinate Court, Mayiladuthurai against the judgment and decree in O.S.No.76 of 2001. The First Appellate Court modified the judgment by granting permanent injunction only to an extent of 6 cents in S.No.262C/24 and partly allowed the appeal in favour of the defendants.

11.The defendants filed their written statement in the suit contending that the plaintiffs had not established that they were in possession of the property obtained in family partition that had taken place on 14.07.1943. There is no clarity with regard to the sale made by the said Mohammed Saali Rauther at various point of time. The plaintiffs had not explained the details of execution of sale deed by Mohammed Saali Rauther in respect of 48 ½



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cents and 6 cents of land. There is no clear description with regard to the extent and boundaries of the properties conveyed by the said Mohammed Saali Rauther. In the absence of any document and other particulars produced by the plaintiffs, it has to be concluded that the plaintiffs had not established their right over the suit schedule property in the manner known to law. The defendants further contended that the plaintiffs have not clearly mentioned what was the extent of land leased out in favour of one Kunju Vagaiyara. Therefore, it has to be construed that the plaintiffs' claim is imaginary and bereft of details.

12.The institution of suit in O.S.No.67 of 2007 by the plaintiffs/respondents cannot be entertained as the suit in O.S.No.76 of 2001 was decided partially in favour of the defendants/appellants. Therefore, the defendants prayed for dismissal of suit on the ground of resjudicata.

13.The Trial Court upon perusal of the plaint and written statement filed by the plaintiffs and the defendants, framed the following issues:-

(1) Whether the plaintiffs are entitled to the relief of recovery of



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possession as prayed for?

(2) Whether the plaintiffs are entitled to the following relief as prayed for?

(3) Whether the plaintiffs are entitled to any other relief?

14. Before the Trial Court, the 4th plaintiff/Majinisha alone was examined as P.W.1 and 5 documents were marked as Exs.A1 to A5. On the side of the defendants, the second defendant/Sirujudeen alone was examined as D.W.1 and 6 documents were marked as Exs.B1 to B6.

15. To substantiate their case, the plaintiffs presented the following documents:

Ex.A1 is the certified copy of decree in O.S.No.76 of 2001 passed by the Trial Court, dated 18.04.2007; Ex.A2 is the certified copy of the judgment in O.S.No.76 of 2001; Ex.A3 is the carbon copy of the plaint in O.S.No.76 of 2001; Ex.A4 is the carbon copy of the written statement filed by the 1st and 2nd defendants/Ummal Bajria and Sirujudeen; Ex.A5 is the sale deed dated 19.09.1977 executed by the said Mohammed Saali Rauther in



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favour of the 1st defendant/Ummal Bajria Beevi.

16.The following testimonies were adduced by the defendants:

Ex.B1 is the certified copy of decreetal order in I.A. No.192 of 2006 in O.S.No.76 of 2001 dated 01.12.2006; Ex.B2 is the certified copy of fair order passed in I.A.No.192 of 2006, dated 01.09.2006; Ex.B3 is the Patta, which was issued by the Tahsildar, Sirkazhi standing in the name of one Mohammed Moosa and 5 others; Ex.B4 is the certified copy of decree passed in A.S.No.59 of 2008 by the Principal Subordinate Court, Mayiladuthurai; Ex.B5 is the certified copy of the judgment in A.S.No.59 of 2008; Ex.B6 is the copy of the settlement deed executed by Ayisha Beevi in favour of one Nabusa Beevi dated 23.01.1978.

17.Before the Trial Court, the defendants in O.S.No.76 of 2001, the plaintiffs herein had filed an interlocutory application in I.A.No.192 of 2006 under Order XXVI Rule 9 of CPC and Section 151 of CPC seeking for appointment of Surveyor to measure the suit property. By order dated 01.09.2006, the said I.A.No.192 of 2006 was dismissed by stating that the



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petition was filed at the belated stage. The Trial Court while considering Ex.B3 Patta, dated 03.10.2009, issued by the Tahsildar, Sirkazhi observed that the said patta does not stand in the names of the persons mentioned in the plaint in respect of property sold to Ayisha Beevi. Therefore, the plaintiffs had not filed any documents to disprove the contentions of the defendant that the averments of the plaintiffs are imaginary. The Trial Court has come to the conclusion that the plaintiffs had not furnished any oral and documentary evidence to establish their right over the suit schedule property and the defendants had proved that the averments of the plaintiffs are false.

18.The Trial Court had taken into consideration the judgment in O.S.No.76 of 2001 in which the Court observed that the defendants herein had purchased only an extent of 6 cents in S.No.262C/24. After evaluating the evidence presented by the plaintiffs in the present suit, the Trial Court concluded that the plaintiffs had not proved that the said Md. Saali Rauther obtained the property to an extent of 64 ½ cents in S.No.262C/24. The Trial Court observed that the plaintiffs had not marked the partition deed dated 14.07.1943. In the absence of any original document or copy of the document to establish that the suit property was obtained by the plaintiffs'



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father by way of family partition, the Trial Court disbelieved the evidence adduced on behalf of the plaintiffs to establish their right over the suit schedule property. The Trial Court observed that the plaintiffs had failed to prove that the defendants had encroached the suit property. On the aforesaid reasons, the Trial Court dismissed the suit.

19. Aggrieved by the same, the plaintiffs preferred the appeal in A.S.No.23 of 2012 before the Principal Sub-Court, Mayiladuthurai. The plaintiffs filed I.A.No.21 of 2021 in A.S.No.23 of 2012 to mark the partition deed dated 14.07.1943 as additional document.

20. The First Appellate Court allowed the application and marked the partition deed dated 14.07.1943 as Ex.A6 for the reason that the Trial Court dismissed the suit by pointing out that the plaintiffs had failed to establish that the plaintiffs' father obtained 64 ½ cents in S.No.262C/24 by filing the partition deed dated 14.07.1943. While examining the correctness of the judgment passed by the Trial Court, the First Appellate Court observed that Ex.A6 makes it clear that the plaintiffs' father has obtained the property in S.No.262C/24 to an extent of 64 ½ cents in the family partition dated



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14.07.1943.

21.The First Appellate Court noted that even though the suit in O.S.No.76 of 2001 was filed for injunction, the Trial Court made the following observation:

“As for as the item 3 of the suit property is concerned when it has been failed to establish by the plaintiffs that they are absolute owners of the suit property and it is admitted that the defendants are the daughters of the vendor of the suit property and legal heirs of the vendor. It would not be appropriate to grant injunction as against true owner”

The First Appellate Court observed that even though the defendants/appellants claimed an extent of 18 5/6 cents in O.S.No.76 of 2001, permanent injunction was granted only to an extent of 6 cents by the First Appellate Court in A.S.No.59 of 2008 as the defendants/appellants had purchased only 6 cents in S.No.262C/24 from the plaintiffs' father.

22.The First Appellate Court in A.S.No.59 of 2008 observed that the



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Trial Court in O.S.No.76 of 2001 has already decided that the defendants/appellants are entitled only to an extent of 6 cents in the said survey number. Therefore, the defendants are barred by *res judicata* from claiming an extent of 18 5/6 cents in O.S.No.67 of 2007 and the same was not considered by the Trial Court.

23.The First Appellate Court noted that the land belonged to Ayisha Beevi is shown as west boundary in Ex.A5 which is the sale deed executed by the plaintiffs' father in favour of the first defendant. Therefore, the First Appellate Court observed that the plaintiffs' father had executed sale in S.No.262C/24 in favour of Ayisha Beevi much prior to the execution of Ex.A5. The First Appellate Court concluded that as the said Ayisha Beevi had executed a settlement deed marked as Ex.B6 to an extent of 48 ½ cents, the plaintiffs' father had sold 48 ½ cents in S.No.262C/24 in favour of Ayisha Beevi. The defendants had purchased 6 cents in S.No.262C/24 and 12 5/6 cents in S.No.262C/45 vide Ex.A5.

24.The First Appellate Court observed that as the plaintiffs had



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already established their right in respect of 10 cents in S.No.262C/24 before the Trial Court in O.S.No.76 of 2001, the plaintiffs are entitled to the relief of recovery of possession as prayed for.

25.On these grounds, the First Appellate Court set aside the judgment and decree in O.S.No.67 of 2007 and allowed the appeal. Challenging the same, the appellants/defendants had filed the present Second Appeal.

26.On 04.10.2013, the Second Appeal was admitted by this Court on the following substantial question of law:

“Whether the lower appellate Court is right in decreeing the suit when earlier proceedings in O.S.No.76 of 2001 and A.S.No.59 of 2008 (Ex.A1 and Ex.B.5) operate as res judicata for filing a subsequent suit?”

27.The primary contention of the appellants/defendants is that the dispute over the subject matter of the suit was already covered in the suit in



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O.S.No.76 of 2001 instituted by the appellants along with the 6th respondent herein for permanent injunction to restrain the defendants therein, who are the 4th and 5th respondents herein from disturbing their peaceful possession and enjoyment of the suit properties. Though the Trial Court granted permanent injunction in so far as other suit properties are concerned, no permanent injunction was granted in favour of the defendants in respect of property in S.No.262C/24. Hence, the suit in O.S.No.76 of 2001 was partly allowed. As against the same, an Appeal in A.S.No.59 of 2008 was filed by the defendants/appellants and the First Appellate Court granted permanent injunction in respect of land in S.No.262C/24.

28.Learned counsel for the appellant would contend that the First Appellate Court though discussed the judgment passed in O.S.No.76 of 2001, had failed to take note of the fact that the dispute relating to the suit schedule property was already decided in O.S.No.76 of 2001. Therefore, the First Appellate Court miserably failed to consider that the present suit in O.S.No.67 of 2007 is barred by *res judicata*.



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29.Learned counsel for the appellant would contend that the issues in O.S.No.76 of 2001 was framed in the year 2001, however, the respondents had filed the suit in O.S.No.67 of 2007 only in the year 2007. Therefore, the suit is barred by limitation.

30.Per contra, learned counsel for the respondents 1 to 5 would contend that the plaintiffs' father inherited the properties in S.No.262C/24 to a larger extent of 64 ½ cents, out of the said 64 ½ cents, 48 ½ cents of land was sold to Ayisha Beevi and 6 cents of land was sold in favour of the first defendant by the plaintiffs' father. Therefore, the plaintiffs have inherited the remaining 10 cents of land in S.No.262C/24 and the defendants/appellants do not have any right over the said 10 cents of land which is the suit property and prayed for dismissal of the Second Appeal.

31.Heard the learned counsel for the appellants/defendants and the learned counsel for the respondents 1 to 5/plaintiffs and perused the materials available on record.



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32. Admittedly, the plaintiffs claim that their father was given with 64 ½ cents of land in S.No.262C/24 in family partition. Out of the said 64 ½ cents, an extent of 54 ½ cents was already sold by the plaintiffs' father and the plaintiffs are claiming recovery of possession as against the defendants only to an extent of remaining 10 cents in S.No.262C/24.

33. The claim of the defendant is that vide Ex.A5, the first defendant purchased 18 5/6 cents in S.No.262C/24, however, the Trial Court in O.S.No.76 of 2001 held that the defendants had purchased only 6 cents in S.No.262C/24 and permanent injunction was granted only to an extent of 6 cents in A.S.No.59 of 2008 in favour of the defendants.

34. The Trial Court has rightly examined the suit schedule properties in O.S. No.76 of 2001 which comprises of 5 items in which the present suit schedule property is also included. The defendants filed O.S.No.76 of 2001 for permanent injunction in respect of 18 5/6 cents of land in S.No.262C/24 in which 10 cents of land, which is the subject matter of the present suit is



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inclusive. Therefore, the Trial Court has considered the judgment and decree passed in O.S.No.76 of 2001 and negatived the claim made by the plaintiffs. The First Appellate Court under misconception of the facts and law applied the principle of *res judicata* to reverse the judgment of the trial court. The First Appellate Court had miserably failed to see that the Judgment and decree in O.S.No.76 of 2001 will prevail over the present suit in O.S.No.67 of 2007.

35.Though the partition deed marked as Ex.A6 shows that the plaintiffs' father obtained 64 ½ cents in S.No.262C/24, the plaintiffs had failed to prove that the suit schedule property (remaining 10 cents of land in S.No.262C/24) was in possession and enjoyment of the plaintiffs and that the said 10 cents was not sold in favour of anyone. The plaintiffs have not filed any revenue records standing in their name to prove the ownership and enjoyment of the said 10 cents of land.

36.The plaintiffs cannot claim the relief of recovery of possession



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only on the basis of the observation made in O.S.No.76 of 2001 that “*it would not be appropriate to grant injunction as against true owner*”. The plaintiffs have failed to prove before the Courts below that the said observation of the Trial Court in O.S.No.76 of 2001 is related to 10 cents of land which is the subject matter of O.S.No.67 of 2007.

37.The First Appellate Court failed to note that the claim of 18 5/6 cents by the defendants was rejected in O.S.No.76 of 2001 for the reason that the defendants had proved their ownership only to an extent of 6 cents in S.No.262C/24. However that cannot be a ground for the plaintiffs to claim 10 cents of land in S.No.262C/24 without producing any oral and documentary evidence to establish their ownership and possession prior to 25.03.2001 which is the date on which the defendants encroached the suit property as per the claim of the plaintiffs.

38.Undoubtedly, the suit in O.S.No.67 of 2007 is hit by *Res judicata* as the dispute in respect of the suit schedule property was already decided in O.S.No.76 of 2001 by the District Munsif Court, Sirkazhi. In view of the



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same, the substantial question of law is decided in favour of the appellants/defendants.

39. Accordingly, the Second Appeal is allowed and consequently, the judgment and decree passed in A.S. No. 23 of 2012 dated 06.07.2013 on the file of the Principal Sub-Court, Mayiladuthurai is set aside and judgment and decree in O.S.No. 67 of 2007 passed by the District Munsif Court, Sirkazhi dated 04.02.2011 is hereby confirmed. No costs. Consequently, the connected miscellaneous petition is also closed.

18.11.2024

Index : Yes/No

Speaking/Non-Speaking Order

Neutral Case Citation : Yes/No

To:

1. The Principal Subordinate Court, Myladuthurai.
2. The District Munsif Court, Sirkali.
3. The Section Officer, V.R. Section, High Court of Madras.

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N.SENTHILKUMAR, J.

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Pre-Delivery Judgment in

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