



S.A.No.424 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	20.11.2023
Pronounced on	31.01.2024

CORAM:

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

S.A.No.424 of 2016
and
C.M.P.No. 7403 of 2016

1. Raju

2. Kuttyraj

3. Kumaran

4. Mageshraj

5. Thirupurasundari

...Appellants

-Vs-

1. T.Manohar

2. Kokila

...Respondents

PRAYER: Second Appeal has been filed under Section 100 of Civil Procedure Code, against the Judgment and decree in A.S.No. 147 of 2013 on the file of the II Additional City Civil Court at Chennai dated 09.07.2015 confirming the Judgment and Decree in O.S.No. 12224 of 2010 dated 12.10.2012 on the file of V Assistant City Civil Court at Chennai.



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For Appellants : Mr. K.P.Gopalakrishnan

For Respondents : Mr. R.S.Ranganathan

JUDGMENT

The present Second Appeal is directed against the judgment and decree dated 09.07.2015 passed in A.S.No. 147 of 2013 on the file of Learned II Additional District Judge, City Civil Court, Chennai, confirming the Judgement and Decree dated 12.10.2012 passed in O.S. No. 12224 of 2010 on the file of V Assistant Judge, City Civil Court, Chennai.

2.The plaintiff is the appellant in the present second appeal. As against the concurrent judgements and decrees of the Courts below, the plaintiff who has filed the suit in O.S.No.12224 of 2010, has preferred the above appeal.

3.It is the case of the plaintiff that, the suit 'A schedule property' among other portions originally belong to one Selvam who died intestate in the year 1964 and the property including the 'A' schedule property was a vacant land measuring about east to west 51 ft and north to south 33 ft. The



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entire extent of this land was enjoyed in common by the legal heirs of late Selvam. After some time the legal heirs of Selvam could not enjoy the property in common and therefore, one of the legal heir by name Mary Margret filed a suit in O.S.No.5323 of 1994 for partition and for separate possession of her 1/4th share in the entire land measuring 51 ft/33ft. In that suit, an Advocate Commissioner was appointed who submitted a report dividing the properties as 'A, B & C' in which one of the legal heirs of Selvam namely Philomina was allotted 'A' Portion, which was upheld by the 1st Appellate Court. In the appeal suit judgment and decree Philomina was allotted 'A' Schedule property measuring about 33 ft on the North to South, on the Western side 26 ft east to West on Southern side and Northern side and 33 ft on the North to South Eastern side. After the demise of the said Philomina, the plaintiffs being her legal heirs became entitled to the 'A' Schedule property. At the time of Commissioner's inspection, it was noted that, the defendants herein encroached 2 ft in the Northern side, which is on the back side of 'A' schedule property. The encroachment made by the defendants was mentioned in the report filed by the Advocate Commissioner in the above suit. While so, the defendants recently attempted to put up construction in the encroached area and the same was objected by the



plaintiffs. Hence, the plaintiffs were constrained to file the above suit for the following reliefs:

a. directing the defendants to vacate and hand over vacant possession of the land described as ' B' schedule property.

b. directing the defendants to remove any structure put up by them in the encroached area.

c. granting an order of injunction restraining the defendants or any persons claiming any right under them for putting any further constructions.

4.On the other hand, the contention of the defendant is that the entire area in Rajapuranikar street is Government Poramboke vested with the Government of Tamil Nadu and as such without impleading the Government of Tamil Nadu as a party, the suit is bad for non-joinder of proper and necessary parties. The defendants were not parties to the alleged suit in O.S.No.5323 of 94 and therefore, the alleged decree and judgment in the said suit and the report of the Advocate Commissioner are not binding on them. The defendants would further submit that without seeking the relief of declaration of title, the plaintiffs are not entitled for the relief of permanent injunction and mandatory injunction in the suit property. It is further



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submitted that the 'B' Schedule property is a pathway measuring 2 x15 ft do not belong to the plaintiffs and it is vested with the Government of Tamil Nadu. The plaintiffs failed to prove that they succeeded to the estate of Selvam and further contended that the suit is barred by limitation, since the alleged encroachment was in the year 2002 and the suit was filed only in the year 2010. It is submitted that the defendants have put up constructions only in their property which was also enquired and found by the concerned Police Official to whom the plaintiffs have lodged a complaint. Hence, the plaintiffs have no right or interest to question the construction put up by the defendants in their property. Hence, prayed for dismissal of the suit.

5.The trial Court by judgement and decree dated 12.10.2012, dismissed the suit, against which the plaintiffs preferred an appeal in A.S.No.147 of 2013 before the II Additional City Civil Court, Chennai. By judgement and decreed dated 09.07.2015 the learned II Additional District Judge, Chennai dismissed the appeal suit and confirmed the decree passed by the trial Court.

6.Feeing aggrieved over the same, the plaintiffs are before this Court



with the present second appeal.

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7.For the sake of convenience, herein after, the parties are referred to, as described before the trial Court.

8.Heard Mr. K.P.Gopalakrishnan, learned counsel appearing on behalf of the appellants/plaintiffs, Mr.R.S.Ranganathan, learned counsel appearing on behalf of the respondents 1 & 2/Defendants 1 &2 and perused the materials available on record.

9.In the grounds of appeal, the following substantial question of law are raised:-

1. Whether the judgement in O.S.No. 5323/1994 is judgement in rem binding on all the person including the respondents.?
2. Whether the Respondents/Defendants ought to have been added as parties in the suit in O.S.No. 5323/1994 though it is a partition suit and no right is claimed against the Respondents/Defendants.?
3. Whether the Court below failed to consider that the Respondents/Defendants failed to prove their title in the suit property



to the extent of 2 feet x 26 feet?

4. Whether the Courts below are right in holding that the Government is necessary party since Respondents/defendants claims the suit land as Poromboke land without filing any document to that effect?
5. Whether the above suit for mandatory injunction and prohibitory injunction is maintainable against the Defendants?

Substantial question of law Nos.1 to 5 :

10.The learned counsel appearing for the appellants/plaintiffs would contend that, the suit 'B' schedule property is absolute property of the plaintiffs. In the suit filed by the legal heirs of one Selvam in O.S.No.5323 of 94, one of the legal heirs of Selvam namely Philomina was allotted 'A' Schedule property measuring about 33 ft north south on the western side and 26 ft east west on Southern side and Northern side and 33 ft on the North to South Eastern side. In the said suit, Advocate Commissioner inspected the properties and filed his report stating that the defendants herein encroached 2 ft in the Northern side roughly about 2ft to 16 ft from East to West in the back side of 'A' Schdule property. Since the defendants attempted to put up constructions in the encroached area, the plaintiffs were constrained to file



the above suit for recovery of possession of the encroached area, for permanent injunction restraining the defendants from putting up any construction in the encroached area and for mandatory injunction directing the defendants to remove any construction put up in the encroached area. However, the Courts below erroneously dismissed the suit filed by the plaintiffs.

Firstly, it has to be seen whether the suit is not maintainable without impleading Government as proper and necessary party in the suit. Though the defendants would content that the entire area in Rajapuram street, is Government Poramboke vested in the Government of Tamil Nadu, which includes the suit property, there is no material on record to establish that the suit property is a Government Poramboke. Even assuming that the suit property is a Government Poramboke, no relief is claimed against the Government. Hence, the suit is not bad for not adding the Government as proper and necessary party

Secondly, it has to be considered whether the suit in O.S.No.5323 of 94 and the report of the Advocate Commissioner is binding on the defendants and whether the plaintiffs have established their title in the 'B' Schedule property before claiming the relief of recovery of possession,



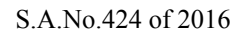
permanent injunction and mandatory injunction. No doubt, the plaintiffs have filed the present suit based on the judgment and decree passed in O.S.No.5323 of 1994 and the report of Advocate Commissioner filed in the above suit. Admittedly, the suit in O.S.No.5323 of 1994 was filed by the legal heirs of one Selvam for partition. According to the plaintiffs, one of the legal heirs of Selvam, namely Philomina was allotted 'A' Schedule property measuring 33 ft on the North to South on the western side, 26 ft East to West on the Southern side and Northern side and 33 ft on the North to South Eastern side. To establish the same the plaintiffs have produced Exs.A.2 to A.6 the judgments and decrees passed in O.S.No.5323 of 1994 and in A.S.No.67 of 2004 and the copy of memo of compromise in A.S.No.67 of 2004. The plaintiffs claims that they are the legal heirs of the said Philomina and after her demise they succeeded to the properties of Philomina. Their further contention is that, in the report filed by the Advocate Commissioner in the above suit, it was noted that the defendants have encroached 2 ft in the Northern side and about 2x16 ft from East to West in the back side of 'A' Schedule property. However, the plaintiffs have not produced any document to prove that they are legal heirs of late Philomina. Even assuming that the plaintiffs are the legal heirs of late Philomina, they have to prove that the suit



'B' Schedule property belong to the plaintiffs and the defendants have encroached in the said property. The plaintiffs must first established that the late Philomina was entitled to the 'B' schedule property in the present suit. Though some extent of property had been allotted to her in the partition suit, the plaintiffs must establish that, the 'B' schedule property in the present suit form part of the property allotted to late Philomina. Moreover, one Mr.R.Kumar, has filed an affidavit along with I.A.No.18760 of 2010 for interim injunction in the present suit and subsequently it was not pressed. This would show that the plaintiffs are not clear with their claim. Moreover, without seeking for a declaratory relief, praying for recovery of possession, permanent injunction and mandatory injunction is unsustainable. The plaintiffs must establish their rights in the 'B' schedule property and only then they are entitled for the above reliefs. Moreover, the Commissioner in the earlier suit has visited the property on 10.08.2002 and filed his report stating that the defendants have encroached into the properties of the plaintiffs. But the suit was filed only in the year 2010. Furthermore, in Ex.A1's commissioner's report it is stated that 2 ft is occupied by the neighbouring thatched house under the occupation of one Mr.Raja and Manohar and 'A' Portion in the sketch of the Commissioner's report is shown that it is under



the occupation of Philomina. Whereas, the present suit is filed only against one Manohar and his wife Kokila and the person mentioned in Commissioner's report namely Raja is not a party in the present suit. Though in the Commissioner's report, it is stated that 2 ft was occupied by Raja and Manohar, the actual measurement occupied by the said Raja and Manohar is not found in Ex.A.1 Commissioner's report. Moreover, in the plaint 'B' Schedule, the extent of encroachment is shown as 2x 16 ft measuring 32 sq. ft., which is contrary to the report of the Commissioner in the earlier suit. Moreover, P.W.1 has deposed that the encroachment area is 2 x 16 feet. This would only show that the plaintiffs have not come forward with a definite plea regarding the extent of alleged encroachment by the defendants. Since the defendants were not parties in O.S.No.5323 of 1994, the judgment and decree in the said suit will not bind them, since it is a judgment in personam, binding alone the parties in the above suit. The second defendant examined as D.W.1 has clearly deposed that the defendants have put up a hut in the vacant land situated behind the plaintiffs' property and the same was destroyed by fire and thereafter the house was re-thatched and they are residing in the said house from the year 1990 and denied the allegations put forth by the plaintiffs that they have encroached over the plaintiffs' land to an



11. In the result, this Second Appeal is dismissed. No cost. Consequently, connected miscellaneous petition is closed.

31.01.2024



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ns1/vsn

Index: Yes/No

Speaking Order : Yes/No

To

1. The II Additional City Civil Court,
Chennai.
2. The V Assistant City Civil Court,
Chennai.

K.GOVINDARAJAN THILAKAVADI,J.

Nsl/vsn

Pre-Delivery Judgment made in

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