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S.A. No.709 of 2020 and Cross Objection No.31 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.03.2024

DELIVERED ON :05.04.2024

CORAM:

THE HON'BLE MR. JUSTICE P.B. BALAJI

S.A. No.709 of 2020 and
Cross Objection No.31 of 2023
and CMP Nos.4021 of 2024 and 7474 of 2023

S.A.No.709 of 2020

Palani (dead)
2.M.Muthukumaran
3.P.Murugesan
4.M.Vijaya rep by their Power Agent
Murugesan
5.Malini Devi rep by their Power Agent
Murugesan
6.Velmurugan rep by their Power Agent
Murugesan
7. Vimaladevi rep by their Power Agent
Murugesan
(Appellants 2 to 7 are represented by
their Power Agent P.Murugesan, who
is the 3rd appellant herein) and appellants
2 to 7 are substituted in the place of 1st
appellant vide court order dated 24.11.2023
made in CMP Nos.25480 and 25486 of 2023
in Cross Objection No.31 of 2023 in SA No.
709 of 2020)

.... Appellants



S.A. No.709 of 2020 and Cross Objection No.31 of 2023

Versus

1.Ramadoss @ Seenu
2.S.Senthil

.... Respondents

Second Appeal filed under Section 100 of the Civil Procedure code, against the decree and judgment passed in A.S.No.5 of 2018 dated 16.09.2019 on the file of Subordinate Judge, Chidambaram, reversing the judgment and decree passed in O.S.No.5 of 2014 dated 18.12.20217 on the file of District Munsif cum Judicial Magistrate, Portnovo.

Cross Objection No.31 of 2023

Ramadoss @ Seenu

... Cross Appellant

VS

1.Palani (dead)
2.S.Senthil

... Respondents

Cross Objection filed under Order 41 Rule 22 of Civil Procedure Code against the decree and judgment passed in A.S.No.5 of 2018 dated 16.09.2019 on the file of Subordinate Judge, Chidambaram, reversing the judgment and decree passed in O.S.No.5 of 2014 dated 18.12.20217 on the file of District Munsif cum Judicial Magistrate, Portnovo.



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For Appellants in : Mr.S.Parthasarathy
S.A.No.709 of 2020 Senior Counsel
for Mr.V.Neethi Durai

For Respondents : Mrs.B.V.Sai Lakshmi
For R.1
R.2 – No appearance

For Cross Appellants in
Cr.Objn. No.31 of 2023 : Mrs.B.V.Sai Lakshmi

For 2nd Respondent : No appearance

COMMON JUDGMENT

The plaintiff in a suit for mandatory injunction, seeking a direction to remove the Hanuman Statue in the suit property and other superstructures in the suit property, is the appellant herein, having initially succeeded before the trial Court and having subsequently suffered a reversal finding before the first appellate Court. The parties are described as per their litigative status in the suit. The brief material facts to adjudicate the second appeal and cross objection are as follows:-

2. The plaintiff claims to be the owner of the suit property, having obtained a decree in O.S.No.68 of 1986 in a suit for specific performance.



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The plaintiff also claimed to have got possession of the suit property through Court on 28.04.1987. The plaintiff has dealt with portions of the suit property, having sold several house sites to various individuals. Having sold 52,100 sq.ft, the plaintiff retained 1,26,496 sq.ft. The defendants trespassed into the property, retained by the plaintiff and erected a Hanuman Statue and a shed, spread over an extent of 0.05 cents approximately.

3. The plaintiff gave a police complaint on 20.04.2010 and filed a petition before this Court in Crl.O.P.No.15052 of 2011, seeking a direction to take legal action. This Court, by order dated 23.10.2023 directed the police to register the case and accordingly, a case was registered in Cr.No.269 of 2013 against the first defendant. The defendants are using God sentiment to usurp the suit property, which belongs to the plaintiff.

4. Pending the suit, an application was filed, seeking amendment of the plaint to include various structures put up in the entire extent of 4 acres and 10 cents. The said amendment application was allowed. The plaintiff, therefore prayed for mandatory injunction to remove the Hanuman Statue



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and also other superstructures, illegally put up by the defendants in the entire extent of 4 acres and 10 cents, though he had come to Court initially only to remove the encroachments put up in an extent of 5 cents.

5. The suit was resisted by the first defendant, who filed a written statement, contending that the plaintiff was not having any title to the suit property. According to the first defendant, the decree in O.S.No.68 of 1986 would not bind the defendants as they were not parties to the said suit. According to the defendants, the suit property amongst other properties originally belonged to Rama Padayachi and after his death, his sons orally partitioned the properties in the year 1934. Further, in the said partition, the suit property along with the other properties were allotted for performance of charities.

6. Further, it is the specific contention of the first defendant that in order to defraud the laudable objects to perform charities, one of the heirs of Rama Padayachi viz., Krishnasamy Padyachi has concocted a sale agreement with the plaintiff. The plaintiff took only paper delivery and was not in



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physical possession as the entire property was only in enjoyment of the heirs of Rama Padayachi. According to the first defendant, he is carrying on grinder, sugarcane and also chips business in the suit property and before him, his ancestors were doing the said business. The second defendant claims to be doing hotel business in the suit property.

7. It is further contended by the first defendant that the plaintiff filed a suit in O.S.No.45 of 2004 for permanent injunction against the first defendant and in the said suit, an Advocate Commissioner was appointed and in and by his Report, he had stated that row of shops have been constructed in the suit property and the said suit was subsequently dismissed, after contest, holding that the plaintiff was not in possession and enjoyment of R.S.No.98/3A, measuring 4 acres and 17 cents. According to the defendants, in the said R.S.No.98/3A, Hanuman Temple exists and the defendants have got electricity service connection from Tamil Nadu Electricity Board also for the said Survey number, with a view to construct a Temple for the idol of Anjaneya. However, the said service connection was illegally disconnected and therefore, the first defendant filed a suit in O.S.No.5 of 2011 and the said



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suit is pending. The plaintiff was aware of the construction of the temple all along and he had no right to seek the relief of mandatory injunction.

8. The trial Court found that the defendants were only trespassers and the plaintiff had established title and consequently decreed the suit as prayed for and directed removal of the Hanuman Statue in two months and consequently hand over possession of vacant land to the plaintiff.

9. On appeal, preferred by the first defendant in A.S.No.5 of 2018, the appellant took out an application in I.A.No.27 of 2019 to receive some documents as additional evidence. Similarly, I.A.No.5 of 2018 was filed by the first respondent in the appeal, viz., the plaintiff to receive additional documents viz., certified copy of the judgment in A.S.No.36 of 2011 dated 23.10.2017, confirming the judgment and decree of the trial court in O.S.No.22 of 2005, pertaining to the very same suit property. Similar applications were also filed in I.A.Nos.80 of 2019 and 118 of 2019 by the first respondent/plaintiff under Order 41 Rule 27 of Civil Procedure Code to file additional documents. The first appellate Court dismissed all the



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interlocutory applications. With regard to the main appeal suit, the first appellate Court held that the trial Court had committed an error in decreeing the suit and thereby, set aside the judgment and decree of the trial court and allowed the appeal.

10. Aggrieved by the reversal findings of the first appellate Court, the plaintiff has preferred the above Second Appeal.

11. On 05.01.2021, the Second Appeal was admitted by this Court on the following substantial question of law:-

a) Whether the finding of the Lower Appellate Court in respect of title in favour of the appellant has been confirmed however negatived prayer for injunction is valid?

b) Whether the possession of the suit property handed over to the appellant in O.S.No.68 of 1986?



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c) Whether the Lower Appellate Court is correct in dismissing the suit of the Appellant/Plaintiff despite the appellant has been handed over possession in O.S.No.68 of 1986?

12. The first respondent in the present Second Appeal, who is the first defendant before the Courts below has preferred Cross Objection in Cross Objection No.31 of 2023 insofar as the findings of the first appellate Court that the first defendant is a trespasser.

13. I have heard Mr.S.Parthasarathy, learned Senior Counsel appearing for Mr.Om Sai Ram, learned counsel for the appellants and Mrs.B.V.Sai Lakshmi, learned counsel for the first respondent. I have also gone through the pleadings, oral and documentary evidence adduced by the parties which have been filed by way of typed sets and also the judgments of the trial Court as well as the first appellate Court.

14. Learned Senior counsel Mr.S.Parthasarathy would submit that the



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suit property originally belonged to Veerappa Padayachi and was allotted to Krishnasami Padayachi, in and by partition dated 17.09.1968. The said Krishnasami Padayachi entered into a sale agreement with the plaintiff herein on 11.02.1986 for sale of the suit properties to the plaintiff. The plaintiff was constrained to file a suit in O.S.No.68 of 1986 for the relief of specific performance as the said Krishnasami Padayachi did not come forward to execute the sale deed in furtherance of the sale agreement. The suit was decreed in favour of the plaintiff and it is seen from Ex.A.6 dated 23.03.1987 that the Court, in execution proceedings, executed sale deed in favour of the plaintiff.

15. Learned Senior Counsel would also invite my attention to Ex.A.7 dated 28.04.1987, where under, in and by, delivery receipt, recorded in the execution proceedings, the appellant was put in possession of the suit property.

16. It is seen from O.S.No.1052 of 1086 on the file of District Munsif Court, Chidambaram, that Ramachandran and Kothandaraman, claiming that



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the suit property was a trust property, filed a suit for declaration. However, the said suit was dismissed, as evidenced from Exs.B.19 and B.20.

17. Aggrieved by the dismissal, Ramachandran and Kothandaraman, the plaintiffs in O.S.No.1052 of 1986, preferred an appeal in A.S.No.41 of 1988 and the first Appellate Court confirmed the findings of the trial Court and dismissed the appeal on 16.04.1991. The same is evidenced from Ex.A.8. In fact, the concurrent findings have been challenged in S.A.No.1166 of 1991 and the same was also dismissed, as can be seen from Ex.A.9, on 09.09.2002.

18. One Santhana Krishnan, filed a partition suit in O.S.No.927 of 1995 and the said suit was decreed and the trial Court directed the suit property to be allotted to the plaintiff herein in the final decree proceedings, as can be seen from Ex.A.16.

19. An Appeal in A.S.No.17 of 1996, preferred against the judgment and decree in O.S.No.927 of 1995, was dismissed by the first appellant Court



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on 19.01.1998 and as against the same, Second Appeal was preferred before this Court in S.A.No.897 of 1998 and the Second Appeal was also dismissed on 17.03.2003, as evidenced from Ex.B.4.

20. Similarly, the learned Senior Counsel would also invite my attention to the Report of the Advocate Commissioner in O.S.No.45 of 2004, which is the suit filed by the plaintiff herein for the relief of permanent injunction against the Ramsamy Padayachi and his family members. Learned Senior Counsel would invite my attention to the cross examination of the first defendant in the said suit as well.

21. Learned Senior Counsel would invite my attention to Ex.A.4 patta, which stands in the name of the plaintiff/appellant. The learned Senior Counsel also refers to Exs.A.1 to A.3 regarding the police complaint and registration of First Information Report against the first defendant.

22. Learned Senior Counsel would also take me through the judgment and decree in O.S.No.61 of 2010, which was the suit filed by the first



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defendant against the officials of Tamil Nadu Electricity Board. Ex.A.12 dated 18.03.2014 is the judgment and decree in O.S.No.61 of 2010. Even the appeal in A.S.No.29 of 2014, preferred against the judgment and decree in O.S.No.61 of 2010 dated 18.03.2014, was dismissed by the Subordinate Judge, Chidambaram by judgment dated 14.08.2015, vide Ex.A.13.

23. A.S.No.35 of 2011 was preferred by the plaintiff herein aggrieved by the dismissal of the suit for permanent injunction in O.S.No.45 of 2004 dated 27.03.2007. The said appeal in A.S.No.35 of 2011 came to be dismissed, confirming the findings of the trial Court.

24. Learned Senior Counsel would also take me through the findings of the first appellate court, where, according to the learned Senior Counsel, the first appellate Court, has committed apparent error in misconstruing the findings of the trial Court in O.S.No.45 of 2004. The learned Senior Counsel would invite my specific attention to Paragraph 35 of the first appellate Court judgment in A.S.No.5 of 2018, where, the first appellate Court has held that the trial Court in O.S.No.45 of 2004 has specifically given a finding



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that the plaintiff is not in possession of the suit property and that the 7th defendant therein, who is the first defendant in the present suit, has encroached the suit property and put up a shed and also erected Hanuman Statue and that since the plaintiff did not take steps to amend the plaint and seek the relief of recovery of possession, the plaintiff was not entitled to the relief of mandatory injunction and further held that the proper relief would have to be by way of seeking a relief of recovery of possession, on payment of proper Court fee and in fact, the judgment and decree of the trial Court came to be reversed only on this ground.

25. Further, according to the learned Senior Counsel, the property, which was the subject matter of O.S.No.45 of 2004 was not the same property, which was the subject matter of the present suit in O.S.No.5 of 2014. Learned Senior Counsel would contend that the structures, being of recent origin and the plaintiff having established his lawful possession, right from the date on which the competent court, put him in possession, in pursuance of execution of the decree of specific performance, he has been in absolute and continuous possession and therefore, the plaintiff could not be



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driven to the necessity of filing a suit for recovery of possession and it would be suffice for the plaintiff to seek the relief of mandatory injunction in this regard.

26. Learned Senior Counsel would further contend that the only defence agitated through out by the defendants was that the judgment and decree of the Courts below in the other suits, which came to be confirmed upto this Court, would not bind the defendants for the simple reason that the first defendant herein, voluntarily, had chosen to implead himself in S.A.No.897 of 1998 and having invited adverse finding therein, it was not open to the defendants to claim that the judgment and decree in the said proceedings, commencing from O.S.No.927 of 1995 and thereafter an appeal in A.S.No.17 of 1996, culminating Second Appeal in S.A.No.897 of 1998 would not bind the first defendant.

27. Learned Senior Counsel also invites my attention to the findings of the Court in the injunction suit filed by the plaintiff, where the title of the plaintiff was upheld through out and injunction was refused only on the



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ground that the plaintiff herein, as plaintiff therein, had admitted that certain other persons were in possession of the suit property. It would be relevant to note that the said suit in O.S.No.45 of 2004 was filed against the legal heirs of Veerappa Padayachi and others.

28. Learned Senior Counsel would also contend that there have been six original suits in all and through out, the title of the plaintiff has been upheld and being a trespasser, the first defendant had no right to claim protection from the Court. Learned Senior Counsel would also state that it was not open to a trespasser to question the measurements pertaining to the suit property, especially when the title of the plaintiff has been upheld in other proceedings, to which, the first defendant himself was a party.

29. Learned Senior Counsel would place reliance on the decision of this Court in the case of *S.Govindarasu Udayar vs Pattu and 2 others* reported in *[(1999) 2 L.W.184]*, wherein, a learned Single Judge of this Court has dealt with the admissibility of various judgments, to which the appellant therein was not a party and whether such judgments would be



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admissible, having any evidentiary value. This Court held that even though the appellant therein, was not a party to the suits, it would not be open to him to contend that he is not bound by the judgments since a decision has been rendered holding that the plaintiff therein was in possession and therefore, the said judgments cannot be irrelevant to this *lis*. Referring to Section 13 of Indian Evidence Act, 1872 this Court held that the judgments would be admissible and also relevant piece of evidence.

30. Learned Senior Counsel also placed reliance on ***K.M.Rathinam Nadar and others vs Arulmigu Hanumantharayar Bhajanai Madam alias Hanumar Kovil represented by its Hereditary Trustee Tmt.L.Padmavathiammal*** reported in ***[(1996) 1 L.W 485]***, wherein, a learned Single Judge of this Court has held that even though the decision may not be binding on a person, who is not a party to the litigation, yet, the decision would operate as judicial precedent when it has decided the character of the temple, which was in question before this Court in the Second Appeal. This Court held that once questions have been decided one way or other, then it should be treated as a precedent in a subsequent case if



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the question arises between some third parties and one of the parties to the earlier proceedings.

31. Learned counsel would also place reliance on the decision of ***Thirumala Tirupati Devasthanams vs K.MKrishnaiah*** reported in ***(1998) 3 SCC 331***, wherein, the Hon'ble Supreme Court, referring to Section 13 of Evidence Act, 1872, held that even a previous judgment not inter parties, would be admissible in evidence under Section 13 of the Evidence Act as a “*transaction*” in which a right to property was “*asserted*” and “*recognised*” The Hon'ble Supreme Court held that the Thirumala Tirupati Devasthanams could rely on a judgment in an earlier suit as evidence to prove its title to the suit property even though the respondent before the Hon'ble Supreme Court was not a party to that suit.

32. Learned Senior Counsel would further place reliance on the decision of ***Chandrasekaran vs Thagattur Anna Chatram Vinayagar Mutt, Thanneerpandal Dharmam rep by its Managing Trustee Ramkumar and another*** reported in ***(2017) 2 L.W 501***], wherein, the learned Single Judge of



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this Court held that when it is established that the defendants are trespassers, the plaintiff would be entitled to obtain the relief of mandatory injunction and the plaintiff cannot be driven to filing of the suit for recovery of possession. In fact, this Court placed reliance on the decision of the Hon'ble Supreme Court in ***Sant Lal Jain vs Avtar Singh*** reported in ***[(1985) 2 SCC 332]***.

33. The learned Senior Counsel would place reliance on the decision of ***Sant Lal Jain vs Avtar Singh*** reported in ***[(1985) 2 SCC 332]***, wherein, the Hon'ble Supreme Court has held that even if there was delay in approaching the Court with the relief of mandatory injunction, attempt should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all attendant delay, trouble and expense. The Hon'ble Supreme Court held that the suit for mandatory injunction was in effect one for possession, only couched in different form and therefore, the plaintiff cannot be denied the relief merely for couching the plaint as a suit for mandatory injunction.



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34. Learned Senior Counsel would also place reliance on the decision of ***Sri Dori Lal Premi vs Smt.Vidya Devi (S.A.No.975 of 2013 dated 30.09.2013)*** reported in ***[(2014) 2 ARC 536] = 2013:AHC:143057***, wherein, a learned Single Judge of Allahabad High Court, referring to the case of ***Sant Lal Jain vs Avtar Singh*** reported in ***[(1985) 2 SCC 332]***, which has already been discussed herein above, held that the only difference between a suit for mandatory injunction for a direction for delivery of possession and a suit for recovery of possession would be payment of appropriate court fees.

35. Learned Senior Counsel, referring to this judgment would submit that the plaintiff is willing to pay appropriate court fee as done in the said case viz., ***Sri Dori Lal Premi vs Smt.Vidya Devi (S.A.No.975 of 2013 dated 30.09.2013)***

36. Per contra, learned counsel for the first respondent, Mrs.B.V.Sai Lakshmi would submit that the first appellate Court had rightly dismissed the suit, finding that the plaintiff was never in possession, which was also confirmed by the judgment of the trial Court in the earlier round of litigation



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in O.S.No.45 of 2004. She would also further contend that the first defendant was never a party to any of the suit proceedings and all the litigations, commencing from suit for specific performance were only collusive in nature to nullify the property dedicated for charitable purposes. She would contend that when the first defendant was admittedly not a party to any of the proceedings, the above decisions would not bind the first defendant. She would further contend that in terms of the partition list, parties had already divided the suit properties and were in separate possession and enjoyment of the same. She would further contend that oral partition is permissible in Hindu Law and there is no necessity to register a partition deed. Learned counsel would also contend that the plaintiff had not established his possession and as rightly held by the first appellate Court, without seeking a relief of recovery of possession, the plaintiff cannot maintain a suit for mandatory injunction simpliciter, by paying fixed and nominal court fee. However, learned counsel for the first respondent would submit that the first appellate Court had erroneously found that the first defendant was a trespasser, ignoring material evidence adduced by the defendants, before the trial Court. She would also contend that the defendants have denied the title



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of the plaintiff even in the written statement and therefore, placing reliance on the decision of the Hon'ble Supreme Court in the case of ***Anathula Sudhakar vs P.Buchi Reddy (dead) by LRs and Others (Appeal (civil) No.6191 of 2001 dated 25.03.2008*** reported in ***AIR 2008 SC 2033***, learned counsel contends that the relief of mandatory injunction simpliciter, without the relief of declaration of title was not maintainable and was liable to be dismissed. She also placed reliance on the decision of the ***Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar vs Chandran and Others*** reported in ***AIR 2017 SC 1034***, wherein, the Hon'ble Supreme Court has held that when the plaintiff was not in possession and the relief of recovery of possession was a further relief which ought to have been claimed by the plaintiff, the suit filed by the plaintiff for a mere declaration, without relief of recovery of possession, was not maintainable. She would therefore pray for dismissal of the Second Appeal and the Cross Objection, being allowed, setting aside the findings of the first appellate Court, characterising the first defendant as a trespasser.

37. I have carefully considered the rival submissions advanced by the



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learned counsel on either side.

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38. Insofar as the title of the plaintiff is concerned, the same has been affirmed in earlier proceedings consistently. The plaintiff filed a suit in O.S.No.68 of 1986 for specific performance of an agreement of sale. The said suit was decreed and the plaintiff was also put in possession of the suit property, which is evidenced by Ex.A.7 dated 28.04.1987, which is a delivery receipt in execution proceedings. The challenge to the title of the plaintiff in O.S.No.1052 of 1986 was unsuccessful upto this Court in Second Appeal.

39. Similarly, in the partition suit filed by one Santhanakrishnan in O.S.No.927 of 1995, the suit property was directed to be allotted to the plaintiff herein. The said judgment and decree also attained finality upto this Court in S.A.No.897 of 1998. Interestingly, the first defendant herein impleaded himself as a party respondent in S.A.No.897 of 1998. The judgment and decree in S.A.No.897 of 1998 has been marked as Ex.B.4 in the present proceedings. This Court has elaborately discussed the disputes



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arising between the branches of Veerappa Padayachi, the question of oral partition between Veerappa Padayachi and his brothers. This Court also took note of the judgment in S.A.No.1166 of 1991 dated 09.09.2002, where also, this Court held that the unregistered partition deed dated 28.07.1934 could not be relied on, since the full text of the partition deed was not filed before the Court. This Court also in S.A.No.1166 of 1991 held that the appellants therein had not proved dedication of property and also found from the evidence that the properties are self acquired properties of the father of Santhanakrishnan, the plaintiff in O.S.No.927 of 1995. Holding that the judgment in S.A.No.1166 of 1991 had reached finality and was binding on the parties, this Court dismissed S.A.No.897 of 1998 and confirmed the decree passed in O.S.No.927 of 1995, filed for partition and separate possession, in and where by, the suit property was directed to be allotted to the plaintiff herein.

40. Having impleaded himself as a party to the above Second Appeal in S.A.No.897 of 1998, the first respondent herein, ought to have taken up the matter further, if at all, he was aggrieved by the decree passed in the



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partition suit, which came to be confirmed by this Court in the presence of the first defendant. In fact, there has been specific reference, as already discussed herein above, even in earlier S.A.No. 1166 of 1991 with regard to the dedication of the suit property for charitable purposes and this Court has found that the dedication has not been proved to the satisfaction of the Court and on the other hand, the Court has specifically held that it was a separate property, being self acquired property of the father of Santhanakrishnan, the plaintiff in O.S.No.927 of 1995.

41. As rightly contended by the learned Senior Counsel for the appellants, Mr.S.Parthasarathy, even though the first defendant was not a party to the earlier suits, excepting for having voluntarily impleaded himself in S.A.No.897 of 1998, drawing strength from the decisions referred herein above, the judgment would have precedential value and would therefore, bind the first defendant even though the first defendant was not a party to any of the proceedings. More so, in the present case, when all these issues have been threadbare agitated before this Court in S.A.No.897 of 1998, in the presence of the first defendant, it is not open to the first defendant to



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contend in the present proceedings that the judgments in the earlier suit would not bind the first defendant. Though the first defendant has taken a plea that all the earlier suits were collusive proceedings behind the first defendant back and in order to snatch away the trust property, I do not find any evidence whatsoever adduced by the first defendant to establish the said plea of fraud or collusion. In any event, this Court has already found that the alleged partition itself has not been proved and the partition list was incomplete and therefore, could not be relied on by the Courts. The judgment in S.A.No.897 of 1998 has become final and especially when the first defendant was admittedly a party before this Court in second appeal proceedings, it is not open to the first defendant to re-agitate the very same issue that the partition is valid and binding and therefore the suit property is a trust property.

42. The next question that arises is whether the plaintiff is entitled to the relief of mandatory injunction or as to whether he has to file suit for recovery of possession.



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43. In this regard, admittedly, the title of the plaintiff has been upheld through out in earlier proceedings and also by the trial Court in the present proceedings. Even the first appellate Court upheld the title of the plaintiff and declined to grant the relief of mandatory injunction only on the ground that the proper remedy was to file a suit for recovery of possession and not a suit for mandatory injunction.

44. It is too late in the day for the first defendant to now contend that the plaintiff is not the owner. Merely because the first defendant has denied the title of the plaintiff, it would not necessarily compel the plaintiff to seek the relief of declaration and relief of recovery of possession. As already discussed, the competent court has granted relief of specific performance in O.S.No.68 of 1986 in favour of the plaintiff herein and in pursuance of the same vide Ex.A.6 as early as 23.03.1987, the Court has executed a sale deed in favour of the plaintiff and the plaintiff was also put in possession, which was confirmed by delivery receipt dated 28.04.1987. Even in the partition suit in O.S.No.927 of 1995, the suit property was directed to be allotted to the plaintiff herein, considering the decree obtained by him in specific



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performance suit and in fact pursuant to the same he obtained sale deed from the competent court and he was also put in possession of the suit property. It is already seen that the said decree in O.S.No.927 of 1995 was also unsuccessfully challenged upto this Court in S.A.No.1166 of 1991. Even in O.S.No.1052 of 1986, the claim of suit property being trust property was tested and it was held that the property was not trust property. Even though the first defendant was not a party to the said suit, in view of the ratio laid down by this Court in the case of ***K.M.Rathinam Nadar and other vs Hanumantharayar Bhajanai Madam alias Hanumar Kovil represented by its Hereditary Trustee Tmt.L.Padmavathiammal*** reported in ***[(1996) 1 L.W 485]***, the judgment would certainly have evidentiary value and could be treated as a precedent in a subsequent suit arising between third parties and one of the parties to the earlier proceedings. Therefore, I have no difficulty in holding that when the title of the plaintiff has been confirmed and reiterated over and over again, it would not be necessary for the plaintiff to seek relief of declaration of title merely because the first defendant chooses to deny the title of the plaintiff and the plaintiff has otherwise clearly established his title to the suit property.



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45. The next question falls for consideration is as to whether the suit for mandatory injunction would be maintainable or whether the plaintiff ought to have filed a suit for recovery of possession.

46. Admittedly, the courts below have found that the first defendant is only a trespasser and the property is the absolute property of the plaintiff. In such circumstances, as held by the Hon'ble Supreme Court in the case of ***Sant Lal Jain vs Avtar Singh*** reported in ***AIR 1985 SC 857***, the plaintiff cannot be denied the relief merely because he has sought for the relief of mandatory injunction instead of praying for relief of recovery of possession. However, at the same time, it is just and proper that the suit for mandatory injunction, which is nothing but seeking recovery of possession, couched in a different form, would require payment of court fee. In this regard, as held in the case of ***Sri Dori Lal Premi vs Smt Vidya Devi (S.A.No.975 of 2013)*** reported in ***[(2014) 2 ARC 536]*** the *Ad valorem* court fee payable for a suit for recovery of possession would have to be paid by the plaintiff in the present case as well.



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47. In fact, the learned Senior Counsel appearing for the counsel for appellants also agreed to payment of necessary court fee in this regard, if this Court comes to the conclusion that the suit for mandatory injunction is maintainable.

48. Even though the cross objection has been preferred by the first defendant, I do not find any illegality and perversity in the findings of the first appellate Court regarding the finding that the first defendant is a trespasser. The first appellate court has assessed the oral and documentary evidence and came to the conclusion that the plaintiff was the absolute owner of the suit property and the first defendant was only a trespasser. The Cross Objection only relies on the alleged partition amongst the sons of Rama Padayachi. However, the said partition has not been proved and therefore, the finding that the first defendant is only a trespasser is neither illegal nor perverse. However, unfortunately, the first appellate Court misdirected itself in holding that the trial Court in O.S.No.45 of 2004 in a suit for permanent injunction has held that the Hanuman Statue was existing and already been



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put up and therefore proceeded to reverse the well considered findings of the trial court, decreeing the suit in favour of the plaintiff.

49. On going through the judgment and decree of the suit in O.S.No.45 of 2004, I find that there is no such finding rendered by the said Court that the first defendant herein, who was the seventh defendant in the said suit, had encroached the suit property and put up a shed and erected a Hanuman Statue and in such circumstances, the suit for mandatory injunction, without resorting to filing of regular suit for recovery of possession was not maintainable. Thus, there is a clear non-application of mind and misreading of the judgment of the court in O.S No.45 of 2004, warranting interference under Section 100 of Civil Procedure Code. In fact, I also find from the judgment in O.S.No.45 of 2004 that since the plaintiff had admittedly sold various portions of the suit property, injunction was refused in favour of the plaintiff, though his title was upheld.

50. For the above reasons, I am constrained to interfere with the judgment and decree of the first appellate Court and the substantial



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question of law is answered in favour of the appellants and the Second Appeal stands allowed and the judgment and decree of the first appellate Court in A.S.No. 5 of 2018 dated 16.09.2019 are set aside and the judgment and decree of the trial Court in O.S.No.5 of 2014 dated 18.12.2017 is restored to file subject to the plaintiff paying the necessary *Ad valorem* court fee payable on the relief for recovery of possession, less the court fee already paid in the suit, styled as one for mandatory injunction, within a period of eight weeks from the date of receipt of copy of judgment. The Cross Objection No.31 of 2023, filed by the first defendant is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

05.04.2024

Index: Yes/No
Speaking Order/Non-Speaking Order
sr

To

1. The Subordinate Court, Chidambaram
2. The District Munsif cum Judicial Magistrate Court, Portnovo
3. The V.R.Section, High Court, Chennai.

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P.B.BALAJI,J.

sr

Pre-Delivery Judgment
in S.A. No.709 of 2020
and
Cross Objection No.31 of 2023

05.04.2024