



S.A.No.1401 of 2001

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 15.07.2024

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

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B.Subbiah (Died)

2.Sasi Reka

3.Shanmuga Priya

4.Theepa Sri

... Appellants

Vs

1.Muthukrishnan (Died)

2.Sivapackiam Muthukrishnan (Died)

3.Meenalatha

4.Lakshmanan

5.Nagarajan

6.Suresh

... Respondents

(Respondents 3 to 6 are brought on record as LR's of the deceased 1st respondent vide Court order dated 17.08.2023 made in C.M.P.No.8908/2002)

(Memo dated 26.06.2024 presented before the Court on 26.06.2024, is recorded as R2 died and R3 to R6, who are already on record, are recorded as LR's of the deceased R2 vide Court order dated 26.06.2024)

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree passed in A.S.No.90 of 2000 on the file of the District Judge-Cum-Chief Judicial Magistrate, Tirunelveli, dated 09.03.2001 reversing the judgment and decree passed in O.S.No.544 of



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1996 on the file of I Additional District Munsif, Tirunelveli dated 23.09.1999.

For Appellants : Mr.S.Meenakshi Sundaram,
Senior Counsel for
Mr.R.Manimaran

For Respondents : Mr.S.Palanivelayutham

JUDGMENT

The plaintiff in the suit is the appellant. The suit is for declaration that the suit 2nd schedule property belongs to the plaintiff absolutely and exclusively and for mandatory injunction to remove the unauthorised constructions made by the defendants in the suit 2nd schedule property. The plaintiff also sought for mandatory injunction for removal of the doors put up by the defendants at the Eastern end of the third schedule pathway. The plaintiff also sought for recovery of possession for 2nd schedule of property after removal of unauthorised constructions put up by the defendants. The suit was decreed by the trial Court. On an appeal filed by the defendants, the first appellate Court reversed the findings of the trial Court and allowed the appeal. Aggrieved by the same, the plaintiff is before this Court.



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2. According to the appellant/plaintiff, the suit property was purchased by his ancestor Mathurayya Pillai, under a registered sale deed dated 22.02.1885. The suit 2nd schedule property is a vacant lane on the Eastern side of the 1st schedule property. The suit 3rd schedule property is a common pathway on the south of the 1st schedule property. It was claimed by the plaintiff that after the death of Mathurayya Pillai, his grandson Balasubramanian, father of the plaintiff, has been in exclusive possession and enjoyment of the suit property and they also claimed joint possession and enjoyment of the 3rd schedule common pathway. After the death of Balasubramanian, the other legal heirs of Balasubramanian, relinquished their share in favour of the plaintiff, by way of a registered release deed dated 04.05.1990. From the date of release, the plaintiff has been in possession and enjoyment of the suit property. It was also claimed by the plaintiff that the defendants, when the plaintiff's family are not in the locality, had put up a staircase encroaching a portion of the 2nd schedule property. Likewise, the defendants had put up a door on the Eastern side of 3rd schedule property obstructing the enjoyment. Hence, the plaintiff was constrained to file a suit for the above said reliefs.

3. The defendants filed a written statement and resisted the suit by



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denying the right of the plaintiff over the suit 2nd and 3rd schedule properties. It was also claimed by the defendants that the suit was bad for non-joinder of other legal heirs of Balasubramanian. The claim made by the plaintiff about his possession and enjoyment from the date of release deed was specifically denied by the defendants. It was claimed by the defendants that the property on the East of the suit property along with the suit 2nd schedule property was purchased by predecessor of the defendant viz., Subbiah Pillai under Ex.B2- sale certificate, dated 10.08.1925 in a Court auction sale. It was also claimed by the defendants that suit 2nd schedule property has been in their exclusive possession for more than 50 years and the plaintiff never used the same. The defendants also denied the right of the plaintiff to use 3rd schedule property and hence, prayed for dismissal of the suit.

4. Before the trial Court, the plaintiff was examined as P.W.1 and yet another witness was examined as P.W.2. On behalf of the plaintiff, 5 documents were marked as Ex.A1 to Ex.A5. The first defendant was examined as D.W.1 and two other witnesses were examined on behalf of the defendants as D.W.2 and D.W.3. 6 documents were marked as Ex.B1 to Ex.B6.



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5. The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the plaintiff was entitled to exclusive right over the suit 2nd schedule property and hence, granted declaration, mandatory injunction and possession as prayed for. As far as 3rd schedule is concerned, the trial Court came to the conclusion that it was a common lane portion and hence, granted a decree for mandatory injunction. Aggrieved by the same, the defendants preferred an appeal in A.S.No.90 of 2000 on the file of I Additional District Judge-cum-Chief Judicial Magistrate, Tirunelveli. The first appellate Court reversed the findings of the trial Court and dismissed the suit by holding that the plaintiff failed to prove his right over the suit 2nd and 3rd schedule properties. Aggrieved by the same, the plaintiff has come by way of this Second Appeal.

6. At the time of admission, this Court formulated the following substantial questions of law by an order dated 25.09.2001:

“1. Whether the lower appellate Court erred in law and misdirected itself in failing to note the admitted fact that the



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third schedule is a common lane and the respondents have no exclusive right to put up a door way in the said common lane?

2. Whether the lower appellate Court erred in law and misdirected itself in proceeding as if the suit is bad for non-joinder of parties when the appellant could institute the suit as a co-owner?

3. Whether the claim of title and exclusive right by the respondents on the basis of certain documents could be sustained on the facts of the case and without consideration of material documents and oral evidence?

7. The learned Senior Counsel appearing for the appellant by taking this Court to the title documents of the plaintiff viz., Ex.A1 and Ex.A3 and the title documents of the defendants viz., Ex.B2, Ex.B4, Ex.B5 and Ex.B7 submitted that boundary description mentioned in those documents clearly established that suit 2nd schedule property as well as 3rd schedule properties are common properties and therefore, the defendants are not entitled to put up any obstructive construction in both the suit schedule properties. The learned Senior Counsel also submitted that after death of Balasubramanian, the plaintiff succeeded to the property as one of the heirs of Balasubramanian and the other children of Balasubramanian relinquished their share in favour of the plaintiff and



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hence, he is entitled to maintain a suit in respect of the suit properties.

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8. On the other hand, the learned counsel appearing for the respondents tried to sustain the judgment passed by the Courts below by submitting that the plaintiff claimed right over the Town Survey No.184 and defendants are claiming right over the Town Survey No.166 and the Advocate Commissioner found that 2nd schedule property is situated in T.S.No.166 and therefore, the plaintiff failed to prove his right over the suit 2nd schedule of property. The learned counsel also submitted that there is no evidence available on record to suggest that the mother of the plaintiff executed any release deed in favour of the plaintiff. Therefore, the suit is bad for non-joinder of necessary parties viz., the mother and siblings of the plaintiff.

9. The plaintiff's predecessor in interest had purchased the suit property under Ex.A1 dated 22.02.1885. The boundary description in Ex.A1 reads as follows:

“East of North-South street

South of Nainar Pillai manai and common wall

West of Thaiyal Pagam Pillai's house and common



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Courtyard

North of common pathway belongs to seller under the document, Thiyal Pagam Pillai and Sankaralingam Pillai.”

10. Thiyal Pagam Pillai referred to in Ex.A1 is the predecessor of the defendant. The Eastern boundary mentioned in Ex.A1 clearly proves that 2nd schedule property was mentioned as a common courtyard belonged to both the parties. Likewise, the Southern boundary mentioned in Ex.A1 would suggest that 3rd schedule property is a common pathway for plaintiff, defendant and one Sankaralingam Pillai. Ex.A1 is the earliest document filed by both the parties. A perusal of the same would suggest that both 2nd and 3rd schedule properties were described as common property of the parties.

11. The defendants purchased the suit property under Ex.B1 dated 20.05.1973. A perusal of the boundary description found in the said document would also suggest that 2 and 3rd schedule of properties were common for both the parties. The said fact can be gathered from the Western boundary mentioned in Ex.B1 as “பொது நடைபாதை மனைக்கும் மதுரையாபிள்ளை வீட்டுக்கும் இந்த வீட்டுக்கும் பொதுவான தென்வடல் பொதுசுவருக்கும் கிழக்கு□. The third schedule property has



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been mentioned as 4th item in Ex.B1. While describing the same, it was

mentioned as “மதுரையாபிள்ளை வீட்டு சுவருக்கும் தெற்கு, இதற்குள்பட்ட பொது நடைபாதையில் பிரிவின்றி பேர்பாதி பாத்தியமும்”. Therefore, the description of the property in Ex.B1 document filed by the defendants would suggest that 2nd and 3rd schedule properties were treated as common properties for both. Ex.B2 is the sale certificate in favour of defendants' purchaser in interest. EX.B2 is the earliest document filed by the defendants. In the said document, the four boundaries are mentioned as follows:

“East of common pathway belongs to Mathurayya Pillai, defendants (Omaiyya Pillai) and common wall.”

12. It is seen from Ex.B1, one Subbiah Pillai, defendants' predecessor filed a suit against Omaiyya Pillai and in execution of the decree obtained by him, he purchased the property of Omaiyya Pillai in Court auction sale with the permission of the Court. Therefore, the description of the property found in Ex.A1, Ex.B2 and Ex.B1 supports the case of the plaintiff that both 2nd schedule property and 3rd schedule property were treated as common properties for both the parties. The description found in Ex.B4 and Ex.B5 also supports the very same



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conclusion. The first appellate Court, without properly considering the boundary description of the properties covered by the title document, has erroneously come to the conclusion that the plaintiff failed to prove his right over the suit property. In the documents relied on by the plaintiff as well as the defendants, there were no reference about the survey number of the property covered by the documents. The properties were described only by four boundaries. In such circumstances, the issue involved in this case has to be decided only based on the boundary description found in the title documents of the parties and it cannot be decided by referring to the survey number in which, 2nd and 3rd schedule properties were found to be situated. Therefore, the arguments made by the learned counsel for the respondents in this regard is rejected. The conclusion reached by the first appellate Court is a result of misreading of title documents of the respective parties and therefore, the said conclusion requires interference by this Court in this Second Appeal.

13. The property was originally purchased by one Mathuraiyya Pillai and he had a grandson Balasubramanian. After the death of Balasubramanian, his heirs succeeded to the property. It is the case of the plaintiff that the other children of Balasubramanian released their



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share in his favour under Ex.A3, dated 04.05.1990. However, there is no evidence available on record to suggest that the wife of Balasubramanian released her share in favour of the plaintiff. In such circumstances, the first appellate Court came to the conclusion that the suit filed by the plaintiff claiming right over 2nd schedule property and 3rd schedule property is bad for non-joinder of mother and also other siblings. As far as brothers and sisters of the plaintiff are concerned, they have already released their share in favour of the plaintiff and the document was marked as Ex.A3. It appears the plaintiff has not established that the share of his mother was released in his favour and subsequently she died. Hence, her share devolved on her children. It is not clear whether release by siblings of plaintiff had taken place subsequent to death of mother. In such circumstances, the first appellate Court came to the conclusion that non-joinder of other heirs of Balasubramanian would be fatal to the suit. The defendants are third parties and they had put up construction in the suit 2nd schedule property and 3rd schedule property. The plaintiff is entitled to maintain a suit as co-owner for benefit of other co-owners also. Any decree passed in this suit in favour of the plaintiff is not only for his benefit and it is also for the benefit of other heirs of Balasubramanian. In case release by siblings had taken place subsequent



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to death of mother, the release deed will confer absolute title to plaintiff.

Even if mother died subsequent to release by siblings, the plaintiff is entitled to maintain the suit as co-onwer for the benefit of other co-owners/siblings. The issue with regard to the non-joinder of necessary party is answered accordingly.

14. In view of the discussion made earlier,

a) the Second Appeal is partly allowed by setting aside the judgment and decree passed by the first appellate Court;

b) The plaintiff is entitled to a declaration that the suit 2nd and 3rd properties are common properties of the plaintiff and the defendants;

c) The defendants are directed to remove the unauthorised construction put up by them in the suit B schedule property;

d) The defendants are directed to remove the door put up in the suit 3rd schedule property; and

e) Since the plaintiff is granted declaration of his common right over B schedule property less than the exclusive right claimed by him, he is not entitled to any recovery of possession. Accordingly, the suit is dismissed in respect of prayer for recovery of possession.



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There shall be no order as to costs.

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NCC : Yes / No

Index : Yes / No

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To

1.The District Judge-Cum-Chief Judicial Magistrate, Tirunelveli.

2.I Additional District Munsif, Tirunelveli

3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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