



Second Appeal Nos.293 & 294 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.01.2025

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THE HONOURABLE Ms.JUSTICE R.N.MANJULA

S.A.Nos.293 & 294 of 2011

AND

M.P.No.1 of 2011 in S.A.No.293 of 2011

S.A.No.293 of 2011

1.Venkatachalam (died)

2.Muniammal

3.Alamelu

4.Amudha

5.Vijayan

6.Malliga

7.Kamaraj

8.Chidambaram

.. Appellants

(appellants 3 to 8 brought on record as LR's of the deceased 1st appellant
vide order dt.4.4.2017 made in CMP.No.3051 of 2017)

Vs

1.Sakunthala

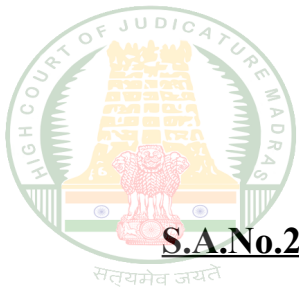
2.Valarmathi Ammal

3.Vijaya Ammal

4.Anniammal

.. Respondents

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 29.09.2010 passed in A.S.No.19 of 2008 on the file of the Sub Court, Ranipet, reversing the judgment and decree dated 17.12.2007 passed in O.S.No.87 of 2000 on the file of the District Munsif-cum-Judicial Magistrate Court No.I, Walajah.



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S.A.No.294 of 2011

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1.Venkatachalam (died)

2.Perumal (died)

3.Muniammal

4.Alamelu

5.Amudha

6.Vijayan

7.Malliga

8.Kamaraj

9.Chidambaram

10.Vasanth

11.P.Sivaji

12.Ammu

13.P.Dayalan

14.Arumugam

15.Narmatha

16.Manikandan

.. Appellants

(appellants 3 to 16 brought on record as LR's of the deceased 1st & 2nd appellant
vide order dt.4.4.2017 made in CMP.Nos.3054 & 3057 of 2017)

Vs

Rangasamy Reddy (died)

1.Chandran

2.Selvaraj

3.Sakunthala

4.Sulli

5.Vijaya Ammal

6.Anniammal

.. Respondents

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 29.09.2010 passed in A.S.No.44 of 2009 on the file of the Sub Court, Ranipet, confirming the judgment and decree dated 17.12.2007 passed in O.S.No.151 of 2000 on the file of the District Munsif-cum-Judicial Magistrate Court No.I, Walajah.



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For Appellants : Mr.K.Sathiyamoorthy
in both S.A.s
For Respondents : Mr.M.Nuzhath Khanam
in both S.A.s for Mr.J.Yoganandam

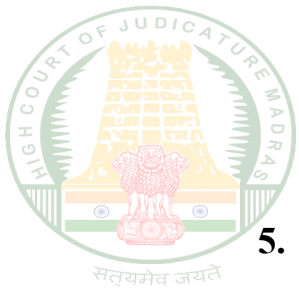
COMMON JUDGMENT

The Second Appeal *viz.*, S.A.No.293 of 2024 has been filed to set aside the judgment and decree dated 29.09.2010 passed in A.S.No.19 of 2008 on the file of the Sub Court, Ranipet, reversing the judgment and decree dated 17.12.2007 passed in O.S.No.87 of 2000 on the file of the District Munsif-cum-Judicial Magistrate Court No.I, Walajah.

2. The other Second Appeal *viz.*, S.A.No.294 of 2024 has been filed to set aside the judgment and decree dated 29.09.2010 passed in A.S.No.44 of 2009 on the file of the Sub Court, Ranipet, confirming the judgment and decree dated 17.12.2007 passed in O.S.No.151 of 2000 on the file of the District Munsif-cum-Judicial Magistrate Court No.I, Walajah.

3. Heard both sides and perused the materials available on record.

4. Since the issue involved in both the second appeals are interconnected, these second appeals are decided by this common judgment.



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5. For the sake of convenient discussion, the parties are referred as per

WEB their rank in the suits as plaintiffs and defendants.

S.A.No.293 of 2011

6. The defendants are the appellants. The plaintiffs have filed the suit against the defendants seeking the relief of declaration of his title in respect of the suit property which is shown as ABCD in the suit plan and consequential permanent injunction along with the relief of mandatory injunction to remove the superstructure constructed by the defendants in the suit property and hand over vacant possession. The trial Court had dismissed the suit and the first appeal filed by the plaintiffs has been allowed and the judgment and decree of the trial Court was set aside and the suit was decreed as prayed. Aggrieved over that, the defendants have preferred this second appeal.

7. The short facts pleaded by the plaintiffs in their plaint are as under :

7.1. The suit property is the ancestral property of the plaintiffs. The 1st plaintiff's father Narasimma Reddiar and his forefathers were in possession and enjoyment of the same for generations together. The four sons of Narasimma Reddiar viz., the Munusamy, Subramani, Rangasamy (1st plaintiff)



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and Chinnasamy have divided the suit property through an oral partition several

years ago.

7.2. The 1st plaintiff purchased the share of Subramani from his widow Kannammal through a registered sale deed dated 17.02.1988. He also purchased the shares of other two brothers as per registered sale deeds dated 05.05.1972 and 16.03.1983. The 1st plaintiff himself has got one share in the oral partition and along with the purchases he made from other sharers, he became entitled for whole of the suit property and he was in possession and enjoyment of the same as he is a lawful titleholder. Patta has been granted in favour of the 1st plaintiff under Natham scheme as early as in the year 1992. The patta and the notice issued by the survey department under the Surveys and Boundaries Act were filed by the 1st plaintiff.

7.3. The 1st plaintiff has constructed a house in the suit property and living there along with his family members for the past several years. He has also paid kist and water tax to the panchayat in respect of the suit property.

7.4. The defendants are husband and wife. The 1st defendant has his property on the eastern side of the suit property and the defendants claimed



right over a portion, which is shown as ABCD in the suit property, which actually belongs to the 1st plaintiff. On 08.06.2000, the defendants demolished the wall illegally and broke the water pipelines which were running in the ABCD portion. Hence, the plaintiff has filed a suit for declaration and permanent injunction and also for mandatory injunction and recovery of possession. Since the 1st plaintiff died during the pendency of the suit, his legal heirs have been impleaded as plaintiffs 2 to 5.

8. The defendants resisted the suit by filing a written statement and an additional written statement are given in brief as under :

8.1. The suit ABCD portion and the remaining portion to the east of the same measuring east to west 45 feet including the suit ABCD portion was purchased by the father of the 1st defendant under a registered sale deed dated 17.09.1941. Subsequent to the death of his father, the 1st defendant and his brothers had entered into an oral partition in the year 1985 and the suit ABCD portion and the portion to the east of the same was allotted to the 1st defendant and his brother Perumal. So, each of them is entitled to 27½ feet east to west and 67½ feet north to south and they are in possession by constructing a thatched hut in the middle of the same by leaving the remaining place vacant. They have perfected their title by adverse possession.



8.2. The 1st defendant and his brother Perumal filed a suit in O.S.No.151 of 2000 and obtained an order of interim injunction against the plaintiff. The terraced portion has been constructed to the knowledge of the plaintiff and his legal heirs. Without giving proper measurements, no relief of mandatory injunction can be claimed. The suit is also bad for non-joinder of necessary parties. The defendant constructed the house with great difficulty with his own funds and at the time of construction, the defendant did not make any objection and after six years of the completion of construction, the plaintiffs filed a suit for mandatory injunction to remove the superstructure, which is not maintainable.

9. On the basis of the above pleadings, the trial Court has framed the following issues and additional issues as under :

- 1. Whether the plaint plan is misleading and not correct ?
Whether the suit ABCD portion of the remaining portion to the east of the same was purchased by the father of the 1st defendant under the sale deed dt.17.11.41 ?*
- 2. Whether by way of oral possession ABCD portion, the portion of the east measuring in total 45 feet east to west was allotted to the 1st defendant and his brother Perumal and whether they are in possession and enjoyment of the same ?*
- 3. Whether the 1st defendant and his brother have effected their title by adverse possession also ?*
- 4. Whether the 1st defendant and his brother Perumal had filed suit in O.S.No.151 of 2000 and obtained order of interim*



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injunction against the plaintiff ?

5. *Whether the plaintiff is entitled to the relief as prayed for ?*
6. *To what other relief is the plaintiff entitled to ?*

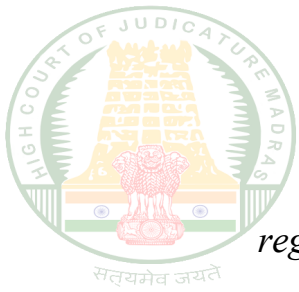
Additional issues :

- 1, தாவாவில் வாதி கோரும் செயலறுத்துக்கட்டளை
பரிகாரம் வழங்கத்தக்கதா ?
2, வாதி வேறு பரிகாரம் என்ன ?

10. During the course of trial, on the side of the plaintiff, two witness was examined as P.W.1 and P.W.2 and Ex.A1 to Ex.A17 were marked and on the side of the defendants, three witnesses were examined as D.W.1 to D.W.3 and Ex.B1 to Ex.B11 were marked.

11. After the conclusion of the trial and on considering the available evidence on record, the trial Court dismissed the suit and the first appeal preferred by the plaintiffs was allowed by setting aside the judgment and decree of the trial Court and the suit got decreed as prayed. Now, the defendants have filed this second appeal by raising the following substantial questions of law :

- (a) *Whether the appellate Court is right in relying on the patta Ex.A4 as the document to prove the title and right of the plaintiffs over the suit property.*
(b) *Whether the appellate Court is justified in appreciating the Commissioner's report Ex.C1 & C2, for arriving a decision*



regarding the possession of parties.

WEB COPY (c) *Whether the appellate Court has properly appreciated the evidence let in by the defendants.*

(d) *Whether the appellate Court is correct in coming to the conclusion that the plaintiff is having title, right and possession, without the help of the surveyor report or without the reveue documents, when there is rival claim with regard to the particular extent by producing title deeds by both parties.*

12. The learned counsel appearing for the appellants/defendants submitted that the trial Court has chosen to dismiss the suit, because the plaintiffs have not taken any steps to identify the suit property and to find out whether the suit property also forms part of the property purchased by him from other sharers and the property allotted to his share. As the defendants have the title deed for the suit property, the Court had arrived at a conclusion that the plaintiffs did not take any steps to get the assistance of the Commissioner appointed by the Court to visit the suit property and take measurements to file a report, in order to decide the dispute. However, the first appellate Court has observed that the Commissioner's report has not been objected by the defendants and relying on the Commissioner's report, the first appellate Court has granted the relief to the plaintiffs.



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13. The learned counsel appearing for the appellants/defendants further submitted that the Commissioner's report ought not to have been relied by the trial Court, as the Commissioner did not give any notice to the defendants at the time of visiting the suit property. Reliance was placed on the judgment of the Kerala High Court in *Maroli Achuthan Vs Kunhipathumma* (1966 SCC OnLine Ker 103) in support of the appellants/defendants that the Commissioner's report is not reliable, if Order 26 Rule 18 CPC is not complied with.

14. The learned counsel for the respondents/plaintiffs submitted that the Commissioner's report has not been objected by the defendants before the trial Court at the earlier point of time. Neither had they sought to reissue the commission warrant for the purpose of enabling the Commissioner to visit the suit property once again with the help of the surveyor. Having remained quiet, the appellants/defendants cannot now claim that it is wrong on the part of the first appellate Court to rely on the Commissioner's report. The first appellate Court has given cogent and acceptable reasons as to why the Commissioner's report is accepted and how the suit filed by the plaintiffs seeking mandatory injunction is within the period of limitation.



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15. In view of the limited contentions raised by the learned counsels

on either side and their submissions revolve around the Commissioner's report,

I feel that the substantial question of law can be reframed and simplified as below :

- i. *Whether in law the first appellate Court is right in relying on the Commissioner's report on the basis of Ex.C1 and Ex.C2, despite the measurement of the property has not been taken by the Commissioner with the help of a surveyor and file a report after the surveyor furnishes his plan to the Commissioner ?*
- ii. *Whether the first appellate Court is right in appreciating the point of limitation for filing a suit praying mandatory injunction after six years from the date of filing the suit by way of amendment ?*

16. Both the plaintiffs and the defendants claim right over the suit property, by virtue of their respective title deeds. While the appellants claim that the construction is well within the boundaries of their property, which has been purchased by them by virtue of Ex.B1, the plaintiffs have contended that there is an encroachment made by the defendants and they have raised ABCD structure inside the property belonging to them.



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17. This is an appropriate case, where the help of the Commissioner could have been of better use, had the party who sought appointment of the Commissioner requested the Court to allow the Commissioner to take the assistance of the surveyor, in order to measure the suit property in accordance with the title deeds produced by both the parties along with FMB records if any, by taking measurement on the ground. Even though the trial Court has observed on the basis of the Commissioner's report, the relief cannot be granted, as it was not executed appropriately by taking measurements with the help of a surveyor.

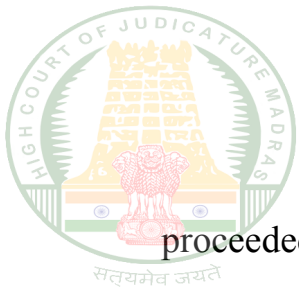
18. No doubt, the presence of the other party is essential, at the time when the commission warrant is executed. If the Commissioner could visit the suit property in the presence of both the parties, the parties would have got a better opportunity to give instructions to the Commissioner to note down the essential aspects pointed out by them. Appointment of the Commissioner to visit the suit property is different from the appointment of Commissioner to record evidence from a witness, who is not able to depose evidence before the Court.



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19. In the citation relied upon by the appellants/defendants viz., *Maroli Achuthan (supra)*, the Commissioner was appointed for the purpose of recording evidence and not for visiting the suit property. No doubt, the Commissioner have examined the witness in the presence of the otherside and the same has not been done in that case. So, the Court proceeded to record a finding stating that the failure on the part of the Commissioner to comply the essential provisions under Order 26 Rule 18 CPC, will render his report not acceptable. However, in the same judgment, it is stated that violation of Order 26 Rule 18 CPC, will not justify the reception of the report as part of the evidence and non-observance of the provision contained in Order 26 Rule 10 CPC, will not make the report totally inadmissible in evidence and it is up to the challenging party to examine the Commissioner with the leave of the Court.

20. But, the defendants who omitted to take the opportunity to examine the Commissioner, had neither filed any objection to the Commissioner's report in time. The defendants have not even taken steps to reissue the commission warrant for the purpose of visiting the suit property and measuring it with the help of a surveyor and then file a report. As the defendants have not taken steps to get the suit property measured, the first appellate Court had taken adverse presumption against the defendant and



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proceeded to rely on the Commissioner's report and had arrived at a conclusion that the defendants had encroached into the suit property.

21. In the instant case, the Commissioner was appointed on the first day when the suit was moved for interim relief of injunction and the Commissioner had proceeded to visit the suit property, immediately after his appointment. It is claimed by the plaintiff that at the relevant point of time, the Commissioner did not give any notice to the defendants and hence, they could not make their presence. It is reiterated that the defendants could not utilise the opportunity thereafter, by seeking to reissue the Commission warrant and measure the property with the help of a surveyor. Unless both the properties of the plaintiffs and the defendants are measured, it will not be easier for anyone to identify whether the defendants have encroached into the properties of the plaintiffs and the plaintiffs are entitled to the relief as prayed for.

22. Under Order 26 Rule 18 CPC, the parties are required to appear before the Commissioner in person or by their agent. However, as per Clause 2 of Order 26 Rule 18 CPC, the Commissioner is given with the liberty to proceed, if the parties did not obey the orders issued by the Commissioner. There cannot be any quarrel on that score. Despite Order 10 Rule 3 CPC gives



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liberty to the parties to examine the Commissioner, both the defendants and the plaintiffs did not choose to avail the said opportunity also. Whatever may be the situation, if the defendants feel that they are aggrieved with the report of the Commissioner, they ought to have filed their objections, at least filing a petition to reissue Commission warrant at the earliest, which they omitted to do.

23. The issue that has been arisen in this suit can be settled only by measuring both the properties mentioned in the respective title deeds of the plaintiffs and the defendants and a report to that effect is filed to the Court. This is a kind of a case which does not require any elaborate oral evidence and the Commissioner's report itself would reduce the oral evidence to enable the Court to arrive at a proper conclusion. Even though there is delay on the part of the defendants in requesting the Court to reissue the commission warrant, I feel in the interests of justice, an opportunity should be given to the appellants/defendants in order to achieve the ends of substantial justice. Hence, the 1st substantial question of law is answered in favour of the appellants/defendants.

24. So far as the question of limitation is concerned, it is seen that during the time when the plaintiff has filed the suit, the defendants have also



filed a counter suit in O.S.No.151 of 2000 before the same Court seeking relief

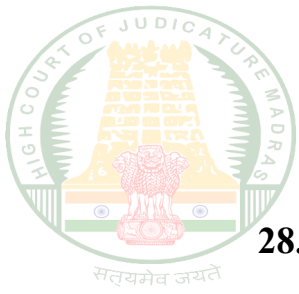
of permanent injunction, in order to restrain the defendants from interfering with the construction work carried out by them. The plaintiffs have filed the suit not only seeking relief of declaration and mandatory injunction, but also recovery of possession by claiming title over the suit property. The defendants cannot have any objection that the plaintiffs have got limitation for seeking relief of recovery of possession within the limitation prescribed under Article 65 of the Limitation Act. Section 65 of the Limitation Act will prescribe 12 years time limit from the date when the possession of the defendant has become adverse. The first appellate Court has rightly approached the point of limitation in the above manner.

25. When the larger relief claimed by the plaintiffs, which is recovery of possession is inclusive of removing any illegal construction, it cannot be stated that the plaintiffs have lost the cause of action, just after three years from the date of finishing the construction by the defendant. As I do not find any illegality in the findings rendered by the first appellate Court with regard to the point of limitation, the 2nd substantial question of law is answered against the appellants. However, taking into consideration of the 1st substantial question of law answered in favour of the appellants, I feel it is appropriate to set aside the judgment of the first appellate Court.



WEB COPY 26. In view of the above said reasons, the second appeal *viz.*, S.A.No.293 of 2011 is allowed and the judgment and decree dated 29.09.2010 passed in A.S.No.19 of 2008 by the first appellate Court, is set aside and the first appellate Court is directed to appoint a Commissioner by issuing a fresh commission warrant directing the Commissioner to inspect the suit property and take measurements with the help of a surveyor, on the basis of the title deeds produced by both the parties or any other records like FMB available and file a report along with the Surveyor sketch and hear the parties only on the Commissioner's report and decide the matter afresh. No costs. Consequently, connected miscellaneous petition is closed.

27. The other Second Appeal *viz.*, S.A.No.294 of 2011 has been filed by the plaintiffs, who are the defendants in the other suit in O.S.No.87 of 2000. In this suit, the appellants as plaintiffs, have claimed that the construction made by them was well within the boundaries of the property belonging to them and for which, they have title through a sale deed dated 17.11.1941. The trial Court dismissed the suit and on appeal, the first appellate Court dismissed the suit by confirming the judgment of the trial Court.



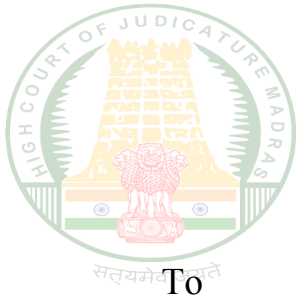
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28. Since the Commissioner is to be appointed in the other suit for taking measurement in respect of the suit property and the decision that might be taken by the Court on the basis of the Commissioner's report and sketch is available, the other suit would also have a bearing on the result of this suit, I feel it is appropriate to allow this appeal and accordingly, the second appeal *viz.*, S.A.No.294 of 2011 is allowed and the judgment and decree dated 29.09.2010 passed in A.S.No.44 of 2009 on the file of the Sub Court, Ranipet, is set aside, remanding the matter along with the other appeal, with a direction to decide both the cases simultaneously, with the help of the Commissioner's report.

With the above directions, the Second Appeals *viz.*, S.A.Nos.293 and 294 of 2011 are allowed. Connected M.P. is closed.

28.01.2025

Index : Yes/No
Neutral Citation : Yes/No
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To
1.Sub Court
Ranipet

2.District Munsif-cum-Judicial Magistrate Court No.I
Walajah



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R.N.MANJULA , J.

gya

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