

SA(MD). No.77 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved On : 03.06.2026

Delivered On : 12.06.2026

CORAM

THE HONOURABLE MR. JUSTICE P.B.BALAJI

**SA(MD). No.77 of 2022
and
CMP(MD)No.1006 of 2022**

Abdul Kalam, ... Appellant / Appellant / Defendant

Vs.

Mohammed Abdul Khader, ... Respondent / Respondent / Plaintiff

PRAYER :- Second Appeal is filed under Section 100 CPC., to set aside the judgment and decree in A.S. No.24 of 2019 on the file of the Sub Court, Aranthangi dated 24-03-2020 in confirming the judgment and decree of O.S. No.17 of 2012 on the file of District Munsif, Aranthangi dated 20-02-2019 and allow this Second Appeal.

For Appellant : Mr.N.Balakrishnan,

For Respondent : Mr.A.N.Ramanathan,
for Mr.M.Suresh,



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JUDGMENT

The unsuccessful defendant, in a suit for declaration and recovery of possession, is the appellant herein.

2. The second appeal is yet to be admitted. Considering the fact that the appeal has been pending from the year 2022, I have proceeded to hear the learned counsel for the appellant Mr.N.Balakrishnan and Mr.A.N.Ramanathan, for Mr.M.Suresh, learned counsel for the respondent.

3. I have gone through the records of the Courts below, including the pleadings, oral and documentary evidence as well as the judgments of the trial Court as well as the first appellate Court.

4. For the sake of convenience, the parties are referred to as per their rank before the trial Court.



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5. Mr.N.Balakrishnan, learned counsel for the appellant / defendant would first and foremost contend that the respondent / plaintiff came to Court with a case that the plaintiff's grandfather purchased the property wayback in the year 1936 under Ex.A1 and by intestate succession, it has come to be bequeathed to the plaintiff and the plaintiff's sister was permitted to reside in the eastern portion of the suit property and that after she had vacated, the appellant / defendant had encroached into the suit property. According to Mr.N.Balakrishnan, the case of the defendant is that the suit property is an ancestral Natham property, in respect of which, patta was issued to the appellant's mother for 2 Ares or thereabouts, in survey No.315/4. The said patta has also been marked as Ex.B13. Pointing out to the case of the plaintiff that the other survey No. 315/4 was subdivided as survey No.315/18 and in this connection, according to the plaintiff, referring to Ex.A21- FMB, Mr.N.Balakrishnan, would contend that the survey No.315/18 is interpolated in the middle and its inclusion appears unnatural for such a subdivision to be even effected. According to Mr.N.Balakrishnan, the subdivision if any of survey No.315/4 would only have been survey No.315/4A, 315/4B etc.,



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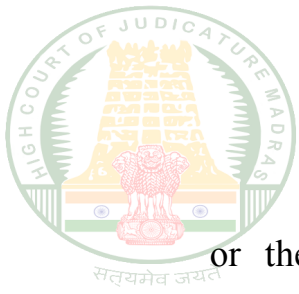
and not survey No.315/18. He would also take me through the admission of P.W.1 that patta was issued to the appellant's mother in respect of survey No.315/4, even prior to the issuance of patta in favour of the plaintiff. It is also the contention of Mr.N.Balakrishnan, that when the total extent of land claimed to be under the ownership of the plaintiff, viz., 5.78 cents, the suit has been laid only in respect of 3.7 cents and there is no whisper about the remaining 2 odd cents. Pointing out to the boundaries set out in the schedule also, Mr.N.Balakrishnan, would state that none of the boundaries refer to any portions of the remaining extent, for which there has been no explanation on the side of the plaintiff. He would also invite my attention to the findings of the trial Court, in this regard, finding fault with the plaintiff for not explaining the lacuna, viz., deficit in the total extent. Thereafter, Mr.N.Balakrishnan, also refers to cross examination of D.W.1 and introduction of a new case for the first time during trial, without any pleading, either in the plaint or in chief examination.

6. It is the contention of Mr.N.Balakrishnan that the trial Court had clearly come to the conclusion that the plaintiff had not made out a case



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and all of a sudden has taken an about-turn and proceeded to decree the suit only based on the weakness in the case of the defendant. In this regard, it is his submission that in a suit for declaration and recovery of possession, the burden is on the plaintiff, to establish his case and cannot rely upon the weakness in the defence, set up by the defendants. Mr.N.Balakrishnan would further state that even though the application for appointment of Advocate Commissioner was taken out before the trial Court, no useful purpose was served and only physical features were noted down by the Advocate Commissioner. The Commissioner has not even endeavoured to measure the suit property, which exercise would have thrown light on the controversy between the parties. Mr.N.Balakrishnan, would further state that eventhough the appellant took out an application in the appeal, the said application for appointment of Commissioner was taken up along with the final hearing of the appeal suit and was dismissed on the ground that it has been filed belatedly. It is the contention of Mr.N.Balakrishnan, that unless or until Ex.A1-sale deed and B13-patta issue in favour of the defendant are correlated, the actual position will not come to light. He would therefore persuade me to allow the appeal and remand the matter to the trial Court



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or the first appellate Court, with a further direction to appoint a Commissioner in order to measure the subject properties, which would have alone given a quietus to the disputes.

7. The case of the appellant was that the lands were originally Natham lands and originally belonged to appellant's father/Mohamed Abdul Kadhar and his brother, who had orally partitioned the same and that the appellant's mother had requested his brother to purchase the suit property. However, the brother-in-law of the appellant's mother had played fraud and purchased the property in his name. It is further pleaded by the appellant's mother that subsequent to the purchase, the possession of the suit property was handed over to the appellant's father / Mohamed Abdul Kadhar. The appellant's mother has further stated that the plaintiff had filed a caveat before the Sub Court, claiming right under survey No. 315/18. However, the appellant's mother had only sought for relief in respect of survey No.315/4 measuring 2.2. Ares. There is no relief sought for in respect of survey No.315/18.



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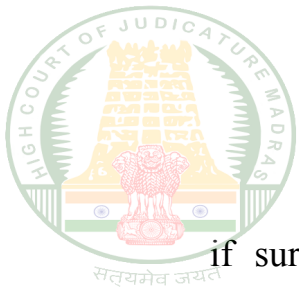
8. Be that as it may, the suit in O.S.No.258 of 1998 was not prosecuted by the appellant's mother and the same came to be dismissed. No doubt, merely because, as rightly pointed out by Mr.N.Balakrishnan, when the suit filed by the appellant's mother has not been dismissed in merits, but, only dismissed for non prosecution, much weightage cannot be given to the same, especially, when the subsequent suit has been filed by opposite party for declaration and injunction. However, when the case on which the appellant's mother came to Court had been totally given up and a new case is pleaded in defence in the present suit, I am unable countenance the submission of Mr.N.Balakrishnan, in this regard. It is not open to the appellant / defendant to plead a different cause altogether, giving up the stand taken by his mother. The appellant's mother herself was aware of the fact that the respondent/plaintiff had claimed right under survey No.315/18. If really the properties were one and the same and the subdivision was fraudulently obtained by the respondent / plaintiff, the appellant's mother ought not to have abandoned the suit filed by her. Alternatively, the appellant's mother could have at least approached the revenue authorities and challenged the subdivision and issuance of patta, which has not been done in the present case.



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9. Per contra, Mr.A.N.Ramanathan, learned counsel appearing for Mr.Suresh, learned counsel for the respondent/plaintiff would first and foremost contend that two Courts have concurrently found on facts, that the plaintiff is entitled to the relief of declaration and consequently possession of the property, which is admittedly in the occupation of the defendant. In this regard, Mr.A.N.Ramanathan, has taken me through Ex.A6-suit filed by the mother of the appellant / defendant in O.S.No.258 of 1998, where the mother set up a case totally different to what has been pleaded in defence in the present suit by the appellant. He would also point out that even in the said plaint, which has been filed way back in the year 1998, there is a clear reference to survey No.315/18, which is a completely different survey number, in respect of which patta has been issued in favour of the plaintiff. He would therefore state that having filed a suit for declaration and having allowed the suit to be dismissed for non prosecution and not taking any steps to restore the said suit or alternatively even challenging the revenue proceedings, subdividing the property or allotted survey No.315/18 in favour of the respondent / plaintiff, the defendant is estopped from pleading a totally a new case, as



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if survey No.315/4 has been erroneously subdivided as survey No. 315/18. He would therefore state that in view of the contradictory and destructive stand taken by the defendant in the proceedings, especially, when the defendant has claimed only under his mother, it is not open to the defendant to set up an entirely new and independent claim and based on the same, seek for remand of a matter for fresh decision, after appointment of a Commissioner, to measure and survey the subject property. The learned counsel, therefore, prays for dismissal of the second appeal.

10. I have carefully considered the submissions advanced by the learned counsel for the parties.

11. It is not in dispute that the defendant is residing in the suit property. According to the plaintiff, the occupation of the defendant is in respect of survey No.315/18, in respect of which, patta has been issued in favour of the plaintiff. The suit was resisted by the appellant / defendant only on the ground that the defendant is an occupation of his own property, in survey No.315/4, and that even during the life time of the



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mother, patta was issued in her favour. The plaintiff also admits the factum of patta issued to the mother of the appellant/ defendant in survey No.315/4. However, it is not the case of the appellant's mother in the earlier suit that the property in survey No.315/4 has been subdivided as survey No.315/18. In fact, the specific case of the appellant's mother in the said suit in O.S.No.258 of 1998 was that FMB in survey No.315/18 was mutated in the name of the plaintiff. In Ex.A21 and Ex.A22, S.No. 315/18 is shown in between survey No.315/2 and 315/4. Strangely, in the written statement filed in the present suit, no credence has been given to the case pleaded by the appellant's mother and it is stated that the property in survey No.315/4 has been under the occupation of the appellant / defendant and his family for over 70 years and that the appellant was in fact born in the said property and recognizing the right of the appellant's mother, patta was also issued.

12. In the written statement filed by the appellant, it is not the case in defence pleaded by the appellant that survey No.315/4 has been subdivided as survey No.315/18 and that it is one and the same property and therefore, the appellant / defendant cannot be treated as a trespasser



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and called upon to vacate and handover the possession to the respondent / plaintiff. In the light of the pleadings before the trial Court, I am unable to countenance the argument of Mr.N.Balakrishnan, with regard to subdivision. The arguments also appear to have been taken for the first time before this Court, in the second appeal and not earlier. In any event, as already seen from the facts of the appellant's mother, the appellant was not ignorant of the fact that the patta was issued to the plaintiff, in respect of survey No.315/18, even in 1999 when the suit was filed by the appellant's mother. Admittedly subdivision and patta issued to the respondent have not been challenged either by the appellant's mother or by the appellant.

13. Though there is some force in the submission of Mr.N.Balakrishnan, that in the FMB, it is quite unusual that survey No. 315/18 is placed in the midst of survey No.315/4, 315/5 etc., and not adjacent to survey No.315/16 and 315/17, in view of the fact that the defendant has not challenged the FMB, or taken independent steps before the revenue authorities to question the same, I am unable to agree with the submissions of Mr.N.Balakrishnan. In fact, I find that the revenue



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records have been marked without any objection and not even a suggestion is put to the plaintiff questioning the truth and genuineness of the said documents.

14. In such circumstances, I do not see any error having been committed by the trial Court and the first appellate Court in accepting the case of the respondent / plaintiff and decreeing the suit, as prayed for.

15. Admittedly, the present suit is in respect of survey No.315/18 alone and it is not open to the appellant to plead a new case that survey No.315/18 is only carved out of survey No.315/4 erroneously without even a pleading to such effect before the trial Court, leave alone, the fact that the appellant's mother herself did not choose to question the subdivision in the earlier proceedings.

16. I am conscious of the fact that which exercising jurisdiction under Section 100 of the Code of Civil Procedure, I cannot interfere with the concurrent findings of facts rendered by the trial Court and confirmed by the first appellate Court, as long as, such findings are



neither perverse nor improper and are based on available materials adduced by the parties.

17. The Hon'ble Supreme Court in ***Hero Vinoth (Minor) v. Seshammal***, reported in **(2006) 5 SCC 545**, has held as follows:

“It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate Court. It is true that the lower appellate Court should not ordinarily reject witnesses accepted by the trial Court in respect of credibility but even where it has rejected the witnesses accepted by the trial Court, the same is no ground for interference in second appeal when it is found that the appellate Court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, one drawn by the lower appellate Court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex



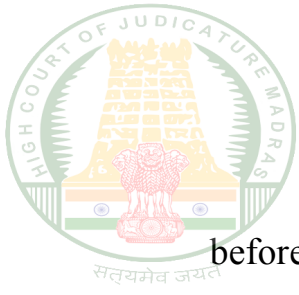
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Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence.”

18. In the light of the above, I find that the Courts have arrived at probable findings, based on the pleadings and evidence adduced by the parties and if the findings rendered are not based on any misleading or misrepresentation of the pleadings or evidence brought on record by the parties and there also not based on no evidence. Hence, I do not see any substantial question of law for consideration in the present second appeal, warranting interference under Section 100 of the Code of Civil Procedure.

19. For all the above reasons, the second appeal is dismissed. The judgment and decree in A.S. No.24 of 2019 on the file of the Sub Court, Aranthangi dated 24.03.2020, confirming the judgment and decree of O.S. No.17 of 2012 on the file of District Munsif, Aranthangi dated 20.02.2019 is hereby confirmed. However, considering that the appellant / defendant has been in possession for several decades, the appellant shall vacate and handover the vacant possession on or



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before 31.10.2026. There shall be no order as to costs. Consequently,
connected Miscellaneous Petition is closed.

12.06.2026

Internet : Yes/No
NCC : Yes/No
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TO

1. The Sub Court,
Aranthangi
2. The District Munsif,
Aranthangi.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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P.B.BALAJI,J.

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**Pre-delivery Judgement made in
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