



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 27.06.2023

Judgment Delivered on : 18.08.2023

CORAM:

THE HONOURABLE MR. JUSTICE P. DHANABAL

S.A.No. 1071 of 2013

Mary Theresa (deceased)
Represented by her Legal heirs.

1. N.A. John Bosco
2. N.J. Roshanbhaskel Raj
[Cause title accepted vide order of Cost
dated 30.08.2013 made in MP.No.2 of 2013
in SA.SR.No.58592/2012

... Appellants

Versus

1. G. Vasantha
2. N.J. Jones Keeran

... Respondents

This Second Appeal is filed under Section 100 of the Code of Civil Procedure, as against the Judgment and Decree dated 03.04.2012 made in Appeal Suit No. 66 of 2011 on the file of the Sub Court, Vellore against the Judgment and Decree dated 30.09.2010 made in O.S.No. 352 of 1997 on the file of the Additional District Munsif, Vellore.

For Appellants : Mr. P. Satheesh Kumar
For R1 : Mr. R.T. Sundari
For R2 : No Appearance

JUDGMENT

This Second Appeal has been preferred by the defendants against the



Judgment and Decree passed by the learned Subordinate Judge, Vellore in A.S.No. 66 of 2011, dated 03.04.2012, reversing the Judgment and Decree passed by the learned Additional District Munsif, Vellore, in O.S.No. 352 of 1997, dated 30.09.2010.

2. The appellants herein are the legal heirs of the deceased defendant, the first respondent is the plaintiff and the second respondent is the legal heir of the deceased defendant in the original suit.

3. Originally, the first respondent/plaintiff has filed the suit in O.S.No. 352 of 1997 for declaration declaring the plaintiff's title over the "A" schedule property and to deliver the vacant possession of the "B" schedule property, which forms part of the "A" schedule property and for permanent injunction restraining the defendant from putting up any further construction in the "B" schedule property. After perusing the records, the trial Court dismissed the suit in O.S.No. 352 of 1997 by judgment and decree dated 30.09.2010. Against the judgment and decree dated 30.09.2010, the plaintiff had preferred an appeal in A.S.No. 66 of 2011 on the file of the learned Subordinate Judge, Vellore District, against the dismissal of the suit in respect of "A" and "B" schedule properties. After scrutinizing the relevant



records, the First Appellate Court allowed the appeal in A.S.No. 66 of 2011 by Judgment and Decree dated 03.04.2012. Being aggrieved by the said judgment and decree, the defendants/appellants have been preferred the present Second Appeal.

4.The case of the plaintiff is that the property described in "A" schedule property is the absolute and exclusive property of the plaintiff and she had purchased the said property under registered sale deed dated 13.11.1981 as vacant site. In the year 1995, tax was levied for the "A" schedule property. The plaintiff has been in peaceful possession and enjoyment of the suit properties from the date of purchase, i.e., 13.11.1981. The defendant who is a neighbour encroached a portion of "A" schedule property of the plaintiff and the encroached portion is shown as "B" schedule property. The defendant, taking advantage of the absence of the plaintiff for some time in the village, encroached upon the portion described as "B" schedule property. When the plaintiff took steps to measure the entire "A" schedule property, she came to know that the defendant has encroached a portion of the "A" schedule property detailed in the "B" schedule in the suit. The plaintiff demanded the defendant for delivery of the "B" schedule property, which forms part of the "A" schedule property . But the defendant



failed to comply with the request of the plaintiff and highhandedly put up a compound wall in the "B" schedule property. The defendant has no right, interest or title over the "B" schedule property and thereby, the defendant is bound to deliver vacant possession of "B" schedule property, which is marked as "ABCD" in the plaint plan. All efforts of the plaintiff to get delivery of the "B" schedule property, marked "ABCD" and coloured red portion in the plaint plan ended in vein and therefore, the plaintiff has filed the suit for the relief of declaration of the plaintiff's title over the "A" schedule property and for recovery of possession over the "B" schedule property ie., marked "ABCD" and coloured red in the plaint plan, and for the relief of permanent injunction restraining the defendant from putting up any further construction over the "B" schedule property which forms part of the "A" schedule property.

5.The case of the defendant is that she has not encroached any portion of the "B" schedule property. In fact, the defendant has purchased the property from one Arulperunselvam by way of registered sale deed dated 24.04.1990. The said Arulperunselvam had purchased the property from the original owner Ashok Nandhanial on 22.01.1986. The defendant has purchased the property with specific four boundaries as well as the



measurement. The defendant made construction on the terraced building in the plaint schedule property purchased by her. Thereafter, the defendant has constructed bathroom, latrine and a room on the Southern end of her property within her measurements five years ago. To demarcate, the plaintiff's portion and the defendants portion, that, is pucca construction, with cement was constructed on the Southern end of the property. The defendant has not encroached on the plaintiff's property. Further, there is a clear street, width of 16 feet on the Northern side of her house. The defendant cannot go to the Northern side on the road specified by the vendor earlier. She constructed her house only within the limits of the property purchased by her within the measurements. It is absolutely false to state that the defendant has encroached a portion, that is, "B" schedule property and all the constructions were made within the measurements of the defendant's property. In the "B" schedule property, there are some constructions, that is, bathroom, latrine and a room. Before five years ago, they are under the continuous possession and enjoyment of the defendant. The suit property has not been properly described by the plaintiff. The plaint plan has been preferred only to suit the convenience of the plaintiff for the purpose of the suit. Hence, the suit is liable to be dismissed.



6. Based on the aforesaid pleadings, upon perusing the documents and hearing all the parties, the trial Court had framed following issues and tried the suit:-

(i) Whether the plaintiff is entitled for declaration and delivery of possession?

(ii) To what other relief the plaintiff is entitled to?

7. Before the trial Court, on the side of the plaintiff, the plaintiff examined herself as P.W.1 and P.W.2 were examined and Ex.A1 to Ex.A3 were marked. On the side of the defendant, D.W.1 was examined and Ex.B1 to Ex.B5 were marked. That apart this, Ex.C1 to Ex.C3 and Ex.X1 and Ex.X2 were marked. The trial Court has tried the suit and after full trial the suit, was dismissed. Aggrieved by the said Judgment and Decree, the plaintiff has preferred an Appeal in A.S.No. 66 of 2011 before the Sub-Court, Vellore on various grounds. The First Appellate Court has framed the following points for determination:-

(i) Whether the judgment and decree of trial Court are correct?

(ii) To what other relief the plaintiff is entitled to?

8. The First Appellate Court reversed the judgment and decree of the



trial Court and decreed the suit in entirety. Being aggrieved by the said First Appellate Court's Judgment and Decree, the defendant has preferred the present Second Appeal on various grounds including the substantial questions of law and this Court admitted the Second Appeal on 04.02.2014 on the following substantial questions of law:-

(i) Whether the Lower Appellate Court is right in relying upon the report of the Advocate Commissioner and his sketch in decreeing the suit when the Taluk Surveyor and his survey report have not been filed and examined?

(ii) Whether the lower appellate Court is right in decreeing the suit when the plaintiff/respondent has not properly furnished the details of the encroachment alleged to have been made by the appellant herein?

9. The learned counsel for the petitioner has argued that the main dispute is with regard to the encroachment of the property and the property has not been identified by the plaintiff and the trial court failed to consider that the surveyor has not produced his report and plan. The Commissioner also stated in his report that the S.F.205/1A8 is not an approved plot and



more than 150 houses situated in the entirety of the said survey field.

Without identifying the main survey stone Advocate Commissioner measured the property. The Advocate Commissioner only measured the plaintiff property but failed to measure the defendant's property. The first appellate court failed to consider the sale deed produced by the defendant. Without identifying the property the first appellate Court reversed the judgement of trial Court and decreed the suit without proper appreciation of evidence. Therefore the second appeal is liable to be allowed by setting aside the judgment and decree of first appellate Court.

10. The learned counsel for the appearing for the respondent has argued that the plaintiff has proved her case through oral and documentary evidence. In order to identify the encroachment Advocate Commissioner was appointed before the trial Court and the Advocate Commissioner inspected the property and measured and then filed detailed report and plan. As per Commissioner report the defendant encroached a portion of land 4.5 feet x 60 feet but the trial Court failed to consider the same and the first appellate Court correctly analysed the evidences and decreed the suit by setting aside the decree and judgment of trial Court. The Surveyor also was present during the inspection of Advocate Commissioner and he was unable to find



out the survey stone since so many houses were built in the said survey number. But the Advocate Commissioner took measurement from Southern side of the plaintiff's property.

11. In this case, the contention of the plaintiff is that the plaintiff has purchased "A" schedule property in the year 1990 by way of registered sale deed dated 13.11.1981, measuring an extent of 3600 sqft., There was no dispute with regard to the purchase by the plaintiff and the extent of the property. The only contention of the plaintiff is that the defendant who is the neighbour having property on the Northern side of the plaintiff's property, had encroached a portion of 'A' scheduled property measuring an extent of 4 feet and x 60 feet ie., 'B' Schedule Property.

12. Per contra, the defendant has denied alleged encroachments and her contention is that she purchased the property in the year 1990, measuring an extent of 2400 sqft., that is, East-West 40, and North-South 60 feet. She constructed house and toilet and bathrooms and put up concrete wall on the southern side of the defendant's property. In order to prove the case of the plaintiff, she has examined P.W. 1 and P.W.2 and marked Ex.A1 to A3 and she produced the original copy of the sale deed as Ex.A1 (60 x 40 feet), tax



receipts and xerox copy of receipt issued by Bagayam Police Station. The defendant has examined D.W.1 and marked Exs.B1 to B.5 and Ex.C.1 to C.3 and Ex.X1 and X2 were marked

13. On a perusal of the records, it reveals that the plaintiff has purchased the property comprised in Survey Number 205/1A8, Palavansathu Village, East-West 60 feet, North-South 60 feet, measuring a total extent of 3600 sq.ft., and in the said Ex.A1, there are some corrections about the four boundaries and the same have not been explained by the plaintiff and the defendant has also not raised any specific objections in that regard. The plaintiff has produced Ex.A2, tax receipt and Ex.A3 xerox copy of the Police complaint given by the Bagayam Police Station, Vellore. Further, on the side of the plaintiff, the plaintiff examined herself as PW1 and one more witness as PW2. PW1 in her evidence stated that she has purchased the property and after purchasing, she has been in peaceful possession and enjoyment of the suit property and the defendant has encroached upon the "B" schedule property. Further, in the cross examination, PW1 states that;

"நான் மனை வாங்கியபிறகுதான் எனக்கு மனையை விற்றவர் வரைபடம் கொடுத்தார். சுமார் 2 வருடம் கழித்துதான் மனைக்காக வரைபடம் கொடுத்தார். ஒவ்வொரு மனைக்கும் தனித்தனியாக கல் போட்டுக்கொடுத்தார். நான் வாங்கியபோது என்னுடைய மனைக்கும் வரைபடத்தின்படி 4



கற்கள் நான்கு பக்கத்திலும் போட்டுக்கொடுத்தார். அந்த எல்லைக்கற்கள் தற்போது தெற்குப்பக்கம் மட்டும்தான் இருக்கிறது. வடக்கு பக்கம் இல்லை. மனையின் வரைபடம் என்னிடம் இருக்கிறது. என் மனையில் கட்டிடம் கட்டும்போது பஞ்சாயத்தாரரிடமிருந்து அனுமதி பெறவில்லை. இப்போதும் அனுமதி வாங்கவில்லை. என் மனையின் தெற்குப்பக்கமாக உள்ள வீதியின் அகலம் சுமார் 32 அடி இருக்கும். 1997ல் எங்கள் மனையை அளந்துபார்த்தபோதுதான் பிரதிவாதி எனது மனையினை சேர்த்து வீடு கட்டிய விவரம் தெரிய வந்ததும் பிரதிவாதி எப்போது அந்த வீட்டில் குடி வந்தார் என்று எனக்கு தெரியாது. நாங்கள் மனையை அளந்துபார்க்கும்போது பிரதிவாதி அப்போதே வீட்டினை கட்டியிருந்தார். பிரதிவாதியிடம் ஏன் எங்கள் இடத்தில் பாத்ரூம், லெட்டீன், நெம்பர் ரூம், சிறிய அடுப்பு புகைக்கூடு ஆகியவற்றை ஏன் கட்டினீர்கள் என்று கேட்டேன்."

14. From the evidence of PW1, it reveals that at the time of purchase of the plot, the plan was not handed over to her. After two years, the plan was handed over to the plaintiff. Therefore, it is clear that the plaintiff has not even seen any plan at the time of purchase. Further, the plaintiff herself admitted that she has also constructed building, but at the time of construction, she has not identified alleged encroachment of the defendant. Further, she admitted that in the year 1997 when they measured the property, she came to know about the construction made by the defendant in the plaint "A" schedule property i.e., 60 x 60 = 3600 feet in the Survey Number 205/1A8, a portion of vacant site described as "B" schedule property, measuring South-North 5 feet East-West 60 feet. But in the plaint she stated that the defendant encroached the vacant site and 'B' Schedule also



mentioned as vacant site 4X 60 feet. Therefore, the plaintiff suppressed the construction made available in the "B" schedule property in the plaint. The plaintiff has suppressed the real facts and the plaintiff did not plead about the construction and she only stated that in the plaint, that the defendant put up compound wall in the "B" schedule property, whereas, in her evidence, she admitted that the defendant constructed latrine and bathroom and another room. When the plaintiff asked to deliver the possession of encroached property the defendant has refused to handover the possession of the property to the plaintiff. Therefore, the plaintiff filed the suit for the relief of declaration and possession and for permanent injunction. The defendant has categorically denied the alleged encroachment and she admitted the construction made by her but it is within her limits.

15. In order to prove the alleged encroachment, the plaintiff has filed the application for appointment of Advocate Commissioner. The plaintiff has taken steps to measure the property through Advocate Commissioner, along, with Surveyor and the Commissioner was appointed and the Commissioner inspected the suit properties and filed a report with plan . The Advocate Commissioner's report was marked as Ex.C1 and plans were marked as Ex.C.2 and C3. Further, the Commissioner Report reveals that



the plaintiff has constructed six shops towards East-West 60 feet and the defendant's house is found on the Northern side and it is a terraced residential building. The said shops have been shown in red colour in the plaint plan. The property of the defendant is house situated on the Northern side of the plaintiff's property and the same is utilized for residential house. In the defendant's property Southern wall constructed and the same was plastered with cement and it was found on the Southern side of the wall, which had been constructed by the defendant. The plaintiff's property has been marked as "ABCD" and the property of the defendant is marked as "EFGH". The measurement of the Southern wall of the defendant's house is shown as "GH" 40 feet. The measurement of the property on the Eastern side is shown as "BC" which is 60 feet and the Western side is shown as "AD" which is 60 feet and on Northern side, is shown as "CD" on the Southern side of 60 feet is shown as "AD".

16. The Commissioner has measured the property from the road which is situated adjacent southern side to the plaintiff's property. There is no records to show the width of the road and how the Commissioner identified the northern end of the road and how fixed southern end of the petitioner property for taking measurement. If the measurement was taken from the



south end of the road and after deducting the width of the road the commissioner could identify the property. The plaintiff in her evidence stated that the south side road is 32 feet width, but no records produced to prove the same. Even it is true then the width of the road is 32 feet then the commissioner has not measured the 32 feet road from south end of the road, thereby measurement itself is incorrect. The Surveyor also did not produce the map by stating that they are unapproved plots. Admittedly, the Commissioner has not measured the property of the defendant. In the Commissioner's report itself, in Para No. 4 it is mentioned that the learned counsel for the respondent issued a memo during inspection to measure the respondent's house and took photographs, but could not accept his submission, since there is no direction given under the warrant to do so. The Taluk Surveyor told that the Survey stone is not available in the disputed property and entire property has to be measured and to find out the survey stone and there are about 150 houses construction in the field without any approved layout, thereby the surveyor has not given any plan. In the above circumstances atleast the property of the defendant could be measured for identifying the alleged encroachment. Therefore, without measuring, the defendant constructed house the real encroachment cannot be identified.



17. Once the defendant made a request for taking the measurement of the property, it is the duty of the Advocate Commissioner to take measurements of the defendant's property also. Even there is no direction from the Court to take measurement of the defendant's property, it is the duty of the Commissioner to bring it to the knowledge of the Court and appropriate direction could be issued by the Court for measuring the property, in order to find out the actual encroachment. There is a chance for availability of the land of the plaintiff in the road situated in the southern side of the plaintiff's property. The Commissioner ought to have started to measure the plaintiff property from the south end of the road and then the width of the could be deduced and then the south end measurement could be fixed. Otherwise the measurement ought to have taken from the northern end of the road mentioned in the defendant's property. Per contra, the Advocate Commissioner approximately measured the property from the stone available on the south end of the plaintiff's property. That would not reflect the correct measurement. The Advocate Commissioner also did not measure the property from the South end of the road.

18. Per contra, the plaintiff's property measured towards the South end of the plaintiff's property and measured north south 50 feet. While so, it is



difficult to find out the identification of the properties and alleged encroachment. Further, the surveyor has failed to produce sufficient details to the Advocate Commissioner during the inspection and failed to give the exact plan to the Commissioner. The Surveyor plan is very essential to prove the alleged encroachment but the surveyor simply stated that since there are many buildings constructed he could not identify the survey stone. These reply is only evasive and it is the duty of the surveyor to identify and measure the property. Once the plaintiff filed a case for recovery of possession alleging that the defendant has encroached the property, it is the duty of the plaintiff to prove the alleged encroachment. The Advocate Commissioner's Report is not absolute, and there is lack of measurement and thereby, the Advocate Commissioner's Report alone is not sufficient to prove the alleged encroachment.

19. On the side of the defendant, she has produced Ex.B1 certified copy of the sale deed and there is no reason stated by the defendant for non-production of the original documents, whereby, he failed to comply the conditions under Section 65 of the Indian Evidence Act. Further, the defendant has produced Ex.B2 building plan which is in the name of the purchaser, that is, Arulperunselvam.



20. On a perusal of the records, it reveals that the said plan has been mentioned as North-South 60 feet and East-West 40 feet in that building which was constructed between the said North-South 34 feet and on the Western side 27.6 feet, but there is no evidence that based on the said plan only, the defendant has constructed the house in the property.

21. Further, the defendant has produced documents stating that she obtained loan from the LIC Housing Finance Limited and the same was sanctioned by the Life Insurance Corporation of India. Further, the documents have been marked by stating that the defendant had obtained permission from the authorities concerned for construction of the house building and the same was destroyed. Ex.X2 is the xerox copy of the letter issued by the Panchayat Board in favour of the defendant. But, in this case, identification of the property itself in question and the available evidence produced by the plaintiff are not sufficient to identify the alleged encroachment. However, the trial Court has failed to frame proper issues and the following issues were framed by the trial Court in the suit for the purpose of trial:-

"(i) Whether the plaintiff is entitled for declaration and



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delivery of possession?
(ii) To what relief?"

22. Hence, the Trial Court ought to have framed proper issues based on the plaint and written statements but only framed one issue and no issue with regard to the title of the property, however without framing proper issues discussed about the title over the property. The trial Court, in the judgment, stated that the plaintiff was examined as PW1 and Ex.A1 to A3 were marked. The defendant examined herself as DW1 and Ex.B1 to Ex.B5 were marked. Apart from this, Ex.C1 to Ex.C3 were marked and Ex.X1 to Ex.X3 were marked. But there is no mention about the other witnesses on both sides.

23. In fact, on the side of the plaintiff, three witnesses were examined and on the side of the defendant, two witnesses were examined. Even after the amendment, only in the last page of List of Witnesses amendment was carried out but the trial Court has not even discussed about the other witnesses. The First Appellate Court also in its judgment, did not formulate proper points for determination and it had only framed point as to whether the Judgment and Decree of the trial Court are correct.



24. Further, the First Appellate Court mainly relied upon the evidence of the Advocate Commissioner and his Report but failed to note the absence of survey plan. Further the first appellate Court directed to remove the encroachments and hand over the possession but failed to note that the case of the plaintiff is not for mandatory injunction to remove the encroachment . Per contra plaintiff case is that the unused property is vacant site. This Court already discussed in the previous paragraphs that the report of the Advocate Commissioner is lack of measurement and it is only with regard to the property of the plaintiff and without proper measurement it was prepared. The dispute with regard to the alleged encroachment, was not identified by the plaintiff and the First Appellate Court has failed to note that the measurements are not taken properly and the alleged encroachment could not be identified through the Commissioner report filed by the Commissioner. Even according to the Advocate Commissioner, he started the measurement from the Southern side of the plaintiff's property if the measurement taken from the South end of the road then the encroachment could be identified. So it is not appropriate to rely on the Advocate Commissioner's report, which lacks measurements and without surveyor report and plan. The Advocate Commissioner has not even got the plan from the Surveyor. The Surveyor has also not properly assisted the Advocate



Commissioner to redress the real dispute. The available evidence is not sufficient to decide the real issue and thereby, it is appropriate to remand the matter back to the trial Court with a direction to the Advocate Commissioner to inspect the suit properties and to take measurements with the assistance of qualified Surveyor. Even according to the Commissioner report the encroached property is 4.5 feet x 40 feet but suit filed for 4 feet x 60 feet as vacant site. Therefore, the available evidence with regard to the real dispute, cannot be redressed and thereby, the substantial questions of law framed by this Court cannot be answered with the available evidence. The Advocate Commissioner's Report is not sufficient to come to the fair conclusion and thereby the Judgment and Decree of the trial Court as well the first appellate Court are liable to be set aside and the case is remanded back to the trial Court for appointment of fresh Advocate Commissioner and to inspect the property with qualified Surveyor and to measure the property from the survey stone and if not possible take measurement from southern end of the road available in the plaintiff's property to North end of the defendant's house and the road.

25. In the result, the Second Appeal is allowed and the judgment and



decree passed in A.S. No.66 of 2011 on the file of the Sub Court, Vellore dated 03.04.2012 and decree and judgment passed in O.S.No.352 of 1997 on the file of the Additional District Munsif Court, Vellore dated 30.09.2010 are set aside the case is remanded back to the Trial Court for appointment of fresh Advocate Commissioner to take measurements and to note down the physical features of the suit properties with qualified surveyor and for filing of report along with surveyor plan. The Trial Court is at liberty to allow the parties to adduce evidence if necessary and then dispose of the suit within a period of six months from the date of receipt of a copy of this Judgment without being influenced by the observation made by this Court. There shall be no order as to costs. Court fees to be refunded as per rules.

18.08.2023

msm

Index:yes/No

Internet:yes/No

Speaking order/Non-speaking order

To

1. The Sub Judge, Vellore.
2. The Additional District Munsif, Vellore.
3. The Section Officer, V.R. Section, High Court of Madras.

P. DHANABAL, J



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