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S.A.No. 412 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.02.2024

PRONOUNCED ON : 25.04.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No. 412 of 2022

&

C.M.P. Nos. 8672 & 16565 of 2022

Duraisamy

...Appellant

Vs.

Latha

...Respondent

PRAYER: Second Appeal filed under Section 100 of CPC against Judgement and Decree dated 02.03.2022 made in A.S.No.64 of 2021 on the file of the Additional Sub Court, Namakkal confirming the Judgement and Decree dated 21.02.2019 made in O.S.No.479 of 2015 on the file of the Principal District Munsif Court, Namakkal.



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For Appellant : Mr. N.Manokaran

For Respondent : Mr. N.Subramaniyan.

JUDGEMENT

The defendant is the appellant before this Court challenging the concurrent Judgement and Decree passed against him. The facts are set out herein below and the parties are referred to in the same litigative status as before the Trial Court.

Relief Claimed:

2. The plaintiff had filed the suit for mandatory injunction directing the defendant to remove the wall and handover possession to the plaintiff and for a permanent injunction restraining them from interfering with the plaintiff's possession and enjoyment of the suit schedule property. The suit schedule property was described as an extent of approximately 38 feet East - West and 5 feet North – South marked as P1 in the plan and forming a part of Door No.484.



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Plaintiff's Case:

3. It is the case of the plaintiff that the suit schedule property which is a residential house measuring an extent of 1032 ½ sq.ft., in Sarkarpalayam Village, Namakkal fell to her share under a partition deed dated 21.07.2008 and also under a release deed dated 16.11.2011 executed by her father, Arumugam and her siblings, Anandhan, Pappathy and Thamizharasi.

4. The plaintiff would submit that she is in enjoyment of the residential house and a vacant site appurtenant to it. The property has been assessed to tax which she has been regularly paying. Along with this plaint, she had also annexed a plan, in which the portion belonging to the plaintiff has been marked as P and that of the defendant has been marked as D, the portion which the plaintiff claims has been encroached by the defendant has been described as P1.



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5. The plaintiff would submit that her backyard measures 10 feet in length and this portion had been left vacant. The defendant had demanded the sale of the plaintiff's property to him at a lower price, which request was turned down by the plaintiff. Angered by this refusal, the defendant taking advantage of the plaintiff's absence, when she had gone for her treatment to Namakkal, had encroached into a portion measuring 5 feet into the 10 feet vacant site and put up 3 feet high wall.

6. On 17.12.2015, the plaintiff had returned from Namakkal and had noticed the encroachment and her husband had called upon the defendant and demanded that he demolish the wall and restore the property to its original state. However, there was no positive response and on the very next day, i.e., on 18.12.2015, the plaintiff had lodged a Police complaint. The Police had directed both the parties to measure their lands with the help of surveyor and find out if there is an encroachment. Thereafter, the plaintiff had requested



the defendant to cooperate with her for appointing the Government surveyor to measure the property which was flatly refused by the defendant. The plaintiff would submit that the encroachment is to a length of 38 feet East - West and 5 feet in breadth North - South. Therefore, she had come forward with the above suit.

Defendant's Case:

7. The defendant had filed a written statement inter alia denying that the plan appended to the plaint. He would submit that it does not reflect the true lie of the property. The defendant would submit that his property is situate in S.No.285/1B and the plaintiff's property is situate in S.No.235/5F. He would further submit that his property which situate on the south is 5 feet higher than the plaintiff's property and as you go further into the property the height tapers down and is ultimately at 2 feet.

8. The defendant would further submit that to the west of his property, nearly 60 years prior to the filing of the suit, his predecessors in title had put up a stone wall to prevent erosion of the



soil and as a boundary. The defendant would submit that it has been the practice in the village that persons owning lands which are in a higher level would put up such walls to prevent erosion. In other words the defendant's contention is that the wall is more in the line of the revetment wall.

9. The defendant would submit that the stone wall and the lands east of the stone walls belongs to him and his predecessors in title. Neither the plaintiff nor her predecessor in title have ever been in possession of the same. In view of the bad blood now running between plaintiff and defendant, the plaintiff has come forward with the suit in question.

10. Further, it is the contention of the defendant that unlike what is alleged in the plaint, he had agreed for the appointment of a surveyor to mark the boundaries and a muchalika to this effect has been executed by both the parties. Thereafter, the surveyor has inspected the lands and filed a report. The plaintiff was not ready to accept the report and despite the protest of the defendant had put up



three layered wall to the length of 140 feet. It is also his contention that the foundation stone of the stone wall had not been removed.

11. On 01.07.2012, the defendant had given a complaint to the Erumapatti Police Station regarding this high ended act of the plaintiff. The defendant thereafter filed O.S.No.335 of 2012 for a declaration, mandatory injunction to remove the 3 layered wall to the length of 140 feet and to restore the old wall. In the above suit, the Advocate Commissioner had been appointed. The Advocate Commissioner had noted down the fact that the old wall has been removed and a new wall was being constructed in the portion marked P. The present suit is nothing but a counter blast to the above suit. The North – South boundary which is to the west of the defendant's land is very old and the land east of the defendant's land are on the same level and where agricultural activities are being carried out. This, according to the defendant, would clearly prove that the plaintiff's case is a fabricated one. The stone wall which is the subject matter of the suit has been in existence for a very long time and the defendants have been enjoying it for over 60 years.



The allegation that the defendant had prevented the plaintiff drawing water from common well is also utter falsehood.

12. Further, the allegation that there is a canal marked XX1 is absolutely false since there is never been a canal in the portion marked XX1. The defendant has been enjoying the usufructs from the property comprised in S.No.236/5E and by plucking the coconuts and pruning the trees.

Advocate Commissioner:

13. Pending the suit, an Advocate Commissioner had been appointed and he had submitted a report. The Advocate Commissioner's report would reveal that the Advocate Commissioner had prepared two plans, one as per sale deed and the other as per FMB. The plan as per FMB has been shown as plan No. I and plan as per document has been shown as plan No.II.

Trial Court:

14. The Trial Court had framed the following issues:



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- “1. தாவா செயலுறுத்துக்கட்டளை பரிகாரம்
வாதிக்கு கிடைக்கத்தக்கதா?
2. தாவா நிரந்தர உறுத்துக்கட்டளை
பரிகாரம் வாதிக்கு கிடைக்கத்தக்கதா?
3. இதர பரிகாரம் என்ன?

15. The plaintiff had examined herself as P.W.1 and her father, Arumugam as P.W.2 and has marked Ex.A.1 to Ex.A.4. The defendant has neither adduced oral evidence nor marked any documentary evidence. The Advocate Commissioner's report and plan have been marked as Ex.C.1 and Ex.C.2.

16. The Trial Court ultimately decreed the suit as prayed for. The Trial Court observed that from the Advocate Commissioner's report, it is evident that the defendant had encroached into the plaintiff's property in S.No.365/71 as the stone wall has been put up in the property comprised in S.No.365/71. The learned Judge observed that the defendant had not taken any step either to file objections to the report or to cross examine the Advocate



Commissioner. Considering the fact that the Advocate Commissioner's report clearly depicts the encroachment, the Trial Court had decreed the suit as prayed for.

Lower Appellate Court:

17. Challenging the same, the defendant had filed A.S.No.64 of 2021 on the file of the Additional Sub Court, Namakkal. The Lower Appellate Court had concurred with the Judgement and Decree of the Trial Court and dismissed the appeal.

18. Challenging the same, the defendant is before this Court.

Substantial questions of Law:

19. The above Second Appeal was admitted on the following Substantial Questions of Law:

“a. Have not the courts below erred in decreeing the suit for Mandatory Injunction and for Delivery of Possession, in the absence of a prayer for Declaration of Title, when the defendant has disputed the title and



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extent of the property claimed by the plaintiff?

b. Whether the judgments of the Courts below are perverse and Vitiating for simply relying upon the Ex.C1 and Ex.C2 for decreeing the suit, especially when the power under Order 26 Rule 9 CPC cannot be used for collection of evidence?

c. Whether the suit filed by the plaintiff is barred by limitation, in the absence of any material particulars in the plaint particularly when the defendant has taken a plea that the disputed stone wall has been in existence for the past 60 years?

d. Have not the courts below erred in holding that the material contradictions in the evidence of PW1 and PW2 with the plaint averments will not assume any significance, when parties are legally bound to give evidence in line with the pleadings and not otherwise?



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Submissions:

20. Mr. N.Manokaran, learned counsel who appeared for the appellant / defendant, while making his submissions, gave up the claim with reference to Substantial Question of Law No.c.

21. It is the contention of the learned counsel that under the partition deed, Ex.A.1, what was allotted to the plaintiff's father was only an extent of 902 sq.ft, as two items of property. However, under Ex.A.2, release deed her father and her siblings released an extent of 1032 ½ sq.ft., He would submit that the construction that has been put up by the plaintiff is not within this extent of 902 sq.ft. He would further argue that in the schedule of property the encroached portion has been marked as 38 feet East - West and North – South 5 feet. However, during the cross examination, the plaintiff has stated that there is 2 ½ feet pathway between the defendant's property and the plaintiff's property. He has submitted that on site the encroached portion measuring 38 ½ feet is not



available and that he would further point out the admission of the plaintiff in cross, where he would state that defendant has encroached 7 ½ feet into her land and put up construction and had also encroached an extent measuring, East - West 10 feet. Therefore, the learned counsel would submit that the plaintiff has not come forward with the definite case by identifying the encroachment.

22. The learned counsel would draw the attention of the Court to the cross examination of P.W.2, the plaintiff's father. P.W.2 in his proof affidavit has stated that there is 10 feet vacant site in the plaintiff's backyard but that its 7 ½ feet wide pathway that is available and it is also his contention that the defendant has encroached into 5 feet of this area and put up construction. The learned counsel would submit that this runs contrary to the pleadings.

23. The learned counsel would submit that the Advocate Commissioner's report also lacks clarity. The Advocate



Commissioner had not taken note of the difference in the measurement between the plaintiff's document and the extent available on site. He would also, in this connection, draw the Court's attention to the Trial Court's finding, where the Trial Court has observed that the stone wall has been put up only in the pathway. He would submit that nowhere in the Commissioner's report has it been stated that stone wall has been put up in S.No.365/71. However, the Trial Court has proceeded to hold that the stone wall has been put up in S.No.365/71.

24. That apart, the learned counsel would submit that the Lower Appellate Court had observed that the encroachment was 1.4 feet at point "A" and 2.5 feet at point "B" and the encroachment ran to the length of 34.6 feet from A to B, which is not the description of the encroachment as submitted in the plan. Therefore, in the light of these contradictions, the Courts ought not to have decreed the suit as prayed for.

25. The learned counsel appearing for the respondent /



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plaintiff would submit that the defendant has not filed any documents what so ever to show the extent of property to which he is entitled to. He would submit that the encroachment has been clearly set out in the Advocate Commissioner's report and the defendant has not chosen to dispute the report by filing objections or by insisting upon the cross examination of the Advocate Commissioner. Therefore, it has to be presumed that the defendant have accepted the report of the Advocate commissioner. The measurements have been taken both as per FMB and as per documents and the Commissioner has come to the conclusion that the stone wall has been put up in the S.No.365/71 belonging to the plaintiff. The encroachment has also been clearly demarcated in red colour with measurement. Both the Courts below have also granted a decree only in respect of the portion marked red and shown as encroachment though the plaintiff had claimed a decree to an extent of 38 feet East -West and 5 feet North – South.

26. The learned counsel would submit that the defendant who claims that the stone wall had been put up 60 years prior to the filing



of the suit has not let in any evidence to prove the same. The learned counsel would submit that it is well open to the Court to restrict the relief although a greater relief has been sought by taking note of the encroachment on site. He would submit that both the Courts below have rightly held that there has been an encroachment to the extent as reported in the Advocate commissioner's report and plan.

27. By way of reply, Mr. N.Manokaran, learned counsel appearing for the appellant would submit that in the patta, the extent has been shown as 936 sq.ft, whereas under Ex.A.2 it is shown as 1032 ½ sq.ft. Therefore, the plaintiff has not come forward with the definite case, which is imperative when a person is seeking a mandatory injunction.

Discussion:

28. Heard the learned counsels on the either side and perused the records.



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29. The plaintiff has come to the Court claiming that the defendant has encroached into her property to an extent of 38 feet East - West and 5 feet North - South. The plaintiff has claimed a right to an extent of 1032 ½ sq.ft., comprised in two survey numbers. S.No.169/4 measuring an extent of 408 ½ sq.ft., and north of this an extent of 624 ft in S.No.365/71, totaling an extent of 1032 ½ sq.ft., which is the description which is given in Ex.A.2, release deed. Under Ex.A.1, partition deed, the plaintiff's father and brother were allotted to an extent of 902 sq.ft., in S.No.365/71.

30. The suit is filed in respect of the following property.

“நாமக்கல் ரிடி, ஏருமப்பட்டி, சப்ரிடி,
சர்க்கார்பழையபாளையம் கிராமத்தில் நத்தம்
சர்வே எண். 169.4 ஹெக்டர்ஸ் 11.86.0ல் விவரம்
அழகிரி மனைக்கும் மேற்கு துரைசாமி
குமரநாடார் வகையறா இவர்கள் மனைக்கும்
மனை நிலத்திற்கும் வடக்கு, குமரநாடார்



செல்வராஜ் இவர்கள் மனைக்கும் மனை நிலத்திற்கும் கிழக்கு, கிழமேல் வீதிக்கும் தெற்கு, இதன் மத்தியில் கிழமேலடி இருபுறமும் 10 3/4 தென்வடலடி இருபுறமும் 38 ஆக இந்த அளவுள்ள 408 1/2 சதுரடிகள் உள்ள மனை நிலமும் இதன் வடவுறம் கிழமேலடி இருபுறமும் 32 தென்வடலடி இருபுறமும் 19 1/2 ஆக இந்த அளவுகள் 624 சதுரடிகள் உள்ள மனை நிலமும் ஆக கூடுதல் 1032 1/2 சதுரடிக்கு (95.92 ச.மீ) உள்ள மனை நிலம் பூராவும் மேற்படி சொத்து தற்கால நத்த நிலவரி திட்டப்படி மனைவரி பட்டா எண்.155 சர்வே எண்.365/71 ச.மீ.0.0087.0 ஏள்பட்டதாகும். இதன் கதவு எண் 484.

31. From a reading of the schedule it is seen that the suit property consist two survey numbers. S.No.169/4 totally measuring 11.86.0 hectares and within following four boundaries, i.e., East by Azhagiri's land, South by house site of Kumaranadar, west by Kumaranadar and Selvarj's land and North by the road. Within these boundaries an area measuring 10 ¾ feet East West and North



South 38 feet, totally measuring an extent of 408 ½ sq.ft. A further land situate north of this land measuring 32 feet North - South and 19 ½ feet East – West totally measuring an extent of 624 sq.ft., comprised in S.No.365/71.

32. A reading of this schedule would indicate that S.No.169/4 is presently S.No.365/71. Therefore, under this release deed the portion which is now marked in green in the Advocate Commissioner's report was allotted to the share of the plaintiff. Immediately to the south of the property is situate the lands of Duraisamy Kumaranadar, who is none else than the defendant herein. The Advocate Commissioner's plan shows that in the land north of Duraisamy Kumaranadar's properties, the plaintiff has constructed to an extent measuring 15 feet North - South and left a vacant site measuring 3.6 feet at one place and 3.9 at the point described as point B in the Advocate Commissioner's plan. It is this extent of 3.9 / 3.6 breadth of land running to the length of about 38 feet, which has been described as a pathway by the Advocate Commissioner. There is no dispute regarding Ex.A.1 or Ex.A.2.



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Therefore, the plaintiff is entitled to the extent as set out in Ex.A.2.

Therefore, even the pathway is situate in S.No.365/71, though the plaintiff has claimed encroachment of 5x30 feet, the actual encroachment on site has been described as 2.5 at the point B which tapers down to 1 feet 4 inches at point A.

33. A perusal of the report of the Advocate Commissioner's marked as Ex.C.1 and Ex.C.2 clearly shows that the encroachment is in the land comprised in S.No.365/71. The defendant has not produced even a single piece of documentary evidence or oral evidence to show the extent to which he owns the property. The description given in Ex.A.2 clearly shows that the defendant's land is situate to the south of the plaintiff's land and there is no description of a street between the two properties. The defendant in his written statement has been referring to the lands comprised in 235/1B, 235/5F, 235/5D etc., and not the suit survey number i.e., S.No.365/71.

34. From the evidence of P.W.2, it can be gathered that the



property to the west of the plaintiff's property belongs to plaintiff's paternal uncle and it could be presumed that the parties are enjoying the portion as a private pathway. Since there is a pathway to the west of the plaintiff's paternal uncle's land which leads to the street, it could be an access that is provided for the second item of the property under Ex.A.2. The defendant's contention that the suit for mandatory injunction and delivery of possession without prayer for declaration of title is not maintainable cannot be entertained. The simple reason being that the defendant has admitted the plaintiff's title to the property comprised in S.No.365/71 and the plaintiff's title to these lands has not been in doubt. Therefore, the substantial question of law no.a is answered against the defendant.

35. The argument that the Advocate Commissioner's report cannot be relied upon as it amounts to collection of evidence is also puerile since the Advocate Commissioner has carried out the measurement of the property both as per FMB and as per documents. The defendant has not sought to object to this report or to cross examine the Advocate commissioner. That apart, the Courts



below have relied upon the Advocate Commissioner's report only to find out the actual extent of encroachment made by the defendant.

Therefore, Substantial questions of law No.b is also answered against the defendant.

36. As already narrated the learned counsel for the defendant / appellant has given up the argument to Substantial Question of Law No.c. Substantial Question of law No.d has not been seriously canvassed by the learned counsel for the appellant. That apart, P.W.1 and P.W.2 have both deposed that the defendant owns property south of their property and that the vacant land which abuts the house of the plaintiff in S.No.365/71 belongs to the plaintiff. The discrepancy is only with reference to measurement of the vacant site, which really does not assume very great significance since ultimately a perusal of the Advocate Commissioner's report would clearly show that the defendant have encroached into the plaintiff's property by putting up the wall and the Advocate Commissioner has clearly measured the extent of encroachment which has not been objected to by the defendant.



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37. According to the plaintiff, the wall has been put up only when she had left for Namakkal to take treatment. The defendant who claims that it has been put up 60 years ago has not proved it. Further, during the Advocate Commissioner's visit this fact has not been brought to his notice. Therefore, in the absence of any contra evidence on the side of the defendant, it has to be held that the discrepancies if any is not fatal to the case on hand. Therefore, the substantial questions of law No.d is also answered in favour of the plaintiff.

38. In fine, the Second Appeal stands dismissed. The Judgement and Decree of both the Courts below is confirmed. Consequently, the connected Civil Miscellaneous Petition is closed. However, there is no order as to costs.

25.04.2024

Index : Yes/No

Internet : Yes/No

Speaking Order / Non Speaking Order

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To

1.The Additional Sub Court,
Namakkal.

2.The Principal District Munsif,
Namakkal.



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Pre-Delivery Judgment in
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