



S.A.(MD).No.266 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 01.08.2024

DELIVERED ON : 14.10.2024

CORAM

THE HON'BLE MR.JUSTICE G.ILANGO VAN

S.A.(MD).No.266 of 2021
and C.M.P.(MD).No.3674 of 2021

Arunachala Asari ... Appellant/Appellant/Defendant

Vs.

Maripandian ... Respondent/Respondent/Plaintiff

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, to set aside the Decree and Judgment passed in A.S.No. 74 of 2019 dated 03.12.2020 on the file of the Additional Subordinate Judge, Tirunelveli, by confirming the decree and Judgment passed in O.S.No.380 of 2014, dated 11.03.2019 on the file of the I Additional District Munsif, Tirunelveli.

For Appellant : Mr.T.R.Subramanian

For Respondent : Mr.K.Esakki



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JUDGMENT

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This appeal has been filed against the Decree and Judgment passed in A.S.No.74 of 2019 dated 03.12.2020 on the file of the Additional Subordinate Judge, Tirunelveli, by confirming the decree and Judgment passed in O.S.No.380 of 2014, dated 11.03.2019 on the file of the I Additional District Munsif, Tirunelveli.

2.The facts in brief:

The ground site of the suit property originally belonged to one Hamim Palli Wakf. A portion was taken on lease by the plaintiff's father Narayana Thevar on 06.07.1982. The property measured North south 16 cubic feet (Thatchumulam). East west 18 Cubic Feet (thatchumulam). Later the entire property was leased out to the plaintiff's father on 01.05.1989. After taking the lease in a portion, the plaintiff's father put up construction. After his father's death the plaintiff renewed the lease on 29.07.2003. Now the property measures east west 94 feet. North south 40 feet. After taking on lease, the plaintiff put up new construction. Now they are assigned as door numbers 2E4-1, 2E5-1, 2E6-1, 2E7, 2E8. The plaintiff was assessed with house tax and is in



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possession. Some of the shops were leased out by the plaintiff to third parties.

3. Along with the plaint a sketch is enclosed. The first item is shown as 'ABCD'. Second item is 'CDEF'. The disputed property is the second item now. On the south of the suit properties, the defendant is owning property. The southern boundary is shown as 'CD'. Only on the south of 'CD' the defendant is owning the properties. The south wall is shown as 'EF'. 'CD' is the boundary line. Through the second item only the plaintiff and his father maintained the southern portion of compound wall and south of 'CD' point the defendants constructed a compound wall some 20 years back. The second schedule is in continuous possession of the plaintiff and before his father for more than 30 years. The defendant has no right in the second schedule and never in possession also. Now he claims that the second schedule property encloses this property also. Further he claims that plaintiff's property boundary is 'EF' point. By claiming right now, he is making disturbances. Now the suit is laid for permanent injunction in respect of the second schedule and for cost.



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4. Along with statement, the defendant has also prayed counter injunction stating that the properties which are in enjoyment of the plaintiff and defendant belongs to Himam Palli Matharasa. So 40 or 50 years back Himam Palli Matharasa plotted out the properties for residential purposes. They leased out the site to various persons. The disputed property was taken on lease through his mother on 19.07.1986 from the Matharasa. After the death of the father, the defendant put up construction and living there. At the time of constructing the houses, he left two feet on the north of his compound wall. At that time there was no construction on the northern side, which was taken out of lease by the plaintiff. So northern compound wall was not compound wall of both parties. The property measures north side 10 thatchumulam which approximately comes around 49 ½ feet and east-west 34 thatchumulam. When the plaintiff raised the issue, the owner of the site namely Mohammed Abupekar executed yadhasthu dated 14.01.2003, the plaintiff stopped the issue at that time. But, frequently interfering into the possession. In 2001, defendant's mother executed settlement deed in his favour.



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5. On 05.07.2011 the plaintiff along with his men encroached northern 2 feet and blocked the same. Over that police complaint was given. During the enquiry, the plaintiff produced the document, which has shown north - south 14 thatchumulam and East west 22 thatchumulam. Later he took steps to measure the property. Measurements were done on 30.12.2011. It was found that 2 feet was in the encroachment of the plaintiff. That encroachment was removed by the plaintiff later.

6. But, in spite of the closure of the enquiry, again a notice was issued by the plaintiff on 21.11.2011. A suitable reply was given by the defendant. In the notices, the plaintiff has not stated anything about the document of the year 1989 and 2003. So those documents have been created for the purpose of the suit. Over the trouble created by the plaintiff, on the basis of the complaint given by him a case in Crime No. 461 of 2014 was registered.

7. On the basis of the pleadings the trial Court formulated 5 issues.

1. Whether the plaintiff is in lawful possession and enjoyment of



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plaint 2nd schedule property?

2. Whether the plaintiff is entitled to the relief of permanent injunction against the defendant regarding the plaint 2nd schedule property?
3. Whether the defendant is in lawful possession of the property mentioned in Yadast dated 23.09.2005?
4. Whether the defendant is entitled to the relief of permanent injunction against the plaintiffs?
5. What other reliefs the parties are entitled to?

8.To substantiate the case, on the side of the plaintiff 5 witnesses were examined and 10 documents were marked. On the side of the defendant two witnesses were examined and 18 documents were marked. Commissioner was appointed and his report and sketches were marked as Ex.C1 to Ex.C3.

9.At the conclusion of the trial, the suit was decreed with cost and counter claim was dismissed with cost. Against the judgment and decree of the trial Court, the defendant filed appeal in A.S.No.74 of 2019. The



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above said appeal was dismissed concurrent with the findings of the trial Court. Against the concurrent findings this second appeal is filed by the defendant.

10.At the time of admission the following substantial questions of law was framed.

1. Whether the plaintiff is in lawful possession and enjoyment of the 2nd schedule property with different measurements regarding Ex.A1 and Ex.A3?

11.Along with plaint, rough sketch is annexed by the plaintiff. It is not in dispute that the defendant's property lies on the south of the plaintiff's property. The portion measured about 94 feet east - west is the subject matter of the present issue, which is shown as second schedule in the plaint. As indicated in the plaint, it is the case of the plaintiff that his right extends up to 'CD' point. Only beyond 'CD' point, the defendant is having right. Now we will straight away go to the finding of the trial Court as confirmed by the appellate Court.



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12.It is also not in dispute that both the plaintiff's possession and defendant's possession are under lease hold right with Himam Palli wakf.

On behalf of them, the official is examined as PW2. We will go through the evidence of PW3 in course of time.

13.Regarding the non joinder of necessary party, there is a finding by the trial court that since it is admitted by both sides that the site belongs to the wakf and on the side of the plaintiff PW3 the official was examined, there is no necessity for impleading the owner of the site as a party. Because the issue is only with regard to the rival claim over the site by the lease holder. Even though it is better for the court to be present in the suit. But it can be pointed out to the court by way of examining the official. So the absence of the persons of the wakf does not affect or does not helpful to the parties to prove their rival title. On the basis of the documents filed by both sides, the matter can be decided. So only on that issue and purpose and finding, the trial court negated the above said contention.

14.Now we will go to the measurements. In Ex.A1, North south



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measurement of the plaintiff's lease hold right is mentioned as 44 feet.

Ex.A1 is dated 06.07.1982. It is the rental agreement between the plaintiff and the Wakf. It is the evidence to the effect that the rent will be increased every year. That is the evidence of PW5. Subsequent to Ex.A1, Ex.A2 and Ex.A3 were executed. Ex.A2 is dated 01.05.1989. Ex.A3 is dated 29.07.2003. The suit is filed in the year 2014. What happened to the subsequent period is not explained by the plaintiff.

15. Contra to this, it is the case of the defendant that the suit property covers his lease hold interest. As mentioned above, he has also pleaded the counter claim. So it is the duty of both sides to substantiate their right over the disputed property. Now we will see the documents on the side of the defendant in this regard. Ex.B5 is the Yadasthu, which is dated 23.09.2005. He also relies upon the letter dated 17.01.2003 under Ex.B4, which will prevail over the other is the task. This court must undertake in the light of the finding made by the trial Court as well as the appellate Court. We can refer Ex.A1 for the present and go to the recital in Ex.A2 and Ex.A3. In Ex.A1, the north south measurements is shown as 44 feet. But, whereas, it is mentioned as 40 feet in Ex.A2 and A3. It is



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the document reads that north south 40 feet. We can take that first.

Ex.B14 is the Town Survey, which shows that the defendant is in possession of the survey numbers 63 to 69. The defendant is in possession in S.Nos.63 to 69. The disputed space lies in S.No.70. But in the name of Matharasa. Similarly, the survey sketch under Ex.A8 and Town Survey register extract Ex.A4 also shows that on the south of east property, there is a vacant site. So also on the north of the defendant's property, he put up construction within his property, which is the compound wall. Now he claims right over the disputed property, which lies north of the compound wall.

16.The defendant's documents were disbelieved by the trial court on the ground that the Wakf board has given a complaint against the defendant stating that Exs.B4 and B5 are fabricated documents. When the Walkf itself is not supporting the case of the defendant, then in all probability, the case of the plaintiff must be taken as true. The next circumstances relied upon the trial Court is that the commissioner report. The commissioner found that the disputed property lies within the first schedule. The another circumstances which relied upon by the trial court



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is DW1, during the course of cross examination he admitted that the plaintiff has encroached the second schedule which means that the second schedule is in possession of the plaintiff. Now we will go to the findings of the appellate Court.

17.The short point is recorded by the appellate court with regard to the right that too on the basis of the commissioner's report. When the defendant says that the plaintiff encroached the disputed property, it is the duty of the defendant to establish that the plaintiff has encroached the disputed property. The point which was omitted to be considered by the trial Court was addressed by the court. When as mentioned above, in Ex.A1 north south measurement is stated as 44 feet. In subsequent document Ex.A2 and Ex.A3, it is mentioned as 40 cents. Similarly, the defendants have produced Ex.B4 and Ex.B5, which indicates that the north south measurement is 18 feet and 18 ½ feet respectively. The northern boundary is shown as the property belongs to Narayanathevar. But in respect of the Ex.B4 and Ex.B5 as mentioned above there is police complaint by the Wakf board itself. So owner of the property says that the Ex.B4 and Ex.B5 are fabricated documents and complaint has been



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lodged in this regard. As mentioned above, the finding of the trial court requires no re-appreciation, as rightly held by the appellate court. Now in the light of the above said findings, we will go to the arguments advanced on the side of the parties.

18.The appellant would submit that the plaintiff has encroached the suit property and except producing the Exs.A2 and A3, the plaintiff has not proved the right over the disputed property. Per contra, the learned counsel for the respondent would submit that Exs.A1 to A3 is not disputed by the defendant and also stand proved by examining the official from the Wakf board. So his right over the disputed property has been established and rightly concluded by the trial court as well as the appellate court, which requires no re-appreciation of evidence.

19.As mentioned in the pleadings portion, the defendant says that the plaintiffs fabricated Exs.A1 to A3. But, absolutely there is no evidence on record to show the same. Unlike the complaint given by the Wakf board against the defendant, no such complaint was given against the plaintiff. Exs.A1 to A3 cannot be construed as fabricated documents



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for the purpose of claiming right over the property.

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20.Per contra as mentioned above when the owner of the property himself disputes the document of right claimed by the defendant, those documents cannot be taken as overriding effect against Exs.A1 to A3. So the contention on the part of the defendant is not correct on record and no doubt that the disputed property now, is recorded in the name of Matharasa. But lies between the defendant and plaintiff's property. When the defendant's documents are not genuine, naturally the documents produced by the plaintiff has to be taken as mentioned above. No doubt in Ex.A1, the north sought measurement is shown as 44 feet and in subsequent documents, it was mentioned as 40 feet. But, the plaint is based upon only the subsequent documents. The first item measurement reads that north south 40 feet, which includes the disputed property. The above said measurement also found correct by the commissioner.

21.Para 2, 3, 4 of the commissioner report can be extracted hereunder for better appreciation.

"2.மேற்படி A புள்ளியில் இருந்து வடக்கே
முறையே 4.9, 10.0 மீட்டர் அளக்கப்பட்டது



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அது முடிவுற்ற புள்ளி 'B' ஆகும். மேற்படி AB புள்ளிகளுக்கு மேல்புறம் கழிவு நீர் ஓடை அமைந்திருந்தது B புள்ளி முடிவுள்ள இடத்தில் ஒரு குப்பை தொட்டி ஒன்று இருந்தது மேற்படி AB புள்ளிகளுக்கு மேல்புறம் ரெட்டியார்பட்டு ரோடு அமைந்திருந்தது மேற்படி B புள்ளியில் இருந்து தொடர்ச்சியாக வடக்கு நோக்கி முறையே 12.4 மீட்டர் அளக்கப்பட்டது. மேற்படி 12.4 மீட்டர் (40 அடி) முடிவுற்ற பகுதி C புள்ளி ஆகும். இதுவே 1ம் தபசில் சொத்தின் தென்வடல் அளவாகும்.

3. 2வது தபசில் சொத்தானது 1ம் தபசில் சொத்தின் ஒரு அங்கமாகும். 2வது தபசில் சொத்தை அளப்பதற்கு B புள்ளியில் இருந்து கிழக்கு நோக்கி 9.1 அடி அளக்கப்பட்டது. அது முடிவுற்ற பகுதியில் கீழ்மேல் முடுக்கு காணப்பட்டது. அதனை D என குறிப்பிட்டுள்ளேன். D புள்ளியில் இருந்து கிழக்கு நோக்கி (34 அடியும்) அதிலிருந்து தெற்கே 1 அடி அடியும் அளக்கப்பட்டது. அது O புள்ளி ஆகும். பின் அதனை தொடர்ந்து கிழக்கே (60 1/2 அடியும்) அளக்கப்பட்டது. அது முடிவுற்ற புள்ளி "E" ஆகும். அது போல் 2வது தபசில் சொத்தை கிழக்கு அத்தில் இருந்து மேற்கே 60 1/2 அடியும்



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வடக்கே 1 அடியும் பின்னர் மேற்கே 34 அடியுமாக அளந்து மொத்தமாக 2வது தபசில் சொத்தின் கிழமேல் அளவு 94 1/2 அடி அளக்கப்பட்டது. 2ம் தபசில் சொத்தின் தென்வடல் அளவானது "E" புள்ளியில் இருந்து "O" புள்ளி வரை 1 அடியாகவும் "O" புள்ளியில் இருந்து "D" புள்ளி வரை 2.3 அடியுமாகவும் இருந்தது.

4. மேற்படி 2ம் தபசில் முருக்கிற்கு தென்புறம் எதிர்மனுதார் வீட்டின் காம்பவுண்ட் சுவர் அமைந்திருந்தது. 2ம் தபசில் வடபக்க சுவரும் எதிர்மனுதார் வீட்டின் காம்பவுண்ட் சுவரும் பழைய சுவராகவே காணப்பட்டது. 'DO' பகுதியில் அமைந்திருந்த சுவரில் வாசல் ஒன்று விடப்பட்டு இருந்து எதிர்மனுதார் வீட்டின் காம்பவுண்ட் சுவர் முடிவுற்ற பகுதியில் இடித்து விடப்பட்டு இருந்தது. மேற்படி காம்பவுண்ட் சுவருக்கு தென்புறம் மரம் ஒன்று அமைந்திருந்தது. கடைகள் கொண்ட 1ம் தபசில் சொத்தில் கடைகள் கொண்ட கட்டிடம் காணப்பட்டது. 1ம் தபசிலுக்கு தென்வடல் பகுதியில் கீழே அமைந்திருந்த 3 கடைகள் பழைய கட்டுமானத்திலும் மேலே அமைந்திருந்த 3 கடைகள் புதியது போன்றும் காணப்பட்டது."



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22. Whether any objection was filed by the appellant in the commissioner's report is not clear on record. Now what ever, it may be survey was undertaken with reference to the documents produced by the parties and as well as revenue records by fixing the survey stone. So the measurements taken on ground tallies with the measurement mentioned in Exs.A2 and A3.

23. The physical feature available also does indicate that the disputed property is in possession of the plaintiff. As per the commissioner report, as indicated above, there is a door towards south on the disputed property in 'DO' region. But to show that the defendant is also in possession they damaged the compound wall on the north, apparently, to make it believe that they are also having access to the disputed property. This itself indicates that only an attempt was made by the defendant to encroach upon the disputed property and not the plaintiff. The presence or availability of the door also indicates that the plaintiff have access to the disputed property from the north. When the measurement on ground tallies with that of the documents of right, I find that absolutely no error either on facts or on the law, committed by the



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trial court and by the appellate court. So I find that the plaintiff has established his right over the property and possession also. So it was rightly decreed as prayed for by the trial court and appellate court and rightly dismissed the counter claim made by the appellant.

24.As mentioned above, the plaintiff's claim on the basis of the subsequent deeds under Exs.A2 and A3, A1 is become relevant. Now Ex.A1 need not be taken and rightly it was not taken by the trial court as well as the appellate court. So the substantial question of law is answered that the difference in the north south measurement mentioned in Exs.A1 to A3 does not affect the right of the plaintiff over the disputed property. So the substantial question of law is answered accordingly. The second appeal fails.

25.In the result, this second appeal stands dismissed with costs. The Judgment and Decree passed by the trial Court as well as appellate Court are hereby confirmed. Consequently, connected miscellaneous petition is closed.

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To

- 1.The Additional Subordinate Judge, Tirunelveli.
- 2.The I Additional District Munsif, Tirunelveli.
- 3.The Section Officer,
E.R.Section/V.R.Section,
Madurai Bench of Madras High Court, Madurai.



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