



S.A.No.1891/2003 & S.A(MD)No.470/2005

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on	09.12.2024
Pronounced on	20.12.2024

CORAM

THE HON'BLE MR.JUSTICE V.SIVAGNANAM

S.A.No.1891 of 2003

And

S.A(MD)No.470 of 2005

S.A.No.1891 of 2003

- 1.Sivaniammal
- 2.Subbiah Konar
- 3.Ram Boopathy

... Appellants

-VS-

- 1.R.Ramaswami (died)
 - 2.Sitalakshmi
 - 3.Krishnammal
 - 4.R.Kannan
 - 5.R.Padmanaban
- (R2 is already on record and recorded as LR of Deceased R1)

(RR3 to R5 are brought on record as LR of the deceased first respondent vide order dated 09.03.2020 made in CMP(MD)Nos.12122 & 12123 of 2017)

..Respondents



S.A.No.1891/2003 & S.A(MD)No.470/2005

PRAYER: Second Appeal filed under Section 100 Code of Civil Procedure, against the Judgment and Decree made in A.S.No.22 of 2002 dated 28.06.2002 on the file of the Sub Court, Sankarankovil modifying the Judgment and Decree made in O.S.No.135 of 1995 dated 30.11.2001 on the file of the Additional Munsif Court, Sankarankovil.

For Appellants ... Mr.M.Thirunavukarasu

For Respondents ... Mr.M.Meenakshi Sundaram
Senior Counsel for
Mr.N.GA.Natraj (RR4 & 5)

S.A(MD)No.470 of 2005

- 1.R.Ramasamy (died)
- 2.RSeethalakshmi
- 3.Krishnammal
- 4.R.Kannan
- 5.R.Padmanaban

(AA3 to 5 are brought on record as LR's of the deceased first appellant vide order dated 20.07.2018 made in CMP(MD)No.10658 of 2017)

... Appellants

-VS-

- 1.Sivaniammal
 - 2.Subbiah Konar
 - 3.Ram Boopathy
- (R1 name is amended as per order dated 10.07.2006 made in CMP.No.3669 of 2006)

..Respondents



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PRAYER: Second Appeal filed under Section 100 Code of Civil Procedure, against the Judgment and Decree made in A.S.No.22 of 2002 dated 28.06.2002 on the file of the Sub Court, Sankarankovil modifying the Judgment and Decree made in O.S.No.135 of 1995 dated 30.11.2001 on the file of the Additional Munsif Court, Sankarankovil.

For Appellants	...	Mr.M.Meenakshi Sundaram Senior Counsel for Mr.N.GA.Natraj
For Respondents	...	Mr.M.Thirunavukarasu

COMMON JUDGMENT

The Second Appeals have been filed against the Judgment and Decree made in A.S.No.22 of 2002 dated 28.06.2002 on the file of the Sub Court, Sankarankovil modifying the Judgment and Decree made in O.S.No.135 of 1995 dated 30.11.2001 on the file of the Additional Munsif Court, Sankarankovil.

2. For the sake of convenience, the parties are referred to as per their ranking in the Trial Court.



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3. The defendants are the appellants in S.A.No.1891 of 2003 and the respondents in S.A(MD)No.470 of 2005. The plaintiffs are the appellant in S.A(MD)No.470 of 200 and the respondents in S.A.No.1891 of 2003.

4. The case of the plaintiff is that the plaintiff schedule property originally belonged to Narayanasamy Naickar and his son Ramasamy Naickar. They partitioned the property on 01.07.1961 by way of a registered sale deed, in which, the 1st schedule was allotted to the said Ramasamy Naickar. The said Ramasamy Naickar sold the first schedule property and other properties on 21.09.1962 by way of a registered sale deed to Rajalakshmi, Dhanalakshmi, Sithalakshmi (second plaintiff) and one Rukmani. After the sale, Dhanalakshmi and Rukmani sold their share to the first plaintiff R.Ramasamy (husband of the second plaintiff) by way of a registered sale deed dated 01.09.1973. Rajalakshmi also sold her share on 12.09.1980 to the second plaintiff by way of a registered sale deed. Thus, the entire first schedule property is owned by the plaintiffs. Patta was granted in their favours. They are enjoying the property by paying house tax. They are enjoying the property more than



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32 years. To show the plaint schedule property, they enclosed rough sketch, in which, the first schedule is shown as A, B, C.D. The second schedule property is shown as B, B1, B2 and B3 and third schedule is shown as D1, D2, D3, D4. In the first schedule property, between A and B point and eastern side of the B point there is a feet height 80 year old wall on the east-west direction. On the west of B point, the plaintiffs' vendors' shed there. On the western side of the first schedule property, on the portion of A and D1 point, they constructed mach box office. While constructing the office, they left 1½ feet vacant place on the southern side from D1 to maintain the southern side east-west wall. Simultaneously, the defendants' vendor also left 1½ feet on the northern side of the property. Thus, the three feet vacant is using as a common lane enjoyed by both the plaintiffs and the defendants. It is shown as third schedule in the plaint. The plaintiffs on the eastern side of their property fixed a natural gas tank and equipments and maintain in vacant place. The defendants, who are the husband, wife and son, have no right over the first schedule of property. But by creating documents, they are attempting to interfere with the plaintiffs' enjoyment and also attempted to construct a wall in the common land. Therefore, the plaintiffs filed the suit for declaring title over the plaint second schedule property with



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permanent injunction not to disturb their enjoyment and possession by the defendants and grant permanent injunction with regard to the third schedule property for their peaceful possession and enjoyment.

5.The defendant contested the suit and filed the written statement. In the written statement, they denied the allegations contained in the plaint. They further contended that first schedule property in between AB point and on the eastern side of the B point, there is a wall. The first schedule property totally east-west 12 Thachumulam, north-south 9¼ Thachumulam. It was originally owned by Kandasamy Naickar and he sold it to Ramasamy Naickar's son Kandasamy Naickar on 24.11.1945 and he and his brother enjoyed the property and other properties and they partitioned among them in the year 1961 orally. In that partition, the property the property purchased on 24.11.1945 was allotted to Kandasamy Naickar's brother Narayanasamy Naickar. Thereafter, Narayanasamy Naickar and his son Ramasamy Naickar partitioned their family property with other properties on 01.07.1961, in which, the property purchased under dated 24.11.1945 was allotted to N.Ramasamy Naickar, in which, he was granted north-west 9 ¼ Thachumulam, in which, instead of mention 9 ¼ Thachumulam they



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mentioned 12 Thachumulam. Thus, they mentioned more than extent.

Ramasamy Naickar, the first plaintiff's brother in law and the second plaintiff's brother. The above said Ramasamy Naickar sold part of the first schedule to Rajalakshmi, Dhanalakshmi and Rukmani on 21.09.1962. Dhanalakshmi Rukmani also sold their share on 01.09.1977 by separate sale deed to the first plaintiff, in which, they mentioned east-west extent as 60 feet instead of 33 feet. The second plaintiff while purchasing the property from his sister Rajalakshmi on 12.03.1980, they mentioned east-west extent as 60 feet. Originally, they are not owned that much of extent. On the western side of Raguram house, there is a 6 feet pathway in the north-south direction. The plaintiffs are entitled to east-west 33 feet and north-south 26 feet. The defendant purchased property on the southern side of the plaintiffs' property with the pathway right on 06.06.1982 and 22.06.1994. In way of counter claim, the defendants claimed that the plaintiffs encroached plaintiff second schedule property. Therefore, the defendants are right over the plaintiff schedule property and recovery the possession from the plaintiffs and to remove the compound wall by way of mandatory injunction and to declare the defendants' right over the third schedule property as the plaintiffs have no right over the property and there is no common pathway and it



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exclusively belong to the defendants. With this counter claim, the defendants filed the written statement and prayed to dismiss the suit and prayed to allow their counter claim.

6. On the basis of the above said pleas set out by the respective parties, the following issues were framed by the Trial Court for consideration:

1. Whether the plaintiffs are entitled to second schedule property which is part of the first schedule property?
2. Whether the plaintiffs are entitled to the relief of declaration in respect of the second schedule property?
3. Whether the plaintiffs are entitled to the relief of permanent injunction respect of the second schedule property?
4. Whether the third schedule property is the common lane?
5. Whether the plaintiffs are entitled to the relief of declaration and permanent injunction in respect of the third schedule property?
6. What other remedy is available to the plaintiffs?

7. Before the Trial Court, on the side of the plaintiffs, 4 witnesses have been examined as P.W.1 to P.W.4 and marked 27 documents as



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Ex.A1 to Ex.A27. On the side of the defendant, one witness has been examined as D.W.1 and 8 documents have been marked as Exs.B1 to B8.

8. On consideration of the oral and documentary evidence adduced by the respective parties and the submission made, the Trial Court declared the plaintiffs' title over the plaint second schedule property and granted permanent injunction and with regard to the third schedule property, dismissed the plaintiffs' case and allowed the counter claim and dismissed the defendant's counter claim with regard to the declaration and recovery of possession of the plaint second schedule property and thus, partly decreed the suit and partly allowed the counter claim without costs.

9. Aggrieved over the same, the defendants alone preferred in A.S.No.22 of 2002 on the file of the Sub Court, Sankarankovil. The First Appellate Court, upon consideration of evidence on record, set aside the Judgment and Decree of the Trial Court and also dismissed the counter claim of the defendant and thereby dismissed the entire suit filed by the plaintiff and dismissed the counter claim. Aggrieved by this, the defendants filed S.A.No.1891 of 2003 and the plaintiffs filed S.A.No.470 of 2005.



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10. While admitting the second appeal, this Court has formulated the following substantial questions of law:-

"(1) Whether the findings of the Courts below are vitiated by its failure to consider Exs.B.6 to B.8 and the admission of P.W.1 regarding the property claimed by way of counter claim?

(2) Whether the courts below is right in not considering the claim of the appellants after having found that the respondents are not entitled to a larger extent than what is conveyed under Ex.A.1?

(3) Whether the appellate Court was right in interfering with the decree in the absence of any cross appeal or cross objection from the plaintiff?

11.The learned counsel for the appellant in S.A.No.1891 of 2003 submitted that the judgment and decree of the First Appellate Court is against the evidence on record and contrary to law. The First Appellate Court erred in law in not upholding the claim of the appellants in respect of the first schedule property referred in the written statement while accepting that the respondent is not having title over the plaint schedule



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property and not entitled to get any relief of declaration and injunction.

He further contended that the First Appellate Court erred while accepting the documents Ex.B6 and B7 and B8 declared to grant relief sought for by way of counter claim and reiterated other grounds raised in the grounds of appeal. He would further submit that the respondents had not filed any appeal against the rejection of their claim with regard to the third schedule property common pathway and therefore, the finding of the trial court has become final and it cannot be agitated before this Court in the second appeal and thus, pleaded to allow S.A.No.1891 and dismiss S.A.No.470 of 2005.. In support of his argument, he has placed reliance on the following decisions:-

- (i) 2003(2) SLR 22 (Banarsi vs. Ram Phal)
- (ii) 2018(4) L.W 699 (Marriyappa Nadar vs. Girija and others)

12. The learned counsel appearing for the respondents in S.A.No. 1891 of 2003 and the appellants in S.A.No.470 of 2005 submitted that the First Appellate Court had erred in concluding that the first schedule property is owned and enjoyed by the respondent. The First Appellate Court failed to take into consideration of the measurement given in the document Exs.A6 to 8 which are extent enjoyed by the vendor of the



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plaintiffs and also failed to consider the fact that Exs.A6 and A7 were executed in the year 1973 and measurement given in the respective sale deeds was in possession and enjoyment of the plaintiffs. Even the plaintiffs' vendor is not owned that much of extent the properties conveyed to them is within the well accepted boundaries and enjoyed the more extent and they prescribed title by long enjoyment. He further contended that the First Appellate Court failed to take note of the settled legal position that in the relevant documents, correct boundaries were given, whereas the area mentioned is only approximate. The description of boundary should prevail in ascertaining the actual properties sold under the document. Therefore, the plaintiffs are entitled for declaration and injunction. The finding of the Trial Court is against the settled position of law and liable to be set aside and thus, pleaded to allow the S.A(MD)No.470 of 2005. In support of his argument, he has placed reliance on the following decisions:-

- (i) CDJ 1977 MHC 256 (The Church of South India Trust Association through its power of attorney vs. Raja Ambrose.



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13. I have considered the matter in the light of the submissions made by the learned counsel on both sides and perused the materials available on records carefully.

14. A perusal of the records, it is seen that the plaint contained three schedule of properties. The second schedule property is a part of the first schedule of property. Third schedule property is mentioned as common land enjoyed by the plaintiffs and the defendant. To explain the suit properties, the plaintiffs filed a rough sketch, which is evidenced as Ex.A13. A perusal of Ex.A13, it is seen that the first schedule property is shown as ABCD. Second schedule property is shown as B B1, B2, C. Third schedule property is shown as D1, D2, D3 and D4.

15. A perusal of records, further reveals that the plaint schedule properties and the properties on the southern side enjoyed by the defendant are originally owned by one Subbiah Naickar. This fact is admitted by both parties and no dispute in this regard.

16. The above said Subbiah Naickar's legal heirs are Kandasamy Naickar, Perumal samy Naickar, Narayanasamy Naickar and Gurusamy



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Naickar. In this regard, there is no dispute among the parties. This also admitted fact.

17.The above said four brothers partitioned the plaint schedule properties and other properties on the southern side. Northern side owner sold the a portion of property by way of sale deed dated 24.11.1945 (Ex.A1) to one Kandasamy Naickar S/o of Ramasamy Naickar.

18.Ex.A1 sale deed is dated 24.11.1945 the extent purchased was east west 12 Thachumulam i.e., 33 feet, south-north 9 $\frac{1}{4}$ Thachumulam i.e., 25 $\frac{1}{2}$ feet. This is the parent documents to the vendors of the plaintiffs. Thereafter, in the partition deed dated 01.07.1967 evidenced as Ex.A4, the extent mentioned is more than purchased under Ex.A1. In the Ex.A4 document east-west 12 Thachumulam, south-north 12 Thachumulam. Originally they got 9 $\frac{1}{4}$ Thachumulam on the northern side. Now, in ExA4, they mentioned 12 Thachumulam. This is the first document mentioned more extent than Ex.A1 original sale deed. In pursuance of these documents, in the subsequent sale deeds Ex.A5, A6, A7 and A8 they mentioned larger extent i.e., east-west 60 feet and south-



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north 33 feet. Hence, it is apparently clear that these extents are more than the original sale deed Ex.A1 dated 24.11.1945.

19.On perusal of the boundaries, it is seen that the same boundaries were mentioned, but extent is differed. The boundaries are reproduced as mentioned by the Trial Court in para 10 of the Judgment:-

10. வா.சா.ஆ.1ன்படிகீழ்க்கண்ட விவரப்படியான சொத்து கிரையம் கொடுக்கப்பட்டுள்ளது.

”பெருமாள்சாமி நாயக்கர் பாக வீட்டுக்கும் வடக்கு வெங்கடசாமி நாயக்கர் வீட்டுக்கும் மேற்கு சித்தைய நாயக்கர் வீட்டுக்கும் தெற்கு பாதைக்கும் கிழக்கு இம்மாலுக்குள் கிழமேல் (நு தச்சுமுழம் 12 (33 அடி) தென்வடல் தச்சுமுழம் 9,1:4 (25,1:2 அடி) உள்ள மனை நிலமும் அதில் காரைச் சுவர் கட்சி பாட்டுத் தகரம் போட்டிருக்கிற வீடு கதவு நிலை மேல்கோப்பு சமஸ்தமும்”

வா.சா.ஆ. 4ல் சொத்து கீழ்க்கண்டவாறு விவரிக்கப்பட்டுள்ளது.

”சுப்பையா நாயக்கர் வீட்டுக்கும் வடக்கு வெங்கடராம் நாயக்கர் வீட்டுக்கும் மேற்கு காளியப்ப நாயக்கர் வீட்டுக்கும் தெற்கு தென்வடல் ரோட்டுக்கும் கிழக்கு இம்மாலில் கிழமேல் தச்சுமுழம் 12 தென்வடல் தச்சுமுழம் 12 உள்ள காரை கட்டு தகரம் போட்ட வீடு கதவு நிலை மேல்கோப்பு காலிமனை வகையறாவும்”

வா.சா.ஆ.4ன்படி பெற்ற சொத்தை இராமசாமி நாயக்கர் அச்சொத்தை 21.9.1962ம் தேதி ராஜலட்சுமி, தனலட்சுமி, 2 வாதி



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சீதாலட்சுமி மற்றும் ருக்மணி ஆகியோர்களுக்கு வா ச ஆகே கிரையம் கொடுத்துள்ளார். வா.சா.ஆ. 5லும், வா.சா.ஆ.சில் உள்ள மால்களே காட்டப்பட்டுள்ளன. வா.சா.ஆ.பீன் கிரையதாரர்களில் ஒருவரான ருக்மணியம்மாள் ? அவரது 4ல் 1 பங்கை வா.சா.ஆ.சின் அசலின்படி கிரையம் கொடுத்துள்ளார், வா.சா.ஆ.பீல் கிரைய கீழ்க்கண்டவாறு விவரிக்கப்பட்டுள்ளது. 1ம் வாதிக்கு

தென்வடல் தெருவுக்கும் ரோட்டுக்கும் கிழக்கு கிழமேல் தெருவுக்கும் தெற்கு வெங்கிட்டாமநாயக்கர் வகையறா வீட்டுக்கும் மேற்கு குருசாமி நாயக்கர் வகையறா வீட்டுக்கும் வெங்கிட்டராம் நாயக்கர் வகையறா வீட்டுக்கும் வடக்கு, இம்மாலுக்குள் கிழமேல் அடி 60 தென்வடல் அடி 33 உள்ள மனை நிலத்தில் கிழமேல் அடி 30 தென்வடல் அடி 9 உள்ள இடத்தில் அதில் கிழக்கு முகமாய் மண்கவர் கட்டி கூரை மேய்ந்து இருக்கிற கூரை கட்டிடமும் கதவு நிலை மேல்க்கோப்பு வகையறாவில் பிரிவின்றி என்பாகம் 4ல் 1 பங்கு பாத்தியமும்

மற்றொரு கிரையதாரரான தனலட்சுமியம்மாள் தனக்குப் பாத்தியப்பட்ட 4ல் 1 பங்கை வா.சா.ஆ.7ல் அசலின் படி 1.9.1973ல் 1ம் வாதிக்கு கிரையம் கொடுத்துள்ளார், வா.சா.ஆ.7லும், வா.சா.ஆ.6ன் மால்களும் அளவுகளும் காட்டப்பட்டுள்ளன, மற்றொரு கிரையதாரரான ராஜலட்சுமி என்பவர் 12.3.1980 தேதி வா.சா.ஆ.8ன் படி 2ம் வாதிக்கு அவரது 4ல் 1பங்கை கிரையம் கொடுத்துள்ளார், வா.சா.ஆ.8ல் கிரையச் சொத்து கீழ்க்கண்டவாறு விவரிக்கப்பட்டுள்ளது.



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”தென்வடல் ரோட்டிற்கும் கிழக்கு ராமகிருஷ்ண நாயக்கர் வகையறா வீட்டு மனைக்கும் மேற்கு குருசாமி நாயக்கர் நாரணப்ப நாயக்கர் இவர்கள் வீட்டு மனைக்கும் வடக்கு ரெங்கசாமி நாயக்கர் வகையறா வீட்டுக்கும் கிழமேல் சந்து பாதைக்கும் தெற்கு, இம்மாலுக்குள் கிழமேல் அடி 60 தென்வடல் அடி 33 உள்ள காலிமனையில் பிரிவின்றி 4ல் 1 பங்கு பாத்தியமும்”

(2௨௭)

வா.சா.ஆ.8ல் கீழ்ப்பக்க மாலாகக் காட்டப்பட்டுள்ள ராமகிருஷ்ண வகையறா, வெங்கட்டராம நாயக்கரின் பின் பாத்தியஸ்தர்கள் ஆவார்கள். வா.சா.ஆ.6 முதல் 8 வரையுள்ள ஆவணங்களில் வா.சா.ஆ. 1 முதல் வா.சா.ஆ.5ஐ விட கிழமேல் அளவு அதிகமாகக் கொடுக்கப்பட்டுள்ளது. தெரியவருகிறது.

20.In all these documents, it is revealed that east-west and north-south extent mentioned more than the original documents. On perusal of the defendants' side documents Exs.B6, B7 and B8, it is seen that Ex.B6 is the sale deed dated 22.06.1983 in favour of Venkaraman Naickar executed by Gurusamy Naickar. Ex.B7 is the sale deed dated 06.06.1945 executed by Venkarama Naickar to the first defendant. Ex.B8 is the sale deed dated 22.05.1994 executed by Venkarama Naickar to the first defendant. All these documents reflect that the defendants purchased the



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properties on the southern side of the plaint schedule properties of the plaintiffs. The First Appellate Court in para 40 elaborately discussed, which reproduced hereunder:-

“40. 2வது தபசில் சொத்து, 1வது தபசில் சொத்துக்குள் வருகிறதா? என்பதை கண்டறியவேண்டியுள்ளது. 2வது தபசில் சொத்து வா.சா.ஆ.13 வரைபடத்தில் 1வது தபசில் சொத்தில் கீழ் பகுதியாகக் காண்பிக்கப்பட்டுள்ளது. வா.சா.ஆ.1ல் பாதைக்கும் கிழக்கு என்று எல்கை சொல்லப்பட்டுள்ளது. இந்த வழக்கில் நீதிமன்ற ஆணையர் நியமிக்கப்பட்டு, இருமுறை சென்று அறிக்கைகள் மற்றும், வரைபடங்கள் தாக்கல் செய்துள்ளார். முதல்முறை தாக்கல் செய்த அறிக்கை நீ.ம.சா.ஆ.1 ஆகவும், வரைபடத்தை நீ.ம.சா.ஆ.2 ஆகவும் குறிக்கப்பட்டுள்ளது. 2வது முறை தாக்கல் செய்த அறிக்கை நீ.ம.சா.ஆ.3 ஆகவும், வரைபடம் நீ.ம.சா.ஆ.4 ஆகவும் குறிக்கப்பட்டுள்ளது. நீ.ம.சா.ஆ. 1 அறிக்கையில் அளவுகளும் சொல்லாததால் 2வது முறையும் அதே வழக்கறிஞர் தான் நியமிக்கப்பட்டுள்ளார். நீ.ம.சா.ஆ.3 அறிக்கையையும், நீ.சா.ஆ. 4 வரைபடத்தையும் பார்க்கும்போது, 1வது தபசில் சொத்திற்கு மேற்கே கழுகுமலை செல்கிற சாலை தென்வடலாகக் காணப்படுகிறது. அந்தத் தென்வடல் சாலையில் 1வது தபசில் சொத்தின் மேற்கு எல்கை ஏ,பி என காண்பிக்கப்பட்டுள்ளது. எனவே, ஏ, புள்ளியிலிருந்து கிழக்காக 12 தச்சுமுழம் மட்டுமே வா.சா.ஆ.1 ஆதி ஆவணத்தின் படி எதிர்மேல்முறையீட்டாளர்களுக்கு



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உரிமை கோர இயலும், அதாவது 33 அடி மட்டுமே கோர இயலும். நீ.ம.சா.ஆ.3 மற்றும் நீ.ம.சா.ஆ.4லிருந்து, “ஏ புள்ளியிலிருந்து “சி6” புள்ளி வரைக்கும் உள்ள கிழமேல் நீளம் 33 அடி என்று தெளிவாகச் சொல்லப்பட்டுள்ளது. “ஏ” புள்ளியிலிருந்து “சி6” புள்ளி வரைக்கும் கிழமேல் சுவர் தொடர்ச்சியாக உள்ளது என்பதும் அறிக்கையிலிருந்து தெளிவாகிறது. எனவே, “ஏ” புள்ளியிலிருந்து “சி6” புள்ளி வரைக்கும் உள்ள கிழமேல் 33 அடி வரைதான் எதிர்மேல்முறையீட்டாளருக்கு பாத்தியதை இருக்கிறது என்பது தெளிவாகிறது. “ஏ” புள்ளி முதல் “ஏ 1” புள்ளி வரைக்கும் உள்ள கிழமேல் நீளம் 46 அடி 3 அங்குலம் என நீ.ம.சா.ஆ. 1 அறிக்கையில் சொல்லப்பட்டுள்ளது. அப்படி பார்க்கும்போது நீ.ம.சா.ஆ.4 வரைபடத்தில் உள்ள “சி6” புள்ளிக்கு கிழக்கே 13 அடி 3 அங்குலம் இடத்திற்கு எதிர்மேல்முறையீட்டாளர்களுக்கு எந்தவித உரிமையும் இல்லை என்பது தெளிவாகிறது. ஆனால், 1வது தபசிலாக கிழமேல் 42 அடியும், தென்வடல் 33 அடியும் உள்ள இடமும், அதில் கிழமேல் 6 அடி, தென்வடல் 33 அடியாகவும் 2வது தபசில் சொத்தாக விவரிக்கப்பட்டுள்ளது. எதிர்மேல்முறையீட்டாளர்களுக்கு கிழமேல் 33 அடி தான் பாத்தியம் இருப்பதால் அதற்கு கிழக்கே இருக்கும் 2வது தபசில் சொத்து 1வது தபசில் ஒரு பகுதி அல்ல என்பதும், 2வது தபசில் சொத்துக்கு உரிமை இருப்பது சம்பந்தமாக மறுக்கின்ற நிலையில் எந்த ஆவணமும் தாக்கல் செய்து எதிர்மேல்முறையீட்டாளர்கள் தரப்பில் நிரூபிக்கப்படவில்லை என்பது தெளிவாகிறது. மேற்கூறிய



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சாட்சிய சான்றாவணங்களின் அடிப்படையில் பார்க்கும்போது, எதிர்மேல்முறையீட்டாளர்களுக்கு 2வது தபசில் சொத்து ஆவணங்களின் அடிப்படையில் பாத்தியப்பட்டது அல்ல எனமுடிவு செய்து இந்தப் பிரச்சினைக்கு மேல்முறையீட்டாளர்களுக்கு சாதகமாக பதில் அளிக்கப்படுகிறது”

21. There is no dispute regarding the fact that in each of the documents relied on by the plaintiffs i.e, Exs.A1, A4, A5, A6, A7 and A8 the extent is clearly marked. Evidence supplied by boundaries, extent, survey numbers are the determining factors. It is established legal position that boundaries would prevail over measurement in case there is conflict. This principle is applicable in case of doubtful or varying extents in the documents of title relating to the property boundaries should be preferred to the extent. Only in the absence of definite materials to show the actual extent intended to be sold the boundaries should outweigh the doubtful extent mentioned in the document. If the recitals in the documents and the circumstance of the case show that a lesser extent only was conveyed then the area covered by boundaries, and there is clear evidence as to the intention of the parties with reference to the extent conveyed, then the extent should prevail over the



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boundaries. This principle is settled by **(1984) 2 MLJ 306 (Dina Malar Publication vs. The Tiruchirappalli Municipality and others.**

Therefore, argument of the placed by the learned counsel for the plaintiffs has no merit.

22. I have considered the submission of the learned counsel for the defendants. The Trial Court rejected claim of the plaintiffs with regard to the third schedule property, but the plaintiffs had not preferred any appeal and it become final and it cannot be agitated before this Court in the second appeal. This argument has no merits in view of the Order 41 Rule 33 C.P.C. Order 41 Rule 33 reads as follows:-

“33. Power of Court of Appeal.—The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection 1 [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]: 1 [Provided that



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the Appellate Court shall not make any order under section 35A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]”

23.Further, with regard to the counter claim of the defendants, there is no sufficient and adequate evidence to show that the pathway claim by the defendant was in existence originally. It is negative on the ground that wall on the east-west direction is the old one more than 80 years, it is old wall as per the report of the Advocate Commissioner Ex.C1 and C2. However, there was no pathway in existence as claimed by the defendant. Under these circumstances, the allegation that the defendants used the pathway by using through second schedule property is not supported by any evidence on record. Further, the defendants failed to prove his counter claim. The boundaries mentioned in the counter claim is not consistence with the title deed filed by the defendants as Ex.B6, B7, B8. The counter claim boundaries and their title deeds are not consistence. Under these circumstances, the Trial Court and the First Appellate Court rightly rejected the counter claim of the defendants.

24. The finding of the First Appellate Court is based on the



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materials on record. There is no misconception of documents or misappreciation of evidence. It is well considered upon the documentary and oral evidence on record. There is no ground for interference. I find no merit in both the appeals. The substantial questions of law are answered accordingly.

25. In the result, both the second appeals fail and the same are dismissed. No costs.

20.12.2024

NCC : Yes/No

Index : Yes/No

Internet: Yes

skn

To:

- 1.The Sub Judge, Sankarankovil.
- 2.The Additional District Munsif, Sankarankovil.
- 3.The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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V.SIVAGNANAM, J.

skn

Judgment made in
S.A.No.1891 of 2003
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20.12.2024