

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.01.2017

CORAM

THE HONOURABLE MR. JUSTICE M.M.SUNDRESH

Second Appeal No.18 of 2016

A.P.Kalpagam

... Appellant/Defendant

vs.

Vithyavathi  
rep by power of Attorney  
P.Kannammal

... Respondent/plaintiff

This appeal is preferred under Section 100 CPC against the judgment and decree made in A.S.No.10 of 2012 dated 03.07.2015 on the file of the Principal District Judge, Chengalpattu, in confirming the judgment and decree made in the suit in O.S.No.63 of 2009, dated 31.01.2011 on the file of the Principal Sub Judge, Chengalpattu.

For Appellant : Mr.V.Raghavachari  
For Respondent : Mr.J.R.K.Bhavanantham

J U D G M E N T

The defendant, who suffered a decree before the Courts below, has come forward with this appeal for the following questions of law framed:

1. Whether the courts below were right in decreeing the suit as prayed for by holding that the appellant has encroached upon a portion of Plot No.39 without considering that the measurement was not made from all four directions, instead, it was made only from west towards east? and

2. Whether the courts below were right in ignoring the approved layout and the sale deed of the appellant, according to which, the property of the appellant measures 60 feet each west on the northern side whereas according to the Commissioner's Report there is only 50 feet shown by the Commissioner?

2.The suit has been filed by the plaintiff for possession. Admittedly, the plaintiff is the owner of the plot Nos.38 and 39 comprising Old Survey No.282/2, New Survey No.282/2A2 with an

extent of 3600 sq.ft.. She has purchased the said property through sale deed, dated 29.08.2005, pursuant to the power of attorney executed in favour of DW2, dated 10.06.2005. From the same person, the defendant has also purchased Plot Nos.40 and 41 with an extent of 2340 and 2220 sq.ft. respectively. One of the boundaries of the plot was purchased by the defendant is 40 feet road. The plaintiff has filed the suit inter alia alleging that though she had purchased a larger extent, patta was issued for lesser extent and subsequently, she came to know that the defendant has encroached upon B Schedule on 25.10.2009 by putting up a compound wall. Thus, according to the plaintiff, a portion of the 'B' Schedule property has been encroached by the defendant.

3. The Trial Court, decreed the suit based upon the report of the learned Advocate Commissioner. The evidence of DW2 would show that he only demarcated the plaintiff's property. He also admitted that the plaintiff has put up basement on the boundaries. The same views were reiterated by the Lower Appellate Court. Challenging the same, the appellant is before this Court.

4. The learned counsel for the appellant submits that there is a fundamental error committed by the Courts below in holding that the appellant-defendant has encroached the suit 'B' schedule property and hence, she should remove the encroachments made thereon and deliver vacant possession to the respondent-plaintiff. Admittedly, lay out has been sanctioned. Therefore, the date of purchase of the respective plots by the parties is irrelevant, since specific extent has been mentioned while granting approval. The evidence of DW2 has to be seen in its own context. He only spoke about the boundaries with respect to the plaintiff. Therefore, 60 feet of the defendant's plot as shown in the approval lay out ought to have been measured before fixing the boundaries of the plaintiff. This fundamental aspect has been missed both by the learned Commissioner and the Courts. It is an admitted fact that the Commissioner has not measured the suit property after notice to the defendant. A mere telephonic message is not sufficient and that is the reason why it was done in absentia. The learned Commissioner ought to have measured in tune with the lay out plan from different directions and also relying upon the patta issued in favour of the plaintiff. It is further submitted that there is no basis to allege the encroachment, as even according to the plaintiff, there was a lesser extent as seen from his patta, since the said document has been marked by the plaintiff herself. The inference drawn by the lower Appellate Court for not filing the document or sale deed is also unnecessary, in view of admitted position qua, the approval lay out and the finding recorded total on the ownership of plots.

5. Learned counsel for the respondent submitted that considering the concurrent findings rendered, no interference is required. The sale deed in favour of the plaintiff being earlier point of time and in the absence of appellant's sale deed produced by the defendant, the Court below decreed the suit as prayed for.

6. Two factors are not in dispute viz.,

(i) The layout was approved with the specific measurement of plots;

(ii) They have been filed as per the said measurements.

Resultantly, the finding of the Courts below that the plaintiff's sale deed being earlier and therefore what is remaining alone should belong to the defendant may not be correct. The Courts below have heavily relied upon the Report of the Commissioner. The said report ought to have been filed by placing reliance upon the approved layout and measurement ought to have been taken from all directions as far as possible. Particularly, the measurement ought to have been taken starting from the plots of the defendant also. Similarly, measurements must have been taken also based upon the patta. Thus, there cannot be a mere presumption of an encroachment.

7. As per the Commissioner's report, neither the defendant nor her counsel were present during inspection. The Commissioner's report is nothing but a piece of evidence. It is a specific case of the plaintiff that the defendant had encroached after her purchase. Therefore, a specific finding has to be rendered in this regard by considering the relevant materials, that too, in the light of the patta issued in favour of the plaintiff and measurement starting from the boundary of the defendant starting from the road as shown in the approved layout plan. Thus, the lower Appellate Court will have to consider that whether the defendant is eligible to the extent measured in plot Nos. 40 and 41.

8. As there cannot be an automatic presumption, this Court is of the view that it is inappropriate to decide this appeal without sufficient materials, as more clarity would be required after seeing a comprehensive report of the learned Advocate Commissioner. Though this Court quite is aware that the other method of calling for report from the Commissioner can also be adopted, considering the fact that such a Commissioner has to be examined by the Court, it would be appropriate to remit the matter to the lower Appellate Court being the final Court of the fact of law. The lower Appellate Court, is also at liberty to extend the scope of commission if it so desires, in the interest of justice.

9. Accordingly, the judgment and decree of the lower Appellate Court in A.S.No.10 of 2012 on the file of the Principal District Judge, Chenglepet, is set aside and the matter stands remitted for fresh consideration. The lower Appellate Court is directed to appoint the commissioner to visit the suit property which inclusive of the plot Nos.40 and 41 sold to the defendant. After commissioner's report is filed, the parties will have to be given an opportunity to examine them, apart from filing the objections to report, if any. Thereafter, the lower appellate Court shall decide the appeal without being influenced by the observations made in this appeal and the entire exercise will have to be done, within a period of six months from the date of receipt of a copy of this order.

10.The second appeal is allowed accordingly, to the extent indicated above. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Principal District Judge,  
Chengalpattu

2.The Principal Sub Judge,  
Chenglepet.

+1 cc to Mr.V.Raghavachari Advocate sr 480

+1 cc to Mr.J.R.K.Bhavanantham Advocate sr 404

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