WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.01.2021	Pronounced on : 19.01.2021

Coram:

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

A.S.No.380 of 2018

V.Bhavani,
W/o.C.Thirugnanam,
No.71, II Cross Street,
Sankar Dass Swamigal Nagar,
Lawspet PO, Puducherry. ... Appellant/Defendant

/versus/

R.Munusamy,
S/o.Ramalinga Mudaliar,
Door No.2, I Cross Street,
Dhavamani Nagar, Samy Pillai Thottam,
Lawspet PO, Puducherry. ... Respondent/Plaintiff

Prayer: First Appeal has been filed under Section 96 of Civil Procedure Code read with under Order 41 Rule 1 of Civil Procedure Code, against the judgment and decree dated 29.04.2017 made in O.S.No.154 of 2012 on the file of the Court of the III Additional District Judge, Puducherry.

For Appellant : Mr.T.P.Manokaran, Senior Counsel,
for Mr.K.P.Jotheeswaran
For Respondent : Mr.Prakash Adiapadam

J U D G M E N T

(The case has been heard through video conferencing)

The Appeal Suit is directed against the judgment and decree of the III Additional District Judge, Pondicherry, passed in O.S.No.154 of 2012, declaring the plaintiff is the absolute owner of "B" schedule property to an extent of 127.50 sq.ft shown as 'ABEC' in Ex.C.4 and direction to the appellant herein to handover the possession of the said portion to the plaintiff/respondent, after demolishing, removing the illegal and unauthorised construction put up in the said disputed area.

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

2. The averments in the plaint is that the plaintiff/Mr.K.Munusamy being the absolute owner of the "A" schedule property to an extent of 3 Kuzhies & 2 Veesams through sale deed dated 06.10.1987, purchased from one John Christopher. He is in possession and enjoyment without interruption. The defendant/Smt.V.Bhavani on 30.10.2009 purchased 900 sq.ft of land adjacent to the plaint "A" schedule property and started constructing house in the said land from month of January – 2011. In the process of construction, the defendant attempted to encroach into the "A" schedule property owned by the plaintiff on the Eastern side. When the matter was reported to the local police on 09.02.2011, the police advised them to approach Civil Court and get remedy. Keeping quiet for sometime, the defendant had started construction by encroaching around 600 sq.ft measuring, East – West 10 feet, North – South 60 feet, on the Eastern side of the "A" schedule property. The plaintiff gave representation to the Directorate of Survey and Land Records, Pondicherry, on 27.01.2011, requested the Authorities to measure and demarcate the plaint "A" schedule property. The Surveyor from the said Office visited the field on 11.03.2011 and demarked the boundaries. Despite demarcation of the boundaries, the defendant did not stop her attempt to illegally encroach upon the Eastern portion of the plaintiff's land. The Surveyor, who revisited the property on 30.07.2012 measured the field in the presence of defendant and gave a report dated 01.08.2012 stating that the defendant has encroached into the plaintiff "A" schedule property to an extent of 600 sq.ft. Since, the redressal sought before the Revenue Authorities did not fructify, suit for declaration regarding ownership of the encroached portion morefully described as "B" schedule property in the plaint which form part of the larger extent of land, morefully described under "A" schedule was filed.

3.The defendant in their written statement has averred that she purchased 900 sq.ft of land in Plot No.71 from one Swarnalatha W/o.Suriyanarayanan under sale deed dated 30.10.2009. After purchase, she obtained PPA approval from the Department concern and started constructing house in the said land. When temporary electricity service connection to the property was sought, the plaintiff objected. After submission of sale deed and FMB copy, the Electricity Department provided temporary service connection for construction purpose. The plaintiff gave petition to the Land and Survey Department, Pondicherry, to measure his Plot No.70 and identify the boundaries. In the presence of the defendant and the plaintiff,

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

the land was measured and report was submitted by the Surveyor on 11.03.2011. The plaintiff as well as defendant were satisfied with the report, measurement and the boundaries fixed. Thereafter, the defendant started constructing the house and completed it and peacefully living in Plot No.71. The said suit is filed without proper Plot number and description, hence, liable to be dismissed. Further, she has not encroached upon the plaintiff's property. The portion of the property mentioned in "B" schedule is not owned by the plaintiff and suit to declare title over the "B" schedule property in favour of the plaintiff is vexatious suit, intend to cause harassment and mental torture to the defendant.

4. The Trial Court based on the pleading framed following issues:-

> (i). Whether the plaintiff is entitled to get declaration that he is absolute owner of plaint "B" schedule mentioned property?
> (ii). Whether the defendant is to vacate "B" schedule property and to deliver the same to the plaintiff?
> (iii). Whether the defendant liable to pay the cost of the suit?
> (iv). What other relief available to both parties?

5.The Advocate Commissioner was appointed and reports were filed along with the sketch and photographies. In support of the plaintiff, two witnesses and 32 Exhibits were marked. In support of the defendant, one witness and one Exhibit was marked. Two Court witnesses and Six Court Exhibits were marked and taken up for consideration.

6. The Trial Court, after appreciation of evidence concluded that the properties of the plaintiff and the defendant were measured with the help of Surveyor and it is found that the construction put up by the defendant is to an extent of 1230 sq. ft. The land left in possession of the plaintiff is to an extent of 1672.50 sq. ft. The plaintiff, who purchased around 1800 sq.ft is left with an extent of land 127.50 sq.ft less. Whereas, the defendant, who has purchased 900 sq.ft of land had constructed building in 1230 sq.ft of land. Therefore, 127.50 sq.ft of land owned by the plaintiff, which is under the encroachment of the defendant was declared as property of the plaintiff and directing the defendant to demolish the construction put up in 127.50 sq.ft of plaintiff's

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

land and handover the vacant possession to the plaintiff.

7. Aggrieved by the said judgment and decree of the Trial Court, decreeing the suit with modification is under challenged in the appeal suit.

8. Grounds of Appeal:-

a). In the plaint, it was averred that the plaintiff/defendant had encroached 10x60 (600 sq.ft) of plaintiff's land. The layout sketch does not form part of the registered sale deed (Ex.A.1) dated 06.10.1987. However, the Advocate Commissioner was mislead to rely upon the said layout sketch to identify and measure the disputed land. The plaintiff purchased agriculture land to an extent of 3 Kuzhies 2 veesams under Ex.A.1 dated 06.10.1987 without linear measurements. P.W.2, C.W.1 and C.W.2 have admitted that the identification of the property is difficult without linear measurements. When the averments of the plaintiff that 600 sq.ft of land has been encroached found to be false, modified relief to an extent of 127.50 sq.ft ought not to have been granted by the Trial Court. The Trial Court erred in relying upon Ex.C.3 to Ex.C.6 which are not based on reliable documents. The Trial Court, without adequate proof that excess land held by the appellant is the land of the plaintiff, had erroneously declared that 127.50 sq.ft of land of the plaintiff has been encroached by the defendant.

b). The Trial Court failed to consider the fact that originally the land in R.S.No.242/4 (Cadastre No.253/3/3) situated at Saram Village, owned by John Christopher. One S.Vijaya purchased a portion of property measuring 3 Kuzhies & 2 veesams (1800sq.ft) under registered sale deed dated 26.08.1987. The respondent/plaintiff purchased 3 Kuzhies 2 veesams (1800 sq.ft) of land on the western side of Ms.S.Vijaya's land under sale deed dated 06.10.1987. The layout was prepared only after alienating these two portions of land. Therefore, any dispute regarding the measurement could be solved only by measuring the entire property in R.S.No.242/4 originally held by John Christopher. The Advocate Commissioners, who visited the property have not measured the entire extent of land in R.S.No.242/4 (Cadastre No.253/3/3). They have adopted inconsistency method for identifying, measuring and demarcating the wet land by relying upon incorrect and self serving layout sketch.

c). 3 Kuzhies & 2 Veesams (1800 sq.ft) of land

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

purchased by S.Vijaya was divided into two half plots measuring 900 sq.ft each. The Appellant purchased 900sq.ft of land from one Swarnaltha, who got the property from her grandmother Padmavathy Loganathan under the settlement deed dated 14.03.2001. The said Padmavathy Loganathan purchased the land from S.Vijaya on 27.08.1997 under Ex.A.4. When the Appellant purchased the property on 30.10.2009, the layout was well laid, the half plot purchased by her was assigned Plot No.71 part. The construction in her plot was made after demarcating the boundaries with the help of Surveyor and construction was put up as per the building plan approval granted by Pondicherry Planning Authority. To prevent her from putting up construction, complaints were given by the respondent to various authorities. On verifying the title deed and other documents, the authorities rejected his objection. However, the Trial Court, without considering the fact that the letter of the Surveyor dated 11.03.2011, after demarcating the property and recording no objection of the plaintiff. The plaintiff is estopped from alleging encroachment. The suit filed after construction ought to have been dismissed following the Doctrine of Estoppel and Acquiescence.

d). The Trial Court erred in ignoring the earlier report dated 11.03.2011 given by the Surveyor attached to department of Directorate of Survey and Land Records. The suit "A" schedule property was measured twice by two different Sub Inspector of Surveyors and two different reports were given. Hence, the Advocate Commissioner ought to have taken assistance of someone below the rank of Inspector of Surveyor, to measure and demarcate the "A" schedule property. The report of the Advocate Commissioner based on the measurements taken with assistance of Field Surveyor as let to erroneous conclusion that the appellant has encroached a portion of "A" schedule property measuring 127.50 sq.ft.

9. The Learned Senior Counsel appearing for the appellant submitted that the Trial Court ought not to have accepted the Advocate Commissioner's report marked as Ex.C.4 which was objected by the appellant giving a detailed reasoning. Since, the measurement was not made as per the FMB available with the Directorate of Survey and Land Records department, the decree is passed by the Trial Court relying upon the Commissioner's report Ex.C.4 is liable to be set aside.

10.The Learned Counsel for the appellant would further state that the inconsistency of the plaintiff's case regarding encroachment and the extent of encroachment ought to

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

have weighed the minds of the Trial Court properly to conclude that the variant claims are borne out of vexatious, malafide, motivated, speculative, illegal and untenable intention.

11.Response by the Respondent's Counsel:-

The Learned Counsel appearing of the respondent would submitted that the land originally belongs to one John Christopher who plotted out the properties and sold to various persons. The plaintiff purchased 1800 sq.ft of land on 06.10.1987 under sale deed Ex.A.1. From the same vendor, the predecessor-in-title of the defendant one S.Vijaya purchased equal extent of land on the Eastern side of the plaintiff's land. The said S.Vijaya, sold 900 sq.ft of land from out of 1800 sq.ft to one Padmavathy Loganathan under Ex.A.4. The measurement made by the Advocate Commissioner had proved that only 1672.5 sq.ft of land remains with the plaintiff as against his title for 1800 sq.ft. Whereas, the appellant/defendant had constructed her building to an extent of 1230 sq.ft. Whereas, the title deed is only for 900 sq.ft. The earlier measurement made by the Surveyors on 01.08.2012 (Ex.A.25) and 11.03.2011 (Ex.B.1) were not done properly and hence, the Court appointed Commissioner was asked to measure the property and submit the report. The Advocate Commissioner's report Ex.C.4, photographies and the sketch attached to report without any doubt has proved the fact of encroachment and shortage of land in “A” schedule property has been identified. The staircase, pillar and septic tank of the defendant has been put up in the encroached portion. Therefore, even in the absence of linear measurement when the boundaries and the extent provides enough assistance to identify the property and demarcate the boundaries, the plea raised by the appellant that the report of the Commissioner ought to have been rejected is untenable.

12. Point for determination:-

(i). Whether the Advocate Commissioner's report regarding the measurements of the disputed portion of land is reliable?

(ii). Whether the plaintiff lost her right for declaration of title on the ground of acquiescence?

13. Heard the Learned Counsel for the Appellant and the Learned Counsel for the respondent.

14. The main contention of the appellant is that Ex.C.4, the Commissioner report is not based on proper Revenue

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

documents. The title document for the plaintiff does not provide clear indication about the measurement. Further, it is contended that having entertained the doubt regarding the measurement and attempt of encroachment, the plaintiff/respondent ought not to have allowed the defendant/appellant to complete the construction. Since the construction was commenced as early as 2011 and completed even before filing of the suit, following the Doctrine of acquiescence, the suit is liable to be dismissed.

15. In support of the said submission, the Learned Counsel for the appellant would rely upon the judgment of this in Palanivelu Vs. Varadammal reported in (1977) 90 LW 531.

> "13. In the present case also, as already stated, the respondent has not done anything when the appellant was putting up a portion of his main building on a portion of the trespassed property and sinking a major portion of the well and doing other acts on the trespassed property. The appellant could not have done these things in a hurry. They must have taken several months for the appellant to complete the things which he had done on the property. The respondent had not disclosed these things in the plaint and has not prayed for a mandatory injunction for the removal of the structures put up by the appellant on the trespassed portion of the suit property. The court would therefore be justified in inferring acquiescence on the part of the respondent; I consider that this is not a case for directing delivery of possession of the trespassed portion to the respondent. But this is a case where the respondent has to be compensated in money for the value of the trespassed portion."

16. In view of this Court, the above said judgment is not applicable to the facts of the present case. The respondent herein, ever since the attempt to encroach upon his land had objected to the Revenue Authorities and Police. It is admitted by the defendant herself in the written statement that there was objection when she sought for temporary electricity service connection. The plaintiff had given representation to the Survey Department to measure the land and

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

found that the defendant had encroached 10x60 (600 sq.ft) on the Eastern side of his land. Thereafter, again 2nd Surveyors inspected the land, demarcated the portion and the plaintiff recorded satisfaction with the measurement. But later, while completing the construction, the defendant/appellant has put up staircase, Pillar and septic tank on the land of the plaintiff's land, which covers to an extent of 127.50 sq.ft. This portion has been identified by the Advocate Commissioner who has visited the land and measured the land with Field Surveyor, with the help of FMB sketch, which is marked as Ex.C.6. Therefore, the relief for declaration as well as to deliver the vacant possession after demolition and removing the illegal and unauthorised construction has been sought in the suit.

17. The Learned Counsel appearing for the appellant would also rely upon the judgment of this Court in T.Matheswari Vs. T.G.Tulasi reported in 2011 (1) CTC 673 contended that the plaintiff has made different claim at different stage and not producing the best evidence available regarding the actual extent of land held by him. This variation ought to have been considered by the Trial Court. Further, the Learned Counsel would also submitted that the decision based on self serving document produced by the respondent is erroneous. In support of the said submission rely upon the judgment cited supra.

18. This Court is unable to countenance with the said submissions. The above said judgment is on different footing. The objection to the Advocate Commissioner's report filed by the Appellant that the measurement should be made based on FMB sketch itself is factually not correct. Since, the FMB sketch was also relied upon by the Commissioner for identification of the property. Further, it is very clear case on facts that the plaintiff who has title over 1800 sq.ft, presently holding 127.50 sq.ft of land less than what he owns as per the title. Contrarily, the Appellant herein, who admittedly purchased only 900 sq.ft had put up construction in 1230sq.ft of land obviously encroaching upon the lands of the neighbours. As pointed out earlier, the 900 sq.ft which is half of the land originally purchased by S.Vijaya. The remaining half still lay vacant. The appellant herein had encroached excess of 330 sq.ft of land either side. The part of the construction made by the appellant is on the land encroached on the west and a part encroached on East. The Commissioner's report marked as Ex.C.4 clearly indicates the measurement made is in accordance with the sale deed and FMB sketch. Therefore, this Court finds no merits in the First Appeal.

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

19. Hence, the judgment and decree of the Trial Court passed in O.S.No.154 of 2012, dated 29.04.2017 is confirmed. Accordingly, the First Appeal is dismissed. With costs.

Sd/-

Assistant Registrar(CS-VIII)

// True Copy //

Sub Assistant Registrar

bsm

To

The III Additional District Judge, Pondicherry.

+1cc to Mr.Prakash Adiapadam, Advocate SR.32161

A.S.No.380 of 2018

VD(CO)
CB(19/01/2022)

https://hcservices.ecourts.gov.in/hcservices/