



S.A.(MD) No.712 of 2011

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**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**DATED : 17.06.2022**

**CORAM : JUSTICE N.SESHASAYEE**

**S.A.(MD) No.712 of 2011**  
**and C.M.P(MD).No.4413 of 2019**

Aazhvarsamy Nayakkar

... Appellant/Appellant/Plaintiff

**Vs**

1.Chellammal  
2.Ganapathy  
3.Narayanasamy  
4.Seenivasan  
5.Kasiraj  
6.Guruvammal

... Respondents/Respondents/Defendants

**Prayer:-** Appeal filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree passed in A.S.No.40 of 2010 on the file of the Subordinate Court, Kovilpatti dated 12.11.2010 confirming the judgment and decree in O.S.No.6 of 2010 on the file of the District Munsif Court, Kovilpatti, dated 01.07.2010.

For Appellant : Mr.R.T.Arivukumar

For Respondents : No appearance



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## **JUDGMENT**

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The plaintiff in O.S.No.6 of 2010 on the file of the District Munsif Court, Kovilpatti is the appellant herein. The plaintiff laid a suit for mandatory injunction seeking a decree against the defendants 2 to 5 for removal of an alleged encroachment by each of them in an area described in the plaint as item No.2 to item No.6. None of the defendants entered appearance and *ex-parte* evidence came to be taken. But, the suit came to be dismissed which decree came to be confirmed by the First Appellate Court. Hence this appeal. For narrative convenience, the parties are referred to as per their rank before the trial Court.

2. It may now be introduced that earlier the plaintiff had instituted a suit in O.S.No.106 of 2005 against the same defendants almost on same set of allegations. In short, his contention was that the present suit property, which is described as item No.2 in O.S.No.106 of 2005, is part of the western portion of a larger property, which the plaintiff had purchased from certain Somasundaram Nayakker on 26.02.1982. In the present suit, this document is marked as Ext.A.1. The eastern wall of the suit property in



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both the suit is stated to be a wall of a ginning mill belonging to the plaintiff. Abutting this wall on the west lies the suit property and according to the plaintiff, the defendants are assignees of some poromboke land on to the immediate west of the suit property. The plaintiff would allege that the defendants have encroached into specific plot to the east of the plots assigned to them by the Government. Therefore, he laid O.S.No.106 of 2005 for declaration of title, for prohibitory injunction and also for mandatory injunction to remove such encroachment made by the defendants on the west. This suit went to trial and the judgment of the trial Court in O.S.106 of 2005 is marked in this case as Ext.A7. Ext.A.7 indicates that the Court has declared the plaintiff's title to a portion of the suit property. Indeed the trial Court in O.S.No.106 of 2005 would hold that the plaintiff's property falls under Sy.No.293/8 and he is not entitled to any property to the west of Sy.No.293/8, and confined the declaratory decree to the property falling within Sy.No.293/8. So far as the reliefs of prohibitory and mandatory injunctions are concerned, the trial Court had held that the defendants in that suit have not encroached into the plaintiff's property and declined to grant the reliefs prayed. In an appeal preferred by the plaintiff in A.S.No.



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116 of 2006 before the Subordinate Court, Sankarankovil, the First Appellate Court came to an identical conclusion and confirmed the decree of the trial Court. The judgment of the Appellate Court is filed here as Ext.A.9 and the decree of the Appellate Court is Ext.A.10.

3. Turning to the present suit, the courts below relied on Exts.A-7 to A-10 referred to above besides the Commissioners Report filed in O.S.No.106 of 2005 before the Court.

4. The present suit is filed for mandatory injunction. The description of item No.1 to item No.6 matches the description of item No.2 of the property in O.S.106 of 2005, and the nature of allegation made here also are similar to those made in O.S.No.106 of 2005. As was mentioned earlier, none of the defendants contested the suit. An *ex-parte* evidence was taken, in which the plaintiff had produced all the documents, but the trial Court found that inasmuch as the dispute raised by the present plaintiff had already been decided in O.S.No.106 of 2005, and had been confirmed in A.S.No.116 of 2006, the present suit is barred by *res-judicata*.



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5. The present appeal is admitted on the following substantial questions of law:

*“1. Whether the trial Court is correct in dismissing the suit without framing any issues?*

*2. Whether the Courts below are correct in dismissing the suit without disbelieving PW1's evidence & Ext.A12?*

*3. Whether the First Appellate Court had given a perverse finding without applying its mind on the evidence of PW1?”*

6. Heard the learned counsel for the appellant. *Prima facie*, this Court cannot fault the approach of the Courts below *vis-a-vis* the cause of action in the suit, but what holds-up this Court to conclusively sail with the said findings of the Courts below is about the property in relation to which the suit is laid. Section 11 of the Code of Civil Procedure operates if any issue in dispute is finally decided as concerning the same property as between the same parties or between parties under whom they or any of them claim, and litigating under the same title.



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7. Here is a case, where the wall of the ginning mill of the plaintiff is stated to be the eastern boundary of the item No.1 of the property. Admittedly, the property to the west of this wall remains a vacant plot. In O.S.No.106 of 2005, the trial Court has not rejected the plaintiff's claim for title over the vacant land to the east of the wall of the ginning mill, but limited its extent to that which fall within Sy.No.293/8. Now, the point is whether the subject matter of the present suit is the very suit property in O.S.No.106 of 2005, or some portion to the east of the property in O.S.No.106 of 2005. If the subject matter of the suit in O.S.No.106 of 2005 and the present suit are identical then, there is hardly any need for this Court to interfere with the judgments of the Courts below. If however, the property involved in the present litigation is different from the one covered under O.S.No.106 of 2005, necessarily that needs to be investigated, since decree passed in O.S.No.106 of 2005 as confirmed in A.S.No.116 of 2006 would not then constitute *res-judicata*.

8. It is therefore necessary that this Court remands the matter back to the trial Court to address this specific issue. The learned counsel for the



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appellant/plaintiff submitted that the plaintiffs had taken out the Commission in O.S.No.106 of 2005 and those plans may also have been produced before this Court. It is clarified that these documents can be received in evidence in the present case only subject to formal proof. This Court considers that it is necessary to appoint a Commission in this case for the Court to ascertain whether the alleged suit property lies to the east of the western boundary of Sy.No.293/8 or whether the suit property falls within Sy.No.293/8.

9. In conclusion, this Court sets aside the decree of the First Appellate Court and remands the matter back to the trial Court with a direction to the trial Court to appoint a Commission to consider the aspect hereinabove indicated *de novo*. The Advocate- Commissioer to be appointed may have to be familiar with civil practices and must also be regular before the Court He is also required to be assisted by an official Surveyor. The learned Principal District Judge, Thoothukudi, is required to ensure that the Commissioner obtains necessary assistance from the Surveyor by communicating it to the District Collector, Thoothukudi. Registry is



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required to send a copy of the Civil Miscellaneous Petition for appointing an Advocate Commissioner to the trial Court. As and when the copy of the same is received by the trial Court, it may act in accordance with the direction as stated above.

**10.** Accordingly, the Second Appeal is allowed, judgment and decree passed in A.S.No.40 of 2010 on the file of the Subordinate Court, Kovilpatti dated 12.11.2010 confirming the judgment and decree in O.S.No.6 of 2010 on the file of the District Munsif Court, Kovilpatti, dated 01.07.2010 is set aside. No costs. Consequently, connected Miscellaneous Petition is closed.

**17.06.2022**

Internet: Yes  
Index: Yes/No  
*Rmk*



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To  
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- 1.The Subordinate Judge, Kovilpatti.
- 2.The District Munsif, Kovilpatti.
- 3.The Record Keeper,  
VR Section,  
Madurai Bench of Madras High Court, Madurai.



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**N.SESHASAYEE, J.**

*Rmk*

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