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S.A.No.266 of 2006

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2023

CORAM

THE HONOURABLE Mr. JUSTICE C.KUMARAPPAN

S.A.No.266 of 2006

1.Mottaraj @ Kuppusamy (died)

2.M.Bakkiyam @ Dhana Bakkiyam

3.M.Indumathy

4.M.Punitha

5.M.Raju

... Appellants

(Appellants 2 to 5 were impleaded as legal heirs of
the deceased first appellant vide order dated 18.12.2013
in C.M.P.No.976 to 978 of 2013)

-Vs-

1.P.Velusamy

2.Valliammal

...Respondents

Prayer:- Second Appeals filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 29.07.2005 in A.S.No.10 of 2004 passed by the learned I Additional Sub Court, Coimbatore, reversing the judgment and decree dated 24.02.2004 in O.S.No.783 of 2001 passed by the learned II Additional District Munsif, Coimbatore.



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For appellants : M/s.G.K.Muthukumar

For respondents : No appearance

J U D G M E N T

The instant second appeal has been filed at the instance of the plaintiff. Subsequently, after demise of the sole appellant/plaintiff, the legal heirs were impleaded as appellants 2 to 5. The respondents herein were the defendants before the Trial Court.

2. For the sake of convenience, the parties will be referred to according to their litigative status as before the Trial Court.

The brief facts, which give rise to the instant second appeal, are as follows:

3. The plaintiff and the first defendant are brothers and the second defendant is sister-in-law of the plaintiff as well as the first



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defendant i.e., wife of their another brother one Mr. Arusamy. Already, there was a partition suit among the family members in O.S.No.837 of 1987 and in the said partition suit, a compromise decree was entered. By virtue of the said compromise decree, 'B' schedule property was allotted to the plaintiff and 'D' schedule property was allotted to the first defendant. According to 'D' schedule property, the first defendant is entitled to only 52 feet north-south upto the eastern eteri. The 'B' schedule property, which was allotted to the plaintiff, is on the northern side of 'D' schedule property i.e. first defendant's property and the plaintiff dug a borewell in the edge of his property. Since the plaintiff has a business in Mysore, he used to shuttle between Coimbatore and Mysore. Taking advantage of the plaintiff's absence, the first defendant encroached upon the plaintiff's property. Hence, the plaintiff came forward with the suit for the relief of mandatory injunction to remove the encroachment and for permanent injunction.

4. The said suit was resisted by the defendants by contending that there was no encroachment at all. Even in the earlier suit in



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O.S.No.298 of 1997 filed by the first defendant, the plaintiff did not allege the said encroachment, which is now pleaded in the plaint. Therefore, the alleged encroachment mentioned in the plaint is false. Hence, they prayed to dismiss the suit.

Evidence and documents:

5. Before the Trial Court, on behalf of the plaintiff, the plaintiff examined himself as P.W.1 and two more witnesses viz., Mr.Sadayappan and Mr.P.Geetha were examined as P.W.2 and P.W.3, respectively. Twelve documents were marked as Exs.A1 to A12. On behalf of the defendants, the first defendant examined himself as D.W.1 and two documents were marked as Exs.B1 and B2.

Findings of both the Courts below:

6. The Trial Court, after considering the oral and documentary evidence, decreed the suit as prayed for. Aggrieved by the same, the first defendant approached the First Appellate Court by way of the appeal.



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The First Appellate Court confirmed the decree of permanent injunction in respect of 'A' schedule property, however, declined to grant mandatory injunction in respect of 'B' schedule property. Challenging the said finding, the plaintiff is now before this Court by way of this second appeal.

Substantial questions of law:

7. At the time of admission on 13.03.2006, this Court framed the following substantial questions of law:

“1. Whether the lower appellate court right in reversing the well considered judgment and decree of the trial court without holding that the 1st respondent is estopped claiming against the appellant herein in respect of the disputed portion of the suit property having admitted the same as that of the Plaintiff herein by accepting the Advocate Commissioner's Plan and report, submitted in the earlier suit in O.S.No.298 of 1997 and marked as Ex.A9 and A10 in this proceedings?

2. Whether the 1st respondent/1st defendant is not entitled to claim against the Plaintiff on the ground of



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principles of estoppel which operates by virtue of the admissions rendered in the earlier proceedings in O.S.No.298 of 1997 especially when the 1st respondent has not disputed the correctness or otherwise of the measurement made under Ex.A10-Surveyor plan adopted by the Advocate Commissioner?”

Submission made by the learned counsel for the appellants:

8. The learned counsel appearing on behalf of the appellants/plaintiff would vehemently submit that the finding rendered by the First Appellate Court in respect of the mandatory injunction is in contravention to the oral and documentary evidence. The learned counsel for the appellants by relying upon Ex.A2/compromise decree, would contend that the first defendant was allotted only 52 feet on either side. Whereas even according to the Commissioner's report, he was in encroachment of 2 feet and the measurement of the encroachment could be very well demonstrated through the Commissioner's report. The Commissioner's report and sketch, which were filed in the earlier suit in O.S.No.298 of 1997 by the first defendant, were marked as Exs.A9 and A10.



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9. It is also the contention of the learned counsel for the appellants/plaintiff that as per Ex.A2/compromise decree, there is a reference that the plaintiff is entitled to the north-south measurement of 52 feet and east-west measurement upto eteri. When there is a proof of encroachment beyond 52 feet as per Exs.A9 and A10/Commissioner's report, the First Appellate Court cannot deny the relief of mandatory injunction with the finding that there is no document to show the east-west measurement is 112 feet. Hence, he prayed to allow this second appeal.

10. Despite the names are printed, there is no representation on behalf of the respondents.

11. This Court has given its anxious consideration to the submission made by the learned counsel for the appellants.

Analysis of the submission made by the appellants:



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12. The main contention put forth by the learned counsel for the appellants is that as per Ex.A2/compromise deed, there is a reference of 52 feet and as per Exs.A9 and A10/Commissioner's report, there is a measurement of 52.5 feet on the eastern side, and 52.5 feet on the western side. The learned counsel for the appellants would submit that this is beyond the land, which was allotted to the first defendant. Though the contention of the learned counsel for the appellants is acceptable to some extent, if we look at the finding recorded by the First Appellate Court, the First Appellate Court is of the view that there is no proof for the east-west measurement of 112 feet. Since the appellants/plaintiff came forward for the relief of mandatory injunction, which is an extraordinary relief, they ought to have proved before this Court in respect of the measurement in all sides.

13. Apart from that, the Trial Court has referred about the defence put forth by the plaintiff herein as a defendant in another suit in O.S.No.298 of 1997. Wherein, this plaintiff took a defence that the defendants herein has encroached only at the place where the borewell



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was dug. In this aspect, the finding of fact recorded by the First appellate Court assumes much significant, though there was a little variation in north-south measurement on the eastern side and western side.

14. Apart from that, admittedly, there is a finding given by the Trial Court in respect of limitation by stating that the encroachment made by the defendants will be a continuing cause of action. Therefore, the filing of the suit even beyond the period of three years, cannot be held to be barred by limitation and in this regard, the Trial Court has relied upon the judgment passed by the Allahabad High Court in the case of ***Rajaram and others vs. Bahadur and others*** [reported in ***AIR 1980 Allahabad 115***]. But, this Court disagrees with the above finding. In the case on hand, though the encroachment admittedly took place prior to three years, through such encroachment, no other day to day activities of the plaintiff was affected to have continuing cause of action.

15. It is pertinent to mention here that under Section 100 of C.P.C, the power of this Court is limited and this Court can go only into



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the substantial questions of law. For easy understanding of Section 100 of C.P.C, this Court deems it appropriate to refer the judgment of Hon'ble Supreme Court in the case of *Hero Vinoth (minor) vs. Seshammal* [reported in *(2006) 5 SCC 545*].

16. The learned counsel would reiterate his contention that based on Ex.A2/compromise deed, the plaintiff was allotted a property, which was on the northern side of the first defendant's property and the plaintiff's property stretches east-west upto eteri. Therefore, it is sufficient to hold that their extent is 112 sq.ft. Since because there is a possibility for different view, cannot be a reason for interfering with the judgment rendered by the First Appellate Court, unless it is perverse. On harmonious reading of the judgment rendered by the First Appellate Court, the finding recorded by the First Appellate Court is based on material and this Court could not find any perversity over the same.

17. Therefore, in view of the above detailed discussions, the substantial questions of law are answered in favour of the respondents.



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18.In the result, this second appeal is dismissed by confirming the judgment and decree passed by the First Appellate Court. There shall be no order as to costs.

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Internet : Yes

Index : Yes/No

Speaking order/Non-speaking order
apd

To

1. The I Additional Sub Court, Coimbatore.
2. The II Additional District Munsif, Coimbatore.
3. The Section Officer, V.R. Section, High Court, Madras.



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apd

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