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S.A.No.1545 of 2004

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20.11.2023

CORAM :

THE HONOURABLE Mr. JUSTICE C.KUMARAPPAN

S.A.No.1545 of 2004

1.Balasubramaniam (Deceased),
2.B.Saroja,
3.B.Radhakrishnan,
4.T.Kanchana,
5.B.Panneerselvam. ...Appellants
(Appellants 2 to 5 were impleaded vide order dated 03.12.2012 in
C.M.P.No.783 to 785 of 2010 in S.A.No.1545 of 2004)

Vs.

1.Loganathan,
2.Gajendran,
3.Elumalai,
4.Valli,
5.Natesa Pillai,
6.Kalaiselvan,
7.Venugopal Pillai. ...Respondents

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree dated 23.01.2003 made in A.S.No.94 of 2002 on the file of the Additional District Munsif (Fast Track No.1), Tindivanam in partly allowed the Judgment and Decree dated 25.08.1998 made in O.S.No.153 of 1989 of the file of the District Munsif Court, Gingee.

For Appellants : Mrs.R.Meenal
for Mr.P.Srinivas.
For Respondents : No appearance.



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J U D G M E N T

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The instant Second Appeal has been filed at the instance of the first defendant. The respondents are the legal heirs of the plaintiff Balarama Pillai.

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

The brief facts which give rise to this Second Appeal is that:

3.The suit property belongs to the plaintiff by virtue of the Partition deed dated 16.09.1972. It is the further submission of the plaintiff that the first defendant has encroached upon the portion of 'A' Schedule property which is described as 'B' Schedule property in the plaint. The plaintiff further submits that he seeks for relief for declaration in respect of 'A' Schedule property and also sought for relief of mandatory injunction in respect of 'B' Schedule property. The plaintiff has also prayed for partition in respect of 'C' Schedule property.

4.The said suit was resisted by the defendant by contending that



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they never put up any construction as stated in the plaint and they only put up construction in 'C' Schedule property and that they have perfected title over the 'C' Schedule property. Therefore, the defendant prayed to dismiss the suit.

Evidence, Documents:

5.Before the Trial Court, on behalf of the plaintiff, the plaintiff examined himself as P.W.1 and Arunachalam was examined as P.W.2 and 9 documents were marked as Exs.A1 to A9. On behalf of the defendants, the first defendant himself examined as D.W.1, Pachiappa Udaiyar was examined as D.W.2 and Vaiyapuri was examined as D.W.3 and 44 documents were marked as Exs.B1 to B44.

Finding of the Courts below:

6.The Trial Court, having considered the submissions on either side and also based upon the oral and documentary evidence, has come to a finding that the plaintiff has not described the suit property correctly and the Trial Court has ultimately dismissed the suit. Aggrieved by the said order, the plaintiff preferred the first appeal. Though the First



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Appellate Court has not found anything contrary to the finding recorded by the Trial Court, based upon the Commissioner's Report, granted mandatory injunction in respect of 'B' Schedule property. Aggrieved by the same, the first defendant is now before this Court by way of this Second Appeal.

Substantial questions of law:

7.At the time of admission of this Second Appeal, this Court has formulated the following substantial questions of law:

“(1) Whether the Lower Appellate court misdirected itself unlawfully in holding the decision of the Trial Court based on solid deposition of evidence?

(2) Whether the Judgment and Decree of the Lower Appellate Court is prejudiced in that it has ignored the material facts let in by oral evidence in favour the of defendant?”

Submissions on either side:

8.Despite the name was printed in the cause list, no one is appeared on behalf of the respondents.



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9.The learned counsel for the appellant/first defendant vehemently

submits that the Trial Court after appreciating the oral and documentary evidence, has rightly come to the conclusion that the plaintiff has not described the suit property correctly. However, the First Appellate Court, without any pleading and also being wrong appreciation on the Commissioner's Report, has granted mandatory injunction in respect of B Schedule property.

10.In this connection, the learned counsel for the appellant/first defendant would rely upon the Commissioner's Report. In this regard the learned counsel for the appellant/first defendant would invite the attention of this Court to the finding recorded by the First Appellate Court in Page No.9 of the order. Wherein the First Appellate Court by referring the Commission's Report, have found that the defendant had encroached upon the portion of the property in 'B' Schedule of the suit property, which comprised in S.F.No.37/1F, situated at Avaloorpettai Village, Chenji Taluk.

11.In this regard, the learned counsel for the appellant/first defendant would invite the attention of this Court that as per the plaint,



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'A' and 'B' Schedule properties are comprised in S.F.No.149, situated at Avaloorpettai Village, Chenji Taluk. However, 'C' Schedule property would come in S.F.No.37/1F. In respect of the factual finding relied by the First Appellate Court that there was an encroachment only in S.F.No.37/1F, and granted mandatory injunction. Admittedly, S.F.No.37/1F comes in 'C' schedule property. But contrary to the same mandatory injunction was granted in respect of 'B' Schedule property, which is factually incorrect as 'B' Schedule property situated in only S.F.No.149.

12. Therefore, this Court is of the firm view that finding of the fact rendered by the First Appellate Court is perverse as the same is not on the basis of the documentary evidence. To put it in other words, it is contrary to the description of the property mentioned in the plaint. Therefore, this Court finds justification to interfere with the order of the First Appellate Court. Therefore, the substantial questions of law are answered in favour of appellant/first defendant.

11. In the result, this Second Appeal is allowed by setting aside the order of the First Appellate Court. As a concomitant, the order of the



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Trial Court is confirmed. There shall be no order as to costs.

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Internet : Yes/No

Index: Yes/No

apd

To

- 1.The Additional District Munsif (Fast Track No.1), Tindivanam,
- 2.The District Munsif, Gingee,
- 3.The Section Officer, V.R.Section, High Court, Madras.



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C.KUMARAPPAN,J.

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