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S.A.No.509 of 2005

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **06.01.2023**

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.509 of 2005

1.Srinivasa Mudaliar (died)

2.Naini Ammal

3.R.Shanthi

4.S.Ganga

5.G.Geetha

... Appellants/Appellant
/Plaintiff

Vs.

1.The Tamil Nadu Accountant
General Office Staff,
Co-operative building Society
rep. by its Secretary

2.Durai Naicker

3.Navarasi

4.Govindaraj

5.Gothandaraman @ A. Ramu

...Respondents/Respondents
/Defendants



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(Appellants 2 to 5 brought on record as legal representatives of the deceased sole appellant vide orders of this Court dated 05.11.2013 in C.M.P.No.465, 466 and 477 of 2013 in S.A.No.509 of 2005)

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 27.09.2004 in A.S.No.40 of 2003 on the file of the learned Subordinate Judge, Poonamallee, upholding the Judgment and Decree dated 07.03.2003 in O.S.No.1115 of 1989 on the file of the learned District Munsif, Poonamallee.

For Appellants : Mr.S.Vijayakumar

For Respondents : Mr.K.S.Murugan
for R2 to R4

R1 – Served
No appearance

JUDGMENT

The plaintiff is the appellant before this Court challenging the concurrent Judgment and Decree of the Courts below.



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2.The facts are briefly set out hereinbelow and the parties are referred to in the same rank and array as before the trial Court:

The plaintiff had filed the suit for the following relief:

“(a)grant a permanent injunction, restraining the 1st defendant, his men, agents, servants and others from dividing the suit property and allot the same to any person and thereby interfere with the plaintiff's possession and enjoyment of the suit property,

(b)grant a permanent injunction, restraining the defendants, their men, agents, servants and others from putting up any further construction anywhere in the suit property,

(c)grant a mandatory injunction, thereby direct the defendants to demolish and to remove the construction put up in the suit property”

3.It is the case of the plaintiff that he was the owner of the



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properties measuring an extent of 41 cents in S.No.53/9 and 53 cents in S.No.53/10 of Mugalivakkam Village, Sriperumbudur Taluk. It is the case of the plaintiff that the lands measuring an extent of 53 cents in S.No.53/10 which was originally comprised in Old Paimash Nos.314, 316 and 318, was purchased by the father of the plaintiff, Angu Mudaliar from one Swaminatha Mudaliar under a Sale Deed dated 29.11.1951. From the date of purchase, the property was being enjoyed as a joint Hindu family property consisting of the plaintiff's father and the plaintiff. Thereafter, the plaintiff had purchased 41 cents in S.No.53/9 from one Sambandam under a Sale Deed dated 22.08.1964. In the year 1954, his father passed away leaving behind him surviving the plaintiff as his only legal heir. On 24.07.1984, the plaintiff had sold 35 cents out of 41 cents in S.No.53/9 to the 1st defendant retaining an extent of 6 cents. On 27.08.1984, the plaintiff had sold 38 cents from out of an extent of 53 cents in S.No.53/10 to the 1st defendant, retaining an extent of 15 cents. The 1st defendant had converted the



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lands purchased by them into house sites and while seeking approval, he appears to have annexed the property belonging to the plaintiff as well. The plaintiff would submit that this act came to his knowledge only in the 1st week of June 1989 and immediately, on 13.06.1989, he had issued a Legal Notice to the defendants questioning the act. However, there was no response and hence, the suit.

4. Pending the suit, the plaintiff had impleaded some of the purchasers of the house plots stating that they have attempted to encroach into the suit property.

5. The 1st defendant has filed a Written Statement *inter alia* denying the contentions that they had trespassed into the suit property. They would categorically state that they have not entered possession of the suit property nor put up any construction thereof. It was their case that it was the 2nd defendant who had put up construction and the 2nd defendant was not a member of the 1st defendant Society. Therefore,



they are unnecessary parties to the proceedings and the suit may be dismissed against them.

6.The 3rd defendant who is none else than the wife of the 2nd defendant had filed a Written Statement denying that they have annexed the suit property. She would also submit that the survey number of the suit Survey Number has been sub divided and the description of the property as given in the suit schedule is not as per the sub divisions. In the Additional Written Statement filed by the 3rd defendant, she had reiterated that no construction has been put up in the suit property.

7.The 4th defendant had filed a Written Statement *inter alia* contending that the 5th defendant had occupied the lands comprised in S.No.54/1 which is a Odai and he had sold the same to the 3rd defendant and therefore, the defendants had not trespassed into the suit property.



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8.The learned District Munsif, Poonamallee, had framed the following issues for consideration:

வழக்கெழு வினாக்கள்:

“(1)வாதி கோரியுள்ள நிரந்தர
உறுத்துக்கட்டளை பரிகாரம் அவருக்கு
வழங்கத்தக்கதா?

(2)வாதி கோரியுள்ள செயலுறுத்துக்கட்டளை
பரிகாரம் அவருக்கு வழங்கத்தக்கதா?

(3)வாதி பெறத்தக்க பரிகாரம் என்ன?”

கூடுதல் எழுவினாக்கள்:

“(1)Whether the 3rd defendant purchased the property which is situated in Saidapet Taluk (Odai) as per Sale Deed dated 28.12.1988?”

9.On the side of the plaintiff, the plaintiff had examined himself as PW1 and marked Ex.A.1 to Ex.A.14. On the side of the



defendants, the 4th defendant had examined himself as DW2 and marked Ex.B.1 to Ex.B.5. From the Judgment, it appears that the 3rd defendant had only filed a proof affidavit and thereafter, she was cross examined.

10.The learned District Munsif, Poonamallee, had ultimately dismissed the suit on the ground that the plaintiff who has come forward with a case that the suit property has been trespassed into by the defendants and constructions put up thereon, had failed to prove the case and except for the Commissioner's report and Plan, there was nothing else to show the alleged trespass. In fact, the Surveyor and the Commissioner have also not been examined. That apart, the plaintiff who has come forward with the specific case that the suit property has been trespassed has not established the said contentions. Aggrieved by the said Judgment and Decree, the plaintiff had filed A.S.No.40 of 2003 on the file of the learned Subordinate Judge, Poonamallee. The learned Subordinate Judge also concurred with the findings of the trial Court and dismissed the suit. Aggrieved by



which, the plaintiff is now before this Court.

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11.The Second Appeal has been admitted on the following
Substantial Questions of Law:

“(1)Are not the Court below committed an error in not considering the Advocate Commissioner report, i.e., Ex.C1 and Ex.C.2 that there are lot of houses in Survey No.53/9 and 53/10, as stated in it?

(2)Are not the Court below committed an error in holding that the appellant has not filed objections to the report filed by the Advocate Commissioner when the appellant filed objection to the report filed by the Advocate Commissioner?

(3)The Lower Appellate Court committed an error is not having appreciated the case of the appellant on the basis of Ex.A1 and Ex.A.14.”



12.Heard the learned counsels appearing on either side and perused the papers.

13.The plaintiff has come forward with the contention that the defendants had trespassed into the suit property and put up constructions. The suit property is the remaining extent of 6 cents in S.No.53/9 and 15 cents in S.No.53/10. It is also the contention of the plaintiff that the properties which have been sold by them to the 1st defendant in the above survey numbers have been formed into house sites and sold to several persons. Therefore, the said survey numbers, namely, S.No.53/9 and S.No.53/10 would have been sub divided, as several persons have purchased the properties and put up constructions. Therefore, the plaintiff has not described the property with its Sub division numbers and the boundaries on site. In fact, a perusal of the Schedule of Properties does not clearly show which portion of the suit survey number has been encroached into. It is not the case of the plaintiff as indicated from the Plaint that the entire extent have been encroached into, i.e., an extent of 21 cents.



Therefore, the plaintiff has not clearly described the property which has been encroached. The

plaintiff has also not provided proof to show the encroachment and both the Courts below have clearly observed that the plaintiff has not filed any evidence to prove his case of encroachment, trespass and putting up of constructions. The Courts below have extensively considered the evidence that have been adduced by both the parties and come to the conclusion that the plaintiff has not proved the case of trespass and has rightly dismissed the suit. The Lower Appellate Court have taken into account the Advocate Commissioner's report and come to the conclusion that the document does not prove the case of the plaintiff. This Court sitting in appeal under Section 100 of the Code of Civil Procedure cannot re-appreciate the evidence considered by both the Courts below as the plaintiff has not been able to establish that the Judgments of the Court below suffers from some error of Law or is perverse. Therefore, the Substantial Question of Laws are



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answered against the plaintiff. I see no reason to interfere with the concurrent Judgment and Decree of the Courts below.

The Second Appeal is dismissed. There shall be no order as to costs.

06.01.2023

Index : Yes/No
Internet : Yes/No
Speaking order / Non speaking order
mps

To

1.The Subordinate Judge,
Poonamallee.

2.The District Munsif,
Poonamallee.



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P.T. ASHA, J,

mps

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