



S.A(MD)No.593 of 2013

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 03.01.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)No.593 of 2013

and

M.P(MD) No.1 of 2014

1.Thiyagarajan

2.Karuppayee @ Dhanavalli

...Appellants/Appellants/
Defendants

-Vs-

Uthanda Veeraiah

... Respondent/Respondent/
Plaintiff

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 21.08.2012 made in A.S.No.2 of 2012 on the file of the III Additional Sub Judge, Madurai, confirming the judgment and decree dated 20.09.2011 made in O.S.No.17 of 2008 on the file of the Principal District Munsif, Madurai.



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For Appellants : Mr.J.Sanjoy Vignesh

For Respondent : Mr.S.A.Ajmal Khan

JUDGMENT

The defendants in the suit are the appellants. The respondent herein filed a suit for permanent injunction and also mandatory injunction directing the appellants to remove the offending constructions made by them in the suit second schedule property. The suit was decreed by the Trial Court and the first appeal filed by the appellants was also dismissed. Challenging the concurrent judgments passed against them, the appellants are before this Court.

2. According to the respondent/plaintiff, the suit property was originally purchased by his mother Chellammal on 09.02.1973 under Ex.A.1. She settled the property purchased by her in favour of the respondent/plaintiff on 11.07.1983 under Ex.A.2. The respondent/plaintiff in his plaint further averred that the appellants are his southern neighbors and taking advantage of his absence from the suit property, during August 2006, the appellants encroached the portion of his property on the southern side with the measurements of three feet north-south



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and 41¼ feet east-west. According the respondent/plaintiff, he put up the building in the property gifted to him by his mother under Ex.A.2 leaving vacant space on the southern side with the measurements of five feet north-south and 41¼ feet east-west. The entire vacant space on the southern side was shown as suit first schedule property. The portion allegedly encroached by the appellants was shown as suit second schedule property.

3. The appellants filed a written statement and resisted the suit by contending that they put up constructions in the suit property as early as in the year 1976 and they have been residing in the house put up by them from the year 1978. According to the appellants, they purchased the Plot Nos.17 and 18, which lie on the south of the plot owned by the respondent on 09.02.1973 and from the date of purchase, they have been in possession and enjoyment of the same. It was also stated that the appellants had not encroached any portion of the property owned by the respondent/plaintiff.

4. Before the Trial Court, the respondent was examined as P.W.1 and 24 documents were marked on his side as Ex.A.1 to Ex.A24 and the first



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appellant/first defendant was examined as D.W.1 and 6 documents were marked on the side of the appellants as Ex.B.1 to Ex.B.6. The Surveyor's Sketch, Commissioner's Sketch and Report have been marked as Ex.C.1 to Ex.C.3.

5. The trial Court, based on Ex.C.1 to Ex.C.3 and the admissions of D.W.1, came to the conclusion that the appellants encroached portion of suit second schedule property and decreed the suit to that extent. Aggrieved by the same, the appellants filed first appeal in A.S.No.2 of 2012 on the file of the learned III Additional Subordinate Judge, Madurai and the same was dismissed by confirming the findings of the Trial Court. Challenging the said judgment and decree, the appellants are before this Court.

6. The learned counsel for the appellants/defendants mainly submitted that the constructions found in the second schedule of the suit property were put up by the appellants even prior to 2002 and the suit filed by the respondent in the year 2008, is hopelessly barred by limitation. The learned counsel further submitted that both the Courts below arrived at a conclusion that the appellants had encroached portion of the land belonged to the respondent by relying on the



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report and plan submitted by the Advocate Commissioner and the findings of the Courts below based on the Advocate Commissioner's report are not correct as Commissioner is not entitled to give any finding with regard to the possession of the parties. The learned counsel also submitted that the Courts below while arriving at a finding that the appellants had encroached a portion of the suit second schedule property, placed reliance on Ex.A.12-reply issued by the Tahsildar, dated 13.09.2006 and the said document was not proved in the manner known to law.

7. Per contra, the learned counsel appearing for the respondent / plaintiff submitted that in order to find out the fact whether there is any encroachment in the property of the respondent, the Trial Court appointed an Advocate Commissioner and he measured the suit property with the help of Surveyor and filed his report along with Surveyor's sketch. The appellants have not chosen to file any objection to the Advocate Commissioner's report and plan, even though in his report the Advocate commissioner categorically stated that the appellants had encroached a portion of the second schedule of the suit property. It is the submission of the learned counsel for the respondent that having failed to object



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to the Advocate Commissioner's report and plan before the Court below, it is not open to the appellants to assail the same in the second appeal. The learned counsel for the respondent has also taken this Court to the evidence of the D.W.1, wherein he admitted that he had gone through the Advocate Commissioner's report and plan, but had not chosen to file any objection to his report. Therefore, it is the contention of the learned counsel for the respondent that both the Courts below have given a concurrent finding that the appellants had encroached into the property of the respondent/plaintiff and the said concurrent finding need not be interfered with by this Court in the absence of any substantial question of law arising for consideration.

8. It is the admitted case of both the parties that the respondent herein owned Plot No.16 and the appellants owned Plot Nos.17 and 18. It is also admitted that the plots of the appellants are lying south of the respondent's plot. In order to find out whether there is any encroachment by the appellants into the property of the respondent, an Advocate Commissioner was appointed to measure the properties of the parties with the help of Surveyor. The Surveyor's sketch along with Advocate Commissioner's report and plan were marked as Ex.C.1 to



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Ex.C.3. A perusal of Ex.C.1 to Ex.C.3 filed in the additional typed set of papers filed by the respondent would suggest that the appellant herein made an encroachment into the property of the respondent on the southern side of his property. The measurement of the encroached portion is given as 41 feet east-west and three feet north-south on the eastern side and two feet north-south on the western side. When D.W.1 was confronted with the Advocate Commissioner's report and plan, he categorically admitted that he had gone through the Advocate Commissioner's report and plan and he did not file any objection. When the Advocate Commissioner, after measuring the property of the parties with reference to the title deed, found that there is an encroachment into the portion of the second schedule of the suit property, in the absence of any objection by the appellants it is not open to the learned counsel for the appellants to assail the findings of the Courts below based on the Advocate Commissioner's report and plan. While coming to the conclusion that there is an encroachment in the portion of the suit second schedule property by the appellants, the Courts below also relied on Ex.A.12-the proceedings of the Tahsildar. In Ex.A.12 also, it is mentioned that the appellants have encroached into the property of the respondent on the southern side.



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9. Though the learned counsel for the appellants submitted that Ex.A.12-the proceedings of the Tahsildar was not proved by the respondent in the manner known law, the said objection cannot be taken into consideration now as Ex.A.12 was marked without any objection before the Trial Court. It is settled law that objection as to want of proof has to be made, when the document is tendered in evidence. If the document is marked in evidence without any objection, it is not open to the other side to raise any objection with regard to the proof or competency of the witness to tender the document in evidence. Therefore, the contention raised by the learned counsel for the appellants with regard to the competency of P.W.1 to tender Ex.A.12 in evidence, cannot be accepted. Even otherwise, the Courts below have come to a conclusion that the appellants have encroached into the property of the respondent based on Advocate Commissioner's report and plan coupled with the own admission of D.W.1. The said findings of fact arrived at by the Courts below does not call for any interference by this Court, while exercising jurisdiction under Section 100 of CPC in the absence of any substantial question of law.



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10. As far as the contention raised by the learned counsel for the appellants with regard to the question of limitation, absolutely there is nothing on record to show that the offending constructions in the suit property were put up prior to the year 2002. Except the interested testimony of the appellants as D.W.1, there is no other evidence available on record to show that the offending constructions were put up even prior to 2002. In these circumstances, the said contention made by the learned counsel for the appellants cannot be accepted.

11. In view of the discussion made above, this Court finds no substantial question of law in the second appeal and hence, the Second Appeal is dismissed.

12. In nutshell,

(a) this Second Appeal stands dismissed by confirming the judgment and decree passed in A.S.No.2 of 2012 on the file of the learned III Additional Subordinate Judge, Madurai;



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(b) in the facts and circumstances of the case, there will be no order as to costs; and

(c) connected miscellaneous petition is closed.

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NCC : Yes/ No
Index : Yes / No
Internet : Yes / No
cp

To

- 1.The III Additional Sub Judge,
Madurai.
2. The Principal District Munsif, Madurai.
- 3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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