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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **22.11.2023**

CORAM:

THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

S.A(MD)NO.625 OF 2022
and
C.M.P(MD)No.8862 of 2022

R.Chithiraikani :Appellant/Appellant/Plaintiff

.VS.

1.Kottiappan

2.Thirumalai Vadivu

3.K.Mariammal

4.V.Mageswari

5.K.Ganesan

(Respondents 2 to 5 are brought on record as legal representatives of the deceased sole respondent as per order of this Court made in C.M.P(MD)Nos.1881 and 1882 of 2023 in S.A.(MD)No.625 of 2022, dated 16.06.2023)

:Respondents/Respondents/
defendants

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree made in A.S.No. 20 of 2018, dated 13.4.2022, on the file of the Subordinate Judge's Court, Sankarankovil, confirming the judgment and decree made in O.S.No.48 of 2010, dated 10.04.2018, on the file of the District Munsif cum Judicial Magistrate Court, Sivagiri.



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For Appellant :Mr.F.X.Eugene

For Respondents :Mr.K.Jeyamohan
2 to 5

JUDGMENT

The Second Appeal is filed challenging the concurrent judgments in A.S.No.20 of 2018, dated 13.4.2022, on the file of the Subordinate Judge's Court, Sankarankovil and in O.S.No.48 of 2010, dated 10.04.2018, on the file of the District Munsif-cum-Judicial Magistrate Court, Sivagiri.

2.The appellant/plaintiff filed the suit seeking the relief of declaration that the appellant is entitled to 2 feet east-west and 43 ¼ feet north-south and the steps constructed on the west of his AF Wall to maintain the wall and for restraining the respondents from interfering with the appellant's enjoyment, to remove the encroachment made by the respondents in the AF Wall by stocking hay-stack and the buildings thereon and for costs.

3.The case of the appellant is that the property described as ABCDEF in the rough sketch is the property of the appellant. The property described as EJKL is the property of the respondents. The disputed property measuring 2 feet x 43 ¼ feet is shown in red



colour in the rough sketch. ABCD1 property belong to Muthammal Vagayara. Chithirakannu Pillai purchased this property on 30.11.1949. It is seen in the sale deed that there is a house in CHIF portion and the remaining portion was vacant. The eastern boundary of ABCD1 property was shown as Perumal Pillai's land. There is a window and drainage water pipes on FG Wall. The plaintiff purchased the property purchased by Chithirakannu Pillai and the property on the west by a sale deed, dated 1.9.1989 and constructed a building in ABCDEF portion. He has not altered the building in GHIF portion but only did some plastering works. He closed the window in FG wall and now placed two windows in AG Wall. There is also sun-shade for these windows. The rain water is drained through pipe laid on the west of AF Wall. The defendants disputed the appellant's right on the further west of the appellant's house. A cattle shed is built using wooden sticks by getting support from FG Wall. There is hay-stack stored on the west of AG wall.

4.NSJ portion belong to Ramalakshmi. Ramalakshmi sold PSRKLM portion to one Kaliammal. And kept for herself MNPQ portion. The defendant purchased EJKL portion from one Ramalakshmi on 19.02.1996. He has also purchased pathway for



reaching this property. That is shown on the western side of the appellant's house. The defendants deny the appellant's right on the west of appellant's house . In such circumstances, the suit was filed for the aforesaid relief.

5.The averments made in the plaint as detailed above are denied by the respondents. It is the case of the respondents/defendants that the appellant never enjoyed any portion beyond his AF Wall. The claim made in the plaint that the appellant is entitled for 2 feet x 43 ¼ feet extent of land on the west of AF Wall, is absolutely false. The plaint plan does not reflect the correct details. However, the defendants filed rough sketch with correct details. In the rough sketch filed by the appellant, the appellant's property is shown as ABCDEF. In the said sketch the property of Ramalakshmi shown as NSJE, properties sold by Ramalakshmi to Kaliammal is shown as PSRKLM. The portion sold by Ramalakshmi to the respondents is shown as KJFG. The portion purchased for using as a pathway is shown as AM1LG. The house kept by Ramalingam and nearby portion is shown as MNPQ. KUTJ portion measures east-west 3 ½ feet and south north 20 feet. It belongs to Chelliah Thevar. The defendants purchased this portion from Chelliah Thevar by oral sale in the year 1997. Thus he is in



possession and enjoyment of the property purchased by Ramalakshmi and Chelliah Thevar shown as KJFG and UTEL. He constructed buildings using the said property. There is a cattle shed in E1E2E3E4FGL portion. The respondents are using AM1LG pathway for raising road on the southern side. Item No.1 of the properties in the written statement is shown as GFVT and item No.2 of the suit properties is shown as AM1LG. The appellant had purchased only ABCEDF portion shown in the rough sketch filed by the defendants on 1.9.1989. There was a house in FF1G1G. There was no window or rain water draining pipe in the FG Wall. The appellant constructed building in F1EDC portion and G1BA portion only recently. When making this construction, he had encroached GAA1 portion and built a wall to the width of one feet and length of 23 $\frac{3}{4}$ feet. He also placed two windows in the wall with sunshades. The drainage pipe was also laid for taking waste water, drainage water etc., in VY portion. When the respondents demanded the appellant to remove the windows in February 2019, he refused. After filing the suit, he made construction in GG1BA portion. The appellant has no right on the further west of GFA portion and that exclusively belongs to the respondents. In the said circumstances, counter claim is made seeking the relief of:



(1) item No.2 of the schedule property mentioned in the written statement and GLEF portion exclusively belongs to the respondents and for consequential injunction;

(2) for the removal of wall measuring one feet width and 23 $\frac{3}{4}$ feet length in GAA1 portion;

(3) for the removal of windows and sunshades and also for the removal of pipes laid underground in EF portion.

6. During trial, P.W.1 and P.W.2 were examined and Ex.A1 to Ex.A8 were marked. D.W.1 was examined and no exhibit was marked on the side of the respondents. Considering the oral and documentary evidence, the learned trial Judge had dismissed the suit filed by the plaintiff and also counter claim made by the defendants. Challenging the judgment appellant/plaintiff filed A.S.No.20 of 2018. The learned Appellate Judge concurred with the findings of the trial Court and dismissed the appeal. Thus the appellant is before this Court by way of this Second Appeal.

7. It is the submission of the learned counsel for the appellant that his property measures 29 feet east-west on the north 22 feet



east west on the south and 52 ¼ feet north south on both sides.

Within this extent, his house and two feet lane for the maintenance of western wall of his house situate. Despite production of sufficient oral and documentary evidence, the Courts below have negated the relief. It is his further submission that though the respondents made counter claim, respondent have only filed a proof affidavit, but did not subject himself for the cross-examination. The dismissal of the suit even in the absence of any contra evidence to the case of the appellant is not correct. It is his further submission that the learned trial Judge found that in the absence of measurement of the properties of both sides, it is difficult to adjudicate the issues involved in this case and that was the reason for the dismissal of the suit. Unfortunately, the appellant has not taken any steps for appointment of an Advocate Commissioner and now requested this Court that this appeal may be remanded back to the trial Court for appointment of an Advocate Commissioner and for disposal of the case on merits.

8. In response to this submission, the learned counsel for the respondents opposes the remand of the appeal on the ground that there is no need for appointment of an Advocate Commissioner in this case. Even if there is a necessity for the appointment of an



Advocate Commissioner, the appellant should have taken steps for appointing an Advocate Commissioner before the trial Court or before the first appellate Court. Having failed to avail the opportunity, it is not open to the appellant to seek remand of the matter for the purpose of appointment of an Advocate Commissioner and for the disposal of the case on merits, when the matter is pending in Second Appeal stage. He further submitted that there is no reference in the appellant's document as to the availability of two feet lane on the west of his wall. The appellant failed to prove that he has two feet lane on the west of his western wall. The Courts below have rightly dismissed the suit and prayed for dismissal of the Second Appeal.

9. This Court considered the rival submissions made on either side and perused the records.

10. It is seen from the judgment of the trial Court that P.W.1 and P.W.2 were examined and Ex.A1 to Ex.A8 were marked on the side of the appellant. Though D.W.1 filed the proof affidavit, it is seen from the judgment that D.W.1 has not appeared for the purpose of cross examination. Therefore his evidence filed in the form of proof affidavit was rejected. The suit was decided only on



the basis of evidence of P.W.1 and P.W.2 and Ex.A1 to Ex.A8.

Reading of the judgment of the trial Court shows that it had extensively considered the documents produced by the appellant and the evidence of P.W.1. The suit was dismissed primarily for the reason that the plaint plan does not have measurements of the properties; that no steps had been taken by the appellant for appointment of an Advocate Commissioner for measuring the suit properties to identify the alleged encroachment made by the respondents. In the said circumstances, the learned trial Judge held that in the absence of measurements, it is not possible to find out whether the appellant has two feet lane further west on AF wall. Similarly, the respondents counter claim was also negated for the reason that the respondents have not produced any oral and documentary evidence in support of the written statement averments. This finding of the trial Court was confirmed by the first appellate Court.

11. In the light of the discussions held above, it is evident that the appellant claims two feet lane on the further west of his western wall of his house for the purpose of maintaining the wall, draining drainage water and rain water etc.



12. On the other hand, the case of the respondents is that the appellant had encroached the respondents land and built a wall. From the nature of the dispute, it is just and necessary that a Commissioner along with a qualified Surveyor should inspect the properties of both the appellant and respondents and file a report along with a plan, for the Court to come to a right decision. Unfortunately, as submitted by the learned counsel for the appellant, either the appellant or the respondents have not taken any steps for appointment of an Advocate Commissioner to measure the properties of both to identify the disputed properties. In the said circumstances, the Courts below found that the Court is not able to come to a conclusion as to whether the appellant has any space left on the further west of his AF Wall. In the said circumstances, though the matter is pending in Second Appeal stage, to render a substantial justice to the parties, this Court is of the view that an Advocate Commissioner has to be necessarily appointed for measuring the properties of the appellant and respondents with the help of a qualified Surveyor and to file a report along with plan for helping the Court in making a right decision.

13. In this view of the matter, the judgment of the Courts below are set aside and the matter is remanded back to the trial



Court namely, the District Munsif-cum-Judicial Magistrate Court, Sivagiri, for fresh consideration and disposal on merits. The learned trial Judge is directed to appoint an Advocate Commissioner with a direction to inspect the properties of both the appellant and respondents with the help of a qualified Surveyor on the basis of the revenue records and the title deeds and to file a report along with plan for adjudication of the lis involved in this case. The expenses for securing the service of Advocate Commissioner and Surveyor has to be borne by the appellant. The learned trial Judge is also directed to permit the parties to lead any additional evidence, if proposed by the parties during the hearing of the case and dispose of the suit on merits, as early as possible, preferably within a period of three months from the date of receipt of the Advocate Commissioner's report along with plan.

14. Accordingly, with the above direction, the Second Appeal is allowed. No costs. Consequently connected Miscellaneous Petition is closed.

22.11.2023

Index:Yes/No
Internet:Yes/No
NCC:Yes/No
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To

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1. The Sub-Judge,
Sankarakovil.
2. The District Munsif cum Judicial Magistrate,
Sivagiri.
3. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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G.CHANDRASEKHARAN,J.

vsn

**JUDGMENT MADE IN
S.A(MD)NO.625 OF 2022
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22.11.2023