



SA.No.1947 of 2001

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.04.2024

PRONOUNCED ON : 22.05.2024

CORAM

THE HON'BLE Mr.JUSTICE C.KUMARAPPAN

**S.A.No.1947 of 2001**

Kaliamurthi (Died)

2. Prabakaran

3. Bhaskaran

4. Shamala

5. Sridhar

6. Jayapriya

(Appellants 2 to 6 brought on record as

LRs of the deceased sole appellant vide

Order dated 25.01.2021 made in CMP.No.10604/2020)

... Appellants

- Vs -

1. Ramasami Sembraiyyar (Died)

2. Dhanalakshmi

3. Devaki

4. Sundaramoorthy

5. Venkatesan

6. Kanakavalli

7. Sivagamasundari

8. Jothi

(R4 to R8 brought on record as LRs of the deceased

1<sup>st</sup> respondent vide order dated 11.07.2022 made

in CMP.No.11036/2021)

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 08.12.2000 in A.S.No.121/96 before the Sub Court, Panruti, confirming the judgment and decree dated 12.01.96



SA.No.1947 of 2001

in O.S.No.240/90 on the file of the District Munsif Court, Panruti.

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For Appellants : Ms.Nilaphor  
for Ms.R.Meenal

For Respondents : Mr.R.Sunil Kumar for R4 to R8  
R1-Died  
R2 & R3 - Given up.

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### **J U D G M E N T**

The second plaintiff is the appellant herein, and the defendants are arrayed as respondents herein.

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

3. The brief facts which give rise to the instant second appeal is that, the suit property described in 'A', 'B' and 'C' schedule absolutely belong to the joint family of the plaintiff. According to the plaintiff, 'A' schedule property was allotted to the family of the first plaintiff under partition effected on 03.06.1946. Similarly, 'B' schedule property was allotted to the plaintiff's family by virtue of partition deed dated 30.08.1958. It is the submission of the plaintiffs that the first plaintiff and the first defendant are brothers. Therefore, to reach the rear side of the plaintiffs' property, 'C' schedule property was left as common passage between the plaintiffs and the defendants. Whereas, the defendants have encroached upon the plaintiffs'



*SA.No.1947 of 2001*

property of an extent of 17 feet north-south and 42 feet east-west. Hence, the plaintiffs came forward with a suit for declaration in respect of 'A' schedule property and for a mandatory injunction for removal of encroachment, which is mentioned as 'E', 'F', 'G' and 'H' in the plaint plan and for a permanent injunction in respect of the 'C' schedule property.

4. The said suit was resisted by the first defendant by contending that 'A' schedule property is a landed property, 'B' schedule property is a house site and 'C' schedule property is also a landed property. This defendant further submits that the 'B' schedule property was wrongly described in the plaint and that the entire extent of the property in S.No.480/12 to which the plaintiffs and the defendants' family is entitled is 94 feet north-south and, 156 feet east-west. According to this defendant, both parties are equally divided the above extent into 47 X 156 feet. It is the submission of this defendant that the first plaintiff took southern half and this defendant taken the northern half. It is the further contention of this defendant that the plaintiff has constructed a terraced house in the above southern half measuring an extent of east-west 40 feet and north-south 50 feet leaving a lane of 7 feet width on the southern extent. It is the further case of the defendant that he has put up a construction measuring an extent of 39 feet



*SA.No.1947 of 2001*

WEB COPY

north-south and 41 feet west-east leaving 3 feet lane on the south of the house and 4 feet lane on the north of the house. Therefore, it is the submission of this defendant that he has not encroached upon any of the plaintiffs' property, and that 'C' schedule property is not at all a joint family property. The defendants 2 and 3 are the wife and daughter respectively of the first plaintiff, and the mother and sister of the 2<sup>nd</sup> plaintiff. They have also supported the case of the plaintiff.

5. Before the Trial Court, the plaintiff has examined 3 witnesses as PW1 to PW3 and marked as many as 19 documents as Exs.A1 to A19. On behalf of the defendants, 3 witnesses were examined as DW1 to DW3 and 3 documents have been marked as Exs.B1 to B3.

6. The Trial Court after having considered the oral and documentary evidence, has found that the plaintiffs have not proved the encroachment of 'B' schedule property and has also not submitted any documents as to the common usage of 'C' schedule property. However, in respect of 'A' schedule property, based upon the admission made by the defendant, the Trial Court decreed the suit only to the 'A' schedule property. Not satisfying with the judgment of the Trial Court, when the plaintiffs approached the First Appellate Court, the First Appellate Court has concurred with the finding of



SA.No.1947 of 2001

the Trial Court and dismissed the appeal. Not satisfying with the judgment of the First Appellate Court, the 2<sup>nd</sup> plaintiff is before this Court by way of this Second Appeal.

7. At the time of admission of this Second Appeal on 23.01.2002, this Court has formulated the following substantial question of law:-

*“Whether in law the courts below did not err grievously in overlooking that the first respondent after having admitted as DW1 to the appellant using the “C” schedule road as the only approach to his property, was estopped from raising objections to the decree being passed?”*

8. The learned counsel appearing on behalf of the appellant would vehemently contend that the Court below failed to see that under partition deed dated 03.08.1958, the first respondent was given northern half of R.S.No.480/12 measuring 47 feet X 156 feet. It was also the contention of the learned counsel appearing on behalf of the appellant that the First Appellate Court has miserably failed to note the construction made by the defendant measuring to an extent of 39 X 59 feet. It is the further contention of the learned counsel for the appellant that except 'C' schedule property, there are no other way to reach the plaintiffs' backyard. In this connection, the learned counsel is very much relying upon Exs.C1 and C2, which are the



*SA.No.1947 of 2001*

Commissioner's report filed by the Commissioner, who was appointed at the Second Appeal stage. The learned counsel for the appellant would further contend that the finding recorded by both the Courts below is perverse and the same are in contravention to the document submitted by the plaintiffs. It was also emphatically contended that even according to the admission made in the written statement, when the plaintiff has got an extent of 47 feet north-south, they put up construction upto 50 feet north-south leaving lane space of 7 feet. Therefore, even according to their own admission, there is an encroachment of 10 feet. Therefore, contended that the decree passed by both the Courts below are erroneous and liable to be interfered with.

9. Per contra, the learned counsel appearing for the respondents would specifically contend that when the plaintiff has approached the Court with a relief of declaration and for a mandatory injunction, a duty is cast upon him to prove his title and also to prove the extent of encroachment. The learned counsel for the respondents would further contend that though the plaintiff contended that 'C' schedule property is the common passage between the plaintiffs and the defendants, to substantiate such contention, the plaintiff has not submitted any documents. It was the further contention of the plaintiffs that to reach the plaintiffs' property, he has got access on the western side of



SA.No.1947 of 2001

the property, as the western portion of the plaintiffs' property is facing main road, and can have access directly from the road. Therefore, the learned counsel would submit that the very finding recorded by both the Courts below are on the basis of the documents. Therefore, under Section 100 of CPC, this Court cannot interfere with the well merited finding, which is supported by the documents. Hence, prayed to dismiss the Second Appeal.

10. I have given my anxious consideration to either side submissions.

11. The main contention put forth by the learned counsel for the appellants is that, even according to the admission made in paragraph 8 of the written statement, there was a total extent of 94 feet north-south belongs to the first plaintiff and the first defendant. It was further admitted that the same was divided equally between the first plaintiff and the first defendant that the southern half of 47 feet north-south was allotted to the plaintiff and northern half of 47 feet north-south was allotted to the defendant.

12. At this juncture, the learned counsel for the appellants would draw the attention of this Court in respect of the pleading made in paragraph 8 of the written statement, wherein, it is stated as follows:-

*“8). In the property allotted to the defendant he has constructed a terraced house in an extent of East to West 40 feet and North to South 50 feet leaving a lane at 7 feet width*



SA.No.1947 of 2001

WEB COPY

*and the Southern most so as to reach his backyard. This defendant has constructed a house in an extent of 39 feet North to South and 41 feet West to East leaving 3 feet lane on the South of the house and 4 feet lane on the North of the house.”*

13. On perusal of the above pleadings, it appears that an extent of 57 feet north-south is under the occupation of the defendant. But, in this regard, the learned counsel for the respondents would submit that the word “defendant” find in the first line of paragraph 8 must be read as “plaintiff” and in this regard, he would submit that 5<sup>th</sup> line of paragraph 8 deals about the construction made by the defendant. He would further submit that according to the written statement, the construction made by the defendant was an extent of 39 feet north to south and 41 feet West to East leaving 3 feet lane on the south of the house and 4 feet lane on the north of the house. Through which the learned counsel would submit that they have put up construction to the extent of 46 feet north to south, therefore, there is no encroachment. Though there is a reference of word defendant in the first line of paragraph 8, this contention has not at all been raised either before the Trial Court as well as before the First Appellate Court. Only at the Second Appeal stage, the argument was put forth by the learned counsel for the



SA.No.1947 of 2001

WEB COPY

appellants/plaintiff. Therefore, this Court is of the firm view that such an argument cannot be advanced at the first instance before the Second Appeal stage, when this Court is exercising jurisdiction under Section 100 of CPC. However, this Court has endeavoured to resolve the issue by appointing the Advocate Commissioner. Even the Advocate Commissioner's report and plan (Exs.C1 and C2), are not helpful to this Court to arrive at any conclusion, as the Commissioner's report does not contain all the necessary measurement of the property.

14. The learned counsel for the appellants relied upon the judgment in *Hero Vinoth (Minor) Vs. Seshammal* reported in (2006) 5 SCC 545, through which the learned counsel for the appellants would submit that parties are entitled to have a right of access to the backyard of their property. However, the facts of the above case is not applicable to the present facts of the case. At the same time, the above judgment is helpful to this Court to see what are all the material requirements to decide the appeal under Section 100 of CPC. According to the above settled legal position, unless the findings of both the Courts below are, perverse and contrary to the evidences or on the basis of misinterpreting any of the document, or when the burden was wrongly cast upon the parties, the concurrent finding should not be interfered



*SA.No.1947 of 2001*

with as the same are immune from challenge under Section 100 of CPC.

Therefore, the judgment relied by the learned counsel for the appellants though not helpful to the appellant, otherwise helpful to this Court to decide the case in its right perspective.

15. At this juncture, the learned counsel for the respondents would submit that when a plaintiff approaches this Court for removal of encroachment, it is mandatory on the part of the plaintiff to give exact measurement of all the side of the suit property, and as to the extent of encroachment. As rightly contended by the learned counsel for the respondents, if we look at the plaint pleadings as well as the rough sketch attached to the plaint, we do not have any inference as to the linear measurement of the plaintiffs' property viz., A B C D. Unless there is a specific measurement is available for the plaintiffs' entire property of A B C D, the extent of alleged encroachment could not be decided. Therefore, the findings recorded by both the Courts below that the absence of linear measurement of the entire plaintiffs' property is fatal to the relief of mandatory injunction, in respect of 'B' schedule property, is perfectly in order.

16. Coming to the 'C' schedule property, the learned counsel for the



*SA.No.1947 of 2001*

WEB COPY

appellants by relying upon Exs.C1 and C2, would contend that except 'C' schedule property, there are no other passage available to reach their backyard of the plaintiffs' property. However, it is an admitted case that on the western side, the plaintiff's property is facing north-south road. However, it is their contention that, in view of construction in the almost entire north south width of the plaintiffs' property, there is no access for them to reach their backyard by a car or a lorry so as to dug a bore well. Only in that context, the plaintiffs seeking relief in respect of 'C' schedule property.

17. As rightly contended by the learned counsel for the respondents and also as rightly found by both the Courts below, there are no records to show that 'C' schedule property was left between the first plaintiff and the first defendant as a common passage. On that basis, both the Courts below have found that even in respect of 'C' schedule property, the plaintiffs cannot have any remedy. Therefore, this Court is of the firm view that the findings recorded by both the Courts below that the plaintiff has not established his claim as to the encroachment in 'B' schedule property, and also their common usage in 'C' schedule property is perfectly in order. This Court is in full agreement with the findings recorded by both the Courts below as the same are based upon the available documents.



SA.No.1947 of 2001

WEB COPY

18. As already submitted, the defendant has admitted that 'A' schedule property is the absolute property of the plaintiff. Therefore, this Court is of the firm view that except 'A' schedule property, the plaintiff is not entitled to have any relief in respect of 'B' and 'C' schedule properties.

19. In view of the above detailed discussions, the substantial question of law is answered in favour of the respondents.

20. In the result, this Second Appeal is dismissed. There shall be no order as to costs.

**22.05.2023**

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Index : Yes/No

Speaking Order : Yes/No

NCC : Yes/ No

To

1. The Subordinate Court,  
Panruti.
2. The District Munsif Court,  
Panruti.



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*SA.No.1947 of 2001*

**C.KUMARAPPAN,J**

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S.A.No.1947 of 2001

22.05.2024