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S.A.No.1222 of 2005



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.03.2024

CORAM

THE HONOURABLE Mr. JUSTICE G.ARUL MURUGAN

S.A.No.1222 of 2005
and CMP.No.16813 of 2005

1.Sheik Mastan Sahib (Died)

2.Inayathulla

(First appellant died. 2nd appellant is recorded
as Legal heir of the deceased 1st appellant vide
order of court dated 04.10.2019 made in
S.A.No.1222/2005 as per memo dated
04.10.2019 are recorded (PRMJ))

... Appellants

vs.

1.Asmath Bi

2.Nazeer (Died)

3.Malika Bi (Died)

4.Thakir Ali

5.Noor Ali

6.Shabiyunisha

7.Rahamattunisha

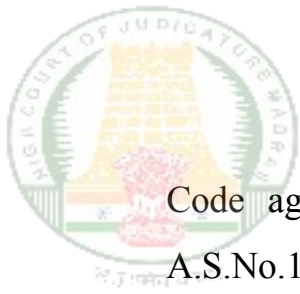
(RR3 to RR7 are brought on record as LR
of deceased 2nd respondent vide order of court
dated 24.03.2021 made in CMP.Nos.1581,
1586 & 1588/2020 in SA.No.1222/05 (TKRJ))

...Respondents

(RR3 to 7 cause title amended vide Court order
dated 20.11.2023 made in CMP.No.26465 of 2023
in SA.No.1222 of 2005 (CKJ))

Prayer:- Second Appeal filed under Section 100 of the Civil Procedure

<https://www.mhc.tn.gov.in/judis>



S.A.No.1222 of 2005

Code against the judgment and decree dated 01.04.2005 passed in A.S.No.158 of 2004 on the file of Subordinate Judge, Kallakurichi, confirming the judgment and decree dated 29.06.2004 passed in OS.No.834 of 2000 on the file of the I Additional District Munsif Court, Kallakurichi.

For Appellants : Mr.P.Dineshkumar for
M/s.Sarvabhauman Associates

For R1, R5 to R7 : M/s.R.Meenal

For R2 & R3 : Died

For R4 : No Appearance

J U D G M E N T

The unsuccessful plaintiffs are before this Court on appeal. The second appeal is filed challenging the judgment and decree dated 01.04.2005 in AS.No.158 of 2004 on the file of Sub-ordinate Judge, Kallakurichi, confirming the judgment and decree dated 29.06.2004 in OS.No.834 of 2000 on the file of I Additional District Munsif Court, Kallakurichi. Pending appeal, the first appellant died and the second appellant, who is already on record is the legal heir of the first appellant. The second respondent also died, and respondent 3 to 7 were impleaded as legal heirs.



2. For the sake of convenience, the parties are referred to as per their ranking before the Trial Court.

3. According to the plaintiffs, they are in possession and enjoyment of the items 1 to 3 of the suit properties as per the plan annexed to the plaint. The items 1 and 2 of the suit properties are mentioned as A,B,C,D,E,F,G,H. The plaintiffs have constructed a terraced house in the portion of A,B,C,H and in the remaining portion H,C,D,E,F,G, they have laid foundation in the year 1977. The plaintiffs have kept 1 ½ feet on the western side and 1 ½ feet on the eastern side as vacant site. The eastern half of the suit properties belonged to first plaintiff's father and second plaintiff's grandfather and as such, half share on the eastern portion measuring 15 kaladi is the ancestral property. The first plaintiff through sale deed dated 04.05.1954 purchased the western portion that is half share in the suit property measuring 15 kaladi and thereby the suit properties belonged to plaintiff. The fourth item of the suit property which is marked as AXYG, have been kept as vacant site to the western side of the plaintiff's house. The plaintiffs thereby becoming the owners of the item nos.1, 2 and 4 had further purchased the 3rd item of the suit property marked as PKIMX through sale deed dated 12.06.1978. While so, the defendants who are having the vacant site to the west of the suit



properties, are now without having any right or title making construction in their vacant site. While making the construction in the vacant site, they had encroached into the portion of the 4th item of the suit property. Further, the defendants attempted to demolish the foundation already put up by them. As such, the plaintiff has come up with the suit for permanent injunction restraining the defendant from interfering in the possession in respect of item nos.1 to 3 of the suit properties, permanent injunction restraining the defendant from demolishing the portions in item nos.2 & 3 and for mandatory injunction to remove the construction in the item no.4 of the suit property.

4. The defendant resisted the suit by filing the written statement denying the relief claimed by the plaintiff. The first plaintiff's father Sheik Dadu Sahib and Mohamed Umar Sahib are brothers. Mohamed Umar Sahib **sold his share of lands** in the lands measuring 30 foot feet east to west, 30 kaladi, and 124 foot feet north to south, 124 kaladi, to his brother Dadu Sahib on 20.11.1940. As such Dadu Sahib was entitled to an extent of 30 kaladi in east to west and 124 kaladi from north to south, and the plaintiffs are entitled only to that extent. Further, there was a well adjacent to that, 3 feet east to west and south to north 20 feet and 1/3rd share in the well were alone entitled to sons of Sheik Sahib, who are



Baksh Sahib and Rahman Sahib, and only that extent was purchased by the plaintiffs on 12.06.1978. In fact, when the construction was made,

the plaintiffs had encroached an extent of 2 feet and put up construction.

There is no right available for the plaintiffs to the west of the house. The

plaintiffs have no right or title in respect of the portion of the lands

mentioned as item 4 of the suit property and it belongs to the defendants.

Even long prior, the defendants had constructed a compound wall and

building. The plaintiffs had not objected at that time when the house and

compound wall were constructed. Further, the lands in LKME and EFZD

are pattai poramboke, and Allah Baksh and Rahman were in possession

and entitled to that property. In fact, when the plaintiff attempted to put

the foundation in the GR portion situated on their western side, it was

objected and stopped by Allah Baksh and Rahman, and the same was

stopped by the plaintiff and for a long time it remained as such. The

property to the north of the GR portion were purchased by the first

defendant from Rahman on 04.07.1997. Therefore, the western portion of

the properties beyond the G point belongs to the defendants, and they are

in enjoyment of the same.

5. During trial, the second plaintiff examined himself as PW.1 and

marked Ex.A1 to Ex.A.9. On the side of the defendants, the second



defendant was examined as DW.1 and Ex.B.1 to B.7 were marked. The Advocate commissioner was appointed and his report and plan were marked as Ex.C1 and Ex.C2.

6. After analysing the documents and evidence, the trial court dismissed the suit. The trial court found that when the plaintiff has not sought any declaration, but only come up with the suit for injunction, based on the material available on record, the plaintiffs were not able to establish their possession. When the plaintiffs have not established their possession, it was found that the documents relied on them in Ex.A2, Ex.A.3, Ex.A7 and Ex.A.9 cannot come to the aid of plaintiff to sustain the relief. Aggrieved, the plaintiffs filed appeal in AS.No.158 of 2004 on the file of Subordinate Judge, Kallakurichi.



7. The Lower Appellate Court, after reappraising the evidence, dismissed the appeal. The Lower Appellate Court found that from the perusal of the Advocate Commissioner Report and also the documents filed by the plaintiff, it does not pertain to the suit property and the plaintiffs were not able to establish their possession. Aggrieved by the concurrent findings of fact, the plaintiffs have come before this Court on appeal.

8. This Court by order dated 28.10.2005 admitted the appeal and framed the following substantial questions of law:

“1. Whether the Courts below are justified in non-suiting the appellants especially when a major part of their claim was admitted by the respondents, in contravention of the provisions of Order 7 Rule 7 of the Code of Civil Procedure?

2. Whether the Courts below are correct in law in discarding Exs.A1 to A9 which would categorically establish the case of the appellants?

3. Whether the decree in a suit dismissed for default, can operate as res judicata in terms of Section 11 of the Code of Civil Procedure?”

9. The learned counsel appearing for the appellant argued that the



claim made by the plaintiffs in respect of 4th item of the suit property is admittedly not sustainable since as per the documents filed by them they were only entitled to 30 kaladi, which comes to 27 feet. When the lands from point A to B alone measures an extent of 27 feet, the plaintiffs cannot claim further lands beyond 27 feet which is mentioned as item 4 of the suit properties. Therefore, the learned counsel restricts his claim to item 1 to 3 of the suit properties. As regards item nos.2 & 3 of the suit properties, the learned counsel contended that the same was purchased by the mother of the 2nd plaintiff on 11.07.1961 in ExA.3 and when there is no dispute regarding the boundaries on the northern side and southern side, the dispute pertains only to the lands on the east to west side. Even though, the sale deed refers to only the portion of 36 feet in east to west, the Advocate Commissioner Report in Ex.C.1 shows that actually an extent of 47 feet in the east to west direction.

10. The learned counsel further contended that the perusal of the title deed of the vendors of the defendants in Ex.A.9 would go to show that the western side boundaries is mentioned as land belonging to the plaintiffs. But however, when the land were sold in favour of the defendants in Ex.B.5 and Ex.B.6, the western side boundary has been wrongly mentioned. When the defendants vendor title deed itself shows



that the lands on the western side belongs to the plaintiff, then the defendants being the purchaser cannot make any claim in the suit properties in item nos. 2 and 3.

11. The learned counsel further contended that the boundaries in the schedule 2, in sale deed in Ex.A.9 which is the earliest document ought to be taken into account, whereby the rights of the plaintiffs for the item nos.2 & 3 of the suit properties can be ascertained.

12. The learned counsel further contended that the courts below have not appreciated the documents in Ex.A.9 in proper prospective and they simply relied on the sale deed in favour of the defendants in Ex.B.5 and Ex.B.6 and also by relying on the documents in Ex.A.3 came to the conclusion that the plaintiffs are entitled only to an extent on 36 feet east to west, which is erroneous, and sought for allowing of this second appeal.

13. Per contra, the learned counsel appearing for the respondents argued that, in fact, when the plaintiffs have purchased only an extent of 36 feet in the east to west, their claim to items nos.2 & 3 of the suit properties beyond the extent of 36 feet is not sustainable. Further when the defendants have purchased the properties in Ex.B.5 and Ex.B.6, which



would amply establish the title and that the defendants are in possession of the suit property, the plaintiffs have not sought for the relief of declaration but only approached the court for bare injunction and also had miserably failed to prove their possession.

14. The learned counsel further contended that, even though the plaintiffs have sought for mandatory injunction for demolishing the building in the item 4 of the suit property, but having found that by the documents they are entitled to only 27 feet has now restricted the claim. When admittedly the documents in Ex.A.3 shows that they have purchased only an extent of 36 feet, still, the plaintiffs have made the claim for an extent beyond that portion which they have purchased and they have not filed any documents to establish their right or to prove their possession.

15. The learned counsel further contended that the defendants have categorically submitted that the suit properties belonged to one Alla Abiak and Rahman and they had been in possession and enjoyment of the properties and when the plaintiffs attempted to lay a foundation, the same was objected by them and the plaintiffs did not proceed further and thereafter the Rahman had sold the properties to the defendants on



04.07.1997 and thereby, the land beyond the portion on the west of the point G belong to the defendants and they are in possession and enjoyment.

16. The learned counsel further submitted that both the courts below have rightly appreciated the documents and arrived at a finding which does not required any interference in this second appeal.

17. Heard the learned counsel on either side and perused the materials available on record.

18. Admittedly, the plaintiffs have purchased an extent of 15 kaladi in Ex.A.2 dated 04.05.1954, and they were entitled to a further extent of 15 kaladi as their ancestral properties. From the documents, it can be seen that the plaintiffs are entitled to 30 kaladi which measures 27 feet. The claim made by them in respect of item no.4 of the suit property in XEGY of the plan is not sustainable as it is beyond 27 feet and the appellants have now restricted the claim by realizing the same. Therefore the relief in so far as item 4 of the suit property is given up.

19. Further, admittedly the plaintiffs had only purchased an extent



of 36 feet from east to west through a sale deed dated 11.07.1961 in

Ex.A.3. The plaintiffs have purchased an further extent of 3 feet through a sale deed dated 12.06.1978 from the vendor of the defendant in Ex.A.7.

But the defendants have purchased that property through sale deed dated 17.02.1994 in Ex.B.5 and sale deed dated 04.07.1997 in Ex.B.6. On the perusal of Ex.B.5 and Ex.B.6 shows that the southern side of the schedule property has been mentioned as a road. As such, from the document in Ex.B.5 and Ex.B.6 it is clear that EFGR portion and EMLK portion as referred in the plan which is a portion of item no.2 of the suit property and item no.3 of the property belongs to the defendants.

20. It is the claim of the plaintiffs that when the sale deed in Ex.B.5 and Ex.B.6 were executed by the vendor in favour of the defendants, the southern side boundary was wrongly noted and relying on the boundaries in Ex.A.9. The learned counsel for the plaintiffs argued that the sale deed pertains to the defendants vendor title deed. It is contended that in Ex.A.9 when the southern side of the property has been shown as lands belonging to the plaintiffs , it has to be taken that since the land in the southern side is the gramanatham land, it has been in the possession of the plaintiffs. This argument of the appellant did not persuade this court based on the documents filed in the suit.



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21. When admittedly, the plaintiffs have purchased only an extent of 36 feet on the east to west direction on the southern side, they cannot claim for more extent beyond what has been purchased by them. It is further argued that even when the lands were purchased by the plaintiffs in Ex.A.3, the lands on the western portion on the southern side is the gramanatham and their the vendors were in possession, and thereby the plaintiffs are also entitled to continue their right. However, the perusal of the schedule to Ex.A.3 does not show that the western side shown as the grama natham which was in possession of the plaintiff's vendor. Further, when the plaintiffs claim to have purchased an extent of 3 feet on the southern portion on the western side and when the plaintiff's claim that they have already have a right to this property, it is not made clear as to what necessitated them to purchase this 3 feet of land in Ex.A.7 as claimed by them. Further, when it is their case that they purchased further extent of 3 feet, it show that those portions of the land belong to some other persons out of which they have purchased the extent of 3 feet, and therefore they cannot make any further claim without any available documents.

22. As this is not a suit filed for title, the documents submitted by



the plaintiffs cannot be taken into account to decide their ownership. If the plaintiff had any right over the 3 feet as claimed though the document, it is for the plaintiffs to take appropriate proceedings and prove their title in respect of the portion claimed to be purchased by them.

23. In the instant suit, the plaintiffs have sought for the relief of bare injunction, but the documents filed by the plaintiffs do not pertain to the suit properties. Further, it has been found that the report and plan filed by the Advocate Commissioner Report do not aid the plaintiffs and the plaintiffs were not able to establish and prove that they are in possession of the item of the suit properties as claimed by them. Even before this court, the learned counsel for the appellant contends that even though they may not be entitled for 8 feet beyond the 36 feet, atleast they have right of possession in respect of 3 feet, which was purchased by them in Ex.A.7, cannot be entertained, as the suit filed only for bare injunction. The plaintiffs is bound to prove their possession, failing which, they are not entitled to the relief.

24. The courts below have concurrently found that the plaintiffs have not established their possession and therefore not entitled for the relief for bare injunction which is based on the materials available on



record and there is no illegality or perversity.

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25. In view of the above, substantial questions of law are answered against the appellant and in favour of the respondent. As such, the second appeal is dismissed. Consequently, connected miscellaneous petition is closed. However, there is no order as to costs.

11.03.2024

drl

Index : Yes / No

Neutral Citation : Yes / No

To

1.The Subordinate Judge, Kallakurichi.

2.The I Additional District Munsif Court, Kallakurichi.



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