



S.A.No.153 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on 14.02.2024	Judgment Pronounced on 08.03.2024
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CORAM

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.153 of 2018
and C.M.P.No.3879 of 2018

1.P.Dhandapani
2.D.Saraswathi

..Appellants

Vs.

Meenambal (Died)

1.Chinnasamy
2.Malliga
3.N.Murali
4.N.Vasantha Kumar
5.N.Gunasekaran

..Respondents

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 31.10.2017 passed in A.S.No.59 of 2014 on the file of the III Additional Subordinate Judge, Coimbatore, confirming the judgment and decree passed in O.S.No.1918 of 1992 on the file of the III Additional District Munsif, Coimbatore.



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For Appellant s : Mr.S.Parthasarathy,
Senior Counsel
for M/s. Aiyar & Dolia

For Respondents

For R1 : Not ready

For RR2 to 5 : Mr.A.S.Palanisamy
for Dr.T.Ramasamy

JUDGMENT

This Second Appeal has been filed against the judgment and decree dated 31.10.2017 passed in A.S.No.59 of 2014 on the file of the III Additional Subordinate Judge, Coimbatore, confirming the judgment and decree dated 25.03.2014 passed in O.S.No.1918 of 1992 on the file of the III Additional District Munsif, Coimbatore.

2.The unsuccessful defendant, who suffered concurrent findings before the Trial Court as well as the First Appellate Court in a suit for recovery of possession, is the appellant herein.

3.The parties are described as per their litigating status before the Trial Court.



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4.The brief material facts that are necessary for adjudicating the Second Appeal are as hereunder:

The plaintiffs claim to be owners of the suit property, having purchased the same under a Sale Deed dated 07.10.1974, from one Ranganathan. According to the plaintiffs, the suit property was purchased as a vacant site and after purchase, the plaintiffs put up construction of a house thereon. In the year 1988, the plaintiffs proposed alterations to the existing house and also obtained approval from the Panchayat in that connection. According to the plaintiffs, the 1st defendant was originally owning property adjoining the plaintiffs property, having purchased the same on 22.02.1981. The 1st defendant also put up a construction and was residing there. In the last week of May 1992, the plaintiffs demolished the rear portion of the house, in order to renovate the same. However, because of her ill-health, she could not carry out the alterations immediately. The defendants also chose to alter their property in and around August 1992 and taking that advantage of the plaintiff's absence, the defendants encroached to an extent of 5 ½ feet into the plaintiffs property, measuring 160 links, which was shown in a rough plan annexed to the plaint. As the 1st defendant refused to remove the



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unauthorized construction, the suit came to be filed, seeking removal of encroachments, in the nature of a wall and for delivery of possession of the encroached property to the plaintiffs. Pending the suit, defendants 2 and 3 have been impleaded, they having purchased the property from the 1st defendant.

5.The 2nd defendant filed a written statement which was adopted by the 3rd defendant. According to these defendants, the 1st defendant had put up construction only in his property and the defendants 2 and 3 have purchased the property from the 1st defendant on 08.03.1993 and 09.03.1993 respectively, for valid considerations and they have not encroached into the plaintiffs' property. The defendants 2 and 3 also stated that they are bonafide purchasers and their right and title to the property would not be affected in any manner and they were not obliged to remove the alleged encroachment or deliver possession of encroached property to the plaintiffs.

6.The Trial Court decreed the suit, after taking into account the report of the Advocate Commissioner in Ex.C1 to Ex.C5. Aggrieved by the judgment and decree of the suit, the defendants 2 and 3 have preferred the



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First Appeal in A.S.No.59 of 2014 and the First Appellate Court dismissed the appeal. Aggrieved by the concurrent findings of the Courts below, the defendants 2 and 3 have preferred the above Second Appeal.

7.The above Second Appeal was admitted by this Court on 19.11.2019, on the following substantial questions of law:

i) Whether the Courts below are right in decreeing the suit for mandatory injunction based on the measurement when admittedly there is a discrepancy between the measurements and the extent of land conveyed under Ex.A1 and Ex.A2?

ii) Whether the Courts below are right in decreeing the suit for mandatory injunction in the absence of prayer for declaration of title, when the defendants had specifically denied the title of the plaintiff to the extent of the land as claimed by the plaintiff?

8.I have heard Mr.S.Parthasarathy, learned Senior Counsel for Mr/s.Aiyar and Dolia, learned counsel for the appellants and Mr.A.S.Palanisamy, learned counsel for the respondents 2 to 5 and I have also gone through the pleadings, oral and documentary evidence adduced by



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the parties before the Trial Court and also the report of the Advocate Commissioner and also the judgments of the Trial Court as well as the First Appellate Court.

9.Mr.S.Parthasarathy, learned Senior Counsel for the appellants would revolve his arguments around the substantial questions of law and contend that the plaintiffs' vendor was entitled only to lesser extent under Ex.A2 but however, he has conveyed larger extent to the plaintiffs and therefore, the plaintiffs cannot be entitled to the relief of recovery of possession, especially, on the allegation that the 1st defendant encroached into the plaintiffs' property. The learned Senior Counsel would also state that the plaintiffs had not even chosen to enter into the witness box and submit himself to cross-examination.

10.The learned Senior Counsel for the appellants would also take me through the written statement and contend that the defendants have denied the title of the plaintiffs and therefore, the plaintiffs ought to have sought for declaration and having merely prayed for the relief of mandatory injunction/possession to the plaintiffs, the plaintiffs will not be entitled to



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succeed. The learned Senior Counsel would further submit that the Advocate Commissioner has inspected the property in the absence of the defendants and therefore, his report could not have been relied on by the Courts below.

11.The learned Senior Counsel placed reliance on the decision of the Hon'ble Supreme Court in *Vidhyadhar Vs. Manikrao and Another* reported in (1999) 3 SCC 573, where the Hon'ble Supreme Court has held that if a party to the suit does not appear in the witness box and state his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct.

12.The learned Senior Counsel would place reliance on the decision of this Court in *S.A.Nos.406 of 2004* where this Court held that a suit laid simpliciter for the relief of mandatory injunction, mainly contending that the defendants had encroached into the plaintiff's property as claimed in the plaint, was not maintainable, with a prayer for declaration.

13.In *S.A.No.387 of 2017*, this Court has relied on Order VII Rule 3 of the Code of Civil Procedure, regarding the description of the property



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sufficiently and on finding, on the facts of the case, that the plaint was absolutely silent about the nature of the illegal construction and without proper identification, the suit has to be dismissed.

14.The learned Senior Counsel would lastly rely on the decision of the Hon'ble Supreme Court in *Muddasani Venkata Narsaiah Vs. Muddasani Sarojana* reported in **(2016) 12 SCC 288**, where the Hon'ble Supreme Court has held that when there is serious cloud raised by the defendant over the title of the plaintiff, then the plaintiff ought to seek for the relief of declaration. The learned Senior Counsel would therefore pray for the Second Appeal being allowed.

15.Per contra, Mr.A.S.Palanisamy, learned counsel for the respondents 2 to 5 would submit that the Courts below have concurrently found the plaintiffs to be entitled to the suit property and moreover, relied on the Advocate Commissioner's report noticing encroachment to an extent of 5 feet into the plaintiff's property. He would also state that the defendants never filed any objections to the Advocate Commissioner's report. Further, according to the respondents, even in the written statement they did not raise any serious cloud on the plaintiff's title to the suit property. He would also



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invite my attention to Ex.A1 and Ex.A2, where linear measurements set out in both the documents are one and the same, excepting for the fact that in one of the Sale Deed, it is mentioned as 3 cents and 225 sq.ft whereas in other Sale Deed, it is mentioned as 3 $\frac{3}{4}$ th cents. Therefore, he would contend that there is no discrepancy whatsoever in the extent and he would also place reliance on Ex.D4, Assignment whereunder, the defendant was assigned an extent of 1 cent in G.O.No.658 dated 11.07.1997.

16.The learned counsel for the respondents would also invite my attention to the revision in C.R.P.(PD).No.882 of 2008 at the instance of the plaintiffs, challenging the Advocate Commissioner's report and state that the revision also was dismissed and therefore, the challenge to the Advocate Commissioner's report had become final and there was absolutely no irregularity and illegality in the Courts below placing reliance on the Advocate Commissioner's report. He would therefore pray for the Second Appeal being dismissed, no interference being warranted in the well reasoned concurrent findings of the Courts below.

17.In reply, the learned Senior Counsel for the appellants would invite



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my attention to the assignment order, in pursuance of the G.O.No.658 dated 11.07.1997, where the admeasurements of the property have been given. It is seen from the measurements in the said assignment that 1 cent has been assigned to the defendant and it is comprised in S.No.211/13 and it admeasures on the north 18 ½ feet and south 5 feet and on the west 37 feet and on the east 39 feet. The learned Senior Counsel would point out the survey number mentioned in the said assignment, namely S.No.211/13, contrary to the plaintiffs' case whereas the plaintiffs purchase was in Old.S.No.39/4 and 43/1 and the plaintiffs had failed to establish any correlation between the S.No.211/13 mentioned in the assignment order.

18.Having heard the arguments advanced by the learned Senior Counsel for the appellants and the learned counsel for the respondents and also the ratio laid down by the Hon'ble Supreme Court with regard to drawing adverse inference for the plaintiffs not entering into the witness box and necessity for seeking relief of declaration and not suing for a mere mandatory injunction simpliciter, I proceed to adjudicate the substantial questions of law.

19. It is the admitted case of both the plaintiffs and the defendants that



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they are neighbours and their properties are adjoining each other's property.

The only contentious issue is that whether the defendants have encroached to the extent of 5 feet on the southern side of the plaintiffs' property measuring 160 links.

20.Before the Trial Court, an Advocate Commissioner has been appointed and he has mentioned that he has taken the assistance of Taluk Surveyor and the respondents/defendants refused to receive notice and they were not present at the time of inspection of the suit property. The Advocate Commissioner has found, on measuring both the plaintiffs' property as well as the defendants property and rendered a categorical finding that the defendants have encroached an extent of 5 feet as against 5 ½ feet alleged by the plaintiff on the southern side and the encroached area was measuring 85 sq.ft. The Taluk Surveyor had also filed a report along with the plans showing the encroached area and the same have all been marked as Ex.C1 to Ex.C5.

21.In both Ex.A1 and Ex.A2, Sale Deeds in favour of the plaintiff's vendor and the plaintiffs the admeasurements are clearly given and the same



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are extracted hereunder:

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“East-West 36 ½ feet on the northern side and East-West on the southern 54 ½ feet and North-South on the eastern side 35 ½ feet and North-South on the western side 36 ½ feet”.

22.The Advocate Commissioner has measured the property of the plaintiffs as well as the defendants and rendered a categorical finding that the plaintiffs southern boundary measured only 49 ½ feet and 5 feet had been encroached by the defendants into the plaintiffs' property and was also able to see that on the southern side, the defendant is entitled only to 46 ½ feet which is available and only if the 5 feet annexed by the defendants is included, it exceeds the defendants' entitlement by 5 feet on the southern side. The trespassed portion is a triangular portion, as set out by the Advocate Commissioner in his sketch and as already indicated, the Advocate Commissioner has taken the assistance of the Taluk Surveyor and therefore, the Courts below have rightly relied on the said Advocate Commissioner's report in coming to a conclusion that the claim of the plaintiffs regarding encroachment of 5 feet on the southern side was proved and also established.

23.In fact, as rightly contended by the learned counsel for the



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respondents, though the appointment of the Advocate Commissioner was challenged by way of revision and the same was also dismissed and therefore, atleast the defendants ought to have filed their objections to the Advocate Commissioner's report. Unfortunately, they have even refused to receive notice and participate during the inspection process. Therefore, I do not find any illegality or infirmity in the Courts below relying upon the Advocate Commissioner's report and finding that the claim of the plaintiffs was established by the report and also plans filed by the Advocate Commissioner along with the Taluk Surveyor's plan.

24. With regard to the plaintiffs not entering into the witness box and adverse inference to be drawn as claimed by the learned Senior Counsel for the appellants, the plaintiff was aged 75 years even when she instituted the suit and during trial, her grandson has been examined on behalf of the plaintiff. In a suit of this nature, where both the plaintiff and the defendant admit their respective titles and it boiled down to whether the defendants had encroached into the plaintiffs' property or not, I do not think that it is necessary for the plaintiff to enter into the witness box and ultimately, the Courts have already found from the documents and report of the Advocate



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Commissioner that the defendant has encroached an extent of 5 feet on the southern side. Thus, the plaintiff has been able to substantiate her allegations in the plaint through her grandson, who was examined as P.W.1, which has been corroborated by the Advocate Commissioner's findings, it cannot be said that adverse inference had to be drawn against the plaintiff and the suit was liable to be dismissed.

25. With regard to next contention raised by the learned Senior Counsel for the appellants regarding the relief of declaration being not prayed and the suit for mandatory injunction/possession simpliciter being filed, I find from the written statement that there is no serious cloud to the title of the plaintiff. Though the learned Senior Counsel would refer the written statement filed by the 2nd defendant to fortify his contention that there is a serious cloud on title, from the reading of the written statement, I do not find any such cloud on title of the plaintiff being raised by the defendants. In fact, in paragraph No.7, the 2nd defendant has only stated, denying the allegations in the plaint that the 1st defendant had no right, title or interest and therefore, the defendants 2 and 3 have purchased the property from the 1st defendant cannot get any title, right or interest over the property which includes the encroached portion. Thus, nowhere in the written statement, the plaintiffs' right to the suit property is



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seriously challenged.

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26.I also find that the plaint contains a schedule, clearly setting out the boundaries and admeasurements and also marking the encroached portion as A B C. The plaintiff has also filed an approved plan and House Tax receipts, Electricity Bills to show his absolute possession and enjoyment of the suit property.

27.In the light of these documents, I do not find Ex.D4 throwing any light on the fact in dispute. No doubt, the defendants have been allotted 1 cent that has been assigned by the Government. However, the measurements in Ex.D4 do not in any way affect the measurements in the Sale Deed, Ex.A1, under which the plaintiff purchased the suit property. The said 1 cent assigned by the Government, under Ex.B4 was over and above the entitlement of the plaintiff and not situate on the southern side, as projected by the learned Senior Counsel for the appellants. I find that Ex.D4 is in no way relevant to decide the issue of encroachment by the 1st defendant in the instant case.

28.Both the Courts have analyzed the oral and documentary evidence



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and also took note of the findings of the Advocate Commissioner vide his report, along with the plans prepared by the Taluk Surveyor and came to the conclusion that the defendants had encroached to an extent of 5 feet on the southern side, in all, an extent of 85 sq.ft. I do not find the Courts below having committed any material irregularity or illegality in arriving at the said findings. Their decision is well merited and based on oral and documentary evidence adduced by the parties before the Court and the same do not warrant interference under Section 100 of CPC. In fine, both the substantial questions of law are answered against the appellant.

29.In the result, the Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

08.03.2024

Index : Yes/No
Speaking Order/Non-Speaking Order
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P.B.BALAJI, J.

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To

- 1.The III Additional Subordinate Judge, Coimbatore.
- 2.The III Additional District Munsif, Coimbatore.
- 3.The Section Officer, V.R.Section, High Court, Madras.

Pre-delivery judgment made in

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