



S.A.No.625 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.03.2024

Pronounced on : 07.06.2024

CORAM : JUSTICE N.SESHASAYEE

S.A.No.625 of 2019
and CMP.No.14081 of 2019

1.M.Joseph
2.M.Porselvi

.. Appellants / Appellants / Defendants

Vs

M.Sampath

.. Respondent / Respondent / Plaintiff

Prayer : Second Appeal filed under Section 100 of Code of Civil Procedure, 1908 praying to set aside the judgment and decree made in A.S.No.29 of 2017 on the file of the Principal Subordinate Judge, Vellore, Vellore District, dated 28.02.2019 confirming the judgment and decree made in O.S.No.315 of 2012 on the file of Principal District Munsif, Vellore, dated 21.04.2017.

For Appellants : Mr.KA.Ravindran

For Respondent : Mr.C.Sivanesan



S.A.No.625 of 2019

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JUDGMENT

The defendants who successively had lost to defend a suit for permanent injunction seeking to restrain them from putting up a compound wall in a common pathway, and also mandatory injunction to remove the construction partially put up in the 'B' schedule property, are the appellants herein. Parties are referred to by their rank before the trial Court.

2. The facts are as follows :

a) The plaint 'A' schedule property is a vacant site measuring 2,184 sq.ft. in Survey No.517/2B of Kizhachur Village in Vellore District. This plot was part of a larger extent, and it originally belonged to the first defendant. While so, on 19.06.1995, vide Ext.A1 sale deed, he sold the same to the plaintiff. Thereafter, the plaintiff has been in possession and peaceful enjoyment of the property by constructing a house. In the plaint, a 12 ft. wide pathway was earmarked, and this pathway is common to both the plaintiff and the first defendant.

b) While so, vide Ext.B6 = Ext.A5 settlement deed dated 22.05.2008,



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S.A.No.625 of 2019

the first defendant had settled his property which is situated to the south of the plaintiff's 'A' schedule property to his daughter, the second defendant.

- c) The second defendant would now construct a house in her portion, and in the process she tried to construct a compound wall by encroaching upto half the width of the common pathway, to be precise an extent of 6 ft x 52 ft.

It is in this circumstances, the suit was laid.

3. In their written statement the defendants contended that the first defendant owned about 1.80 cents in Survey No.517/2, and he had parcelled it into various plots and sold them to many, including the plaintiff herein. While so, on 22.05.008, vide Ext.B6, the first defendant had settled a plot measuring 4,200 sq.ft., measuring 42 ft east-west and 100 ft. north-south to the second defendant. And the plot sold to the plaintiff under Ext.A1 measures 42 ft. east-west and 52 ft. north-south. However, the plaintiff had left 5 ft. on the west, and encroached an extent of 5 ft. on the east and accordingly, constructed a house in his property. Thus, the plaintiff had encroached the first defendant's property which was left for pathway.



S.A.No.625 of 2019

WEB COPY

4.1 The dispute went to trial, before which, the plaintiff had examined himself as P.W.1, and examined one Kalaimani as P.W.2. For the defendants, the first defendant examined himself as D.W.1. Besides, he had examined four other witnesses as D.W.2 to D.W.5, of whom, D.W.3 is the Court appointed Advocate-Commissioner. While the plaintiff had produced Ext.A1 to Ext.A5, the defendants have produced Ext.B1 to Ext.B12. The Commissioner's report and plan was marked as Ext.C1 and Ext.C2, and the Surveyor's plan was marked as Ext.C3.

4.2 The Commissioner's report shows that the width of the common passage that runs between the property of the first defendant and the plaintiff was 7 ft., whereas in terms of Ext.A1 it ought to be 12 ft. The Commissioner had also noted that while the north-south length of the second defendant's property is stated to be 100 ft., on lie there was only 95 ft. In the backdrop of this evidence, the trial Court has held that the first defendant had clandestinely executed Ext.B6, overlooking the right which the plaintiff had obtained over 12 ft. pathway even few years earlier. And before the trial Court, it was contended on behalf of the defendant, that the



S.A.No.625 of 2019

plaintiff had access from the north to the street, but this was rejected by the trial Court and ultimately, the trial Court proceeded to decree the suit.

5. Aggrieved by the same, the defendants preferred A.S.No.29/2017 before the Principal Sub Court, Vellore. The first Appellate Court has also arrived at the same conclusion as the trial Court, and has held that the first defendant has deliberately suppressed the 12 ft. pathway in Ext.B6 = Ext.A5 settlement deed which he had executed in favour of the second defendant, and acted on the Commissioner's report to deny remedy to the defendants, and directed removal of construction. This decree of first appellate Court is now under challenge in the present second appeal.

6. The second appeal is admitted on the following substantial questions of law :

- a) *Whether the Courts below have right in decreeing the suit as prayed for when the plaintiff / respondent has approached the Court with unclean hands and also against the principles that the plaintiff who prays for equitable relief has to do equity?*
- b) *When the lower Appellate Courts have given a categorical finding that the respondent/plaintiff has also encroached the pathway, whether the Courts below are right in decreeing the*



S.A.No.625 of 2019

suit as prayed for?

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- c) *Whether the Courts below are right in decreeing the suit to remove the encroachment of the appellants when the plaintiff himself is found to be an encroacher?*
- d) *Having not the Courts below committed a grave error in not non-suiting the plaintiff by drawing adverse inference against him for the act of encroachment of 5 feet of land on both eastern and western sides of his plot?*
- e) *When the first appellant, who is the promoter of the layout, has every right to change the alignment of the pathway before gifting it to the panchayat, whether the Courts below are right in decreeing the suit to remove the alleged encroachment in 'B' schedule property which portion was shown on western boundary under Ex.A5, a settlement deed executed by the first appellant in favour of the second appellant?*

7. Heard both sides. The counsel on either side took this Court meticulously through the facts. The issue is whether the defendants have encroached or occupied any part of the 12 ft. pathway which admittedly finds place in Ext.A1, but not in Ext.B6 = Ext.A5 settlement deed in favour of the second defendant. The Commission was taken out at the instance of the defendants, but instead of cross-examining the Commissioner, the first defendant chose to examine the Commissioner on his side as D.W.3, a



S.A.No.625 of 2019

procedure contrary to law. Still, it no way vitiates the trial. Turning to the merit of the case, the appellants/defendants require this Court to go for a meticulous analysis of facts in the second appellate stage when he insisted that the encroachment by plaintiff into defendants' property as noted by the Commissioner should not be overlooked.

8. This Court cannot interfere with the concurrent findings on facts, unless it is demonstrated before that the findings of the Courts below, more particularly that of the first appellate Court is tainted with perversity. The appellants' efforts however, fell short of establishing perversity in the approach of the first appellate court. So far as defendants' argument vis-a-vis the encroachment made by the plaintiff into the former's property is concerned, the same is alien to the cause of action of the present suit, and the defendants may have to work it out in a separate suit, if they are desirous, but subject to the provision of law.

9. In conclusion, this Court does not find any merit, and hence, the appeal is dismissed. The judgment and decree dated 28.02.2019 made in A.S.No.29 of 2017 on the file of the Principal Subordinate Judge, Vellore, confirming



S.A.No.625 of 2019

the judgment and decree dated 21.04.2017 made in O.S.No.315 of 2012 on the file of Principal District Munsif, Vellore, is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

07.06.2024

Index : Yes / No
Internet : Yes / No
Speaking order / Non-speaking order
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S.A.No.625 of 2019

To:

- 1.The Principal Subordinate Judge
Vellore, Vellore District.
- 2.The Principal District Munsif
Vellore, Vellore District.
- 3.The Section Officer
VR Section, High Court, Madras.



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S.A.No.625 of 2019

N.SESHASAYEE.J.,

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Pre-delivery Judgment in
S.A.No.625 of 2019

07.06.2024