



S.A.(MD) No.1164 of 2008

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.06.2024

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A. (MD) No.1164 of 2008

N.Sivasamy

... Appellant

-VS-

1.Soliammal

2.Gunasekaran

... Respondents

PRAYER: Appeal against the judgment and decree, dated 31.03.2008, passed in A.S.No.5 of 2008 on the file of Sub-Court, Karur, reversing the judgment and decree, dated 16.08.2007, passed in O.S.No.418 of 2003 on the file of Additional District Munsif Court, Karur.

For Appellant : Mr.K.Govindarajan

For Respondents : Ms.V.T.Harshini,
for Mr.D.Nallathambi



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JUDGMENT

The plaintiff in the suit is the appellant. The suit was filed, seeking injunction in respect of the suit A-Schedule property and mandatory injunction to remove the encroachment in the suit B-Schedule property. The suit was decreed by the trial Court. On appeal filed by the defendants, the first appellate Court reversed the findings of the trial Court and dismissed the suit. Aggrieved by the same, the plaintiff has come by way of this Second Appeal.

2. The plaintiff and the defendants are close relatives. The plaintiff is the son of second wife of Nallusamy. The first defendant is the first wife of Nallusamy and the second defendant is the son of the first defendant. The suit property was allotted to the share of the plaintiff in a compromise decree passed in A.S.No.319 of 1978 on the file of this Court. It was claimed by the plaintiff that the defendants were also allotted with the properties adjacent to the suit properties in the said decree. When the plaintiff had been in possession and enjoyment of the properties allotted to him under the compromise decree, the defendants made an attempt to interfere with his possession. Therefore, the plaintiff was constrained to file a suit for bare



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injunction. Pending suit, the defendants made encroachments in the suit items 1 and 2 of the suit A-Schedule property. Therefore, the plaint was amended, seeking mandatory injunction in respect of the encroached portion. The encroached portion is shown as the suit B-Schedule property.

3. The defendants filed a written statement and resisted the suit on the ground that both the plaintiff and the defendants have been in possession and enjoyment of the properties allotted to them under the compromise decree with specific four boundaries. It was claimed by the defendants that the plaintiff had shown the properties allotted to the defendants also as his property and filed the present suit with wrong description. Therefore, the defendants sought for dismissal of the suit.

4. Before the trial Court, the plaintiff was examined as P.W.1 and Firka Surveyor was examined as P.W.2. The Advocate Commissioner, who measured the property with the help of a Surveyor, was examined as P.W.3. On behalf of the plaintiff, 4 documents were marked as Exs.A-1 to A-4. The first defendant was examined as D.W.1 and the Patta Passbook in the name of the first defendant was marked as Ex.B-1. Advocate Commissioner's Report and Surveyor's Plan were marked as Exs.C-1 and 2.



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5. The trial Court, on appreciation of the oral and documentary evidence available on record, came to the conclusion that the defendants have encroached a portion of the properties in items 1 and 2 of the suit A-Schedule and hence decreed the suit as prayed for. Aggrieved by the same, the defendants preferred an appeal in A.S.No.5 of 2008. The first appellate Court reversed the findings of the trial Court and allowed the appeal. As a necessary consequence, the suit was dismissed. Aggrieved by the same, the plaintiff has come by way of this Second Appeal.

6. The learned counsel for the appellant, by taking this Court to the Advocate Commissioner's Report and the Surveyor's Plan, marked as Exs.C-1 and C-2, and the compromise decree between the parties under Ex.A-3, submitted that the plan submitted by the Surveyor would establish encroachment of the portion of items 1 and 2 of the suit A-Schedule property by the defendants and the said vital documents were overlooked by the first appellate Court.

7. On the basis of the arguments advanced by the learned counsel for the appellant, the following substantial questions of law are formulated for consideration in the Second Appeal :



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(a) Whether the judgment and decree passed by the first appellate Court is vitiated by mis-reading of Exs.C-1 and C-2 ?

(b) Whether the reasoning assigned by the first appellate Court for discarding Ex.C-2 is justified in law ?

8. Heard the learned counsel for the respondents on the above substantial questions of law.

9. The learned counsel appearing for the respondents submitted that there is no signature of the Advocate Commissioner in Ex.C-2 Plan and the directions were also not mentioned in Ex.C-2 and therefore, the first appellate Court rightly rejected Exs.C-1 and C-2 as defective and came to the conclusion that the plaintiff failed to establish the encroachment made by the defendants.

10. It is not in dispute that the plaintiff and the defendants were allotted with specific properties under Ex.A-3, compromise decree, passed by this Court in A.S.No.319 of 1978. A perusal of Ex.A-3 would suggest that the plaintiff -Sivasamy was allotted with properties included in E-Schedule to Ex.A-3. The first defendant – Soliammal was allotted with properties included in C-Schedule and the second defendant – Gunasekaran was allotted with the



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properties included in D-Schedule. The suit items 1,2 and 3 in A-Schedule were allotted to the plaintiff under E-Schedule to Ex.A-3.

11. It is the case of the plaintiff that the defendants, who were allotted with the adjacent properties in the compromise decree, made an attempt to interfere with his possession and later on, pending suit, made an encroachment into a portion of the suit A-Schedule property.

12. In order to find out the position on ground, the trial Court appointed an Advocate Commissioner. He measured the properties with the help of a Surveyor and filed a report, Ex.C-1. The Surveyor's Plan has been marked as Ex.C-2. A perusal of the same would suggest that the properties allotted to the plaintiff were shown as P1,P2 and P3 in pink, dark green, and black washed portions. The properties allotted to the share of the defendants were shown in violet, light green, and dark blue washed portions. The encroachment made by the defendants in suit item 1 is shown as squares with black stripes in pink colour washed portions. Likewise, the encroached portion in suit item 2 is shown as orange coloured portion. The Surveyor's Report was rejected by the first appellate Court on the ground that it did not contain the signature of the Advocate Commissioner. The Advocate Commissioner visited



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the suit properties and measured the same with the help of a Surveyor and Surveyor's Plan has been marked as Ex.C-2. The Advocate Commissioner has filed a separate report, based on the Surveyor's Plan. Hence, there is no necessity for the Advocate Commissioner to affix his signature in the Plan, prepared by the Surveyor. Ex.C-2 Plan has been signed by the Firka Surveyor under his seal. Therefore, the reasoning given by the first appellate Court that the Surveyor's Plan has not been signed by the Advocate Commissioner is not acceptable to this Court. Further, if directions are not specifically mentioned in the Plan, top portion of the Plan shall be taken as North. As such, non-mentioning of the directions in the Surveyor's Plan cannot be put against the same. More importantly, the Advocate Commissioner filed a report along with the Surveyor's Plan, mentioning the encroached portions in suit items 1 and 2 of the suit A-Schedule property. The defendants have failed to file any objection to the Advocate Commissioner's Report and the Surveyor's Plan. When D.W1 was cross-examined with regard to this aspect, she answered that she had not made any encroachment into the property of the plaintiff and therefore, there was no need to file objection. If the Surveyor's Plan is defective in any material aspect, the defendants should have filed an objection, mentioning the same. Had it been done, the plaintiff would have got an opportunity to seek re-issue of warrant to the same Surveyor or a different



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Surveyor to measure the property again. Having failed to make any objection to the Surveyor's Plan before the trial Court, it is not open for the defendants to say that the encroached portions, mentioned by the Surveyor, were not correct and the measurements were not properly made. Therefore, the reasoning assigned by the first appellate Court for discarding the Surveyor's Plan is not legally sustainable. Thus, the first appellate Court committed a serious error in ignoring Exs.C-1 and C-2, Advocate Commissioner's Report and Surveyor's Plan, while deciding the main issue with regard to the encroachments made by the defendants. If the Surveyor's Plan is taken into consideration, the plea made by the plaintiff with regard to the encroachment of the suit B-Schedule property by the defendants stands proved. Therefore, the judgment and the decree passed by the first appellate Court are liable to be set aside and the judgment and the decree passed by the trial Court deserve to be restored.

13. In view of the fact that the defendants made encroachments into items 1 and 2 of the suit A-Schedule properties, the cause of action pleaded by the plaintiff with regard to the interference with his possession over the suit A-Schedule properties also gets probabilized. Therefore, the plaintiff is entitled to permanent injunction in respect of the suit A-Schedule properties.



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14. In view of the discussions made above, both the questions of law formulated for consideration are answered in favour of the appellant and against the respondents.

15. The Second Appeal is allowed, by setting aside the judgment and the decree passed by the first appellate Court and restoring the judgment and the decree passed by the trial Court. No costs.

19.06.2024

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

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To:

- 1.Subordinate Judge,
Karur.
- 2.Additional District Munsif,
Karur.
- 3.Section Officer,
V.R. Section,
Madurai Bench of Madras High Court.



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