



S.A.(MD)No.455 of 2005

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 31.07.2024

CORAM

THE HONOURABLE MR.JUSTICE **S.SOUNTHAR**

S.A.(MD)No.455 of 2005

1.N.Abdul Kareem (Died)
2.A.Sikkandar Banu
3.A.Asmitha Banu
4.N.A.Apsara Banu
5.N.A.Sultan Ali
6.N.A.Asina Rani

...Appellants

-Vs-

M.Shajahan

... Respondent

(Appellants 2 to 6 were brought on record as legal heirs of the deceased sole appellant vide order of this Court, dated 16.12.2020 in C.M.P.(MD)Nos.5367 and 5368 of 2020)

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the decree and judgment, dated 13.09.2004 rendered in A.S.No.194 of 2003 on the file of the First Additional Subordinate Judge, Madurai, reversing the decree and the judgment, dated 27.06.2002 rendered in O.S.No.66 of 1997 on the file of the District Munsif of Melur.

For Appellants :Ms.P.Jessi Jeeva Priya
For Respondent :Mr.S.Vellachamy



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JUDGMENT

The plaintiff in the suit is the appellant. The suit is for declaration of title, recovery of possession and mandatory injunction. The suit was decreed by the trial Court. On appeal filed by the defendant, the first appellate Court allowed the appeal and the suit was dismissed. Aggrieved by the same, the plaintiff has come by way of this Second Appeal.

2. According to the plaintiff, he purchased the suit property from one Muthu Kumar under Ex-A1, dated 30.10.1995. The said Muthu Kumar got the suit property under a gift deed executed by his father, Vellai Chamy, dated 06.05.1983, under Ex-A2. The said Vellai Chamy got the property from one Mohamed Adam Rawthar under a sale deed, dated 23.04.1966 marked as Ex-A5. It is the case of the plaintiff that he has been in possession and enjoyment of the suit property situated in R.S.No.235/5A from the date of purchase and the defendant, who is the owner of the property situated on the north in S.No.235/4, encroached the portion of plaintiff's portion on the northern side and put up construction. In spite of registered notice issued by



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the plaintiff calling upon the defendant to remove the offending constructions in suit S.No.235/5A, the defendant has not taken any steps to remove the encroachment and he came up with a reply containing false allegations. In these circumstances, the plaintiff was constrained to file a suit for declaration, recovery of possession and permanent injunction.

3.The suit was resisted by the defendant by denying the right of the plaintiff over the entire extent in S.No.235/5A. It was the case of the defendant that he purchased the suit property from one Mohamed Masthan Rawthar under Ex-B1, dated 19.01.1957. The said Mohamed Masthan Rawthar in turn purchased the suit property from one Mohamed Mydeen Pulavar under a registered sale deed, dated 15.07.1935 marked as Ex-B2. It was also further averred that Mohamed Mydeen Pulavar got the suit property in a suit for partition decree in O.S.No.496 of 1926 and the final decree passed in the partition suit was marked as Ex-B5, dated 22.08.1930. It was asserted by the defendant that he and his predecessor-in-interest had been in possession and enjoyment of the suit property from the year 1930 and after getting approval from the local authority in the year 1988, he had put up



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construction. It was also claimed that there was a building in the suit property even prior to the year 1935 and the allegations of encroachment by the defendant was specifically denied by him. The defendant also denied the claim of the plaintiff as if he and his predecessor-in-interest continuously possessed the said property till the alleged encroachment. On these pleadings, the defendant sought for dismissal of the suit.

4.Before the trial Court, the plaintiff was examined as PW-1 and three other witnesses were examined on his side as PW-2 to PW-4. On behalf of the defendant, the defendant was examined as DW-1 and 13 documents were marked as Ex-B1 to Ex-B13 and the Advocate Commissioner's report and plan along with Tahsildar plan have been marked as Ex-C1 to Ex-C3.

5.The trial Court on appreciation of oral and documentary evidence available on record came to the conclusion that the plaintiff was entitled to the relief, as prayed for and decreed the suit. Aggrieved by the same, the defendant preferred an appeal in A.S.No.194 of 2003 on the file of the first Additional Subordinate Court, Madurai. The first appellate Court reversed



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the findings of the trial Court and dismissed the suit. Aggrieved by the same, the plaintiff has come up with this Second Appeal.

6.At the time of admission, this Court formulated the following substantial questions of law, by order, dated 25.05.2005:-

“1.In a suit relating to the identity of the properties belonging to the plaintiff and the defendant, is not the report of the Advocate Commissioner be relevant and essential for the purpose of identifying the property in dispute?

2.Whether a suit for possession after declaration and for removal of the encroachments made by the defendant would fall under the residuary Article 113 of Limitation Act?

3.Whether a suit for declaration of title and for possession filed within 12 years from the date of dispossession is barred by limitation under Article 113 of Limitation Act?”

7.The learned Counsel appearing for the appellants vehemently contended that the plaintiff sought for declaration of title and recovery of possession and hence, the limitation for the suit is twelve years as per Article 65 of the Limitation Act and the first appellate Court committed a serious error in non-suiting the plaintiff on the ground that the suit was not filed within three years from the date of alleged encroachment by the defendant. The learned Counsel by taking this Court to Ex-B7 final decree passed in



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O.S.No.496 of 1926 submitted that the defendant's predecessor-in-interest was allotted a share only in sub division No.5b and hence, the defendant is not entitled to claim any right over the property in sub division No.5a.

8.The learned Counsel for the respondent by taking this Court to the evidence available on record, particularly, the Advocate Commissioner's report and plan submitted that the plaintiff miserably failed to establish the alleged encroachment over the suit property and hence, the first appellate Court rightly came to the conclusion that the plaintiff was not entitled to any relief as prayed for.

Answer to substantial questions of law 2 and 3:

9.The first appellate Court came to the conclusion that there is no concrete evidence available on record to establish the actual date of encroachment by the defendant. By relying on Ex-B12, plan approval by the local authority, the first appellate Court held that the construction by the defendant had been made in the year 1990 and hence, the plaintiff failed to file a suit within a limitation period of three years and hence, the first



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appellate Court held that the suit is barred by limitation. The said finding of the first appellate Court is not correct in view of the fact that the plaintiff had prayed for declaration of title and recovery of possession. It is not a suit for relief of mandatory injunction alone.

10.The main relief sought for in the suit is declaration of title and recovery of possession and the relief of mandatory injunction to remove the encroached construction is only an ancillary relief to the main relief sought for. When the suit is for a relief of recovery of possession based on title, the proper Article to be applied is Article 65 of the Limitation Act and therefore, the time limit for filing the suit is twelve years from the date on which, the possession of the defendant turned hostile to the interest of the plaintiff. In the case on hand, the first appellate Court factually found that the construction was put up by the defendant in the year 1990 after obtaining approval earlier in the year 1989. The suit has been filed in the year 1995 well within the period of twelve years and therefore, the finding rendered by the first appellate Court with regard to the limitation is liable to be set aside and the substantial questions of law 2 and 3 are answered in favour of the



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appellants and against the respondent.

Answer to substantial question of law No.1:-

11.The appellant/plaintiff claimed title over the suit property under Ex-A1 to Ex-A5. The earliest document produced by the plaintiff is of the year 1966. The defendant claimed title over the suit property under Ex-B1 to Ex-B5. The earliest document filed by the defendant is Ex-B5, the final decree passed in O.S.No.496 of 1926. A perusal of the final decree passed in O.S.No.496 of 1926 and the plan, which were marked as Ex-B5 to Ex-B7, would suggest that the defendant's predecessor-in-interest, namely, Mohammed Mydeen Pulavar, was allotted one cent equivalent to 1200 square links in S.No.235/5a. In the subsequent document under Ex-B2, dated 15.07.1935, the said Mohamed Mydeen Pulvar sold the property, he got under Ex-B5 to Mohamed Masthan.

12.In Ex-B2, the survey number was mentioned as 235/5. The learned Counsel appearing for the appellants by referring to Ex-B7 plan submitted that the defendant's predecessor-in-interest was allotted only one cent in



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S.No.235/5b and therefore, the defendant is not entitled to claim any right over S.No.235/5a. A perusal of Ex-B7 plan would suggest that the defendant's predecessor-in-interest, Mohamed Mydeen Pulavar was allotted one cent in the north-western portion of S.No.235/5. The portion allotted to the defendant's predecessor-in-interest was denoted as 5a and the rest of the portion in S.No.235/5 was mentioned as 5b. It is a plan prepared by the Advocate Commissioner to mention the property allotted to the predecessor of the defendant. If it is the sub division number in the revenue records, it should have been mentioned as 5A and 5B. Therefore, the plaintiff is not entitled to take advantage of the fact that 5b mentioned in Ex-B7 would suggest that the defendant's predecessor-in-interest was allotted a portion of the property only in 5b. An examination of Ex-B5 to Ex-B7 would suggest that the defendant's predecessor-in-interest Mohammed Mydeen Pulavar was allotted one cent on the north-western portion of S.No.235/5.

13.The Advocate Commissioner appointed in the present suit, in his plan under Ex-C3 mentioned that the defendant has encroached a small portion on the north-western side of S.No.235/5 and the said encroached



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portion is shown as red washed portion in the Advocate Commissioner's plan. When the defendant's predecessor-in-interest was allotted one cent on the north-western portion of S.No.235/5, we are not in a position to come to a definite conclusion that the red washed portion shown by the Advocate Commissioner would suggest the encroachment on the property of the plaintiff. The Advocate Commissioner has not taken any efforts to find out the actual portion delivered to the defendant's predecessor-in-interest on the north-eastern side of S.No.235/5 and find out the actual encroachment made by the defendant. The Advocate Commissioner's report and plan marked as Ex-C2 and Ex-C3 are not useful to come a conclusion that the defendant has not encroached a portion of the property of the plaintiff. Accordingly, the substantial question of law No.1 is answered against the appellants and in favour of the respondent.

14.The learned Counsel appearing for the appellants submitted that the defendant's predecessor-in-interest was allotted with only one cent on the north-western corner of S.No.235/5 and hence, the plaintiff is entitled to declaration in respect of the rest of the portion. In the Advocate



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Commissioner's plan under Ex-C3, the property in possession of the defendant has been shown as red washed portion and the property in possession of the plaintiff was shown as green washed portion. The defendant has no claim in respect of the green washed portion. Therefore, the first appellate Court ought not to have dismissed the suit in respect of the entire portion in S.No.235/5.

15.As the plaintiff failed to establish the actual encroachment made by the defendant, he is not entitled to the relief of recovery of possession and mandatory injunction. As far as the declaration is concerned, the red washed portion is found to be in possession of the defendant. As far as the remaining green washed portion is concerned, the defendant has no claim over the same. Therefore, there may not be any impediment for granting a declarative relief in respect of the green washed portion in Ex-C3. The judgment and decree passed by the first appellate Court is, accordingly, modified.

16.In view of the answer to the substantial questions of law No.1 and above discussion, the Second Appeal is partly allowed in respect of green



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washed portion in Ex-C3, the Advocate Commissioner's plan by granting the relief of declaration. In all other respects, the judgment and decree of the first appellate Court is confirmed. No costs.

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

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To

- 1.The I Additional Subordinate Judge, Madurai.
- 2.The District Munsif, Melur.
- 3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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