



S.A.No.1945 of 20

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : **23.10.2024**

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THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A.No.1945 of 2003

M.R.M.Mohammed Hanifa (Died)	... Plaintiff/Respondent
2.Hajji Fathima	Appellant
3.Asi Fathima	
4.Mohideen Abdul Kadar	

(Appellants 2 to 4 and third respondent
are brought on record as LR's of the
deceased Sole appellant vide Court
order dated 01.02.2024 made in
C.M.P(MD)No.3234, 3236 and 3237 of 2023)

Vs.

1.K.Arumugam	
2.A.Pichammal (Died)	...Defendants/Appellants
3.Ali Fathima	Respondents
4.Mariappan	
5.Mokkammal	
6.Murugan	
7.Subramanian	

(Respondents 4 to 7 are brought
on record as LR's of the deceased
2nd respondent vide Court order
dated 01.02.2024 made in
C.M.P(MD)No.5609 of 2023)



S.A.No.1945 of 20

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 16.10.2001 made in A.S.No.50 of 2001, on the file of the Additional Sub-Court, Tenkasi reversing the judgment and decree dated 20.04.2001 made in O.S.No. 250 of 1996, on the file of the Additional District Munsif Court, Tenkasi.

For Appellants : Mr.P.Thirumahilmaran
For Respondents : Mr.V.Janaki Devi
for M/s.N.Sylappa Kalyan

JUDGMENT

The appellant, who is the plaintiff in the suit, filed the present appeal against the judgment and decree, dated 16.10.2001 made in A.S.No.50 of 2001, on the file of the Additional Sub-Court, Tenkasi reversing the judgment and decree, dated 20.04.2001 made in O.S.No. 250 of 1996, on the file of the Additional District Munsif Court, Tenkasi.

2. For the sake of convenience, the appellants and the respondents shall be referred to as per their ranks in the plaint, as the defendants and plaintiffs respectively.



S.A.No.1945 of 20

3. The plaintiff, who is the appellant in the present appeal, filed a suit in O.S.No.250 of 1996 before the Additional District Munsif Court, Tenkasi, for declaration that the second schedule property belongs to the plaintiff and for recovery of possession and also the mandatory injunction.

4. On analyzing documentary and oral evidence, the learned Additional District Munsif, Tenkasi has allowed the suit by granting declaration, recovery of possession and mandatory injunction. Aggrieved by the judgment and decree of the trial Court, the defendants filed an appeal before the Sub-Court, Tenkasi which is taken on file in A.S.No.50 of 2001. Considering the pleadings evidences, judgment and decree of the trial Court, the learned Sub-Judge, Tenkasi, has allowed the appeal by setting aside the judgment and decree of the trial Court. Aggrieved over the same, the plaintiff has filed the present appeal. Pending the appeal, the appellant died and his legal heirs were impleaded.

5. The case set-up by the plaintiff in the plaint is as under:-

The first schedule property originally belongs to Muthusami Naidu from whom the plaintiff's father had purchased it on 27.07.1941 and he is in enjoyment of the same. He died before 20 years leaving



the plaintiff and other children, who partitioned his properties on 09.07.1977. Through the registered partition deed, the first schedule was allotted to the share of the plaintiff. On the western side of the first schedule, the defendants own property. Taking advantage of the fact that the first schedule is a vacant site, on 14.04.1996, when the plaintiff had gone to Madaras, the defendant encroached a portion of it shown as second schedule and started construction. When on 29.04.1996, the plaintiff learnt about this, he returned. He asked the defendants and then reported to elders and then measured it with the help of surveyor, who found out the encroachment. Then the defendant agreed to remove the encroachment within a week. But again on 22.06.1996 onwards he is attempting to continue the construction. If done so, the plaintiff would be put to irreparable loss. Hence, the suit has been filed for a declaration that the second schedule property belongs to the plaintiff and for recovery of possession and mandatory injunction.

6. The defence set-up by the defendant in the written statement is as under:-

The suit is not maintainable. It has been filed with an intention of purchasing the defendant's property at low sale consideration. The property does not exist on land as per measurement in the plaint.



S.A.No.1945 of 20

Second schedule property is an imaginary one. After construction of the property, the plaintiff served the injunction order without **leaving** the documents copy. Though the plan is incorrect, the measurement are in excess of the document. There is no document dated 09.07.1977. But, the document dated 09.06.1997 has been filed containing 5-5/8 cents. But the extent comes to 5.3986 cents as per measurement. Plaintiff's property is south-west of the defendants property. On 14.04.1996 it is not true that the plaintiff went to his relatives place. It is not true that the defendants encroached the second schedule property on 14.04.1996. Surveyor did not say that there is an encroachment. The defendant has been constructing for one month to the knowledge of the plaintiff. In the plaint and plan, the land situated on the south eastern side has been suppressed. Even if it is assumed that plaintiff's land lacks three feet east-west, it would be encroached by the eastern side owner viz., B.K.S.Abdul Khadar. So, he is a necessary party. The defendant is a poor washer man. The suit has been filed for defaming him. The defendant is entitled to 6/1 feet east-west. He has constructed only 12 feet and has left open space of 1/8 C C east of his eastern wall. The sun share projects only in the defendant's eastern space. Cause of action is imaginary. Court fee paid is incorrect. In fact the defendant is reconstructing the old house in the same place. So he has also prescribed title through



adverse possession. With an intention of preventing the defendant from using the eastern pathway, the suit has been filed. Hence, he prayed for dismissal of the suit.

7. Before the trial Court, the plaintiff himself examined as P.W.1 and Exs.P1 to P4 were marked. The first defendant was examined as D.W.1 and Ex.D1 & Ex.D2 were marked. Court documents Ex.C1 to Ex.C3 were marked.

8. On the basis of the rival pleadings made on either side, the trial Court, after framing necessary issues and after evaluating both oral and documentary evidence, had decreed the suit by granting declaration, recovery possession and mandatory injunction in favour of the plaintiff.

9. Aggrieved by the judgment and decree of the trial Court, the defendants filed an appeal before the Sub-Court, Tenkasi, which is taken on file in A.S.No.50 of 2001.

10. The first appellate Court, after hearing both sides and upon re-appreciating the evidence available on record, had allowed the appeal by setting aside the judgment and decree of the trial Court.



11. Challenging the said judgment and decree passed by the first appellate Court, the plaintiff has filed the present appeal.

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12. At the time of admitting the present second appeal, this Court had formulated the following substantial questions of law for consideration:

"i) When admittedly the western boundary holder does not make any trespass and the western boundary of A schedule property is a Wall, which was in existence for more than 20 years whether learned Judge is right in dismissing the suit for non-joinder of necessary party for not impleading the western owner of the 'A' schedule property?

(ii) Whether the learned Additional Subordinate Judge is right in tracing the judgment on the plea of estoppel against the title especially when the plaintiff has filed the suit on the basis of declaration of title, recovery of possession and for mandatory injunction?

13. The learned counsel appearing for the appellant would submit that the first appellate Court failed to note that it is an admitted fact that on the eastern side, boundary Wall is there for more than 20 years and when there is no dispute on that side, the findings of the first appellate Court that he ought to have been added as a



party defendant and that the suit is bad for non-joinder of necessary party is therefore, totally erroneous. The learned first appellate Court pre-judged the entire issue by observing that the 'A' schedule and 'B' schedule properties were not properly described and the learned Judge on assumption that on the western side of B-schedule property the boundary was not properly described is erroneous because A-schedule is for the whole property and B-schedule is only forming part of A-schedule only and eastern end of western side of the B-schedule property can only be described as a remaining portion of A-schedule property and therefore, the entire judgment of the learned judge is vitiated because of the wrong assumption of the facts.

14. It is his further contention that the learned first appellate Court failed to note that the plaintiff has produced his title deed of the year 1941 and also subsequent period in 1970 and the defendants have come forward with the documents, which are more than 10 years after the plaintiff document. In such circumstances, when admittedly defendant had purchased the property after the plaintiff's predecessors-in-title and the partition has taken place, the observation of the learned Judge is therefore erroneous. The defendants themselves admitted that at the time of purchase, only a small hut was there in the property and after the purchase only they recently



demolished the hut and had put up a bigger house. The first appellate Court failed to note that when the plaintiff has filed a suit on the basis of title, acquiescence even if it is proved will not divest the title. Hence, he prayed for allowing the appeal.

15. The learned counsel appearing for the respondents would submit that the first appellate Court after hearing both sides and upon re-appreciating the evidence available on record, had rightly allowed appeal and there is no interference is required. Hence, he prayed for dismissing the appeal.

16. I have heard the learned counsel for the appellants and the respondents and also perused the materials on record carefully.

17 The plaintiff filed a Suit for declaration, recovery of possession and for mandatory injunction, in respect of the suit 2nd schedule property. The first schedule property originally belongs to one Muthusami Naidu from whom the plaintiff's father had purchased on 27.07.1941 and he is in enjoyment of the same. He died before 20 years leaving the plaintiff and other children, who partitioned his properties on 09.07.1977. The eastern common wall forms the boundary for the first schedule. The northern boundary is also road



property. There is no dispute over the south boundary which is a common lane. Further, there is no dispute over the first part of the western boundary situated in the northern side. Only North-west boundary, which meets the defendants property is in dispute.

18. The plaintiff, in his examination-in-chief, had deposed that there was a permanent wall in the eastern side of his property, which is the western house wall of Abdul Khadar Sahib. Abdul Khadar Sahib had constructed his house before 20 or 25 years. But, later, in cross, he deposed that the said wall is a common wall between Abdul Khadar Sahib and himself and the breadth of the wall is 1-1/4 ft. Further, he deposed that there is no access for the defendant from south to east. At the same time, in the Commissioner's Report, it has been clearly stated that there were symptoms of using the pathway and the same cannot be simply brushed aside. No doubt, it is for the plaintiff to prove his case. But, the trial Court shift the burden on the defendant to prove his case, which cannot be accepted.

19. Be that as it may, earlier, while hearing the Second Appeal, this Court, taking into consideration the facts and circumstances of the case, was of the opinion to appoint Amicus curiae to assist the Court to find out the real position of the Suit schedule properties.



S.A.No.1945 of 20

Accordingly, Mr.R.Ragavendran, learned Government Advocate, was appointed as an amicus curiae, and he was directed to measure the entire suit schedule properties with the help of surveyor and file a report along with sketch. On a perusal of the report of the Amicus Curiae, it has been revealed that the Sub-Inspector of Surveyor, Taluk Survey, Tenkasi Taluk, filed a report stating that on 30.09.2024, after issuing notice to the parties concerned, conducted the survey on 01.10.2024. As per Document No.667/1997, the four sons of Mohideen Abdul Kadhar Sahib, partitioned the properties among themselves. Out of which, an extent of 3-5/8 cents of vacant land belonged to one Mohammed Hanifa. The Document No.770/1986 and Document No.19/1987 belonged to the defendant. As per the said Document, including east-west portion, 70 Sq.meter (1.72 cent), there is a small building and vacant land and that there is no encroachment. A sketch has also been enclosed along with the report. From the above report of the Sub-Inspector of Surveyor, Taluk Survey, Tenkasi Taluk, it is clear that there is no encroachment made by the defendants. In view of the above discussion, the questions of law are answered in favour of the defendants.



S.A.No.1945 of 20

20. In the result, the Second Appeal is dismissed, confirming the Judgment and Decree passed in A.S.No.50 of 2001, by the learned Additional Sub-Judge, Tenkasi, reversing the judgment and decree passed in O.S.No.250 of 1996, by the learned Additional District Munsif, Tenkasi. However, there shall be no order as to costs.

23.10.2024

Index : Yes/No
Internet : Yes/No
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To

- 1.The Additional Sub-Court,
Tenkasi.
- 2.The Additional District Munsif Court,
Tenkasi.
- 3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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S.A.No.1945 of 20

V.BHAVANI SUBBAROYAN, J.

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Judgment made in
S.A.No.1945 of 2003

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