



S.A.No.679 of 2003

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **24.06.2024**

CORAM

THE HON'BLE MR.JUSTICE S.SOUNTHAR

S.A.No.679 of 2003

G.Karunakaran Nair

... Plaintiff/Respondent
Appellant

Vs.

G.Sarveswaran Nair

... Defendant/Appellant
Respondent

2.Jayanthi

... 2nd Respondent

(Second respondent is impleaded as per the order of this Court, dated 22.01.2024 made in C.M.P(MD)No.15986 of 2023 in S.A.No. 679 of 2003)

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 10.10.2002 and made in A.S.No.96 of 1996 on the file of the Subordinate Judge, Padmanabhapuram, reversing the judgment and decree, dated 08.07.1996 and made in O.S.No.185 of 1988 on the file of the Principal District Munsif, Padmanabhapuram.



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For Appellant : Mr.B.Ashok

For Respondents : M/s.J.Anandhavalli

JUDGMENT

The plaintiff in the suit is the appellant herein.

2. The suit was filed for demarcation of plaint 'A' and 'B' Schedule properties and for putting up a wall separating the properties. The suit was decreed by the Trial Court and on appeal filed by the defendant, the First Appellate Court reversed the findings of the Trial Court and dismissed the suit. Aggrieved by the same, the plaintiff is before this Court.

3. According to the plaintiff, the suit 'A' and 'B' Schedule properties belonged to plaintiff and defendant respectively as per the allotment made to them under partition deed, dated 22.12.1973. It is the case of the appellant / plaintiff that the suit 'A' Schedule property was the 11th item of 'A' Schedule to the partition deed allotted to the share of plaintiff and the suit 'B' Schedule property was the 13th item of 'B' Schedule to the partition deed allotted to the share of defendant. It was



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asserted by the plaintiff that, from the date of partition, the parties had been in possession and enjoyment of the respective plots allotted to them.

Subsequently, the defendant constructed a building in the middle of the plot allotted to him in 'B' Schedule and he also started a Tyre Re-trading Company on the North of his building. The plaintiff also constructed a row of shops on the Southern side of the plot allotted to him in suit 'A' Schedule property. It was also contended that considering the close relationship between the plaintiff and the defendant, the boundary between 'A' and 'B' Schedule properties have not been fixed and they have been enjoying the respective portions. When the plaintiff wanted to put up a boundary wall on the Eastern side of plot allotted to him, the defendant obstructed the same with *mala fide* intentions. Therefore, the present suit was filed for demarcating the boundary line between suit 'A' and 'B' Schedule properties and for construction of the compound wall on the Eastern side of 'A' Schedule property.

4. The suit was resisted by the defendant on the ground that, both 'A' and 'B' Schedule properties have been enjoyed by the respective parties as one plot from the date of partition deed and there is a road on the Western side of the building put up by the defendant to take lorry



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from the Southern side to the Tyre Re-trading Company on the Northern side of the 'B' Schedule property. The defendant also contended that the actual lie of the suit property on ground is not in accordance with the plan annexed with partition deed and hence, there is a necessity for division of the properties taking into consideration, the existing features.

5. Before the Trial Court, the plaintiff was examined as P.W.1 and four documents were marked on his side as Exhibits A.1 to A.4. On behalf of the defendant, no oral or documentary evidence was let in and the Advocate Commissioner's report and plan were marked as Exhibits C.1 to C.3.

6. The Trial Court on consideration of evidence available on record came to the conclusion that the plaintiff was entitled to the relief as prayed for and granted decree. Aggrieved by the same, the defendant preferred an appeal. The First Appellate Court reversed the findings of the Trial Court and dismissed the suit. Aggrieved by the same, the plaintiff is before this Court.



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7. At the time of admission, this Court formulated the following substantial question of law by an order, dated 30.04.2003:

"(a) When the plaintiff and the defendant are parties to the partition deed, the genuineness of the same is not even in dispute, is a suit for partition contemplated in law?"

"(b) When such a suit for partition is not contemplated in law, in view of the admitted partition deed, is the Appellate Court right in law in negating the relief claimed by the plaintiff for demarcation and putting up boundary based on the description of the property in the partition deed Exhibit A.1?"

8. The learned Counsel for the appellant submitted that both the plaintiff and defendant divided the suit properties as early as in the year 1973. The property on the Western side with an extent of 30 cent was allotted to the share of plaintiff and the property on the Eastern side with an extent of 30 cent was allotted to the share of defendant. In such circumstances, there is no difficulty to demarcate the boundary line in between the properties of the plaintiff and defendant based on the plan annexed with partition deed, dated 22.12.1973. The learned Counsel for



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the appellant also submitted that the Advocate Commissioner appointed by the Court noted that, there is a shortage of measurement in the Southern side and if the existing 164 links is divided into two, both plaintiff and defendant can be allotted 82 links each. Even in such case, the road portion lies on the property falls to the share of defendant. Therefore, the right of way available to the defendant will not get affected by dividing the property as per the measurement available on ground. The Trial Court rightly granted decree to fix the boundary line as per the measurement available on ground and the First Appellate Court on an erroneous view set aside the finding. The learned Counsel for the appellant also submitted that when the properties were already partitioned, there is no need for another partition and hence, requested this Court to set aside the judgment and decree passed by the First Appellate Court and restore the judgment and decree passed by the Trial Court.

9. On the other hand, the learned Counsel appearing for the respondent submitted that though Advocate Commissioner in his report found that the Southern measurement of the suit property is only 164 links in the plan submitted by him, he adopted the measurements



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mentioned in Exhibit A.1 partition deed and filed Exhibit C.3 plan.

Therefore, the measurements mentioned in Exhibit C.3 plan is not in accordance with the measurement available on ground. Therefore, if boundary line is fixed as per Exhibit C.3 plan submitted by the Advocate Commissioner, the right of access available to the defendant will get affected.

10. It is not in dispute that suit 'A' Schedule property which lies on the Western side was allotted to the share of the plaintiff and the suit 'B' Schedule property which lies on the Eastern side allotted to the share of the defendant as per 1973 partition marked as Exhibit A.1. The only dispute between the parties is with regard to the fixation of dividing line in between the plots allotted to them in the partition. A perusal of Exhibits C.1 to C.3 Advocate Commissioner's report and plan would suggest the measurement mentioned in the plan annexed with partition deed tallies with the measurement found on ground in Eastern, Northern and Western directions. As far as Southern side is concerned, the measurement mentioned in plan appended with Exhibit A.1 partition deed was 173 links. However, the Commissioner found as on today only 164 links are available on ground. Therefore, the Commissioner filed



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Exhibit C.3 plan dividing the existing 164 links on the Southern side into 82 plus 82 and fixed the dividing line. Exhibit C.3 plan (Plan 2) submitted by Advocate Commissioner was objected to by the defendant on the ground that, the Advocate Commissioner measured the property as per the re-survey plan without fixing 'G' line shown in the re-survey plan. Therefore, if the dividing line is fixed as per Exhibit C.3 plan, it will create problem on ground. A perusal of Advocate Commissioner's report and plan would also suggest, the Advocate Commissioner observed that on four sides the boundary stones were not available and the property was measured only from the wall belonged to the bank building on the Eastern side of defendant's property. If properties of both the parties are divided without fixing the boundary stones and 'G' line, certainly the division would not be proper and it will create confusion on ground. The Courts below failed to take into consideration the objection raised by the defendant, dated 14.06.1996. The plaintiff also filed an objection to Commissioner's report and plan, dated 04.06.1996, wherein he also raised an objection that fixation of the property with the help of re-survey plan was not properly done by the Commissioner. He also raised an objection that there was no lorry road as shown by the Commissioner on ground. The measurement of 173 links mentioned in Exhibit A.1 plan is



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not available on ground. The available breadth on the Southern side has to be divided into two. However, the actual Southern measurement shall be made with reference to the survey stones and 'G' line.

11. A perusal of Advocate Commissioner's report would suggest he has not measured the property with reference to the survey stones and 'G' line. It is also seen, no qualified surveyor assisted the Advocate Commissioner. In such circumstances, the judgment and decree passed by the Courts below by taking into consideration the Advocate Commissioner's report and plan which were filed without properly measuring the property with reference to survey stone with the help of surveyor, would not solve the controversy between the parties. Therefore, this Court feels that the judgment and decree passed by the First Appellate Court based on the Advocate Commissioner's report and plan is liable to be set aside and the matter is deserve to be remanded back to the file of the First Appellate Court with a direction to appoint a qualified surveyor. The surveyor to be appointed by the First Appellate Court shall measure the suit property with reference to the survey stones after fixing 'G' line. Based on the measurements found by the surveyor, the properties of the plaintiff and defendant has to be divided by allotting



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Western side to the plaintiff and Eastern side to the defendant.

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12. With these clarifications, the Second Appeal stands allowed by setting aside the judgment and decree passed by the First Appellate Court and the matter is remanded back to the file of the First Appellate Court with a direction to appoint a qualified surveyor to measure the suit property and file a report as mentioned above. Qualified surveyor shall accompany the Advocate Commissioner. If earlier Commissioner is not available, it is open to the Court to appoint fresh Advocate Commissioner.

13. Taking into consideration the suit is of the year 1988, the First Appellate Court is directed to dispose of the First Appeal after remand, within a period of nine (9) months from the date of receipt of a copy of the judgment. It is made clear both the parties are at liberty to file Memo before the surveyor with regard to the manner of surveying the property. There shall be no order as to costs.

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

To

- 1.The Subordinate Judge,
Padmanabhapuram.
- 2.The Principal District Munsif,
Padmanabhapuram.
- 3.The Section Officer,
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

BTR

Judgment made in
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