

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	23.07.2025
Pronounced on	19.09.2025

CORAM

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

S.A.No.668 of 2019

Chandrasekaran

...Appellant

Vs.

Balasubramanian

...Respondent

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 08.01.2019 passed in A.S. No.13 of 2017, on the file of the Principal Subordinate Judge, Mayiladuthurai, confirming the Judgment and decree dated 11.01.2017 passed in O.S. No.76 of 2011, on the file of the Additional District Munsif, Mayiladuthurai.

For Appellant : Mr.B. Jawahar

For Respondent : Mr.J. Ram

JUDGMENT

Assailing the decree and judgment dated 08.01.2019 passed in A.S. No.13 of 2017, on the file of the Principal Subordinate Judge, Mayiladuthurai, confirming the Judgment and decree dated 11.01.2017 passed in O.S. No.76 of 2011, on the file of the Additional District Munsif, Mayiladuthurai, the plaintiff is on appeal.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court.

3. The case of the plaintiff is that originally the suit property belonged to one Ramalingam, S/o. Rathinam Pillai. The said Ramalingam executed a Will dated 11.06.1969 in favour of one Rajammal, wife of Vaidyalingam, giving life estate to her and thereafter absolute right to her son, who is the plaintiff. In the year 1998, the said

Rajammal died and the plaintiff has become absolute owner of the suit property as per the said Will. In the abovesaid Will, the existence of pathway measuring 15 feet east-west, 144 feet north-west is mentioned in the 'A' schedule property. The said pathway belongs to the plaintiff. However, the usage of the said pathway was given to the legal heirs of Ramalingam. After the death of the said Ramalingam, there was a partition among the legal heirs of Ramalingam on 31.07.1976. In the said partition, the shops situated in the northern side adjacent to the road were allotted to Kaliaperumal. The properties lying south to the above shops were allotted to the defendant herein. Thereafter, on 15.02.1994, the defendant and his brother Kaliaperumal exchanged the properties, through which the property lying on the east of the first item was given to the defendant. Thereafter, in the year 2005, the shops mentioned in the partition deed were demolished and a pucca building was constructed. The plaintiff is permanently residing at Chennai. Taking advantage of this, the defendant in the year 2005 has encroached upon the property of the plaintiff by constructing a wall. Hence, the plaintiff issued a notice on 06.11.2010, for which the defendant sent a reply notice on 22.11.2010

with false allegation. Hence, the plaintiff was constrained to file the above suit for the following reliefs:

- i. Mandatory injunction to remove the above compound wall and the fence put up by the defendant.
- ii. For recovery of possession directing the defendant to hand over the encroached portion in the 1st item of the suit property.

4. The claim of the plaintiff was resisted by the defendant by stating that the description of property mentioned in the Will is incorrect. Neither the mother of the plaintiff nor the plaintiff enjoyed the disputed land as mentioned in the alleged Will. It is also stated that it is incorrect to state that the pathway measures East-West 15 feet and that it is well in existence as it was enjoyed by the defendant's father. It is further contended that the the plaintiff cannot claim exclusive right over the pathway since the same is a common pathway for the plaintiff and the defendant. It is further submitted that it is false to state that the defendant has made a new construction in his property by encroaching

upon the property to an extent of 0.22 cents and when the plaintiff was attempting to sell his property, the proposed purchasers were insisting to sell the common pathway. Hence, the plaintiff has filed the above suit to grab the property of the defendant. Hence, prayed for dismissal of the above suit.

5. The trial court upon perusing the oral and documentary evidence dismissed the suit vide its judgment and decree dated 11.01.2017. Aggrieved over the same, the plaintiff preferred the appeal suit in A.S. No.13/2017, which was also dismissed by the first appellate court. Challenging the same, the present Second Appeal has been preferred by the plaintiff.

6. At the time of admission of the second appeal the following substantial questions of law were framed.

"a) Whether the judgments of the courts below are liable to be set aside as perverse in its ignoring exhibits C1

to C4, Advocate Commissioner's report and plan along with surveyors report and plan which establish encroachment by the respondent?

b) Whether the plaintiff is not entitled to 27 cents under his title document which is anterior in time leaving the respondent, who claims under a subsequent document, to take remaining extent available in suit survey number?"

7. The learned counsel appearing for the appellant/plaintiff submits that Ex.A1 Will is anterior to the title document relied upon by the defendant marked as Ex.B1 and hence, the defendant could have acquired only the remaining land, out of 0.27 cents acquired by the plaintiff under Ex.A1. He would further submit that in Ex.A1 Will, a clear description of property is given i.e. East-west breadth and North-south length and the suit passage is mentioned as 15 feet x 144 feet and hence, the defendant who acquired title under

subsequent document cannot claim the suit passage. Even in Ex.B1, the western boundary is clearly mentioned as 'East of Passage' referring to suit passage. The Advocate Commissioner's report and plan along with surveyor's report and plan would clearly establish the encroachment made by the defendant. Admittedly under Ex.B2, the plaintiff had sold only a lesser extent after deducting the disputed suit property to Kavitha and in any way, the said document which came into existence subsequent to the suit will not affect the rights of the plaintiff. The courts below failed to appreciate Ex.C1 to Ex.C4 in a proper perspective manner and they have failed to consider the evidence of P.W.2 regarding the encroachment and the new construction put up by the defendant. Hence prayed for setting aside the judgment and decree passed by the courts below.

8. The learned counsel appearing for the respondent/defendant submits that in the sale deed executed by the plaintiff in favour of

one Kavitha on 11.03.2013 while describing the schedule of property, failed to mention about whether the remaining land lies either on the west or east side of the property conveyed under the said deed. It is only mentioned that the entire property of the plaintiff was conveyed to the said Kavitha. The courts below has rightly held that the plaintiff is not entitled for the claim made in the suit, which warrants any interference by this Court.

9. Heard on both sides. Records perused.

10. The plaintiff filed the above suit against the defendant for the relief of manadatory injunction and recovery of possession in respect of Items 1 and 2 of the suit properties. It is not in dispute that on 11.03.2013, pending suit, the plaintiff has sold the suit property to one Kavitha under Ex.B2, excluding the disputed property. The specific case of the plaintiff is that he is entitled to the

suit pathway measuring 15 feet width and 144 feet length under Ex.A1 Will dated 11.06.1969 executed by one Ramalingam. While so, it is contended by the learned counsel for appellant/plaintiff that the defendant had encroached upon the common pathway to an extent of 1 feet breadth and 144 feet length in the year 2010 in the 'A' schedule property and had also encroached upon the property measuring 913.05 sq. Ft in the 'B' schedule property by constructing a wall and therefore, he was constrained to file the above suit for mandatory injunction and recovery of possession. On the other hand, the contention of the respondent/defendant is that since it is a common pathway, the plaintiff cannot claim any exclusive right over the same and that the plaintiff has encroached upon 0.22 cents over the property of the defendant.

10.1. The factum of execution of the alleged Will is not disputed. It has to be seen whether there is any encroachment made

by the defendant as shown by the plaintiff in the rough plan enclosed along with the plaint. The specific contention of the plaintiff is that the defendant has encroached 1 foot width x 144 feet length in the common pathway in the 'A' schedule property and constructed a wall measuring 1 foot breadth x 35 feet length from the road and the alleged encroachment is shown as B1, B2, B3 and B4 in the rough plan and in the 2nd item of the suit property and that the defendant has encroached 14.45 feet breadth on the east-west side and 63 feet length on the sought-north side. The above encroached portion exclusively belongs to the plaintiff and that the defendant has no right whatsoever. On the other hand, it is the specific contention of the defendant that in pursuant to the execution of Exchange deed, the defendant and his brother Kaliaperumal, the defendant is entitled for 3 acre 63-1/3 cent. But, the defendant is now having only 3 acre 26-1/2 cents in total and hence the defendant has not encroached the property of the plaintiff as alleged

by him. In fact, the plaintiff failed to establish the alleged encroachment by the defendant. The courts below have concurrently held that the plaintiff failed to establish the alleged encroachment by the plaintiff. The first appellate court also held that though it is contended by the plaintiff that the defendant encroached upon the his property in the year 2005 itself, inaction by the plaintiff in taking any steps against the defendant would go to show that the said contention is false. Considering the evidence of P.W.1 and P.W.2, both the courts below came to the conclusion that the case of the plaintiff is not true and accordingly dismissed the suit filed by the plaintiff. Considering the report and plan of the Advocate commissioner, the courts below came to the conclusion that the parties are in enjoyment of the properties to an lesser extent than mentioned in their respective title documents. The courts below further held that the plaintiff failed to establish the alleged encroachment made by the defendant and accordingly dismissed the

suit.

10.2. On a perusal of the findings rendered by the courts below, this court comes to a conclusion that the courts below rightly held that the plaintiff failed to make out prima facie case that he has exclusive title over the disputed portion. When there is a dispute over the title of the property by the rival parties, the plaintiff ought to have amended the suit including the prayer for declaration of title. Since the plaintiff failed to do so, he is not entitled for the reliefs claimed in the suit. No infirmity or perversity is found in the judgment and decree of the court below. Therefore, I do not see any question of law much less a substantial question of law in order to enable me to entertain this appeal.

11. In the result,

- i. The Second Appeal is dismissed. No costs.
- ii. the decree and judgment dated 08.01.2019 passed in A.S. No.13 of 2017, on the file of the Principal Subordinate Judge, Mayiladuthurai, confirming the Judgment and decree dated 11.01.2017 passed in O.S. No.76 of 2011, on the file of the Additional District Munsif, Mayiladuthurai. is upheld.

19.09.2025

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
bga

To

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

S.A.No.668 of 2019

K.GOVINDARAJAN THILAKAVADI,J.
bga

Pre-delivery judgment in
S.A.No.668 of 2019

19.09.2025