



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	08.07.2025
Pronounced on	08.08.2025

CORAM

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

S.A.No.762 of 2019 and
C.M.P. No.14816 of 2019

1. Chokkalingam (died)
2. Sivalingam
3. Kadhirvel
4. Meganathan
5. Srinivasan

...Appellants

Memo dated 24.06.2025 recorded. A1 died. A2 to A5 already on record are recorded as legal heirs of the deceased A1 vide court order dated 24.06.2025 made in S.A. No.762/2019.

Vs.

Vijayan

... Respondent

Prayer : Second Appeal filed under Section 100 CPC, 1908 to set aside the decree and judgment dated 04.02.2019 made in A.S. No.59 of 2014 on the file of the learned Subordinate Judge, Arakkonam, reversing the judgment and decree dated 23.08.2011 made in O.S. No.47 of 2005 on the file of the learned District Munsif, Sholinghur, Vellore District.

For Appellants : Mr. G. Jeremiah



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY For Respondent : Ms. T.R. Gayathri
for M/s. Sarvabhauman Associates

JUDGMENT

The present Second Appeal is directed against the judgment and decree dated 04.02.2019 made in A.S. No.59/2014 on the file of the Sub-Court, Arakkonam, reversing the judgment and decree dated 23.08.2011 made in O.S. No.47/2005 on the file of the District Munsif Court, Sholinghur, Vellore District.

2. The Second Appeal has been admitted on the following Substantial questions of law.

"1. Whether the first appellate court is correct in law in having held that the appellants had not established their title to the suit property without any reference to Ex.A1 document of title while answering point No.1?

2. Whether the first appellate court is correct in law in having reversed the well considered finding of the trial court regarding the location of the suit property in relation to the



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY

respondent's property on the basis of Ex.B7 and Ex.B8?

3. Whether the first appellate court has correctly construed Ex.B7 and Ex.B8 while locating the suit property is correct in law?

4. Whether the first appellate court is correct in law in having reissued the warrant to the Advocate Commissioner at the appellate stage without recording any reasons as to why it was not satisfied with the earlier report of the Advocate Commissioner Exs.C1 and C2?

5. Whether the first appellate court is correct in law in having placed reliance on the subsequent report and plan of the Advocate Commissioner appointed at the appellate stage without having admitted the report and plan in evidence?"

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. For the sake of convenience, the parties are referred to as per



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY their ranking in the Trial Court.

5. One Boopathiammal filed the suit in O.S. No.47 of 2005 before the District Munsif, Sholinghur, seeking a relief of Mandatory injunction as well as permanent injunction against the defendant. After filing of the written statement by the defendant, the plaintiff sought for an amendment to include the relief of declaration in 'B' schedule property.

6. Briefly stated, according to the plaintiff, the suit property described as 'A' schedule property shown as ABCD in the plaint plan belonged to one Maariammal and others which was their ancestral property and they were in possession and enjoyment of the same as a vacant site. While so, the plaintiff purchased the same for Rs.250/- through a registered sale deed (Ex.A1) dated 09.07.1971 and since then she was in possession and enjoyment of the same as absolute owner. While so, the defendant, being the adjacent owner of the land, encroached a portion of the plaintiff's vacant site and constructed steps to his house and the encroached portion is shown as 'EFGH' in the plaint plan and the



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

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same is described as 'B' schedule property, which is part of the 'A' schedule property. The specific contention of the plaintiff is that she is in continuous possession of the suit property by putting a pucca construction in the portion of the property. Hence the plaintiff was constrained to file the above suit for declaration of title in the 'B' schedule property and for mandatory injunction for removing the construction put up by the defendant.

6.1. On the other hand, the defendant resisted the suit contending that the suit property is 100 feet away from the property of the defendant and that the plaintiff without identifying her property filed the above vexatious suit. His further contention is that in an oral partition between the defendant's father and his elder brother, site in S.F. No.356/7G was allotted to defendant's father. The next eastern site in S.F. No.356/22 was also allotted to the defendant's father and further eastern site in gramanatham S.F. No.357/9 also belonged to defendant's father. Thus the sites in S.F. No.356/7G, 356/22 and 357/9 belonged to the defendant and his younger brother Moorthy after the demise of their father. In an oral



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY

partition between the defendant and his brother, the western half was allotted to the defendant and the eastern half was allotted to his brother Moorthy and from then onwards they are in separate possession and enjoyment of their respective share. Therefore, the site in S.F. No.356/7G belongs to the defendant and he is in possession and enjoyment of the same as absolute owner. To the north of the defendant's site, site in S.F. No.356/5B5 is situated. But the plaintiff states that to the north of the defendant's site, his site in S.F. No.356/17 is situated. The defendant has constructed a house only in S.F.No.356/7G and while the defendant constructed steps in S.F. No.356/7G, the plaintiff filed the above suit. Hence the suit is liable to be dismissed.

6.2. The trial court on the basis of the above pleadings, framed the following issues:

1. Whether the suit is framed in a correct way?
2. Whether the plaintiff is entitled to get the mandatory relief to remove the steps in the 'B' schedule property?
3. Whether the plaintiff is entitled to get permanent injunction as



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY prayed for in the plaint?

4. To what other remedy is available to the plaint?

6.3. Before the trial court the husband of the plaintiff was examined as P.W.1 and one K. Narasimhan was examined as P.W.2 and 17 documents were marked. On the side of the defendant, the defendant examined himself as D.W.1 and one Pandurangan as D.W.2 and marked 8 documents.

6.4. Based on the pleadings, the materials on record and the arguments advanced by the respective counsel for the parties, the trial court, vide its order dated 23.08.2011 decreed the suit in favour of the plaintiff.

6.5. Aggrieved by this, the defendant preferred the first appeal in A.S. No.59/2014 before the Sub-court, Arakkonam. Since the plaintiff died, her legal heirs contested the first appeal. The first appellate court on the basis of the materials placed on record, was pleased to reverse the



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

judgment of the trial court by a judgment and decree dated 04.02.2019.

Impugning the same, the second appeal has been preferred by the plaintiff.

6.6. The learned counsel for the appellant would submit that the first appellate court failed to consider Ex.A1 title deed of the plaintiff through which the plaintiff has established her title to the suit property. The Advocate Commissioner Report and Plan marked as Ex.C1 and Ex.C2 clearly establish the case of the plaintiff that the suit property belongs to the plaintiff. The first appellate court ought not to have allowed the appeal based on Ex.B7 and Ex.B8 documents and that the above documents clearly establish the location of the suit property and the defendant's property, which support the case of the plaintiff. The first appellate court misconstrued the oral evidence of D.W.1 and D.W.2 which was contrary to the documentary evidence, namely, Ex.B7 and Ex.B8. His further contention is that the first appellate court without assigning any reason, rejected the earlier commissioner's report and reissued the warrant to the Advocate Commissioner and also without



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY

marking the second report and plan of the Advocate Commissioner, relied on it. The learned counsel further submits that the finding of the first appellate court that the offending steps are located in S.No.356/22 and 356/7G is factually incorrect for the reason that S.No.356/7G is located to the west of S.No.356/22, while 356/22 adjoins the suit property. Further the second plan of the Advocate Commissioner locates S. No.356/7G to the east of S.No.356/22, which is contrary to Ex.B7 and Ex.B8. Hence without making any reference to Ex.A1 title deed and reversing the well considered findings of the trial court regarding the location of the suit property on the basis of Ex.B7 and Ex.B8 and reissuing the warrant to the Advocate Commissioner without recording any reasons as to why it is not satisfied with the earlier report of the Advocate Commissioner, the findings rendered by the first appellate court requires interference by this Court.

7. Per contra, learned counsel for the respondent contended that the first appellate court, after analysing the oral/documentary evidence adduced on both sides, rightly set aside the judgment and decree passed



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY

by the trial court by holding that in a suit for declaration, it is for the plaintiff to prove his case by clearly stating where exactly the suit property is situated, which the plaintiff failed to do so. Hence according to the respondent, no interference is called for by this Court and accordingly prayed for dismissal of the present appeal.

8. Heard on both sides. Records perused.

9. Two points had been raised by the learned counsel for the appellant. The first point is that the first appellate court failed to consider Ex.A1 title deed of the plaintiff through which plaintiff has established her title to the suit property. The second point is that the first appellate court ought not to have reissued the warrant to the Advocate Commissioner for reinspecting the property without setting aside the earlier report and plan marked as Ex.C1 and Ex.C2, without recording its dissatisfaction to the earlier report and plan and the first appellate court also erred in relying upon the second report and plan of the Advocate Commissioner without marking the above report and plan of



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY the Advocate Commissioner.

9.1. When there is a dispute related to the sketch filed along with the plaint, then, for clarification, the court can, under Order 26 Rule 9 CPC appoint an Advocate Commissioner to find out the actual lay of land for better appreciation of evidence already on record (Ref. ***AIR 1982 Kar 233 (B.Jagannath Vs. N.C.Narayanappa and another.)***)

9.2. It is settled position that appointment of a fresh Advocate Commissioner for the second time cannot be done unless the earlier report is set aside. However, warrant can be reissued to the first Advocate Commissioner if not satisfied with his earlier report. In the instant case, the records are available. Along with the original plaint, a rough plan has been filed which is in dispute. Therefore, for clarity purposes, the trial court had appointed an Advocate Commissioner. Since the first appellate court was not satisfied with the earlier report, directed the same Advocate Commissioner to revisit the premises for better appreciation of evidence and to determine the actual lay of the land indicating the



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY property of the plaintiff vis-a-vis the property of the defendant.

Therefore, the appointment of the same Advocate Commissioner to revisit the premises by the first appellate court without setting aside the earlier report do not suffer any infirmity.

9.3. In the instant case, the plaintiff's claim is that under Ex.A1 sale deed dated 09.07.1971, the suit 'A' schedule property was purchased by her and then onwards, she is in possession and enjoyment of the same. It is well settled law, in a suit for declaration of title, the burden of proof lies on the plaintiff and to succeed, the plaintiff must do so on the strength of her own title, by adducing sufficient evidence to discharge the onus on it. Moreover, when the suit has been laid for necessary reliefs in respect of the immovable property, as per Order 7 Rule 3 CPC, the plaint shall contain a description of the property sufficient to identify it and in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

9.4. From the rival contentions put forth by the respective parties, it is found that the dispute between the parties lies only with the location



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

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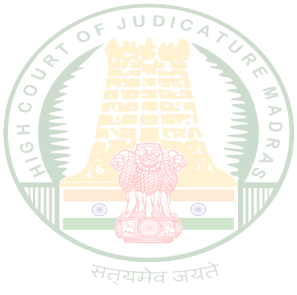
of the suit property. Therefore, it has to be seen as to what property was actually purchased by the plaintiff under Ex.A1 sale deed. At the foremost, it is found that the plaintiff herself is not clear as to where exactly the suit property is situated. The plaintiff must establish that the defendant has encroached upon a portion of plaintiff's property. At first the plaintiff filed the suit for declaration and permanent injunction in respect of the property in S.No.356/17. Thereafter, the plaint was amended stating that the suit property is situated in S.No.357/8. The plaintiff's contention is that the suit property comprises of S.F.No.356/17 was later sub divided into 357/8. It is the specific case of the defendant that the lands in S.F.No.356/7G, 356/22, 357/9 belong to the defendant and his brother Moorthy and that the constructed portion of the house of the defendant falls within S.F. No.356/7G and 356/22. The learned counsel for the appellant/plaintiff contends that the Advocate Commissioner who initially filed a report (Ex.C1) has stated that the encroached portion falls in S.F. No.357/8, later filed an additional report stating that the construction is made only in S.F. No.356/22 and 356/7G and therefore, the same ought not have been accepted by the first



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

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appellate court. The first appellate court placing reliance on the field map annexed with the Advocate Commissioner's report concluded that the constructed portion falls in S.F. No.356/22 and 356/7G and not in S.F. No.357/8. As rightly pointed out by the first appellate court, it is the duty of the plaintiff to prove that the said constructed portion falls in S.F. No.357/8. The first appellate court has mainly relied upon the supplementary report of the Advocate Commissioner who measured the property with the assistance of surveyor, which was not done at the time of the first inspection. Moreover, the commissioner has inspected the property for the second time in the presence of the plaintiff and the defendant. The first appellate court accepted the report and plan of the Advocate Commissioner, who is an officer of the court and who discharges the warrant issued to him, to clarify certain aspects on behalf of the court and not on behalf of either the plaintiff or defendant. Since the earlier report was not sufficient, the first appellate court ordered for revisit of the commissioner for better appreciation of evidence. I find no irregularity in such procedure adopted. In fact, the plaintiff ought to have approached a surveyor for identification and measurement of her property



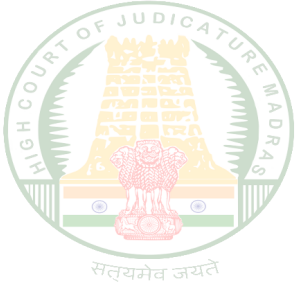
S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY

and seek clarification whether the alleged construction is within her property. The first appellate court has correctly construed Ex.B7 and Ex.B8 while locating the suit property and placed reliance on the subsequent report and plan of the Advocate Commissioner appointed at the appellate stage. Reference was made to the commissioner's report for clarity purposes alone. Though the position of law is correct that, the above report and plan without marking cannot be relied upon. But, in the instant case, no prejudice has been caused by the procedure adopted by the first appellate court for the reason that opportunity was given to the plaintiff for filing her objection to the said report and plan. Moreover, the inspection was done in the presence of the plaintiff and the defendant.

9.5. The trial court's judgment and decree was mainly based on the categorical admission made by D.W.1, which according to the first appellate court is incorrect. The relevant portion of the impugned judgment of the first appellate court is extracted hereunder.

"The evidence of D.W.1 cross is re-iterated for the purpose of better understanding “அவர்கள் வீட்டின்



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

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பின்பக்கம் 11 அடி நீளத்திற்கும் 8 அடி அகலத்திற்கும்
ஆக்கிரமித்து படி கட்டினேன் என்றால், நான் கட்டி 2 வருடம்
கழித்து தான் கேஸ் கொடுத்தார்கள்.”

*The defendant in the later part of the cross
examination also had deposed as below:*

“அவர்கள் இடத்தில் நான் ஆக்கிரமம் செய்து படி
கட்டியதால் தான் புகார் குடுத்து கேஸ் போட்டார்கள்
என்றால் நான் கட்டி 2 வருடம் கழித்து தான் வழக்கை
தாக்கல் செய்துள்ளார்கள்.”

*The trial court upon considering the said evidence
treated the same as admission of the defendant that the he
admitted the fact that he had encroached upon the backside
portion and built the steps. It appears from the evidence
of D.W.1 that he was interested in conveying that the case
was filed only after 2 years of his construction. As there
had been a continuous question the answer given by D.W.1
in respect of the construction made by him could not be
taken as an admission with regard to the alleged
encroachment. No where it was directly admitted by D.W.1*



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY *that he had encroached upon the plaintiff's land in S.No.357/8. The lower court has proceeded with the said mind that the defendant himself admitted the encroachment and came to a wrong conclusion. This Court is not inclined to accept the same. The answer given by D.W.1 could at no stretch of imagination be considered as an admission to the encroachment averred in the plaint."*

No perversity or infirmity found in the said findings of the first appellate court. Therefore, the substantial questions of law can be answered that the first appellate court had not made any error in setting aside the judgment and decree of the trial court.

9.6. If at all, the plaintiff has any grievance or necessity, it is always open to her to approach the revenue authorities with respect to identification and measurement of her property and if such a course is undertaken, the Tahsildar or any other revenue authority must put the defendant on notice and also undertake such task in the presence of the



S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

WEB COPY defendant herein.

10. In the result,

- i. The Second Appeal stands dismissed. No order as to costs.

Consequently connected miscellaneous petition is closed.

- ii. The decree and judgment dated 04.02.2019 made in A.S. No.59 of 2014 by the learned Subordinate Judge, Arakkonam, is upheld.

08.08.2025

Index: Yes/No

Internet: Yes/No

Speaking/Non-Speaking order

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To

1. The Subordinate Judge, Arakkonam.
2. The District Munsif, Sholinghur, Vellore District.
3. The Section Officer, VR Section, High Court, Madras.



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S.A.No.762 of 2019 and C.M.P. No.14816 of 2019

K.GOVINDARAJAN THILAKAVADI,J
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S.A.No.762 of 2019 and
C.M.P. No.14816 of 2019

08.08.2025