



WEB COPY

S.A.No.191 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 21 / 10 / 2024

JUDGMENT PRONOUNCED ON : 20 / 01 / 2025

CORAM:

THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

S.A.NO.191 OF 2021
AND CMP NO.3846 OF 2021

Nagappa Gounder (Died) ... Appellant /Respondent /
Defendant

2.Rajamanikkam

3.Sampath Lakshmi

4.Mallika

5.Raja

6.Ravichandran

7.Geethamani

8.Dhanalakshmi ... Appellants

(Appellants 2 to 8 are brought on
record as legal representatives of
deceased sole appellant vide Order of
this Court dated November 16, 2023
made in CMP No.18382 of 2023 in
S.A.No.191 of 2021)

Vs.

Dr.K.V.Duraisamy (Died)

1.D.Palaniammal

2.Dr.D.Babu Ramesh Prabhu

3.Dr.D.Kavitha Yogini ... Respondents 1 to 3



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PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, praying to set aside the Judgment and Decree dated December 11, 2019 made in A.S.No.41 of 2006 on the file of the learned Subordinate Judge, Bhavani reversing the Judgment and Decree dated November 30, 2004 made in O.S.No.192 of 2001 on the file of the learned II Additional District Munsif, Bhavani.

For Appellants : Mr.L.Mouli

For Respondents : Mr.P.Vishnu Manoharan
1 to 3 for Mr.Rahul Balaji

J U D G M E N T

This Second Appeal is directed against the Judgment and Decree dated December 11, 2019 passed in A.S.No.41 of 2006 by the 'Subordinate Court, Bhavani' ['First Appellate Court' for brevity], whereby the Appeal Suit was partly allowed and the Judgment and Decree dated November 30, 2004 passed in O.S.No.192 of 2001 by the 'II Additional District Munsif Court, Bhavani' ['Trial Court' for brevity] was partly modified.

2. For the sake of convenience, hereinafter, the parties will be referred to as per their array in the Original Suit.



TRAJECTORY OF THE CASE

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3. The plaintiff filed a Suit for declaration, permanent injunction and mandatory injunction. The Trial Court dismissed the same, challenging which, the plaintiff preferred an appeal in A.S.No.41 of 2006 before the First Appellate Court and the same was dismissed on April 27, 2007. Assailing the Judgment and Decree dated April 27, 2007 of the First Appellate Court, the plaintiff approached this Court vide S.A.No.335 of 2008 (earlier Second Appeal).

3.1. During pendency of the earlier Second Appeal, the sole appellant therein / sole plaintiff passed away and hence, the Respondent Nos.1 to 3 herein were brought on record as his legal representatives vide Order of this Court dated June 13, 2019 made in CMP Nos.11853 to 11855 of 2019 in S.A.No.335 of 2008.

3.2. A learned Single Judge of this Court upon perusing the records and hearing either side, remanded the matter to the First Appellate Court for the purposes set out in Paragraph No.10 of his Judgment in the earlier Second Appeal, which reads thus:



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“10.As indicated earlier, this is a case where Commissioner ought to go to measure the property as per the sale deeds of the parties, more particularly that of the plaintiff's. Therefore, this Court remands the matter back to the first Appellate Court, viz.,Subordinate Court, Bhavani, the final Court of facts in our scheme of things, for the following purposes:

(a)To appoint a competent advocate of reasonable standing on the civil side, and also one who is regular to Court, for local inspection, to measure the properties of the plaintiff and the defendant with the assistance of a Taluk Surveyor.

(b)The first Appellate Court shall fix the batta payable to the Commissioner which shall be paid by the plaintiff/appellants. The appellate Court is further directed to address a letter to the District Collector through the Principal District Judge, to ensure that a Taluk Surveyor is made available for assisting the Commissioner.

(c)The parties will be granted one week time to file their objections, if any, and if the Commissioner is required to be cross examined by any of any of the parties, the same shall be done before the first Appellate Court.

(d)The entire exercise shall be completed within a period of three months from 10-07-2019.”

3.3. Upon receiving the Judgment passed in the earlier

Second Appeal, the First Appellate Court took the matter on file in its



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original number *i.e.*, A.S.No.41 of 2006 on July 10, 2019 and proceeded further with the Appeal Suit. Pursuantly, an Advocate Commissioner was appointed, who after inspection, was examined as C.W.1. He marked his Report as Ex-C.7 and Plan as Ex-C.9 along with Surveyor's Plan as Ex-C.8. Eventually, the First Appellate Court proceeded to partly allow the Appeal Suit by decreeing the Original Suit for declaration, permanent injunction and dismissing it for mandatory injunction. The present Second Appeal *i.e.*, S.A.No.191 of 2021 came to be filed by the sole defendant challenging the verdict of First Appellate Court. During pendency of the present Second Appeal, the sole appellant herein / sole defendant passed away and hence, the Appellant Nos.2 to 8 herein were brought on record as his legal representatives vide order of this Court dated November 16, 2023 made in CMP No.18382 of 2023 in S.A.No.191 of 2021.

FACTS

4. Originally, a portion of Suit land and the house therein was allotted to one Mannatha Chettiar vide Ex-A.3 - Partition Deed dated November 17, 1941 under 'C' Schedule therein. Remaining portion of the Suit land was purchased by Mannatha Chettiar vide Ex-A.4 - Sale Deed



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dated September 4, 1956. Post his demise, the legal representatives of Mannatha Chettiar sold the Suit Property to the plaintiff vide Ex-A.5 - Sale Deed dated March 8, 1979. In Re-survey, the Suit Property was assigned R.Survey No.1932/4.

4.1. Subsequently, the sole defendant purchased the property situate to the north-eastern side of the Suit Property. In Re-survey, the property purchased by the defendant was assigned R.Survey Nos.1932/5 and 1932/6.

4.2. There is an East-West Lane to the southern side of the property purchased by the defendant. Similarly, there is a North-South Lane situate on the eastern end of Suit Property extending from the Main Road on the northern side of Suit Property to the plaintiff's house situate on the southern portion of Suit Property.

4.3. The dispute between the parties is in the nature of boundary dispute with regard to the said North-South Lane. According to the plaintiff, the said lane is his exclusive one formed to reach the southern portion of Suit Property where his house is situated. His further case is that the defendant, claiming exclusive rights over the said North-



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South Lane, tried to encroach upon the same by putting up debris and by letting branches of thorny trees grow over the said lane. Hence, the Suit for permanent injunction, declaration, mandatory injunction and other reliefs.

4.4. Accordingly to the defendant, he owns the entirety of the said North – South Lane which joins the said East-West Lane to run along the southern end of his property, thus connecting his property to the Brahmma Desam Main Road situated on the eastern side of his property. His case is that the plaintiff's vendor *i.e.*, Mannatha Chettiar was allotted a portion of Suit Property in cubits vide Ex-A.3 – Partition Deed. Similarly, Mannatha Chettiar purchased the remaining portion in cubits vide Ex-A.4 – Sale Deed. However, the plaintiff purchased the Suit Property from the legal heirs / legal representatives of Mannatha Chettiar in feet. The extent of Suit Property purchased under Ex-A.5 exceeds that of Ex-A.3 and Ex-A.4. Taking advantage of the discrepancy, the plaintiff is trying to encroach upon the North – South Lane which absolutely belongs to the defendant. Accordingly, he seeks dismissal of the Suit.



WEB COURT **TRIAL COURT**

5. At trial, the plaintiff – Dr.K.V.Duraisamy was examined as P.W.1 and three other witnesses were examined as P.W.2 to P.W.4 and Ex-A.1 to Ex-A.18 were marked on the side of the plaintiff. On the side of the defendant, the defendant – Nagappa Gounder was examined as D.W.1 and one Jaganathan was examined as D.W.2 and Ex-B.1 to Ex-B.7 were marked. Advocate Commissioners' Reports and Plans were marked as Ex-C.1 to Ex-C.6.

5.1. The Trial Court, after analyzing the oral and documentary evidence and after hearing either side, dismissed the Original Suit mainly on the ground that the plaintiff failed to prove that the extent of property covered under Ex-A.5 is same as the sum of extents of properties covered under Ex-A.3 and Ex-A.4.

FIRST APPELLATE COURT

6. As stated *supra*, challenging the Judgment and Decree of Trial Court, the plaintiff approached the First Appellate Court and the Appeal Suit was eventually dismissed. Aggrieved by the same, he



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approached this Court vide the earlier Second Appeal, wherein the matter was remitted to the First Appellate Court for the purposes stated *supra*.

6.1. As per the directions of this Court, the First Appellate Court appointed an Advocate Commissioner who after field inspection, deposed as C.W.1 and filed his Report (Ex-C.7) and Plan (Ex-C.9) along with the Surveyor's Plan (Ex-C.8).

6.2. Upon hearing either side and perusing the evidence available on record including Ex-C.7 to Ex-C.9, the First Appellate Court partly allowed the appeal. It granted the relief of declaration and permanent injunction primarily based on its finding that, as per Ex-A.5 – Sale Deed, the disputed North-South Lane falls within the boundaries of the property purchased by the plaintiff thereunder (Suit Property) and therefore, absolutely belongs to the plaintiff. The First Appellate Court declined the relief of mandatory injunction as the subsequently appointed Advocate Commissioner, neither in his Report (Ex-C.7) nor in his Plan (Ex-C.9), has shown any sort of obstructions in disputed lane as alleged by the plaintiff.



SECOND APPEAL

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7. Feeling aggrieved by the Judgment and Decree of the First Appellate Court dated December 11, 2019, the defendant has preferred this Second Appeal, which was admitted on March 5, 2021 on the following substantial questions of law:

- “a) Whether the Lower Appellate Court is correct in allowing the Appeal when the Respondents 1 to 3, who are the legal heirs of the deceased Dr.K.V.Duraisamy was not brought on record in A.S.No.41 of 2006?*
- b) Whether the Lower Appellate Court is correct in holding the Respondents are entitled for relief of Declaration and Mandatory Injunction as per Exhibit C-A7 [sic Exhibit-A.7] without considering Exhibit A1 to A5, B6 and B7 and oral evidence C1?*
- c) Whether the Lower Appellate Court erred in holding that as per the Exhibit C-A7 that the Respondents are the absolute owners of land in R.S.No.1932/4 including portion mentioned as “C” in the suit plan, without considering Exhibit A1 to A5 and Exhibit B6 and B7?”*

DISCUSSION:

8. This Court has considered the submissions made on either side and perused the materials available on record in light of Substantial Questions of Law.



Substantial Question of Law No.1

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9. The appellant / plaintiff in the earlier Second Appeal, passed away during the pendency of that Second Appeal and hence, his legal representatives were brought on record as appellant 2 to 4 therein vide Order of this Court dated June 13, 2019 made in CMP Nos.11853 to 11855 of 2019 in S.A.No.335 of 2008. As stated *supra*, the earlier Second Appeal was remanded to the First Appellate Court with certain directions. Pursuant to the directions, the legal representatives of the plaintiff filed an Interlocutory Application in I.A.No.1 of 2019 seeking appointment of Advocate Commissioner and the same was allowed. In the said Interlocutory Application, the deceased – Dr.K.V.Duraisamy and his legal representatives were described as petitioners / appellants. The defendant did not raise any objection to the same at any point of time before the First Appellate Court. In the objection filed by the defendant against Ex-C.7 to Ex-C.9, he has described the deceased – Dr.K.V.Duraisamy and his legal representatives as petitioners / appellants in the said Interlocutory Application. To be noted, these proceedings were in continuation of the earlier Second Appeal and the legal representatives of the deceased sole plaintiff were brought on record in the earlier Second Appeal itself. It is the



legal heirs of the deceased sole plaintiff who were proceeding against the defendant and the defendant was very well aware of it. It is true that the plaintiff could file a memo to carry out the necessary changes on records. The First Appellate Court could have also *suo moto* carried out the changes. The defendant could have also pointed out the defect. In these circumstances, it being a curable defect causing no prejudice to the defendant, this Court is of the view that it would not stand on the way of justice. Substantial Question of Law No.1 is answered accordingly in favour of the respondents herein.

Substantial Question of Law Nos.1 and 2

10. Mr.L.Mouli, learned Counsel for the appellants would argue that the Advocate Commissioner appointed as per the directions of this Court, did not measure the Suit Property as per the directions issued by this Court in the earlier Second Appeal. Elaborating on the said point, he would bring the attention of this Court to the Paragraph No.10 (set out *supra*) of the Judgment dated June 28, 2019 passed in the earlier Second Appeal and argue that the Advocate Commissioner failed to factor in the measurements in Ex-A.3 – Partition Deed and Ex-A.4 – Sale Deed. Measuring the Suit Property solely based on the Ex-A.5 – Sale Deed and



the revenue records, is not in line with the directions issued in the earlier

Second Appeal. In these circumstances, the First Appellate Court ought to have dismissed the Suit in its entirety. Accordingly, he prayed to allow the Second Appeal, set aside the Judgment and Decree of the First Appellate Court and confirm the Judgment and Decree of the Trial Court.

11. Per contra, Mr.P.Vishnu Manoharan for Mr.Rahul Balaji, learned Counsel for the respondents would submit that the Suit Property has been measured in cubits in Ex-A.3 and Ex-A.4. Thereafter, at the time of Ex-A.5 – Sale Deed, to avoid confusion, the plaintiff measured and described the Suit Property in feet. This is evident from the fact that the North – South western boundary of the Suit Property is described as 55 cubits in Ex-A.3, and as 103 feet in Ex-A.5. There is no dispute with the same. If 55 cubit is taken as 103 feet, 1 cubit would measure around 1.87 feet. If it is so, the northern East – West Boundary of the Suit Property described as 15 Cubit in Ex-A.3 and Ex-A.4 would measure around 28 feet. In Ex-A.5, the northern most East – West Boundary of the Suit Property has been described as 27.5 feet. It has to be noted that though standard cubit nowadays is 1.5 feet, in those days, one cubit would measure up to 2 feet. Thus, clearly the property covered under Ex-A.5



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does not exceed the extent mentioned in Ex-A.3 in any manner. Further, in

Ex-A.5, the East – West measurement of the Suit Property has been described at three points, one in the northern end, one in the middle and another in the southern end. Whereas, in Ex-A.3 and Ex-A.4, such measurements are absent, which fortifies that the Suit Property has been described in Ex-A.5 only after due measurement. Furthermore, extent of Suit Property mentioned in the revenue records matches that in Ex-A.5. Thus, he would contend that there is no discrepancy with regard to the measurements in Ex-A.5 and that the First Appellate Court was right in granting the relief of declaration and permanent injunction.

12. Considered the submissions on either side. Ex-A.3 – Partition Deed, Ex-A.4 – Sale Deed and the measurements of the Suit Property as mentioned therein are admitted. The Suit Property is bounded by Andhiyur-Athani Road on the North, and Vengaiyan Street on the South. The western side North-South measurement of the Suit Property is 31.8 meter or 105 feet as per ‘Field Measurement Book’ [‘FMB’] and 103 feet as per Ex-A.5. In Ex-A.3, western side North-South measurement of the Suit Property is described as 55 cubit. Further, in Ex-A.3, measurement of the northern side East-West boundary of the Suit Property is described



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as 15 cubit. There is no dispute with respect to the above facts. In this case, dispute concerns only the East – West measurement of the Suit Property.

13. As rightly contended by the learned Counsel for the respondents, if 55 cubit is 105 feet at the time of Ex-A.3, then 1 cubit would measure around 1.9 feet. If so, northern side East-West boundary of the Suit Property, described as 15 cubit, would measure 28.5 feet. However, in Ex-A.5, the Suit Property has been described as measuring East – West 27 ½ feet on the northern end, 26 feet in the middle, and 19 ¾ feet on the southern end. Further, in Ex-A.5, at two points between the middle and the southern end, the Suit Property has been described as measuring 25 feet and 20 ¾ feet. At no point they seem to measure more than the said 28.5 feet. Hence, the contention of the defendant that the extent covered under Ex-A.5 exceeds the sum of those covered under Ex-A.3 and Ex-A.4 deserves to be rejected. Further, the fact that the East – West measurement of the Suit Property has been described at multiple points, supports the contention of the plaintiff that Ex-A.5 – Sale Deed was executed only after measuring the Suit Property and not by merely converting the cubits mentioned in Ex-A.3 and Ex-A.4 to feet.



14. Further, at the time of Ex-A.3 – Partition Deed itself, there

was a house on the western side of the Suit Property, and the said house and the Suit Property shares a common wall, and there is no boundary dispute with respect to the same. Hence, the same is a good reference to measure the East – West measurement of the Suit Property. Furthermore, the FMB has been marked as Ex-A.7. The measurements contained therein also tally with the measurements of the Suit Property in Ex-A.5 – Sale Deed, with a negligible difference. Moreover, defendant's vendor purchased the property now owned by the defendant subsequent to Ex-A.5, vide Ex-B.3 – Sale Deed, wherein the western boundary of the property covered thereunder has been described as Mannatha Chettiar's North – South Lane. Similarly, in Ex-B.5 to Ex-B.7 – Sale Deeds also, the western boundary of the defendant's property has been described as Mannatha Chettiar's North – South Lane. Under Ex-B.5 and Ex-B.6, the defendant's vendor sold his entire property situated in R.Survey Nos.1932/5 and 1932/6. However, at a later point of time, contrary to the recitals contained in Ex-B.5 and Ex-B.6, he executed Ex-B.7 – Sale Deed in favour of the defendant as if he has some more extent of land within the same boundaries specified in Ex-B.6 and Ex-B.7. This contravention



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between Ex-B.5 & Ex-B.6 and Ex-B.7 creates a doubt that Ex-B.7 was executed only with a view to defeat and defraud the legitimate rights of the plaintiff. Hence, in the considered opinion of this Court, the plaintiff does not enjoy any extent exceeding the sum total of Ex-A.3 and Ex-A.4.

15. The First Appellate Court relied on the Advocate Commissioner's Report and Plan [Ex-C.7 and Ex-C.9] to dismiss the Suit *qua* mandatory injunction. Perusal of the earlier Advocate Commissioner's Plan (Ex-C.2) shows that the defendant has dumped some waste on his western boundary. Ex-C.2 and Ex-A.16 – Photographs would show that there are three big thorny trees on the western boundary of the defendant's land, whose branches have spread over the plaintiff's house and the hospital situated on the Suit Property. It creates hardship and it is a continuing nuisance. It is a well-settled principle of law that, while trees may be planted on one's own property, their branches should not extend onto a neighbour's land and cause disturbance. A landowner has the right to utilize their property not only horizontally but also vertically, enjoying unobstructed sunlight and rainwater. In instances where such obstructions arise, the affected neighbouring landowner is entitled to remove the encroaching branches as per law [See ***P. Sheik Batcha Rowther -vs- N.R.***



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Alagappan Servai, 1957 SCC OnLine Mad 240 and P. Sheik Batcha

Rowther -vs- N.R. Alagappan Servai, 1957 SCC OnLine Mad 240].

Consequently, this Court holds that, if the alleged obstructions now exist, it is the responsibility of the defendant's legal representatives to remove them. Failing their compliance, the plaintiff's legal representatives shall be entitled to undertake its removal as per law of torts. The First Appellate Court is right in all other aspects. Substantial Question of Law Nos.2 and 3 are answered accordingly.

CONCLUSION

16. Resultantly, the Second Appeal is dismissed with the above observations. The appellants shall pay the cost of this Second Appeal to the respondents. Connected Civil Miscellaneous Petition is closed.

20 / 01 / 2025

Index : Yes / No
Speaking Order : Yes / No
Neutral Citation : Yes / No
TK



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- To
- 1.The Subordinate Judge
Bhavani.
 - 2.The II Additional District Munsif
Bhavani.



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R. SAKTHIVEL, J.

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PRE-DELIVERY JUDGMENT MADE IN
S.A.NO.191 OF 2021

20 / 01 / 2025