



S.A.No.1106 of 2019

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.04.2025

DELIVERED ON : 07.04.2025

CORAM :

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

S.A.No.1106 of 2019

Fr.Backiyasamy

... Appellant

Vs.

1.Patchamuth Udaiyar (Died)

2.P.Kaveri

3.P.Arulmozhi

... Respondents

(The sole respondent died, R2 and R3 are brought on record as the legal heirs of the deceased sole respondent vide Court order dated 04.11.2020 in C.M.P.No.12236/2020 in S.A.No.1106/2019)

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 18.01.2018 passed in A.S. No.3 of 2011, on the file of the Principal Sub Court, Vridhachalam, reversing the decree and judgment dated 28.10.2010 passed in O.S.No.581 of 1998, on the file of the Principal District Munsif Court, Vridhachalam.

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For Appellant : Mr.D.Shivakumaran
For R2 : Ms.Hema Sampath
Senior Counsel
Assisted by Ms.R.Meenal

JUDGMENT

The appellant is the defendant in O.S.No.581 of 1998, on the file of the Principal District Munsif Court, Vridhachalam. The first respondent Patchamuthu Udaiyar (since deceased) filed the said suit for a declaration of his title to the suit property. The suit property morefully described in the plaint schedule is an agricultural land in Survey Number 64/2A1A of Sathamangalam Village, Virudhachalam Taluk, Chidambaram District, measuring 3.83 cents within the boundaries stated therein. The plaintiff also sought for a mandatory injunction directing the defendant to remove the encroachments made by him in the suit property and also to pay damages for use and occupation under Order XX Rule 12 CPC.



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2. For the sake of convenience, the parties are referred to as per their rank in the trial court and at appropriate places, their rank in the present second appeal would also be indicated.

3. The case of the plaintiff in a nutshell is as follows :

The plaintiff was allotted 12.86 cents in Survey Number 64/2 of Sathamangalam Village, Virudhachalam Taluk, in a partition that took place in his family on 25.01.1979, out of which, he sold 3.93 cents to one Rajeswari, Vasuki, Saraswathi and Ananthavalli. The defendant purchased 3.93 cents from Rajeswari and others through a registered sale deed. While so, when the plaintiff was out of station, during May 1998, the defendant put up a bund encroaching his property. Though the plaintiff requested the defendant to remove the same, the defendant did not do so. Therefore, the plaintiff issued a lawyer's notice dated 20.07.1998 (Ex.A5) to the defendant requesting the latter to remove the encroachment. The defendant received the said notice and sent a reply notice dated 06.08.1998 (Ex.A6) to the plaintiff. According to the

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4. The defendant filed a written statement with a counter claim.

The contentions of the defendant are

- i. the suit filed by the plaintiff is not maintainable either in law or on facts.
- ii. the defendant has not encroached the property of the plaintiff.

Hence the suit filed by the plaintiff is liable to be dismissed.

- iii. in fact the plaintiff had encroached upon the land of the defendant and therefore he should hand over the vacant possession in respect of the property in Survey Number 64/2 of Sathamangalam Village, Virudhachalam Taluk, measuring 3.93 cents to him.

5. The trial court after framing necessary issues posted the case for trial.



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6. In the trial Court, the plaintiff examined himself and marked Ex.A1 to Ex.A9. Two witnesses were examined and Ex.B1 to Ex.B13 were marked on the side of the defendant. An Advocate Commissioner was appointed by the trial court, who filed his report and plan as Ex.C1 and Ex.C2. The FMB sketch of the suit property was marked as Ex.C3.

7. The learned Principal District Munsif, Vridhachalam, on considering the evidence on record, dismissed the suit filed by the plaintiff and the counter claim filed by the defendant, vide his decree and judgment dated 28.10.2010, on the following grounds:

- i. A perusal of the sale deeds dated 21.09.1995 (Ex.B1) and 07.03.1996 (Ex.B2) clearly shows that the Survey Number 64/2 was subdivided as 64/2A1A, 64/2A1B, 64/2A1C and 64/2A1/A.
- ii. DW1 in his evidence had admitted that he did not measure the property which he purchased from Rajeswari and others.
- iii. The defendant has also not stated in his written statement that whether his vendor Rajeswari raised any objection before the



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- iv. Merely based on the report of the Advocate Commissioner the Court cannot come to a conclusion that the defendant had encroached upon the land of the plaintiff.
- v. The plaintiff has also not clearly indicated the encroached portion of the land by the defendant in his plaint.

8. Aggrieved over the decree and judgment passed by the trial court judge, the plaintiff filed an appeal in A.S. No.3 of 2011, before the Principal Sub Court, Vridhachalam. The learned Principal Subordinate Judge, Virudhachalam, vide her decree and judgment dated 30.10.2013, set aside the decree and judgment passed by the trial court judge and remanded the entire case to the trial court with a direction to the trial court to appoint an Advocate Commissioner to inspect the suit property and measure the same with the help of a taluk surveyor and file his report and plan.



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9. Aggrieved over the same, the plaintiff filed a Civil Miscellaneous Appeal in C.M.A.No.193/2014 before this Court. A learned single judge of this Court (Hon'ble Mr.Justice R.Subramaniam) vide his orders dated 14.07.2017, set aside the orders passed by the first appellate court and directed the first appellate court to decide the case on merits. Subsequently, the learned Principal Subordinate Judge, Virudhachalam, vide her decree and judgment dated 18.01.2018 allowed the appeal filed by the plaintiff on the following grounds :

- i. The property of the plaintiff is situated in Survey Number 64/2A1A which is on the western side of 'AB' line indicated in the Advocate Commissioner's report (Ex.C1).
- ii. The Advocate Commissioner with the help of taluk surveyor had measured the suit property. He also clearly indicated the encroachments made by the defendant. In the circumstances, the suit filed by the plaintiff has to be decreed.
- iii. The property of the defendant is situated in Survey Number 64/2A1B which is on the eastern side of 'AB' line.



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iv. The Advocate Commissioner has shown the encroached area as A, B, B1, A1.

v. It has not been explained by the defendant as to why he left two links on the western side of his property and put up a bund. Hence the contention of the defendant cannot be accepted.

Aggrieved over the decree and judgment passed by the first appellate court the present second appeal is filed.

10. Though the second appeal is filed in the year 2019 it has not been admitted till date.

11. Heard Mr.D.Shivakumaran, learned counsel for the appellant and Ms.Hema Sampath, learned Senior Counsel assisted by Ms.R.Meenal, learned counsel for the second respondent.

12. During the pendency of the present second appeal the first respondent / plaintiff died and his legal heirs were impleaded as respondents 2 and 3.



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13. The first respondent, Patchamuthu Udaiyar filed the suit in O.S.No.581/1998 before the Principal District Munsif Court, Virudhachalam, seeking declaration of his title to the property in Survey Number 64/2A1A of Sathamangalam Village, Virudhachalam Taluk, measuring 4 acres 93 cents and for recovery of possession measuring 3.83 cents and also for damages. According to the plaintiff, the defendant had encroached 3.83 cents of his land. The appellant / defendant resisted the suit by contending that the plaintiff alone had encroached upon an area of 2 cents in his land. He had also filed a counter claim to that effect. An Advocate Commissioner was appointed during the pendency of the suit to inspect the suit property and to measure the same with the help of a taluk surveyor. Accordingly, the Advocate Commissioner measured the suit property with the help of the taluk surveyor and filed his report and plan which were marked as Ex.C1 and Ex.C2.



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14. The learned trial court judge had held that merely based on the report of the Advocate Commissioner he cannot come to a conclusion that the defendant had encroached upon 3.83 cents. The trial court had also held that the defendant has not proved that the plaintiff has encroached upon his property. Therefore, the suit and the counter claim were dismissed.

15. It is pertinent to point out that the defendant did not file any appeal against the dismissal of the counter claim. The plaintiff alone filed an appeal in A.S.No.3/2011 before the Principal Sub Court, Virudhachalam. Therefore, he cannot press his counter claim in the present second appeal.

16. It is seen from the Advocate Commissioner's report (Ex.C1) that the defendant had encroached upon the property of the plaintiff and the encroached portion is shown as A, B, B1, A1. The Advocate Commissioner had infact measured the suit property with the



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help of the taluk surveyor and had filed a detailed report. The properties of the plaintiff and the defendant are clearly shown in the plan. It is pertinent to point out that in the counter claim the defendant had indicated that his land is situated in Survey Number 64/2. It is seen from the records that the Survey Number 64/2 was subdivided as 64/2A1A, 64/2A1B, 64/2A1C and 64/2A1/A. The defendant had purchased his property from one Rajeswari. Rajeswari's vendor is the plaintiff. There is no pleading in the written statement that the vendor of the defendant raised any objection with regard to the subdivision of Survey Numbers. It is admitted by the defendant that though he purchased 3.93 cents, the actual extent available on the ground is only 3.78 cents. According to the defendant, this shortfall is due to incorrect subdivision of Survey Number 64/2. When his vendor did not raise any objection, the defendant cannot now contend that the subdivisions were made wrongly in Survey Number 64/2. The defendant had not also examined his vendor Rajeswari. On a careful perusal of all the documents including the Advocate Commissioner's report and plan (Ex.C1 and Ex.C2), it is clear that the plaintiff has proved his title over the suit property. The defendant should



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have measured the property at the time of his purchase. He cannot encroach upon the property of the plaintiff on the ground that he is entitled to 3.93 cents. The first appellate court had analysed each and every aspect of this case and has given a clear finding that the plaintiff has proved his title over the suit property. In fact, there is no substantial question of law involved in the present second appeal. Therefore, the second appeal fails and is dismissed.

17. In the result,

- i. the Second Appeal is dismissed. No costs.
- ii. the decree and judgment dated 18.01.2018 passed in A.S. No.3 of 2011, on the file of the Principal Sub Court, Vridhachalam, is upheld.
- iii. the decree and judgment dated 28.10.2010 passed in O.S.No.581 of 1998, on the file of the Principal District Munsif Court, Vridhachalam, is set aside.



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iv. the suit in O.S.No.581 of 1998, on the file of the Principal District
Munsif Court, Vridhachalam, is decreed with costs.

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

To

1. The Principal Sub Court, Vridhachalam.
2. The Principal District Munsif Court, Vridhachalam.
3. The Section Officer, VR Section, High Court, Madras.



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R. HEMALATHA, J.

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Pre-Delivery Judgment in
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