

S.A.(MD)No.214 of 2008

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 05.08.2025

CORAM

THE HONOURABLE MS.JUSTICE **R.POORNIMA**

S.A(MD)No.214 of 2008

V. Swaminthan

... Appellant/Appellant/1st Defendant

Vs.

S. Vijayalakshmi

Rep by the Power Agent

V.Thailan

...Respondent/ Respondent/Plaintiff

PRAYER : Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree in A.S. No.58 of 2005 on the file of the Principal Subordinate Court, Kumbakonam, dated 09.07.2007 confirming the Judgment and Decree in O.S.No.171 of 2001 dated 15.09.2004 on the file of the Additional District Munsif Court, Valangaiman at Kumbakonam.

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For Appellant : Mr.P.Thiagarajan

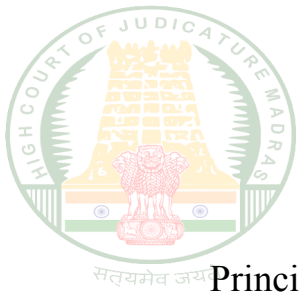
For Respondent : Not present

JUDGMENT

This Second appeal had been filed by the 1st defendant in O.S.No.171 of 2001 on the file of the Additional District Munsif Court, Valangaiman at Kumbakonam.

2. In O.S.No.171 of 2001 had been filed by the plaintiff through her power of attorney against the defendants, seeking a Judgment and decree for mandatory injunction and for permanent injunction restraining the defendants, their men, agents, etc., from in any way trespassing into the suit property.

3. This suit came up for consideration before the learned Additional District Munsif, Valangaiman at Kumbakonam, who, by judgment and decree dated 27.08.1997, decreed the suit. The 1st appeal in A.S.No.58 of 2005, filed by the 1st defendant came up for consideration, the



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Principal Subordinate Court, Kumbakonam, by judgment and decree dated 09.07.2007, the appeal was dismissed and the judgment in O.S.No.171 of 2001 was confirmed. Challenging that judgment, the 1st defendant had filed this present second appeal.

4. The plaintiff's case in O.S.No.171 of 2001 in brief, is as follows:

The suit property originally belonged to Neelambal Achi and she adopted one Muthayya Chettiar as her son. Her son Muthayya Chettiar had two wives namely, Gnanam and Parvathi. The plaintiff is the daughter of Parvathi. Neelambal Achi has executed a WILL dated 04.06.1956 bequeathing the suit properties in favour of the plaintiff. At the time of the WILL, the plaintiff was a minor and Parvathi managed the suit properties till the plaintiff attained majority. The WILL was later probated. The original unregistered WILL was filed in O.S.No.3 of 1993 on the file of the Valangaiman District Munsif Court. The suit property is surrounded by Door Nos. 24, 27 to 30 and 33 to 36 on the south of Door No.30 the first defendant had a small place. On the East of Door Nos.27 to 30 and

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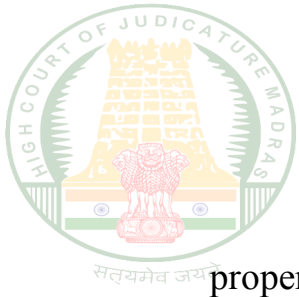
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Veerasami's building. There is a pathway that stretches from South to North excluding the buildings. The suit property situated in R.S.No.24/10 is the subject matter in O.S.No.3 of 1993. The first defendant without any right has trespassed into the suit property and has put up a basement measuring 10 x 20 feet. It is alleged that the entire pathway is covered leaving a space of 2 feet in breadth. On 24.07.2001 when the plaintiff questioned the illegal construction, first defendant gave an evasive answer in collusion with second defendant who were making arrangements to further construct. The Plaintiff states that if the first defendant is allowed to construct the building, the plaintiff will be put to loss and hardship and the plaintiff restricted it. The defendant is liable to surrender vacant possession of the suit property. Hence, the suit.

5. The 1st defendant filed written statement.

The 1st defendant denied the averments contained in the plaint and rough sketch. This defendant alleged that he is in actual possession and enjoyment of the suit property referred to in the plaint along with other extent of the site. It is said that the 2nd defendant has nothing to do with the



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property and he was earlier a tenant under this defendant in the building when it had a thatched roofing and the 2nd defendant has also vacated and left the place. The description of the suit property as given in the plaint is not correct and the sketch is misleading. In the suit site there was a thatched building bearing Door No.32/3-A. This portion was earlier used by the 1st defendant's father and later the suit site was under the 1st defendant's possession for more than 50 years. It is alleged that the site wherein the buildings bearing Door Nos.31 and 31-A were purchased by the 1st defendant's father by registered Document dated 25.03.1946. Since then, the 1st defendant is in possession and enjoyment of the same. The extent according to this defendant is 40 feet North to South and 45 feet on the East - West. The suit property according to the defendant was leased out long back in favour of the defendant's father by the plaintiff's predecessors in title. This defendant was a paguthithar for the site under the plaintiff's predecessor in title. Therefore, this defendant stated that the plaintiff was never in enjoyment. This defendant has nothing to do with the suit property covered under in O.S.No.3 of 1993 on the file of Valangaiman District Munsif Court. It is alleged that the plaintiff in order to confuse the issue has



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referred to the suit. The suit site is in exclusive possession and enjoyment of this defendant and his father for over 50 years. This defendant alleged that his father was running a petromax light shop. This defendant denied that there was a way to reach the coconut garden of the plaintiff on the North-East of the suit property. The way to coconut garden is only on the Mayiladuthurai Road which is on the East of Tharangampadi road. It is said that the construction of the building is completed and has renovated the earlier dilapidated walls. This defendant denied the alleged occurrence dated 24.07.2001 and the alleged trespass by the defendants. It is said that the construction was not hurriedly done and prayed to dismiss the suit with costs.

6. On the basis of the rival pleadings, the learned Additional District Munsif, Valangaiman at Kumbakonam framed the following issues for consideration:

- 1. Whether the plaintiff entitled to the relief of mandatory injunction as prayed for ?*
- 2. Whether the plaintiff is entitled to the relief of*



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permanent injunction as prayed for ?

3. Whether the suit property properly described ?

4. To what relief the plaintiff is entitled to ?

7. During trial, on the side of the plaintiff, the plaintiff's power agent was examined as P.W.1 and Exs.A.1 to A.3 were marked. On the side of the 1st defendant D.W.1 to D.W.3 were examined and Exs.B.1 to Exs.B.9 were marked. Advocate Commissioner's report with plan and Survey Commissioner's report were marked as Ex.C.1 to Ex.C.4. During trial the second defendant was relieved from the suit.

8. The trial Court / Additional District Munsif, Valangaiman at Kumbakonam, has granted a decree for recovery of possession and permanent injunction in O.S.No.171 of 2001 dated 15.09.2004, whereas, the First Appellate Court/ the Principal Subordinate Judge, Kumbakonam has dismissed the appeal in A.S.No.58 of 2005, filed by the defendant by confirming the judgment in O.S.No.171 of 2001, as against which, the present Second Appeal has been filed by the 1st defendant.



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9. This Second Appeal was admitted on the following substantial questions of law:-

1. Whether the judgment and decree of the Court below are perverse on account of its failure to consider the fact that there was no factual foundation in the plaint to grant the prayer ?

10. For the sake of convenience, the parties are referred to herein, as their own ranking as before the Trial Court.

11. The learned counsel for the appellant argued that the plaintiff impleaded the 2nd defendant, who is admittedly a tenant under the 1st defendant and this contradicts the plaintiff's own case of the 1st defendant being a trespasser and if the 2nd defendant is tenant under the 1st defendant, then the 1st defendant must be in lawful possession, not a trespasser and the suit appears to be filed with an ulterior motive and the cause of action is fabricated. The 1st defendant has categorically denied the alleged act of trespass and has asserted possession through his father for over 50 years.



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12. The learned counsel further submitted that failure to decide whether the 1st defendant is a lessee or trespasser and the crux of the case hinges on whether the 1st defendant is a lawful occupant (lessee) or a trespasser and the Courts below failed to record a specific finding on this vital issue. As per settled law, a General Power of Attorney holder can only depose to matters within his knowledge not on behalf of the Principal's personal knowledge. In this regard, he also relied upon the judgment in Janki Vashdeo Bhojwani Vs. Indusind Bank reported in 2005 (2) SCC 217 holder cannot testify about Principal's personal knowledge. The suit is not maintainable in the absence of declaration of title and the plaintiff failed to prove possession or trespass and hence, prays to allow the second appeal and the suit may be dismissed.

13. Heard the learned counsel for the appellant and perused the materials available on record. Despite service of notice on the respondent, none appears for the respondent either in person or through counsel and her name is also printed in the cause list.

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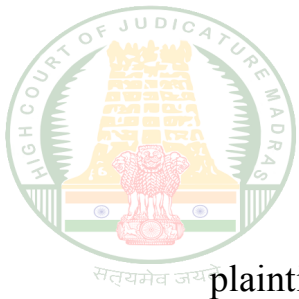
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14. The first ground urged by appellant is that the plaintiff miserably failed to establish absolute right and entitlement in the alleged portion in the suit schedule property.

15. In a suit for mandatory injunction it is not always necessary for the plaintiff to prove ownership, but he must establish a legal right or lawful possession over the property. The defendant admitted in his written statement, that his father was the lessee of the plaintiff's predecessor in title in respect of the suit property. He also admitted that Smt.Neelambal Achi, grandmother of the plaintiff was the original owner of the property and she had passed away long back. He stated that he has been in possession and enjoyment of the site as Paguthidhar and paying rent to the landlord.

16. In the present case, the plaintiff has produced Ex.P1 certified copy of the decree and judgment passed in O.S No. 3 of 1993 on the file of the Principal District Munsif, of Valangaiman at Kumbakonam wherein the legal title of the suit property was declared in favour of the

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plaintiff. This document constitutes a strong piece of evidence supporting the plaintiffs claim. The plaintiff who is the granddaughter of the said Neelambal Achi, original owner of the suit property, claimed title to the property based on a will allegedly executed by the said owner. In the said suit, she was declared the owner of the suit property in the above suit in O.S No. 3 of 1993. The defendant admitted that his father was a lessee of the suit property and that as his legal he has been continuously enjoying the property and paying rent to the land owner. Admittedly the original owner passed away long back.

17. The plaintiff filed a suit for declaration, seeking to be declared the owner of the property. In O.S No. 3 of 1993, and the suit a decree was passed in her favour affirming her title. It is only legal heir of Neelambal Achi who can dispute or deny her title not by third party defendant with no independent right title to the property. Though the 1st defendant claims to be the lessee of the suit schedule property, he has not produced any document to substantiate his lease hold right. He examined certain witness to support his claim as lessee, during cross examination,

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they admitted that they were brought by the defendant to support his case one of such witnesses was his employee and another one is his friend and they do not had no personal knowledge about his alleged claim over the property. One of witnesses is his employee, admitted that he was brought by the defendant, to support his claim. In the absence of any documentary evidence, the defendant possession is deemed that of trespasser. A trespasser has no right to oppose or challenge the right of the true owner. The trial Court, therefore rightly held that the plaintiff's title was sufficient to grant the permanent injunction. I don't find any infirmity in the order of the trial Court.

18. The second ground raised by the appellant is that the actual dispute pertains to a portion measuring 40 feet North South, and about 45 feet on the East West on the North of Tharangambadi Road and east of this appellant's building having door nos. 31 and 31A of the Krishnasamy Naidu and South of the property of Chandrashekhar. The appellant disputes the four boundaries as described in the plaint are not actually correct.

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19. According to the plaintiff, the defendant encroached the right of way and constructed a building in her land measuring East West 10 feet, North South, 20 feet, and the remaining vacant site. The defendant denied that the suit schedule property was vacant site and claimed that a thatched shed had existed on it for a considerable period. Further contended that there was no pathway leading to the plaintiff's Coconut garden which is located at a considerable distance to the north east of the suit property.

20. The 1st defendant was examined as D.W.1 during cross examination, he admitted that, the plan annexed with the plaint corresponds the suit scheduled property. The plan annexed to plaint tallied with the plan submitted by the Advocate Commissioner. The Advocate Commissioner appointed by the Court, inspected the suit schedule property and submitted his report. In the report he categorically stated that a newly constructed building was found on the North West of the suit property measuring of 11 feet on the East West, 20.5 feet on North West, which he identified as Royal wines. He noted that the building door number as NIL.



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21. The measurement contained in the Commissioner report consistent with the description of the building mentioned in para six of the plaintiff. The Commissioner in his report clearly stated that due to the said construction, plaintiff is obstructed from accessing her property from the eastern side. The surveyor of the Thiruvudaimarudur also annexed a plan by indicating that a building was constructed measuring 11 feet into 20 feet = 224.7 sq. ft abetting the road leading to the plaintiff's property.

22. The plaintiff is represented by a power of attorney agent. The 1st defendant contended that the power of attorney holder cannot depose on matters requiring the personal knowledge of the principal and the suit should be dismissed. However, the Power agent clearly admitted that he is personally aware of the plaintiff's possession and enjoyment as well as encroachment committed by the defendant. Personal knowledge means only the plaintiff personally knows the construction of building and encroachment are physical acts observed by anyone. These are not issued confined to the personal knowledge of the plaintiff alone.



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23. Though the defendant had claimed that a thatched shed was an existence on the property, the commissioner report clearly established that the building in question is a newly constructed one. This confirms that the defendant had unauthorized entered the land, raised the construction and thereby abstracted the plaintiff from accessing her property, the plaintiff has established that she is the lawful owner of the suit property and that the defendant had unauthorizedly constructed a building there on. She therefore sought a mandatory injunction for demolition of the said structure. Considered in the records, the trial Court rightly granted mandatory injunction and permanent injunction, not to trespass into her remaining property. I find no reason to interfere with the said judgment. The Second Appeal has no merit and the same is liable to be dismissed.

24. In the result, the Second Appeal is dismissed. No costs.

05.08.2025

Index :Yes/No
NCC :Yes/No
RM

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To

- 1.The Principal Subordinate Court,
Kumbakonam.
- 2.The Additional District Munsif Court,
Valangaiman at Kumbakonam.
- 3.The Section Officer,
ER/VR Section,
Madurai Bench of Madras High Court,
Madurai.



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R.POORNIMA, J.

RM

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