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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 04.07.2025

CORAM

THE HON'BLE MR. JUSTICE R.VIJAYAKUMAR

S.A.(MD)No.68 of 2004
and
C.M.P.(MD)No.186 of 2004

1.Mahalakshmiammal (Died) ...1st Defendant/Appellant/Appellant
2.Thiruppathi
3.Seenivasan
*(Appellants 2 and 3 are brought on record as LR's of the deceased
sole appellant vide Court order dated 23.09.2024, made in
C.M.P(MD)Nos.11902, 11907 and 11910 of 2024 in
S.A.(MD)No.68 of 2004)* ...Appellants

Vs.

1.Venkatasamy Naicker
2.Subburaj ...Plaintiffs & 2nd Defendant/
Respondents/Respondents

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgement and decree dated 03.12.2003 and made in A.S.No. 32 of 2003, on the file of the Subordinate Court, Kovilpatti, confirming the judgment and decree dated 27.01.2003 and made in O.S.No.223 of 2000, on the file of the District Munsif Court, Kovilpatti.

For Appellants : Mr.V.Shathurthi Raja

For Respondents : No appearance

* * * * *



JUDGMENT

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The first defendant in O.S.No.223 of 2000, on the file of the District Munsif Court, Kovilpatti, has filed the present Second Appeal challenging the concurrent findings of the trial Court as well as the first appellate Court with regard to the schedule 1 to 4 of the suit schedule properties.

2.The plaintiff has contended that his father has purchased the suit schedule property under Ex.A1, dated 13.09.1962. According to him, the northern side of the property, there is a lane, which is shown as the second schedule property. The said lane absolutely belongs to him. He had further contended that an aerial encroachment made by the first defendant in the first floor of the second schedule property which is shown as the fourth schedule property.

3.The plaintiff has further contended that his western wall which is shown as the fifth schedule property absolutely belongs to him. The defendants had filed their written statement disputing the claim of the plaintiff. The defendants had contended that as per the measurement found in the sale deed of the plaintiff, the alleged second schedule property would not fall within the first schedule and the second schedule absolutely belongs to the first defendant.



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4.The defendants has further contended that there is no encroachment in the second schedule property or in the alleged third schedule property. The defendants has also disputed the right of the plaintiff to drain the water on the western side lane. The trial Court after considering the oral and documentary evidence has decreed the suit as prayed for.

5.The first defendant has preferred A.S.No.32 of 2003, before the Sub Court, Kovilpatti. The first appellate Court had dismissed the appeal except with regard to the prayer of the plaintiff for draining the water on the western side lane. Challenging the said judgment and decree of the first appellate Court, the present Second Appeal has been preferred by the first defendant.

6.The Second Appeal was admitted on the following substantial question of law:-

i)Had not the Courts committed an error in wrongly placing the burden on the first defendant to disprove the case of the plaintiff?

ii)Had not the learned Appellate Judge committed an error under law in not properly framing the points for determination as required under Order 41 Rule 31 of C.P.C.?



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7.The learned Counsel appearing for the appellant has relied upon Ex.A1, sale deed of the plaintiff, dated 13.09.1962, and contended that there is no reference about any lane either on the northern side or on the western side of the plaintiff's property in the said sale deed. As per the plaint measurement, the east west measurement of the plaintiff's property is 43 and 1/2 feet. However, the Advocate Commissioner in his report has found that the plaintiff is claiming to an extent of 57 feet in the east west direction. Therefore, when the plaint east west measurement and the sale deed of the plaintiff are looked into in the light of the commissioner report, they did not tally with each other. Therefore, according to the learned Counsel appearing for the plaintiff, the plaintiff property is to have an east west measurement in the 43 and 1/2 feet starting from the point A1 as pointed out by the Advocate Commissioner in his report.

8.The learned Counsel appearing for the appellant has further submitted that the north south measurement in the plaint is mentioned as 19 and 1/2 feet. However, in the commissioner report, only 18.6 feet has been pointed out. When the east west measurement of the plaintiff ends at 43 and 1/2 feet starting from Ex.A1, the alleged encroachment found in the portion of the J and K would not fall within the property of the plaintiff. These aspects have not been



considered by the trial Court as well as by the first appellate Court. He has further pointed out that the trial Court as well as the first appellate Court have erroneously placed the burden of proof upon the defendants to establish that the defendants are having right over the second schedule property. On the other hand, Ex.A1-sale deed, Ex.C1-commissioner's report and Ex.C2-commissioner's plan would clearly indicate that the plaintiff has miserably failed to prove his case with regard to the east west measurement of the property.

9.Though the respondents have been served and represented through the Counsel, there is no representation on several occasions. Therefore, this Court is constrained to pass orders on merits on the basis of the submissions made by the learned Counsel appearing for the appellant.

10.A perusal of Ex.A1, sale deed in favour of the plaintiff, would clearly reveal that there is no reference about any lane either on the western side or on the northern side of the plaintiff's property. As per the rough sketch annexed to the plaint, the lane on the northern side of the plaintiff's property is shown as the second schedule property. The alleged encroachment of the first defendant in the second schedule is shown as the third schedule. The alleged encroachment of the first defendant in the first floor is shown as the fourth



schedule property. Therefore, unless the plaintiff establishes his exclusive right over the second schedule property, there cannot be a decree for permanent injunction or for mandatory injunction to remove the alleged obstructions in the third schedule property as well as in the fourth schedule property.

11. Considering the fact that there is no lane shown on the northern boundary of the plaintiff's property as per the plaintiff sale deed, dated 13.09.1962, under Ex.A1, this Court is of the considered opinion that the plaintiff has miserably failed to establish his exclusive title over the second schedule property. That apart, a perusal of the Commissioner's report and plan marked as Ex.C1 and Ex.C2, would clearly reveal that the plaintiff has claimed his possession not to an extent of 46 and 1/2 feet (as per the sale deed), but to an extent of 57 feet. If the property of the plaintiff is measured from point A1 (as per commissioner's report), it should end at 43 and 1/2 feet on the southern side. However, the measurement has been stretched upto 57 feet and finding has been arrived at if the defendants have encroached between J & K. In such circumstances, this Court is of the considered opinion that the plaintiff having failed to establish his exclusive title over the 'A' schedule property especially between J & K point, in the Commissioner report. The trial Court as well as the first appellate Court were not right in granting relief to the plaintiff with regard to the second schedule property.



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12. In view of the above said deliberations, the substantial questions of law are answered in favour of the appellant. The judgment and decree of the first appellate Court are hereby set aside with regard to clause Nos.1 to 5 of the first appellate Court decree and in other aspects, the judgment and decree of the first appellate Court stands confirmed.

13. Accordingly, this Second Appeal is partly allowed to the extend as stated above. No costs. Consequently, connected Civil Miscellaneous Petition is also closed.

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NCC: Yes/No
Internet: Yes/No
Index: Yes/No
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R.VIJAYAKUMAR, J.

RJR

To

- 1.The learned Subordinate Judge, Kovilpatti.
- 2.The learned District Munsif, Kovilpatti.

Copy to:-

The Section Officer,
VR Section,
Madurai Bench of Madras High Court, Madurai.

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