

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08-06-2026

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CORAM:

THE HON'BLE MR.JUSTICE R.SAKTHIVEL

S.A. No. 708 of 2005

1. Kamala (died)

W/o Krishanapillai, Pavendhar Nagar,
Nallamangudi Village, Kumbakonam Main
Road, Nannilam.

... Appellant No.1 /
Sole Appellant /
Defendant

2. K.Anbalagan

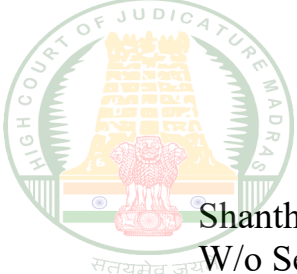
S/o K.Krishnan, Ezhil Nagar Street,
Nannilam Taluk.

3. G.Kala

W/o Ganesan D/o K. Krishnan.
No.44, Rastha Street, Nallamangudi Village,
Nannilam Taluk, Thiruvavur District

... Appellant Nos.2 & 3 /
Legal representatives
of deceased first
appellant - Kamala

Note: Appellant No.1 died.
Appellants 2 and 3 are brought on
record as legal representatives of the
deceased appellant No.1 -Kamala *vide*
Order of this Court dated January 03,
2023 made in C.M.P. Nos.5431, 5435
and 5439 of 2021.



-versus-

Shanthi

W/o Selvam, Angalamman Koil Street,
Achuthamangalam Village And Post, Nannilam.

...Respondent/
Respondent /
Plaintiff

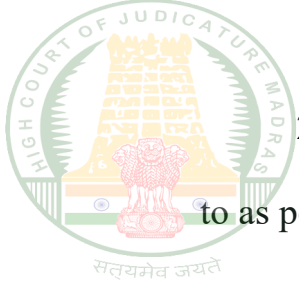
PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 praying to set aside the Judgment and Decree of the Subordinate Court, Thiruvarur passed in A.S. No.19 of 2004 dated March 24, 2005 confirming the Judgment and Decree of the District Munsif cum Judicial Magistrate Court, Nannilam passed in O.S. No.109 of 2002 dated February 13, 2004.

For Appellants : Mr.K.Selvaraj

For Respondent : Mr.A. Arun Babu
For Sole Respondent

J U D G M E N T

Feeling aggrieved by the Judgment and Decree passed by 'the Subordinate Court, Thiruvarur' ['First Appellate Court' for convenience] in A.S. No. 19 of 2004, wherein and whereby the Judgment and Decree passed in O.S. No. 109 of 2002 by the 'learned District Munsif cum Judicial Magistrate, Nannilam' ['Trial Court' for convenience] was confirmed, the defendant in the Original Suit who is the appellant in the Appeal Suit, has come up with this Second Appeal.



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

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3. Short facts pleaded in the plaint are as follows:

3.1. Case of the plaintiff is that an extent of 20 Cents *Nanja* Land in Survey No.26/5A of Achuthamangalam Village was originally owned by Murugaiya Pillai, who sold the said property to the defendant *vide* Sale Deed dated May 07, 1969. On August 21, 2000, out of the said 20 Cents, the defendant sold an extent of 12 1/3 Cents on the western side of the said property, along with the mangalore-tiled house thereon, in favour of the plaintiff. The eastern side of the said property remained with the defendant, which the defendant has failed. When the plaintiff was out of station, on April 30, 2002, the defendant encroached upon a portion of the plaintiff's property on its eastern side by extending his fence. The extent of encroachment is East-West 19 feet and North-South 88 feet. The encroached portion is described as the suit property herein. The plaintiff took steps to measure the suit property through a surveyor; however, the defendant did not allow the same. Hence, the plaintiff has filed the Suit for recovery of possession, *mesne* profits under



Order XX Rule 12 of 'the Code of Civil Procedure, 1908' ('C.P.C.' for short),
and costs.

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**4. Brief facts stated in the written statement filed by the defendant
are as follows:**

4.1. Case of the defendant is that the defendant did not encroach upon any portion of the plaintiff's land. At the time of the Sale Deed dated May 07, 1969 itself, a north-south fence was laid in the aforesaid 20 Cents of *Nanja* Land to demarcate the plaintiff's portion and the defendant's portion. The north-south fence was 6 feet away from the eastern side of the house on plaintiff's portion. Further case of the defendant is that a water channel runs abutting the northern side of the aforesaid 20 Cents of *Nanja* Land and a drainage channel runs abutting its southern side. Soil erosion took place due to the heavy flow of water during rainy season in the northern side water channel and consequently, portion of land on the northern side merged with the northern side water channel. In other words, the width of the water channel on the northern side elongated shrinking the plaintiff and defendant's land mass. The said fact came to light only when Advocate Commissioner along with Surveyor measured the aforesaid 20 Cents of *Nanja* Land. The



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plaintiff is wrongfully claiming the extent which eroded into the northern side water channel from the defendant. The plaintiff ought to have filed a Suit against the State of Tamil Nadu. As State of Tamil Nadu is a necessary party, the Suit is liable to be dismissed on the ground of non-joinder of a necessary party. The plaintiff is well aware of the fact that he is entitled only to 6 feet towards the east from his house. The plaintiff suppressed many material facts and filed the Suit. Therefore, the defendant prayed for dismissal of the suit.

TRIAL COURT

5. Based on the above pleadings, the Trial Court framed the following issues:

- "1. Whether the plaintiff is entitled for recovery of possession from the defendant as prayed for?*
- 2. Whether the defendant had sold the extent of 12 1/3 cents[37 Kuzhi] to the plaintiff as alleged in the plaint?*
- 3. Whether the defendant is barred by the principles of estoppel?*
- 4. Whether the plaintiff is entitled to Mesne profit?*
- 5. To what other reliefs the parties are entitled to?"*



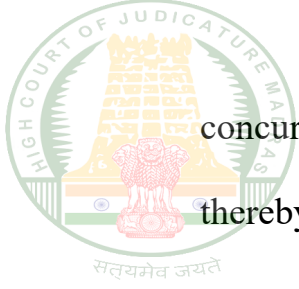
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6. At trial, on the side of the plaintiff, the plaintiff's husband was examined as P.W.1 and one Govindasamy was examined as P.W.2 and Ex-A.1 to Ex-A.3 were marked. On the side of the defendant, the defendant was examined as D.W.1 and one Hanifa was examined as D.W.2. No document was marked on defendant's side. The Advocate Commissioner's report & plan along with the Surveyor's report and plan were marked as Exs.C.1 to C.4 respectively. The Advocate Commissioner was examined as C.W.1 and the Surveyor was examined as C.W.2.

7. After hearing both sides, the Trial Court concluded that the plaintiff purchased an extent of 12 1/3 cents under Ex-A.1 - Sale Deed from the defendant and that the defendant handed over the same to the plaintiff. Further, the Trial Court found that the defendant had encroached the suit property and accordingly decreed the Suit with costs, *vide* its Judgment and Decree dated February 13, 2004.

FIRST APPEAL

8. Feeling aggrieved by the Judgment and Decree passed by the Trial Court, the defendant preferred an appeal in A.S. No.19 of 2004 before the First Appellate Court. The First Appellate Court, after hearing both sides,



concurrent with the findings of the Trial Court and dismissed the appeal, thereby confirming the Judgment and Decree passed by the Trial Court.

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SECOND APPEAL

9. Feeling aggrieved by the Judgment and Decree passed by the First Appellate Court, the defendant has preferred this Second Appeal, which was admitted on June 23, 2005 on the following Substantial Question of Law:

"When the Commissioner and surveyor have identified the property comprised in the sale deed executed by the appellant to the respondent herein under Ex.A.1 and without considering the report given by them, whether the decree and judgement granted by the Courts below sustainable in law?"

ARGUMENTS:

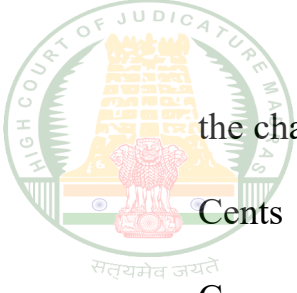
10. Mr. K.K. Selvaraj, learned Counsel appearing for the appellants / legal representatives of the deceased sole defendant, submits that the Trial Court as well as the First Appellate Court miserably failed to appreciate the fact that on the northern side of the suit survey number, there is a water channel running from east to west. Further, during the rainy season, due to floods, soil erosion took place and some portion of the properties of the



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plaintiff and the defendant merged with the said channel. While measuring the suit property, the Advocate-Commissioner has also noted the said fact in his report. The Advocate-Commissioner has nowhere mentioned or deposed that the defendant encroached the suit property. The burden is upon the plaintiff to prove his case of encroachment but she has miserably failed to do so. He further submits that the defendant did not encroach upon any portion of the plaintiff's land. He further submits that the State of Tamil Nadu is a necessary party to the Suit and, as the plaintiff has not impleaded the State of Tamil Nadu, the Suit must fail. In these circumstances, the Suit is not maintainable. The Trial Court as well as the First Appellate Court did not consider the nature of the Suit and the relief sought by the plaintiff and decreed the Suit under a wrong notion. Accordingly, he prays to allow the Second Appeal and set aside the Judgment and Decree of the Trial Court and that of the First Appellate Court.

11. *Per contra*, Mr. Arun Babu, learned Counsel appearing for the respondent / plaintiff, submits that the Advocate-Commissioner has clearly mentioned in his report that the plaintiff is in possession and enjoyment of 9.077 Cents and the defendant is in possession and enjoyment of 8.162 Cents. The plaintiff purchased an extent of 12 $\frac{1}{3}$ Cents towards the southern side of



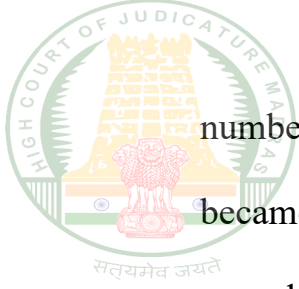
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the channel under Ex-A.1 - Sale Deed. Hence, the plaintiff is entitled to 12 $\frac{1}{3}$ Cents towards the southern side of the channel, but as per the Advocate-Commissioner's report, the plaintiff has only 9.077 Cents towards the southern side of the channel. Thus, it is clear that the defendant encroached upon the plaintiff's land. The plaintiff has proved her case. The Trial Court as well as the First Appellate Court, on appreciation of facts in the right perspective, recorded factual findings that the defendant had encroached upon the suit property. Hence, no question of law, much less any Substantial Question of Law, arises in this Second Appeal. Accordingly, the learned counsel prays for dismissal of the Second Appeal.

DISCUSSION

12. This Court has considered the submissions made on either side and perused the materials available on record.

13. Admittedly, an extent of 20 Cents in Suit Survey No.26/5A was owned by the defendant under a Sale Deed dated May 07, 1969. It is further an admitted case that the defendant, *vide* Ex-A.1 - Sale Deed dated August 21, 2000, sold an extent of 12 $\frac{1}{3}$ Cents on the western side of the said 20 Cents in favour of the plaintiff. Accordingly, out of the 20 Cents in the suit survey

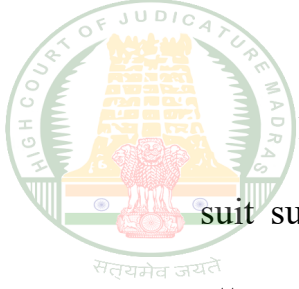


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number, the plaintiff became entitled to 12 1/3 Cents and the defendant became entitled to 7 2/3 Cents. There is no dispute between the parties as regards the above.

14. Case of the plaintiff is that he is entitled to 12 1/3 Cents towards the southern side of the water channel and that the defendant encroached upon the plaintiff's property to an extent of 19 feet on the east-west side and 88 feet on the north-south side. If that be so, the burden is upon the plaintiff to prove the same. To be noted, there is no east-west measurement mentioned in Ex-A.1.

15. In this case, an Advocate-Commissioner was appointed and he inspected the suit property along with a qualified Surveyor and filed reports and plans, which are marked as Exs.C.1 to C.4. A bare perusal of Exs.C.1 to C.4 would show that the plaintiff is in possession and enjoyment of 11.517 Cents in the suit survey number *viz.*, Survey No. 26/5A and the defendant is in possession and enjoyment of 9.266 Cents therein. Exs.C.1 to C.4 further show that an extent of 20 Cents is available in the suit survey number. The Surveyor examined as C.W.2 has deposed that the northern water channel runs in Survey No.25 and not in the suit survey number.

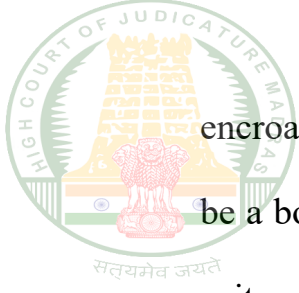


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16. Case of the defendant is that a portion on the northern side of the suit survey number eroded into the water channel and that the plaintiff is attempting to recover the same from the defendant by raising a false claim that the defendant encroached the suit property.

17. The four boundaries specified in Ex-A.1 - Sale Deed would show that the plaintiff is entitled to 12 $\frac{1}{3}$ Cents towards the southern side of the northern water channel, which as per the deposition of C.W.2 runs in Survey No.25. Exs-C.1 to C.4 would show that the plaintiff is in possession and enjoyment of 11.517 Cents. When so, the plaintiff has described the suit property as measuring 3.8 Cents (11 $\frac{1}{2}$ *Kuzhi*) and seeks recovery of possession in respect of the same. But she has not let in sufficient evidence to prove her case that the defendant actually encroached upon the easter side portion of the property purchased by her under Ex-A.1 - Sale Deed *i.e.*, the suit property. The plaintiff has not established a case for recovery of possession and mesne profits under Order XX Rule 12 of C.P.C.

18. Upon due consideration of the evidence available on record as well as the facts and circumstances of this case, this Court is of the considered view that the plaintiff has failed to prove her case that the defendant



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encroached upon the suit property. The dispute between the parties appears to be a boundary dispute in nature. Admittedly, the total extent comprised in the suit survey number viz., Survey No. 26/5A is 20 Cents. There is no dispute with the same. If the said extent of 20 Cents in the suit survey number is identified, and 12 1/3 Cents on the western side thereof and 7 2/3 Cents on the eastern side thereof are demarcated, the dispute between the parties could be easily resolved. Encroachment if any would come to light only then. Only upon such demarcation, the encroachment and the encroacher, if any, could be identified. Hence, the plaintiff ought to have sought for the relief of demarcation, and sought recovery of possession and *mesne* profits as further and consequential reliefs. The Trial Court as well as the First Appellate Court failed to consider the true nature of the dispute between the parties and erred in decreeing the suit. The Substantial Question of Law is answered accordingly.

19. Considering the facts and circumstances of this case, in the interest of justice, to avoid multiplicity of proceedings, this Court is inclined to mould the reliefs sought for by the plaintiff and order for demarcation.

**CONCLUSION**

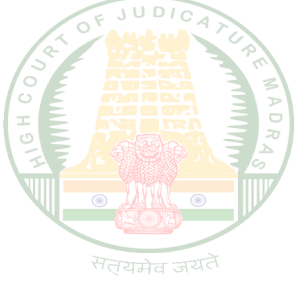
20. In the result, the Second Appeal is **partly allowed**. The Judgment and Decree of the First Appellate Court and the Trial Court are set aside. A preliminary decree for demarcation is passed in the following terms:

- (a) The plaintiff is entitled to 12 $\frac{1}{3}$ Cents out of the 20 Cents on the western side in Survey No. 26/5A and the defendant is entitled to 7 $\frac{2}{3}$ Cents out of the 20 Cents therein on the eastern side.
- (b) The Trial Court shall appoint an Advocate-Commissioner along with a Surveyor to identify Survey No.26/5A and to carry out demarcation in terms of clause (a) *supra*, and get a report from them.
- (c) Upon receipt of such report, the Trial Court shall pass a final decree based on the report.
- (d) Considering the facts and circumstances of the case, there shall be no order as to costs.

08-06-2026

Index: Yes/No
Speaking/Non-speaking order
Neutral Citation: Yes/No

JRS



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S.A. No. 708 of 2



R.SAKTHIVEL J.

JRS

To

1. The Subordinate Judges Court, Thiruvarur.
2. The District Munsif cum Judicial Magistrate Court,
Nannilam.

S.A. No. 708 of 2005

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