

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT****Dated: 02.08.2017****Coram****WEB COPY The HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA****S.A(MD)No.17 of 2014**

1.Hariram Sait

2.Pushpam .. Appellants/Respondents/Defendants 1 & 2

Vs.

Banumathi .. Respondent/Appellant/Plaintiff

Prayer:- Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and Decree, dated 21.06.2010 made in A.S.No.33 of 2007 on the file of the Sub Court, Ambasamudram, reversing the Judgment and Decree, dated 03.04.2007 made in O.S.No.77 of 2003 on the file of the District Munsif Court, Cheranmahadevi.

For Appellants : Mr.P.Subbaraj

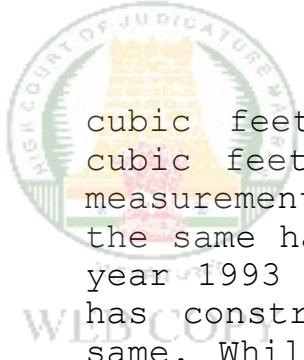
For Respondent : No Appearance

JUDGMENT

The above second appeal arises against the Judgment and Decree, dated 21.06.2010 passed in A.S.No.33 of 2007 on the file of the Sub Court, Ambasamudram, reversing the Judgment and Decree, dated 03.04.2007 passed in O.S.No.77 of 2003 on the file of the District Munsif Court, Cheranmahadevi.

2.The defendants 1 and 2 in the suit for bare injunction are the appellants, challenging the reversing Judgment of the lower Appellate Court.

3.The case of the plaintiff is that the suit property originally belonged to one Annapooranammal @ Avudaiammal. She had sold the same in favour of one Kuppusamy Nadar under Ex.A.1, dated 02.02.1976. Thereafter, the said Kuppusamy Nadar had gifted the same in favour of her grand daughter under Ex.A.2, dated 23.06.1993. The said grand-daughter, who is the plaintiff, claiming to be in possession of the suit property from the date of the gift. Actual measurement is said to be East-West 9-1/2 thatchu muzham (carpenters cubic feet) and North-South 35 thatchu muzham (carpenters cubic feet). But, in the sale deed under Ex.A.1, it has been described as East-West 35 thatchu muzham (carpenters



cubic feet) and North-South 9-1/2 thatchu muzham (carpenters cubic feet). Though it is stated by the plaintiff that such a measurement cannot be available as per the lie of the property, the same has been corrected when the gift deed was executed in the year 1993 as per Ex.A.2. After the said gift deed, the plaintiff has constructed a house and raised a compound wall around the same. While constructing the compound wall, it is stated that an extent of 3-1/2 feet breadth pathway was left for the purpose of maintenance of the wall. The said pathway is a portion of the plaintiff's property which is also shown as second schedule in the plaint. The said pathway (Klf;F) is an exclusive property of the plaintiff and nobody has got any right over the same. While so, the defendants threatened the plaintiff to close down the said pathway, which constrained the plaintiff to file a suit for bare injunction.

4.The suit was resisted by the defendants by contending that the execution of Exs.A.1 and A.2 are not true and the measurements found therein are also not correct. The defendants also denied the measurements mentioned in the said sale deed. It was contended that even presuming that there was a mistake crept in Ex.A.1 document, the only way out to the plaintiff is to file a rectification deed. But in this case, the plaintiff has *suo motu* altered the measurements while executing Ex.A.2 in the year 1993, which is not permissible under law. The defendants also denied the allegation of encroachment of the suit pathway.

5.The trial Court dismissed the suit, excepting granting permission to the plaintiff to use the pathway for the purpose of maintaining the wall by strengthening the same and white washing it. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No.33 of 2007 on the file of the Sub Court, Ambasamudram. The Appellate Court had decreed the suit as prayed for. Hence, the defendants have come up with the above Second Appeal.

6.At the time of admission of the above Second Appeal, the following substantial questions of law have been framed for consideration:-

"a) Whether the lower Appellate Court is justified in granting the relief of permanent injunction, when there is no reliable document available on record or has been produced by the respondent/appellant/plaintiff showing the right of title on the disputed suit property?

b) Whether the lower Appellate Court is justified in granting the relief of permanent injunction, by accepting the alleged rectification deed, executed by the subsequent purchaser, who is not the author of the original deed, that too, after a



lapse of 16 years?

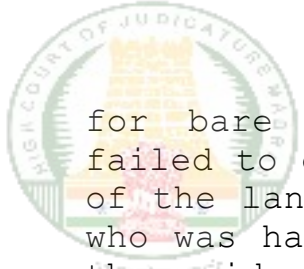
c) Whether the present suit filed by the respondent/appellant/plaintiff is barred by limitation, because of it is admitted in the plaint itself as such, the cause of action for the suit has been raised in the year 1976, but the suit has been filed only in the year 2003, that is, after a lapse of 26 years?"

7. Heard the learned counsel for the appellants.

8. The learned counsel, who appeared for the respondent at the S.R stage, did not continue to prosecute the appeal. Hence, notice was ordered to the respondent through Court and privately. The Court notice was served on the respondent, but, however, she has not chosen to appear either in person or through counsel.

9. The plaintiff has placed her reliance only on Exs.A.1 and A.2. Admittedly, there is a discrepancy in the measurement of the suit property. In Ex.A.1, it is stated as East-West 35 thatchu muzham (carpenters cubic feet) and North-South 9-1/2 thatchu muzham (carpenters cubic feet). It is stated by the plaintiff that it should be the converse, as the property cannot be described as mentioned in the document. Not stopping with that, the plaintiff has executed a gift deed under Ex.A.2, dated 23.06.1993. The purchaser under 1976 document has executed a settlement deed in favour of her grand-daughter, who is the plaintiff, on 23.06.1993. In the said document, the settlor has *suo motu* corrected the measurement and registered the document. Merely because the subsequent document was registered with the correct measurement, it will not absolve the mistake that had crept in Ex.A.1. According to the plaintiff, the specific case is that, her possession is as per Ex.A.2. The Appellate Court has erred in holding that the plaintiff was entitled to the measurement of 9-1/2 and 35, when the original document carries the measurement as East-West 9-1/2 thatchu muzham (carpenters cubic feet) and North-South 35 thatchu muzham (carpenters cubic feet). Without the deed of rectification, the plaintiff has obtained the settlement deed *suo motu* correcting the same on her own. When the possession of the plaintiff is based on the document and its measurements and when the document itself shows that the measurement was wrong, the claim made by the plaintiff cannot be granted.

10. When the defendants have specifically disputed the extent and denied the entitlement of the plaintiff as per settlement deed, the plaintiff ought to have filed a suit for declaration of title in spite of the fact that the title of the plaintiff was challenged and the suit filed only



for bare injunction is not maintainable. The Appellate Court failed to consider the fact that even though in Ex.A.1, the extent of the land has been wrongly mentioned, the said Kuppusamy Nadar, who was having the title to the property, ought to have rectified the said mistake by way of rectification deed immediately after having the knowledge of the same. But the plaintiff had not taken any steps to do that, but has altered the measurement *suo motu* in Ex.A.2, which is not permissible. Such unilateral change is unacceptable.

11.In fact, the plaintiff in the cause of action paragraph has stated that cause of action arose as early as 1976 when the purchase was made by Kuppusamy. Therefore, the mistake in the deed had crept in the year 1976, which has not been corrected till today, but had executed the settlement deed in the year 1993 by unilaterally changing the measurements. Insofar as the second schedule of property is concerned, which is a suit pathway, the trial Court had given right to the plaintiff to maintain the wall once in a year, if required. The defendants have not challenged the said right given to the plaintiff and allowed it to become final.

12.In the light of the above reasonings, the questions of law are answered in favour of the appellants. The Judgment and Decree of the lower Appellate Court is set aside and the Judgment and Decree of the trial Court is restored.

13.In fine, this Second Appeal is allowed. No costs.

Sd/-

Assistant Registrar(CS-II)

/True Copy/

Sun Assistant Registrar

To

1. The Subordinate Judge,
Ambasamudram.
2. The District Munsif,
Cheranmahadevi.

+1cc to Mr.P.Subbaraj, Advocate in SR.No.69980

ps

AE/KP/SAR3/04.09.2017/4P/4C