

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.01.2015

Coram:

THE HONOURABLE Ms. JUSTICE K.B.K.VASUKI

S.A.No.1532 of 1998

Chinna Bidda Naidu

.. Appellant/2nd Defendant

vs.

1.Rahamath Bi
2.B.R.Syed Basha
3.Nagarajan
4.Chinnappan

.. Respondents/Plaintiff/
Defendants 1,3,4

The Second Appeal is filed under Section 100 of Code of Civil Procedure against the judgment and decree dated 1.7.1998 made in A.S.No.68/1997 on the file of the 3rd Additional District Judge, Dharmapuri at Krishnagiri District confirming the judgment and decree dated 18.6.1997 made in O.S.No.171/1991 on the file of the District Munsif Court, Krishnagiri.

For Appellant : Mr.V.Ragavachari

For Respondents : Mr.C.R.Muralidaran for R1

JUDGMENT

The second defendant in O.S.No.171/1991 and the first appellant in A.S.No.68/1997 is the appellant herein.

2.The suit came to be filed by the first respondent herein for the relief of declaration and permanent injunction in respect of the suit property. The plaint proceeds as if the first defendant was originally the owner of land by a registered sale deed dated 15.3.1983 and he sold the suit property measuring 40 cents to the plaintiff for sale consideration of Rs.3,200/- under a registered sale deed dated 12.9.1985 and the northern boundary of the suit property measuring 40 cents purchased by the plaintiff is in the sale deed dated 12.09.1985 mentioned as the remaining land belonging to the first defendant and one Muniammal but after UDR Survey, no such land belonging to the first defendant was available on the north of the suit land and the land, if any land belonging to the first defendant is available on the north of the suit property, the plaintiff has got right of pathway through the same to go to his suit land and the plaintiff has actually been using the same as mamool pathway from the northern side. According to the plaintiff, the first defendant has no right, title or interest in the suit land nor is he in possession of the same and neither of the defendants are entitled to the suit land. While so, the defendants 2 to 4 with the connivance and assistance of the first defendant, tried to trespass into a small

portion on the northern side of the suit land and tried to prevent the plaintiff to reach the suit land and also threatened to obliterate the existing pathway leading to the suit land. When the plaintiff prevented them from doing so, the defendants went away stating that they would come again and throw out the plaintiff from the northern portion of the suit land and take forcible possession of the same. The plaintiff by contending so, sought for declaration of her title to the suit property and for permanent injunction restraining the defendants from in any way interfering with the plaintiff's peaceful possession and enjoyment of the suit property.

3.The suit relief was seriously opposed by the contesting defendants 2 to 4 by denying the plaintiff's right over 3 cents in S.No.28/1 situated on the northern side of 40 cents of land purchased by the plaintiff. According to the defendants 2 to 4, the first defendant, after having sold 40 cents of land to the plaintiff, retained three cents of land on the north of the suit land for his use and that is why, the portion retained by the first defendant was shown as northern boundary in the sale deed dated 12.9.1985 and the same was subsequently sold to the second defendant on 20.2.1991 for a sale consideration of Rs.6,000/- and there was a well formed ridge separating 40 cents of land belonging to the plaintiff and 3 cents of land belonging to the second defendant. Whereas, the same was wrongly stated as that of S.N.Rahman Sahib's land in the description of suit property. The defendants 2 to 4 have also in their written statement, stoutly denied any right of pathway to reach the suit property from the northern side and the enjoyment of 3 cents on the northern side of the suit land by the plaintiff as passage or in any other manner.

4.The parties, in support of their respective contentions, adduced oral and documentary evidence. The Advocate Commissioner's report and plan were received and marked as Exs.C1 and C2 court documents. Both the courts below on the basis of the evidence placed before the same, accepted the claim of the plaintiff and decreed the suit by granting the relief of declaration and permanent injunction in respect of 40 cents of land with right of passage in 3 cents of land on the northern side. Aggrieved against the same, the second defendant has come forward with the present second appeal before this court.

5.The second appeal is admitted on the following substantial questions of law:

1.Whether the courts below are right in ignoring the admission of PW1 and the recitals contained in the documents under Exs.A1 and B2?

2.Whether the courts below ought not to have held that the plaintiff had purchased 40 cents of land and is dis-entitled from claiming the 3 cents of land retained by his vendor?

3.Whether the lower appellate court is right in its appreciation of evidence, particularly the documents under Exs.A1, B2 and B1 and should it not have held that the vendor of the plaintiff and the first defendant had retained

3 cents of land, which had been sold to the appellant herein and that the plaintiff is dis-entitled to claim over and above the extent of his purchase?

6.This Court, during the course of argument, framed the following additional substantial question of law:

"Whether both the courts below are right in granting the relief without necessary pleadings regarding easementary right by way of necessity and without asking for the relief specifically?"

7.Heard the rival submissions made on both sides and perused the records.

8.The first defendant has under Ex.B2 dated 15.3.1983 purchased the land measuring 40 cents in S.No.28/1F situated on the South of the land belonging to Muniammal and S.B.Rahman Sahib measuring an extent of 43 cents in S.No.28/1F from one Chennan and his son Thimmarayan. The plaintiff admittedly purchased 40 cents out of 43 cents from the first defendant under Ex.A1 sale deed dated 12.9.1985. The northern boundary of the land purchased by the plaintiff is the remaining 3 cents of land belonging to the vendor and immediately on the north of the same is the land belonging to Muniyammal. That means, the vendor retained 3 cents out of 43 cents on northern portion. As per Ex.A1 sale deed dated 12.9.1985, the land measuring 40 cents along with 20 palmyra trees with the right of passage (மாழில் வழிநடை) is sold to the plaintiff. Ex.B1 is the sale deed dated 20.2.1991 executed by P.R.Sayed Basha in favour of the second defendant Chinna Bidha Naidu in respect of 3 cents on the northern portion of the suit land measuring 40 cents and the same is sold along with palmyra trees numbering 7 and mamool vazhi pathiyam. Thus, the combined reading of Exs.B2, A1 and B1 sale deeds would go to show that the first defendant purchased 43 cents on the south of the land belonging to Muniammal and S.B.Rahman Sahib and he sold 40 cents in the southern portion to the plaintiff and he retained 3 cents on the northern portion and thereafter, the land measuring 3 cents situated on the north of the land belonging to Muniammal and S.B.Rahman Sahib is sold to the second defendant.

9.The plaintiff has come forward with the suit for declaration and for permanent injunction in respect of the land measuring 40 cents, which is the extent admittedly covered under Ex.A1 sale deed along with palmyra trees and mamool pathway. The suit property is described in the plaint schedule as measuring an extent of 40 cents in S.No.28/1F at Basinayanapalli Village, Krishnagiri Taluk with about 20 palmyra trees and pathway right to reach the suit land from the northern side and is situated within the following boundaries:

West of the lands belonging to the second defendant and

Syed Kader Sahib, the late husband of the plaintiff;

North of Chinnappan's land

East of Muniammal's land; and

South of Muniammal's land - S.B.Rahman Sahib's land.

However, the boundaries of 40 cents are mentioned in the plaint schedule in such a manner that southern boundary is shown as the land belonging to Muniammal and S.B.Rahman Sahib. That means, the

description of the suit land includes the remaining extent of 3 cents which is not covered under his Ex.A1 sale deed. As rightly pointed out by the learned counsel for the appellant/second defendant, the plaintiff cannot be now permitted to make any claim in respect of more extent than what was conveyed to him under Ex.A1. When the plaintiff is entitled to only 40 cents, as per her sale deed and the remaining 3 cents on northern portion was sold to the second defendant by the vendor first defendant any claim for right, title and interest in respect of such 3 cents land, setting up any right on herself and any claim denying the right of either the first defendant or the second defendant in respect of such 3 cents land is hence legally and factually unsustainable, as such, the trial court has rightly restricted the relief of declaration and permanent injunction in respect of 40 cents of land.

10.Whereas, the lower appellate court has, on total misconception of facts and misconstruing the documents, arrived at the conclusion that there is no proof to show that the first defendant retained 3 cents out of 43 cents and sold 40cents to the plaintiff and sold the remaining 3 cents to the second respondent. It is evident from the sale deed stands in the name of the plaintiff which is only for 40cents out of 43cents. The lower appellate court has arrived at an erroneous conclusion as if as per the boundaries and extent mentioned in Ex.A1 sale deed, the entire extent in S.No.28/1 including 3 cents having 3 feet pathway was purchased by the plaintiff and such finding is without any basis and contrary to the documentary evidence. Except wrongly mentioning the northern boundary, that too, in his plaint, no such specific claim is made by the plaintiff in respect of entire 43 cents of land. In the absence of any pleading and in the absence of any claim for title in respect of 3 cents, the relief granted by the lower appellate court in respect of entire 43 cents of land is erroneous, perverse and contrary to law. To that extent, the judgment and decree of the lower appellate court, granting 43 cents of land excluding 3 cents is liable to be interfered with.

11.As already stated, the declaratory relief as sought for in the suit is in respect of 40 cents of land more fully described in Ex.A1 sale deed. As far as the land measuring 3 cents covered under Ex.B1 sale deed is concerned, no right of passage is given to the plaintiff. The right of passage mentioned in the original title deeds in Ex.B2 and Ex.A1 and Ex.B1 is only *மாழில் வழி பாத்தியம்*, *மாழில் வழி பாத்தியம்* and *மாழில் வழிநடை பாத்தியம்*. It is nowhere mentioned in either of the documents that mamool passage lies in 3 cents of land on the northern side. There is also no pleading to that effect raised by the plaintiff. The entire averments raised in the plaint as relating to suit land is only in respect of 40cents and nothing more. The plaintiff has only at the end of para 5 averred vaguely that no one else has got any right, title or interest in the suit land and even if there is any land belonging to the first defendant situated to the north of the suit land, the plaintiff has got the right of pathway through the remaining land of the first defendant. That shows, the plaintiff has not come forward with any definite case about his right over 3 cents on northern side of the suit land.

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12.The learned counsel for the plaintiff, in the course of his argument has also admitted that the plaintiff was not given any such

right in the document and what was claimed as the right of passage is by way of easement of necessity. Here again, there is no pleading raised in this regard. There is no specific averment regarding length, width and breadth of the pathway and the course of the same i.e. beginning and end of the same. No separate description is given in the suit schedule in respect of the so called pathway. Though the Advocate Commissioner was appointed to go and inspect the suit property to ascertain the existence and location of so called pathway, Exs.C1 and C2 Advocate Commissioner's report and plan are of no help to prove the claim of the plaintiff as the existence of pathway is nowhere indicated in the same. The plaintiff did not file any objection to Exs.C1 and C2 Advocate Commissioner's report and plan which are also not accepted by the trial court. On the contrary, as per the written statement filed by the defendants, there is a well formed ridge separating 3 cents of land and 40 cents of land belonging to the plaintiff and the same is reported to be obliterated. The pathway to reach the plaintiff's property is shown on the southern side.

13. Be that as it may, the lower appellate court without any pleadings and without seeking any specific relief being sought for in respect of 3 cents of land, granted the relief in respect of entire 43 cents and the same is hence without any evidence and by overlooking the material evidence adduced before the same and the finding so rendered by the lower appellate court, declaring the plaintiff's right in respect of the suit land including 3 cents, in my considered view, is totally perverse and vitiated. The plaintiff, under the guise of seeking the relief in respect of 40 cents, has now obtained the relief in respect of entire 43 cents in deceitful manner, without any pleadings and satisfactory evidence in support of the same. The judgment and decree of the lower appellate court is hence not sustainable and the suit relief is restricted to 40 cents within four boundaries as described in Ex.A1 plaintiff's sale deed dated 12.9.1985 and substantial and additional substantial questions of law are accordingly answered in favour of the appellant.

14. In the result, the judgment and decree of the courts below are restricted to 40 cents more fully described in Ex.A1 sale deed dated 12.9.1985 executed in favour of the plaintiff and the second appeal is accordingly disposed of. No costs.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

rk
To

1.The 3rd Additional District Judge, Dharmapuri at Krishnagiri District.

2.The District Munsif, Krishnagiri.

Copy to: The Section Officer, VR Section, High Court, Madras.

+1 cc to Mr.V.Ragavachari, Advocate, sr.498

+1 cc to Mr.D.Sivakumaran, Advocate, sr.504

rj co, kra 18/09

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