

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 13.03.2015

CORAM:

THE HON'BLE MS. JUSTICE K.B.K.VASUKI

Second Appeal Nos.520 & 521 of 1999

Meiyanandan @ Selvaraj .. Appellant in both the second appeals

Vs

1.Palanisami Gounder (deceased).. 1st Defendant in O.S.645/87 & 2nd
Plaintiff in O.S.658/87

2.Viswanthan

3.Ponnusamy

(R2 & R3 are brought on record as LR's of the deceased R1 vide order of Court dated 22.01.2015 made in CMP.No.513 of 2012 in SA.No.520 of 1999.) and R2 and R3 are recognised as LR's of R1 vide order dt.22/01/2015 in S.A.521/99)

.. Respondents in both the second appeals/
Plaintiff in O.S.645/87 and defendants
in O.S.658/87.

Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 30.11.1998 made in A.S.Nos.17 & 18 of 1998 respectively on the file of the Principal District Judge, Periyar at Erode confirming the Judgment and Decree dated 11.12.1997 made in O.S.No.645 & 658 of 1987 respectively on the file of the II Additional District Munsif, Erode.

For Appellant : M/s.M.V.Venkataseshan

For Respondents : M/s.V.Bharathidasan
M/s.P.T.Ramadevi
M/s.A.Sundaravadhanan.

COMMON JUDGMENT

Both the second appeals arise out of the common judgment and decree made in OS.Nos.645 & 658 of 1987 as confirmed in AS.Nos.17 & 18 of 1998. Both the second appeals are filed by one and the same person by name Meiyanandan @ Selvaraj who was the first defendant in OS.No.645 of 1987 and the first appellant in AS.No.17 of 1998 and the 2nd plaintiff in OS.No.658 of 1987 and the appellant in AS.No.18 of 1998. The subject matter of the dispute in both the suits though described with different particulars in the suit schedule in both the suits admittedly the same property i.e, vacant site which is the front portion of the defendants property and is situated on the south

of the plaintiffs property. The measurement given in OS.No.645 of 1987 is 90x40feet whereas the measurement given in OS.No.658 of 1987 is 47x37feet.

2.The parties are for convenience sake described as per their rank in OS.No.645 of 1987.

3.The relief sought for in OS.No.645 of 1987 by the deceased plaintiff Palanisamy Gounder was for permanent injunction restraining the defendants from interfering with his peaceful and uninterrupted enjoyment of the suit property either by putting up construction or in whatsoever manner. Whereas, the relief sought for in OS.No.658 of 1987 by the first defendant in OS.No.645 of 1987 as the plaintiff therein was for restraining the defendant therein who was the plaintiff in OS.No.645 of 1987 from interfering with any construction work in the suit property in any manner and from interfering with the plaintiff's peaceful enjoyment of the suit property. In short, while OS.No.645 of 1987 was filed not to put up any construction in the property in question, the relief sought for in OS.No.658 of 1987 is not to interfere with any construction work in the same property.

4.The trial Court, having arrived at a finding that the suit schedule disputed vacant site is the property belonging to the plaintiff and the first defendant has no right over the same and the construction sought to be put up by the first defendant has to be necessarily restrained, decided the issue in favour of the plaintiff and decreed the suit OS.No.645 of 1987 and dismissed the suit OS.No.658 of 1987. Aggrieved against the same, the defendant in OS.No.645 of 1987 and the plaintiff in OS.No.658 of 1987 filed AS.Nos.17 and 18 of 1998 and the lower appellate court agreed with such findings of the trial court and dismissed both the appeals. Hence, these two second appeals before this Court by the unsuccessful defendant and the plaintiff in both the suits.

5.The second appeals are admitted on the following substantial question of law framed by this Court :

Whether the Courts below are right in holding that the suit property belongs to the respondents based on Ex.A1 when Exs.B1, B6 and B7 consistently represent that there is yet another man's property in between the property of the appellant and the 1st respondent?

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

7.The actual dispute involved in both the suits is nothing but identity of the property based on which to decide the ownership and possession and enjoyment of the same. Both the parties claimed the disputed vacant site to be their own, on the basis of Ex.A1 and Ex.B1

sale deeds standing in their respective names. As the plaintiff has first approached the appropriate civil forum claiming ownership of the property in question, the plaintiff's claim can be first decided. It is the specific case of the deceased plaintiff's father purchased the suit property under Ex.A1 sale deed dated 25.06.1937 and the property on the north of the same already belonged to the purchaser and after Ex.A1 sale deed both the properties had been jointly enjoyed by the father Marappa Gounder and in due course, the house property in both the properties became dilapidated and was demolished and the property remained as vacant site and after the death of father Marappa Gounder, the deceased plaintiff came to be in possession and enjoyment of the same and his peaceful possession and enjoyment of the same was sought to be interfered with by the defendant by putting up any wall enclosing the suit property.

8. When that being the nature of the claim made herein, the material document to be looked into is Ex.A1 sale deed dated 15.06.1937. The subject matter of the sale deed was described therein as vacant site and three anganam house within the following boundaries West of Nachimuthu Gounder house, East of Chennimalai Gounder house, North of Nallappa Gounder house and South of the property of the purchaser. The sale deed does not contain any east west and north south measurement and total extent of the property. The plaintiff has also not furnished in his plaint in OS.No.645 of 1987 the particulars regarding the measurement of the property purchased under Ex.A1 and property situated on the north of the same. Whereas the measurement is given as 90x40feet but north south and east west measurement is not given. The plaintiff as PW1 in the witness box is unable to explain as to how the measurement of the suit property was described in suit schedule in his suit as 90 x 40feet. As a matter of fact, PW1 has admitted in his cross examination that he is not aware of the measurements of the property belonging to him. The plaintiff as PW1 in the witness box would further admit that the measurement given in the plaint schedule is given on his own and the property is at no point of time measured. The plaintiff has also described the property in the plaint schedule with different boundaries. It is pertinent to mention at this juncture that the first defendant property was in the suit schedule originally shown to be on East and the same was then amended and as per the amended description, the suit property lies on the west of Nallamuthu Gounder and road and on the North of the house of Nallappa Gounder/who is the grand father of the defendant. Whereas the plaintiff as PW1 has stated in the course of his cross examination that the property on the west of the suit property belonged to one Chennimalai Gounder and on the north of Chennimalai Gounder is the vacant site belonging to Periasamy on the north of the same is the vacant site belonging to Subburaya Gounder and the house belonging to first defendant/Selvaraj is on the East of Subburaya Gounder. He would further deny that the vacant site on the north of the defendant house is the front vasal portion. Thus, the combined reading of the description of the property in Ex.A1 and the plaint averments and the

description of the property in the OS.No.645 of 1987 suit schedule and the evidence of PW1 as above referred to and the failure of the plaintiff to furnish the particulars regarding the measurement of the property would lead to an irresistible conclusion that the plaintiff has not come forward with correct particulars but also unable to and failed to identify the property purchased under Ex.A1 and the suit property. This court is at loss to understand as to how this material discrepancy and confusion regarding the suit property in the plaintiff's case escaped the attention of both the courts below. The finding of the courts below that the suit property is the subject matter of Ex.A1 is based on no evidence and Ex.A1 is not helpful for the plaintiff to prove his case and the finding of the courts below to that effect is hence baseless, unfounded and perverse.

9.As far the case of the first defendant is concerned, it is his categorical case that he has been in possession and enjoyment of disputed vacant site, since the date of his purchase under Ex.B1 and there is coconut tree fencing dividing his property and other property on the north of the same and the plaintiff property and his property are divided by east west pathway and the construction put up by him which is sought to be stopped is only construction of wall after removing the fencing etc., The first defendant has also both in his written statement as well as in his evidence explained the physical features available on land and the manner of his enjoyment of the same and the same is tallied with the physical features as explained in EXs.C1 to C4 Advocate Commissioners report and plan. As a matter of fact, as per the boundaries mentioned in Ex.B1 sale deed standing in the name of first defendant, the property on the north of the disputed portion is east west passage and the Advocate Commissioner report refers to the existence of passage on the north of the disputed portion and the same to greater extent supports the claim of the first defendant. The cursory glance at Exs.C1 to C4 would reveal that the plaintiff's property is situated on the north of the disputed portion and the passage.

10.It is also relevant to point out at this juncture that neither of the parties particularly the plaintiff filed any objection to the Advocate commissioner's interim plan and rough plan filed along with his report and plan. When the physical features available on land as described in the Advocate Commissioners report do not support the plaintiff's case, the plaintiff ought to have filed his objection and his failure to do so assumes greater importance. Both the courts below failed to duly appreciate the description of the property as given by the plaintiff and the relevant documents regarding actual lie of the land under dispute and the four boundaries surrounding the same and other physical features on land as disclosed in Exs.C1 to C4 and erroneously held that the plaintiff is the owner of the disputed portion and the first defendant has no right over the same and the finding so rendered by the courts below is perverse and warrants interference by this Court. The plaintiff, having failed to establish his right over the property, is disentitled to claim any

relief of injunction against the first defendant and the first defendant, having established his right to possession and enjoyment of the disputed portion, is entitled to seek the injunction relief against the plaintiff.

11.In the result, the second appeals are allowed and the common judgment and decree of both the courts below are set aside and the suit in OS.No.645 of 1987 stands dismissed and suit in OS.No.658 of 1987 is decreed as prayed for. No costs. Connected CMP is closed.

Sd/-
Asst.Registrar (CS III)

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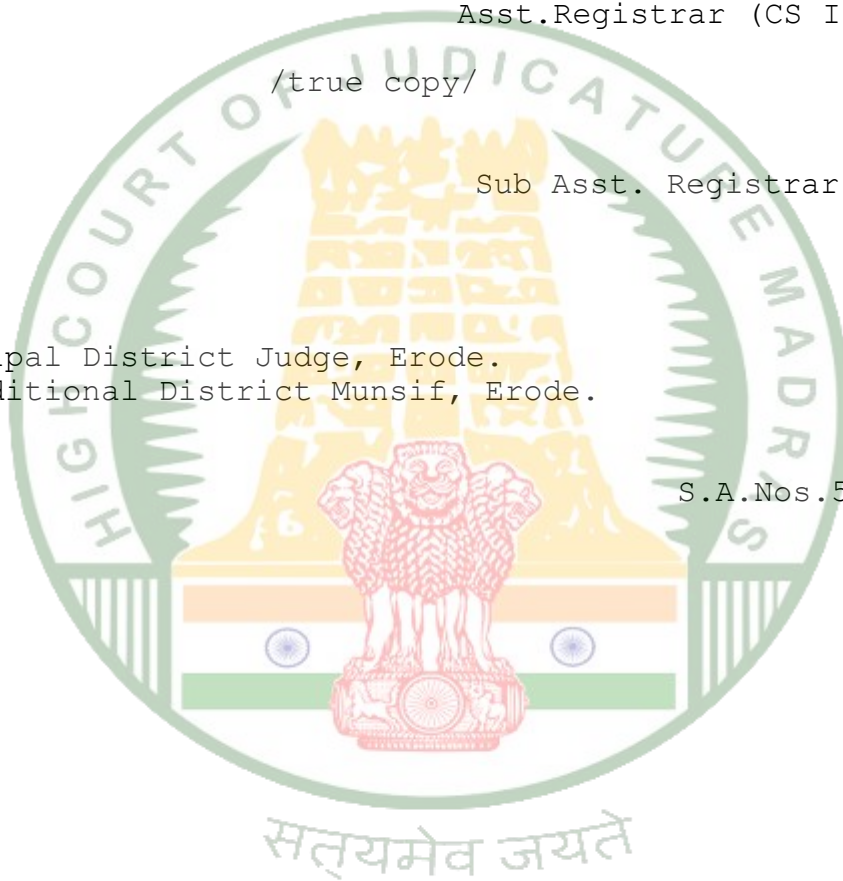
Sub Asst. Registrar

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To
The Principal District Judge, Erode.
The II Additional District Munsif, Erode.

S.A.Nos.520 & 521 of 1999

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