

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.09.2015

CORAM:

THE HON'BLE SMT. JUSTICE PUSHPA SATHYANARAYANA

S.A. No. 235 of 2009

and

M.P. No. 1 of 2015

Somasundaram

... Appellant/Appellant/
Ist Defendant

Vs.

1. Rajeswari

2. Madras City Municipal Corporation,
Rep by its Commissioner,
having its office at Rippon Buildings,
Chennai 600 003.

3. The Madras Metropolitan Development Authority
Rep by its Member Secretary,
Having Office at Thalamuthu Natarajan Buildings,
Egmore, Chennai 600 008

... Respondents 1 to 3/
Respondents 1 to 3/Plaintiff/
Defendants 2 and 3

Appeal under Section 100 of the Civil Procedure Code, against the judgment and decree dated 28.11.2007 passed by the learned Additional District Judge, Fast Track Court-V, Chennai made in A.S.No.239 of 2007, confirming the judgment and decree passed by the learned XIII Assistant Judge, City Civil Court, Chennai in O.S. No.5872 of 1991, dated 31.07.2006.

For Appellant : Mr. R.Subramanian
for Mr.M.Kamalanathan

For Respondent -1: Mr.M.A.Abdul Wahab

For Respondent-2 : Ms.Karthikaa Ashok

For Respondent-3 : Mr.C.Johnson

JUDGMENT

The appeal is filed by the defendant who has lost before the Courts below.

2. The suit originally filed for declaration and for injunction and in the event of finding that the first defendant is in possession for recovery of possession. The suit properties are described as two schedules 'A' and 'B' and the 'B' schedule is said to be part of 'A' schedule.

3. Both the plaintiff as well as the defendants have purchased the properties from the common vendor. The dispute is with respect to 'B' schedule property, which is an extent of 8 feet x 32 feet. The properties originally was purchased by one Balakrishna Naicker. The said Balakrishna Naicker purchased the properties under Ex.A-9 on 10.02.1929 from one Govindalal Purushothama Das and Manickan Govindalal, an extent of 3055 Sq.ft. The said Balakrishna Naicker also purchased on 17.08.1934 under Ex.A.10, an extent of 2622 Sq.Ft. from one Rangayanaki Ammal and Lakshmi Kanthammal. Thus, the said Balakrishna Naicker became the owner of 5677 Sq.ft, being adjacent properties in one block. The said Balakrishna Naicker had taken loan from one Jorar Mull Champalal. In order to discharge the said loan, the said Balakrishna Naicker sold the properties purchased by him under Ex.A-10, namely, an extent of 2622 Sq.ft to one Nathammal Daga under Ex.A-14, dated 07.08.1967. After the demise of the said Balakrishna Naicker, his son Ponnambala Naicker became the absolute owner of the properties. The said Ponnambala Naicker sold the remaining portion owned by Balakrishna Naicker, after deducting the extent of 2622 Sq.ft sold to Nathammal Daga to the plaintiff under Ex.A.15, dated 29.08.1979. As per Ex.A.15, the plaintiff has purchased 3072 Sq.ft.

4. From the above facts, it is clear that the plaintiff herein, who is the respondent has purchased 3072 Sq.ft of lands under Ex.A-15 with specific boundaries. So, also the defendant has purchased under Ex.B.1, an extent of 2622 Sq.Ft. from Nathamal Daga. The perusal of A4 and B1 shows that what was purchased by Nathammal Daga in the year 1967 from Balakrishna Naicker has been conveyed under Ex.B.1 on 19.06.1978 to the defendants. The plaintiff has purchased the property, subsequent, to the purchase of the defendants under Ex.A.15 on 29.08.1979. In Ex.A.15 also, the plaintiff has purchased within the specific boundaries, an extent of 30.72 Sq.Ft.

5. The original owner Balakrishna Naicker had purchased under two documents, namely, Exs.A9 and A10, an extent of 3055 and 2622 Sq.Ft, of which, the defendant has purchased under Ex.B.1, an extent of 2622 Sq.Ft. which has sold to his vendor Nathammal Daga. Therefore, the balance owned by the said Balakrishna Naicker would be only 3055 Sq.ft, as per purchase by him under Ex.A9 on 10.02.1929. However, the plaintiff seems to have purchased 3072 Sq.Ft. under Ex.A.15 from legal heirs of Balakrishna Naicker's son Ponnambala Naicker.

6. Before the trial Court, on the side of plaintiff, P.W.1 to P.W.4 were examined and marked Exs.A1 to A33. On the side of the defendants, the first defendant examined himself as D.W.1 and two more witnesses were examined and marked Exs.B1 to B3. Exs.C1 to C4 were marked as Court documents.

7. The dispute is now with respect to the portion measuring North-South 8 feet and East-West 32 Feet. Both the Courts below had decreed the suit as prayed for. Aggrieved by the same, the Second Appeal is filed on the following of substantial questions of law:-

1. Whether the Courts below ignored the principle that the boundary would prevail over the extent?
2. Whether the Courts below are right in decreeing the suit by relying upon the weakness in the case of the defendant, not considering the proof on the part of the plaintiff?.

8. Heard the learned counsel appearing for the appellant as well as the respondents and perused the records.

9. The learned counsel for the appellant / defendant contended that the original owner of Balakrishna Naicker had himself owned 5677 Sq.ft only, having purchased the same under two sale deeds in Exs.A9 and A10. The defendants' vendor Nathammal Daga, purchased 2622 Sq.ft. covered under under Ex.A.14 on 07.08.1967. Therefore, only, the balance, that was purchased under Ex.A.9, i.e. 3055 Sq.Ft. land was with the said Balakrishna Naicker. The plaintiff has purchased a specific extent of 1.672 grounds, namely, 3072 Sq.Ft under Ex.A.15. In the said Ex.A.15, the Northern boundary was shown as Nathammal Daga's property. It is not the case of the plaintiff that she had purchased the entire extent available with Balakrishna Naicker, after, he sold the same Nathammal Daga was purchased by him. It is

only a specific extent within a specific boundary that was sold to the plaintiff by the owner. The schedule in Ex.A-15 refers to a compound wall on the Northern side which goes to prove that the plaintiff is entitled to only up to the compound wall. It is not the case of the plaintiff that the actual measurement of the properties is less than what he has purchased. When the plaintiff who has come before this Court, claiming right and title over the suit properties under the specific sale deed, he cannot be entitled to more than what he has purchased.

10. The schedule of property mentioned in Ex.A.15 is as follows:-

All the house and Ground bearing (old Door No.2) New Door No.6, Sathiyanarayana Street, West Mambalam, Madras -33 comprised in S.No.54, Paimash Nos.15 and 17, Block No.9, Division No.116 bounded on the North by land belonging to Nathammal Daga, south by the said street, East by N.Kuppuswami Mudaliar's House and West by Nathammal Daga's house with an extent of about one Ground and six hundred and seventy two square feet (1.672 Ground) together with the compound walls on Northern sides within the Registration District of Madras, Sub-Registration District of T.Nagar.

11. A mere reading of the above said property clearly indicates that the properties purchased by the plaintiff is only 3072 Sq.Ft. within the specific boundaries, more particularly, a compound wall on the Northern side, which is the disputed area. While so, the plaintiff claiming that he is the absolute owner of the 'A' schedule property including 'B' schedule property is unacceptable. The 'A' schedule described in the plaint does not correlate the schedule of the property purchased by the plaintiff under Ex.A.15. Besides, the plaintiff has also not established as to how 'B' schedule property forms part of 'A' schedule property. The plaintiff who comes to Court has to fall or stand on his own case, he cannot pick the holes on the defendants.

12. It was also pointed out by the learned counsel for the appellant that the first Commissioner's report could not specifically describe 'B' schedule property. When the plaintiff has purchased the specific schedule of property which ends with compound wall on the Northern side, now the claim of the plaintiff appears to be beyond the same. Unless, the plaintiff establish that he has purchased an extent of more than what his vendor was entitled to or he has been in possession of the property by illegally occupying the same or the

measurement given was wrong and that he is entitled to the entire extent within the specific boundaries are established, the plaintiff cannot succeed. When, admittedly, under Ex.A.15, the plaintiff has purchased only 3072 Sq.Ft., he cannot make a claim for 3169 Sq.ft. which, on the face of it, is false. In para 6(e) of the plaint, the plaintiff claims title to the suit property.

6(e).....The plaintiff has got possession and enjoyment under the sale deed registered as document No.1206/1979. The plaintiff is the absolute owner of the said property and she has absolute possession and enjoyment as owner thereof living in the house situated therein. In other words plaintiff submits that she is in absolute possession and enjoyment of the schedule property-A, inclusive of 'B' schedule property herein as one and thereof.

Though the plaintiff had admittedly purchased only 3072 Sq.ft under Ex.A.15 had managed to get patta for 1 ground 769 Sq.ft. Though the defendant has purchased the property prior in point of time, no notice was issued to him before issuing patta. The purchase by the plaintiff is in 1979 and the suit is filed in the year 1991. The plaintiff cannot even claim title by adverse possession. The plaintiff who has come to Court claiming title has the burden on her to prove the same, which has not been done by the plaintiff for the additional extent of land claimed.

13. The appellant / defendant being the purchaser earlier in point of time has been in possession of the property purchased by him. The plaintiff who had purchased only subsequent to the purchase of the defendant, he is trying to make a claim for what he is not entitled to. In Ex.B.1, the Southern boundary is shown as Balakrishna Naicker's land. The plaintiff also had suppressed the fact that there was a compound wall existing on the Northern side, which was shown as her boundary. The learned counsel for the appellant also contended that the said suppression would amount to abuse of process of Court.

14. The plaintiff who is claiming tile exclusively under Ex.A.15 has to establish that his right over 'B' schedule property is covered under Ex.A.15. As discussed earlier, Ex.A.15 is only for an extent of 3072 Sq.Ft. In the absence of proof of 'B' schedule forming part of 'A' schedule, the claim of the plaintiff cannot be allowed.

15. The principle that the boundary would prevail over the extent will not be applicable to the case on hand, as there is no dispute with respect to the extent purchased by each of the parties. The claim of the plaintiff is only imaginary and the Courts below had erroneously accepted the contention of the plaintiff and granted a decree without application of mind. It is a settled principle that when there is no question of law involved, concurrent findings of facts cannot be disturbed and the High Court cannot come to independent conclusion unless the findings of the Courts below are contrary to the mandatory provisions of law. However, the proviso to Section 100 of Civil Procedure Code significantly acknowledges the power of High Court. The Hon'ble Supreme Court (2002(6) SCC 404) has held that the admission of parties or their witnesses are relevant pieces of evidence and should be given due weightage by Courts. Findings of facts ignoring such admissions and concessions is vitiated in law and can be interfered with by the High Court in Second Appeal.

16. The said principle is also reiterated by three Judges Bench of the Hon'ble Supreme Court in Sebastiao Luis Fernandes (dead) through LRs and others vs. K.V.P. Shastri (dead) through LRs and others [(2013) 15 SCC 161] has held that the High Court can interfere with the perverse findings of fact at the stage of Second Appeal and upholding the view taken by the High Court, the Bench observed in paragraph 34 of the judgment, observed as follows:-

"In our considered view, the substantial questions of law framed by the High Court at the time of the admission of the second appeal is based on law laid down by this Court in the above referred case of Hira Lal which view is supported by other cases referred to supra. Therefore, answer to the said substantial questions of law by the High Court by recording cogent and valid reasons to annul the concurrent findings that the non-appreciation of the pleadings and evidence on record by the Courts below rendered their finding on the contentious issues / points as perverse and arbitrary, and therefore the same have been rightly set aside by answering the substantial questions of law in favour of the defendants."

17. In view of the above judgments, this Court, with a view to prevent aberration of justice answers, the substantial questions of law in favour of the appellant. Hence, the findings of the Court below are set aside.

18. In the result, the Second Appeal stands allowed; and the suit is dismissed. However in the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

srn

To

1. The Additional District Judge,
Fast Track Court-V, Chennai
2. The XIII Assistant Judge,
City Civil Court, Chennai
3. The Record Keeper
V.R. Section,
High Court, Madras

+1cc to Mr.C.Johnson, Advocate, S.R.No.46747
+1cc to Mr.Keerthikaa Ashok, Advocate, S.R.No.47084
+1cc to Mr.M.Kamalanathan, Advocate, S.R.No.46532
+1cc to Mr.M.A.Abdul Wahab, Advocate, S.R.No.47672

S.A. No. 235 of 2009
and
M.P. No. 1 of 2015

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