

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.10.2016
PRONOUNCED ON : 26.10.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No. 1 of 2011

Hasinabi ... Appellant/Respondent/Plaintiff

Vs.

C.Kaliyamoorthi ... Respondent/Appellant/Defendant

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 26.07.2010 passed in A.S.No.38 of 2010 on the file of the Principal District Court, Villupuram reversing the judgment and decree dated 27.01.2009 passed in O.S.No.197 of 2006 before the Principal District Munsif's Court, Villupuram.

For Appellant : Ms.R.Meenal

For Respondent : Mr.A.Thamizharasan

JUDGMENT

Impugning the judgment and decree dated 26.07.2010 passed in A.S.No.38 of 2010 on the file of the Principal District Court, Villupuram reversing the Judgment and Decree dated 27.01.2009 passed in O.S.No.197 of 2006 on the file of the Principal District Munsif, Villupuram, the plaintiff has preferred this second appeal.

2. The suit has been laid by the plaintiff for declaration, possession and for mandatory injunction.

3. The avernments in brief contained in the plaint are as follows:

The property described in the "A" schedule property originally belonged to Ramani and she has been in possession and enjoyment of the same. The above said Ramani has sold "A" schedule property to the plaintiff by means of registered sale deed dated 26.03.1990 and since the date of sale, the plaintiff

has been in possession and enjoyment of the said property. The plaintiff has constructed a residential house in "A" schedule property and paying property tax and also, obtained the electricity service connection in her name and Municipal Water connection and paying necessary charges. The property purchased by the plaintiff was subdivided and patta has been granted in her name. The plaintiff has left a open space on the eastern side of the "A" schedule property for the purpose of gardening and also, storing wastage and the said open space is described as "B" Schedule property. The "B" schedule property forms part of the "A" schedule property. A rough plan is appended along with the plaint and the "A" schedule property is shown as ABCDEF and "B" schedule property is shown as CDE. The Lalkhan Kuttai Poromboke is situated on all sides of "B" schedule property except on the western side. The defendant has made an encroachment on the south of the "B" schedule property a few years ago and constructed a house and also, attempted to encroach the property situated immediately on the north of his house property and also, attempted to encroach upon the "B" schedule property. While the plaintiff was obliged to go to Madurai in the month of February 2006 to attend a marriage, the defendant has laid foundation in the "B" schedule property during her absence and the plaintiff has questioned about the illegal encroachment and the defendant had agreed to remove the same, but he failed and neglected to do so. Further, 02.05.2006, the defendant has added further construction in the "B" schedule property and also, closed the way to "B" schedule property by way of illegal construction despite protest by the plaintiff. The defendant has no title or interest in the "B" schedule property and he is not entitled to interfere with the plaintiff's possession and enjoyment of the "B" schedule property. Hence, the suit.

4. The averment in the written statement filed by the defendant are briefly stated as follows:

The suit is not maintainable either in law or on facts. The defendant denied all the averments put forth by the plaintiff in the plaint with reference to her title, interest, possession and enjoyment of the "B" schedule property. The plaintiff has not specifically pleaded and proved that she is entitled to "B" schedule property and as to when she started enjoying the same. The plaintiff, from the purchase of "A" schedule property in the year 1990, could not project her possession in respect of "B" schedule property either by her or by her predecessor in title. The defendant's father Chinnathambi a resident of Perumal Koil Street in Villupuram Town, shifted his residence 60 years ago to "B" schedule property and the then, vacant site situate on the southern side of "A" and "B" schedule properties and put up a thatched hut and enjoyed the vacant site situate on the south of "A" and "B" schedule properties and also, enjoyed "B" schedule

property in particular by putting a cow shed and by heaping up hay-rick. After the demise of Chinnathambi, the defendant has been enjoying the property with all the superstructure in his own and absolute right and had converted the thatched house into a Mangalore tiled house in the year 1972 itself and obtained service connection in S.C.No.1120 from TNEB and also enjoyed the Mangalore tiled house along with the above said cow shed situated in "B" schedule property under the same electricity service connection. "B" Schedule property is part and parcel of the Mangalore tiled house situate on the southern side of "B" schedule property. It is true that "A" schedule property is situated on the eastern side of "B" schedule property. The plaintiff has sought permission from the defendant a few years ago to put up a septic tank on the western side of "B" schedule property as she did not have sufficient space for the same in the property purchased by her under the sale deed. The defendant out of generosity permitted her and the plaintiff agreed not to block way from the defendant's tiled house situate on the south of "A" and "B" schedule properties. However, contrary to her promise, the plaintiff occupied the defendant's property in his absence in more measurements than what was sanctioned to her and also blocked the defendant way from his tiled house and despite agreeing to remove the same, she has filed the present suit with false cause of action. The rough sketch filed by the plaintiff does not portray the real picture of the suit schedule properties with correct measurement and with their correct boundaries. The plaintiff cannot claim that she has purchased under her sale deed and deny the defendant's title and interest in respect of the "B" schedule property. The defendant has perfected and acquired absolute title over "B" schedule property by way of adverse possession also as his possession and enjoyment of the same proved to be adverse even to the knowledge of the plaintiff for more than prescribed period. Hence, the suit without a cause of action is liable to be dismissed.

5. In support of the plaintiff's case PW1 & 2 were examined and Exs.1 to 7 were marked. On the side of the defendant, DW1 is examined and Exs.B1 to 41 were marked. Ex.C1 and 2 also were marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to decree the suit as prayed for. Aggrieved over the judgement and decree of the trial Court, the defendant preferred the first appeal. The first appellate Court was pleased to reverse the judgement and decree of the trial Court and dismissed the suit filed by the plaintiff. Aggrieved over the judgement and decree of the first appellate Court, the present second appeal has been preferred by the plaintiff.

7. That "A" schedule property has been purchased by the plaintiff from one Ramani under the sale deed dated 26.03.1990 has not been disputed by the defendant. The "B" schedule property is the bone of contention between the plaintiff and the defendant. Now, according to the plaintiff, she has left a open space on the eastern side of "A" schedule property for the purpose of gardening and also, storing wastage and the same is described by her as the "B" schedule property. The registration copy of the sale deed dated 26.03.1990 has been marked as Ex.A1. The plaintiff has not produced the original sale deed and comments were made with reference to the same by the first appellate Court. Be that as it may, a perusal of Ex.A1 would go to show that the plaintiff has purchased less than 0.02 cents measuring about 770 sq.ft in Punja Survey No.350/3 under Ex.A1. Therefore, it could be seen that the plaintiff has purchased an extent of 770 sq.ft alone under Ex.A1. Further, the perusal of Ex.A1 would also go to show that the plaintiff has purchased the property with a specific measurement and also, giving specific boundaries. Now, according to the plaintiff's averments, the "B" schedule property is bounded on all the sides by Lalkhan Kuttai Poromboke except on the western side. According to the plaintiff, on the western side of "B" schedule property, the "A" schedule property is situated. As seen earlier, the case of the plaintiff as averred in the plaint is that "B" schedule property forms part of "A" schedule property. The said fact has been seriously disputed by the defendant. Further, according to the plaintiff, she has been in possession and enjoyment of "B" schedule property along with "A" schedule property right from her purchase under Ex.A1 and that, she has been using the "B" Schedule property for the purpose of gardening and also, storing wastage. The specific case of the defendant is that "B" schedule property does not form part of "A" schedule property and that, the plaintiff or her predecessor-in-interest have never been in possession and enjoyment of "B" schedule property at any point of time. Further, according to the defendant, he and his father had been in possession of "B" schedule property right for more than sixty years and that, his father had put up a thatched hut on the south of "A" and "B" properties and also, enjoying the "B" schedule property by putting a cow shed and also, by heaping up hay-rick and later the defendant has converted the thatched house into a Mangalore tiled house and obtained electricity service connection and also, enjoying the same along with "B" schedule property. Thus, according to the defendant, the "B" schedule property and also, property lying to the south of "A" and "B" schedule properties are in possession and enjoyment of the defendant uninterruptedly, openly to the knowledge of one and all including the plaintiff for more than the statutory period and thus, the defendant has also perfected his title in respect of "B" schedule property by adverse possession.

8. As found earlier, the defendant is seriously disputing

the title and enjoyment of the "B" schedule property either by the plaintiff or her predecessor in interest. Despite the above said fact, the plaintiff has not placed any material whatsoever to the satisfaction of the Court to show that either her predecessor in interest or the plaintiff, subsequently, under Ex.A1 enjoyed the "B" schedule property in particular as claimed by her. The plaintiff has produced property tax receipt of the years 2004 to 2005 and also, water charges receipt for the period of 2005 & 2006 marked Exs.A3 to 5. Therefore, it could be seen that the plaintiff has not placed any material to show that her vendor had enjoyed "B" schedule property prior to 1990 and that, she had been in possession and enjoyment of the "B" schedule property from 1990 till date of filing of the suit. It could also be seen that as rightly argued by the defendant counsel, there is no indication in Exs.A3 to 5 that it pertains to "B" schedule property. It is the admitted case of the defendant that the "A" schedule is in possession and enjoyment of the plaintiff and therefore, it could be seen that Exs.A3 to 5 only pertains to the "A" schedule property.

9. According to the plaintiff, except the western side "B" schedule property is bound by Lalkhan Kuttai Poromboke. Further, as found earlier, under Ex.A1, the plaintiff has purchased the property with specific measurement less than two cents, around 770 sq.ft. Compared with the description of the property purchased by the plaintiff under Ex.A1 with the plaintiff plan and also, that averments contained in the plaintiff, it could be seen that nothing could be co-related with the "B" schedule property as projected by the plaintiff in the rough plan. Now, according to the plaintiff, the "B" schedule property is surrounded on three sides by Lalkhan Kuttai Poromboke. The plaintiff plan does not depict the same. Further, according to the plaintiff, the "B" schedule property measures north-south 13 ft, on the western side, 13', on the eastern side and east-west 8', on the northern side and 0' on the southern side measuring 52 sq.ft. However, the description of the property found in Ex.A1 would go to show that in all, the plaintiff had purchased the first measurement east-west 27', south-north 22', on the eastern side, second measurement east-west 16' south-north 11 feet, on the western side 22' triangular in shape measuring 770 sq.ft approximately 0.02 cents in Survey 350/3. Therefore, as per Ex.A1, the second measurement, on east-west is given as 16' and south-north as 11 feet and on the western side 22'. However, the above measurements are not properly described in the rough plan. In the sale deed Ex.A1, only on the eastern side Lalkhan Kuttai Poromboke is shown as boundary, whereas according to the plaintiff "B" schedule property is surrounded on all the three sides by Lalkhan Kuttai Poromboke, except on the western side. Therefore, the description of the property purchased by the plaintiff under Ex.A1 does not correspond to the description of the property given by her to the "B" schedule property in the

plaint and also, the description of the property depicted by her in the rough plan. Therefore, it could be seen that the plaintiff is not sure as to whether the "B" schedule property forms part of "A" schedule property which had been purchased by her under Ex.A1.

10. As found earlier, the plaintiff is found to be have purchased 770 sq.ft. under Ex.A1. So, the plaintiff at the best could be entitled to only a decree in respect of land measuring an extent of 770 sq.ft. and not more than that. On the other hand, during the cross-examination, the plaintiff has admitted that she has put up house construction measuring 22' and 27' and she does not know whether she has constructed house measuring 946 sq.ft.

11. According to the plaintiff, the defendant had encroached the portion on the south of "B" schedule property a few years ago and constructed a house. She has not specifically stated as to when the defendant put up the house construction on the south of "B" schedule property. As seen earlier, according to the defendant, for the past sixty years, his father and subsequently, the defendant has been in possession and enjoyment of the property situated to the south of "A" and "B" schedule properties and also, enjoying the "B" schedule property by putting up cow shed and by heaping up hay-rick. Further, according to the plaintiff, the defendant in the month of February, 2006, during her absence, laid foundation in the "B" schedule property. It does not stand to reason as to how come such a foundation was suddenly put up in the month of February, 2006 in the "B" schedule property. On the other hand, as rightly contended by the defendant, the plaintiff has not come forward with clean hands and therefore, unable to state clearly as to when actually the defendant encroached upon "B" schedule property. Further, according to the plaintiff, on 02.05.06, the defendant has put up further construction in the "B" schedule property and it could therefore be seen that the defendant has already been in possession and enjoyment of the "B" schedule property by putting up superstructure thereon and with a view to conceal the same, the plaintiff has invented the case falsely that during her absence in February, 2006 and May, 2006, the defendant has encroached upon the "B" schedule property and put up foundation and further construction on the same. As seen earlier, the plaintiff has not placed any material to show that at any point of time, "B" schedule property has been in her possession and enjoyment. Further, as discussed earlier, the plaintiff is also unable to establish that she has purchased the "B" schedule property under Ex.A1.

12. From the evidence adduced by the respective parties, it could be seen that "B" schedule property is only a Porambooku land and it is seen that the defendant has encroached upon the

same and put up cow shed and enjoying the same along with his house construction put up on the south "A" and "B" Schedule properties. Only on account of the same, the plaintiff during the cross examination has clearly admitted that for putting up septic tank, the "B" schedule property has been utilised by her and that she has sought permission from the defendant to put up in the same "B" schedule property and also, further admitted that she has put up septic tank on the southern side of "A" schedule property and further, admitted that the defendant has put up 2 house on the southern side of her house and enjoying the same and that, when she had purchased her property, the defendant has been enjoying the house property and also, the cow shed and the defendant enjoying two terraced building and also. "B" schedule property separately without any division and even prior to her purchase, the defendant has put up house construction on the southern side and he has put up house construction 20, 30 years prior to her purchase and she does not remember the extent of land purchased by her and that, she has been enjoying only the extent of land purchased by her and not in excess of the same and she has purchased only 2 cents under Ex.A1. As found earlier, the plaintiff is not sure to be in enjoyment of 946 sq.ft and the plaintiff feigned ignorance in respect of the same.

13. In this matter, the inspection of the suit property by the advocate commissioner was also made and the commissioner has filed his report and plain, which are marked as Exs.C1 and C2. No doubt, the plaintiff has filed her objection to the commissioner's reports. As adverted to earlier, the plaintiff has admitted that she has purchased only less than two cents under Ex.A1 viz. 770 sq.fet. and also further admitted that she is not in possession and enjoyment of excess extent than what has been purchased by her under Ex.A1. To the suggestion put forth to her that she has constructed a house to the extent of 946 sq.ft. the plaintiff has feigned ignorance to the same and not denied the suggestion. A perusal of the commissioner report and plan cumulatively, would go to show that as per the town survey documents, the plaintiff's property measures 807 sq.ft and further it could also be seen that the plaintiff has encroached upon the Natham Porambokku to an extent of 32 sq. ft. and also encroached upon right side to an extent of 66.75 sq.ft. If as per Ex.A1, the plaintiff has only purchased 770 sq.ft, it could be seen that it is only she who has encroached the other portion and put up construction without any authority. The plaintiff in her evidence has also admitted that the construction put up by the defendant is only on Lalkhan Kuttai Poromboke.

14. As seen earlier, the plaintiff has miserably failed to establish that her vendor and subsequently, the plaintiff has been in possession and enjoyment of "B" schedule property at any

point of time. That apart, the plaintiff's sale deed, Ex.A1, does not indicate that she has also purchased the "B" schedule property under the same. If according to the plaintiff, she has purchased "B" schedule property under Ex.A1 and that, her vendor had title over the "B" schedule property, the plaintiff would not have sought permission from the defendant to put up Septic tank in "B" schedule property. This would go to indicate that inasmuch as the defendant had already been in possession of Natham Porambokku viz., "B" schedule property and as the plaintiff has sought some space for putting up septic tank, she has obtained the defendant's permission and accordingly, put up Septic tank in the place earmarked for the same by the defendant.

15. To cap it all, though the plaintiff has claimed to have purchased the "B" schedule property also under Ex.A1 from her vendor, the plaintiff unable to hide the true facts has clearly admitted in the memorandum of grounds that "B" schedule property land is only a Porambokku land in ground No.11. She has stated that it is a common case of both parties that "B" Schedule property is a Porambokku land. Therefore, "B" schedule property being Porambokku land, it has not been explained by the plaintiff counsel, as to how she could lay claim, right or interest over the same, particularly, under Ex.A1. Further, if as seen above, the plaintiff has already admitted that "B" schedule property is in the possession and enjoyment of the the defendant and the lower appellate court having also found that the "B" schedule property has been possession and enjoyment of the defendant for more than statutory period continuously and also openly, to the knowledge of the plaintiff and the date of alleged encroachment over the "B" schedule property by the defendant has not been clearly established by the plaintiff, it could be seen that the plaintiff in order to save the point of limitation has falsely contended that the defendant has encroached upon "B" schedule property only during February, 2006 and May, 2006. Therefore, I hold that the plaintiff has miserably failed to establish that she has title over the "B" schedule property and hence, it could be seen that the plaintiff is not entitled to obtain the reliefs sought for in the suit.

In conclusion, the second appeal is dismissed as devoid of merits and no substantial question of law is involved in the second appeal. No costs.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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To

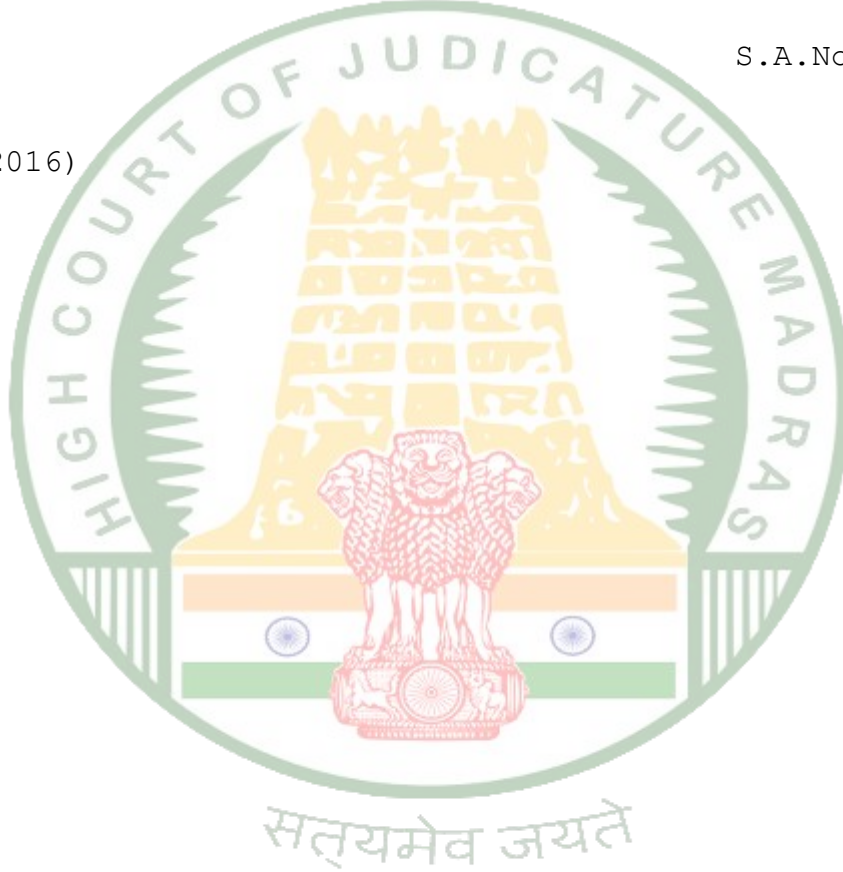
1. The Principal District Judge,
Villupuram.
2. The Principal District Munsif,
Villupuram.

+1cc to Ms.R.Meenal, Advocate, S.R.No.61678

+1cc to Mr.A.Thamizharasan, Advocate, S.R.No.61083

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