

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.03.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

S.A.No.74 of 2017

1.Mrs.Parameswari
2.Subbarayan

.. Appellants/Appellants/
Defendants 1 and 2

vs.

Mrs.P.Jyoshna

.. Respondent/Respondent/
Plaintiff

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 07.08.2015 passed by the learned Principal District Judge, Tiruvellore in A.S.No.36 of 2010, confirming the judgment and decree passed by the learned Subordinate Judge, Poonamallee dated 12.03.2010 in O.S.No.59 of 2008.

For Appellant : Mr.R.Venkatraman
for M/s.S.Ramesh

For Respondent : Mr.T.Karunakaran

J U D G M E N T

The defendants, who lost below the Courts below are the appellants. The respondent/plaintiff filed the Suit in O.S.No.59 of 2008 on the file of the Sub-Court, Poonamallee, praying for the relief of declaration, declaring that she is the absolute owner of the suit property admeasuring to an extent of 3300 sq.ft. in S.No.93 in Athi Pattu Village, Ambattur Taluk, Tiruvellore District and also for a direction to the defendants to deliver vacant possession of the suit property after removing whatever construction put up and further directing the defendants to pay a sum of Rs.12,000/- as past damages from 28.03.2008 to 08.04.2008 and also to pay a sum of Rs.1,000/- per day as future damages from the date of plaint till the date of delivering vacant possession.

2. The plaintiff/first respondent would aver that land admeasuring 3 acres and 99 cents situated in S.No.93, Athipattu Village, Ambathur Taluk, originally belonged to one N.Balaraman and he divided the said lands into plots of 49 cents each and created sale deeds in favour of several persons, namely Tvl.

Ramachandran, Kumaravelu, Naryanamurthy, Kothandaraman, Sekar, Dharmalingam and Others and they joined together and formed an unapproved layout in the said land. The portion of the land purchased by Ramachandran, Kumaravelu and Narayanamurthy runs north to south contiguously and the portion of the land shown as Plot No.42 in the rough sketch of the layout falls within the 49 cents purchased by Kumaravelu and the plaintiff purchased the same from Kumaravelu under registered sale deed dated 08.01.1997, marked as Ex.A8. Ramachandran, who is the owner of northern side of the land was also made as a party to the said sale deed. It is the claim of the plaintiff that after purchase, he levelled it and fenced it and started enjoying it absolutely as the owner. The plaintiff would further aver that the defendants who are utter strangers to the property claims right over Plot No.42, based on the sale deed executed by one Kalidass on 21.02.2008, marked as Ex.B8 and they traced title from one Narayana Murthy, who sold it to Kalappa Naicker on 18.9.1992, marked as Ex.B5. The legal heirs of Kalappa Naicker had sold the property to one M.R.Ravi on 24.03.2016, marked as Ex.B6 and the legal heirs of M.R.Ravi had sold it to Kalidass on 11.05.2007, marked as Ex.B7. It is also stated by the plaintiff that on 28.03.2008, the defendants had trespassed into the suit property and taking steps to put up a construction and therefore, came forward to file the Suit.

3. The defendants 1 and 2 had entered appearance and the third defendant, though served with summons, did not enter appearance and was called absent and set exparte. The first defendant in the written statement contended that the suit property was part of land in an unapproved layout and the rough sketch along with the plaint cannot be relied upon and as regards, topography, only the Taluk Surveyor or any other suitable person of revenue department can draw the appropriate sketch. It is the case of the first defendant that Plot Nos.42 and 43 was originally purchased by Kalappa Naicker in the year 1992, vide Sale Deed/Ex.B5 from Narayana Murthy and Ramachandran and ever since from purchase, he was in possession and enjoyment and the records was also mutated in his favour and after the demise of Kalappa Naicker, his legal heirs sold Plot Nos.42 and 43 to M.R.Ravi, vide Sale Deed dated 24.03.2006/Ex.B6 and patta was transferred in his name and after the demise of M.R.Ravi, his legal heirs sold the entire extent admeasuring 3929 sq.ft. to one Kalidass through Sale Deed dated 11.05.2007/Ex.B7 and from the said Kalidass, the first defendant purchased Plot No.42 and portion of Plot No.43 measuring 3929 sq.ft. through Sale Deed dated 21.02.2008/Ex.B8. The first defendant also took a stand that the vendors to the documents in title have not been impleaded as parties and the defendants 2 and 3 have no connection with the property.

4. It is also the stand of the first defendant/appellant that the plaintiff claims right over Plot No.42 based on the sale deed dated 08.01.1997 executed by Kumaravel and Ramachandran and whereas the lands in both the plots were sold in the year 1992 itself to Kolappa Naicker. The first defendant also took a stand that the rough sketch relied on by them is only to mislead the Court and the Suit for Declaration is not maintainable without impleading the plaintiff's predecessor in title and prays for dismissal of the Suit.

5. The second defendant had also filed a written statement stating that he is not a necessary party.

6. The third defendant had also filed a written statement stating that one Balaraman purchased 3 acres 99 cents of land under two sale deeds dated 14.11.1983 and 16.11.1983 and he sold 49 cents of land to one Narayanamurthy under Sale Deed dated 02.05.1991/Ex.B3 and 48 cents of land to one Ramachandran under Sale Deed dated 02.05.1991/Ex.B3 and they in-turn plotted out 97 cents of land and sold Plot Nos.42 and 43 to Kalappa Naicker under Sale Deed dated 18.09.1992/Ex.B5 with specific boundaries and measurements and as such, the vendors of the plaintiff had no title to convey the property and prays for dismissal of the Suit.

7. The Trial Court, on consideration of the pleadings, framed the following issues:

1. Whether the plaintiff is entitle for the relief of declaration as prayed?
2. Whether the 2nd defendant is not a necessary party to the suit?
3. Whether it is correct to say the suit property is in the possession of the first defendant?
4. Whether the claim of the third defendant that the plaintiff's vendor had no title to the suit property is correct?
5. What other relief the plaintiff is entitle for ?

During the course of trial, on behalf of the plaintiff, one Prabhakar Naidu was examined as PW1 and Exs.A1 to A37 were marked. On behalf of the defendants, the first defendant examined herself as DW1 and the third defendant was examined as DW2 and Exs.B1 to B11 were marked. During the course of trial, Advocate Commissioner was also appointed and his report as well as the sketch were marked as Exs.C1 and C2. The Trial Court, on consideration of the pleadings, appreciation of oral and documentary evidence, decreed the Suit insofar as the third defendant is concerned and dismissed the Suit, vide judgment and decree dated 12.03.2010.

8. The defendants 1 and 2, aggrieved by the judgment and decree passed in O.S.No.59 of 2008, filed an appeal in A.S.No.36 of 2010 on the file of the District Court, Tiruvellore and also filed an application in I.A.No.76 of 2014 to appoint an Advocate Commissioner to measure and survey the property and the Lower Appellate Court, on perusal of the materials, has formulated the following points for determination:

(In A.S.)

1. Whether the trial Court erred in relying Ex.A-4 also marked as Ex.A-7 to conclude that Narayanamurthy one of the vendor of the first defendant has no title over Plot No.42?
2. Whether the conclusion of the trial Court is correct under law and facts?

(In I.A.)

Whether appointment of second advocate commissioner at appellate stage is necessary to measure the suit item property and the appellants/defendants property as prescribed under the sale deed dated 20.02.2008?

9. The Lower Appellate Court found that though in the written statement, the defendants 1 and 2 took a stand that the rough sketch cannot be relied upon, found that the first defendant/DW1, during the course of her testimony had stated to the authenticity of the said layout sketch and taking into consideration the boundaries given in the respective documents, found that there is no pleadings or evidence that Ramachandran or Narayana Murthy owned land in S.No.94 and therefore, the revenue documents under Exs.B9 and B10 relied on by the appellant does not help her case. The Lower Appellate Court also found that though Ex.B5, the title deed of Kalappa Naicker is earlier in point of time, it is not purchased from the true owner of the land and therefore, the defendant, who is the subsequent purchaser of the land through the legal heirs of Kalappa Naicker, can have no better title than his vendor and since the title itself is defective, application taken out by them pendency of the appeal to measure and survey the land through Advocate Commissioner is unsustainable and therefore, dismissed I.A.No.76/2014.

10. The Lower Appellate Court has taken into consideration the crucial admission on the part of DW1 that she had purchased lands as described in the rough sketch and that the authenticity of the said rough sketch is not in serious dispute and the Trial Court was right in relying upon Ex.A4 to conclude that Narayanamurthy has no title in respect of plot No.42 and citing the said reason, dismissed the appeal suit, vide impugned

judgment and decree dated 07.08.2015. The defendants, aggrieved by the dismissal of the appeal suit by the Lower Appellate Court, had filed this Second Appeal.

11. In the Memorandum of Grounds of Appeal, the following Substantial Questions of Law are raised:

1. Whether the Courts below have committed a concurrent error of law in failing to see that proper and necessary parties to the Suit who formed the layout and conveyed the respective property to plaintiff and the first defendant have not been added and suit liable to be dismissed on account of the same?
2. Whether the Courts below have committed a concurrent error in failing to see that the pleading of the plaintiff is different from the proof produced under Ex.A4 and any proof in variance of the pleading is not acceptable in the eyes of law?
3. Whether the Courts below failed to see that the Exhibit A-4 claims the lay out to have been formed by all 6 purchasers of Balaraman while the same is not the case of the plaintiff and therefore, renders the documents a nullity?
4. Whether the Courts below erred in relying on report of Advocate Commissioner along with the sketch prepared by the plaintiff when the same is not authenticated ?

12. Mr.S.Ramesh, learned counsel appearing for the appellants/defendants 1 and 2 has drawn the attention of this Court to the typed set of documents and strenuously contended that even as per the Rough Sketch/Ex.A4 and other documents in title filed on behalf of the appellant, objections were raised and it is for the plaintiff to succeed or perish on her own pleadings and except marking the sale deeds, they have not produced any tenable to substantiate that the ownership, right and title in respect of the property and the Courts below instead of casting the burden upon the plaintiff to probablise her case, erroneously shifted the burden to the defendants to do otherwise. It is also the submission of the learned counsel appearing for the appellants/defendants that the plaintiff's predecessor in title ought to have been arrayed as parties and inspite of such steps beings taken in the written statement, the plaintiff did not chose to implead them and an application was filed for appointment of Advocate Commissioner to survey and

measure the property and the Lower Appellate Court committed a grave error in dismissing the said application.

13. Per contra, Mr.T.Karunakaran, learned counsel appearing for the plaintiff would contend that the findings rendered by the Courts below are concurrent in nature and though the Lower Appellate Court had delivered the judgment as early as on 07.08.2015, the appellants/defendants 1 and 2 did not take any steps to move the Second Appeal and the respondent/plaintiff also filed Execution Petition on the file of the Sub-Court, Poonamallee and delivery of possession has also been ordered and before effecting delivery, the defendants, at this juncture, wants to stall the further proceedings. The learned counsel appearing for the respondent/plaintiff on merits of the case would contend that the admission on the part of the first defendant is the best piece of evidence that she has purchased the land as described in the rough sketch- Ex.A4 and though the title deed of Kalappa Naicker is earlier in point of time, it is not purchased from the true owner of the land and therefore, the defendant, who is the subsequent purchaser of land through the legal heirs of Kalappa Naicker can have no better title than his vendor and the Courts below, on a proper consideration and appreciation of documentary evidence, reached the conclusion to uphold the claim of the plaintiff and in the light of the well considered findings, no substantial questions of law arises for consideration and prays for dismissal of this Second Appeal.

14. This Court paid it's best attention to the rival submissions and also perused the entire materials placed before it.

15. No doubt, both the parties had traced their title through earlier title deeds. It is to be pointed out at this juncture that though with regard to the rough sketch annexed to the plaint, serious objections were raised on behalf of the defendants 1 and 2, the fact remains that those documents were marked as Exs.A4 and A7, and the first defendant/DW1 during the course of her testimony, in more than one place admitted about the authenticity of the same and she went on to say that she purchased the same based on the said rough sketch only. The testimony of DW1 would also disclose that in respect of earlier title deeds, every time when sale is effected, the extent of the property got increased and also made a crucial admission that with regard to parent documents as well as extent of properties purchased, there is a difference in the measurements as well as boundaries.

16. It is a well settled position of law that in the event of any dispute with regard to extent and boundary, boundary will prevails over extent and on account of the fact that it was an unapproved plan, the boundaries may also change. The Courts

below, taking into consideration the crucial admission on the part of DW1/first defendant, found that the revenue records marked on her behalf namely Exs.B9 and B10 would not also come to her aid and her immediate predecessor in title did not purchase the property from the true owner and therefore, the defendant, who was the subsequent purchaser, cannot have better title.

17. It is also pertinent to point out at this juncture that even before the Trial Court Advocate Commissioner was appointed and when Advocate Commissioner's report was filed, on behalf of the defendants 1 and 3, no serious objection was raised and thereafter, the appellants/defendants were of the view that the properties purchased by them could not be located and nothing prevented them to give instructions to the Advocate Commissioner to locate the property with the help of Taluk Surveyor and the defendants, at the later point of time before the Lower Appellate Court, realized the mistake and filed a fresh application for appointment of Advocate Commissioner and it was also dismissed. It is also a well settled position of law that unless the earlier report of the Advocate Commissioner is scrapped, fresh Advocate Commissioner cannot be appointed as both the reports would be contrary to each other and in that event, the Courts below would be put to difficulty in appreciating the same.

18. In the considered opinion of the Court, the Trial Court as well as the Lower Appellate Court had considered the materials including the oral and documentary evidence in proper perspective and reached the conclusion to uphold the case of the plaintiff. This Court, on an independent application of mind to the entire materials placed, is of the view that there is no error apparent or infirmity in the findings rendered by the Courts below. The points urged on behalf of the appellants have been considered in extenso by the Lower Appellate Court and therefore, there are no questions of law, leave alone substantial questions of law arises for consideration in this Second Appeal.

19. Therefore, this Second Appeal is dismissed, confirming the judgment and decree dated 07.08.2015 passed by the learned Principal District Judge, Tiruvellore in A.S.No.36 of 2010, confirming the judgment and decree passed by the learned Subordinate Judge, Poonamallee dated 12.03.2010 in O.S.No.59 of 2008. No costs.

Sd/-

Asst.Registrar (CS II)

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Sub Asst. Registrar

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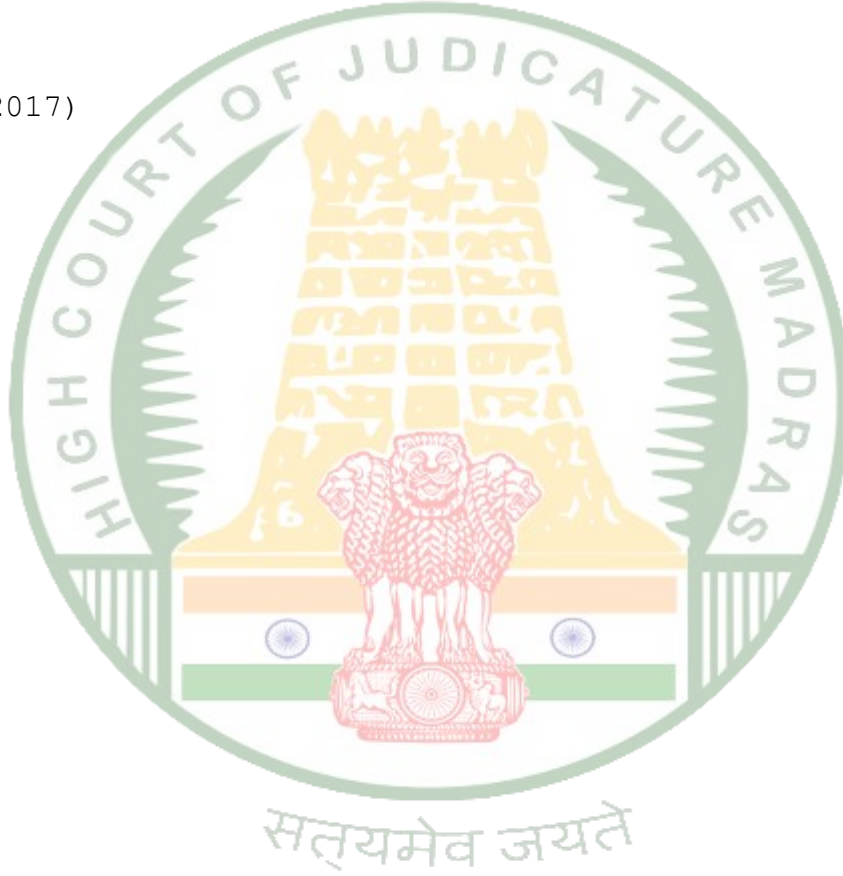
1. The Principal District Judge, Thiruvallur.
2. The Sub-Judge, Poonamallee.

+1cc to Mr.S. Ramesh, Advocate Sr. 19078

+2cc to M/S. T. Karunakaran, Advocate Sr. 19019

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SV (CO)
VR(12/04/2017)



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