

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.12.2016

PRONOUNCED ON : 06.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.Nos.106 & 107 of 2011

and

M.P.Nos.1 & 2 of 2011

S.A.No.106 of 2011

Ongan A.Arumugam ... Appellant/Plaintiff

Vs.

1. Thangammal

2. P.S.Rajagopal

3. A.K.Renugopal

... Respondents/Defendant

S.A.No.107 of 2011

Ongan A.Arumugam ... Appellant/Defendant

Vs.

Thangammal

... Respondent/Plaintiff

COMMON PRAYER: Second Appeals are filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 30.12.2009 in A.S.Nos.56 of 2009 & 55 of 2009 respectively on the file of the Principal Subordinate Judge, Salem, reversing the judgment and decree dated 28.04.2009 in O.S.Nos.1033 of 2007 & 717 of 2007 respectively on the file of the Principal District Munsif, Salem.

For Appellant in
both second appeals : Mr.D.Shivakumaran

For Respondent No.1
in both second appeals : Mr. A.Tamilvanan

COMMON JUDGMENT

Challenge in these second appeals are made by the defendant in O.S.No.717 of 2007/plaintiff in O.S.No.1033 of 2007 against the judgment and decree dated 30.12.2009 passed in A.S.Nos.55 of

2009 and 56 of 2009 on the file of the Principal Sub ordinate Judge, Salem, reversing the judgement and decree dated 28.04.2009 passed in O.S.Nos.717 of 2007 & 1033 of 2007 on the file of the Principal District Munsif Court, Salem.

2. The second appeals have been admitted and the following substantial questions of law are formulated for consideration in the second appeals.

" (i) When the 1st respondent herein has filed the suit in O.S.No.717 of 2007, only for the relief of permanent injunction and when the appellant herein has denied the title of the respondent and also filed a separate comprehensive suit for declaration and injunction in O.S.No.1033 of 2007 including the disputed (14x37.5) property is the lower appellate court correct in law in holding that the 1st respondent herein has proved her title to the suit property in the suit in O.S.No.717 of 2007, without any prayer for declaration.

(ii) Can the principle "boundaries will prevail over the extent" be applied, by ignoring the principle that the "vendor cannot sell more than what he has"?

(iii) Is the lower appellate court correct in law in reversing the well considered judgment of the trial court analyzing the material evidence on record without proper perspective?

3. The parties are referred to as per their ranking in the trial Court in O.S.No.717 of 2007.

4. Both O.S.No.717 of 2007 and O.S.No.1033 of 2007 were jointly tried and common evidence recorded and the evidence recorded in O.S.No.717 of 2007 has been treated as evidence in O.S.No.1033 of 2007 also. O.S.No.717 of 2007 has been laid by the plaintiff for permanent injunction and O.S.No.1033 of 2007 has been laid by the defendant in O.S.No.717 of 2007 for declaration and permanent injunction.

5. For an easy understanding of the issues, as regards the disputed property, the plaint plan appended to O.S.No.1033 of 2007 can be referred to and the same has been marked as Ex.B28. A perusal of Ex.B28 would go to show that the plaintiff's property is situated to the South of Raja veedhi and to the South of the plaintiff's property, the defendant's property is

situated and the defendant's property is situated to the North of Rangasamy terraced house and 4 1/2 ' lane. As far as the building portions of the plaintiff and the defendant's properties are concerned, there is no dispute. The dispute lies only in the vacant space situated between the built up portions of the plaintiff and the defendant's properties.

6. The plaintiff claims title to her property under Ex.A2 and her vendor had purchased the suit property, according to the plaintiff, under Ex.A1. The original owners are stated to be A.K.Arunachala Mudaliar and R.Angamuthu Mudaliar. A.K.Arunachala Mudaliar and R.Angamuthu Mudaliar, according to the plaintiff, had sold the property to Ponnusamy Mudaliyar under Ex.A1 and Ponnusamy Mudaliar had sold the property to the plaintiff under Ex.A2. As regards the East - West measurement of the plaintiff's property is concerned, there is no dispute, only as regards the North-South measurement, the problem arises between the parties. Now, according to the plaintiff, she claims North - South measurement up to 91' under her title deed.

7. The defendant claims title to his property under Ex.B2 and according to the defendant, his vendor had purchased the said property under Ex.B1. Even as regards the East-West measurement of the defendant's property, there is no serious dispute, particularly, with reference to the extent of the property, to which, the defendant and his predecessor in interest are actually entitled to. Now, according to the defendant, he has purchased his property measuring North-South 75'. So, as rightly found by the courts below adding North-South measurement of the plaintiff and the defendant's properties together, it could be seen that it comes to 166'.

8. In this matter, the properties were inspected by the advocate commissioner through the Taluk surveyor and the plan marked as Ex.C8 has been filed, which would go to show as to what extent the contesting parties are entitled to as per their documents and what is the actual extent in their possession at ground reality. A perusal of Ex.C8, as also found by the Courts below, would go to show that the actual extent of the properties of the plaintiff and the defendant North-South measures 155'. In between the built up portions of the respective parties, there is a vacant space. Therefore, it could be seen that there is a difference of 11' North-South between the title deeds of the properties and on actual ground. Therefore, the Courts below have proceeded with the case of the respective parties that either in one of their title deeds, an excess extent has been incorporated and if the same is found, it would disclose as to what extent the parties would be really entitled to, particularly with reference to the North-South of their respective properties.

9. According to the defendant, the plaintiff's predecessors in title viz., A.K.Arunachala Mudaliar and R.Angamuthu Mudaliar had no title to convey North-South measurement of 91' under Ex.A1 to Ponnusamy Mudaliar and therefore, Ponnusamy Mudaliar in turn would not be entitled to convey 91' North-South to the plaintiff under Ex.A2. Per contra, according to the plaintiff, the defendant's vendors are not entitled to convey 75' North-South and therefore, the title deed marked as Ex.B1 does not reflect the actual North-South measurement of the property, to which, the defendant's predecessors in interest are entitled to and therefore, the defendant's case should not be accepted.

10. The defendant's vendor viz., Appavoo Mudaliar had purchased the property under Ex.B1. A perusal of Ex.B1 would go to show that only 3 anganams of the property situated on the eastern side out of 5 anganams of the property are alienated. Further, it could be seen that 2 anganams of the property on the western side belonged to one Sengoda Mudaliar, who is the brother of Ramasamy Mudaliar. The document Ex.B1 does not point out as to what is the actual North - South measurement of 3 anganams or the 2 anganams of the property situated in the concerned survey number. Without giving any specific measurement under Ex.B1, only 3 anganams of property had been conveyed. However, the legal heirs of Appavoo Mudaliar under Ex.B2 had conveyed the entire 5 anganams of the property in the concerned survey number, i.e. 24/3 to the defendant, in particular North-South measuring 75' and it has not been explained by the defendant, as to how his vendors would be entitled to convey 5 anganams of the property in its entirety under Ex.B2, when Appavoo Mudaliar had only purchased 3 anganams of the property on the eastern side under Ex.B1. With reference to the same, the defendant examined as DW1, during his cross examination would only state that Sengoda Mudaliar, to whom, the western 2 anganams of the property belonged, had given the same to Appavoo Mudaliar in lieu of maintenance. However, there is no reference under Ex.B2 that Sengoda Mudaliar has given the 2 anganams of property to Appavoo Mudaliar in lieu of maintenance.

11. In such circumstances, the first appellate court has rightly found that there is no proper explanation adduced on the part of the defendant, as to how, his vendors would be entitled to convey 5 anganams of the property to the defendant under Ex.B2. Particularly, it has not been explained as to on what basis the defendant's vendors had conveyed North-South 75' to the defendant under Ex.B2, when no such specific extent, particularly, North-South had been conveyed to Appavoo Mudaliar under Ex.B1. Therefore, it could be seen that as rightly found by the first appellate court, the defendant has not placed valid title deed to evidence that he had purchased his suit property, particularly measuring North-South 75' from his vendors. In

such circumstances, the first appellate court disbelieved the case of the defendant and accordingly, set aside the judgment and decree of the trial court and accepting the case of the Plaintiff and resultantly, dismissed the suit filed by the defendant in O.S.No.1033 of 2007. Even during the course of hearing of the second appeal, the counsel for the defendant is unable to place any material other than Ex.B2 to establish that the defendant is entitled to North-South measuring 75' and therefore, it could be seen that the defendant has miserably failed to establish that he is entitled to the suit property as described in O.S.No.1033 of 2007.

12. The defendant's counsel, however, would contend that the plaintiff's predecessors in title had no saleable interest to convey North-South 91' and even before the plaintiff had purchased the property under Ex.A2 and even before the plaintiff's vendor had purchased the property under Ex.A1, the predecessor in title had alienated 13' measuring North - South for the purpose of forming Raja Veedhi and in such circumstances, according to the defendant's counsel, the plaintiff would not be entitled to his property, particularly, measuring North-South 91' as mentioned in Ex.A2.

13. However, countering the above contention of the defendant's counsel, the plaintiff's counsel would contend that the plaintiff's predecessors in title had conveyed an extent of 13' measuring North-South under Ex.B4, out of the remaining extent of 0.87 cents in survey 23/5 and not out of 0.59 cents purchased by them out of 0.87 cents under Ex.B3.

14. It could be seen that the plaintiff's predecessors in title A.K.Arunachala Mudaliar and R.Angamuthu Mudaliar had purchased the property from Vaiyapuri Mudaliar and others under Ex.B3 dated 22.12.1942 to an extent of 0.59 cents out of 0.87 cents situated in resurvey No.23. Further, as found by the trial Court, under Ex.B4 executed in the year 1944, A.K.Arunachala Mudaliar and Angamuthu Mudaliar had sold some portions of the property to A.K.Vaiyapuri Mudaliar and others measuring East-West 280' and North-South 13' and so, the trial court has found that when the plaintiff's predecessors in title had conveyed 13' North-South under Ex.B4 out of the property purchased by them under Ex.B3, they would not be entitled to convey North-South measuring 91' to Ponnusamy Mudaliar under Ex.A1. It has not been established on the part of the plaintiff by producing any document of title that A.K.Arunachala Mudaliar and R.Angamuthu Mudaliar had subsequent to Ex.B3 purchased the remaining extent in resurvey No.23. Thus it could be seen that 13' North-South measurement has been sold under Ex.B4 only out of the extent purchased under Ex.B3. At the most, the plaintiff's predecessors in title would be having legal right

only to an extent of 78' North-South and therefore, it is evident that the North-South measurement depicted in Exs.A1 and A2 are not correct and therefore, it could be seen, as found by the trial Court that the plaintiff cannot claim title to an extent of 91' North-South in respect of her property.

15. The first appellate court has also found that A.K.Arunachala Mudaliar and R.Angamuthu Mudaliar had sold 13' North-South under Ex.B4, however, it would raise a doubt as to whether the said extent measuring North-South 13' had been sold by them out of 0.59 cents purchased under Ex.B3 or out of the remaining 28 cents available in the concerned survey number. With reference to the same, the first appellate Court has held that there is no clear cut evidence adduced on that aspect by the parties concerned. As rightly contended by the defendant's counsel, the plaintiff having come forward with the suit seeking the relief of permanent injunction based on de jure possession has to establish that she is entitled by authority or legally to be in possession of an extent of 91' North-South of her property. However, when there is no clear evidence as to how her predecessors in title are entitled to convey North-South measuring 91' under Ex.A1 sale transaction, it could be seen that the first appellate court has proceeded on an erroneous approach of the matter in accepting the case of the plaintiff by relying upon the title deeds in respect of the property belonging to the third defendant.

16. The third defendant in O.S.No.1033 of 2007 is one A.K.Renugopal. Now according to the first appellate court, the plaintiff's predecessors in title viz., Ponnusamy Mudaliar and Kuppayammal had sold the property under Ex.B9 measuring 2230 sq.ft to one Sadhasivam under Ex.B9 sale deed and in turn Sadhasivam had alienated the said property to the third defendant on 25.02.1987 under Ex.B10 and according to the first appellate Court, inasmuch as the property sold under Ex.B10 measures North-South 91', the plaintiff's property situated to the east of the said property should also measure 91' North-South and so, holding the first appellate court proceeded to hold that the plaintiff is entitled to North-South measuring 91'. However, as rightly argued by the defendant's counsel, the above approach of the first appellate court in upholding the plaintiff's case cannot be accepted either factually or legally. In so far as the present lis is concerned, we are not in particular concerned as to what extent of the property the third defendant is entitled to and we are concerned only as to what is the saleable interest of the plaintiff's predecessors in title to convey under Ex.A1, particularly, with reference to North-South measurement. When it is found that they had already sold the 13' North-South under Ex.B4 and when the plaintiff has not clearly established that 13' North-South alienated under Ex.B4

is out of some other property in the suit survey number and not pertaining to her property, the plaintiff's title to her property, particularly, North-South measuring 91' cannot be upheld, merely because the property that had been conveyed under Ex.B10 to the third defendant also measures 91' North-South. The findings of the first appellate court that inasmuch as the property of the third defendant is situated to the West of the plaintiff's property and as the third defendant's property is measuring 91' North-South, the plaintiff's property would also be only measuring North-South 91' cannot be accepted as such. The plaintiff having come forward with the case, claiming specific relief particularly on the basis of de jure possession and when the extent to which the plaintiff is entitled to, in particular North-South is seriously being disputed by the defendant, as rightly put forth by the defendant's counsel after seeing the defence raised in the written statement, the plaintiff should have amended the relief sought for by including the relief of declaration. However, the plaintiff has not chosen to seek the relief of declaration in spite of the defence put forth by the defendant. That apart, the plaintiff has also not cared to establish that her predecessor in title had the legal right to convey North-South 91' under Ex.A1 and in such circumstances, it could be seen that even the plaintiff has failed to establish that she is entitled to hold the property measuring North-South 91' as claimed by her.

17. The trial court has focused on the case of the plaintiff and held that the plaintiff has failed to establish that she is entitled to North-South measuring 91'. Further, the trial Court has also found that despite the defence put forth by the defendant, the plaintiff having not cared to seek the relief of declaration, on that score also, the plaintiff should be non suited. The similar contention is also pressed into service by the defendant in the second appeal. In this connection, the decisions reported in 2009-2-L.W.546 (Anathula Sudhakar V. P.Buchi Reddy (Dead) By Lrs & Ors), 2014(2)CTC 421 (Ratna Kounder Vs. Annamalai and others) and (2014) 2 Supreme Court Cases 269 (Union of India and others Vs. Vasavi Cooperative Housing Society Limited and others) are pressed into service. A perusal of the above said decisions would go to show that when the defendant has categorically denied the title of the plaintiff, the plaintiff should have taken suitable steps to amend the plaint and seek the relief of declaration and cannot continue to prosecute the suit merely for bare injunction. However, in so far as this case is concerned, despite the denial of the title of the plaintiff by the defendant, the plaintiff has not chosen to seek the relief of declaration and proceeded to press only the relief of permanent injunction. As found earlier, the plaintiff has claimed the relief of permanent injunction based

upon her de jure possession. When the plaintiff is unable to establish her de jure possession to the disputed property i.e. The disputed vacant space other than the built up portion it could be seen that the plaintiff cannot be granted the relief sought for.

18. As adverted to earlier, the defendant has also failed to establish that his predecessors in title are entitled to convey North-South measuring 75' under Ex.B1 and so, it could be seen that the defendant has also failed to establish that he has legal title over the vacant space lying to the North of his built up portion. In the light of the above discussions, the suit laid by the plaintiff without a prayer for declaration, particularly, when her title to the property is disputed by the defendant, is not maintainable and further, it could be seen that when the plaintiff has failed to establish that her vendors had competency to convey 91' North-South, she cannot lay any claim over 91' North-South under her title deed marked as Ex.A2. Further, it could also be seen that the first appellate court has, without giving cogent reasons and also on an erroneous approach of the issues, reversed the well considered judgment of the trial court in dismissing the plaintiff's suit and to that extent, the findings of the first appellate court are found to be perverse and erroneous. However, as regards the approach of the first appellate court, while rejecting the case of the defendant, it could be seen that the first appellate court has focused the issues and evidence on record in the right perspective and on an analysis of the materials placed, found that the defendant has failed to establish that his predecessors in interest had saleable interest to convey North-South measuring 75' and accordingly, rightly rejected the case of the defendant. The substantial questions of law formulated for consideration in these second appeals are accordingly answered.

In conclusion, the judgment and decree dated 30.12.2009 passed in A.S.No.55 of 2009 on the file of the Principal Sub Court, Salem, are set aside and the judgment and decree dated 28.04.2009 passed in O.S.No.717 of 2007 are confirmed and accordingly, the second appeal in S.A.No.107 of 2011 is allowed. The judgment and decree dated 30.12.2009 passed in A.S.No.56 of 2009 on the file of the Principal Sub Court, Salem are confirmed and resultantly, the second appeal in S.A.No.106 of 2011 is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

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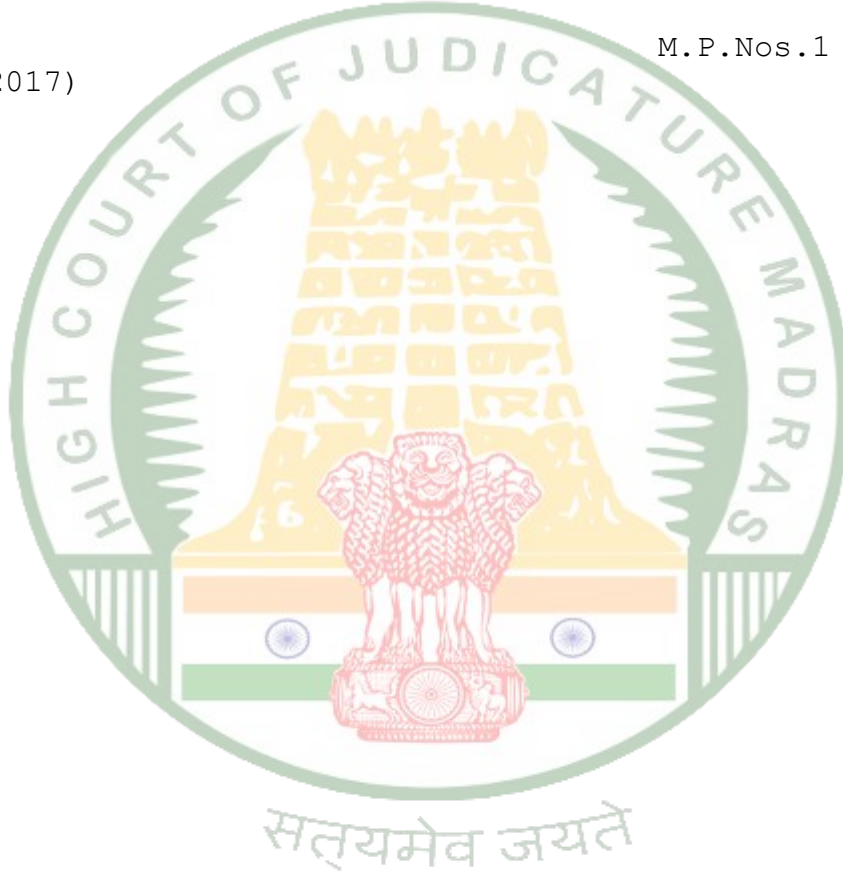
Sub Assistant Registrar

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To

- 1.The Principal Sub Court, Salem.
- 2.The Principal District Munsif Court, Salem.
- 3.The Record Keeper, VR Section,
High Court, Madras.

S. A.Nos.106 & 107 of 2011
and
M.P.Nos.1 & 2 of 2011

GN(11/04/2017)



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