

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.11.2016
PRONOUNCED ON : 04.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.149 of 2011
and
M.P.No.1 of 2011

A.K.S.Ravichandar ... Appellant/Defendant/Appellant

Vs.

Venkateswara Hospitals
rep. by its Partners
1. Dr.Su.Thillai Vallal
2. Leela Vallal

... Respondents/Plaintiff/Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree in A.S.No.40 of 2009 on the file of the Principal District Judge, Chengalpet and dated 29.09.2010 in confirming the judgment and decree in O.S.No.21 of 2007 on the file of the Principal Sub Judge, Chengalpet and dated 16.09.2009.

For Appellant : Mr.V.Raghavachari

For Respondents : Mr.M.S.Krishnan
Senior Counsel
For M/s.J.James

JUDGMENT

Challenge in this second appeal is made by the defendant against the judgment and decree dated 29.09.2010 made in A.S.No.40 of 2009 on the file of the Principal District Court, Chengalpet, confirming the judgment and decree dated 16.09.2009 made in O.S.No.21 of 2007 on the file of the Principal Sub Court, Chengalpet.

2. The suit has been laid by the plaintiff's hospital for declaration, possession and permanent injunction.

3. The case of the plaintiffs, in brief, is as follows:

The plaintiff's hospital has purchased "A" schedule property of an extent of 2 acres 78 cents in old dry survey No.120/3B, new dry survey No.120/3C in No.86, Thirutheri village, Chengalpattu Taluk, from M/s.Kalaimagal Sabha, represented by its Joint Receivers under the registered sale deed dated 18.08.2005 and the same is marked as "ABCDEFGA" in the plaint plan. After purchase, the plaintiff hospital has constructed a compound wall enclosing the property along "EFHBCD" marked in the plaint plan. The compound wall was not constructed in Southern margin i.e. ED portion. After construction of the compound wall, the plaintiff has applied for transfer of patta in its name in respect of "A" schedule property to Tahsildar, Chengalpeattu and also, paid necessary measurement charges. The Taluk Surveyor has measured the property and found that the property purchased by the plaintiff is localised as survey No.120/3C, which is marked as "ABCDEFGA" in the plaint plain and the surveyor has planted six survey stones in points "ACDEFG". The property on the North Western side of the suit property belongs to the defendant, who is running a petrol and diesel outlet. The defendant owns portion marked as "AGFIA" in the plaint plan. The Tahsildar, Chengalpattu, has granted patta No.201, in favour of the plaintiff in respect of "A" schedule property of an extent of 1.12.5 Hectares (2.78acres) in survey No.120/3C. The defendant has trespassed on 20.01.2007 and making arrangements to put up construction in the area, which is marked as "ASHFGA" in the plaint plan, which is forming part of "A" schedule property purchased by the plaintiff. The trespassed portion by the defendant is described as "B" schedule property. "B" schedule property is part of "A" schedule of an extent of 0.04.72 ares (11.67 cents). The defendant has no manner of right or title over the "B" schedule property. The plaintiff gave a police complaint against the illegal action of the defendant and despite the same, inasmuch as the defendant is continuing in his action of putting up illegal construction contrary to the undertaking given by him to the police and also, cast a cloud on the plaintiff's title to the "B" schedule property, the plaintiff has been necessitated to file the suit for necessary reliefs.

4. The case of the defendant, in brief, is as follows:

The suit is not maintainable either in law or on facts. After denying the plaint allegations totally, according to the defendant, Kothai ammal was owning and possessing an extent of 3.32 acres being the total extent in survey No.120/3 and that she sold an extent of 0.36 $\frac{3}{4}$ cents to the defendant under the registered sale deed dated 12.02.1986 for a sum of Rs.8,000/- and surrendered possession of the same and the said extent is bounded on the North by survey No.120/2 Meikkal Poramboke, East

and South by remaining extent owned by Kothai ammal and West by GST Road. Patta No. 126 was issued to the defendant for 0.15.0 Hectare under sub-division No.120/3A. The defendant has been paying kist for the same and running a petrol bunk thereon, after getting due licence. He has also put up a compound wall besides raising coconut, Teak, Mango, Guava, Neem and other trees as live-fencing along three sides except on the West and enjoying its usufructs since 1987. In any event, the defendant has prescribed title to the same by adverse possession also. The remaining extent in survey No.120/3 has been subdivided as survey No.120/3B. It is made known to the defendant recently that the sub divisions were effected without his knowledge or notice to him as survey 120/3A 0.12.5 Hectare, Joint patta given to the defendant and Kothai, survey No.120/3B 0.09.05 Hectare, patta No.200 given to the defendant and survey No.120/3C 1.12.5 Hectare, patta was given to Kothai.

5. The plaintiff, purported to have purchased survey No.120/3C from the subsequent purchasers of Kothai ammal, after being fully aware of the extent under the enjoyment of the defendant, covered within the age old compound walls and after verification of the available extent in survey No.120/3C. While so, the defendant was taken aback on receipt of the notice on 31.01.2007 under RPAD from the advocate commissioner that he was going to visit on 30.01.2007. On entering appearance in the matter, the defendant learnt that the advocate commissioner inspected the suit premises on 30.01.2007 in his absence and noted the physical features based on the representations made by the plaintiff through his counsel. The Advocate commissioner did not measure the suit premises with reference to survey stones or FMB. The scope of the warrant entrusted to him is to measure with the help of the surveyor. The defendant has filed his objections to the same. The existence of Septic Tank and Generator Room, abutting the compound wall, were not noted. The document No.8 of the plaint, contains survey 120/3A and 120/3C only. The certified Chitta extract for current fasli, regarding survey No.120/3B patta No.200 to the defendant is found not incorporated in the FMB. As per the FMB sketch, the plaintiff claims 83.0 meter East to West, on the North. Whereas, as per the report and plan filed by the advocate commissioner, the plaintiff is in possession of 84.5 meters along CD portion covered within compound wall. The plaintiff is out of possession of suit "B" schedule property and hence, not justified in seeking the relief of injunction in respect of the "B" schedule property. Without localising survey No.120/3B, the alleged localisation of the suit "A" schedule property, is untenable in law and not binding on the defendant. The certified FMB is misleading and invalid in law. The plaintiff has made a spurious claim based upon the incorrect survey records and the plaintiff has also not alleged the period of trespass made by

the defendant. The description of suit "A" & "B" properties is vague and incorrect. There is no cause of action for the suit and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PW1 to 3 were examined and Exs.A1 to 5 were marked. On the side of the defendant, DW1 and 2 were examined and Exs.B1 to 12 were marked. Exs.C1 to 5 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to accept the case of the plaintiff and accordingly, the decreed the suit in part. The defendant preferred the first appeal. The appellate court, on a reappraisal of the evidence, was pleased to confirm the judgment and decree of the trial court. Challenging the same, the present second appeal has been filed.

8. The second appeal has been admitted and the following substantial questions of law are formulated for consideration in this second appeal.

"a. Whether the courts below are justified in granting a declaration of title to the schedule property in favour of the plaintiff, when it had failed to establish both title and possession?

b. Whether the courts below are justified in presuming title with the plaintiff, when the vendor's title to the property had not been proved by the plaintiff?

c. Whether the survey report and commissioner report and plans, sans the document of title could be a source of title to the plaintiff?

d. When the defendant had proved that the B schedule property had been in his occupation for over 2 decades and the B schedule had been improved by him and had been put to use by him, is it proper on the part of the courts below to decree a suit for declaration of title on mere surmises?

e. Whether the plaintiff suit ought not to have been dismissed on the principles of estoppel?"

9. The suit has been laid by the plaintiff seeking for declaration of its right to the "B" Schedule property and

consequential relief of recovery of vacant possession of the same after removing the illegal constructions put up by the defendant and for permanent injunction restraining the defendant not to put up any further construction in the "B" Schedule property. The "B" schedule property is stated to be comprised in the "A" schedule property survey No.123/3C (part) marked as "ABHFGA in the plaint plan measuring an extent of 0.04.72 Hectres (11.67 cents) only. In the description of the "B" schedule property, the boundaries of the same have not been specifically mentioned. Now, according to the plaintiff, the "B" schedule property forms part of the "A" schedule property and the plaintiff's case is that the "A" schedule property comprising an extent of 2 acres 78 cents in old dry survey No.120/3B, new dry survey No.120/3C, was purchased from M/s Kalaimagal Sabah represented by its joint Receivers under the sale deed dated 18.08.2005 and the same has been marked as Ex.A2. Based upon Ex.A2 alone, the plaintiff claims the reliefs sought for in the suit. Now, according to the plaintiff, the defendant had trespassed into the "B" schedule property on 20.01.2007 and making arrangements to put up construction on the same. The plaint plan has been marked as Ex.A3. According to the plaintiff's case, the plaintiff claims title to the property marked as ABCDEFGA in the plaint plan and that is stated to be the "A" schedule property. The "B" schedule property is shown to be ABHFGA in the plaint plan. Therefore, it has to be seen whether the plaintiff has established that he had purchased the "A" schedule property as described in the plaint plan or as found in the description of the "A" schedule property.

10. According to the defendant, Kothai ammal was the original owner of the full extent of 3.32 acres in survey No.120/3. According to the defendant, Kothai ammal sold an extent of 0.36 $\frac{3}{4}$ cents to the defendant under the registered sale deed dated 12.02.1986 and the same has been marked as Ex.B3. The purchase by the defendant of 0.36 $\frac{3}{4}$ cents from Kothai ammal under Ex.B3 is not disputed. The said property is bounded on the North by Survey No.120/2 Meikkal Poramboke, East and South by remaining extent owned by Kothai Ammal and West by GST Road. The defendant purchased this property much earlier to the plaintiffs purchase. The plaintiff did not purchase the "A" schedule property from Kothai ammal and on the other hand, it had purchased the same from the Joint receivers of M/s Kalaimagal Sabha under Ex.A2. Now, according to the defendant, he has not made any encroachment into the "B" schedule property as alleged by the plaintiff and on the other hand, according to him, the "B" schedule property forms part of the property purchased by him under Ex.B3 and further, according to the defendant recently, he came to know that the properties concerned were subdivided and survey No.120/3A is stated to be

measuring 0.12.5 hectares, survey No.120/3B is stated to be measuring 0.09.5 hectares and survey No.123/3C is stated to be measuring 1.12.5 Hectares. According to the defendant and it is the specific case that before effecting the above said sub division, no notice was given to him and that he had no knowledge about the same. Now, according to the defendant, he had been enjoying the property purchased by him under Ex.B3 right from the purchase till date. Therefore, it could be seen that as per the case of the defendant, he had been enjoying the property purchased by him under Ex.B3 inclusive of the "B" schedule property right from 1986 onwards. Further, according to the case of the defendant, in any event, he has prescribed title to his property by way of adverse possession also.

11. The case of the plaintiff, as regards the relief of permanent injunction is concerned, was not accepted by the trial court and accordingly, the trial court has held that the plaintiff is not entitled for permanent injunction.

12. As per the plaint averments, after purchase, the plaintiff has constructed the compound wall inclusive of the property along EFHBCD marked in the plaint plan under Ex.A3. However, it would also state that the compound wall was not constructed in the southern margin i.e. ED portion. Therefore, even as per the case of the plaintiff in the plaint, after purchase under Ex.A2, they had erected compound wall leaving the "B" schedule property and put up the compound wall only along EFHBCD.

13. In such circumstances, knowing fully well about the extent of property purchased by it under Ex.A2, it could be seen that as rightly argued by the defendant counsel, the plaintiff has put up compound wall along the above said lines excluding the "B" schedule property. If the plaintiff was unaware about the extent actually purchased by them, they would not have ventured to put up the compound wall excluding the "B" schedule property. In other words, if according to the plaintiff, they had purchased the "B" schedule property also under Ex.A2, they would not have pleaded that compound wall was put up after the purchase along EFHBCD.

14. The further case of the plaintiff is that after construction of the compound wall, they applied for transfer of patta in their name and on measurement of the property by the Taluk surveyor, it was found that the property purchased by the plaintiff is localised as survey No.120/3C which is shown as ABCDEFGA in the plaint plan and thus, according to the plaintiff, thereafter, they had come to know through the Taluk surveyor that the defendant had encroached the ABHFGA portion shown in the plaint plan which is the "B" schedule property.

Thus, according to the plaintiff, they have come forward with the suit seeking for necessary reliefs.

15. In such circumstances, the plaintiff should establish its title to the "B" schedule property for seeking the reliefs sought for. As found earlier, it is the specific case of the defendant that inclusive of the "B" schedule property, he has purchased under Ex.B3 and therefore, there is no question of the defendant trespassing into the "B" schedule property on 20.01.2007 as alleged by the plaintiff. Further, from the evidence adduced by the respective parties, it could be seen that the defendant has laid 7' high wall along the "B" schedule property and enjoying the same. Now, according to the defendant, his property has been let out to petrol and diesel outlet on lease.

16. Be that as it may, inasmuch as the plaintiff has come forward with the suit seeking for the reliefs of declaration and possession, the plaintiff should establish its case particularly that its vendors had title to the property conveyed to it under Ex.A2 and that its vendors had conveyed and delivered possession of the entire property described in Ex.A2 to it. In this connection, the evidence of PW1, the first plaintiff assumes significance.

17. PW1, during cross-examination has admitted that the defendant had put up 7' high compound wall on the portion marked as BHF and the advocate commissioner has also noted the presence of trees and to the question whether the advocate commissioner has noted the presence of trees, Motor room, sump in the "B" schedule property his answer is that he knew the noting down of the trees and does not remember the other aspects. Now, according to the plaintiff, it had purchased from the joint receivers of Kalaimagal sabha the property under Ex.A2. According to PW1, prior to the purchase, they had not measured the property through surveyor. He has also admitted that he has erected the compound wall on the portion EFHBCD shown in the plaint plan. He has categorically admitted that when he purchased the property under Ex.A2, there was compound wall on the portion HB. Therefore, it could be seen that knowing fully well that the compound wall had been put up on the HB portion prior to the purchase and when it is further admitted that after the purchase, the plaintiff had put up the compound wall along EFHBCD and when there is no material to hold that it is only the plaintiff, who had put up the wall along HB portion, it could be seen that PW1 is not speaking truth and on the other hand, it could be seen that knowing fully that the "B" schedule property was in possession and enjoyment of the defendant, even at the time of purchase under Ex.A2 and accepting the sale under Ex.A2, it could be seen that the plaintiff have put up the wall in the

remaining area of EFHBCD portion excluding the "B" schedule property. However, for the sake of the case, it could be seen that it is alleged they had put up the compound wall along the HB portion also as if to make out a case that the defendant had encroached the "B" schedule property on 21.01.2007 as claimed in the plaint. On the other hand, even as per the admitted case of PW1 as adverted to earlier, even at the time of the purchase under Ex.A2, the compound wall was in existence along HB Portion.

18. As found earlier, the plaintiff claims the reliefs of declaration and possession based on the title deed Ex.A2. So, the plaintiff can take only what had been conveyed to it under Ex.A2 and not more than that and further the plaintiff should also establish that their vendors had title and possession of the property to comprised under Ex.A2 prior to the said sale. Now, according to the plaintiff, they found after the purchase i.e. after measuring the property through the Taluk surveyor during March 2006, that they are enjoying lesser extent than what had been conveyed to them under Ex.A2 i.e according to PW1, it was found specifically that they were found to be enjoying 11 cents less than that had been purchased under Ex.A2. The plaintiff had purchased the property on 18.08.2005. Now, according to the plaintiff, the suit property was measured by the advocate commissioner and Taluk surveyor on 30.01.2007 and thereafter also, they came to know that they were enjoying 11 cents less than what had been conveyed. If that be so, as a prudent person, on coming to know of the same, the plaintiff should have enquired about the same with the vendors and sought necessary clarification. On the above aspect PW1, during the cross examination would only state that he did not issue any notice to his vendors regarding the lesser extent of the property conveyed to them i.e. about the 11 cents and when it was questioned whether its vendors handed over the "B" schedule property at the time of purchase, PW1 has testified that either his vendors or the plaintiff were not aware that "B" schedule property was in the possession and enjoyment of the defendant at the relevant point of time. When further questioned, PW1 would state that his vendor did not point out that what was conveyed under Ex.A2 lies only to south and East of the compound wall and according to PW1, the vendor informed that that the portion that was conveyed lies to the East and South of Petrol bunk. Further, he has also stated that there is no difference of opinion or misunderstanding between him and his vendors. If that be so, if according to PW1, his vendor had conveyed the entire property to the East and South of the portion occupied by the petrol bunk, it does not stand to reason as to how the plaintiff had ventured to put up the compound wall after the purchase along the lines EFH and BCD. Though they would claim that they had put up compound wall along HB portion also, the

fact remains, as seen from the evidence of PW1, the wall along the HB portion has been put up only by the defendant and the same was in existence even at the time of purchase under Ex.A2.

19. From the averments contained in the plaint, what the plaintiff has pleaded is that they had purchased under Ex.A2 inclusive of the "B" schedule property and as the defendant had unlawfully encroached into the "B" schedule property on 20.01.2007, thereby denying its title and right in respect of the same, they had come forward with the suit seeking necessary reliefs. Therefore, according to the plaintiffs, it's case based on the title deed Ex.A2. In such circumstances, as rightly argued by the defendant counsel, the plaintiff should have established its case that their vendors had title to the "B" schedule property so as to enable them to convey the same to the plaintiff under Ex.A2. As found earlier, the defendant had purchased his property under Ex.B3 from the original owner Kothai ammal. On the other hand, the plaintiff had purchased the property from the subsequent purchasers of Kothai ammal. Therefore, it is not clear as to what portion the vendors of the plaintiff had in the suit survey number at the time of their conveyance to the plaintiff under Ex.A2. It has not been specifically pleaded by the plaintiff in the plaint that their vendors or the previous title owner Kothai ammal or the defendant, as the case may be, had lost any portion of their respective lands by way of land acquisition proceedings. On the other hand, according to the plaintiff, they seek the relief claimed in the suit based on its title deed. In such circumstances, the foremost duty on the part of the plaintiff would be to establish that its vendors had title and possession in respect of the property conveyed under Ex.A2. To establish the same, the plaintiff should have endeavoured and taken steps to examine its vendors. On the other hand, the plaintiff, though had admitted that it has no issue with its vendors, did not choose to examine them in support of its case. If the vendors had been examined, as rightly argued by the defendant, much light would have been thrown as regards the extent of the property which the vendors had been enjoying in the suit survey numbers concerned and it would have also been known whether the vendors had title or possession over the property conveyed under Ex.A2 prior to the said sale transaction. However, for the reasons best known to the plaintiff, it had not chosen to let in the best evidence to establish its title.

20. The plaintiffs' case seems to be solely based upon the Taluk surveyor's report and plan, particularly, the plan submitted by the Taluk surveyor which has been marked as Ex.C5. Accordingly, it could be seen that the courts below have also granted the reliefs of declaration and possession not based upon the title deed of the plaintiff. On the other hand, they had

granted the reliefs to the plaintiff based upon what has been stated by the Taluk surveyor in his plan marked as Ex.C5.

21. Now, according to the plaintiff, the "B" schedule property measures an extent of 11.67 cents. As adverted to earlier, the boundaries within which the B schedule property remains have not been described in the plaint. According to the case of the plaintiff, after the purchase, they applied for patta and also took steps to measure the property and thereafter, came to know that the property purchased by them is localised as survey No.120/3C and only thereon they came to know that the defendant had encroached the "B" schedule property as described in the plaint. As found earlier, the "B" schedule property is stated to be measuring 11.67 cents.

22. As regards the endeavour of the plaintiff to measure the suit property purchased under Ex.A2 through Taluk surveyor and also the advocate commissioner after the institution of the suit, it could be seen that some notice/summons has been issued about the proposed inspection on 30.01.2007 to the defendant also. However, no material has been placed to show that the defendant had been well informed in advance about the proposed inspection of the property by the advocate commissioner and the Taluk surveyor on 30.01.2007. In this connection, according to the case of the defendant, they had not been served notice about the proposed inspection on 30.01.2007. In this connection, PW1, during cross examination has admitted that the property was inspected by the advocate commissioner on 30.01.2007, the notice with reference to the inspection was sent on 27.01.2007 and the same had been received by the defendant on 30.01.2007. Therefore, it could be seen that the defendant was not aware of the proposed inspection of the property by the advocate commissioner or the Taluk surveyor. Be that as it may, the surveyor, who had made inspection has been examined as PW2 and his plan has been marked as Ex.C5. Ex. C5 appears to be the trump card for the plaintiff's case, because the plaintiff had been granted the reliefs in the suit by the courts below only based on Ex.C5 plan and not based upon the title deed of the plaintiff. Therefore, the sketch assumes importance. As to how the surveyor PW2 had come to the conclusion that the "B" schedule property forms only part of the property purchased by the plaintiff under Ex.A2, has to be seen.

23. As adverted to earlier, the defendant has specifically taken a plea that he was not given any notice before the sub divisions were effected in the area and that he had no knowledge about the same. PW2, the surveyor who had measured the property would state during cross examination that in the FMB sketch pertaining to survey No.120, there are only three sub divisions viz., survey No.120/1, 120/2 and 120/3C and as per the

FMB sketch, there is no sub division as survey No.120/3B. Therefore, it could be seen that as per the FMB plan maintained by the revenue department, though there is no sub division 120/3B, now, according to PW2, the property purchased by the defendant under Ex.B3 has been localised as survey No.120/3B and the property purchased by the plaintiff under Ex.A2 has been localised as S.No.120/3C and the GST road portion on the western side to the plaintiff's property and the defendant's property has been localised as S.No.120/3A. Therefore, if proper inspection and measurement had to be done, it could be seen that PW2 should have been armed with or taken the assistance of the relevant revenue records particularly, FMB sketch maintained by the revenue department. As regards the sub division effected in the area, as seen earlier, it has been admitted by PW2 that there is no sub division as 120/3B in the FMB sketch of the revenue department. Further, PW2 has also admitted that at the time of inspection, he has not taken the assistance of any FMB sketch or the document of Highways department particularly with reference to the land acquisition proceedings of the Highways department. Therefore, it could be seen that without the aid of FMB sketch or the records pertaining to the acquisition of the property by the Highways department in the disputed area, PW2 has conducted inspection and taken measurement in the presence of the plaintiff and its advocates. As found earlier, it has not been established that due notice of the inspection has been given to the defendant well in advance. According to PW2, he has shown 3A portion in the plaint plan as 3B in Ex.C5.

24. Further according to him, in his plan Ex.C5 he has shown survey No.120/3A, 3B and 3C. However, he has admitted that at the time of inspection, as depicted by him under Ex.C5, the FMB sketch maintained by the revenue department did not indicate that the survey No.120 has been subdivided as 120/3A, 3B and 3C. Even in the plaint plan Ex.A3, the defendant's portion is shown only as 120/3A. Therefore, it could be seen that at the time of inspection of the advocate commissioner and the surveyor (PW2), the FMB sketch did not mention anything about the sub division effected as survey No.120/3A, 3B and 3C and that apart, PW2 has also admitted the sub divisions 3A, 3B and 3C are found only in the chitta and patta documents and the same has not been incorporated in the FMB sketch maintained in the Revenue Department. According to him, the sub divisions 3A and 3C alone are available and the sub division 3B is not available in the FMB sketch. However, he would state that he has shown 3A portion of Ex.A3 as 3B portion in Ex.C5. According to him, on measurement, he found that 120/3A measures 12.5ares, 120/3B measures 9.5 ares and further according to him, the area mentioned by him in sub division 120/3A, has been indicated as National Highways. However, he has fairly admitted that at the time of inspection, he has not seen or brought any document pertaining to the

acquisition proceedings of National Highways with reference to survey No.120/3A. Under such circumstances, how come PW2 is able to give his plan marked as Ex.C5 depicting that survey No.120/3A measures 12.5 ares or lie in National Highways, particularly when he has not seen any records pertaining to the acquisition of the area by the National Highways department, has not been explained. That apart, according to PW2, only after completing the inspection and after coming down to his office while preparing Ex.C5 plan at his office, he had come to know about the acquisition proceedings conducted in the area and even thereafter, he had not cared to verify those records and annex the same in his plan Ex.C5. Therefore, it could be seen that without any basis or records, PW2 has made inspection of the area concerned and found that survey No.120/3A belongs to National Highways and it measures 12.5 ares. How come National Highways had an extent of 12.5 ares in survey No.120/3A has not been properly explained by PW2 or properly substantiated by PW2 in his plan Ex.C5 or properly proved by PW2 with acceptable records pertaining thereto. As seen earlier, he has admitted that he has not seen any records pertaining to land acquisition effected by the National Highways in the area. In such circumstances, how come he would be able to assert that survey No.120/3A measures 12.5 ares has not been substantiated. If according to PW2 or for that matter according to the plaintiff, some area in survey No.120 had been acquired by the National Highways department, the same could be explained only on perusal of the records or by summoning the records so as to enable the court to come to the conclusion that the National Highways acquired particular area in the survey Number and thereafter the area was annexed by the National Highways and has been subdivided as 120/3A. As per Ex.A3 plaint plan, survey 120/3A has been shown to be the defendant property. Now, according to PW2, sub divisions of the suit survey number has been effected, as seen earlier, according to the defendant, he has no notice of the same.

25. Now, according to the plaintiff's case, after the purchase by the defendant under Ex.B3 and at the time when Kothai Ammal was having the remaining extent, National Highways had acquired further land in the suit survey No.120 and thereby annexed more portions of the property purchased by the defendant under Ex.B3 and also more portions of the area to which Kothaiammal had title and in view of the same, it is contended that the defendant would not be entitled to 0.36 $\frac{3}{4}$ cents in the suit survey number and on the other hand, he would be entitled to only a lesser extent barring the area annexed or acquired by the National Highways department and so, it is contended that barring the area annexed or acquired by the National Highways department, if it is found that the defendant is in possession and enjoyment of more extent than what he would be entitled to,

according to the plaintiff ,the excess land found in the possession and enjoyment of the defendant should be only the land purchased by the plaintiff under Ex.A2 and thus, according to the plaintiff, the B schedule property belongs to it and it is entitled to seek the reliefs sought for with reference to the same.

26. The Courts below had accordingly accepted the plaintiff's case, without any pleadings with reference to the same in the plaint or even assuming that there is no pleading to that effect but the courts below have accepted the above case of the plaintiff based on the Taluk surveyor PW2's version. In the absence of any material or proof to substantiate the same, if this is how the courts below had approached the issue, as rightly argued by the defendant's counsel, the approach of the courts below with reference to the controversy involved between the parties, in accepting the plaintiff's case without any material, would go to show that the courts below, they being civil courts adjudicating title issues without any application of mind, has adverted to the issues and given a finding mechanically sans any proof or material to buttress the same.

27. Both the courts below based upon the measurements found in the lease deed marked as Ex.A5 have come to the conclusion that though the defendant had purchased $0.36 \frac{3}{4}$ cents under Ex.B3 inasmuch after the purchase under Ex.B3, out of $0.36 \frac{3}{4}$ cents $0.13 \frac{1}{2}$ cents had been acquired by the National Highways, according to the courts below, the defendant would be entitled to only for remaining $0.23 \frac{1}{4}$ cents and further according to the courts below, out of remaining 2.95 acres retained by Kothai ammal, as the National Highways had acquired 0.17 cents out of the same, the remaining extent available with Kothai ammal would be only 2.78 acres. Therefore, on the above reasoning, the courts below, based upon the measurements found in the lease deed Ex.A5 had come to the conclusion that the defendant instead of holding $0.23 \frac{1}{4}$ cents, was found to be holding $0.32 \frac{1}{4}$ cents in excess 0.09cents as set out in Ex.C5 plan red coloured area.

28. According to the Courts below, the said excess of 0.09 cents would be covered only under the area purchased by the plaintiff under Ex.A2 and so holding, according to the courts below, the plaintiff has title to the B schedule property, however, granted the declaratory relief only to the extent of 0.09 cents. Even according to the case of the plaintiff, the B schedule property measures 11.67 cents. Therefore, it could be seen that the courts below have proceeded on the basis that as the National Highways had subsequently, acquired portions in the area and as the portions acquired by the National Highways fall within the defendant's property and also, the remaining property of Kothaiammal and after deducting the same, on further noting

that the defendant is still in the enjoyment of 0.32 $\frac{1}{4}$ cents, held that the defendant is in possession to an excess 0.09 cents of land and the same is the encroached area and the said area would only fall within the portion purchased by the plaintiff under Ex.A2.

29. Therefore, as rightly put forth by the defendant's counsel for enabling the courts below, particularly, they being civil courts, even if there is no pleading in the plaint with reference to the land acquisition proceedings, at least, the courts below should not have embarked upon to give such a finding sans any proof with reference to the same. As found earlier, the surveyor PW2 in his evidence has categorically admitted that even the sub division noted by him in Ex.C5 plan is not reflected in the FMB sketch maintained by the revenue department. Even going further, even if the sub division i.e. S.No.120/3A depicted by PW2, in his plaint plan, has been acquired by the National Highways Department, it has not been explained by PW2 or for that matter, by the plaintiff, as to how come they held that the National Highways department had acquired 0.13 $\frac{1}{2}$ cents in the defendant area and 0.17 cents in the remaining area of Kothai ammal when there is no record pertaining to the same. At least, one could understand if PW2 had, along with Ex.C5 plan, annexed the records of the acquisition of the National Highways pertaining to the same and if, based upon the said records the courts below had given a finding, one could appreciate the findings of the courts below that they had dwelt upon the issue in the right perspective based upon the material produced. However, even according to the PW2 he has not seen any record with reference to the same and he has simply submitted his plan Ex.C5 and as found earlier, when no notice of his inspection was given to the defendant and when the sub divisions noted by him are also not reflected in the FMB sketch other than the patta and chitta adangal records, to say that National High ways had subsequently acquired this portion of area in the survey number and thereby holding that even thereafter, the defendant is in possession and enjoyment of the excess land to an extent of 0.09 cents, without any material to substantiate the same, as rightly argued by the defendant counsel, the findings of the courts below with reference to the same could only be termed as perverse and erroneous and nothing more than that. As seen from the findings of the courts below they seem to have mainly based their reasoning on the lease deed marked as Ex.A5. Ex.A5 is the lease deed between the defendant and the Hindustan petrol Bunk. On the basis of the same and measurement in the plan annexed to the lease deed, the courts below have come to the conclusion that the defendant was aware of the acquisition proceedings of the National Highways and accordingly has shown the area annexed by the National High ways in the plan appended to Ex.A5 and based upon measurements given

in the remaining area of the site let out for retail outlet they have come to the conclusion that the defendant is in possession and enjoyment to an excess of 0.09 cents. However, in the description of the property according to the lease deed it is stated to be situated on the south by the land of ravichandra the defendant and on the east by the land of Ravichander, the defendant and on the west by N.H-45 and on the north by (not clear). Therefore, it could be seen that the boundaries of the demised land are shown to be to the west of the property of the defendant and to the North of the property of the defendant. Therefore, without any basis or materials, on noting some measurements found in the plan attached to the lease deed, it could be seen that the courts below had proceeded that the national High ways had acquired 0.13 1/2 cents of the defendant's area and 0.17 cents of the remaining area of Kothai ammal and compared the same with A5 plan and came to the conclusion that the defendant is found to be in possession of 0.09 cents area in excess than what he is entitled to hold. To come to such a conclusion, as rightly argued by the defendant counsel, there should be some material in support of the same.

30. Further, as rightly argued by the defendant counsel, the area which is shown to be lying with the national high ways in survey No.120/3A, it is argued that as per revenue records, the same still stands in the name of defendant and his vendor Kothai ammal. Even this aspect has not been taken note of by PW2 and the courts below while arriving at their conclusion. It could be seen that PW2 himself, in this connection, has admitted that the area shown by him under survey 3A are acquired area by the National High ways and though the said area had been acquired by the National High ways, inasmuch as the compensation has not been paid, the revenue records pertaining to the area still stand in the name of Kothai ammal and the defendant Ravichandran. Therefore, it could be seen that though the area shown by the surveyor PW2 in his plan Ex.C5 as belonging to the National Highway i.e. 120/3A, the revenue records pertaining to the said area still stand in the name of Kothai ammal and the defendant. However, without noting and perusing the land acquisition records and revenue records pertainign to the same, it appears the courts below have ipse dixie accepted the case of plaintiff projected through the mouth of PW2 and his plan Ex.C5. According to the defendant counsel, to the knowledge of the defendant no acquisition proceedings was taken in respect of the area purchased by the defendant under Ex.B3 and if at all any acquisition activities had been initiated, the plaintiff could have averred about the same in the plaint or at least, in support of his case could have summoned the relevant records from the concerned departments. As rightly argued, only on summoning the records pertaining to the same, we can understand what area was acquired by the National High way out of the

defendant's area, out of the area retained by Kothai ammal and what remained available to Kothai ammal to sell to her purchaser and what thereafter remained available to the plaintiff's vendor to convey to the plaintiff under Ex.A2. When the sub division effected are not even reflected in the revenue FMB sketch as admitted and when the acquisition records are not on the table and Ex.C5 has been prepared by PW2 without any basis and when the courts below have based their finding upon some measurements in the plan appended to A5 lease deed and when the same would not suffice to substantiate the case of the plaintiff and when there are no records or material to buttress or support the findings of the courts below and when serious objections have been put forth by the defendant to the reports and plans of the advocate commissioner and the surveyor and when it is also found that the plaintiff has also put forth objections to their report and when the plaintiff has not established that the defendant has encroached into the B schedule property after its purchase and on the other hand, the available evidence points out that the defendant has been in enjoyment of the B schedule property for a long time by raising the compound wall and planting the trees, putting up construction etc., and when the plaintiff has failed to establish their vendor's title to the land conveyed to them under Ex.A2 and when the plaintiff's case has not been approached by the courts below in the right perspective based on title deed and on the other hand when they proceeded to approach the issues involved based upon Ex.C5, when it is found Ex.C5 has not been prepared with supporting materials by PW2, it could be seen that the courts below have lost sight of the issues involved in the matter and proceeded wrongly to hold that the defendant is in the possession and enjoyment of an excess extent of 0.09 cents and the same is only the property of the plaintiffs and accordingly erred in granting the reliefs sought for by the plaintiff to the extent of 0.09 cents.

31. In the light of the above discussions, it could be seen that the courts below are not justified in granting the reliefs of declaration of possession in favour of the plaintiff sans any material or proof and based upon only presumptions and therefore, as rightly argued by the defendant counsel when it is found that the courts below have not taken the relevant material into consideration and on the other hand accepted the case of the plaintiff without any pleadings and without necessary pleadings and proof, it has to be held the approach of the courts below and their findings are erroneous and perverse. I therefore, hold that for the reasons afore stated the substantial questions of law 1 to 4 formulated in this second appeal are answered in favour of the appellant and against the respondent.

32. In the light of the above position, this court refrains from answering the last substantial question of law formulated

in this appeal as unnecessary. The counsel for the appellant in support of his case, placed reliance upon the decisions reported in (2010) 13 Supreme Court Cases 216 (Municipal Committee, Hoshiarpur V. Punjab State Electricity Board and others), (2001) 6 Supreme Court Cases 652 (M.S.V.Raja and another V. Seenii Thevar and others), (2001) 7 Supreme Court Cases 186 (Hafazat Hussain Vs. Abdul Majeed) and (2009) 14 Supreme Court Cases 224 (T.K.Mohammed Abubucker (Dead) through LRs.and others V. P.S.M.Ahamed Abdul Khader and others). Similarly, the counsel for the respondent in support of his case relied upon the decisions reported in(2007)8 Supreme Court Cases 155 (Boodireddy Chandraiah and others V.Arigela Laxmi and another), (2001) 3 Supreme Court Cases 179 (Santosh Hazari V. Purushottam Tiwari (Deceased) By LRS), Equivalent Citation: AIR 1952 SC 47 (Kidari Lall Seal and another V. Hari Lall Seal) (1966)2 SCR 286 : AIR 1966 SC 735 (Bhagwati Prasad V. Chandramaul) and (1987) 2 Supreme Court Cases 555 (Ram Sarup Gupta (Dead) By LRs V. Bishun Narain Inter College and others). The principles of law set out in the above decisions are taken into consideration and followed as applicable to the facts and circumstances of the present case.

33. In view of the aforesaid reasons, I hold that the plaintiff has miserably failed to establish that it has title to the "B" schedule property much less to the extent of 0.09 cents depicted under Ex.C5 and as found by the courts below and consequently entitled to recover possession of the same.

In conclusion, the second appeal is allowed and the judgment and decree of the courts below are set aside and the suit filed by the plaintiff is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

sms
To

Sub Assistant Registrar

1. The Principal District Judge, Chengalpet.
2. The Principal Sub Judge, Chengalpet.

+1cc to Mr.J.James, Advocate, S.R.No.960
+1cc to Mr.V.Raghavachari, Advocate, S.R.No.481

S.A.No.149 of 2011
and M.P.No.1 of 2011

CNR(CO)
CA(14/02/2017)