

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.01.2017
PRONOUNCED ON : 09.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.475 of 2011
and M.P.No.1 of 2011

Krishnanamoorthy .. Appellant/Appellant/Defendant

Vs.
Rajangam .. Respondent/Respondent/Plaintiff

Second Appeal is filed under Section 100 of Civil Procedure Code, against decree and judgment dated 23.07.2009 in A.S.No.38 of 1997 on the file of Sub Court, Ariyalur, confirming the decree and judgement dated 23.08.1995 in O.S.No.292 of 1991 on the file of District Munsif Court, Ariyalur.

For Appellant : Mr.M.V.Krishnan

For Respondent : Mr.A.Muthukumar

JUDGMENT

Challenge in this second appeal is made by the defendant against the Judgement and decree dated 23.07.2009 made in A.S.No.38 of 1997 on the file of the Sub Court, Ariyalur, confirming the Judgement and Decree dated 23.08.1995 made in O.S.No.292 of 1991 on the file of the District Munsif Court, Ariyalur.

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

3. The plaintiff has filed a plaint plan, wherein the portion marked as "ABCD" is said to be originally belonging to one Arunachalam and Athimoolam, who are the divided brothers. According to the plaintiff's case, the eastern half of the above said portion had been allotted to Athimoolam and the western half had been allotted to Arunachalam.

4. The above case of the plaintiff has been admitted by the defendant in his written statement. In the written statement, the defendant has categorically admitted that the property shown as " ABCD" in the plaint plan originally belonged to Athimoolam and Arunachalam and the partition between them as pleaded by the plaintiff is admitted.

5. It could thus be seen that in the "ABCD" portion shown in the plaint plan, the western half originally belonged to Arunachalam and the eastern half originally belonged to Athimoolam. Now according to the plaintiff, he had purchased the western half of "ABCD" portion from Arunachalam under the registered sale deed dated 24.07.1999 which has been marked as Ex.A2. A perusal of the recitals contained in Ex.A2 would go to show that Arunachalam and Athimoolam were entitled to east-west portion measuring to an extent of 66 feet and out of the same, the plaintiff has purchased the east-west 33 feet from Arunachalam. Though the defendant had admitted in his written statement that "ABCD" portion originally belonged to Athimoolam and Arunachalam and also the partition effected between them, now according to the defendant, the east-west measurement is not 66 feet as pleaded by the plaintiff and the case of the defendant is that the defendant is entitled to the eastern portion measuring east-west 38 feet as claimed during the course of his evidence. According to the defendant, both Athimoolam and Arunachalam were owning the property measuring east-west 76 feet and there had been a partition between the two brothers during 1980 wherein the house portion measuring 30 feet east-west on the western side and 8 feet vacant space on the western side were allotted to Arunachalam and the house portion measuring east-west 30 feet and the vacant space measuring 8 feet on the eastern side were allotted to Athimoolam. It is the further case of the defendant that he had purchased the portion which was allotted to Athimoolam under the sale deed dated 14.06.1983 and the same has been marked as Ex.B1. Therefore, according to the defendant, as per Ex.B1, the defendant is entitled to 38 feet of the "ABCD" portion which was claimed to be purchased from Athimoolam.

6. However, a perusal of Ex.B1, as rightly found by the court below, did not disclose as to what is the total east-west measurement, to which Arunachalam and Athimoolam were entitled to. Similarly even in the written statement, the defendant has not averred that Arunachalam and Athimoolam were owning the property measuring east-west 76 feet and in the partition effected between them, the said Arunachalam was allotted on the eastern side, the portion measuring 38 feet east-west.

7. As rightly argued by the plaintiff's counsel, no material has been placed by the defendant to show that the brothers Arunachalam and Athimoolam were owning the property

measuring east-west 76 feet. It appears that the defendant has issued a legal notice to the plaintiff dated 17.07.1989 which has been marked as Ex.B2. Ex.B2 has been issued, before the plaintiff had purchased the property under Ex.A2. In Ex.B2 it has been claimed by the defendant that the said Arunachalam is only entitled to the property measuring 24X28 feet and the plaintiff is attempting to purchase the property from Arunachalam inclusive of the property belonging to the defendant. As rightly found by the courts below, as regards the north-south measurement namely, 24 feet, there is no dispute between the parties. Therefore, it could be seen that the measurement mentioned in Ex.B.2 would only indicate that the said Arunachalam is entitled to the property measuring east-west 28 feet alone. Now according to the defendant, he had purchased the property from Athimoolam under Ex.B1 measuring East-West 38 feet. So it could be cumulatively seen from Ex.B1 and B2 that the measurement of the property east-west is only 66 feet. The averments contained in Ex.B.2 cannot be sustained unless the east-west measurement of the property belonging to Arunachalam and Athimoolam is only 66 feet east-west.

8. It is contended by the defendant's counsel that the plaintiff has conveniently omitted to include the vacant space lying to the west of the property and if that had been taken into consideration, there would have been no cause of action for laying the suit against the defendant. The above argument seems to be on the basis of the boundary recitals of Ex.A2. The plaintiff's property is described to be situated to the east of one Dharmaraj. As per the Commissioner's report and plan particularly Ex.C2 and C4, it could be seen that there is a lane to the west of the plaintiff's property. Further, it could also been seen that lane measures 11 feet and 3 inches. If the case of the defendant is accepted that the plaintiff has purposefully omitted to include above said lane, as rightly found by the court below, the total extent of the property belonging to Arunachalam would come to east-west 39 feet and 3 inches. Therefore, the above argument made by the defendant's counsel concurred neither with the plaintiff's case nor with the defendant's case. On the other hand, as per the Commissioner's Report marked as Ex.C1, it could be seen that the lane is situated to the west of the plaintiff's property belonged to one Dharmaraj. As far as the report of the Commissioner is concerned, the defendant has not put forth any objection to the same. Therefore, for the first time, without any basis, the defendant has taken a stand that the plaintiff has omitted to include the lane lying to the west of the plaintiff's property and hence, he would not be entitled to seek the reliefs sought for in the suit. The said argument could not be countenanced. As rightly found by the court below, the defendant has not pleaded in the written statement that Arunachalam and Athimoolam had owned the property measuring east-west 76 feet. Even in

his sale deed under Ex.B1, there is no reference about the same. Further, there is no material placed by the defendant to hold that Arunachalam and Athimoolam had owned the property measuring 76 feet. On the other hand, the factors referred to above indicate that two brothers had owned the property measuring only 66 feet east-west. Hence, the case of the defendant that he is entitled to the property measuring east-west 38 feet under Ex.B1, cannot be accepted.

9. However, the defendant's counsel would further contend that the plaintiff's vendor Arunachalam had attested the sale deed Ex.B1 and under Ex.B1-sale deed dated 14.06.1983, the defendant had purchased the property measuring east-west 38 feet and the plaintiff's vendor Arunachalam without any demur had attested the said document, hence the plaintiff claiming through Arunachalam would be estopped from contesting the defendant's entitlement of the property measuring east-west 38 feet. No doubt Ex.B1 has been attested by Arunachalam. However, as far as the plea of estoppel now put forth by the defendant's counsel, it could be seen that the same has not been specifically pleaded in the written statement.

10. As rightly argued by the plaintiff's counsel, for raising the plea of estoppel, the same should have been not only pleaded, but also proved. In this connection, the plaintiff's counsel placed reliance upon the decision of this Court reported in AIR 1979 Madras 419, Karmega Kone vs. Udayar Kone and others, and contended that there is no plea of estoppel made in the written statement. It has to be seen whether the plea of estoppel projected during the course of arguments has been established by the defendant. Merely because, the plaintiff's vendor Arunachalam had attested Ex.B1, would not be sufficient enough to conclude that he had admitted the contents of Ex.B1 in its entirety and acknowledged the same by attesting the document. In this connection, the plaintiff's counsel relied upon the decision of this court reported in 1987 (100) LW 363, K.Nagarathinam and another vs. K.Rajammal. As per the above said decision, it could be seen that unless it is established that the contents of the document are known to the attester and he is also a consenting party to the transaction, the principle of estoppel could not be invoked on the mere factum of attestation.

11. Insofar as this case is concerned, there is no evidence put forth on the side of the defendant that Arunachalam had attested Ex.B1-sale deed knowing the contents thereof in its entirety, particularly the east-west measurement of the property mentioned therein and also acquiesced to the same, while he had attested the said document. In such circumstances, as rightly put forth by the plaintiff's counsel, the attestation of Ex.B1 by Arunachalam would by itself not lead to the conclusion that he had admitted the title of the

defendant's property measuring east-west 38 feet as mentioned in Ex.B1. Therefore, it has to be held that the plea of estoppel now put forth by the defendant's counsel has neither been pleaded nor proved in any manner.

12. It is contended by the defendant's counsel that immediately after purchase of the property under by Ex.B1 sale deed, the disputed wall over EG portion of the plaint plan, had been raised and therefore, according to him, the cause of action pleaded by the plaintiff for the removal of wall could not true. However, the above argument of the defendant's counsel, is not supported by any evidence. As rightly found by the court below, as per the report of the Commissioner, it could be seen that the wall put up on EG portion, has been recently erected. Even plastering has not been completed. It could therefore be seen that offending wall on the EG portion has been recently put up by the defendant by encroaching into the property belonging to the plaintiff.

13. It is vehemently argued by the defendant's counsel that the court below has negatived the relief of easementary right sought for by the plaintiff and as such, the plaintiff would not be entitled to seek the relief of mandatory injunction as regards the disputed wall. Now, as per the discussion made above it is found that Arunachalam and Athimoolam had owned the property measuring east-west 66 feet alone. Of the said property, the plaintiff had purchased the western half and the defendant had purchased the eastern half. It could therefore be seen that both the plaintiff and the defendant would be entitled to only east-west measuring 33 feet alone.

14. Now it is found that the offending wall on EG portion had been put up only on the portion of the property belonging to the plaintiff. The plaintiff has sought for the relief of declaration and possession of the plaint schedule property. Therefore, according to the plaintiff's counsel, in as much as the plaintiff has sought for the possession of the disputed property, it is unnecessary for the plaintiff to specifically seek the relief of mandatory injunction. In this connection, he placed relied upon the decision of this Court reported in 2007(1) CTC 217, Madaswamy vs. Govindaraj, wherein it has been held as follows:

13. The main point to be considered are - can the Decree Holder, who has obtained the Decree for possession, execute the Decree by removing the superstructure? Contending that the power of the Executing Court to remove the superstructure is incidental and necessary, the learned counsel for the petitioner placed reliance upon K.Arumugham Naicker and another vs. Tiruvalluva Nainar Temple by its

Trustee, AIR 1954 Mad.985, in which, this Court has held as follows:

" Where a Court directs, by a Decree or order, vacant possession of land, that Decree could be made effective by directing its own officers to remove the superstructures in the property and deliver vacant possession of the properties to the Decree Holder. It is unnecessary to have any specific power in that behalf. The power to remove the superstructures is an incidental, necessary and ancillary power to the power to deliver possession of the property".

As per the above said decision, inasmuch as the relief of possession was granted in favour of the plaintiff by the courts below, the right lies with the plaintiff to seek the relief of the demolition of the offending wall put up in the property. Admittedly, the offending wall has been put up in the portion marked as " EFGH" in the plaint plan particularly on the EG line. It could therefore be seen that the courts below have rightly not only granted the relief of declaration and possession, but also granted the relief of mandatory injunction .

15. In the light of the above discussion, it could be seen that the courts below have rightly approached the matter and also on the correct appreciation of the evidence adduced by the parties, have rendered the Judgment in the correct manner accepting the plaintiff's case and rejecting the defendant's case and consequently granted the reliefs, to which, the plaintiff is entitled to. Hence, no interference is called for, to the findings of the courts below. At the end, no substantial question of law is found to be involved in the Second Appeal.

In the result, the second appeal fails and is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar(CS-II)

//True Copy//

Sub-Assistant Registrar

To

1. The Subordinate Judge, Ariyalur,
2. The District Munsif,
Ariyalur.

+1 CC to Mr. M.V. Krishnan, Advocate sr 1750
+1 CC to Mr. A. Muthukumar, Advocate sr 2752

S.A.No.475 of 2011
and M.P.No.1 of 2011

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