

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06-09-2017

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

S.A.Nos.729 and 730 of 2011
and
M.P.No.1 and 1 of 2011

1. Selli Gounder (died)
2. Kaliammal
3. Dhanalakshmi

(Appellants 2 and 3 brought on record as Legal Representatives of the deceased first appellant, vide Court Order dated 03.03.2017 in C.M.P.Nos.3710 to 3712 of 2017 in S.A.Nos. 730 of 2011)

.. Appellants/Respondent/Plaintiffs in S.A.No.730 of 2011

1. Selli Gounder (died)
2. Kaliammal
3. Dhanalakshmi

(Appellant 3 brought on record as Legal Representative of the deceased first appellant, vide Court Order dated 03.03.2017 in C.M.P.Nos.3709 of 2017 in S.A.Nos.729 of 2011)

.. Appellants/Respondents/Defendants in S.A.No.729 of 2011

Vs.

1. Masaiyappa Gounder
2. Muthayal

.. Respondents/Appellants/Defendants in
S.A.No.730 of 2011

Masaiyappa Gounder

.. Respondent /Appellants/Plaintiffs in
S.A.No.729 of 2011

Second Appeal No.729 of 2011 filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 24.02.2011 in A.S.No.43 of 2010 on the file of the Subordinate Court, Sathyamangalam, against the judgment and decree dated 16.08.2010 in O.S.No.330 of 2007 on the file of the District Munsif Court, Sathyamangalam, Erode District.

Second Appeal No.730 of 2011 filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 24.02.2011 in A.S.No.44 of 2010 on the file of the Subordinate Court, Sathyamangalam, against the judgment and decree dated 16.08.2010 in O.S.No.225 of 2007 on the file of the District Munsif Court, Sathyamangalam, Erode District.

For appellants : Mr.I.C.Vasudevan in both the appeals
For respondents : Mr.N.Manokaran in both the appeals

COMMON JUDGMENT

S.A.No.729 of 2011 is filed against the judgment and decree dated 24.02.2011 in A.S.No.43 of 2010 on the file of the Sub-Court, Sathyamangalam, Erode District, against the judgment and decree dated 16.08.2010 in O.S.No.330 of 2007 on the file of the District Munsif Court, Sathyamangalam, Erode District.

2. Second Appeal No.730 of 2011 is filed against the judgment and decree dated 24.02.2011 in A.S.No.44 of 2010 on the file of the Subordinate Court, Sathyamangalam, against the judgment and decree dated 16.08.2010 in O.S.No.225 of 2007 on the file of the District Munsif Court, Sathyamangalam, Erode District.

3. Since the appeals arise out of common judgment and decree of the Courts below, they are disposed of by this common judgment. For the sake of convenience, the parties are referred to as they are ranked in O.S.No.225 of 2007.

4. A joint trial was conducted in O.S.Nos.225 and 330 of 2007 filed by the respective parties. O.S.No.225 of 2007 was filed by Selli Gounder and O.S.No.330 of 2007 was filed by Masayappa Gounder.

5. The plaintiff in O.S.No.225 of 2007 is the first defendant in O.S.No.330 of 2007 and vice-versa. O.S.No.225 of 2007 is filed for permanent injunction restraining the defendants from either preventing the plaintiff's use of item No.2 of the suit property or putting up any sort of construction in item No.2. O.S.No.330 of 2007 is filed for permanent injunction restraining the defendants from disturbing the plaintiff for erecting fence in the suit property and also for permanent injunction restraining the defendants from using the suit property. The trial Court decreed O.S.No.225 of 2007 and dismissed O.S.No.330 of 2007, against which Masayappa Gounder preferred First Appeal in A.S.No.43 of 2010 and Masayappa Gounder and Muthayal preferred A.S.No.44 of 2010, which were allowed, against which, Selli Gounder has preferred these Second Appeals.

6. The Second Appeals were admitted on 17.03.2017 on the following substantial question of law:

"Whether, Masayappa Gounder, the plaintiff in O.S.No.330 of 2007, is entitled to have larger extent of land than what is mentioned in Ex.B-1 sale deed, when admittedly, there is no dispute with regard to the extent of the land owned by both the said Masayappa Gounder (O.S.No.330 of 2007) and Selli Gounder, the plaintiff in O.S.No.225 of 2007, when it is settled law that the boundaries will prevail over the extent of land mentioned in the sale deed, in the absence of measurement of the land in question ?

7. As there was dispute between the plaintiff and defendant with regard to the suit pathway, both of them have approached the trial Court with different prayers in the respective suits as noted supra. It is not in dispute that they are the neighbours and the land to the extent of 10 cents is owned by Selli Gounder and 12 cents of land is owned by Masayappa Gounder. The issue that has cropped up is that in the property of Masayappa Gounder, the extent of land is not 12 cents, but much more. With regard to item No.2 of the suit property mentioned in O.S.No.225 of 2007, the excess land to the extent of 54 links, adjusting the use of Selli Gounder, has got to be treated as common pathway, as the extent of document to which the property has been purchased, referred to the extent and area which the plaintiff and the defendant own.

8. Mr.I.C.Vasudevan, learned counsel for the plaintiff-Selli Gounder submitted that the pathway exists, which could be seen from the sale deed, through which the plaintiff has purchased the suit property of 10 cents mentioned supra in S.No.201, vide Ex.A-1 sale deed, dated 13.05.1960 from one Karuppa Gounder. According to the learned counsel, with regard to item No.2 of the suit schedule property, on the Eastern side of suit schedule property of item No.1 mentioned in Ex.A-1 supra, there exists common pathway from time immemorial and that has got to be used by both parties, namely Selli Gounder and Masayappa Gounder and their family members.

9. Mr.N.Manokaran, learned counsel for the defendant-Masayappa Gounder submitted that one Marappa Gounder (father of the defendant-Masayappa Gounder) has purchased the property from one Chidambara Iyer as per Ex.B-1 sale deed, dated 15.02.1960 of an extent of 12 cents in Old S.No.201 and New S.No.226/5i, in which, the defendant-Masayappa Gounder claims ownership through inheritance. Learned counsel further submitted that the boundaries will prevail over the extent of land and that where there is excess or lesser square feet of land, when the same is

purchased without measuring the entire property including the excess, the same would belong to the respective parties and in terms of various decisions of the Supreme Court and this Court, the boundaries will prevail over the extent of land. Learned counsel further submitted that though the pathway suit was decreed, in the First Appeals (Appeal Suits), the same was reversed on the ground that the boundaries will prevail over the measurement and the plaintiff-Selli Gounder has taken a plea that the so-called excess land has to be taken as passage/pathway, in which he claimed that he has got a right over the property to the extent of 5 feet and having taken a stand that it is a common pathway, claiming a right over the property on the ground that he becomes the owner of the property, cannot be accepted, and on that score alone, the suit filed by Selli Gounder was dismissed by the first appellate Court.

10. Mr.N.Manokaran, learned counsel for the defendant-Masayappa Gounder further submitted that no pathway at all exists and the property belonging to Selli Gounder is in-tact, namely 10 cents, and Masayappa Gounder has not encroached upon the property, and that being the case, the relief sought for by the plaintiff-Selli Gounder is not at all maintainable.

11. In reply, Mr.I.C.Vasudevan, learned counsel appearing for the plaintiff-Selli Gounder submitted that the defendant-Masayappa Gounder has filed the suit in O.S.No.330 of 2007 for permanent injunction restraining the defendants from disturbing the plaintiff from erecting fence in the suit property and also for permanent injunction restraining the defendants from using the suit property. In the said suit, he has filed a sale deed and it is only a self-serving document, i.e. when the defendant-Masayappa Gounder contended that the plaintiff-Selli Gounder has filed the sale deed, which is a self-serving document to the extent of the area/boundary, stating that there was a pathway, and similarly, the defendant-Masayappa Gounder's statement is based on the sale deed, dated 15.02.1960 which could also be treated as self-serving document, mentioning the boundaries of the plaintiff-Selli Gounder, as the area is in the North-South side, thereby, claiming ownership on the common pathway.

12. Mr.I.C.Vasudevan, learned counsel for the plaintiff-Selli Gounder further submitted that the plaintiff-Selli Gounder has not claimed any right of ownership over the common pathway and he submitted that both the plaintiff and the defendants have a right over the common pathway.

13. Mr.Manokaran, learned counsel appearing for the defendant-Masayappa Gounder, while reiterating his contentions, submitted that the boundaries alone will have to be taken into account and in order to enter into the defendants' property, a

new door has been fixed, as could be seen from the report of the Advocate Commissioner. The report of the Advocate Commissioner was accepted and finally, O.S.No.225 of 2007 filed by the plaintiff-Selli Gounder was decreed and the suit filed by the defendant-Masayappa Gounder in O.S.No.330 of 2007 was dismissed, which were reversed by the lower appellate Court, against which, these respective Second Appeals are filed.

14. Heard both sides and perused the materials available on record.

15. It is not in dispute with regard to the sale deeds in Ex.A-1 executed by Karuppa Gounder in favour of the plaintiff-Selli Gounder and Ex.B-1 sale deed executed by Chidambara Iyer in favour of Marappa Gounder, who is the father of the defendant-Masayappa Gounder. It is also not in dispute that there was a small passage in the suit property. It is contended by Mr.N.Manokaran, learned counsel for the defendant-Masayappa Gounder that the suit property belongs to the defendants and that the defendants have put up a way to reach the land in S.No.226/5J.

16. According to the learned counsel for the plaintiff-Selli Gounder, instead of 54 links, there are 63 links and 9 links are in excess, i.e. 12.4 meters, which is the pathway (It is to be noted that 0.66 foot = 1 link). According to the learned counsel for the defendant-Masayappa Gounder, the total extent of land alleged to have been owned by the defendants is 12.4 meters, i.e. frontage, i.e. 63 links. Mr.N.Manokaran, learned counsel for the defendant-Masayappa Gounder admitted that there is specific mention of the boundaries and the extent of the properties that the defendant-Masayappa Gounder owns. However, he also admitted that there is excess land and that the document produced by the plaintiff-Selli Gounder are self-serving document, in which, the defendant-Masayappa Gounder is not at all a party at the time of execution of the plaintiff-Selli Gounder's sale deed. Mr.Manokaran, learned counsel for the defendant-Masayappa Gounder further submitted that the said lane has been created by the plaintiff-Selli Gounder for the purpose of entering into his property in Survey No.226/5J and at no point of time, the defendants have encroached upon the property of the plaintiff. When the learned counsel for the plaintiff-Selli Gounder stated that the plaintiff has left a lane and in the course of evidence, the plaintiff claims 5 feet ownership on the lane, but admittedly the lane does not belong to the plaintiff.

17. In support of his contention that the boundaries will prevail over the measurement and if the measurement is less, the defendants will have to suffer the lower extent of land and the defendants cannot demand from the plaintiff that the plaintiff

should give a portion of his land, Mr.N.Manokaran, learned counsel for the defendants relied on the following judgments:

(i) AIR 1963 Madras 147 (Dharmakanny Nadar Siviseshamuthu and others Vs. Mahalingam Nadar Gopalakrishna Nadar and others);

(ii) 1998 (1) LW 244 (Madras High Court) (Roohnisha Beevi and 15 others Vs. A.M.M.Mahudu Mohamed and 29 others);

(iii) 2000 (3) MLJ 327 (Madras High Court) (Ramaiya Asari Vs. Ramakrishna Naicker alias Kollimalai Naicker);

(iv) 2004 (5) CTC 344 (Madras High Court) (Kuppuswami Naidu Vs. Krishnasami Naidu);

(v) 2006 (5) CTC 180 (SC) (Subhaga Vs. Shoba);

(vi) 2007 (1) LW 706 (Madras High Court) (Kolandasamy Gounder Vs. Thirumalai Gounder and another);

(vii) 2007 (1) CTC 577 (Madras High Court) (Thiruvengadachari Vs. Nagarajan);

(viii) 2008 (1) LW 690 = 2008 (3) MLJ 219 (Madras High Court-Madurai Bench) (R.Nainar Pillai and another Vs. Subbiah Pillai);

(ix) 2011 (1) MWN (Civil) 85 (Madras High Court-Madurai Bench) (Samayana Thevar Vs. Abdul Razack);

(x) 2011 (1) CTC 663 (Madras High Court) (A.Chandran Vs. Periyammal);

(xi) 2013 (1) MWN (Civil) 206 (Madras High Court-Madurai Bench) (S.Lakshmi Vs. M.Tamilselvi);

(xii) 2014 (2) LW 919 (Madras High Court) (R.Radhakrishnan Vs. R.Nagarajan);

(xiii) 2016 (1) MWN (Civil) 152 (Madras High Court) (Natarajan Vs. Sathiyavani) and

(xiv) 2016 (2) CTC 77 (Madras High Court) (N.Valliammal (dead) Vs. M.Kannah)

18. It is true as laid down in the said decisions that the boundaries mentioned in a document will prevail over the measurement of land/extent of land mentioned in the document. In the case on hand, the land is more than what has been purchased and the boundaries will have to be taken into account, even if excess land belongs to the defendants. Both parties however agree that 1 link = 0.66 foot. Now, the extent of land mentioned in the sale deed is in feet instead of link and in many occasions, while converting the link into feet, erroneous calculation is made and at times, the same measurement is given, but the word "feet" is replaced by "link" which will enable the parties to have more extent of land than what was mentioned in the original sale deed. However, in the present case on hand, the extent of property owned by the plaintiff and the defendants is not in dispute, but there is dispute with regard to the passage only.

19. The property that belongs to the plaintiff-Selli Gounder is Survey No.226/5i, which has not been encroached upon and the size of the property is perfectly in order. It is also not in

dispute that the property in S.No.226/5J belongs to the defendants.

20. Though it is contended by the learned counsel for the defendant-Masayappa Gounder that none expected about the litigation in the future date and the compound wall of the plaintiff-Selli Gounder is in existence for more than 100 years, but admittedly, the property has not been purchased by showing the boundaries without mentioning any extent. When a specific extent is mentioned in the sale deed, be it excess or reduced in extent, based on that only, the defendants would be entitled to enjoy the possession of the property.

21. It is contended by the learned counsel for the defendants that a new case has been created by the plaintiff-Selli Gounder with regard to 5 feet of the property. At no point of time, the plaintiff has contended that he has left 5 feet for the purpose of common pathway. But what was submitted is that there existed a common pathway and in that common pathway, based on the earliest sale deed, a common pathway is shown. Out of the total extent of the common pathway, the plaintiff would be entitled to 50% and the defendants would be entitled to the remaining 50%, as there is specific extent of property in the schedule of the suit property that was purchased by the defendants.

22. Mr.I.C.Vasudevan, learned counsel for the plaintiff-Selli Gounder relied upon a judgment of this Court reported in 2002 (1) MLJ 529 (Rajagopal Mudaliar Vs. Venkataraman) and another decision of this Court reported in 1984 (2) MLJ 306 = 1984 (97) LW 365 = CDJ 1983 MHC 293 (Dina Malar Publications, a Tami Daily, represented by its Partner R.Krishnamoorthy Vs. The Tiruchirapalli Municipality, represented by its Executive Authority, the Commissioner and others), and in both these decisions, it is held that the measurement in the sale deed alone has got to be considered, unless the conversion from link to meters or feet is erroneous, as contended by the parties in the case on hand.

23. Learned counsel for the defendants relied on a decision of this Court reported in 2012 (7) MLJ 813 (Natesa Gounder Vs. Raja Gounder) in order to substantiate his contention that the sale deed is a self-serving document and it emerged only between the parties and the plaintiff wanted to have the existing pathway for his convenience. In that decision, it was further held that it is a common or garden principle that, generally, private easement rights would not be found specified in the Revenue maps and if at all, it is a Panchayat road or public way or road in villages, there would be specific marking either as a pathway or a cart-track or iteri, etc. Based on this decision, learned counsel for the defendants contended that the plaintiff

is trying to project and portray his case as if there existed pathway as per the Revenue Records. Though there is no quarrel over the principle laid down in the above said decision of this Court reported in 2012 (7) MLJ 813 (cited supra), the same is distinguishable on facts.

24. Learned counsel for the defendants also relied on the following decisions in support of his contentions:

(i) 2011 (5) SCC 435 (Joint Action Committee of Air Line Pilots' Assn. of India Vs. DG of Civil Aviation):

"11. In R.N.Gosain Vs. Yashpal Dhir [1992 (4) SCC 683 : AIR 1993 SC 352] this Court observed as under: (SCC pp. 687-88, para 10)

"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage'."

12. The doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily. [Vide Babu Ram Vs. Indra Pal Singh [1998 (6) SCC 358], P.R.Deshpande Vs. Maruti Balaram Haibatti [1998 (6) SCC 507] and Mumbai International Airport (P) Ltd. Vs. Golden Chariot Airport [2010 (10) SCC 422 : 2010 (4) SCC (Civ) 195]."

(ii) 2013 (5) SCC 470 (Rajasthan State Industrial Development and Investment Corpn. Vs. Diamond & Gem Development Corpn. Ltd.):

"I. Approbate and reprobate

15. A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and

reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [Vide Nagubai Ammal Vs. B. Shama Rao [AIR 1956 SC 593] , CIT Vs. MR.P. Firm Muar [AIR 1965 SC 1216], Ramesh Chandra Sankla Vs. Vikram Cement [2008 (14) SCC 58 : 2009 (1) SCC (L&S) 706 : AIR 2009 SC 713], Pradeep Oil Corpn. Vs. MCD [2011 (5) SCC 270 : 2011 (2) SCC (Civ) 712 : AIR 2011 SC 1869], Cauvery Coffee Traders Vs. Hornor Resources (International) Co. Ltd. [2011 (10) SCC 420 : 2012 (3) SCC (Civ) 685] and V. Chandrasekaran Vs. Administrative Officer [2012 (12) SCC 133 : 2013 (2) SCC (Civ) 136 : JT 2012 (9) SC 260]].

16. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppels in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had."

25. The above decisions are relied on by the learned counsel for the defendants to show that the plaintiff cannot approbate or reprobate in his contentions. Though there is no dispute over the above two decisions of the Apex Court, in this case, the defendants cannot take advantage of the case of the plaintiff and vice-versa.

26. Moreover, the Apex Court in the judgment reported in 2002 (3) SCC 533 (Padma Sundara Rao Vs. State of T.N.), has held as follows:

"9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington Vs. British Railways Board (1972 (2) WLR 537 = 1972 AC 877 (HL)). Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

27. The contention of the learned counsel for the respondents-defendants in the Second Appeal, more particularly, in the light of the decisions quoted supra, i.e. 14 decisions quoted by him, which is not disputed at all, is that the boundaries mentioned in the document will prevail over the measurement of the land, as held in those 14 decisions. But if there is any specific extent mentioned in the document, the respondents/defendants cannot contend that the boundaries will prevail over the extent of measurement mentioned in the document. If such contention is accepted, the purpose of mentioning the extent of land in the document becomes futile. It may be true that if the boundaries are mentioned, the extent of land may be more or less, but that cannot be the case when specific measurement is mentioned in the document. If the property is purchased showing the boundaries, if it is excess or reduced in the extent at the time of measurement, the purchaser of the property will have to suffer either the lower extent of land or enjoy the benefit of the excess land. That cannot be the case if there is specific extent mentioned in the sale deed.

28. From the above decision of the Supreme Court in the case of Padma Sundar Rao (cited supra), it is clear that the Courts cannot mechanically follow the ruling and if the decision is distinguishable based on facts, that decision need not be followed.

29. Though the respondents/defendants contended that the property purchased through a document by the appellant/plaintiff-Selli Gounder is only a self-serving document, namely the sale deed on the date of purchase of land by the appellant-plaintiff-Selli Gounder, the portion adjacent to the respondent/defendant's share is shown as "lane". As the lane existed, the property schedule mentioned as lane is on one side of this property and with regard to 5 feet mentioned by the appellant/plaintiff to contend that out of 10 feet passage, there are only two occupants, namely the appellant/plaintiff and the respondent/defendant, next to the passage, 5 feet belongs to the appellant/plaintiff and the remaining 5 feet belongs to the respondents/defendants. The said contention can at the most be taken to show that there was a passage and it cannot be construed that both parties are entitled to extend their compound wall by 5 feet and take a share in the common passage.

30. From the copy of the plans enclosed in the typed set of papers filed by the learned counsel for the respondents, dated 16.03.2017, produced before this Court, more particularly in pages 7 and 8, it is clear that there was a passage, apart from the fact that there was excess land over and above what has been purchased by the respondents/defendants.

31. In the light of the above discussion, I find that the findings of the lower appellate Court in reversing the judgments and decrees of the trial Court, are liable to be interfered with and accordingly, the judgments and decrees of the lower appellate Court are set aside and that of the trial Court are restored. The substantial question of law is answered accordingly in favour of the appellants. The Second Appeals are accordingly allowed. No costs. The Miscellaneous Petitions are closed.

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

cs

Copy to

1. The Subordinate Judge, Sathyamangalam, Erode District.
2. The District Munsif, Sathyamangalam, Erode District.
3. The Section Officer, V.R. Section, High Court, Madras.

+1 CC to Mr.I.C. Vasudevan, Advocate sr 64379.

+2 Ccs to Mr.N. Manokaran, Advocate sr 64091,64690.

S.A.Nos.729 and 730 of 2011

RSY(CO)
sp(23/10/2017)

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