



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 06.09.2017

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THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) No.297 of 2017

and

C.M.P. (MD) .No.6397 of 2017

R.Pushpakala ...Appellant /Respondent/Defendant

Vs.

M.Ponnanaintha Perumal ... Respondent/Appellant/Plaintiff

PRAYER: Appeal filed under Section 100 of C.P.C., against the judgment and decree, dated 19.07.2013, made in A.S.No.64 of 2012 by the learned Principal Subordinate Judge, Nagercoil, Kanyakumari District, modifying the judgment and decree, dated 19.06.2012 made in O.S.No.21 of 2011 by the learned Principal District Munsif, Nagercoil, Kanyakumari District.

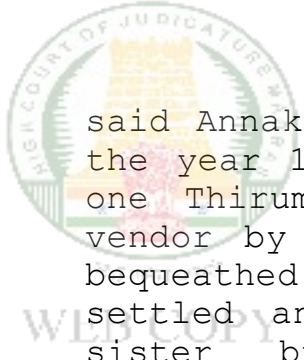
For appellant ... Mr.G.Aravindan

For respondent ... Mr.M.P.Senthil

JUDGMENT

The unsuccessful defendant is the appellant. The suit is filed for permanent injunction restraining the defendant from trespassing, encroaching or putting up any construction in the plaint schedule property and for mandatory injunction to remove the illegal construction including the shed put up in the suit property by violating the decree in O.S.No.53 of 2010, dated 12.08.2010.

2.The case of the plaintiff is that the suit property, measuring an extent of 7-1/2 cents, originally belonged to Muthu Nadar, who is the father of the plaintiff. He had been in possession and enjoyment of the same by putting up a construction. In the year 1983, the said Muthu Nadar had settled northern 3 cents of land and building thereon in favour of younger brother of the plaintiff by name Kumaresan. In 1985, the said Kumaresan had sold the said 3 cents of land to the another brother of the plaintiff by name Duraimoni, who, in turn, sold the same to one Annakili, who is the sister of the plaintiff and Kumaresan. The



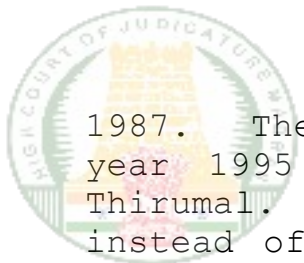
said Annakili had sold 1 cent out of 3 cents to the plaintiff in the year 1995 and the balance 2 cents of land was dealt with by one Thirumal, who, in turn, sold the same to the defendant's vendor by name Samadhanam. In the year 1988, the plaintiff had bequeathed 2-1/2 cents from his father. The plaintiff's father had settled another 2 cents in favour of the plaintiff's another sister by name Saraswathi. When the actual area was only 3 cents, in the settlement deed executed in favour of Kumaresan, it was falsely stated as 4 cents. The defendant's vendor has no right over 3 cents in the plaint survey number, as the predecessor in title of the defendant's vendor had already sold 1 cent to the plaintiff. The remaining area was only 2 cents. Since the defendant's vendor - Samadhanam attempted to encroach upon the said 1 cent land, the plaintiff had filed a suit in O.S.No.53 of 2010 for declaration of title and injunction, in which the defendant's vendor - Samadhanam remained *ex parte* and the suit was decreed on 12.08.2010. But, the said Samadhanam had fraudulently sold the property on 13.09.2010 in favour of the defendant. As the defendant was attempting to put up a construction in the plaint schedule property, the plaintiff had filed the suit.

3. In the written statement, the defendant had stated that one Thirumal had purchased 4 cents of lands in the plaint survey number and out of the same, northern 3 cents were sold to one Samadhanam, who, in turn, sold the same to the defendant and the defendant has been in possession and enjoyment of the same from the date of purchase. The southern 1 cent land was already left over to the plaintiff by the vendor of the defendant. The present suit property was not included in the schedule property in O.S.No.53 of 2010. Thus, he prayed for dismissal of the suit.

4. Before the trial Court, on the side of the plaintiff, the plaintiff himself was examined as PW1 and Exs.A1 to A9 were marked. The defendant remained *ex parte*. The trial Court has granted the decree of permanent injunction against the defendant and negatived the relief of mandatory injunction. On appeal by the plaintiff, the first appellate Court has modified the judgment and decree passed by the trial Court and thereby negatived the relief of permanent injunction and granted the relief of mandatory injunction. Aggrieved by the same, the defendant has filed this appeal.

5. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent.

6. The plaintiff's father Muthu Nadar owned the suit property in R.S.No.253/19A and constructed a house therein in 1983. The northern 3 cents of land was given to the plaintiff's brother ~~Kumaresan~~ and the said Kumaresan had sold the property in the year 1985 to his brother one Duraimoni and after that, the said Duraimoni also sold the same to his sister Annakili in the year



1987. The said Annakili sold one cent to the plaintiff in the year 1995 and the remaining portion was sold by her to one Thirumal. But, in the sale deed executed in favour of Thirumal, instead of mentioning two cents, it is mentioned as four cents. Having sold one cent to the plaintiff, the said Annakili could have had only two cents which was sold to Thirumal. The said Thirumal had executed a sale deed in favour of Samadhanam. The said Samadhanam also did not have four cents of land and he was entitled to only two cents of land. Hence, the plaintiff also had filed a suit in O.S.No.53 of 2010 against the said Samadhanam, who is the vendor of the defendant. The said suit was decreed in favour of the plaintiff on 12.08.2010. After the said decree, the said Samadhanam sold the said property to the defendant on 13.09.2010. Hence, the plaintiff has filed the suit claiming one cent.

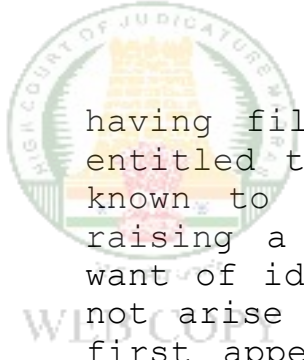
7. After filing the written statement, the defendant had remained *ex parte*, before the trial Court. In paragraph No.10 of the written statement, it is stated by the defendant as follows:

"Admittedly, as per document No.3669/2010, Samadhanam sold northern 3 cents of property to this defendant leaving one cent of property on the southern side to the plaintiff out of the entire area of four cents."

As per the above admission made in the written statement, the plaintiff is having absolute right of one cent in Survey No.253/19-A. The defendant has not specifically denied the claim of the plaintiff. However, the trial Court had granted only permanent injunction and negatived the claim of mandatory injunction.

8. The plaintiff has stated that the defendant had made some constructions over the plaint schedule property, which has not been specifically denied by the defendant. As the claim itself is only for one cent, if the defendant is allowed to encroach the same, the plaintiff would be at a loss. The defendant, being the subsequent purchaser, that too after passing of the decree in O.S.No.53 of 2010, cannot have better right than the plaintiff. Hence, the first appellate Court had granted the decree for mandatory injunction vacating the relief of permanent injunction granted by the trial Court.

9. The learned counsel for the appellant / defendant submitted that the description of the property made in the plaint is not in accordance with Order VII Rule 3 of C.P.C. As there is no proper identity of the suit property, it is submitted that the decree will be inexecutable. The plaint has clearly given the description of the one cent of property within the specific boundaries. The said one cent was also decreed only based on the pleadings in the written statement. The defendant/ appellant



having filed a written statement stating that the plaintiff is entitled to one cent had remained *ex parte* for the reasons best known to her. At the second appeal stage, the defendant is raising a contention that the decree would be inexecutable for want of identity of the property. However, the said question does not arise at this stage, as the defendant had not preferred any first appeal against the grant of permanent injunction. It is only the plaintiff had preferred the first appeal against the dismissal of relief of mandatory injunction. Hence, the said defence is not available to the defendant at this stage.

10. In the light of the above facts, there is no question of law arising for consideration. As there is no appeal preferred by the plaintiff, the judgment and decree of the first appellate Court are liable to be confirmed.

11. In the result, this second appeal fails and the same is, accordingly, dismissed, confirming the judgment and decree passed by the first appellate Court. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar(AE)

/True Copy/

Sub Assistant Registrar

To

1. The Principal Subordinate Judge,
Nagercoil, Kanyakumari District.
2. The Principal District Munsif,
Nagercoil, Kanyakumari District.

+ 1 cc TO Mr.G.Aravindan , Advocate in SR No. 77005
+ 1 cc TO Mr.M.P.Senthil , Advocate in SR No. 77026

gcg

AE/MR KKR/SAR2/04.10.2017/4P/5C

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