

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.10.2018

Pronounced on : 01.11.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.1633 of 1999
Sonachalam ... Respondent/Appellant/2nd defendant

Vs.
Kannammal ... Appellant /Respondent/plaintiff

Prayer:- Second Appeal filed under Section 100 of C.P.C., to set aside the Judgment and decree dated 14.07.1999 made in A.S.No.50 of 1997 on the file of Sub-Court, Villupuram, reversing the Judgment and Decree dated 31.07.1996 and made in O.S.No.529 of 1988 on the file of District Munsif, Thirukoilur.

For Appellant : M/s.T.S.Baskaran

For Respondent : Mr.S.Gunasekaran
for M/s.K.S.V. Prasad

J U D G M E N T

This second appeal has been filed by the second defendant against the judgment and decree passed by the Sub-Judge, Villupuram in A.S.No.50 of 1997 dated 14.07.1999.

2. The respondent herein has filed a suit in O.S.No.529 of 1988 on the file of the District Munsif, Thirukoilur to declare her title over the suit 'B' schedule property and to grant permanent injunction to restrain the defendants from interfering with her peaceful possession and enjoyment of the suit 'B' schedule property. The learned District Munsif by the judgment dated 31.07.1996 partly decreed the suit declaring that the plaintiff is entitled to the property measuring about 10 feet north-south and 111 feet east-west on the southern side of the suit 'A' and 'B' schedule properties and also granted permanent injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the aforesaid portion of the property. However, he directed the parties to bear their respective costs. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.50 of 1997 on the file of the Sub-Judge, Villupuram. The learned Sub-Judge, Villupuram by the judgment dated 14.07.1999 has allowed the said appeal and

decreed the suit fully with costs. Feeling aggrieved, this second defendant has preferred this second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint are, in brief, as follows:

The suit 'A' schedule property originally belonged to one Mannangatti Ammal W/o.Samiappa Udayar. The said Mannangatti Ammal had sold the suit 'A' schedule property along with other properties to one Nallathambi Udayar under a registered sale deed dated 12.12.1949. The said Nallathambi Udayar had sold the said properties to the plaintiff under a registered sale deed dated 21.08.1950 and from the date of purchase, the plaintiff has been in possession and enjoyment of the suit 'A' schedule property along with her husband. The plaintiff and her predecessors in title have been in possession and enjoyment of the suit 'A' schedule property for more than 35 years and thereby, the plaintiff has perfected title to the suit 'A' schedule property by adverse possession also. The second defendant is the son of the first defendant and they are having property on the north of suit 'A' schedule property. The defendants are not having any right over the suit 'A' schedule property and also in the suit 'B' schedule property which forms part of the suit 'A' schedule property. While so, the defendants tried to demolish the wall which is situated on the northern side of the suit 'B' schedule property and encroach the said property. Hence, the plaintiff has filed the above suit to declare her title over the suit 'B' schedule property and for permanent injunction to restrain the defendants from interfering with her peaceful possession and enjoyment of the said property.

4. The averments made in the written statements filed by the second defendant and adopted by the first defendant are, in brief, as follows:

a) The allegation that the suit 'A' schedule property was originally belonged to one Mannagatti Ammal and she had sold the said property to one Nallathambi Udayar on 12.12.1249 and from the said Nallathambi Udayar, the plaintiff had purchased the said property on 21.08.1950 and from that date onwards, she has been in possession and enjoyment of the same are all false. It is also false to state that the plaintiff has been in possession and enjoyment of the suit 'A' schedule property for more than 35 years and thereby she has preferred a title by adverse possession also. It is also false to state that the suit 'B' schedule property forms part of 'A' schedule property and the defendants were attempted to demolish the wall which was situated on the north of suit 'B' schedule property.

b) The entire 'A' schedule property was not owned by Mannangatti Ammal and she had not been in possession and enjoyment of the same. She had no right to execute a sale deed in respect of the entire 'A' schedule property. So, the said Nallathambi Udayar also had no right to sell the entire 'A' schedule property in favour of the plaintiff. It is false to state that the 'A' schedule property is having 15 feet on north-south. The suit for declaration in respect of 'B' schedule property is not maintainable. The suit 'A' schedule property is situated in Natham S.No.15/2. In the said Survey number, a thatched house with a vacant site measuring about the 38¼ feet on north-south and 112 feet on East-West was situated in which Ramasamy Udayar and Ayyasamy Udayar and Narayanasamy Udayar had right. The aforesaid persons had orally partitioned the aforesaid house with vacant site 75 years ago. In the said oral partition, Narayanasamy Udayar was allotted southern portion measuring about 9¼ feet North-South and 112 feet East-West. Next to the said portion, in the northern side, Ayyasamy Udayar was allotted a house with a vacant site measuring about 23½ feet South-West and 112 feet East-West and further north, Ramasamy Udayar was allotted a house with a vacant site measuring about 5½ feet South-West and 112 feet East-West. From the date of said partition, they were in exclusive possession and enjoyment of their respective shares.

c) After the death of Narayanasamy Udayar, his share was enjoyed by Mannagatti Ammal and she in turn, sold the said property to one Nallathambi Udayar who had two sons viz., one Appavu Udayar and Kandasamy Udayar. The first defendant is the wife of the said Appavu Udayar and the second defendant is his only son. The share which was allotted to Ayyasamy Udayar jointly enjoyed by the second defendant and his paternal uncle Kandasamy Udayar and they have orally partitioned the said property twenty years ago. In the said partition, the second defendant was allotted southern portion measuring about 10½ feet north-south and 112 feet East-West. The northern portion was allotted to Kandasamy Udayar measuring about 13 feet North-South and 112 feet to East-West. The plaintiff is the wife of the said Kandasamy Udayar, the second defendant had purchased the said Kandasamy Udayar's share under a registered sale deed dated 22.03.1983. In the said sale deed, it has been wrongly mentioned as 9 feet north-south instead of 13 feet. After purchase, the second defendant orally made usufructuary mortgage in favour of one Ammakannammal and the said Ammakannammal is residing in the said property. On the north of the aforesaid property, the second defendant's property which was obtained through partition is there and the said house is in the said portion collapsed and now it is a vacant site. The plaintiff made attempt to construct a wall in the property which was purchased by the second defendant from the said Kandasamy Udayar. The second

defendant has thrawrted the same. However, taking advantage, the second defendant is residing at Chennai, the plaintiff had constructed a wall including a property which was purchased by the second defendant from Kandasamy Udayar. Therefore, the defendants prayed to dismiss the above suit.

5. Based on the aforesaid pleadings, the learned District Munsif had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined herself as PW1 and marked Exhibits A1 to A6 as exhibits. On the side of the defendants, the second defendant was examined as DW1 and one more witness was examined as DW2. Ex.B1 was marked on the side of the defendants. The report and plan filed by the Advocate Commissioner have been marked as Exs.C1 and C2 respectively.

6. The learned District Munsif after considering the materials placed before him found that the plaintiff has not established that her vendor had a saleable interest in the entire suit 'A' schedule property. Relying on the averments made in the written statement, he came to the conclusion that the plaintiff is entitled to north-south 10 feet and East-West 111 feet. He also found that only fifteen days prior to the filing of the suit, the plaintiff had put up a wall and hence, she has to remove the said wall. Accordingly, he decreed the suit for the property measuring 10 feet North-South and 111 feet East-West. Aggrieved by the same, the plaintiff has preferred an appeal in A.S.No.50 of 1997 on the file of the Sub-Judge, Villupuram. The leaned Sub-Judge has allowed the said appeal and decreed the suit in toto. Feeling aggrieved, the second defendant has filed the present second appeal.

7. This court at the time of admitting the second appeal has formulated the following substantial questions of law:

" 1. Whether the learned Subordinate Judge was in error in decreeing the suit without confirming the settled principle of law viz., that the boundaries prevailed over the extent?

2. Whether the learned subordinate Judge was correct in admitting the claim over the B schedule property in spite of the categorical admission of Pws.1 and 2 that they had trespassed a schedule property and raised a new wall just 15 days prior to the filing of the suit?"

8. Heard Mr.T.S.Baskaran, learned counsel for the appellant and Mr.S.Gunasekaran for M/s.K.S.V. Prasad, learned counsel for the respondent.

9. Substantial Questions of Law - 1 and 2:

The learned counsel for the appellant/second defendant has submitted that the first appellate court erred in reversing the findings of the trial court. He further submitted that the first appellate court failed to consider that the Advocate Commissioner's report and plan would show that the plaintiff was never in possession and enjoyment of 'B' schedule property. He further submitted that the first appellate court failed to consider that PW1 and PW2 have admitted in their evidence that just fifteen days prior to the filing of the suit, the plaintiff had encroached the 'B' schedule property and raised the wall. He further submitted that as per the Commissioner's report and plan, the suit 'A' schedule property is measuring about North-South 9 feet 3 inches and 'B' schedule property is measuring about 7 feet 6 inches on the north-south and totally it would come to 16¾ feet and that is even more than what the plaintiff had purchased under Ex.A2 sale deed. He further submitted that the first appellate court failed to consider that as per the evidence of DW1 and DW2 that original owner Narayanasamy Udayar was allotted only 9¼ feet North-South and that being so, the plaintiff is not entitled to claim 15 feet North-South. Therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

10. Per contra, the learned counsel for the respondent has submitted that as per Ex.A1 sale deed dated 12.12.1949, the plaintiff's vendor Nallathambi Udayar had purchased the suit 'A' schedule property from one Mannagatti Ammal and subsequently, the said Nallathambi Udayar had sold the said property to the plaintiff under Ex.A2 sale deed dated 21.08.1950 and from that date onwards, the plaintiff has been in possession and enjoyment of the same. He further submitted that though the defendants have stated in their written statement that originally, the property was measuring about 38¼ North-West and 112 feet East-West and the said property was owned by one Ramasamy Udayar; Ayyasamy Udayar and Narayanasamy Udayar and they had orally partitioned the aforesaid property 75 years ago and in the said oral partition, on the southern side, the property measuring about 9¼ft North-South and 112 feet East-West was allotted to the said Narayanasamy Udayar and after his death, the said property was enjoyed by Mannagatti Ammal and subsequently, the said Mannagatti Ammal had sold only the said property to Nallathambi Udayar and the said Nallathambi Udayar can sell only the property measuring about 9¼ ft North-South and 112 feet East-West and contrary to the same, he had sold 15 feet North-South, but to prove the aforesaid pleadings, the defendants have not adduced any documentary evidence and therefore, the contention of the plaintiff has to be accepted. He further submitted that the trial court without any basis, it has simply accepted the pleadings of the defendants made in the written

statement and hence the first appellate court has rightly interfered in the said findings. He further submitted that the plaintiff has proved her case by producing oral and documentary evidence and taking into consideration of the same, the first appellate court has rightly decreed the suit as prayed for and in the factual findings, this court cannot interfere and therefore, he prayed to dismiss the second appeal.

11. According to the plaintiff, the suit 'A' schedule property and other properties originally belonged to one Mannagatti Ammal and the said Mannagatti Ammal had sold the same to one Nallathambi Udayar under a registered sale deed dated 12.12.1949 (Ex.A1) and the said Nallathambi Udayar had sold the said properties to her under a registered sale deed dated 21.08.1950 (Ex.A2). Her further case is that the suit 'B' schedule property is the part of the 'A' schedule property and the same is situated on the northern side. Her further case is that the defendants' property is situated on further north and they are not allowing her to enjoy the suit 'B' schedule property.

12. The case of the defendants is that the suit 'A' schedule property forms part of a larger extent consisting of North-South 38½ ft and East-West 112 feet. Their further case is that the said property was originally owned by one Ramasamy udayar, Ayyasamy Udayar and Narayanasamy Udayar and they had orally partitioned the aforesaid property 75 years ago and in the said partition, the property measuring 9½ feet North-South and 112 feet East-West was allotted to the said Narayanasamy Udayar and after his demise, Mannangatti Ammal was in possession and enjoyment of the same and she sold the said property to Nallathambi Udayar. Their further case is that since the said Narayanasamy Udayar got only 9½ feet North-South, the said Mannagatti Ammal had no right to sell 15 feet North-South under Ex.A1 sale deed. Likewise, the said Nallathambi Udayar also had no right to sell 15 feet North-South to the plaintiff under Ex.A2. सत्यमेव जयते

13. Ex.A1 is the sale deed dated 12.12.1949. Under the said document Mannangatti Ammal had sold 15 feet North-South and 111feet East-West to one Nallathambi Udayar. The said Nallathambi Udayar had sold the same extent under Ex.A2 sale deed dated 21.08.1950 to the plaintiff. When Exs.A1 and A2 came into existence, there was no dispute between the parties herein. The defendants have not disputed that the plaintiff had purchased the property from the said Nallathambi Udayar under Ex.A2 and she has been in possession and enjoyment of the property from the date of her purchase. But according to the defendants, the said Mannagatti Ammal and Nallathambi Udayar had no right to sell the entire suit 'A' schedule property i.e., 15

feet North-South and 111 feet East-West. If the defendants felt that the said Mannagatti Ammal and Nallathambi Udayar had no right to sell the entire suit 'A' schedule property, they should have questioned the same, immediately, as soon as Ex.A1 and Ex.A2 came in to existence. The defendants have not challenged the Exs.A1 and A2 sale deeds. Further, the defendants have not produced any documentary evidence to show that in the oral partition which took place between Ramasamy Udayar, Ayyasamy Udayar and Narayanasamy Udayar, only the property measuring 9¼ feet North-South, and 112 feet East-West was allotted to Narayanasamy Udayar. If really partition took place 75 years ago, following the said partition, mutation should have been effected in the revenue records. The defendants have not produced any revenue records to show that in the oral partition what were the shares allotted to the said Ramasamy Udayar and Ayyasamy Udayar and Narayanasamy Udayar. In the absence of any such evidence, it has to be presumed that Narayanasamy Udayar was allotted the suit 'A' schedule property and after his death, the said Mannagatti Ammal was in possession and enjoyment of the same and she sold the property which was inherited by her through her husband to Nallathambi Udayar through Ex.A1 sale deed and the said Nallathambi Udayar in turn had sold the same through Ex.A2 sale deed on 21.08.1950 in favour of the plaintiff. As already pointed out that at that time, there was no dispute between the parties and they were in cordial relationship and under the said circumstances, the recitals made in Exs.A1 and A2 have to be taken as true.

14. It is also to be pointed out that even though the defendants have taken a plea that Narayanasamy Udayar got only 9¼ feet North-South, the trial court has granted a decree for 10 feet North-South and challenging the same, the defendants have not filed any appeal. It was only the plaintiff who has filed an appeal against the trial court's decree denying the relief for 15 feet North-South. In the said appeal, the first appellate court has held that since the plaintiff has purchased 15 feet North-South even in the year, 1950, she is entitled to the decree as prayed for. It is to be pointed out that the plaintiff has not asked any relief for suit 'A' schedule property. On the contrary, she asked relief for the suit 'B' schedule property. According to the plaintiff, the suit 'B' schedule property forms part of 'A' schedule property. In such a case, the total extent of both 'A' and 'B' schedule should not exceed 15 feet North-South because as per Ex.A2, the plaintiff has purchased only 15 feet North-South. She can claim only the extent which was purchased by her under Ex.A2, but as per the Advocate Commissioner's report, the portion marked as ABCD in the plan is measuring North-South 9.3 feet and the portion marked DCJK in the plan is measuring 7.6 feet. So as per the Advocate Commissioner's report, the total length of both the

properties' comes about 16.9 feet. The plaintiff while examining herself as PW1 has admitted in her evidence that 15 days prior to filing of the suit, she has put up a wall on the northern boundary of 'B' schedule property. So it is clear that she had put up a wall encroaching 1.9 feet on the northern side of the 'B' schedule property. The said encroached portion belongs to the defendants. So, the plaintiff cannot ask interim injunction including the portion which was encroached by her.

15. Admittedly, the plaintiff had purchased the suit 'A' schedule property under Ex.A2. In such a case, she should have filed a suit for declaration and permanent injunction in respect of the entire 'A' schedule property. Instead of that she has filed a suit only for a portion describing it as 'B' schedule property. If the 'B' schedule property alone is separately measured, that will not give the exact measurement what the plaintiff is entitled to. However, the trial court has granted decree for 10 feet North-South by combining the suit 'A' and 'B' schedule property. The first appellate court granted decree in respect of 'B' schedule property alone. As already pointed out that the plaintiff had purchased the suit 'A' schedule property measuring about 15 feet North-South and 111 feet East West and only for that property, she can get declaration and injunction. If 'B' schedule property alone is declared, that it would cause prejudice to the defendants, because the 'B' schedule property includes 1.9 feet of the defendants. As observed by the trial court, the plaintiff has to remove the wall which was put up by her encroaching the defendants' property just 15 days prior to the filing of the suit. Therefore, this court is inclined to allow this second appeal partly and modify the judgment and decree passed by the courts below as the plaintiff is entitled for declaration and permanent injunction in respect of the property measuring 15 feet North-South and 111 feet East - South i.e., suit 'A' schedule property. Accordingly substantial questions of law are answered.

16. In the result, the second appeal is partly allowed. The judgment and decree passed by the courts below are modified as follows:

(i) that it is declared that the plaintiff is the owner of the suit 'A' schedule property and consequently, the defendants are restrained by means of permanent injunction from interfering with her possession and enjoyment of the suit 'A' schedule property;

(ii) that the plaintiff has to remove the wall which was put up by her encroaching the defendants' property within three months and

(iii) that the parties are directed to bear their own costs.

Sd/-
Assistant Registrar (CS-VI)

//True copy//

Sub Assistant Registrar

gv

To

1. The Sub-Court, Villupuram.
2. The District Munsif, Thirukoilur.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.T.S.Baskaran, Advocate SR.No.75050

+1cc to Mr.K.S.V.Prasad, Advocate SR.No.75704

S.A.No.1633 of 1999

AD(CO)
GMY (04/07/2019)



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