

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 01.09.2017

Judgment Pronounced on : 19.04.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.285 of 2007

1.Jamuna Begum (Died)
2.Rahamathullah
3.R.Vajibunnissa Begum
4.A.Abidunnisha Begum
5.R.Jabirullah
6.R.Jahir Hussain
7.Najibunnisa Begum
(Appellants 2 to 7 brought on record as Lrs.
of the deceased sole appellant vide
this Court by order dated 18.01.2012 made
in CMP.No.530/2009 in SA.No.285/2007)

....

Appellants/
Plaintiffs

Vs.

1.Mumtaz
2.Jinnah

...

Respondents/Defendants

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 21.07.2006 passed by the learned Principal Sub Judge, Villupuram, in A.S.No.79 of 2005, confirming the Judgment and decree dated 04.02.2005 passed by the learned II Additional District Munsif's Court, Thirukovilur, in O.S.No.407 of 2003.

For Appellants : M/s.A.Nilaphar for
M/s.R.Meenal

For Respondents : Ms.R.T.Shyamala

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 21.07.2006 passed by the learned Principal Sub Judge,

Villupuram, in A.S.No.79 of 2005, confirming the Judgment and decree dated 04.02.2005 passed by the learned II Additional District Munsif's Court, Thirukovilur, in O.S.No.407 of 2003.

2. Brief facts of the plaintiff is as follows:-

According to the plaintiff, the suit property originally belonged to their paternal grand mother Mahabu bee. After her demise, her only son Moor John Bagadthur Ali was entitled for the same, and he is the father of the plaintiff. He has no male heirs and left behind 5 daughters including the plaintiff. After his demise, the plaintiff is in possession and enjoyment of the same with the knowledge of the defendants without any interruption as his ancestral property. The suit property is situated in S.No.620/3 of Sandaipettai, Tirukovilur Taluk, measuring an extent of 2.38 cents. The four sisters of the plaintiff released their rights in the suit property in favour of the plaintiff 24 years ago itself. Thus the entire property belonged to the plaintiff only. To the south of the suit property, a property measuring 25 feet East - West and 70 feet North - South was purchased by the first defendant through Ex.B6 on 16.10.1988 from one Amirsai beevi. In the above said sale deed itself the northern boundary is stated as on the south of well. In 16.10.1988 sale deed the south-north measurement was mentioned as 70 feet instead of 67 feet and when the plaintiff questioned the same the defendants assured that he will measure the land in full and construct the house within 67 feet only. Hence the plaintiff kept quiet without taking any further action. Thus, the plaintiff is in possession and enjoyment of the suit property as well as the well. She has also obtained patta in her name and also paid kist for fasli 1406 - 1411. But, the defendants encroached upon the said portion of plaintiff property and constructed bathroom and challenged the title of the plaintiff. Hence, the plaintiff has come forward with the suit for declaration, recovery of possession and mandatory injunction.

3. On the other hand, opposing the claim of the plaintiff by filing written statement, it is contented by the first defendant that the suit property does not belong to the plaintiff as alleged by him. The property situated to the west of the suit property was purchased by the mother of the plaintiff one Jogaraabi in 1948 and putting up construction in that property. Now the plaintiff seeks to encroach the suit property without any right. The suit property is sub-divided and classified as natham land. Opposing the said fact, the plaintiff has come forward with the suit. The land in which the well and 7 feet wall is put up as well as the area in which the bathroom is constructed does not belong to the plaintiff. The plaintiff has to prove that the well and the area over which the drainage from the first defendant's property is going, belongs to the

plaintiff. The said area forms part of common path way. The same belongs to the defendants and one Ismail the non inclusion of the said Ismail and sisters of the plaintiff in the suit amounts to non-joinder of necessary parties. That the suit property and other properties was purchased by plaintiff's grand mother Mahabu bee and Jogaraabi in 1920. Subsequently, in oral partition the property was allotted to Jogaraabi. The property was subsequent encumbered by Jogaraabi and the same was encumbered on different occasions. Subsequently, the said property was enjoyed by three brothers namely Syed Hussain, Syed Jalal and Syed Jafar and during 1930, in the partition among said brothers, property was allotted to Syed Hussain. The well and another path way mentioned in the present suit is shown in the A schedule of the partition deed effected in 1949 among the said three brothers. The said Syed Hussain settled the property in favour of his son Syed Hameed in 1963. The said property was purchased by the first defendant from Syed Hameed on 07.11.1988 under Ex.B6 sale deed. Thereafter, the first defendant obtained plan approval from the concerned Municipal authorities as evidenced by Ex.B8 and put up construction in the suit property. The plaintiff was not in possession of the suit property as claimed by her. The plaintiff was not having any right over the suit property. Thus, the defendants seek dismissal of the suit.

4. In order to prove the case, on the side of the plaintiff, one Rahamudhullah was examined as P.W.1 and documents Ex.A1 to Ex.A7 was marked to substantiate her claim. On the side of the defendants, they examined D.W.1 to D.W.4 and marked Exs.B1 to B11 to prove their claim. After contest, the trial Court dismissed the suit. Aggrieved upon that the plaintiff preferred the first appeal and the first appellate Court also negatived the claim of the plaintiff. Hence, the present second appeal is preferred by the plaintiff.

5. The following substantial questions of law was framed by this Court at the time of admission in this appeal:-

- 1) Whether in law the courts below are right in failing to see that under Section 31 of the Indian Evidence Act, the facts admitted by the respondents need not be proved?
- 2) Whether in law the courts below are right in misreading Ex.B-11 partition deed and Ex.B6 sale deed with regard to the extent and the boundaries of the property belonging to the respondents and giving a perverse finding on facts thus warranting interference under Section 100 CPC vide AIR 2001 SC 1273?

6. The learned counsel appearing for the appellants would

submit that the admission is substantial evidence and the facts admitted by the defendants need not be proved by the plaintiff as per Section 31 of the Indian Evidence Act. In this case, the defendants have clearly and categorically admitted that the property was purchased by the vendor of the first defendant from the grand mother of the plaintiff. In the document, the measurement is mentioned as 25 feet East - West and 70 feet North - South. Actually, they are entitled only to 67 feet North - South. When the above said fact was informed to the first defendant, she has also admitted the real facts and real measurement. As such in view of the admission with regard to measurement, the plaintiff need not prove anything more. As per the verdict of this Court which reported in 82 Law Weekly 142, boundary would prevail over extent when there is dispute regarding extent of the property. In this case, the boundary is mentioned as south of the well. Thus, the northern boundary for the first defendant is the well. Even though the measurement is mentioned as 70 feet North - South, the boundary ends with the well and not more than that. However, the first appellate Court as well as the Trial Court have not considered this question of law and came to a wrong conclusion and failed to grant a decree in favour of the plaintiff. In such circumstances, the second appellate Court has to set aside the concurrent finding of the Court below, following the Apex Court verdict which is reported in AIR 2001 SC 1273. Hence, the appeal is sought to be allowed.

7. Per contra, the learned counsel appearing for the respondents would submit that the plaintiff must prove his own case and cannot rely on the weakness of the defendants' case. The plaintiff came forward with the suit for declaration and so he has to prove the title to the suit property. However, in this case, apart from Ex.A1, the plaintiff has not produced any title deeds to prove his title as well as the possession. Ex.A1 sale deed is dated 27.10.1926 and Exs.A5 and A6 are the kist receipts relating to the suit property. However, no patta has been produced by the plaintiff to corroborate the said kist receipts. In Ex.A1, there is no specific mentioning about the boundaries. In such circumstances, on the basis of the boundaries in Ex.B6 alone, the plaintiff claims title to the suit property. It is not sufficient, as the plaintiff ought to prove his own case. Hence, the trial Court as well as the first appellate Court rightly negatived the claim of the plaintiff. The trial Court as well as the first appellate Court dealt with the same kind of contention advanced by the appellants in the before this Court and the same was answered properly by the Court below. Thus, it is contented that without any acceptable evidence on record, to prove the title of the plaintiff over the suit property, the declaratory relief cannot be granted. Therefore, it is pointed out that the trial Court as well as the first appellate Court negatived the claim of the plaintiff and

hence, no interference of the same is warranted by way of the second appeal.

8.I have heard the rival submissions and also perused the materials available on record.

9.The first appellant is the plaintiff in the trial Court, and he came forward with the suit for declaration, recovery of possession and for mandatory injunction. In the pleadings, the plaintiff has narrated about deriving the title to the suit property which is in Survey No.620/3 measuring an extent of 2.38 cents. The said property originally belonged to one Mehaboob Bevi, the paternal grand mother of the plaintiff and then devolved upon her only son Meer John Bagadthur Ali who is the father of the plaintiff. The said Meer John Bagadthur Ali died about 25 years ago intestate leaving behind his four daughters, namely, the plaintiff Jamuna Begum, Alliga Begum, Mumtaz Begam and Mahabu Bee. There was no male heir to said Meer John Bagadthur Ali. The other three daughters of Meer John released orally their right in the suit property in favour of the plaintiff. The above said oral release took place 24 years back. From the date of release, the plaintiff is in possession and enjoyment of the suit property as her absolute property, hence the plaintiff alone is entitled to the whole suit property. The plaintiff as well as her predecessor in title wherein in possession and enjoyment of the same for past more than 50 years without any interruption and with the knowledge of the defendants. So, the plaintiff claims that he has also prescribed title by way of adverse possession. This is the specific pleadings of the plaintiff in para 3 of the plaint. It is clear from the plaint averments that the plaintiff claimed absolute title over the property on the ground that she derived title from her paternal grand mother. At the same time, she has also claimed the prescriptive title by adverse possession. Basically, the plaintiff took two different stand. When claiming title by adverse possession, the plaintiff ought to have accepted that title is with other person. In this case, the plaintiff has not openly accepted the title of the defendants, but impliedly accepted the title of the defendants. It is clear from the above said facts that basically regarding the title of the plaintiff over the suit property is concerned, she has adopted two totally different stand. She has not definitely pleaded with clarity as to how the suit property absolutely belongs to her. The plaintiff has described the suit property in the plaint schedule is as follows:-

"In Villupuram District, in Thirukovilur Taluk, In Santhaipet, North Street, Punja land re-survey No.620/3 measuring to an extent of 2.38 cents bounded on the

North by : Mumtaz/first defendant house

East by : House of Rahamathullah/plaintiff's husband
South by : Plaintiff Jamuna Begum Punja land
West by : Ismail Sahib bathroom

In the middle measuring East - West 25 feet, North - South 9 feet and including well.

10. Pointing out the same, it is contended that the plaintiff must prove her title on her own and she cannot advantage of any weakness in the case of the defendants to such declaration. As per the Apex Court verdict which is reported in AIR 2004 SC 137 in DALIP SINGH Vs. SIKH GURUDWARA PRABHANDAK COMMITTEE, the plaintiff must prove the title in order to seek declaration. Thus, permission given to construct a boundary wall is not enough to prove title. The plaintiff cannot depend on the weakness of the defendants' case to succeed in the suit. The plaintiff must establish subsisting right not only on the date of the suit, but also on the date of the decree by letting in acceptable evidence on her own.

11. Thus, on the basis of the guidance given by the Apex Court in the above said verdict regarding the burden of proof to seek relief of declaration, we have to analyse the case in hand. In the case on hand, the plaintiff rely upon Ex.A1 sale deed dated 27.10.1926 and the kist receipts marked as Ex.A5 and Ex.A6 to prove her claim. It is further contended by the plaintiff that in Ex.B6 sale deed under which the first defendant purchased the suit property, he signed as an attesor and at that time itself, he pointed out that the measurement is wrongly given as 70 feet north-south instead of 67 feet. However, there is no independent witness examined on the side of the plaintiff to substantiate the said contention. There is nothing on record to show that any steps was taken to correct the error and any correction deed was executed. Further, in Ex.A1 sale deed it is subsequently stated as follows:-

“இதன் மத்தியில் உள்ள சுண்ணாம்பு ”குளை கிணறு உட்பட”

Thus it clearly reveals that the property mentioned in Ex.A1 consists of not only the land but also the well and brick kiln. Pointing it out the learned counsel for the defendants contended that no man will sign as an attesor in the sale deed if it covers some portion of the attesor's property also. There is nothing on record to show that any protest was made by the defendants regarding the wrong measurements given in Ex.A1 settlement deed.

12. Further the Commissioner's report marked as Ex.C1 and Ex.C2 sketch also confirmed the same. Thus both the Courts below arrived at a conclusion that the first defendant is entitled to

70 feet north-south as per Ex.C1 Commissioner's report also. Thus, from the documents relied on by both the parties, it could be easily inferred that the first defendant purchased 70 feet and to that effect, he has produced Ex.B6 sale deed and to corroborate the same, he has produced Ex.B1 and Ex.B2. Further as stated above, the burden is on the plaintiff who has come to Court seeking documentary title to prove his case on the basis of his own document and oral evidence, but he has failed to do so and seeks to verify upon the defendants side evidence. The plaintiff has not produced any piece of paper to show that the entire suit property absolutely belongs to her. In such circumstances, both the Courts below have rightly negated the claim of plaintiff on factual ground itself.

13. Further the learned counsel appearing for the appellant/plaintiff contended that the boundary given in the document will prevail over the measurements wherever there is conflict between parties was not followed by the Courts below. Hence, he sought for interference by this Court. In support of his said contention, the learned counsel appearing for the appellant relied upon the ruling reported in AIR 2001 SC 1273. The plaintiff solely relied boundaries alone the content of the document reveals that including Well as well as brickkiln were sold. So the intention of the vendor has to be looked into. Hence, the principle relied upon by the appellant's side is not applicable to the facts of this case.

14. The further contention of the plaintiff is that the fact measurements given in Ex.A1 is not correct. The measurement was only 67 feet north-south was admitted by the defendants himself and as such the said admission is the best evidence, but the Courts below failed to appreciate the same. Thus, the plaintiff contends that the Principles under Section 31 of the Indian Evidence Act with regard to the admission was not properly considered by the courts below.

15. On the other hand, refuting the same it is contended by the defendants that there is no such admission by the defendants either in the pleadings or in the oral evidence and even assuming that there was any such admission it can be reverted. In support of the said contention, he relied upon the ruling reported in AIR 1997 SC 1724 [JOHN SUBRAMANIAM Vs. RETURNING OFFICER]. It is clear from the said Ruling that any admission by any party to the proceedings with substantial evidence. But the person who made admission can revert the same with proper evidence. Further it is contended by the defendants that in the case on hand the fact of admission by the defendants is not proved and there is no corroborative evidence to support the claim of PW1 regarding admission made by the defendants about the extent and measurement of property being given wrongly in

Ex.A1 sale deed. Except the interested evidence of PW1 who is the husband of the plaintiff, no other oral evidence is let in by the plaintiff. Further has stated earlier even though PW1 claimed that at the time of execution of Ex.A1 itself, he pointed out about the wrong extent mentioned in the sale deed. He has not taken any steps subsequently to rectify the same. The conduct of the plaintiff as well as her husband PW1 who is an attester in Ex.A1 sale deed appears unnatural. It is also pointed out by the defendants that the said claim of plaintiff about admission made by defendants is rebutted by the defendants by producing Exs.B1 to B5 and B7 documents. It is clear from the contents of Ex.B7 sale deed itself that property measuring 70 feet to the south of 6 feet common way was purchased. If the common pathway of 6 feet was included by extent will be 76 feet. It is clear from Ex.B5 settlement deed as the sale belongs to the brothers mentioned in Ex.B5 and on the northern side 6 feet common pathway was cleared for their use. It is clear from both the documents that the property measuring north-south 70 feet including the well situated to the south 76 feet common pathway was conveyed under Ex.B6. The same is corroborated by Exs.B1 and B2 documents also. The Commissioner who inspected the property and filed report Ex.C1 and rough sketch Ex.C2 as clearly stated that 70 feet is from Point J and upto Point D mentioned in Ex.C2 sketch. The Commissioner categorically stated that the well and toilet is situated within that area of property. Thus, it is clear from the documents produced by the defendants that the measurements given Ex.B6 sale deed is correct. In the light of the said available evidence and also the fact that the claim of the plaintiff about admission made by the defendants as stated above is not established. The contention of appellant/plaintiff that the Courts below failed to apply the principle under Section 31 of the Indian Evidence Act is not correct and there is no scope for applying the same, as admission by the defendants is not proved before the Court. Hence, the third substantial question of law raised by the appellants/plaintiffs is answered against her.

16. From the above discussion, it is clear that the appellant has miserably failed to prove her case by way of any documentary proof. In such circumstances, both the Courts below have elaborately discussed the available materials on record and arrived at correct conclusion and this Court finds no ground to interfere with the judgments of the Courts below. Thus the substantial questions of law raised by the appellant/plaintiff is answered against her. Therefore, this Court come to the conclusion that this appeal is devoid of merits and the same is liable to be dismissed.

17. In the result, the second appeal is dismissed. No costs. The Judgment and Decree dated 21.07.2006 in A.S.No.79 of 2005 passed by the learned Principal Sub Judge, Villupuram is hereby confirmed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Subordinate Judge,
Villupuram.
2. The II Additional District Munsif,
Thirukovilur.

Copy To

The Section Officer,
VR Section, High Court,
Madras-104 (2 copies)

+1cc to M/s.R.Meenal, Advocate, S.R.No.29323

+1cc to Ms.R.T.Shyamala, Advocate, S.R.No.29079

S.A.No.285 of 2007

MG(CO)
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