

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.06.2018

PRONOUNCED ON : 11.06.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1791 of 2004

N.Tajuddin ... Appellant/Plaintiff

Vs.

Malar Kodi Ammal ... Respondent/Defendant

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 16.03.2004 in A.S.No.20 of 2003 on the file of Sub Court, Panruti, reversing the judgment and decree dated 28.08.2003 in O.S. No.49 of 1996 on the file of District Munsif Court, Panruti.

For Appellant : Mr. R.Venkatesulu
for Mrs. Usha Raman

For Respondent : Mr.R.Gururaj

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 16.03.2004 passed in A.S.No.20 of 2003, on the file of the Subordinate Court, Panruti, reversing the judgment and decree dated 28.08.2003 passed in O.S. No.49 of 1996, on the file of the District Munsif Court, Panruti.

2. Suit for declaration, possession and permanent injunction.

3. The case of the plaintiff, in brief, is that he had purchased the A schedule property consisting of two items, by way of a sale deed dated 11.04.1983 and since then, it is the plaintiff, who has been in possession and enjoyment of the said property and also acquired title to the same by way of adverse possession on account of continuous enjoyment. To the north of the A schedule property, the defendant has purchased a house and garden and on the back portion of the house of the plaintiff and

the defendant, there is garden and there is no fence existing in between the plaintiff's garden and the defendant's garden and there are two latrines, one on the side of the plaintiff's garden and another on the side of the defendant's garden and having common septic tank and there were three coconut trees on the back of the plaintiff's garden and due to misunderstanding, the defendant filled up the debris in the common septic tank without any right and knowledge of the plaintiff and in respect of the same, the plaintiff issued a notice to the defendant through his lawyer on 16.06.1995 and to the same, the defendant sent a reply on 19.07.1995, containing false allegations and on account of the dispute between the parties regarding the enjoyment of the garden portion, the defendant wanted to construct a compound wall between the plaintiff's garden and defendant's garden and accordingly, the plaintiff advised the defendant to measure the garden by a qualified surveyor and raise the proposed compound wall and the defendant also agreed to the same. All of a sudden, the defendant with the help of her men, attempted to dig foundation with an intention to raise compound wall by encroaching about 3 feet south north into the plaintiff's garden and also attempted to cut the three coconut trees lying on the plaintiff's garden. The plaintiff had been resisting the unlawful action of the defendant and also preferred a police complaint and inasmuch as the defendant by way of filing a caveat petition, had unlawfully trespassed into the plaintiff's garden portion as described in the B schedule, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs as regards the B schedule property.

4. The case of the defendant, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts. The defendant does not admit the purchase of the property by the plaintiff by way of the sale deed dated 11.04.1983 and according to the defendant, she has purchased the property to the north of the plaintiff's property having measurements east west 217 feet and north south 25 feet, by way of a registered sale deed dated 07.12.1985, from one Kuppusamy and others and since then, it is only the defendant, who has been in possession and enjoyment of the said property and also acquired title to the same by way of adverse possession on account of continuous enjoyment. Since the plaintiff's vendors and the defendant's vendors are close relatives, they were having one septic tank for their respective latrines and without any demarcation in their respective gardens and after the purchase, the plaintiff has constructed separate septic tank and latrines in his portion and the defendant also constructed separate septic tank and latrines and the common septic tank was not put in use by either parties for more than 15 years and there is no question of the defendant putting debris in the common septic tank as alleged in the plaint. It is false to

state that the plaintiff has got three coconut trees and the said coconut trees were in the defendant's property and in order to avoid unnecessary quarrels, the defendant raised a compound wall on the south side and the plaintiff also accepted to measure the defendant's property and accordingly, the properties were measured in the presence of both the parties and taking into account the sale deeds of the both parties and accordingly, the defendant has left north south 2 feet in the eastern side adjoining to the plaintiff's property and the compound wall had been put up by the defendant by leaving a space, so that the north south measurement of 25 feet has been reduced to 23 feet on the eastern side as agreed by the plaintiff. Hence, there is no question of trespass as alleged in the plaint and the new wall put up by the defendant is not raised as alleged in the plaint plan and the plaint plan is incorrect and the compound wall has been raised by the defendant within the property purchased by her and hence, the allegations of trespass by the defendant into the plaintiff's property is false and hence, the plaintiff is not entitled to obtain the reliefs sought for and the suit is liable to be dismissed.

5. In support of the plaintiff's case, PW1 has been examined. Exs.A1 to A7 were marked. On the side of the defendant, DW1 was examined, Exs.B1 to B4 were marked. Exs.C1 to C4 were also marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to decree the suit as prayed for. On appeal, the first appellate Court, on the basis of the appreciation of the materials placed on record, set-aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the defendant, dismissed the suit laid by the plaintiff. Aggrieved over the same, the present second appeal has been levelled.

7. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

1. Whether the measurement given in the sale deed in reference to the Gramanatham property was not liable to be acted upon and taken as proof of ownership in the absence of any proof that the documents contained deliberate mis-statement and hence devoid of any evidential value?

2. Whether the learned Subordinate Judge did not err in setting aside the trial Court judgment even without finding as to how

the trial Court had erred by setting out reasons as required to be done under Order 41 Rule 31 C.P.C.?

8. The plaintiff claims title to his property by way of a sale deed dated 11.04.1983, which document has come to be marked as Ex.A1. The defendant claims title to her property by way of a sale deed dated 07.12.1985, which document has come to be marked as Ex.B1. As rightly determined by the first appellate Court, as regards the purchase of the property by the respective parties by way of Exs.A1 and B1 respectively, there is no dispute as such between them. Now, according to the materials placed on record, it is found that on the back portion of the plaintiff's house and the defendant's house, the garden portion of the respective parties are located and it is found that there is no wall dividing the garden portion belonging to the parties. From the materials placed on record, it is found that after the purchase, the parties had put up separate latrines in their respective portions and therefore, it is seen that the parties had been utilising the latrine portions available in their portions and not utilising the common septic tank located in the garden portion. Now, according to the plaintiff, the defendant agreed to measure the garden portion and raise the compound wall and the plaintiff has consent to the same. Similarly, it is also pleaded by the defendant that he had approached the plaintiff for putting up a compound wall after measuring the property and the said course had been agreed to by the plaintiff. Now, according to the plaintiff, all of a sudden, the defendant had encroached into her portion described as the B schedule property in the plaint and attempted to put up a compound wall and hence, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs. The abovesaid case of the plaintiff has been disputed by the defendant and according to the defendant, only in the portion purchased by her under Ex.B1, she had raised compound wall and the allegations of trespass into the B schedule property, as projected by the plaintiff, is false and further, according to the defendant, the B schedule property does not form part of the property purchased by the plaintiff by way of Ex.A1.

9. In the light of the abovesaid defence projected by the defendant, it is for the plaintiff to establish that the B schedule property forms part of the property acquired by him under Ex.A1. As determined by the first appellate Court, it is found that both the plaintiff and the defendant had purchased specific extents of the property under their respective sale deeds. In fact, it is seen that the plaintiff has purchased the first item of the A schedule measuring north south 15 feet and east west 156 feet and also purchased the second item of the A

schedule measuring 36 feet north south and east west 200 feet and it is seen that the defendant, by way of Ex.B1, had purchased the property measuring north south 25 feet and east west 217 feet. With reference to the abovesaid acquisition, the parties are not in serious dispute as such.

10. In so far as this case is concerned, as determined by the first appellate Court, the only material that is placed on record to adjudicate the issue raised in the matter is only the commissioner's report and plan. It is found that the commissioner had originally visited the property and filed his report and plan marked as Exs.C3 and C4. As objections had been raised to the same by the defendant, the commissioner had again visited the property and filed his report and plan, which has come to be marked as Exs.C1 and C2. Accordingly, it is found that the first appellate Court had taken into consideration the second report and plan of the Advocate commissioner marked as Exs.C1 and C2 and I am unable to place any interference to the abovesaid approach of the first appellate Court in relying upon Exs.C1 and C2.

11. From Exs.C1 and C2, it is found that, as determined by the first appellate Court, considering the measurements available of the properties belonging to the respective parties, it is seen that the dividing line KB between the properties of the respective parties measures 219.5 feet. Accordingly, as found by the first appellate Court, the defendant is found to be enjoying an excess extent of 2.5 east west than what she had acquired by way of Ex.B1. It is further seen that the plaintiff is in possession of an excess extent of 19.5 feet on the southern side than what he had acquired by way of Ex.A1. Accordingly, as determined by the first appellate Court, it is found that on the eastern portion, the plaintiff is found to be in possession of a lesser extent by 1.2 feet and the defendant is found to be in possession of a lesser extent by 2 feet. Accordingly, as found by the first appellate Court, it is seen that though the parties claim to have purchased the extent of properties as described in Exs.A1 and B1 respectively, it is found that without measuring the properties concerned, they had purchased their respective properties on the basis of the previous sale documents. Accordingly, it is seen that on ground the parties are in possession of only lesser extent than what they had actually acquired under their respective sale deeds. In view of the above position, merely because the defendant is found to be owning lesser extent of two feet on the eastern side, it cannot be presumed without any material that the defendant had encroached into the B schedule property, which is stated to be measuring east west 75 feet and north south 3 feet. As seen by the first appellate Court, when it is found that the plaintiff is in possession of more extent of property than what

he had acquired under Ex.A1, as above noted and as above depicted in the commissioner's report and plan marked as Exs.C1 and C2, the case of the plaintiff that the defendant has encroached an extent of 75 feet east west as described in the B schedule property does not merit acceptance. When as aboveseen, the defendant is found to be in possession of lesser extent by 2 feet on the eastern side, the further case of the plaintiff that the defendant has encroached the B schedule property measuring 3 feet north south also does not merit acceptance. Accordingly, it is found that the first appellate Court, based on the appreciation of report and plan marked as Exs.C1 and C2 in conjunction of the measurements of the property acquired by way of Exs.A1 and B1, is found to have rightly come to the conclusion that the defendant has not encroached into the B schedule property as claimed by the plaintiff and on the other hand, it is found that the B schedule property forms part of the property acquired by the defendant under Ex.B1. The measurements of the property belonging to and in possession of the parties on ground as depicted in the commissioner's report and plan improbabilise the version of the plaintiff's case that the defendant has encroached into the B schedule property and also improbabilise the case of the plaintiff that the B schedule property forms part of the property acquired by him under Ex.A1. In such view of the matter, it is found that the first appellate Court is justified in relying upon Exs.C1 and C2 for coming to the conclusion that the B schedule property only forms part of the property acquired by the defendant and does not falls within the limits of the property acquired by the plaintiff by way of Ex.A1.

12. The case of the respective parties that they have prescribed title to their respective portions by way of adverse possession has been rightly negatived by the first appellate Court. Considering the dispute between the parties as regards their respective garden portions, the abovesaid findings of the first appellate Court negating the plea of adverse possession projected by the respective parties do not call for any interference.

13. In the light of the above discussions, it is found that the first appellate Court is found to have correctly appreciated the available materials on record in the proper perspective, both factually as well as legally and accordingly finding that the parties had not acquired the respective properties by measuring the same and on the other hand, they are found to be in possession of the different extents than what they had acquired under their respective sale deeds, had rightly come to the conclusion that the plaintiff has miserably failed to establish that the B schedule property forms part of the A schedule property and accordingly, rightly held that the

judgment and decree of the trial Court are liable to be set-aside. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendant.

14. The counsel for the appellant, in support of his contentions placed reliance upon the decision reported in (2018) 1 MLJ 54 (A.Gurusamy Mudaliar Vs. E.Zeenath). Similarly, the counsel for the defendant, in support of his contentions placed reliance upon the decisions reported in AIR 1966 SC 1457 (The Roman Catholic Mission Vs. The State of Madras and another (In C.A.No.389 of 1964), The State of Madras and another Vs. The Roman Catholic Mission and others (In C.A.No.69 of 1965)), AIR 1976 SC 1485 (Vishwa Vijay Bharati Vs. Fakhrul Hassan and others), (1998) 6 SCC 423 (Satya Gupta (smt) alias Madhu Gupta Vs. Brijesh kumar), AIR 1963 SC 361 (Shri Raja Durga Singh of Solon Vs. Tholu and others), AIR 2001 SC 2920 (Veerayee ammal Vs. Seenii ammal), AIR 1963 SC 1633 (Madamanchi Ramappa and another Vs. Muthaluru Bojjappa), AIR 1961 SC 1097 (Raruha Singh Vs. Achal singh and others), AIR 1959 SC 1204 (Paras Nath Thakur Vs. Smt Mohani Dasi (deceased) and others), (2001) 10 SCC 764 (A.H.Pinto (Dead) by Lrs Vs. V.Chaniyappa and others), AIR 1959 SC 57 (Deity Pattabhiramaswamy Vs. S.Hanymayya and others), (1999) 3 SCC 733 (Mohd. Amirullah khan and others Vs. Mohd.Hakumullah khan and others) and (1972) 4 SCC 181 (Rao Saheb Vs. Rangnath Gopalrao Kawathekar (Dead by Lrs.) and others. The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

15. In conclusion, the second appeal fails, and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-iv)

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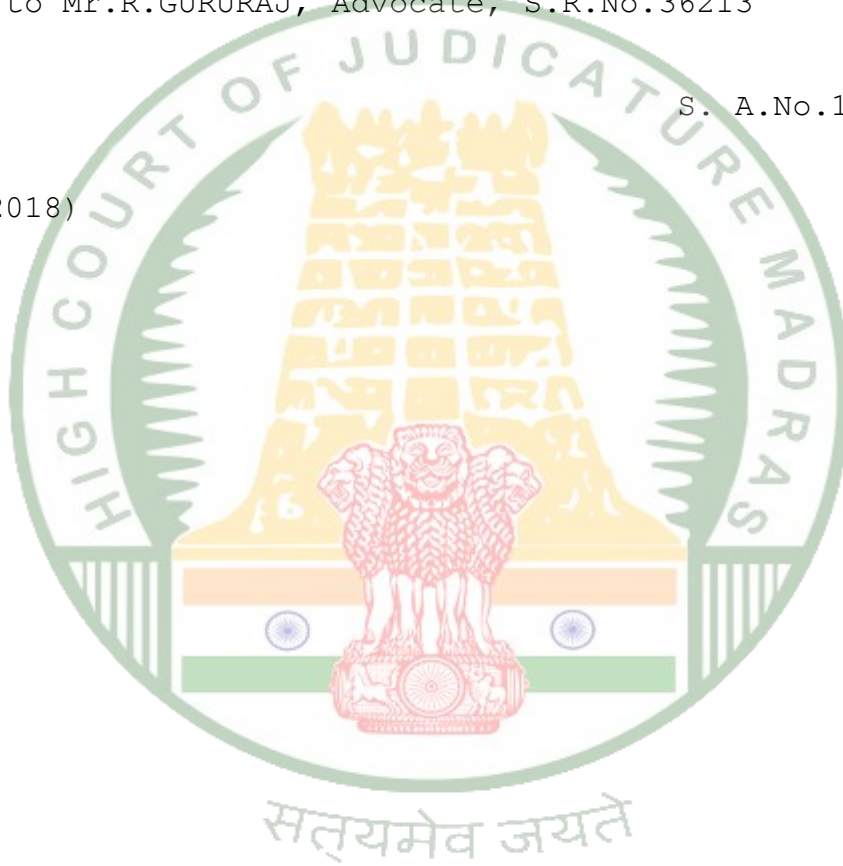
To

1. The Sub Court, Panruti.
2. The District Munsif Court, Panruti.
3. The Section Officer,
V.R.Section,
High Court, Madras.(2 copies)

+1cc to Mr.R.GURURAJ, Advocate, S.R.No.36213

Judgment in
S. A.No.1791 of 2004

CNR(CO)
TR(10/07/2018)



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