

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.12.2019

Date of Verdict : 20.12.2019

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.512 of 1996

Udayathammal

...Appellant/Plaintiff

Vs.

1.Subramania Pillai(died)

2.Velayudham Pillai(deceased)

3.Renganathan Pillai

4.V.Kumaravel

5.V.Rajavel

...Respondents/Respondents

(RR2 and 3 recorded as LR's of the deceased R1 vide order of court dated 14.03.2014 made in CMP.Nos.1045 to 1047 of 2008 in SA.No.512 of 1996)

(RR4 & 5 brought on record as LR's of the deceased R2 vide order of court dated 11.12.2018 made in CMP.No.2208 of 2017 in SA.No.512 of 1996(CVKJ))

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 30.08.1995, in A.S.No.61 of 1992 on the file of the Subordinate Judge's Court, Ariyalur, affirming the decree and judgment dated 18.03.1992 in O.S.No.118 of 1989 on the file of the District Munsif's Court, Ariyalur.

For Appellant : Mr.J.Antony Jesus

For Mr.G.Prabhu Rajadurai

For Respondents

For R3 to R5: Mr.S.Parthasarathi,
Senior Counsel,

for M/s.Sarvabhauman Associates

: R1 & R2 - Died

JUDGMENT

This second appeal is directed as against the judgment and decree dated 30.08.1995, passed in A.S.No.61 of 1992 on the file of the Subordinate Court, Ariyalur, confirming the judgment and decree dated 18.03.1992 in O.S.No.118 of 1989 on the file of the District Munsif Court, Ariyalur.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. The case of the plaintiff in brief is as follows :-

3.1. The case of the plaintiff in brief is that the plaintiff filed the suit for declaration and permanent injunction and as per the plan AGHR admeasuring three feet to be declared as common lane, in which two feet breadth marked as ABCR to be declared in favour of the plaintiff. Plot No.1 to 4, originally belong to one Jayaraman and Arumugam and purchased by the sale deed dated 21.12.1967, in which plot No.2 and 3 were purchased from the said Jayaraman by the plaintiff, and thereafter in plot No.4 the plaintiff constructed lavatrine and in plot No.1 and 2 constructed RCS roofed house. From 1968 onwards, she is residing in the said house and while constructing the house in plot No.1 to maintain southern side wall of her house, two feet lane was left out by her as set back area, which is marked as ABCR in the plan annexed to the plaint. While being so, the defendants 1 to 3 are residing in the southern side of her house situated in plot No.1. There is a three feet lane, in which two feet belong to the plaintiff and one feet belongs to the defendants. Now, the defendants renovated their house and constructed a new house encroaching two feet lane belongs to the plaintiff on the southern side of the plaintiff's house. Likewise in the plaint plan marked as DC, is a boundary for both plaintiff and defendants. On the northern side of the boundary line DC, the plaintiff constructed lavetrine and southern side, their fencing is situated. In fact, the lavetrine was there from the year 1968 onwards and as such the plaintiff filed the suit for declaration and permanent injunction in respect of the area marked as CDEF and the property marked in the lane as ARHG to be declared in favour of the plaintiff and seeking permanent injunction.

4. The defendants filed written statement resisting the plaintiff's case and also filed counter claim in respect of the suit property. They had stated that the description of the boundaries of the property furnished in the plaint are not correct. The plots mentioned in the plaint are misleading and do not actually represent the portion belongs to their predecessors in interest. The plaintiff purchased the plot Nos.1 and 4 from one, Arumugam and Plot Nos.2 and 3 from one, Jayaraman by the registered sale deed dated 21.12.1967 is not at all correct and it is false. The plaintiff is not in possession and enjoyment according to the said sale deed. The said Arumugam derived the suit property by way of Will executed by one, Somu Pillai. In the said Will, Arumugam has requested a plot, as if the plot No.1 at a length of 45 standard feet east west and whereas in the same Will, Boorasamy is bequeathed as if Plot No.2 had a length of 43 ½ standard feet east west. The fact remains that the original owner Somu Pillai has only a length of 43 ½ standard feet on the east west. The said mistaken measurements ought to have

been carried out subsequently to new measurement namely $45 \frac{1}{2}$ standard feet east west in both the sale deeds by the husband of the plaintiff to lay an unfounded claim over some length in the adjacent owners' vacant cites. Similarly if the measurement of north south is taken into account, it will be very easily seen that the plaintiff is enjoying the actual north south measurements fully. She is not entitled to any length on the north south side more than 55 standard feet. The entire 55 standard feet is within her enjoyment. Therefore, on the southern side, the plaintiff cannot claim any right more than $43 \frac{1}{2}$ standard feet. The plaintiff at the time of construction of her house in plot No.1, has left a two feet space on the southern side is not correct and it is false. The entire three feet lane adjacent to the southern wall of the plaintiff's house belongs to the defendants. Therefore, the said claim is completely erroneous and false against the defendants. The incomplete latrine put up by the plaintiff is a newly constructed one and was never constructed at the time of construction of house in the year 1968.

5. Originally the defendants' vendor Madurambal Achi and her daughter were the absolute owners of the property lying to the east side of the plaintiff portion, marked as EF in the plan annexed to the plaint. The vendors of the defendants settled at Cuddalore and utilising the said circumstances, the husband of the plaintiff trespassed into the length of two standard feet on the east and put up latrine and the wall to a length of 9 standard feet north to south and also padal fence.

6. In fact, the Madurambal Achi title contains actual measurement equivalent to the length of $27 \frac{1}{2}$ standard feet. It could be easily culled out from the sale deed if the north south measurement is taken into consideration. It works out to 10 inches per human foot. Therefore, the vendors of the defendants were having $27 \frac{1}{2}$ standard feet east west for their property as the actual extent. The plaintiff's title deed namely the Will also would corroborate the same. The defendants further contended that in fact while purchasing the property from their vendors, the plaintiff and her husband assured that the encroachment portion of two standard feet will be handed over and they also agreed to demolish the construction put by them in the encroached portion of two feet. Only in that contingency, the sale deed was executed by the vendors of the defendants and that is why the construction of the latrine was not completed and it is in abandoned stage. The defendants have purchased the schedule property to the east of the EF line by means of registered sale deed dated 20.02.1989 from their vendors, namely the Madurambal Achi and her daughter for a valid sale consideration. The father of the second defendant and his paternal uncle have purchased the properties south of AR line as per the plan from the previous owner one, Venkatachalam Pillai by registered sale deed dated 16.05.1968. In the sale deed also, the measurements are mentioned in the human feet. The human feet equation for this

sale deed could be easily culled out as 10 inches to one standard feet. The total north south measurement that is available in between DC line in the Commissioner's plan on the northern wall of the Subrayapillai's house is only 25 standard feet. Therefore, the second defendant is entitled for more than four standard feet north of the above said DC line as such the defendants prayed for dismissal of the suit filed by the plaintiff.

7. The defendants also submitted a counter claim for the suit property item No.2, DEFC portion by virtue of the sale deed dated 20.02.1989 executed by their vendors Madurambal Aachi and her daughter for a valid consideration of Rs.5,000/-. The total dues for the said sale deed would also prove the actual extent that was in possession and enjoyment of the vendors, namely Madurambal Aachi and her daughter. Further the second defendant's father and paternal uncle Subrayapillai have purchased the property to the south of AR line from its previous owner one, Venkatachalam Pillai by a registered sale deed dated 16.05.1968. The measurements in the sale deed are stated in the human foot. The human foot equation could be easily culled out as ten inches to one standard feet. Further submitted that the existence of the remnants of the old brick wall near B point in the Advocate Commissioner's plan will also strengthen the plea of the second defendant that the property exists upto EF line in the plaint plan. The new encroachment made by the plaintiff just before filing the suit will also be evident from the physical features that are found near the old wall. The other incomplete latrine and the new hastily constructed wall will also go to show that the plaintiff has trespassed just before filing the suit and just at the time of sale deed registered in favour of the second defendant. Therefore, to avoid multiplicity of proceedings, the defendants also filed counter claim in the suit filed by the plaintiff. As such, the plaintiff is not entitled to seek any relief as prayed for.

8. In support of the plaintiff's case, P.W.1 was examined and five documents were marked as Ex.A.1 to Ex.A.5. On the side of the defendants, D.W.1 was examined and Ex.B.1 to Ex.B.3 were marked. The Advocate Commissioner's reports and plans were marked as Ex.C.1 to Ex.C.5. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court dismissed the suit and allowed the counterclaim filed by the defendants. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred an appeal suit in A.S.No.61 of 1992 before the Sub Court, Ariyalur. The first appellate Court on appreciating the materials placed on records, dismissed the appeal by confirming the judgement and decree passed by the trial Court. Challenging the same, the plaintiff has come forward with the present second appeal.

9. At the time of admission of the second appeal, the following substantial questions of law were framed :-

a) Whether the lower Appellate Court was right in dismissing the application under Order 41 Rule 27 C.P.C. without considering the effect of the documents filed before it?

b) Whether the Lower Appellate Court was right in not considering the plea of acquiescence with regard to the relief of mandatory injunction?

10. Heard Mr.J.Antony Jesus, learned counsel appearing for the appellant and Mr.S.Parthasarathi, learned Senior Counsel appearing for the respondents 3 to 5.

11. The plaintiff filed the suit for declaration and permanent injunction in respect of the suit schedule property. The first item of the suit schedule property is the lane situated at the southern side of the plaintiff house and as per the plaint plan marked as DC are measuring two feet breadth and the second item of the suit schedule property as per the plaint plan marked as EDCF. In the plan, ARHG admeasuring three feet breadth, in which two feet breadth marked as ABCR are claimed by the plaintiff and the suit also for injunction as against the respondents from their interference. Likewise, in the plaint plan EDCF to be declared as plaintiff's property and also sought for injunction as against the defendants. In the counter claim, the defendants sought for declaration declaring the item No.2 suit schedule property as per the plaint plan marked as EDCF to be declared in their favour and also sought for mandatory injunction to remove the construction put up by the plaintiff and also the fence put up by the plaintiff to be removed.

11.1 The plaintiff purchased the property situated in plot No.1 and 4 through Ex.A5, the Plot No.2 and 3 were purchased through Ex.A4. Ex.A2 and A3 are the parent documents of those sale deeds. According to the sale deeds, the boundaries are mentioned as measurement of south to north 15 ½ standard feet east to west admeasuring 45 ½ standard feet for the plot No.1 and south to north 12 standard feet and east to west 22 ½ standard feet.

11.2 On perusal of Ex.A5, the boundaries mentioned for plot No.1 is east to west 45 ½ standard feet south to north 15 ½ standard feet and for the plot No.4 east west 22 ½ standard feet south to north 12 standard feet, but the parent deed for the Ex.A4 and A5, namely the Will marked as Ex.A2 mentioned about the measurement for the plot No.1 as east west southern side 45 standard feet and east west northern side 43 ½ standard feet. Therefore the measurements stated in the parent document as well as the sale deed differs. Even as per

the plan annexed to the plaint, mentioned about the measurements for the plot No.1 and 2 as both side 45 standard feet. Likewise for the Plot No.3 and 4 east to west northern side 22 ½ standard feet and southern side 12 standard feet. Even then, there is no mention about the east to west on the southern side of the plot and also no evidence marked by the plaintiff.

11.3 The Advocate Commissioner was appointed by the trial court and he inspected the suit schedule property and surveyed the land with the help of the surveyor and filed reports. According to the Advocate Commissioner, the plaintiff encroached the item 2 of the suit schedule property and constructed latrine and also fenced. But the construction of the said latrine was not completed and it was not used by the plaintiff.

11.4 The second defendant through Ex.B1 purchased the property on 20.02.1989, in which the measurements mentioned as east to west 27 ½ standard feet south to north 51 ¾ standard feet. The parent document of Ex.B1 is Ex.B2 Will. According to the Will Ex.B.2. east to west 33 human foot and south to north 62 human foot. Ex.B3 is the sale deed executed in favour of the first defendant and his brother Subraya Pillai. The measurement mentioned as east to west and also as per Ex.B1 on the southern side east to west 134 human foot, south to west 35 human foot. Accordingly, each human foot calculated as ten inches and according to the Commissioner's reports and plans, the measurements mentioned in Ex.B3 as south to north 29.2 feet and east to west 111.8 feet. As per the Ex.B3, measurement south north 28 feet and east to west 112 feet. Likewise as per Ex.B2, south to north 51.8 standard feet and east to west 27 standard feet. Therefore, the property belongs to the defendants 1 ½ feet from east to west on the southern side of the plot No.1 and northern side 39.5 feet property is encroached by the plaintiff. As per the plan annexed with the plaint marked as ED east to west 1 ½ feet and south to north upto N 39 ½ feet encroached by the plaintiff. As per the plan annexed with the plaint, the property marked as ABCR admeasuring 2 feet breadth and 45 feet length is not proved by the plaintiff by any of the documents, whereas according to the Commissioner's plan Ex.C5 from south to north A to C3 26.9 feet, C3 to D 27.9 feet in total 54.6 feet and likewise B2 measuring 9.2 feet, B2 to B3 42.10 feet, B3 to C three feet, in total 55 feet. According to the plaintiff, two feet marked in ABCR belongs to the plaintiff, but it could been seen that no construction was made by the plaintiff since on the southern side of her house no windows or sunshades were put up by the plaintiff. It shows that the plaintiff is never in possession and enjoyment of the said portion. Pending appeal, the plaintiff also filed application to mark additional documents under Order 41 Rule 27 of C.P.C. and the same was duly considered by the first appellate court and rejected the same. Further, the documents which intended to

be marked by the plaintiff are not related to the suit property and the reasons stated in the application are not satisfied and as such the first appellate court rightly rejected the same.

11.5 The trial court after considering the facts and circumstances of the case and also the documents produced by the defendants, rightly allowed the counter claim of the defendants and granted the relief of declaration and mandatory injunction against the plaintiff. Therefore, this Court finds no reason to interfere with the judgment and decree passed by the courts below.

11.6 In the light of the above discussions, the substantial questions of law formulated in this second appeal are answered in favour of the defendants and against the plaintiff.

12. In fine, the second appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-VIII)

//True copy//

Sub Assistant Registrar

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To

1. The learned Subordinate Court,
Ariyalur,
2. The learned District Munsif Court,
Ariyalur.
3. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

+1cc to Mr.J.Antony Jesus, Advocate SR.No.34

S.A.No.512 of 1996

CA (CO)
GMY (12/03/2020)