

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.12.2018

Pronounced on : 03.01.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No.1376 of 2000

1.Lakshmi
2.Selvi
3.Savithri
4.Ganthimathi

... Appellants/Plaintiffs

Vs

1.Bagiyam
2.A.Muniappan(deceased)
3.M.Saraswathi
4.Kasthuri
5.M.Tirumurthi
6.M.Mallika
7.K.Alamelu Mangai

RR 3 to 7 brought on record as
Legal Representatives of the
deceased R2 vide order of court
dated 04.12.2018 made in
CMP.No.11810 to 11812/2016 in
S.A.No.1376/2000 (CVKJ)

... Respondents

PRAYER: The Second Appeal filed under Section 100 of CPC,
against the judgment and decree of the learned Additional
Subordinate Judge, Erode in A.S.No.6 of 1998 dated 14.01.1999
reversing the judgment and decree of the I Additional District
Munsif, Erode, in O.S.No.1338 of 1993 dated 31.07.1997.

For Appellants : Mr.Niranjana Rajagopalan
For M/s. G.R.Associates

For R1 : Mr.A.K.Kumarasamy, Senior Advocate,
For Mr.S.Kaithamalai Kumaresan

For R2 : Died

For RR3 - 7 :Mr.S.Saravanan

JUDGEMENT

The plaintiffs in O.S.No.1338 of 1993 on the file of the I Additional District Munsif Court, Erode, are the appellants herein. O.S.No.1338 of 1993 had been filed seeking a judgement and decree directing the demarcation of property purchased by the first defendant on 07.09.1981 and granting mandatory injunction, directing the first defendant to remove the construction put up by her on the South of her property and deliver possession of the portion encroached by her in the cart track belonging to the plaintiffs and the second defendant, and in default for removal of the construction by an officer of the Court at her costs and deliver possession and also for a further direction to grant costs of the suit. This suit came up for consideration on 31.07.1997, before the I Additional District Munsif Court, Erode. By judgment and decree dated 31.07.1997, the suit was decreed and two months time was granted to the first defendant to remove the construction. The cart track was declared to be a common cart track.

2.As against the judgment, the first defendant filed A.S.No.6 of 1998. By judgment and decree dated 14.01.1998, the I Additional Subordinate Judge, Erode, allowed the appeal and the judgment and decree of the trial Court in O.S.No.1338 of 1993 dated 31.07.1997 was set aside. Challenging that judgment, the plaintiffs had filed the present Second Appeal.

3.The Second Appeal had been admitted on the following substantial question of law:

"1.Where in the case of a house site or a vacant site, the deed of conveyance unambiguously specifies a particular extent, whether the same will prevail over its boundaries and whether the purchaser will not be disentitled to claim any additional extent apart from what has been conveyed to him under the sale deed, for the only reason that the boundaries described do not reflect the correct extent conveyed?"

It must be mentioned that pending the appeal the second respondent/second defendant died and his legal representatives have been brought on record as respondents 3 to 7.

O.S.No.1338 of 1993 (I Additional District Munsif Court, Erode):-

4.The plaintiffs, Lakshmi wife of late Kandasamy and her three daughters, Selvi, Savithri and Ganthimathi had filed the said suit against two defendants Bagiyam, sister of late Kandasamy and Muniyappan, brother of late Kandasamy. However, Muniyappan, the second defendant remain exparte during the trial Court proceedings.

5.As stated above, the suit was filed seeking a judgment and decree directing demarcation of the Southern boundary of the property purchased by the first defendant on 07.09.1981 and for a mandatory injunction, directing the first defendant to remove the construction put by her on the South of her property and deliver vacant possession of the portion encroached in the cart track belonging to the plaintiffs and the second defendant and on failure of compliance for removal of encroachment by an officer of the Court.

6.In the plaint, it had been stated that the first plaintiff's husband Kandasamy and his brother, the second defendant, Muniyappan executed a registered sale deed in favour of their sister, the first defendant, Bagiyan on 07.09.1981, conveying 9½ cents in S.F.No.39/1 of Mettunasuvanpalayam Village with the following boundaries:-

"To the north of common cart track belonging to Kandasamy and second defendant;
To the west of the property given to the second defendant;
To the south of the property of second defendant wherein he had put up foundation;
and
To the east of Bhavani-Erode Old Highway road."

7.It was stated that the Southern boundary of the property sold to the first defendant was a cart track belonging to the plaintiffs and the second defendant. However, it was referred as 17 links wide pathway. It was stated that in or about February 1990, the first defendant attempted to encroach into the cart track on the North Western side which was prevented. When she again renewed her attempt, the plaintiffs filed O.S.No.127 of 1990 on the file of the District Munsif Court, Erode, for permanent injunction restraining the first defendant from putting up any construction except in an area of 9 ½ cents. Since there were some technical and formal defects in O.S.No.127 of 1990 and since the first defendant put up construction encroaching into the cart track, the plaintiffs withdrew O.S.No.127 of 1990, with liberty to file a fresh suit. It was stated that the real dispute between the parties was the boundary line between the cart track of the plaintiffs and the second defendant, and the property purchased by the first defendant on 07.09.1981. It was stated that order was granted on 20.07.1993 granting permission to withdraw O.S.No.127 of 1990 with liberty to institute a fresh suit and consequently, the present suit had been filed seeking the reliefs as stated above.

8.The first defendant filed a written statement, stating that the suit is not maintainable since the portion said to have been encroached had not been specifically stated. It was

further stated that the first defendant had purchased an extent of 9½ cents on 07.09.1981, within the boundaries mentioned in the sale deed. She however denied, that she had encroached into the cart track. It had been stated that the plaintiffs had not mentioned about the width of the cart track. The width was 17 links or 12 feet. However, in the earlier suit in O.S.No.127 of 1990, the plaintiffs had claimed that the width was 26 feet. It was stated that in the said suit, the injunction application filed by the plaintiffs was dismissed, and the order was also confirmed in the First Appellate Court and by the High Court in the Civil Revision Petition. Thereafter, the plaintiffs filed an application to withdraw the suit on 20.07.1993. On the same date permission was also granted without affording opportunity to the first defendant. It was claimed that the suit is not maintainable and has to be dismissed.

9. On the basis of the above pleadings, the learned I Additional District Munsif, Erode, framed the following issues for trial:-

1. Whether the first defendant had raised construction within the area of 9 ½ cents purchased by her by sale deed dated 07.09.1981?
2. Whether the plaintiffs are entitled for the relief of mandatory injunction?
3. Whether the plaintiffs are entitled for a decree to demarcate the southern boundary of the property purchased by the first defendant on 07.09.1981?
4. To what other reliefs are the parties entitled to?

10. During the course of trial, the third plaintiff Savithiri was examined as PW-1 and another witness Sivasamy was examined as PW-2. On the side of defendant, the first defendant Bagiyam was examined as DW-1 and two other witnesses Sanjeevi Ramasamy and Thamizharasan were examined as DW-2 and DW-3. The plaintiffs marked Exs.A1 to A3. These included the sale deed in favour of the first defendant in document No.2320/81, dated 07.09.1981 as Ex.A1 and the objections to the report of the Advocate Commissioner in I.A.No.210/90 in O.S.No.127 of 1990 as Ex.A2 and the counter statement of first defendant in I.A.No.210/90 in O.S.No.127 of 1990 as Ex.A3. The first defendant marked Exs.B1 to B10. Ex.B1 and B2 are the pleadings in O.S.No.127 of 1990. Ex.B3 and B4 are the certified copies of the order in I.A.No.209 of 1990 in O.S.No.127 of 1990. Ex.B5 is the certified copy of the report of the Commissioner and rough sketch filed in O.S.No.127 of 1990. Ex.B6 dated 08.08.1990 is the order and decretal order in CMA.No.16 of 1990 on the file of the District Court, Erode. Ex.B8 dated 30.11.1990 is the order of the High Court in CRP.No.2784 of 1990. Ex.B9 is the application in I.A.No.1223 of 93 in O.S.No.127 of 1990 is the

docket order. Ex.B10 is the original of the sale deed in favour of the first defendant dated 07.09.1981. During the Course of trial an Advocate Commissioner was appointed and the report and rough sketch were marked as Exs.C1 and C2.

11.On the basis of the oral and documentary evidence, the learned I Additional District Munsif, Erode, relied on the evidence of PW-2, Sivasamy who was the Manaiyakarar of Sithodu Village and who was also a signatory in Ex.A1/B10 sale deed in favour of the first defendant dated 07.09.1981. It was stated that before the sale, the land of 9½ cents was measured. The learned I Additional District Munsif, rejected the contention of the first defendant that prior to sale deed the land was not measured. It was also observed that the first defendant had not produced the plan which was drawn prior to execution of the sale deed in her favour after measuring the land. The learned I Additional District Munsif, also relied on the report and plan of the Advocate Commissioner, marked as Exs.C1 and C2.

12.It was also found that the first defendant was in occupation of an extra area of 1 cent and had also put up construction. It was also found that the description of the property was different in O.S.No.127 of 1990 and consequently, the orders therein would not bind the Court. It was held that with respect to issue No.1, the first defendant had put up construction in area excess of the 9½ cents purchased by her. It was further held that the plaintiffs were entitled for a decree of mandatory injunction. The suit was decreed.

A.S.No.6 of 1998 (Additional Subordinate Court, Erode):-

13.Challenging that judgment and decree the first defendant filed A.S.No.6 of 1998. The learned Additional Subordinate Judge, Erode, reappraised the evidence and framed points for consideration. The learned Additional Subordinate Judge, found that the properties in O.S.No.127 of 1990 and the present suit were the same. It was also found that the property conveyed to the first defendant was 9½ cents to the North of the cart track which measured 17 links. The decision of the second defendant to remain exparte was also commented upon, by the learned Additional Subordinate Judge. The learned Additional Subordinate Judge, did not accept the report of the Advocate Commissioner regarding encroachment by the first defendant in the common cart tract. The learned Additional Subordinate Judge, finally reversed the finding of the trial Court, allowed the appeal and dismissed the suit.

S.A.No.1376 of 1999:

14.Challenging that judgment and decree, the plaintiffs had filed the present second appeal. The second appeal had been admitted on the following substantial question of law:-

"1.Where in the case of a house site or

a vacant site, the deed of conveyance unambiguously specifies a particular extent, whether the same will prevail over its boundaries and whether the purchaser will not be disentitled to claim any additional extent apart from what has been conveyed to him under the sale deed, for the only reason that the boundaries described do not reflect the correct extent conveyed?"

15.As stated above, pending the appeal the second respondent/second defendant/Muniappan, died and his legal representatives were brought on record. It is significant to point out that he remained *exparte* in the suit and also in the first appeal proceedings. However, in the second appeal, arguments were advanced on behalf of the legal representatives of the deceased second respondent/second defendant affirming the case of the appellants/plaintiffs.

16.Heard arguments advanced by Mr.Niranjana Rajagopalan for M/s. G.R.Associates, learned counsel for the appellants and Mr.A.K.Kumarasamy, learned senior counsel for Mr.S.Kaithamalai Kumaresan, learned counsel for the first respondent and Mr.S.Saravanan, learned counsel for the respondent Nos. 3 to 7.

17.The appellants here in are the plaintiffs and the first respondent was the first defendant and the 3 to 7 respondents are the legal representatives of the second respondent who was the second defendant in the suit. For the sake of convenience, the parties would be referred as plaintiffs and defendants.

18.The plaintiff had filed the suit seeking a direction to demarcate the Southern boundary of the property purchased by the first defendant on 07.09.1981 by Ex.A1/B10. The property purchased by the first defendant measured 9½ cents. There is no dispute over the same. There is also no dispute over the fact that the vendors in Exs.A1/B10 were Kandasamy and Muniappan, who were brothers and the purchaser was Bagiyam, their own sister. The boundaries were also given in the sale deed. The area was also given in the sale deed. The boundaries for the property conveyed under Exs.A1/B10, as given in the plaint was as follows:

"To the north of common cart track belonging to Kandasamy and second defendant;

To the west of the property given to the second defendant;

To the south of the property of second defendant wherein he had put up foundation; and

To the east of Bhavani-Erode Old Highway road."

19.The dispute was with respect to the Southern boundary of

the property which is the common cart track said to belong to Kandasamy and Muniyappan, the vendors under Exs.A1/B10. It must be mentioned that the legal representatives of Kandasamy were the plaintiffs. Muniyappan was impleaded as second defendant. He chose to remain exparte in the suit and in the first appeal. However, arguments advanced on behalf of his legal representatives affirming the stand in the second appeal.

20.It must also be mentioned that there was an earlier litigation between the parties. Muniyappan was not impleaded as a defendant in that suit. The earlier suit was also filed by the present plaintiffs against the present first defendant alone. That suit was O.S.No.127 of 1990. It related specifically to an allegation that the first defendant had put up construction over the cart track, encroaching it. In the said suit, the cart track was shown to measure 26 links. But, in the present case, the cart track shown to measure 17 links.

21.In the written statement filed by the first defendant, it had been very significantly pointed out that the plaintiffs have failed to specify the portion alleged to have been encroached by the first defendant. The nature of encroachment had also not been specified. The schedule in the plaint is as follows:

Schedule - Description of property

Periyar Registration District, Bhavani Sub Registration District, Erode Taluk, Mettunasuvanpalayam Village, S.F.No.39/1. In this, an extent of 9 ½ cents, within the following boundaries:

"To the north of common cart track belonging to Kandasamy and second defendant;
To the west of the property given to the second defendant;
To the south of the property of second defendant wherein he had put up foundation;
and
To the east of Bhavani-Erode Old Highway road."

22.It is seen that, the area of 9½ cents which had been conveyed is fixed and the boundaries are also fixed. However, the exact nature and place where encroachment was allegedly made had not been specified in the plaint. It was only blindly stated that the first defendant had encroached into the cart track. The trial Court had observed that the property involved in O.S.No.127 of 1990 and property involved in the present suit are different. The First Appellate Court, differed from that finding and stated that they are the same.

23.I hold the finding of the First Appellate Court is correct. In both the suits, the plaintiffs were concerned with alleged encroachment over the cart track. It is very significant

to point out that in the earlier suit, arguments were advanced on the interim injunction application. The injunction application was dismissed by the trial Court. The order was upheld in the First Appellate Court. The order was confirmed in the Civil Revision Petition by the High Court. These orders have been produced as Exs.B3 and B4, B6, B7 and B8. It is thus, seen that plaintiffs had proceeded towards the logical conclusion in the interim application seeking injunction. Thereafter, when the High Court had rejected the contention, they then filed I.A.No.1223 of 1993, under Order 23 Rule 1(3) under section 151 of CPC. The said petition and docket order have been filed as Ex.B9. Reading of the same reveals a very shocking picture. In the petition, the counsel for the respondents had made an endorsement on 20.07.1993 as follows:

"I take notice and oppose. Pray time for counter"

24.On the same day, the learned Principal District Munsif, had passed orders on the following noting by a staff:

"To grant leave to the petitioner to withdraw the suit. Affidavit filed, notice given to other side and oppose."

25.The order passed was "heard and allowed". A speaking order was not at all passed. Opportunity was not granted to file counter. In effect, this has resulted in re-litigation of the entire issues once again. Even though points of law have not been framed in the present second appeal, relating to this procedure, this Court must express its displeasure on the guile of the counsels to present an application under Order 23 Rule 1 (3) CPC, obtain leave to institute a fresh suit and re-agitate the same issue after the interim application had been considered up to the stage of the High Court. The nature of proceedings in I.A.No.1223 of 1993 in O.S.No.127 of 1990 and the manner in which the learned Principal District Munsif had adjudicated on the said issue deserves condemnation.

26.In the present case, the plaintiff had filed only three documents to substantiate their case. They filed Ex.A1 which is certified copy of the sale deed dated 07.09.1981 and Ex.A2 which is the objection given to the Advocate Commission report in I.A.No.210 of 1990 in O.S.No.127 of 1990 and Ex.A3 which is the counter in I.A.No.210 of 1990 in O.S.No.127 of 1990 having withdrawn O.S.No.127 of 1990. It is impermissible on the part of the plaintiffs to rely on the documents filed in O.S.No.127 of 1990. The said documents having been adduced as evidence before this Court, have not been proved in manner known to law. They have not shown how they are relevant and no finding can be given on the basis of those documents. The plaintiffs have not taken any effort to prove the facts pleaded in the plaint independently. In the present case they have not established encroachment, nature of encroachment and area of encroachment.

27.Both sides placed reliance on the report and sketch of the Advocate Commissioner appointed in the present case. Ex.C1 and C2 are the report and sketch. The Advocate Commissioner had not been examined as witness. There is no affirmation of his findings in the report. There is no cross examination on the findings given by him. In the report, the Advocate Commissioner had however very clearly stated as follows:

“தாவா சொத்தில் தெற்கு அத்தில் 12 அடி அகலமுள்ள தடமாக உள்ள பகுதி நிர்ணயிக்கப்பட்டது, அந்த 12 அடி உள்ள இடம் காலியாக இருந்தது. அந்த 12 அடியில் தடமாக காட்டப்பட்டநிர்ணயிக்கப்பட்ட பகுதியில் எந்தவிதமான ஆக்கிரமிப்போ கட்டுமானமோ கிடையாது”

It is clear from the Advocate Commissioner's report that there is no construction over the cart track which he had given as measuring to a width of 12 feet which is equivalent to 17 links. This is the Southern boundary of the property of the first defendant.

28.The substantial question of law which had been framed relates to determination, whether in a sale deed if the area is specified, whether it would prevail over the boundaries. In the present case, the area is specified and the boundaries are also specified. It is seen that there is no construction beyond the boundary of the cart track. In the substantial question of law, it had been further queried, whether the purchaser will be entitled to claim any additional extent, apart from what had been conveyed, on the only reason that the boundaries described did not reflect the correct extent conveyed. The area is fixed as 9½ cents. The Southern boundary is fixed as the cart track. The purchaser can claim only 9½ cents extending up to the cart track. She cannot claim anything more. The first defendant who is the purchaser has not claimed anything more.

29.The Advocate Commissioner in the present case, had categorically stated that there is no construction in the cart track which measures a width of 12 feet namely 17 links.

30.In the present case, the Southern boundary has been given. The area conveyed was 9½ cents. The Advocate Commissioner had also measured the area. He found that the first defendant is in occupation of 9½ cents. He also found that the Southern boundary is the cart track. He also found that there is no construction or encroachment over the cart track. Consequently, I hold that with respect to the substantial question of law framed, the area being given unambiguously and the Southern boundary also being specified and since both correlate, the plaintiffs are not entitled for any declaration as sought. The first defendant is at liberty to put up constructions within the area which she had purchased under Ex.A1/B10.

31. In view of these facts, I hold that the First Appellate Court had correctly decided the issue under consideration. The Judgment of the First Appellate Court requires no interference. On facts it had been found that the suit is only a clever form of re-litigation of the issues raised in the earlier suit in O.S.No.127 of 1990. The plaintiffs are not entitled for any relief in the present suit, since it had been found on evidence and particularly also by the Advocate Commissioner that there is no encroachment over the cart track. As a matter of fact, the plaint itself is bereft of any details as to nature of the encroachment and the area of encroachment. In the absence of these details, I hold no relief can be granted to the plaintiffs. The substantial question of law is answered that in the present case, there is no ambiguity either over the area of 9½ cents or over the Southern boundary of cart track measuring 12 feet/17 links width.

32. In view of the above discussion, the Second Appeal fails and is accordingly dismissed. The judgment and decree of the First Appellate Court in A.S.No.6 of 1998 on the file of the Additional Subordinate Court, Erode, dated 18.01.1999 is confirmed. The judgment and decree of the Trial Court in O.S.No.1338/1993 on the file of the I Additional District Munsif Court, Erode, dated 31.07.1997 is set aside. In the circumstances of the case, the Second Appeal is dismissed, with costs.

Sd/-

Assistant Registrar(CS-VIII)

//True copy//

Sub Assistant Registrar

Smv

To

1.The Additional Subordinate Judge, Erode

2.The I Additional District Munsif, Erode

3.The Section Officer, VR Section,
Madras High Court.

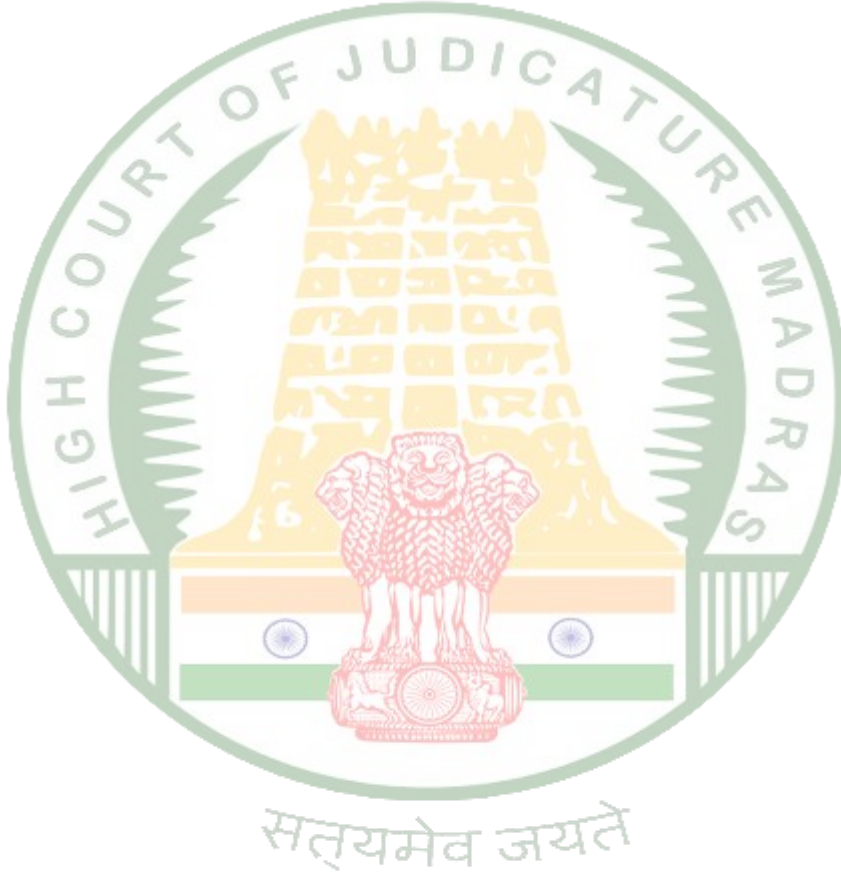
+1cc to M/s.G.R.Assocaites, Advocate SR.No.425

+1cc to Mr.A.K.Kumarasamy, Advocate SR.No.421

+1cc to Mr.S.Saravanan, Advocate SR.No.1195

S.A.No.1376 of 2000

EV(CO)
GMY(28/03/2019)



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