

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.03.2019

PRONOUNCED ON:25.04.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.2081 of 2002

Kaliaperumal ..Appellant/Plaintiff

Vs.

Lalitha ..Respondent/Defendant

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree of the Principal Subordinate Judge, Mayiladuthurai in A.S.No.97 of 2001 dated 11.02.2002 reversing the judgment and decree of the Additional District Munsif, Mayiladuthurai (Additional Incharge) in O.S.No.320 of 1997 dated 24.09.2001 and dismissing the suit.

For Appellant : Mr.T.Krishna Bhagavat
for M/s.P.Subba Reddy
For Respondent : Mr.S.Sounthar

JUDGMENT

In this second appeal, challenge is made to the judgment and decree dated 11.02.2002 passed in A.S.No.97 of 2001 on the file of the Principal Subordinate Court, Mayiladuthurai, reversing the judgment and decree dated 24.09.2001 passed in O.S.No.320 of 1997 on the file of the Additional District Munsif Court, Mayiladuthurai.

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

3. Suit for recovery of possession.

4. The case of the plaintiff in brief is that he had purchased an extent of 22 $\frac{2}{3}$ cents comprised in R.S.No.169/A from Saroja, W/o, Kalia perumal under the registered sale deed dated 15.08.1990 and as per the abovesaid sale deed, the plaintiff has purchased the property inclusive of an extent of 8 ft breadth portion lying to the north of northern wall of the

house portion comprised in the said property and out of the total extent of the 41 cents the plaintiff's vendor had conveyed an extent of $22 \frac{2}{3}$ cents to the plaintiff under the abovesaid sale deed and while selling the property to the plaintiff, her vendor had retained the northern vacant site in the said survey number and accordingly described the property sold to the plaintiff as lying to the south of the property retained by her. The vacant space to the north of the northern wall of the plaintiff's house measures 8 ft in breadth and the same belongs to the plaintiff and the plaintiff put up fence on the northern boundary line of the abovesaid vacant space and there were a number of trees standing thereon and to the north of the said boundary line, the defendant had purchased the remaining extent of $18 \frac{1}{3}$ cents by way of a sale deed dated 14.11.1990 and the defendant had purchased only the property in the suit survey number excluding the property already purchased by the plaintiff and however the defendant is now making a claim as if she has got an extent of 2 ft breadth in the 8 ft breadth portion belonging to the plaintiff and accordingly the plaintiff issued a notice on 05.01.1995 and the defendant sent a reply making a false claim of title to the extent of 2 ft breadth portion in the portion conveyed to the plaintiff lying to the north of the northern wall of the house property and accordingly the plaintiff is unable to cut off the branches of the over hanging trees which resulted in damages to the plaintiff's house property and thereby the plaintiff had incurred damages to the tune of Rs.5,000/- and the defendant filed a caveat petition before the District Munsif Court, Mayiladuthurai and thereby encroached to a breadth of 2 ft portion in 8 ft breadth portion belonging to the plaintiff on the northern side of the house property and throughout the encroached portion, the defendant had also put up the fence and planted poles and trees thereon and accordingly the plaintiff issued another notice on 26.04.1997 directing the defendant to vacate the encroached portion and surrender the possession of the same to the plaintiff and on the other hand, the defendant has refused to comply with the same and hence according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant is brief is that she had entered into a sale agreement in respect of the extent of $18 \frac{1}{2}$ cents in the suit survey number with the vendor Saroja on 20.07.1989 and pursuant to the same she had obtained the abovesaid extent by way of a sale deed dated 14.11.1990 and enjoying the same and the plaintiff knowing fully well about the sale agreement entered into by the defendant with the vendor, had purchased the portion lying to the south of the $18 \frac{1}{2}$ cents of land with reference to which the sale agreement had been

entered into by the defendant with the vendor Saroja and therefore it is only the defendant who had first purchased the property in the suit survey number and only thereafter the plaintiff has purchased and the defendant's vendor had handed over the possession of 18 ½ cents in the suit survey number to the defendant on the date of the agreement itself and accordingly earmarked the boundary line by putting the fence east to west and only the property lying to the south of the said fence, the vendor Saroja had conveyed the property to the plaintiff and therefore the claim of the plaintiff that he had purchased 22 2/3 cents in the suit survey number is not acceptable and not true. There is only the fence lying in the south of the defendant's property and in the plaintiff's property there is no lane as such and there is a tiled house in the plaintiff's property and to the north of the northern wall of the tiled house, the plaintiff is having 6 ft lane up to the fence and the plaintiff could not claim any lane portion in the area where the fence is lying and the plaintiff has come forward with the false suit claiming title to the extent of 8 ft breadth portion to the north of the northern wall of the house property and it is false to state that the defendant attempted to encroach into the 2 ft breadth portion without any entitlement and thereby the plaintiff is prevented from cutting the trees lying on the fence and thereby his house property had been damaged and the plaintiff's house property is a dilapidated building more than 100 years old and no damage has been caused to the building by the falling of the branches of the trees and therefore the claim of damages put forth by the plaintiff is false. To the notice sent by the plaintiff, the defendant sent a suitable reply, it is false to state that the defendant had encroached into the 2 ft breadth portion belonging to the plaintiff after filing the Caveat, the defendant is enjoying the property as purchased by her from the vendor and only with a view to grab the property belonging to the defendant, the plaintiff has come forward with the false suit and therefore the suit is liable to be dismissed.

6. In support of the plaintiff's case, P.W.1 was examined. Exs.A1 to A17 were marked. On the side of the defendant, D.Ws.1 and 2 were examined. Exs.B1 to B3 were marked. Exs.C1 to C4 were also marked.

7. 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 in favour of the plaintiff. On appeal by the defendant, the first appellate court was pleased to 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. Impugning the same, the present second appeal has been preferred.

8. At the time of admission of the second appeal, the following substantial question of law was formulated for consideration.

Whether the right to a property can be decided only on the basis of the report of a surveyor which is also in contradiction to the recitals in a sale deed?

9. It is found that both the plaintiff and the defendant had purchased the property lying in R.S.No.169/A which originally belonged to one Saroja. It is not in dispute that the total extent of R.S.No.169/A is 41 cents. Now according to the plaintiff he has purchased an extent of 22 $\frac{2}{3}$ cents in the abovesaid survey number from Saroja by way of a registered sale deed dated 15.08.1980 which document has come to be marked as Ex.A1. On a perusal of the recitals contained in Ex.A1, it is found that while conveying the abovesaid property to the plaintiff, the vendor Saroja had retained the northern portion of the property in the suit survey number and accordingly while describing the property which she had conveyed to the plaintiff in Ex.A1 sale deed described the same as lying to the south of the property retained by her in the suit survey number. Thus it is found that by way of Ex.A1 sale deed, the plaintiff has clearly established that he had purchased the extent of 22 $\frac{2}{3}$ cents lying in the southern portion and on a perusal of the recitals contained in Ex.A1 sale deed, it is found that the plaintiff had purchased the property inclusive of house lying therein and the description of the property in Ex.A1 recites that the plaintiff has purchased the property comprising of an extent of 22 $\frac{2}{3}$ cents in the suit survey number with the house lying thereon measuring east-west 70 ft and north-south 30 ft bearing door No.1-5B with service connection etc., and the property is also described as inclusive of 8 ft lane portion lying to the north of the northern wall of the house lying in the demised property and accordingly it is seen that as put forth by the plaintiff he has purchased in specific the 8 ft breadth lane portion lying to the north of the northern wall of the house property lying in the suit survey number by way of the abovesaid sale transaction.

10. It is found that the defendant had purchased the remaining property from the vendor Saroja in the suit survey number and according to the defendant, she had purchased the extent of 18 $\frac{1}{2}$ cents in the suit survey number lying on the

northern side by way of a sale deed dated 14.11.1990 which document has come to marked as Ex.B2 and on a perusal of the recitals contained in Ex.B2 it is evident that the vendor Saroja had only conveyed the remaining property available with her in the suit survey number after selling the extent of $22 \frac{2}{3}$ cents in the suit survey number to the plaintiff by way of Ex.A1 sale transaction and accordingly the clear recitals are found in Ex.B2 that the vendor Saroja had only conveyed the remaining portion available with her after the sale made in favour of the plaintiff under Ex.A1 sale transaction and in such view of the matter, when the vendor Saroja is found to be entitled only to an extent of 41 cents in the suit survey number and when she is found to have already alienated the extent of $22 \frac{2}{3}$ in the suit survey number to the plaintiff under Ex.A1 sale deed and when she has clearly recited that she is selling only the remaining portion available with her in the suit survey number to the defendant under Ex.B2 sale transaction, so viewed, it is found that the remaining extent which the vendor Saroja could have validly conveyed to the defendant under Ex.B2 sale transaction would only be $18 \frac{1}{3}$ cents and not $18 \frac{1}{2}$ cents as now projected by the defendant. Therefore, obviously it is evident that the vendor Saroja by way of Ex.B2 sale transaction is found to have conveyed more extent of land in the suit survey number than what she is entitled to i.e., instead of conveying the $18 \frac{1}{3}$ cents, it is found that she had conveyed the extent of $18 \frac{1}{2}$ cents to the defendant under the said sale transaction and accordingly the excess extent sold by the vendor Saroja in favour of the defendant with reference to Ex.B2 sale transaction, when the vendor is found to be not having the legal entitlement to convey the same, the defendant cannot be allowed to resist the plaintiff's suit by contending that he had purchased the extent of $18 \frac{1}{2}$ cents in the suit survey number from the vendor Saroja. At the most, it is seen that the sale transaction marked as Ex.B2 would be valid only to the extent of $18 \frac{1}{3}$ cents in the suit survey number on the northern side and not with reference to the extent of $18 \frac{1}{2}$ cents in the suit survey number as sought to be projected by the defendant.

11. Though it is put forth by the defendant that prior to Ex.B2 sale transaction, she had entered into a sale agreement with the vendor Saroja in respect of the extent of $18 \frac{1}{2}$ cents in the suit survey number on 20.07.1989 itself and only thereafter the plaintiff had purchased the property under Ex.A1 sale transaction from the vendor Saroja, however as rightly determined by the Courts below, there is no reference at all made about the sale agreement dated 20.07.1989 marked as Ex.B1 in Ex.B2 sale deed and furthermore when the passing of consideration under Ex.B2 is found to be totally contrary to the

passing of the consideration as recited in the sale agreement Ex.B1, the sale agreement reciting that the sale consideration has been passed on three different dates whereas in the sale deed Ex.B2 it is recited that the sale consideration has been passed at one single stroke and furthermore when there is no averment in Ex.B2 that the possession of the extent of 18 ½ cents had been entrusted to the defendant on the date of Ex.B1, on the other hand, Ex.B2 sale deed recites that only by way of the said sale transaction, the possession had been handed over to the defendant and furthermore when Ex.B1 sale agreement has not been registered as such and in addition to that despite the plaintiff throwing a stiff challenge to the truth and validity of Ex.B1 agreement, the defendant having not endeavored to establish its authenticity by examining the attestors and the scribe of the said document to buttress her case, it is seen that both the Courts below had rightly disbelieved the defence version as regards the sale agreement projected by her marked as Ex.B1 and in my considered opinion, no interference at all is required qua the abovesaid determination of the Courts below in rejecting the theory of sale agreement projected by the defendant as having preceeded the sale transaction under Ex.B2.

12. In this matter, the Commissioner had been appointed to note the extent of the property of the parties concerned as well as the physical features obtaining in the suit property and accordingly it is found that the Commissioner had inspected the suit property along with the surveyor and surveyor's report and plan have been marked as Exs.C1 and C2. Furthermore on a perusal of Exs.C1 and C2 in toto it is found that RS.No.169/A only consists of 41 cents and according to the surveyor, as mentioned in Ex.C1, if the extent of the property purchased by the plaintiff under Ex.A1 and if the extent of the property said to have been purchased by the defendant as described in Ex.B2 are taken and added together, it is stated by him that the total extent exceeds 166 square links beyond 41 cents, i.e., exceeding the admitted extent in the suit survey number and accordingly, the surveyor had mentioned that the defendant is in possession of 018.645 square links in the suit survey number i.e., she is in possession of an excess extent of 165 links than the extent of 18 ½ cents purchased by way of Ex.B2 sale transaction and from the surveyor's plan marked as Ex.C2 read with Ex.C1, the fence portion is lying 6 ft away from the northern wall of the house property of the plaintiff on the road side and 7.6 ft away on the rear side. Similarly as could be seen from the Advocate Commissioner's report and plan marked as Exs.C3 and C4, it is found that the distance of the plaintiff's northern wall of the house property is 6 ft from the fence and there is a lane portion measuring 1 ft 10 inches between the fence and the

defendant's house portion and accordingly on the abovesaid physical features obtaining in the suit property, when it is found that the defendant had only purchased the remaining portion available with the vendor under Ex.B2 sale transaction after the sale of 22 2/3 cents in favour of the plaintiff under Ex.A1 sale transaction and when the plaintiff is found to have acquired in specific the lane portion measuring 8 ft breadth to the northern wall of the house property lying in the extent of 22 2/3 cents and when on ground as could be seen from Exs.C1 to C4, in toto, the lane portion is only measuring 6 ft north of the northern wall of the house property from the fence lying on the ground and to the north of the fence, an extent of 1 ft 10 inches are available between the fence and the defendant's house property and furthermore, when the defendant is found to be in the enjoyment of more extent than what she has been sold under Ex.B2, as detailed in Exs.C1 to C4 in toto and as rightly determined by the trial court, it is only the defendant who had encroached into the 2 ft portion belonging to the plaintiff out of the 8 ft portion lying to the north of the northern wall of the house property of the plaintiff and accordingly the trial court is found to be totally justified in ordering the delivery of the encroached portion to the plaintiff on the part of the defendant.

13. In this second appeal, the argument has been putforth by the defendant's counsel that as per Exs.C1 and C2 , the defendant is found to be only in excess of 165 links and therefore the claim of the plaintiff that she had encroached into the portion measuring 2 ft x 70 ft and put up the fence cannot be believed and accordingly justified the dismissal of the plaintiff's suit by the first appellate court. However the abovesaid contention does not merit acceptance.

14. It is not in dispute that one cent is equal to 435.60 sq.ft and so calculated, it is found that the extent of the property acquired by the plaintiff under Ex.A1 sale transaction measuring 22 2/3 cents, it is found that the plaintiff had acquired an extent of 9,871 sq.ft. As above noted, the vendor Saroja would be competent to alienate only the remaining portion available with her in the survey number after selling the extent of 22 2/3 cents to the plaintiff under Ex.A1 sale deed. It is not in dispute that the total extent available in the suit survey number is only 41 cents, and so calculated it is found that at the most, the vendor Saroja would be legally competent only to alienate 18 1/3 cents in the suit survey number to the defendant and not 18 ½ cents and in such view of the matter, if the extent of 18 1/3 cents is calculated in sq.ft, it is found that the plaintiff's vendor would be entitled

to convey only the extent of 7989 sq.ft to the defendant by way of Ex.B2 sale transaction and not more than that. Adding 9871 sq.ft with 7989 sq.ft, the total would come to 17,860 sq ft. As above noted, one cent is equivalent to 435.60 sq.ft. The total extent of the property lying in the suit survey number is found to be only 17,860 sq.ft and if the same is divided by 435.60, it is seen that the total extent would only come to 41 cents. As above pointed out, the parties are not in dispute that the total extent available in the suit survey number is only 41 cents. As rightly put forth by the plaintiff's counsel the surveyor and the Commissioner who had been appointed to measure the properties belonging to the parties had proceeded on the presumption that the defendant has acquired an extent of 18 ½ cents in the suit survey number under Ex.B2 sale transaction legally. However, when it is found that the defendant 's vendor Saroja would be competent to only alienate 18 1/3 cents and not more than that, as above noted, at the most, she would be entitled to convey only an extent of 7989 sq ft and on the other hand, on a perusal of Ex.B2 sale transaction, the same is described as comprising of an extent of 8066 sq ft and taking advantage of the same, it is evident that the defendant had encroached into the portion belonging to the plaintiff, particularly in the 8 ft lane portion lying to the northern wall of the house property of the plaintiff and extended the fence by encroaching into the suit property measuring 2 ft x 70 ft and if the actual entitlement of the defendant in the suit survey number is calculated as above, it is found that she is in the possession of more extent of land than what she is actually entitled to and therefore it is found that the excess of land noted to be in the possession of the defendant by the surveyor is incorrect and if the extent of the property belonging to the defendant is measured as only 18 1/3 cents i.e., 7989 sq.ft, it is obvious and clear that the defendant had encroached into the plaintiff's portion as put forth by the plaintiff and in such view of the matter, the trial court is fully justified in granting the relief of the recovery of the possession in favour of the plaintiff as regards the suit property. The first appellate court has failed to consider the abovesaid aspects of the matter by assessing the materials placed on record in the right perceptive and on the premise that the excess of 165 links found to be in the possession of the defendant, not being equivalent to the suit property, on that basis, proceeded to disturb the well considered reasonings and conclusions of the trial court for upholding the plaintiff's case. If the abovesaid factors are take into account by the first appellate court, the truth would have been divulged, it is thus found that the defendant had in fact encroached into the more portion of the plaintiff's property and in such view of the matter, the

case of the plaintiff that it is only the defendant who had encroached into the suit property measuring an extent of 2 ft x 70 ft gets highly probabalised and also strengthened by the documents placed for consideration and in such view of the matter, when the defendant has not placed any acceptable and reliable material to hold that she is entitled to the suit property and on the other hand when the plaintiff has established his entitlement to the suit property as above discussed, the first appellate court, on an erroneous appreciation of the report of the surveyor and failing to take into consideration the actual entitlement of the extent available to the defendant under Ex.B2 sale transaction as above pointed out, in all, totally erred in dismissing the plaintiff's suit. In such view of the matter, judgment and decree of the first appellate court are liable to be set aside. In view of the abovesaid reasonings, the substantial question of law formulated in the second appeal is accordingly answered in favour of the plaintiff and against the defendant.

15. For the reasons aforesaid, the judgment and decree dated 11.02.2002 passed in A.S.No.97/2001 on the file of the Principal Subordinate Court, Mayiladuthurai are set aside and the judgment and decree dated 24.09.2001 passed in O.S.No.320 of 1997 on the file of the Additional District Munsif Court, Mayiladuthurai are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition if any is closed.

Sd/-
Assistant Registrar (C.S.VI)

/True Copy/

Sub Assistant Registrar

To

1. The Principal Subordinate Judge, Mayiladuthurai.
2. The Additional District Munsif, Mayiladuthurai.

Copy to : The Section Officer, VR Section,
High Court, Chennai.

+1 cc to M/s.P.Subbareddy, Advocate Sr.No. 39786
+1 cc to M/s.S.Sounthar, Advocate Sr.No. 41116

AKM/12.02.2020/9P- 6C /

judgment made in
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