

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.03.2019

PRONOUNCED ON : 10.04.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.263 of 2001

Easwaramoorthy

... Appellant/Plaintiff

Vs.

1.Lakshmi

2.Damodran(Deceased)

3.Thangababy

4.Minor Cibivaran rep. by mother

Thangababy

... Respondents/Defendants

(Respondents 3 & 4 brought on
record as LRs of the deceased R2
vide order dated 09.01.2019 made
in CMP.No.13194/2005)

(To appointed to 4th respondent Guardian viz.,
Thangababy vide order dated 09.01.2019 made
in CMP.No.13195/2005)

PRAYER : Second Appeal filed under Section 100 of C.P.C.,
against the judgment and decree dated 27.01.2000 made in
A.S.No.210/99 (on the file of the Principal District Judge,
Erode) confirming the judgment and decree dated 19.07.1999 made
in O.S.No.414/1996 (on the file of the District Munsif-cum-
Judicial Magistrate, Perundurai).

For Appellant : Mr.T.Murugamanickam, Senior Counsel

For Mrs.Zeenath Begum

For Respondents : Mr.P.Valliappan for R3 and R4

R1- set exparte

JUDGMENT

This Second Appeal has been filed by the plaintiff
against the judgment and decree passed by the Principal District
Judge, Erode, in A.S.No.210 of 1999 dated 27.01.2000 confirming
the judgment and decree passed by the District Munsif-cum-

Judicial Magistrate, Perundurai, in O.S.No.414 of 1996 dated 19.07.1999.

2. The appellant herein had filed a suit in O.S.No.414 of 1996 on the file of the District Munsif-cum-Judicial Magistrate, Perundurai, to declare that the suit property absolutely belongs to him and to restrain the defendant from interfering with his peaceful possession and enjoyment of the suit property. The learned District Munsif-cum-Judicial Magistrate, Perundurai, by the judgment and decree dated 19.07.1999 had dismissed the said suit without costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.210 of 1999 on the file of the Principal District Judge, Erode. The learned Principal District Judge, Erode, by the judgment dated 27.01.2000 had dismissed the said appeal with costs confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the plaintiff has filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial Court.

3. The averments made in the plaint are, in brief, as follows:

(a) The plaintiff's father Duraisamy Gounder and the defendant are the sons of one Nachimuthu Gounder. On 07.11.1970, the plaintiff's father Duraisamy Gounder, the defendant and their father Nachimuthu Gounder had partitioned the family properties under a registered document. In the said partition, in S.No.439/C1, the southern half was allotted to the plaintiff's father and the northern half was allotted to the defendant. On 12.06.1995, a partition took place between the plaintiff, his brother Selvaraj and their father Duraisamy Gounder. In the said partition, the suit property was allotted to the plaintiff. The plaintiff wanted to sell his property and hence he approached the defendant and made a request to measure the entire property situated in R.S.No.168/5 (old S.No.439) and fix boundaries. The defendant also agreed for the same and hence the property situated in R.S.No.168/5 has been measured by the Village Administrative Officer and found that the said S.No. contains 52½ cents. As per the old survey, there was only 40 cents but in the re-survey, it was found that there are 52½ cents in the aforesaid survey number. Hence, the plaintiff and defendant are each entitled to 26¼ cents. On 08.11.1999, the plaintiff had sold 17 cents to one V.Dharmalingam son of Vinaytheertha Mudaliar and retained 9¼ cents on the northern side.

(b) The defendant suppressing old records, had tried to sell the property to one Pongiana Gounder and hence the plaintiff had issued a lawyer's notice dated 09.11.1995 to the

defendant and also to the said Pongiana Gounder. Both of them had received the said notice. But the defendant alone sent a reply notice with false averments. Thereafter, the defendant had sold the property leaving $9\frac{1}{4}$ cents which is in possession of the plaintiff. The said $9\frac{1}{4}$ cents is the suit property. The plaintiff is enjoying the same by putting fence and also paying costs. But the defendant with a view to grab the plaintiff's property, tried to encroach the same and hence, the plaintiff was constrained to file the above suit for declaration and permanent injunction.

4. The averments made in the written statement and additional written statement are, in brief, as follows:

(a) Relationship between the parties is admitted. It is true that there was a partition on 07.11.1970 between the plaintiff's father Duraisamy Gounder, the defendant and their father Nachimuthu Gounder under which they divided their family properties including the suit property. It is also true that the old S.F.No.439/C1 ad-measures 40 cents and the plaintiff's father was allotted on the southern half and the defendant was allotted on the northern half in the said survey field. It is false to say that the lands on the southern half in R.S.No.168/5 (old S.F.No.439) is entitled to plaintiff and on the northern half to the defendant. It is false to say that the property was measured with the consent of the defendant and it was found that the land in R.S.No.168/5 comprises $52\frac{1}{2}$ cents and the plaintiff and the defendant are entitled to $26\frac{1}{4}$ cents each.

(b) It is false to say that after the fixation of boundary lines, the plaintiff had sold 12 cents in his share on 18.11.1999 to one V. Dharmalingam with definite boundaries and the same is under his possession. It is false to say that the defendant concealed the survey records and tried to sell the property to Pongiana Gonder including the plaintiff's share. It is false to say that the defendant has share only on the northern extremity. It is false to say that the plaintiff is in possession and enjoyment of the suit property by laying fence and paying kists. In the partition which took place on 07.11.1970, the plaintiff's father viz., Duraisamy Gounder was allotted with 20 cents in old S.F.No.429/1C. It seems that the plaintiff, his brother Selvaraj and their father Duraisamy divided the property and in the said partition, the aforesaid 20 cents was allotted to the plaintiff's share. It seems that the plaintiff has sold his land and put the purchaser in possession of his entire property in R.S.No.168/5. Hence, the claim of the plaintiff that he holds $9\frac{1}{4}$ cents on the north of the property sold to V.Dharmalingam, is unsustainable. The defendant has land in old S.F.No.439/1C i.e., in R.S.No.168/5 on the south and north of the property sold to Pongianna Gounder. The plaintiff has no title or possession over the suit property and the same

is absolutely belongs to the defendant. After receipt of the lawyer's notice, the defendant has sent a suitable reply. Further, the Commissioner's report will disprove the case of the plaintiff and therefore, the defendant prayed to dismiss the suit.

5. During pendency of the suit, the sole defendant died and hence his legal representatives have been impleaded as defendants 2 and 3.

6. Based on the aforesaid pleadings, the learned District Munsif-cum-Judicial Magistrate, Perundurai, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and also examined one more witness as PW2. He has marked Exs.A1 to A9 as exhibits. On the side of the defendants, second defendant was examined as DW1 and one more witness was examined as DW2. They have marked one document as Ex.B1. The reports and plans filed by the Advocate Commissioner have been marked as Exs.C1 to C4.

7. The learned District Munsif-cum-Judicial Magistrate, Perundurai, after considering the materials placed before her, found that the Advocate Commissioner's reports and plan show that there is no fence in the suit property as averred by the plaintiff in the plaint. She further found that the plaintiff failed to prove that he is in possession and enjoyment of the suit property. Accordingly, she dismissed the suit without costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.210 of 1999 on the file of the Principal District Judge, Erode. The learned Principal District Judge, by the judgment dated 27.01.2000 had dismissed the said appeal confirming the trial Court's judgment and decree. Feeling aggrieved, the plaintiff has filed the present second appeal.

8. This court at the time of admitting the second appeal has formulated the following substantial question of law:

"When joint family members divide their property equally assuming that the actual extent available for partition is a particular extent, and later it is found that a larger extent is actually available, whether the member can be estopped from claiming a share in the larger extent available?"

9. During pendency of the second appeal, the second respondent died and hence, his legal representatives have been impleaded as respondents 3 and 4.

10. Heard Mr.D.Murugamanickam, learned Senior Counsel assisted by Ms.Zeenath Begum, the learned counsel for the appellant/plaintiff and Mr.P.Valliappan, learned counsel for the respondents 3 and 4.

11. Substantial question of law :-

The learned Senior Counsel for the appellant/plaintiff has submitted that the Courts below failed to consider that Ex.A8 Re-survey register shows that S.No.439C/1 correlates with the new S.No.168/5 and therefore, the measurements indicated therein have been taken as being correct. He further submitted that the Courts below failed to consider that the parties are the members of the joint family and they have divided the property situated in S.No.439C/1 equally and therefore, whatever extent is later found to be in excess, has to be shared amongst them equally. He further submitted that the Courts below failed to consider that Ex.A9 adangal extract also indicates that the total extent available on ground is 0.21.0 hectare = 52 cents, then the excess extent has to be divided equally. He further submitted that the DW1 himself has admitted that his father had encroached lands in addition to the allotted to him in partition. He further submitted that the principle that boundaries will prevail over the extent will not apply to this case because larger extent omitted to be mentioned in Ex.A1 partition deed and therefore he prayed to allow the second appeal and set aside the judgments and decrees passed by the Courts below and decree the suit as prayed for.

12. In support of the aforesaid contentions, he relied upon the decision in R.Thangam Vs. P.T. Ram Mohan and another, CDJ 2018 MHC 5938.

13. Per contra, the learned counsel for the respondents 3 and 4 has submitted that the plaintiff has not produced any documentary evidence to show that he is in possession over the suit property. He further submitted that Ex.A8 has been issued during pendency of the suit and hence no reliance can be placed upon the said document. He further submitted that in Ex.A1, it is clearly stated that in S.No.439C/1, only 20 cents with specific boundaries allotted to the plaintiff's father and the same extent has been allotted to the plaintiff under Ex.A2 partition deed also which took place between the plaintiff and his brother and their father. He further submitted that the Courts below taking into consideration of all the aforesaid facts concurrently found that the plaintiff failed to prove title and possession over the suit property and in the said concurrent factual findings, this Court cannot interfere and hence, he prayed to dismiss the Second Appeal.

14. The plaintiff has stated in his plaint that as per the partition deed dated 12.06.1995, the suit property and other properties allotted to him and after the said partition, he wanted to sell his share and hence, he approached the defendant and made a request to measure the entire property and at that time, the defendant had informed him that he also going to sell the property to one Pongiana Gounder and hence, both of them can measure the entire land situated in the aforesaid survey number and divide equally and on that basis, the property was measured through Village Administrative Officer and it was found that the aforesaid survey number contains 52 ½ cents. The plaintiff while examining himself as PW1 has also deposed in his evidence that the property was measured in the presence of both the parties and one Pongiana Gounder with the help of a surveyor. But the plaintiff has not examined either the aforesaid Pongiana Gounder or the Village Administrative Officer or Surveyor to prove the fact that the property was measured and it was found that the aforesaid survey number contains 52 ½ cents and it was decided that the plaintiff has to take 26 ¼ cents.

15. It is to be pointed out that in Ex.A1 partition deed dated 07.11.1990 which was executed between the plaintiff's father Duraisamy Gounder, the defendant and their father it is specifically stated that no property was allotted to their father Nachimuthu Gounder and the entire family properties were divided and allotted to the plaintiff's father Duraisamy Gounder and the defendant. Further, it is stated that the properties which were allotted to the said Duraisamy Gounder and his brother Narayanasamy Gounder have to be enjoyed by them as absolute owners and one person cannot claim any right over the properties allotted to another person. It is also stated that the said partition deed shall not be cancelled at any event and even if it is cancelled that will be invalid. Therefore, it is clear that one party cannot claim any right over the properties which were allotted to the share of another and the said partition deed shall not be cancelled at any event. Under the said circumstances, the contention of the plaintiff that with the consent of the defendant, the property situated in old S.No.439C/1 (Resurvey No.168/5) has been measured cannot be accepted.

16. According to the plaintiff, the property which was allotted to his father under Ex.A1 partition deed in old S.No.439C/1 ad-measuring 20 cents was allotted to him under Ex.A2 partition deed dated 12.06.1995. Under Ex.A1 out of 40 cents in S.No.439C/1, 20 cents was allotted to the plaintiff's father with specific boundaries. But in Ex.A2, it has been mentioned as Old S.No.439 and for that R.S.No.168/5 ad-measuring 0.21.0 hectares and out of which 20 cents with specific boundaries have been allotted to the plaintiff's share. So, it

is clear that even at the time of executing the said document itself the plaintiff got knowledge that the said survey number contains 0.21.0 hectares. Therefore, the contention of the plaintiff that only after the said partition, he made a request to the defendant to measure the aforesaid survey number and the defendant also agreed for the same and in his presence the said survey number was measured and only thereafter it was found that the said survey number contains 52 ½ cents (0.21.0 hectares) cannot be accepted. Further, in Ex.A2 though it is mentioned that the aforesaid survey number contains 0.21.0 hectares, the plaintiff was allotted only 20 cents with specific boundaries and therefore, even if there is any excess land in the said survey number, the plaintiff cannot claim more than 20 cents which was allotted to him under Ex.A2.

17. As already pointed out that under Ex.A2, only 20 cents with specific boundaries has been allotted to the plaintiff's share and the same has been admitted by the plaintiff also. In the plaint, the plaintiff has stated that after Ex.A2 partition, the property was measured and found that the said survey number contains 52 ½ cents and it was decided that the plaintiff is entitled to 26 ¼ and the defendant is entitled to 26 ¼ cents, but, he has not stated that he was allotted 26 ¼ cents with specific boundaries. Further, admittedly the plaintiff had sold 17 cents to one V.Dharmalingam under Ex.A5 and thereafter, he claims that he is in possession of 9 ¼ cents. As already pointed out that the plaintiff has not pleaded and proved that after the alleged measurement, the plaintiff was allotted 26 ¼ cents and that being so, the plaintiff is not entitled to the relief of declaration and permanent injunction as prayed for.

18. In R.Thangam Vs. P.T.Ram Mohan and another, (cited supra) this Court in Para Nos:16 and 20 has observed as follows:-

"16. The first one is of Dina Malar Publications Vs. The Tiruchirapalli Municipality and others reported in 1984 (2) MLJ 306. Relevant paragraph that was read to the Court is paragraph 9, which read as follows:-

"9. The property in question bears a subdivided town survey No.371/2, with an extent of 2,400 sq.ft. The property in question is not an unsurveyed area or an area in respect of which the extent is in doubt. In laying down the principle that the boundaries should prevail over the extent, in the above decisions, the

learned Judges have applied the following principles: (1) in case of doubtful or varying extents in the documents of title relating to the property, boundaries should be preferred to the extent; (2) Only in the absence of definite material to show the actual extent intended to be sold the boundaries should outweigh the doubtful extent mentioned in the document; (3) If the recitals in the documents and the circumstances of the case show that a lesser extent only was conveyed than the area covered by boundaries, and there is clear evidence as to the intention of the parties with reference to the extent conveyed, then the extent should prevail over the boundaries. Bearing in mind the above said principles, we will have to examine the facts of this case."

20. On perusal of case laws pressed into service and relevant paragraphs of case laws which have been extracted supra, this Court does not have the slightest hesitation in accepting the submission that principle that boundaries prevail over extent is not an absolute doctrine, but is a doctrine or principle which will come into play only when there are doubtful or varying extents in the document of title relating to the property. Three conditions necessary for this principle to come into play as set out in Dina Malar case in paragraph 9 of the case law which has been extracted supra is very elucidative and lucid."

19. From the aforesaid decision, it is clear that in case of doubtful or varying extents in the documents of title relating to the property, boundaries should be preferred to the extent. It is also clear that only in the absence of definite material to show the actual extent intended to be sold, the boundaries should outweigh the doubtful extent mentioned in the document. It is also clear that if the recitals in the documents and the circumstance of the case show that a lesser extent only was conveyed than the area covered by boundaries, and there is clear evidence as to the intention of the parties with reference to the extent conveyed, then the extent should prevail over the boundaries.

20. In this case, in Ex.A1 it is clearly stated that in S.No.439C/1 out of 40 cents, 20 cents allotted to the plaintiff's father with specific boundaries. In Ex.A2 also it is clearly stated that in Old S.No.439 (New R.S.No.168/5) out of 0.21.0 hectares only 20 cents allotted to the share of the plaintiff with specific boundaries. Therefore, there is no doubt with regard to the extent of the property allotted to either the plaintiff's father or to the plaintiff. Therefore, the aforesaid decision will not help the plaintiff's case.

21. As already pointed out that the plaintiff has failed to prove that after Ex.A2 partition, the property which is situated in Old S.No.439C/1 (New R.S.No.168/5) has been measured with the consent of the defendant and only thereafter it was found that the said Survey number contains 52 ½ cents and it was decided that the plaintiff has to take 26 ¼ and defendant has to take 26 ¼ cents. Further, the plaintiff has not proved that he was allotted to 26 ¼ cents and boundary also fixed. Further, he has not produced any documentary evidence to show that he is in possession of the suit property after selling 17 cents to one V.Dharmalingam under Ex.A5. Taking into consideration of all the aforesaid facts, the trial Court has dismissed the plaintiff's suit and the same has been confirmed by the first Appellate Court. In the said factual concurrent findings, this Court cannot interfere. Accordingly, the substantial question of law is answered against the appellant/plaintiff.

22. In the result, the Second Appeal is dismissed confirming the judgments and decrees passed by the Courts below. No costs

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Erode.

2.The District Munsif-cum-Judicial Magistrate,
Perundurai.

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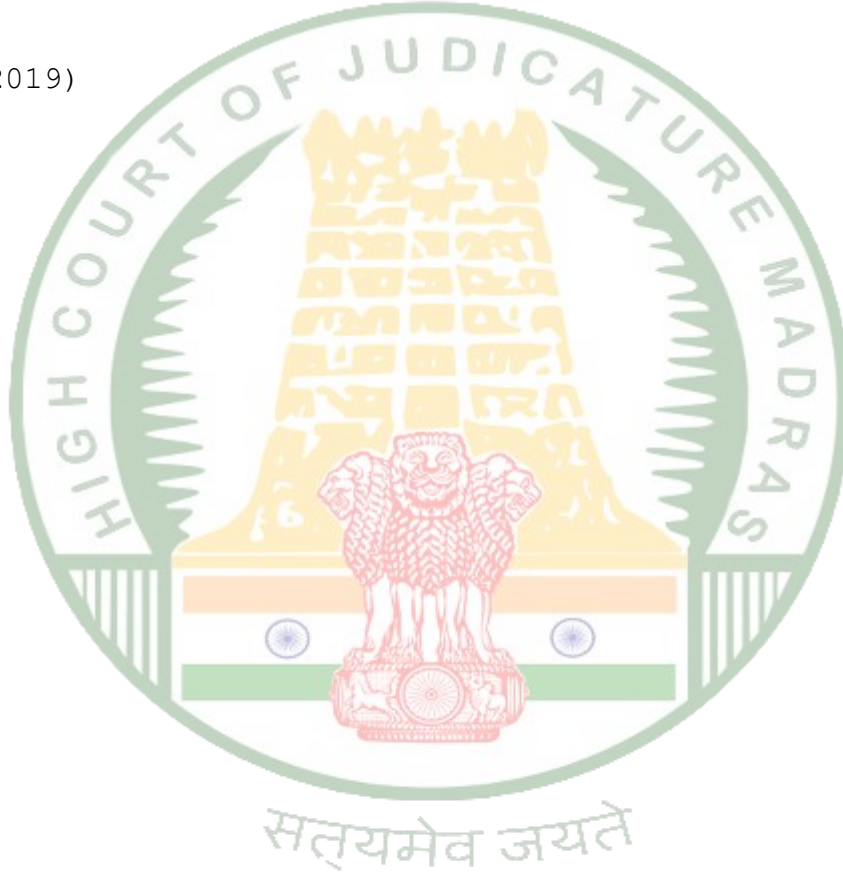
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S.A.No.263 of 2001

RK (CO)
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