

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
12~03~2019	05~04~2019

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

S.A.No.333 of 2008
and M.P.No.1 of 2008

Panchalai Ammal ... Appellant/Appellant/Plaintiff

Versus

D. Govindasamy ... Respondent/Respondent/Defendant

Second Appeal filed under Section 100 C.P.C. against the judgment and decree of Sub Court, Ariyalur in A.S.No.53 of 2003 dated 30.10.2006 confirming the Judgment and Decree of Additional District Munsif, Ariyalur in O.S.No.54 of 2001 dated 30.01.2003.

For Appellant ... Mrs.Mythili Suresh
for M/s Sarvabhauman Associates

For Respondent.. No appearance

JUDGMENT

Aggrieved over the concurrent finding of the trial Court and First Appellate Court dismissing the suit in respect of the portions shown as D,E,F,G in Ex.C.1 Advocate Commissioner's Report, the present Second Appeal came to be filed.

2. The brief facts of the Plaintiff case is as follows:

2.a. The Plaintiff is the owner of the property which is marked as A,B,C,D in the plaint plan. It measures roughly 8 cents. Western portion originally owned by the Defendant and his brother Subbaraya Udayar, who are sons of Duraisamy Udayar. In the North half i.e., yellow marked portion A, E, F, H measuring 1.3/4 cents owned by the defendant. Southern half Red marked portion i.e., E,D,G,F owned by Subbaraya Udayar. The Green marked Eastern half i.e., B,C,G,H owned by one K.Subbaraya Udayar who sold the same to the Plaintiff by a sale deed dated 7.6.1974 an extent of 0.3.1/2 cents. Likewise, Red marked

portion also sold to the Plaintiff by the Defendant's brother Subbaraya Udayar by a sale deed dated 14.11.1983 an extent of 1.3/4 cents.

2.b. It is the contention of the Plaintiff that Yellow marked portion orally sold by the Defendant to the Plaintiff some 25 years back. After that oral sale, the Plaintiff constructed a Tiled house in the Yellow marked portion 20 years back and the house extends on the eastern side portion of 1974 sale and northern portion of the the Plaintiff which is not connected with the suit property. The Plaintiff has prescribed title to the property by adverse possession. Plaintiff's house stand in the Yellow marked portion for the last 20 years and he is paying house tax and electricity charges which would go to show that the Plaintiff has prescribed title in the yellow marked portion.

2.c. The defendant developed enmity with this plaintiff for some other disputes and he has approached Tahsildar for Patta, however, the Tahsildar refused to issue patta. Thereafter, the R.D.O. passed an order directing the Tahsildar to grant joint patta to the defendant along with the Plaintiff. The order passed by the Revenue Divisional Officer is illegal. It is the contention of the Plaintiff that she is in possession of the suit property. House Tax receipts also filed. Hence suit filed for Permanent Injunction.

3.a. The Defendant denying the allegation that Yellow marked portion of the Plaintiff land owned by the defendant and southern portion of the Red marked portion i.e., E,D,G,H owned by Subbaraya Udayar. It is the contention of the Defendant that the Red marked portion is only belonging to the defendant and Yellow marked portion was belonged to his brother Subbaraya Udayar. Only to grab the Red marked portion from the Defendant, the Plaintiff simply shifted shares of the Plaintiff and his brother vis-e-versa northern and southern side. The alleged sale by the Subbaraya Udayar in respect of the Red marked portion is denied. The sale pertaining only to Yellow marked portion.

3.b. It is the further contention of the Defendant that the alleged oral sale by the defendant also denied. The partition between the defendant and his brother taken place only in the year 1981. In the oral partition, this defendant was allotted the Red marked portion and his brother was allotted to Yellow marked portion. It is his further contention that the Plaintiff extended his house by putting 'thazhwaram' in the Yellow marked portion only after he had purchased the same from the said Subbaraya Udayar. The alleged description of title is also denied by the Defendant. This defendant is in possession of Red

marked portion. Hence, prayed for dismissal of the suit.

4. The learned trial court has framed as many as 7 issues:

1. Whether the plain is correct?
2. Whether the Plaintiff is in possession of the Red marked portion as per the sale deed 14.11.1983?
3. Whether the Plaintiff is in possession of the Yellow marked portion as per oral sale?
4. Whether the Plaintiff has perfect title in respect of the Red colour portion?
5. Whether the Defendant is in possession of the Red colour portion?
6. Whether the Plaintiff is entitled for the relief as prayed for?
7. To what other relief?

5. On the side of the Plaintiff P.W.1 to P.W.3 examined and Ex.A.1 to Ex.A.32 marked. On the side of the Defendant D.W.1 was examined and Ex.B.1 to Ex.B.7 marked and Ex.C.1 and Ex.C.2 were also marked by the trial Court. The trial court in extensive analysis of the documents and evidence of the parties has granted a decree only in respect of the portion shown as H,B,G,C and A,E,F,H in the Commissioner Plan Ex.C.2. However, suit is dismissed in respect of D,E,F,G, against which first Appeal filed. The First Appellate court has also dismissed the appeal as against which the present second appeal is filed.

6. The learned counsel for the Appellant would contend that Ex.A3 Sale Deed executed by the brother of the Defendant clearly indicate that only Red portion was purchased by the Plaintiff. The boundaries set out in the above sale deed clearly show that Northern boundary is shown as Plaintiff's property. Further, the Commissioner Report and Plan also tallies with the boundaries of the suit property as set out in the plaint. Exhibits filed on the side of the Plaintiff show that the Plaintiff is all along in possession of the suit property. In fact, the above document clearly probabalise the Plaintiff's stand that she is in possession of the entire Yellow marked portion. House of the Plaintiff is also extended in the Yellow marked portion and House Tax receipts clearly show that the house was in existence for a long period. The above facts coupled with Ex.A.3 clearly proves the fact that Yellow marked portion was originally allotted to the Defendant and in fact, he

sold the same long back in the oral sale. the Plaintiff has proved his possession. Ex.A.26 order of the Revenue Divisional Officer proved the fact that the respondent is not in possession of the suit property. In the entire suit property shown in the plaint plan. Hence, prayed for allowing of the appeal.

7. No representation for the Respondent. Despite his name printed non appeared for him.

8. The Appellant has raised the following substantial Questions of law in the Second Appeal:

A. Whether in the light of the recitals of Ex.A1 sale deed, the Courts are correct in law in dismissing the appellant suit with respect to the 'DEFG' portion after allowing the same with respect to the other portions?

B. Are not the courts below in error in not considering Ex.A26 order of the Revenue Divisional Officer as a whole to arrive at a conclusion that the respondents are not in possession of the suit property but that only the appellant is in possession?

C. Whether the Courts below are correct in law in dismissing that suit for bare injunction filed by the appellant inspite of the appellant proving his possession to the suit property?

9. The suit has been laid for mere permanent injunction in respect of the entire suit property. A Plan also appended with the plaint. Trial Court also appointed Advocate Commissioner to note down the physical features of the suit property. The Advocate Commissioner also filed Report Ex.C.1 and Ex.C.2. Boundaries set out in the suit plan and the Commissioner's Plan were compared by the trial Court and found that there is discrepancies with regard to the boundaries in two plans. Be that as it may. From the evidence adduced on both sides, there is no dispute that the portion mentioned as 'ABCD' in the suit plan originally owned by the Plaintiff's father Duraisamy and his brother Subbaraya Udayar. The extent of the above land is 7 cents. The plaintiff's family entitled to 3 1/2 cents and their uncle Subbaraya Udayar entitled to 3 1/2 cents. These facts are not in dispute.

10. It is the case of the Plaintiff that the eastern 3 1/2 cents fell in the share of Plaintiff and western 3 1/2 cents fell in the shares of defendant and his brother. The share of the defendant and his brother on the western side is not in

dispute. Similarly, the share of the plaintiff in the eastern side is also not in dispute. The main contention of the plaintiff that in the western side the defendant and his brother had equal share and defendant's brother had sold the Red colour portion i.e., the property situated in the southern side under Ex.A.3, 1 3/4 shares sold in the year 1983. As far as property shown in BHGC there is no dispute. It is the specific contention of the plaintiff that the sale under Ex.A.3 pertaining to Southern Portion. According to the Plaintiff the sale pertaining only to the Red Portion shown in the plaint plan. One of the boundaries shown in Ex.A.3, Eastern and Western boundaries shown as the Plaintiff's land and Southern boundary shown as one Sundarathu Udayar land. Northern boundary shown as the plaintiff's land. The Plaint plan clearly indicate that northern side the plaintiff has other property and western side and eastern side also she has property.

11. It is the contention of the plaintiff that subject matter of Ex.A.3 pertaining only to the Red colour portion in the plaint. Such contention cannot be countenanced for the simple reason that she has categorically admitted in her evidence that the property has been purchased under Ex.A.3 is situated in south of her ancestral house and besides she has also admitted that only property purchased under Ex.A3 she has constructed house extending her ancestral land. If her evidence is taken into consideration along with the plan the same makes it clear that house owned in the plan constructed not only in the AEFH area but also AVCH area is also extended towards ancestral land. The above facts clearly indicate that Ex.A3 is only relate to the Yellow colour shown in the plaint plan. Whereas it is the contention of the plaintiff that the Yellow colour was allotted to the defendant and he has sold it orally from 20 years back. But such oral sale has not been established. No materials have been produced. The defendant has not admitted any such oral sale and admitted that only the Red colour portion is allotted to him. The very Ex.A.3, the northern boundary, western boundary, Eastern boundary shown as plaintiff's property. Southern boundary shown as one Sundarathu Udayar. Admittedly, Sundarathu Udayar also having property beyond to the suit property. Merely because some discrepancy occurred in the boundary in Ex.A.3 it cannot be stated by the plaintiff the he has purchased only property shown as Red colour in the plaint. Whereas in her own evidence clearly indicate that she has purchased only in the Yellow colour plan. Though Ex.B.12 and Ex.B.13 house tax receipts filed, the same were issued in the name of the husband of the plaintiff and Exs.B.5 to B.11 kist receipts issued only for six years as per her own admission Natham patta was issued. Therefore, the lower court has also noted down when the natham patta was issued how could be kist receipts in the properties. Be that as it may. When the

purchase in respect of Red portion under Ex.A.3 has not been established whereas her evidence clearly indicate that she has purchased only Yellow portion and the boundaries also tallies with her evidence we cannot presume that only southern portion has been sold under Ex.A.3. The vendors or legal heirs have not been examined to prove the above fact. Further, oral sale in respect of Yellow portion has not been established by the Plaintiff.

12. It is curious to note that the Plaintiff has taken mutually destructive pleas one as owner and also adverse possession. Such mutually destructive pleas is not permissible under law. However, the nature of the adverse possession when such possession has become adverse to the real owner there is no pleading in the plaint. Therefore, merely on the basis of revenue records and patta number, this Court cannot presume that she has real owner of the property. As per her own pleadings and evidence of P.W.1 she has legally purchased only 1 3/4 cents under Ex.A.3 remaining 1 3/4 cents though claimed to have purchased in oral sale, oral sale has not been proved before the Court. Therefore, the contention of the appellant counsel that the boundaries tallies, oral evidence cannot be given much importance cannot be countenanced.

13. Ex.B.26 R.D.O. order clearly indicate that joint patta issued not only to the plaintiff but also the defendant. Though in the above proceedings it is observed that the defendant is not in possession such revenue document cannot be given much importance to conclude that only the plaintiff alone is in possession of the property. When the plaintiff is come before the court on the basis of the title of property, she has to establish the title for seeking injunction of the property and she has failed to prove oral sale and also adverse possession and the subject matter of the disputed area is a vacant site. As long as title and possession have not been established the Plaintiff cannot seek injunction. When the title is established, the possession follows the title. But in this case title has not been established by the plaintiff. Similarly, possession also not established. In the plaint it is pleaded that the Red colour portion purchased by her. Whereas evidence shows that Ex.A.3 is only related to the Yellow portion. That being the possession the plaintiff cannot succeed. The learned trial court analysed the entire documents and evidence and come to the right conclusion. The trial court has decided the issue on facual matrix and considered the entire facts properly. The findings of the trial court also confirmed by the First Appellate Court. This court does not find any infirmity in the judgement and decree passed by the courts below. The substantial questions of law raised by the appellant is answered

against her. Accordingly the second appeal is dismissed.

14. In the result, the Second Appeal is dismissed. Consequently connected M.P.is closed. No costs.

Sd/-
Asst.Registrar (CS VIII)

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Sub Asst. Registrar

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To

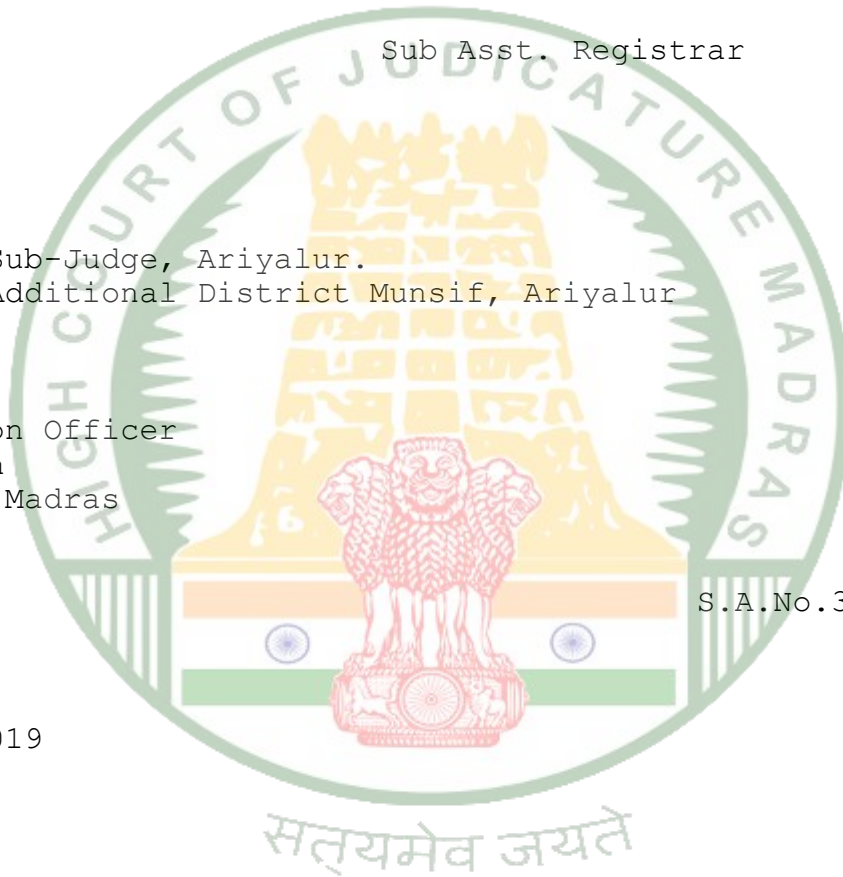
1. The Sub-Judge, Ariyalur.
2. The Additional District Munsif, Ariyalur

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