

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.11.2019
DELIVERED ON : 14.11.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A. No.22 of 2007

&

M.P.No.1 of 2007

1.Subramaniam
2.S.K.Palanisamy
3.Kittusamy
4.Chennimalai Gounder
5.Shenniappa Gounder
6.Kallakadu Subramani
7.Appakutty @ Devan ... Appellants/ Defendants 1 to 6&8

Vs

1.Thangamuthu (Deceased)
2.Sumathi
3.Jothi
4.Thambi alias Vivekanandan ... Respondents/ LRs of the Plaintiff

(Respondents 2 to 4 brought on record as LRs of the deceased sole respondent vide order of this Court dated 23.09.2014 made in M.P.Nos.1 to 3 of 2011)

PRAYER: Second Appeal filed under Section 100 C.P.C. against the judgment and decree of the learned First Additional Subordinate Judge, Erode in A.S.No.68 of 2005 dated 31.10.2005 confirming the judgment and decree of the learned District Munsif cum Judicial Magistrate, Perundurai in O.S.No.133 of 2001 dated 09.02.2005.

For Appellants : Ms.T.Prithivi
for Mr.Kaithamalai Kumaran
For Respondents 2 to 4 : Ms.Yoga Lakshmi
for Mr.M.Guruprasad.

JUDGMENT

This Second Appeal has been filed challenging the judgment and decree dated 31.10.2005 passed by the learned First Additional Subordinate Judge, Erode in A.S.No.68 of 2005 confirming the judgement and decree dated 09.02.2005 passed by the learned District Munsif cum Judicial Magistrate, Perundurai in O.S.No.133 of 2001.

2. The Appellants are the defendants and the respondents are the legal representatives of the plaintiff in the suit O.S.No.133 of 2001.

3. For the sake of convenience, the parties are referred to as per their ranking before the Trial Court.

Brief facts leading to the filing of this appeal:

4. The plaintiff filed a suit against the defendants in O.S.No.133 of 2001 before the learned District Munsif cum Judicial Magistrate, Perundurai seeking for the following reliefs: (a) to declare that the plaintiff is the absolute owner of the suit schedule properties, (b) seeking for permanent injunction restraining the defendants from trespassing into any portion of the suit schedule properties and from causing obstruction to the plaintiff by putting up a new construction in any portion of the suit schedule properties, (c) seeking a mandatory injunction directing the defendants to remove the new construction put up by them over the plaintiff's site measuring 25 feet east to west and 10 feet north to south on the immediate north of plaintiff's tiled house on or before the date to be fixed by the Court and (d) any default thereof, direct the removal of the above said new construction through the officer of the court.

5. The case of the plaintiff is that he purchased the suit schedule properties through a registered sale deed dated 13.12.1974. It is his case that the electricity charges to TNEB for the suit schedule properties were also paid by him. According to him, the house tax was also paid by him and the Natham Special Tahsildar, Perundurai has also issued house site patta for the suit property in the name of the plaintiff. According to him, there is a long standing enmity between the plaintiff and the defendants for a long period of time.

6. According to the plaintiff, the plaintiff wanted to put up a pucca construction on the northern side of his tiled house for running his petty shop. According to the plaintiff, on 07.09.2001, when the plaintiff had brought masons for commencing the construction work within the suit schedule premises at about 9.00 a.m., the defendants came in a group armed with sticks, attempted to trespass into the suit property and in a threatening manner, prevented the masons from commencing the construction work. According to the plaintiff, the defendants are disputing the right and title of the plaintiff over the suit schedule properties.

7. It is also the plaintiff's case that the defendants unlawfully trespassed into the suit schedule properties and have created nuisance to the plaintiff. It is also the case of the plaintiff that on 10.10.2001, the defendants with the aid of their henchmen destroyed major portion of the plaintiff's petty shop and encroached upon the plaintiff's site measuring 25 feet east to west and 10 feet north to south. With these averments, the plaintiff has sought for the reliefs mentioned supra in the plaint.

8. The defendants who are the Appellants herein have filed their written statement denying the allegations of the plaintiff. They have also denied that there was a long enmity between the plaintiff and the defendants. According to them, the northern side of the plaintiff's property belonged to Selambana Gounden Palayam Mariamman Koil Temple. According to them, that property and some other properties were assigned to the above said Temple by one Muthusamy gounder son of Karuppana Gounder and others through a gift deed dated 08.05.2001. According to the defendants, the above said Karuppana Gounder purchased that property which is situated on the northern side of the plaintiff's property through a sale deed dated 22.03.1965. According to the defendants, from the date of purchase, the Karuppana Gounder and after his demise his son Muthusamy Gounder was in possession and enjoyment of the said property.

9. According to the defendants, Muthusamy Gounder assigned the said property to Selambana Gounden Palayam Mariamman Koil Temple under a gift deed dated 08.05.2001. It is the case of the defendants that after the assignment, the people of that Village planned to construct three shops for rental purpose for maintenance of the temple and hence, they collected donations and constructed two shops and leased out the same for milk society and provision shop. According to the defendants, the people of the village are using the rental income for maintenance of the temple.

10. According to the defendants, the vacant site on the northern side of the plaintiff's house as well as on the eastern side of the property belonging to the Temple, the plaintiff has no right of title or interest over the said area.

11. It is also pleaded in their written statement that the plaintiff had earlier filed a suit O.S.No.187 of 1998 against the third defendant and others seeking for the relief of injunction for the same suit property. Therefore, according to the defendants, the decision of the suit O.S.No.187 of 1998 would operate as res-judicata. It is their case that due to the suppression of the earlier suit O.S.No.187 of 1998, the suit O.S.No.133 of 2001 will have to fail.

12. Before the Trial Court, the plaintiff has filed 12 documents which were marked as Ex.A1 to Ex.A12 and two witnesses were examined on his side viz., the plaintiff himself as PW1 and Duraisamy as PW2. On the side of the defendants, 6 documents were marked as Ex.B1 to Ex.B6 and one witness was examined namely the third defendant - Kittusamy as DW1. An Advocate Commissioner was also appointed by the Trial Court during the pendency of the suit and his report dated 27.06.2003 was marked as Ex.C1 and the sketch filed by the Advocate Commissioner along with his report was marked as Ex.C2.

13. The Trial Court after framing the issues and after completion of trial, decreed the suit O.S.No.133 of 2011 as prayed for by the plaintiff. According to the Trial Court, the plaintiff has established his title over the suit schedule property and therefore, entitled for the suit reliefs. Aggrieved by the judgement and decree dated 09.02.2005 passed in O.S.No.133 of 2011 by the District Munsif cum Judicial Magistrate, Perundurai, the defendants in the suit preferred an appeal before the lower appellate court namely the First Additional Sub Court, Erode in A.S.No.68 of 2005.

14. The lower appellate court by its judgement and decree dated 31.10.2005 in A.S.No.68 of 2005 confirmed the findings of the Trial Court and dismissed the appeal. Aggrieved by the same, this Second Appeal has been filed by the defendants in the suit.

15. Heard Ms.T.Prithivi, learned counsel appearing for the Appellants and Ms.Yoga Lakshmi, learned counsel appearing for the respondents 2 to 4.

16. The learned counsel for the Appellants/defendants submitted that the legal rights of the defendants have been affected in view of the perverse findings of the courts below. According to the learned counsel for the Appellants, the extent of properties in Ex.A1 which is the sale deed executed in favour of the plaintiff by his mother and the extent of properties mentioned in Ex.A8 which is the parent sale deed by which the mother of the plaintiff purchased the properties from one Kuttiyya gounder are different and is a lesser extent. She submitted that the mother of the plaintiff cannot convey to the plaintiff under the sale deed (Ex.A1) more than what she was legally entitled to as per Ex.A8.

17. The learned counsel for the Appellants/defendants drew the attention of this Court to the findings of the Trial Court and submitted that by total non application of mind, the Trial Court without properly examining Ex.A1 and Ex.A8 had come to the erroneous conclusion that the extent of properties mentioned in Ex.A1 and Ex.A8 are same. She drew the attention of this Court to the extent of the property mentioned in Ex.A1 being the sale deed in favour of the mother of the plaintiff dated 13.12.1975 which shows the extent of the land as 36 feet x 40 feet x 36 feet x 40 feet totally measuring 1440 sq. ft. She also drew the attention of this Court to Ex.A8 which is the sale deed dated 13.12.1958 standing in the name of the plaintiff's mother Ammani ammal who purchased the property from one Kuttiyagounder. The extent of property mentioned in Ex.A8 is 15 Muzham x 20 Muzham x 15 Muzham x 20 Muzham.

18. According to the learned counsel for the Appellants, one Muzham is 1 $\frac{1}{2}$ feet and as proof of the same, she drew the attention of this Court to Oxford Dictionary, 1964 Edition page 296 which describes that the cubit (Muzham) as ancient measurement of length which measures from 18 to 22 inches (which is 1 $\frac{1}{2}$ feet). She also drew the attention of this Court to the Single Bench Judgment of this Court in the case of Balamani vs. Govindammal and others in S.A.No.329 of 1999 dated 23.03.2018 reported in Law finder, wherein reference has been made that one Muzham is equal to 1 $\frac{1}{2}$ feet.

19. For the submission made by the learned counsel for the Appellants that one Muzham equals 1 $\frac{1}{2}$ feet, the learned counsel for the respondents has not been able to dispute the same by any contra evidence. Therefore, it has to be accepted that one Muzham equals 1 $\frac{1}{2}$ feet.

20. According to the learned counsel for the Appellant, the measurement of lands mentioned in Ex.A8 sale deed dated 13.12.1958 is 22 ½ feet x 30 feet x 22 ½ feet x 30 feet which equals 675 sq. ft. According to the learned counsel for the Appellants, eventhough the defendants in the suit were able to establish that the extent of land mentioned in Ex.A1 and Ex.A8 are different, the Trial Court by its total non-application of mind has come to the erroneous conclusion that the extent of land mentioned in Ex.A1 and Ex.A8 are same.

21. The learned counsel for the Appellants also drew the attention of this Court to Ex.B1 which is the gift deed dated 08.05.2001 executed by one Senniappan and sons, Tamilselvan, Ravi, Muthusamy Gounder, Seviappa Gounder, Amarajothi in favour of Mariamman Temple in respect of three items. She drew the attention of this Court to the description of the second item of the property found in the gift deed dated 08.05.2001 (Ex.B1) which reads as follows:

- Natham S.No.143/B (New No.105/1)
- 40 feet x 15 feet x 40 feet x 15 feet (Total extent 600 square feet)
- Bounded by Uthulkulil Road on north
- Ammaniammal land on south
- Nachammal land on west
- Village natham on east

22. The learned counsel for the Appellants also drew the attention of this Court to Ex.B2 which is the sale deed dated 22.03.1965 executed by Rakkiya Gounder in favour of the Muthusamy Gounder. She referred to the description of the schedule mentioned in the sale deed dated 22.03.1965 Ex.B2 which reads as follows:

- 40 feet x 15 feet x 40 feet x 15 feet (Total Extent 600 square feet)
- Bounded by Uthulkuli Road on north
- Ammaniammal land on south
- Sellapandaram land on west
- Oor Manthai on east

23. Referring to Ex.B1 and Ex.B2, the learned counsel for the Appellants would submit that item 2 in Ex.B1 is same as the description of the property in Ex.B2. She also drew the attention of this Court to the written statement wherein the

defendants in paragraph 6 of their written statement have pleaded that only after the execution of Ex.B1, the villagers erected, constructed and rented the same for milk society and provision shop. According to the Appellants, the said plea of the defendants was not considered by the Courts below. It is the submission of the learned counsel for the Appellants that the plaintiff having filed a suit for declaration of title ought to have proved that he is the owner of the entire 1440 sq. ft. and the plaintiff cannot stand on the weakness of the defendants case.

24. The learned counsel for the Appellants also drew the attention of this court to Ex.A12 patta standing in the name of the plaintiff and submitted that the said patta was not granted for entire extent of the suit property and therefore, the plaintiff was not entitled for the suit reliefs for the entire extent of the suit property. Further she would submit that Ex.A5 and Ex.A6 being the receipts issued under Food Safety Act, though standing in the name of the plaintiff does not reveal the extent of land the plaintiff is in possession.

25. In the light of the above submissions, the learned counsel for the Appellants would submit that by total non-application of mind, the courts below have given a perverse finding against the defendants by holding that the plaintiff is the absolute owner of the suit schedule property and therefore, they are entitled for the suit reliefs. The learned counsel for the Appellants relied upon the following authorities :

(a) Union of India and others vs. Vasavi & Coop Housing Society Ltd. and others reported in AIR 2014 SC 937 for the proposition that in a suit for declaration of title, onus to prove his title is on the plaintiff and he cannot succeed on the weakness of the defendants' case.

(b) The Judgement of the Hon'ble Supreme Court in the case of U.Manjunath Rao vs. U.Chandrashekar & Anr in Civil Appeal No.9951 of 2014 dated 04.08.2017 reported in WWW.LIVELAW.IN for the proposition that the Appellate Court has to independently analyse and give reasons for confirming the findings of the Court below.

(c) The single Bench Judgment of this Court in the case of Balamani vs. Govindammal and others in S.A.No.329 of 1999 dated 23.03.2018 reported in Law Finder for the purpose of proving that one Muzham equals 1 ½ feet.

26. Per contra learned counsel for the respondents 2 to 4 would submit that there is no substantial question of law involved in this Appeal as courts below have given their verdicts only based on the evidence and materials available on record. According to the learned counsel for the respondents, the extent of land mentioned in Ex.A1 and Ex.A8 are same. According to her, the unit of measurements mentioned in Ex.A1 and Ex.A8 are only different, though the extent of land is one and the same. According to her, as seen from the deposition of DW1, the defendants have accepted the boundaries of the plaintiff. Therefore according to her, boundaries prevail over extent and therefore, the defendants have no locus standi to deny the title of the plaintiff over the suit schedule property.

27. According to the learned counsel for the respondents, the reliance made by the learned counsel for the Appellants regarding the equivalent of one Muzham based on Lifco & Oxford Dictionary cannot be accepted as a proper standard of weight and measurement. Further, according to the learned counsel for the respondents, the Appellants have no locus standi to claim the property on behalf of the temple. According to her, till date Mariamman Temple has not initiated any legal action against the plaintiff for recovering the possession of the suit properties.

28. According to the learned counsel for the respondents, the alleged gift deed dated 08.05.2001 (Ex.B1) in favour of Mariamman Temple is a disputed document, since it is not established as to how the donor had the legal authority to gift the lands to the temple under Ex.B1. According to the respondents, when a temple is not a party to the present litigation and has not initiated any proceeding to recover possession of the property from the plaintiff, the defendants have no locus standi to dispute the plaintiff's right and ownership over the suit schedule properties.

29. In support of her contention, the learned counsel for the respondents 2 to 4 cited the following authorities:

(a) (2018) 4 SCC 562 - Surat Singh (dead) vs. Siri Bhagavan and others;

(b) (2016) 10 SCC 315 - Syeda Rahimunnisa vs. Malan Bi (Dead) by legal rep. and another;

(c) (2005) 9 SCC 232 - Commissioner, Hindu Religious & Charitable Endowments vs. P.Shanmugama and others;

(d) (2019) 6 SCC 686 - Arulmighu Nellukadai Mariamman Thirukkoil vs. Tamilarasi (Dead) by legal rep.;

- (e) (2016) 3 SCC 78 - Damodar Lal vs. Sohan devi and others;
- (f) (2010) 13 SCC 216 - Municipal Committee, Hoshiarpur vs. Punjab State Electricity Board and others.

30. All the authorities relied upon by the learned counsel for the respondents referred to supra relate to general principles of law laid down by the Hon'ble Supreme Court with regard to substantial questions of law under Section 100 of the Code of Civil Procedure. The well settled propositions of law laid down by the Hon'ble Supreme Court in those judgements are not disputed.

31. We need to now examine as to whether in the case on hand, call for interference under Section 100 of Code of Civil Procedure to the concurrent findings of the courts below is required or not.

32. This Court ordered notice to the respondents in this second appeal on 09.01.2007. This court now admits the second appeal on the following substantial questions of law:

"1. Are the courts below justified in decreeing the suit overlooking that the plaintiff/respondent's vendor had purchased an extent of 22 ½ feet x 30 feet only whereas plaintiff/respondents had purchased an extent of 36 feet x 40 feet under Ex.A1 Sale deed?

2. Whether the lower Appellate court, being the final court of fact is justified in not considering the respective contentions of parties with reference to the documents filed by them, before rendering findings on the issues raised in the suit?"

Discussion:

33. This Court has perused and examined the sale deed dated 13.12.1974 (Ex.A1) in favour of the plaintiff and the sale deed dated 13.12.1958 (Ex.A8) in favour of the plaintiff's mother Ammani Ammal.

34. The extent of land mentioned in the schedule to the sale deed dated 13.12.1958 (Ex.A8) is 15 Muzham x 20 Muzham x 15 Muzham x 20 Muzham. One muzham is 1 ½ feet as seen from the Oxford Dictionary 1964 Edition, page 296. The conversion

equivalent from muzham to feet is also supported by the Single Bench Judgment of the Madras High Court in the case of Balamani vs. Govindammal and others in S.A.No.329 of 1999 dated 23.03.2018 reported in Law finder. As seen from the Oxford Dictionary as well as from the reported decision referred to supra, one muzham equals 1 ½ feet. Accordingly, 15 Muzham x 20 Muzham x 15 Muzham x 20 Muzham equals 22 ½ feet x 30 feet x 22 ½ feet x 30 feet which equals 675 square feet. Therefore, Ammani Ammal, the mother of the plaintiff purchased only an extent of 675 square feet under Ex.A8 sale deed dated 13.12.1958. She can convey to her son, the plaintiff only the extent of land she purchased under Ex.A8 sale deed dated 13.12.1958. However, under sale deed dated 13.12.1974 (Ex.A1), Ammani Ammal has sold 36 feet x 40 feet x 36 feet x 40 feet equivalent to 1440 square feet to the plaintiff which is far in excess of the land she purchased under Ex.A8. The Trial Court as well as the Lower Appellate Court by total non-application of mind have given an erroneous finding that the extent of land mentioned in Ex.A1 and Ex.A8 are equal which in fact, is incorrect.

35. This Court has also perused and examined Ex.B1 which is the gift deed dated 08.05.2001 executed by one Senniappan and sons, Tamilselvan, Ravi, Muthusamy Gounder, Sevviappa Gounder, Amarajothi in favour of Mariamman Temple. Under Ex.B1, the description of the second item of the property found in the schedule is as follows:

- Natham S.No.143/B (New No.105/1)
- 40 feet x 15 feet x 40 feet x 15 feet (Total extent 600 square feet)
- Bounded by Uthulkulil Road on north
- Ammaniammal land on south
- Nachammal land on west
- Village natham on east

36. Ex.B2 is the sale deed dated 22.03.1965 standing in the name of the Muthusamy Gounder. The schedule of the sale deed dated 22.03.1965 (Ex.B2) reads as follows:

- 40 feet x 15 feet x 40 feet x 15 feet (Total Extent 600 square feet)
- Bounded by Uthulkuli Road on north
- Ammaniammal land on south
- Sellapandaram land on west
- Oor Manthai on east

37. The description of the property of Item 2 in the gift deed dated 08.05.2001 (Ex.B1) and the description of the property in the sale deed dated 22.03.1965 (Ex.B2) are same. The schedule contained in the sale deed dated 22.03.1965 standing in the name of Muthusamy Gounder, (Ex.B2), item 2 property mentioned in the gift deed dated 08.05.2001 in favour of the Mariamman Temple (Ex.B1) and the sale deed dated 13.12.1958 (Ex.A8) in favour of the plaintiff's mother Ammani Ammal, all seem to be more or less identical. The Trial Court as well as the lower Appellate Court have failed to apply their mind objectively to Ex.B1, Ex.B2 and Ex.A8. If the Courts below had analysed and examined Ex.B1, Ex.B2 & Ex.A8 in the proper perspective, the courts below could not have given the verdicts in favour of the plaintiff as the evidence available on record does not favour the plaintiff.

38. Further, the Mariamman Temple which was donated with lands under Ex.B1 gift deed dated 08.05.2001 is not a party to the suit. The plaintiff ought to have made the Mariamman Temple as a party to the suit as Mariamman temple is a necessary party for the effective adjudication of the dispute between the parties. Hence the suit ought to have been dismissed for nonjoinder of necessary parties. The Trial Court ought to have dismissed the suit as the evidence available on record cannot lead to the conclusion that the plaintiff is the absolute owner of the entire suit schedule property. As a court of appeal, the lower appellate court has blindly accepted the findings of the trial court by confirming the same. Though the power of remand has to be sparingly used by courts, the instant case is a fit case for remand as Mariamman temple, the donee under the gift deed dated 08.05.2001 is certainly an interested party and a decree passed behind their back will necessarily affected their right and interest.

39. As it has been categorically held by this Court based on the materials and evidence available on record that there is total non application of mind by the courts below, the judgement relied upon by the learned counsel for the respondents are not applicable for the facts of the instant case. As rightly held by the Hon'ble Supreme Court in the case of Union of India and others vs. Vasavi & Coop Housing Society Ltd. and others reported in AIR 2014 SC 937 referred to supra, the plaintiff cannot succeed on the weakness of the defendants' case and the onus to prove his title is on the plaintiff. In the case on hand, the plaintiff has failed to prove his title with the available evidence and hence, it would be appropriate for this Court to remand back the matter to the Trial Court for fresh consideration after permitting the plaintiff to implead Selambana Gounden Palayam Mariamman Koil Temple which is a necessary party for the effective adjudication of the dispute.

40. For the foregoing reasons, this Court is of the considered view that there is total non-application of mind and perversity in the findings of the court below. In the result, the substantial questions of law formulated by this Court are answered in favour of the defendants/Appellants and hence, the Judgement and decree dated 31.10.2005 passed by the learned First Additional Subordinate Judge, Erode in A.S.No.68 of 2005 and the Judgment and decree dated 09.02.2005 passed by the learned District Munsif cum Judicial Magistrate, Perundurai in O.S.No.133 of 2001 are hereby set aside and the matter is remanded back to the Trial Court namely District Munsif cum Judicial Magistrate, Perundurai in O.S.No.133 of 2001 for fresh consideration. The Trial Court after giving sufficient opportunity to the parties including permitting them to amend the pleadings by impleading Selambana Gounden Palayam Mariamman Koil Temple as one of the defendants to the suit, shall dispose of the suit in accordance with law. Accordingly, the second appeal is allowed. No costs. Consequently connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The First Additional Subordinate Judge, Erode.
2. The District Munsif cum Judicial Magistrate, Perundurai.

Copy to:

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

+1cc to Mr.M.Guruprasad , Advocate SR.No. 94778

+1cc to Mr.S.Kaithaimalaikumaran, Advocate SR.No. 94516

S.A. No.22 of 2007

A.SK(11/09/2020)