

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.03.2019
PRONOUNCED ON: 16.04.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.2275 of 2003
and
C.M.P.No.21450 of 2003

1. Ramathal
2.C.Palanichamy
3.C.Ramasamy

... Appellants/Plaintiffs

Vs.

V.Subramaniam

... Respondent/Defendant

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree of the II Additional District Judge of Coimbatore dated 27.12.2002 passed in A.S.No.251 of 2001 reversing the judgment and decree of the III Additional District Munsif of Coimbatore dated 07.08.2001 passed in O.S.No.1146 of 1997.

For Appellants : Mr.V.Karthikeyan
For M/s.V.Nicholas

For Respondent : Mr.V.Manohar
for M/s.S.B.Viswanathan

J U D G M E N T

Challenge in this second appeal is made to the judgment and decree dated 27.12.2002 passed in A.S.No.251 of 2001 on the file of the II Additional District Court, Coimbatore reversing the judgment and decree dated 07.08.2001 passed in O.S.No.1146 of 1997 on the file of the III Additional District Munsif Court, Coimbatore.

2.The second appeal has been admitted on the following substantial questions of law.

(a) In the face of the covenant in Ex.A1 dated 04.03.1963, which is a sale deed in favour of the husband of the first plaintiff, which gives them a right to use the suit property as a pathway and in the face of the finding rendered by the

appellate court itself that the defendant had not right to obstruct use of such passage, has not the lower appellate court committed an error of law in non-suiting the plaintiff on a non-existing ground?

(b) Though the plaintiff may not be entitled to a larger relief as prayed for, assuming it is so, have not the courts got power to mould the relief and grant a lesser relief which would come within the ambit of the larger relief prayed for?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

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

5. The plaintiffs have laid the suit against the defendant for the reliefs of declaration and consequential permanent injunction.

6. The plaintiffs claim title to the suit property as described in the plaint on the basis of the sale deed dated 04.03.1963, which document has been marked as Ex.A1. As per the case projected by the plaintiffs, the suit property was purchased by Chinnaiya Gounder under Ex.A1 sale deed, who is the husband of the first plaintiff and the father of the plaintiffs 2 and 3 and it is further put forth by the plaintiffs that the suit property comprised of a tiled house and a vacant space and in the said vacant space, there is a common open space and the common passage and accordingly seeking right over the said property, the plaintiffs contending that the defendant without any right or interest, attempted to disturb their possession and enjoyment of the suit property and the lane portion comprised therein and accordingly stated that they had been necessitated to lay the suit for appropriate reliefs.

7. The defendant resisted the plaintiffs' suit at the foremost contending that the plaintiffs have not given the proper description of the suit property sufficiently to identify the same with correct survey number / door number and not describing the same with clear boundaries and furthermore, it is also contended by the defendant that the plaintiffs have also not come forward with any plan or survey sketch of the Revenue Department for identifying the location of the suit property as described in the plaint and furthermore, according to the defendant, the plaintiffs have no right, title or interest as well as the enjoyment over the suit property as described in the

plaint and further also it is putforth by the defendant that the relief of declaration sought for by the plaintiffs cannot also be granted, inasmuch as, the plaintiffs have laid the suit seeking the declaration of title to the suit property inclusive of the common passage said to be lying therein along with other co-sharers without mentioning as to who are the other co-sharers and also without impleading the other co-sharers as parties and in all, according to the defendant, the plaintiffs' suit is liable to be dismissed.

8. In support of the plaintiffs' case, P.Ws.1 to 3 were examined. Exs.A1 to A5 were marked. On the side of the defendant, D.W.1 was examined. Exs.B1 to B14 were marked. Exs.C1 to C3 were also marked. Further, C.W.1 was also examined.

9. 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 as prayed for. On appeal preferred by the defendant, it is seen that in the first appellate court, on the application preferred by the defendant, additional documents have come to be marked on behalf of the defendant and the same had been exhibited as Exs.B15 to B17 and the first appellate court, on an appreciation of the materials placed on record and the submissions made, 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 plaintiffs. Impugning the same, the present second appeal has been preferred.

10. On the case projected by the plaintiffs, it is found that the plaintiffs claim title to the suit property particularly the alleged common passage lying in the suit property on the strength of the sale deed dated 04.03.1963. On a perusal of the description of the suit property, as rightly contended by the defendant, on a reading the same, one would not be able to understand as to where actually the alleged suit property lies i.e., as to, in which survey number the same lies, within which boundaries the same lies, particularly, where the common passage, vacant site etc., said to be forming part of the suit property lie and as to, where they lie in the suit property, within which boundaries and in such view of the matter, as rightly contended, for a better understanding of the lie of the suit property inclusive of vacant space, common open space and common passage said to be forming part of the same, the plaintiffs should have come forward with clear particulars as to the survey number within which the suit property is located and the boundaries within which the same is located and also should have come forward clearly as to whether the vacant space said to be forming part of the suit property as well as

the common space and the common passage said to be forming part of the vacant site are also lying within the survey numbers of the suit property and within the boundaries, within which the suit property is claimed to be lying. Though the plaintiffs have given the description of the suit property of not less than one page, however from the abovesaid description, we are unable to gather as to where actually the suit property lies, particularly as to where actually the vacant space, common open space, common passage lie and in such view of the matter, furthermore, as rightly put forth by the defendant, the plaintiffs should have come forward with maps or plans depicting the lie of the suit property inclusive of the vacant space, common open space, common passage etc, or else, they should have endeavored to obtain the survey field maps from the Revenue Department to show the lie of the suit property and thereby endeavored to establish their case whether the said property had been actually acquired by them under Ex.A1 sale deed. On the other hand, as rightly determined by the first appellate court, from Ex.A1 sale deed, one is unable to identify the suit property, particularly, the lie of the alleged vacant space, common open space, common passage said to be forming part of the suit property. Further, the plaintiffs have not stated in the plaint clearly as to where/whether the suit property lies to the south or north of the defendant's property and even with reference to the same, there appears to be no consistency in the case projected by the plaintiffs.

11. As the plaintiffs are unable to identify the suit property, it is found that endeavors had been made to identify and locate the suit property with the help of Advocate Commissioner and even the Advocate Commissioner at the first instance on visiting the suit property finding that the suit property is difficult to be identified, accordingly, sought for the assistance of a surveyor for identifying the suit property and as ordered by the Court, he had also taken the assistance of the surveyor for identifying the suit property. However, as could be seen from the Commissioner's report and plan marked in the case, the Advocate Commissioner despite the assistance of the surveyor, he is unable to identify the suit property and he has in his report clearly averred that there is no proper way to reach the suit property and though the properties are sought to be identified by the respective parties with the title documents available with them, he has stated that, despite the same, he and the surveyor had been unable to find out the place where the suit property is situated and that apart, the Advocate Commissioner examined as C.W.1 has also deposed that he is unable to identify the suit property and where it lies and the length and breadth measurements of the same and also further stated that despite the production of title deeds on the part of the rival parties, the lie of the suit property could not be

detected and accordingly had submitted his report and plan to the Court. Though it is found that both the parties had preferred certain objections to the Commissioner's report and plan, however when the Advocate Commissioner has come forward specifically that the title deeds of the respective parties are not sufficient to identify the lie of the suit property as described in the plaint, even thereafter, the parties particularly, the plaintiffs have not endeavored to take steps to re-issue the commission warrant for the purpose of identifying the suit property with more particulars and documents and on the other hand, the plaintiffs other than preferring the objections to the Commissioner's report and plan, had not taken any further steps to identify the suit property. So as could be seen from the Commissioner's report and plan and his evidence, the suit property as described in the plaint is unable to be located on ground particularly, as to where it lies, within which the boundaries the same is located etc., and in such view of the matter, particularly, when the houses comprised in the properties belonging to the parties are found to be occupied by third parties and in such view of the matter, in the absence of the identity of the suit property as such as described in the plaint, as rightly determined by the first appellate court, the plaintiffs are not entitled to seek and obtain the relief of declaration as prayed for by them with reference to the suit property.

12. The first plaintiff examined as P.W.1, has also admitted that she does not know the contents of Ex.A1 sale deed and does not know the door number of the suit property and also does not know the survey number and though she would state that there is a space available for tying the cattle etc., in the suit property and admitted that she does not know the measurements of the said space and pleaded ignorance as to whether the Advocate Commissioner is unable to identify the suit property and though she would claim that they had identified the suit property to the Advocate Commissioner, as above noted, after the report filed by the Advocate Commissioner, she had not taken further steps to reissue the commission warrant for the purpose of identifying the suit property and though she would assert that the cattle shed is available in the suit property, but unable to give the measurements of the same and the above being the evidence of P.W.1, as rightly found by the first appellate court, her evidence would be no use in particular, to identify the lie of the suit property. The plaintiffs' vendor has been examined as P.W.2 and he has not deposed about the lie of the suit property in the course of his evidence. According to him, the parent title has been entrusted at the time of Ex.A1 sale transaction. However the alleged parent title deed said to have been entrusted by P.W.2 has not been produced for consideration. In such view of the matter, when P.W.1 has not

produced any reliable evidence/document as regards the lie of the suit property as such, her evidence would be no use to identify the suit property for granting the reliefs prayed for by the plaintiffs.

13. The surveyor who had accompanied with the Advocate Commissioner has been examined as P.W.3. Though P.W.3 would claim that he had measured the suit property and the properties of the defendant however in the surveyor's plan appended with the commissioner's report and plan other than stating that so and so are the properties of the plaintiff and the defendant and even according to him, he had recorded the same based on the instructions given to him by his menial, however, unable to substantiate as to how he had depicted in his plan that the portion occupied by the defendant had been encroached by the defendant. Quite inconsistent, to his plan, P.W.3 has admitted that Ex.B1 is the plan pertaining to survey No.463/15 and further admitted that to the north of the said property the survey No.463/7 lies and to the east of the same, survey No.463/8 lies and also admitted that the name of the plaintiffs are shown against the survey No.463/8. But, when his plan does not correspond to the plan as available in Ex.B1 and in such view of the matter, when P.W.3 is also found to be not able to identify the lie of the suit property particularly, the vacant space, common open space and the common passage said to be forming part of the same, in all, his evidence cannot be safely relied upon for acceding to the plaintiff's case.

14. At the foremost, for seeking the relief of declaration of title to the suit property, the plaintiffs must ensure and identify that the suit property is available on ground and in a position to identify the same and establish their claim of possession and enjoyment of the same. When the lie of the suit property on ground itself has not been established by the plaintiffs, as above pointed, the case projected by the plaintiffs that they have acquired title to the suit property based on Ex.A1 sale deed, as such, cannot be readily countenanced particularly, when the property as described in Ex.A1 is not shown to be lying on ground and in such view of the matter, in the light of the abovesaid factors, the first appellate court is found to be justified in not granting the reliefs prayed for by the plaintiffs.

15. In addition to that, the plaintiffs have also claimed the relief of declaration of title to the suit property inclusive of the vacant space, common open space and common passage etc., as belonging to them and other co-sharers. As to who are the other co-sharers, and what are their interest in the suit property, and how they had acquired right title or interest in the suit property, under what documents they are projected

to have acquired title, right and interest etc., absolutely there is no pleas putforth in the plaint other than stating that the suit property belongs to the plaintiffs and other co-sharers. On the said vague pleas, it does not stand to reason as to how the plaintiffs would be entitled to seek the relief of declaration of title qua the suit property along with the alleged co-sharers. When the right of the alleged co-sharers of the suit property has not been established by the plaintiffs by producing title deeds of the alleged co-sharers or by impleading the co-sharers as parties either as the plaintiffs or the defendants or atleast by examining the co-sharers in support of their case and when the defendants had also thrown a challenge to the abovesaid relief of declaration sought for by the plaintiffs as not maintainable in law, despite the same, the plaintiffs having not endeavored to come forward with a clear case as to the particulars of the co-sharers, their mode of right etc., to the suit property, in such view of the matter, the first appellate court is found to be fully justified in refusing the grant of the relief of declaration sought for by the plaintiffs.

16. No doubt, the first appellate court has admitted the reception of additional documents projected by the defendant at the first appellate stage. It is putforth by the plaintiffs' counsel that without affording the opportunities to them to test the veracity of the documents by adducing evidence or by cross-examining the defendant and his witness with reference to the same, it is contended that the first appellate court had erred in relying upon the additional evidence projected by the defendants. However, as rightly putforth by the defendant's counsel, the documents projected by the defendant, had already been detailed in the written statement filed by the defendant. But, they had not marked the said documents during the course of trial. Accordingly they had chosen to mark the same in the first appellate court. The first appellate court had also accordingly ordered the reception of additional documents as additional evidence. However, as sought to be projected by the plaintiff's counsel, the first appellate court has not dismissed the plaintiffs' case merely on relying upon the additional evidence projected by the defendant. On the other hand, in addition to that, the first appellate court has also negatived the plaintiffs' case by holding that the plaintiffs have not properly described the suit property and not placed any proof of possession and enjoyment of the same, unable to identify the suit property and also not endeavored to take appropriate steps as per law to reissue the commission warrant for identifying the suit property, despite the fact that the Advocate Commissioner had come forward with report expressing the difficulty in the identification of the suit property and also the first appellate court has also held that the plaintiffs are

not entitled to seek the relief of declaration of title along with the other co-sharers without naming the other co-sharers and their mode of claim of right to the suit property in detail and in such view of the matter, the first appellate court, has, for the abovesaid various reasons, found not acceptance to the plaintiffs' case. In such view of the matter, the arguments put forth by the plaintiffs that the first appellate court had merely set aside the judgment and decree of the trial court by placing reliance upon the additional evidence projected by the defendant, as such, cannot be countenanced.

17. In the light of the abovesaid factors, in my considered opinion, when the plaintiffs have come forward with the reliefs of declaration of title to the suit property and the consequential permanent injunction and when from the inception, the plaintiffs have not come forward with the clear description of the suit property by placing acceptable and reliable materials as above pointed out and when they also unable to identify the suit property on ground and when the same could also be gathered from the Advocate Commissioner's report and plan as well as the evidence of Advocate Commissioner C.W.1 and furthermore, when the plaintiffs have also not placed as to how the so called co-sharers also have the right to the suit property and also have not come forward as to who are the alleged co-sharers etc., in such view of the matter, the plaintiffs' case cannot be held to have been established merely on the production of Ex.A1 sale deed, particularly, when the property as described in Ex.A1 is not shown to be existing and available on ground and in such view of the matter, I do not find any reason to interfere with the determination of the first appellate court in dismissing the plaintiffs' suit on an analysis of the various materials placed on record both factualwise as well as legalwise and in such view of the matter, it is seen that as such no substantial question of law is involved in the second appeal. Be that as it may, the substantial questions of law formulated in the second appeal are accordingly answered against the plaintiffs and in favour of the defendant.

18. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

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To

1. The II Additional District Judge,
II Additional District Court,
Coimbatore.
- 2.The III Additional District Munsif,
III Additional District Munsif Court,
Coimbatore.

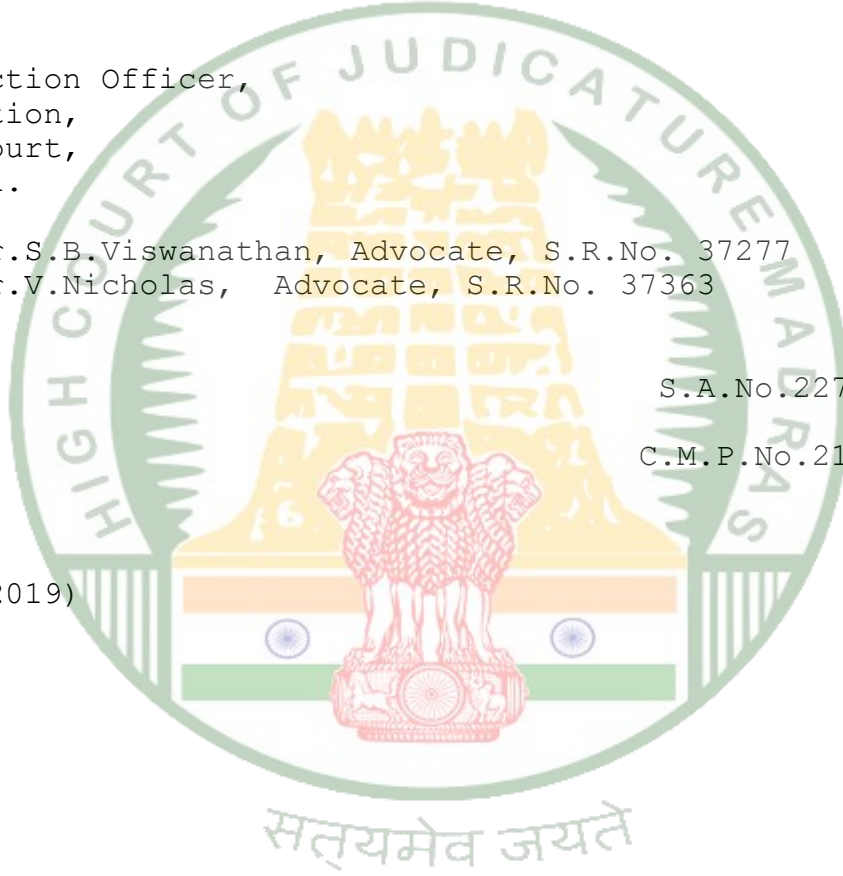
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The Section Officer,
VR Section,
High Court,
Chennai.

+1cc to Mr.S.B.Viswanathan, Advocate, S.R.No. 37277
+1cc to Mr.V.Nicholas, Advocate, S.R.No. 37363

S.A.No.2275 of 2003
and
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