

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.01.2020

DATE OF VERDICT : 03.07.2020

CORAM

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

S.A.NOS.930 & 931 OF 2001

1.A.N.Rajalakshmi (Deceased)
2.N.K.Lakshmanan
3.N.L.Kannadasan
4.N.L.Chandrasekaran
5.N.L.Nagendran
6.Nalina Madhavan
7.Uma Rajendran

.. Appellants/Appellants/
Defendants in both appeals

(Appellants 3 to 7 brought on record as LRs' of the deceased 1st Appellant vide order of Court dated 11/10/2018 made in C.M.P.No.4395 & 4396/2005 in S.A.No.930/2001) CMP.Nos.7441 to 7444 of 2005 in S.A.No.931 of 2001, dated 18.08.2005)

Vs.

1.K.K.Nannuswami (Deceased)
2.K.N.Vasudevan
3.K.N.Varadhachari
4.K.N.Santharaman
5.K.N.Jayaraman
6.Santhi
7.Indira

(R2 to R7 brought on record as legal heirs of the Deceased 1st Respondent 11/10/2018 in C.M.P.No.4397 & 4398/2005 in S.A.No.930/2001 and CMP.Nos.7441 to 7444 of 2005 in S.A.No.931 of 2001, dated 18.08.2005)

...Respondents/Respondents/
Plaintiffs in both appeals

Prayer in both appeals:

Second Appeals filed under Section. 100 of C.P.C. against the judgment and decree dated 31.08.2000 made in A.S.Nos. 11 &

12 of 2000 on the file of the II-Additional Sub-Ordinate Judge, Salem, confirming the common judgment and decree in O.S.Nos. 510 of 1995 & 530 of 1996 on the file of the I-Additional District Munsif, Salem dated 28.08.1999.

For Appellants
in both appeals : Mr M.Muthappan

For Respondent
in both appeals : R1 - Died. : 1st Respondent died
R2 to R7 - Notice Served.

C O M M O N J U D G M E N T

S.A.No.930 of 2001

This second appeal has been filed as against the judgment and decree dated 31.08.2000 passed in A.S.No.11 of 2000 on the file of the II-Additional Sub-Ordinate Judge confirming the common judgment and decree in O.S.No.510 of 1995 on the file of the I-Additional Munsif, Salem dated 28.08.1999.

S.A.No.931 of 2001

2. This second appeal has been filed as against the judgment and decree dated 31.08.2000 passed in A.S.No.12 of 2000 on the file of the II-Additional Sub-Ordinate Judge, Salem confirming the common judgment and decree passed in 28.08.1999 passed in O.S.No.530 of 1996 on the file of the District Munsif Court, Salem.

3. On the side of the plaintiff in O.S.No.510 of 1995, the suit filed for declaration and mandatory injunction and permanent injunction. The case of the plaintiff is that the suit property is a common lane with vacant space on its South. By the registered sale deed dated 19.04.1971, the plaintiffs and another purchased the vacant land admeasuring 3,230 sq.ft., for valid sale consideration. The suit property comprised in T.S.No.128 and 129/509 situated at Ward - M, Block - 18, Nathi Mullamakkan Street, Salem along with area of 4 feet on the West of the street, 30 feet on the East of the Seelavari Vaikaal and 190 feet towards East West on the North and South along with their common passage lane right to breadth 3 feet towards North South and 190 feet towards East West on the North of the property. The other person namely, Krishnaiyer along with the plaintiff executed a release deed in respect of his $\frac{1}{2}$ share in favour of the plaintiff by the registered sale deed dated 25.01.1974 and thus, the plaintiff has become an absolute owner

of the entire property. Thereafter, the plaintiff constructed a Thatched house and sold the same to the Vendees under different sale deeds by retaining portion of vacant land with Well and a common passage right in the common lane and left spaces on the North of the houses for convenient enjoyment of the common lane. While being so, the first defendant demolished the thatched house and constructed RCC house and thereupon encroached an extent of 80 sq.ft., of land on the North of the plaintiff's property. On 17.06.1985, the plaintiff objected for he same and asked her to remove the same. Therefore, the plaintiff issued notice on 19.06.1995 to the first defendant. On receipt of the same, the first defendant also replied with false and frivolous averments. Hence, the suit.

4. Resisting the same, the defendants filed a written statement and stating that no common lane exist on the Northern side of the constructed house sold to the first defendant. The suit common lane is availed only for the use of all who had purchased the properties in the said land. Therefore, the claim of the plaintiff on ownership in the suit property is untenable and unsustainable. In fact, after sale of their property, they constructed the house and the defendants have been enjoying the purchased built up areas right from the date of their purchase. The property being build up portion it can be deemed to be the correct area if the measurements have been given by the plaintiffs, the defendants would be entitled to the extent and sell the build up areas. Therefore, the build up area cannot be considered as encroachments and in fact the measurement given by the plaintiff in the year which the construction made. Further, the Advocate Commissioner confirmed the above fact and it is seen no encroachment made in the common lane. Hence, prayed for dismissal of the suit.

5. The case of the plaintiff in O.S.No. 530 of 1996 is that the suit property comprised of vacant land, well with the common pathway along with coconut tree. The plaintiff is the owner of the suit property and he is in possession and enjoyment of the same. Originally, the suit property was purchased by the plaintiff along with one Krishnaiyer by the registered sale deed dated 19.04.1971 admeasuring 3,230 sq.ft. The plaintiff has got a right of way in the land exists on the Northern side of the above suit property to a length of 190 feet East West and a breadth of 3 feet North to South on both sides. Thereafter, the plaintiff alone became absolute owner of the property by the release deed executed by Krishnaiyer. Thereafter, the plaintiff constructed house and also dug up a well leaving spaces on North of the house that is in between the house and the common lane and left vacant lands namely, the suit property of a Well and Coconut tree. Thereafter, the plaintiffs sold out the houses with due measurement to various persons by the registered sale

deeds. Thereafter, the plaintiff is in possession and enjoyment of the suit property without any disturbance from any one. While being so, the defendants are the husband and wife respectively demolished the house and constructed a terrace building. While constructing, the defendants were encroached vacant space left in front of their house and put up a staircase in that place. Hence, the plaintiff also filed a suit in O.S.No.510 of 1995 in which the interim injunction granted. Hence, the suit for declaration and permanent injunction.

6. Resisting the same, the defendants filed a written statement and stated that the common lane left out only for all those who had purchased properties abutting the said common way. The plaintiffs' claim of right of ownership in the same is untenable and unsustainable. There is no such reservation made by the plaintiff in the sale deed executed in favour of the first defendant. In fact, the plaintiff sold out the build up areas to the first defendant by the sale deed dated 31.01.1979. Therefore, no encroachment were made by the defendants and it is absolutely false and prayed for dismissal of the suit.

7. Both the suits clubbed together and on the side of the plaintiff examined P.W.1 and were marked Exs. A1 to A17. On the side of the defendants, examined D.W.1 and marked Exs.B1 and B2. The Advocate Commissioner's preliminary report along with plan and final report and plan were marked as Exs. C1 to C4. On perusal of the evidence available on record, oral and documentary evidence adduced by the parties and the submissions of the learned counsel appearing for both the parties, the Trial Court decreed the suit in O.S.No. 510 of 1995 except the prayer of permanent injunction, since it became infructuous in favour of the plaintiff. The Trial Court also decree the suit in O.S.No.530 of 1995 in favour of the plaintiffs. Aggrieved by the same, the defendants preferred an appeal suits in A.S.No.11 of 2000 and A.S.No.12 of 2000 respectively. The lower Appellate Court dismissed both the appeals by the common judgment and decree. Aggrieved by the same, the defendants filed these appeals in S.A.Nos.930 & 931 of 2001.

8. At the time of admission, the following substantial questions of law were framed for consideration:-
S.A.No. 930 of 2001

i) Are the lower Courts are right in that the defendants cannot claim title by adverse possession ?

ii) Are the lower Courts are right in finding in the absence of definite measurements in the schedule of property in Ex.B1, the plaintiff is entitled to title over the suit property ?"

S.A.No. 931 of 2001

"i) Are the lower Court's right in holding that in the absence of any documentary evidence over the measurements of the suit property, the plaintiff can claim title over the property ?

ii) Are the lower Courts right in granting declaration of the suit property in the absence of other purchasers of lands from the plaintiff and their respective recitals ?

iii) Are the lower Court's right in granting title to the plaintiff in the suit land, in the absence of any documents to show correct measurement of vacant land which is alleged to be in possession of the plaintiff ?"

"i) In light of the vague measurements in Ex.B1 the lower Appellate Courts right is justified in granting mandatory injunction to remove the alleged encroachment in the suit property ?

9. The plaintiffs filed two suits in O.S.No. 510 of 1995 and O.S.No. 530 of 1995 in respect of the very same property. The first suit is filed for declaration and declaring that the plaintiffs right to use the common passage left by him on the North of the first defendant's property as common lane and easement of necessity in the suit property, injunction and also mandatory injunction. Thereafter, he filed another suit for declaration declaring the said suit property in his favour and also permanent injunction. The plaintiffs along with one Krishnaiyer purchased the property ad measuring 3,230 sq.ft., of vacant land. Thereafter, the said Krishnaiyer, executed release deed in so far as $\frac{1}{2}$ of the said property in favour of the plaintiff. Thus, the plaintiff became absolute owner of the entire property. Thereafter, the plaintiff constructed a Thatched house and sold the same to the Vendees under different sale deeds by retaining portion of vacant land with Well and a common passage right in the common lane and left spaces on the North of the houses for convenient enjoyment of the common lane.

10. Thereafter, the first defendant demolished a portion of a thatched house and constructed the terraced building. The first defendant also obtained permission from the plaintiff to carry the building in a South Seelavari Vaikaal through the common lane.. Ex.A1. The boundaries mentioned, the 3 feet breadth East - West common lane. The first defendant purchased the property by the registered sale deed, which was marked as Ex.B1 clearly mentioned the description of property. Therefore, under Ex.A1.. categorically conveyed the message that the vacant sites that existed in between the common lane on the North and the property purchased by the first defendant and the South.

The first defendant demolished the Eastern portion, since it was dilapidated condition on the constructed new building in the some old constructions. Under Ex.B1, the plaintiff sold the property measuring North to South 17feet and East and 14.1 feet and the West as second Thakku. If the plaintiff intended to sell more than these measurements, the first defendant intended to purchase the vacant sites for in between the build up portion and common lane. The specific North- South measurement might not have been mentioned in Ex.B1. Therefore, the plaintiff sold only the North - South ad measuring 17 feet on the East and 14.1 feet on the West in favour of the first defendant. Therefore, both the Courts below concluded that it is an encroachment by the first defendant and as such decreed the suit in favour plaintiff in so far as the mandatory injunction is concerned and order to remove the encroached constructions.

11. The Advocate Commissioner was also appointed to inspect the suit property and he filed his report and plan which were marked as Exs.C1 and C2. According to the initial report of the Advocate Commissioner, the construction was only in half way through thereafter, the Commissioner again revisited the suit property and filed his report which were marked as Exs. C3 and C4. Though initially injunction granted against the first defendant, they completed entire construction of staircase in the suit property. According to the second report, they finished the entire construction in the suit property. Therefore, the contention of the defendant in respect of the adverse possession also against held good. Considering the above, the first Appellate Court also dismissed the appeal filed by the first defendant and confirmed the judgment and decree passed by the Trial Court.

12. In view of the above, this Court does not find any valid reason to interfere with the reasoning and findings rendered by the Courts below by upholding the case of the plaintiff. Therefore, this Court is of the considered opinion, no substantial questions of law are involved in these appeals. Be that as it may, the following substantial questions of law are accordingly answered against the first defendant and in favour of the plaintiffs. In fine, both the second appeals are dismissed. No costs.

Sd/-

Assistant Registrar(I)

//True Copy//

Sub Assistant Registrar

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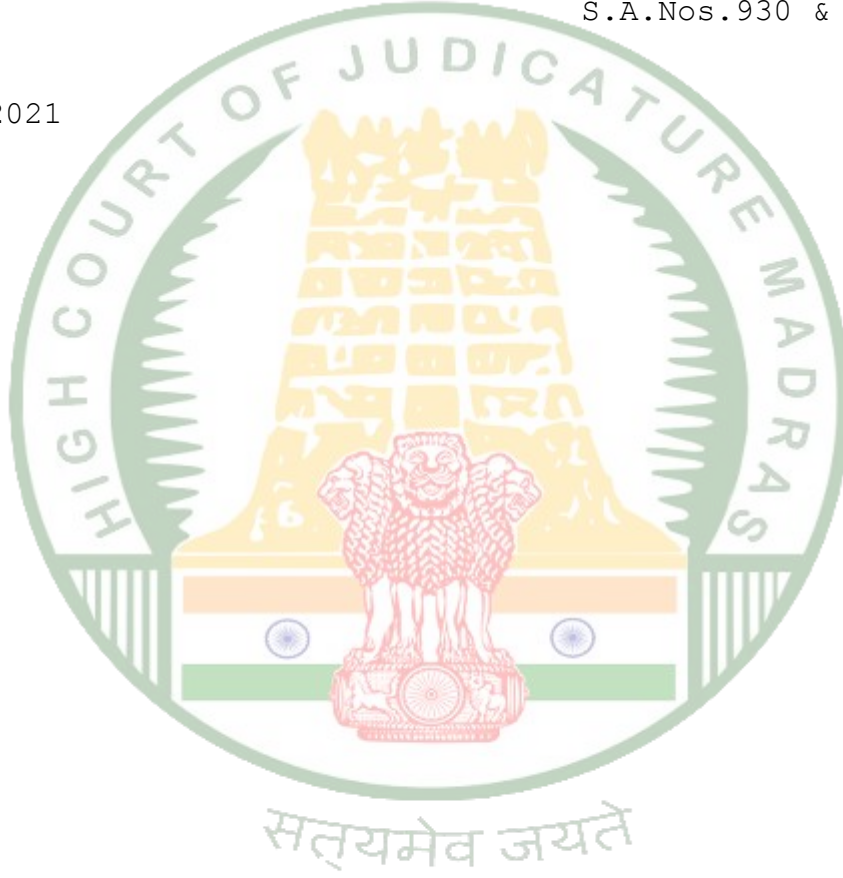
To:-

1. The II Additional Sub Judge, Salem.
2. The I Additional District Munsif,
Salem.

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

S.A.Nos.930 & 931 of 2001

MR (CO)
CS/03/05/2021



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