

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.03.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.86 of 2007

1.Venkatesa Konar (Deceased) ...1st Appellant/Respondent/
Defendant

2.Vedhavalli ...2nd
Appellant/LR of 1st appellant

Vs

1.Minor Vignesh
rep.by mother and Guardian Malliga
...1st Respondent/Appellant/2nd Plaintiff

2.Vetriselvi

3.Rajeswari

4.Shanthi

5.Rajasekar

6.Vasanthi

7.Usha Rani ... Respondents 2 to 7/LRs of 1st appellant

(2nd Appellant and Respondents 2 to 7 brought on record as LRs of the Deceased sole appellant viz, Venkatesam Konar vide order of Court dated 04.09.2019 made in C.M.P.Nos.15776 to 15778 of 2017 in S.A.No.86 of 2007)

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree passed in A.S.No.135 of 2005 dated 29.11.2005 by the Principal Sub-Ordinate Judge, Mayiladuthurai in reversing the Judgement and Decree passed O.S.No.90 of 2001 dated 24.02.2005 by the Additional District Munsif, Mayiladuthurai.

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For Appellant : Mr.A.Muthu Kumar
For Respondent 1 : Mr.S.Sounthar
For Respondents 2 to 7 : Mr.T.Thiyagarajan

J U D G E M E N T

The appellant before this Court is the defendant who seeks to challenge the reversing Judgements in A.S.No.135 of 2005 passed by the Principal Subordinate Judge, Mayiladuthurai in and by which the learned Principal Subordinate Judge had reversed the Judgement and Decree passed by the Additional District Munsif, Mayiladuthurai in O.S.No.90 of 2001. It is necessary to allude to the facts that has culminated in the filing of the above Second Appeal. The parties are referred to in the same ranking as in the lower Court.

2.Plaintiff's case:

i) The suit was originally filed by one Chidambaram Pillai, the grandfather of the 2nd plaintiff / 1st respondent herein. On the death of Chidambaram Pillai the 2nd plaintiff was impleaded on the basis of the will executed by the said Chidambaram Pillai in his favour on 07.03.2002. The suit was filed for a bare injunction restraining the defendant from interfering with the peaceful possession and enjoyment of the suit property by the plaintiffs.

ii) It is the case of the 1st plaintiff that he is the absolute owner of the suit property having purchased the same under a sale deed dated 03.05.1963 from one Soundara Nayaki. The 1st plaintiff would contend that he had purchased an extent of 15 cents within specified boundaries. Though 15 cents were purchased by him, however, the extent was wrongly mentioned as 5 cents in the sale deed. He would submit that the boundaries would clearly show the fact that it was the extent of 15 cents and not 5 cents that was sold to them.

iii) The 1st plaintiff had given the building on the western side of the suit property to one Jegan Murugan for running a School and further east of the suit property is the defendant's house site. The 1st plaintiff would contend that the defendant had also purchased his property from the very same vendor

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Soundara Nayaki, 15 years prior to the filing of the suit. When the 1st plaintiff had purchased the property there was a parent wall in existence and thereafter the wall had crumbled, taking advantage of the same the defendant was attempting to encroach into the property and hence the suit.

3. Defendant's case:

i) The defendant would contend that the 1st plaintiff had only purchased 5 cents in the suit property and not 15 cents as claimed by him. The defendant would contend that he had purchased 5 cents west of the defendant's house also from Soundara Nayaki and he had also obtained patta too for the same and has been in possession and enjoyment of the said 5 cents since the date of its purchase.

ii) The defendant would submit that he had measured the property purchased by him with help of surveyor and there was a Panchayat in which it was decided that defendant had right over the 5 cents of land on the west of the western wall and the boundary line was marked in the presence of the 1st plaintiff. Thereafter, the plaintiff had moved the suit.

4. Trial Court:

i) On the basis of the pleadings, the learned Additional District Munsif, Mayiladuthurai had framed the following issues:

"1. Whether the claim of the plaintiff that he is in possession and enjoyment of the suit proper is correct?

2. Whether the plaintiff is entitled for the relief of permanent injunction as sought for?

3. To what other relief is the plaintiff entitled to?"

ii) P.W.1 and P.W.2 were examined on the side of the plaintiffs and Ex.A.1 and Ex.A.2 were marked on their side. Ex.A.1 is the sale deed under which the property was purchased and Ex.A.2 was the Will dated 07.02.2002 executed by Chidambaram Pillai in favour of the 2nd plaintiff. On the side of the defendant, D.W.1 and D.W.2 were examined and Ex.B.1 was marked. Pending the suit the Advocate Commissioner was appointed. The Advocate Commissioner had filed his report and plan. This report and plan were marked as Ex.C.1 and Ex.C.2.

iii) The Trial Court had held that the plaintiffs were only entitled to 5 cents as described in the sale deed particularly

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when the Will which is executed pending the suit by the 1st plaintiff also confirms that only an extent of 5 cents was purchased by the 1st plaintiff and that 5 cents had been bequeathed to the 2nd plaintiff. The Trial Court had also found that if the extent was a mistake, the same would have been rectified at the earliest point and the fact that the 1st plaintiff was silent for over 40 years clearly proves that it was only the 5 cents that was purchased by the 1st plaintiff. The learned Judge ultimately proceeded to dismiss the suit.

5. Appellate Court:

The learned Principal Subordinate Judge, Mayiladuthurai relied upon the Commissioner's report and plan, Ex.C.1 and Ex.C.2 to hold that the points AA' was the western Wall of the defendant's house and BB'' is the wall situate west of the defendant's wall and AB is the base foundation. Therefore the learned Judge had concluded that the plaintiff's property extended upto point AA'. The learned Principal Subordinate Judge, Mayiladuthurai has held that it is the boundary that would prevail since the property in question is a vacant site and consequently had reversed the Judgement and Decree of the learned Additional District Munsif, Mayiladuthurai.

6. Second Appeal:

Challenging the said Judgement and Decree the defendant has filed the present Second Appeal and the same has been admitted on the following Substantial Questions of law:

"1. When the deceased first plaintiff had purchased only 5 cents and the same is reflected in his Will executed during the pendency of the suit, whether the Lower Appellate Court erred in law in holding that the plaintiff is entitled for a decree for injunction to 15 cents?

2. Whether the lower appellate Court erred in law in placing the burden of proof on the defendant?"

7. Mr.A.Muthu Kumar, learned counsel appearing on behalf of the defendant would contend that the finding of the Appellate Court that the 1st plaintiff had purchased the 15 cents is totally contrary to Ex.A.1 more particularly when the 1st plaintiff who had executed the Will pending the suit has chosen to describe the extent of property only as 5 cents. He would further draw the attention of the Court to the fact that schedule of property would describe the suit property as the east 2 ½ cents of the total extent of 15 cents and according to him the very description of the property is erroneous and cannot

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be considered.

8. He would further argue that the plaintiffs have not proved their possession of the suit property and on the contrary the defendant had produced Ex.B.1 revenue records to show his possession of the suit property. He would also point out that the Advocate Commissioner's report clearly shows that there is a wall which has been marked as BB''. In these circumstances, the learned Principal Subordinate Judge, Mayiladuthurai has decreed the suit with reference to the property much beyond the property that is legally due to the plaintiffs.

9. Per contra, Mr.S.Sounthar, learned counsel appearing for the plaintiff would contend that the point AA' has been described in the Advocate Commissioner's report as the western wall of the defendant and the description of the suit property purchased by the 1st plaintiff in the year 1963 clearly shows that the property is the one west of the property of Soundara Nayaki, who is the vendor of both the plaintiffs as well as the defendant. He would therefore contend that the learned Principal Subordinate Judge, Mayiladuthurai is right in decreeing the suit as prayed for.

10. Heard the counsels and perused the records.

11. Though the plaintiff has come forward with the case that he had purchased 15 cents, the document Ex.A.1 clearly describes the property as 5 cents in survey No.400. It is to be borne in mind that the properties purchased by both the plaintiffs as well as the defendant was originally owned by a common owner. She had sold the western 5 cents to the 1st plaintiff and the eastern 5 cents to the defendant. The sale deed Ex.A.1 would clearly indicate that there were a wall in existence within the 5 cents. The Advocate Commissioner has in his report Ex.C.1 clearly states that the wall BB'' are the old parent wall of the plaintiff. The commissioner's report further shows that east of the point BB'' the land is on a lower level. Therefore, it is clear that the property beyond BB'' was not part of the property west of the point BB''.

12. Therefore the only conclusion that can be drawn is the plaintiff's property measuring an extent of 5 cents ends at the point BB''. Considering the fact that Ex.A.1 describes the defendant's property as the eastern boundary the only conclusion that can be drawn is the property east of the point BB'' belongs to the defendant. Since the plaintiff has proved their right to enjoy the property upto the points BB'' this Court is partly allowing the Second Appeal and granting a decree for injunction

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in respect of the property lying within the point CC' and BB'B'' as indicated in the Advocate Commissioner's plan (Ex.C.2). Ex.C.2 shall form the part of the decree. There shall be no order as to costs.

Sd/-
Assistant Registrar (CS-III-MDU)

//True Copy//

Sub Assistant Registrar

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To

1.The Sub-Ordinate Judge,
Mayiladuthurai.

2.The Additional District Judge,
Mayiladuthurai.

Copy to:
The Section Officer,
VR Section, high Court,
Madras-104.

+1cc to Mr.S.Sounthar, Advocate SR.18611

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