

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.03.2021

PRONOUNCED ON : 08.04.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.552 of 2009

T.Sreenivasan ... Appellant / Defendant

Vs.

T.Anjappa @ Kannappa ... Respondent / Plaintiff

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 29.11.2008 passed in A.S.No.6 of 2007 on the file of the Subordinate Court, Hosur, confirming the judgment and decree dated 14.11.2006 passed in O.S.No.67 of 2002 on the file of the District Munsif Court, Hosur.

For Appellant : Mr.P.Mani

For Respondent : Mr.J.Hariharan
for Mr.V.Nicholes

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 29.11.2008 passed in A.S.No.6 of 2007 on the file of the Subordinate Court, Hosur, confirming the judgment and decree dated 14.11.2006 passed in O.S.No.67 of 2002 on the file of the District Munsif Court, Hosur.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3.The second appeal has been admitted on the following substantial questions of Law:

"1.Whether the courts below erred in law in casting the burden of proof on the defendant to prove that the 10 ft. portion between the road and the defendant's shop forms part of the road poromboke land when it is for the plaintiff to prove his case that the said 10 ft. portion forms part of the defendant's patta land?

2.Whether the courts below erred in law in holding that the suit properties are situated in the portion purchased by the plaintiff without identifying the boundaries of the defendant's land and the plaintiff land with the assistance of a surveyor particularly when subdivision of their said lands were already made and separate patta have been issued?

3.Whether the judgment an decree passed by the courts below are sustainable in law when they have failed to appreciate the oral and documentary on record in their proper perspective and based their conclusions on mere surmises and conjecture?"

4.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.

5.The plaintiff has laid the suit against the defendant for declaration of his title to the plaint "A" & "B" schedule properties and for recovery of possession qua the plaint "A" schedule property and for the relief of permanent injunction qua the plaint "B" schedule property.

6.The issue between the parties, is whether the plaint "A" and "B" schedule properties lie within the property belonging to the defendant or within the property belonging to the plaintiff.

7.From the pleas put forth by the respective parties and the evidence adduced in the matter, it is found that the extent of 5 cents in the suit survey number was purchased by way of a sale deed dated 18.10.1979 and it is noted that by way of the abovesaid sale deed marked as Ex.A1, the property measuring East-West 24 ft. and North-South 91 ft. bounded on the East by the vendor's land, West by the land of Madhanagiriappa, North by Hosur-Bangalore road and South by the land of Kesavamoorthy had been conveyed and the abovesaid sale deed had been executed by Venkatachari in the name of the plaintiff. The sale deed Ex.A1 is not in dispute. It is also not in dispute that the property purchased under Ex.A1 sale deed was also the subject matter in the partition effected between the plaintiff and the defendant with their family members during 1981 and it is not in dispute that in the abovesaid partition, as regards the abovesaid extent of 5 cents, 2 1/2 cents lying on the eastern side measuring East-West 12 ft., North-South 91 ft. within the specific boundaries was allotted to the defendant and remaining 2 1/2 cents lying on the western side measuring East-West 12 ft. North - South, 91 ft. was allotted to the plaintiff's share and accordingly, it is found that the parties had been enjoying their respective shares in the abovesaid extent of 5 cents. The abovesaid partition had been effected by the deed of partition dated 28.08.1981 marked as Ex.B1.

8.From the pleas put forth by the respective parties, it is found that as the shares allotted to the plaintiff and the defendant in the abovesaid extent of 5 cents are situated to the South of Hosur - Bangalore Road, while constructing the building in the suit property, they were directed to leave apart 10 or 11 ft. vacant site on the road side and put up the building. The abovesaid fact is not in issue. Accordingly, it is noted that the defendant, after the partition effected under Ex.B1 leaving about 10 ft. space on the northern side abutting Hosur - Bangalore road, had put up the building in his share. It is also noted that the defendant had alienated the southern portion of 2 1/2 cents allotted to him lying to the south of the vacant space and the building put up by him measuring East-West 12 ft. north-south 66 ft. totally an extent of 792 sq.ft. to the plaintiff by way of the sale deed dated 03.02.1984 marked as Ex.A2. That the defendant had executed Ex.A2 sale deed in favour of the plaintiff with reference to the abovesaid extent of 2 1/2 cents allotted to

him under Ex.B1 partition deed is not in dispute.

9.Now, according to the plaintiff, the plaint "A" & "B" schedule properties lie within the property acquired by him under Ex.A2. Per contra, according to the defendant, the abovesaid properties lie within the extent retained by him, after Ex.A2 sale deed.

10.It is the case of the plaintiff that while constructing the building in the portion, he had put up ground floor shop and also abutting the same, also put up an underground shop and let out the ground floor shop for rent to one Muneer Ahmed to put up photo studio and further stated that the underground shop had been rented out to one Jayakumar and accordingly, contended that the plaint "A" schedule property and the plaint "B" schedule property belong to him and taking advantage of his absence, it is the case of the plaintiff that the defendant encroached into the "A" schedule property and also endeavoured to disturb his possession qua the "B" schedule property and hence, according to the plaintiff, he has been necessitated to institute the suit against the defendant for appropriate reliefs.

11.Per contra, according to the defendant, it is he, who had put up the ground floor shop abutting the building raised by him and also the underground shop and contended that the ground floor and the underground shops are lying within the property belonging to him and not lying within the property alienated to the plaintiff under Ex.A2 sale deed.

12.The plaintiff has examined Jayakumar, the tenant as PW2 and according to the plaintiff, the underground portion had been let out to PW2 for running the service station and the ground floor shop is let out to Muneer Ahmed and it is put forth that when Muneer Ahmed vacated the ground floor shop, taking advantage of the same, the defendant had encroached into the plaint "A" schedule property and put up doorway abutting his property and encroached into the plaint "A" schedule property.

13.Considering the evidence of PW2, it is found that it is only the plaintiff, who had let out the underground shop to PW2 and collecting the rent from PW2 and accordingly, the same has been spoken to by PW2. The same has also been admitted by

the defendant examined as DW1 during the course of cross-examination. Accordingly, inasmuch as the underground shop had been put up by the plaintiff, he being the owner, he had accordingly let out the same to the tenant viz., Jayakumar, who has been examined as PW2 and as the owner, it is he, who has been collecting the rent from Jayakumar as spoken to by PW2 and the same has also been admitted by DW1 during the course of cross-examination. If really the underground shop lies within the property belonging to the defendant, there is no question of the same being let out to Jayakumar PW2 by the plaintiff and on the other hand, as rightly concluded by the Courts below, the said shop would have been let out only by the defendant to the tenant and accordingly, the Courts below are found to be justified in holding that the underground shop in dispute is belonging to the plaintiff and the same has been put up by the plaintiff only in the property purchased by him under Ex.A2 sale deed. Further more, PW2 has also deposed that it is only the plaintiff, who is the owner of the same and the plaintiff is having service connection No.1087 in the said shop and he had been paying the current charges only with reference to the abovesaid service connection, when he occupied the underground shop and further more, deposed that the ground floor shop had been let out by the plaintiff to one Muneer Ahmed and the same has been also spoken to by the plaintiff examined as PW1. In this connection, to establish that the ground floor shop had been let out by the plaintiff to one Muneer Ahmed, the plaintiff has also marked the lease deed entered into between the plaintiff and the Muneer Ahmed as Ex.A3. The defendant has not put forth any case that Ex.A3 lease deed does not relate to the ground floor shop and admitted that the ground floor has been let out to Muneer Ahmed, however, would contend that it is he, who had let out the ground floor shop to Muneer Ahmed. However pointing to the abovesaid version, absolutely there is no documentary evidence projected on the part of the defendant. If really the ground floor shop had been put up by the defendant and lying within the portion which the defendant has retained after Ex.A2 sale transaction, as rightly concluded by the Courts below, it is only the defendant, who would have rented out the said shop to the third parties and on the other hand, the available materials placed on record go to show that the ground floor shop also had been let out only by the plaintiff to Muneer Ahmed.

14.The advocate commissioner had been appointed in the

matter and he has inspected the property in issue and filed his report and plan marked as Exs.C1 & C2. Considering the report and plan of the advocate commissioner marked as Exs.C1 & C2, it is found that the advocate commissioner has taken the northern boundary i.e Hosur - Bangalore High road into account and accordingly, noted that while measuring the property from Hosur - Bangalore main road to the plaint "B" schedule property, the same is measuring as 27 ft. north - south. The total extent belonging to the defendant in the said survey number under Ex.B1 is 91 ft. north - south and 12 ft, east-west and when according to the defendant, as he had already sold north-south 66 ft. to the plaintiff under Ex.A2 sale transaction, it is evident that to the north of the same, he would be entitled to 26 ft. north - south in the said survey number. On the other hand, as per the commissioner's report and plan, the north - south measurement commencing from Hosur - Bangalore main road up to the plaint "B" schedule is 27 ft. Therefore, considering the commissioner's report and plan in toto, as rightly concluded by the Courts below, it is obvious that the ground floor shop and the underground shop lie only within the property purchased by the plaintiff under Ex.A2 sale deed and not within the portion retained by the defendant after Ex.A2 sale deed. In this connection, the contention has been raised by the defendant that the property belongs to the parties lies in survey No.728/1, whereas, the Hosur - Bangalore high Road lies in survey No.735 and according to him, 10 ft. left on the northern side is localised in survey No.735 and therefore, put forth the case that the property in dispute is lying within only the portion retained by him. However, the abovesaid case of the defendant is belied by the evidence of Taluk Surveyor examined in this matter as PW3. Considering the evidence of PW3, it is found that Hosur - Bangalore road lies in survey No.735 and to the south of the same, survey No.728/1 lies and he has not deposed that 10 ft. north-south vacant space in survey No.728/1 lies in survey No.735. As rightly concluded by the Courts below, if 10 ft. space lying on southern side of survey No.735 also forms part of Hosur - Bangalore highways road, the Taluk surveyor would have deposed that the survey number 735 also comprised of 10 ft. portion lying to the south of Hosur - Bangalore Highways road. Considering the abovesaid factors in toto, when the plaintiff has admittedly purchased north-south 66 ft. from the defendant under Ex.A2 sale deed, considering the description of the property comprised in Ex.A2 sale deed, as rightly concluded by the Courts below, the

property comprised in Ex.A2 sale deed has been only described as lying to the south of the building and the vacant space belonging to the defendant. Accordingly, it is noted that inasmuch as the defendant had left apart 10 - 11 ft. abutting Hosur - Bangalore Highways road, while putting up the building, accordingly, had described the northern boundary of Ex.A2 property as building and vacant space lying in survey No.728/1. If really the defendant had put up the building in the northern portion in entirety, while describing the property in Ex.A2, he would describe that the alienated property is lying to the south of the building put up by him and not to the south of the building and vacant space belonging to him. Therefore, considering the evidence of PW3 as well as the recitals found in Ex.A2 together, as rightly concluded by the Courts below, the defendant has put forth the false plea that the "A" and "B" schedule properties had been put up by him and the same are lying in the portion retained by him in survey No.728/1, after alienating the property to the plaintiff comprised in Ex.A2.

15.Considering the report and plan of the Advocate commissioner marked as Exs.C1 & C2, it is found that the doorway had been newly erected in the building put up by the defendant in his portion adjacent to the "B" schedule property and accordingly, the Courts below are found to be justified that the defendant had attempted to encroach into the "B" schedule property by putting up a new doorway abutting his building and also accordingly, taking advantage of the ground floor portion remaining vacant after the plaintiff had evicted the tenant, had encroached into the "A" schedule property as described in the plaint. As rightly held by the Courts below, if really the ground floor shop and the underground shop had been raised by the defendant at the same time, when he had put up his building shown as MNOP by the advocate commissioner, considering the building put up in the "B" schedule shown as YPQR by the advocate commissioner, there is no possibility of putting up a new doorway by the defendant as seen by the advocate commissioner and noted in his report, the doorway would have put up by the defendant even at the time when he had originally put up the building in the suit survey number. Therefore, the Courts below are found to be justified in holding that the defendant, without any entitlement, had trespassed into the plaint "A" schedule property and also endeavouring to disturb the plaintiff's possession and enjoyment of the plaint "B" schedule property and in such view of

the matter, the plaintiff is found to have laid the suit against the defendant for appropriate reliefs.

16. In the light of the abovesaid discussions, when from the pleas and the materials placed on record by the respective parties and when the parties are not at issue as regards the title deeds belonging to them and only at issue as regards the lie of the ground floor shop and the underground shop i.e. whether the same lie within the property purchased by the plaintiff under Ex.A2 sale deed or put up by the defendant in the portion retained by him after Ex.A2 sale deed, however, as above pointed out, when it is found that the disputed shops are only put up by the plaintiff and accordingly, the same had been only rented out by the plaintiff and the same also found to be only lying within the property purchased by the plaintiff under Ex.A2 sale deed, in such view of the matter, when the plaintiff's case has been amply established by the materials placed on record and when the defendant has miserably failed to establish his version that the suit properties belong to him and enjoyed by him at any point of time and when the advocate commissioner had localised the suit properties clearly by measuring the total extent taking into account the northern and southern boundaries of the said survey number, in such view of the matter, it is found that the Courts below are found to be justified in upholding the plaintiff's case and granting the reliefs sought for in the plaint. The reasonings and conclusions of the Courts below for upholding the plaintiff's case being founded on the correct appreciation of the materials available on record, both on factual matrix as well as on the point of law and when they are not shown to be in any manner perverse, illogical and irrational and when the Courts below had not erred in shifting the burden of proof on the part of the defendant and on the other hand, had granted the reliefs in favour of the plaintiff only based on the materials projected by the plaintiff to sustain his claim of title to the suit properties and also further held that the defendant has failed to establish that the suit properties belong to him, in such view of the matter, the substantial questions of law formulated in the second appeal are accordingly answered against the defendant and in favour of the plaintiff.

In conclusion, the Judgement and Decree dated 29.11.2008 passed in A.S.No.6 of 2007 on the file of the Subordinate Court, Hosur, confirming the judgment and decree dated 14.11.2006 passed

in O.S.No.67 of 2002 on the file of the District Munsif Court, Hosur, are confirmed. Resultantly, the second appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sms

To:

- 1.The Subordinate Judge,
Hosur.
- 2.The District Munsif,
Hosur.
- 3.The Section Officer,
V.R.Section, High Court, Madras.

+1cc to Mr.V.Nicholas, Advocate, S.R.No.22517
+1cc to Mr.P.Mani, Advocate, S.R.No.22255

S.A.No.552 of 2009

BR(CO)
SB(10/11/2021)