



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 15.02.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A. (MD) .No.30 of 2015

J.Mallika ..Appellant/1st Respondent/Plaintiff

Vs.

1.Lingapoo Ammal ..1st Respondent/Appellant/1st Defendant

2.J.Johnson Navaraj ...2nd Respondent/2nd Respondent/
2nd Respondent

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree passed in A.S.No.124 of 2007 on the file of the Sub Court, Thoothukudi, dated 27.03.2014, reversing the judgment and decree passed in O.S.No.174 of 2005 on the file of the Principal District Munsif Court, Srivaikundam, dated 03.07.2007.

For Appellant : Mr.M.P.Senthil
For R1 : Mr.Kadarkarai

JUDGMENT

The plaintiff in O.S.No.174 of 2005 is the appellant. The suit has been laid by the plaintiff seeking a declaration that the suit 'B' schedule property is a joint property belonging to the parties, for an injunction restraining the 1st defendant from interfering with the enjoyment of the suit 'B' schedule property as a common property, for a declaration that the plaintiff is entitled to maintain her south Wall of her house situated in the suit 'A' schedule property bypassing over the 'B' schedule property, for an injunction restraining the 1st defendant from interfering with such right of the plaintiff and for a mandatory injunction directing the 1st defendant to remove the construction put up by her over the 'B' schedule property and for costs.

2.The case of the plaintiff, as projected before the trial Court, is as follows:-

The plaintiff had purchased the suit 'A' schedule property under three sale deeds, dated 19.09.1991, 18.09.1991 and 19.09.1993, marked as Exs.A1 to A3 respectively. According to the



plaintiff on south of the property so purchased lies the 'B' schedule property that was left out by the plaintiff and the 1st defendant as a common lane to enable them to maintain their southern and northern walls respectively. Contending that the 1st defendant, namely, the south owner, had encroached upon the said common lane and put up the construction, the plaintiff has come up with the above suit.

3.The suit was resisted by the 1st defendant contending that there was no common lane over the 'B' schedule property, as claimed by the plaintiff. She would also contend that the recitals in Ex.A1, which are self serving recitals, cannot be used against her. It is the further contention of the 1st defendant that the parent sale deed, under which, the plaintiff's vendor purchased the property in the year 1946, did not show the existence of any common lane on the southern portion of the suit schedule property and therefore, the plaintiff is not entitled to claim any right as such.

4.At trial, the plaintiff was examined as P.W1 and Exs.A1 to A4 were marked. The 1st defendant was examined as D.W1 and Ex.B1 was marked. The Commissioner's report and plan were marked as Ex.C1 and Ex.C2. The document received from Srivaikundam Taluk Legal Services Committee was marked as Ex.X1.

5.Upon consideration of the evidence on record, the learned trial Judge concluded that the suit 'B' schedule property was a common lane. The trial Court, after taking note of the boundary description in Ex.A1 and the fact that the plaintiff was in possession of a lessor extent than what has been purchased by her and the 2nd defendant under Exs.A1 to A3, concluded that the case of the plaintiff that there was more land belonging to the plaintiff on the south, which was left out for maintenance on the southern Wall of the plaintiff's property. On the said conclusion, the learned trial Court Judge decreed the suit as prayed for. The report of the Commissioner to the effect that the northern wall of the first defendant has been put up very recently using hallow-blocks was also taken note of by the learned trial Judge. On the above conclusion, the learned trial Judge decreed the suit as stated above. Aggrieved by the same, the first defendant preferred an appeal in A.S.No.124 of 2007.

6.The learned appellate Judge, upon reconsideration of the evidence, concluded that the plaintiff has not proved the existence of any common lane described as 'B' schedule between the suit 'A' schedule property and the first defendant's property on the south. The absence of any common lane in the 1946 document, namely, Ex.B1, the sale deed, under which, the vendor of the plaintiff had purchased the northern property described as suit



'A' schedule property, was taken note of by the learned appellate Judge to deny the reliefs to the plaintiff. The appellate Court also took note of physical features pointed out by the Commissioner. On the above conclusion, the learned appellate Judge allowed the appeal and dismissed the suit. Hence, the second appeal.

7.The following substantial questions of law were framed at the time of admission:

"1.Whether the judgment and decree of the lower appellate Court could be sustained both on facts and law which has been rendered on perverse appreciation of the oral and documentary evidence, especially no cogent reasons has been assigned for reversing the well considered judgment and decree of the trial Court?

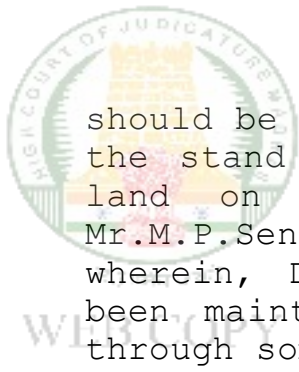
2.Whether the lower appellate Court is right in law in dismissing the suit merely on the basis that the appellant as plaintiff has to prove her claim de hors the lacunae in the case of the defendant, even without advertng that the appellate has discharged the initial onus of proof on the basis of positive and acceptable evidence of P.W1?

3.Whether the judgment and decree of the lower appellate Court is vitiated in declining to grant the relief sought for merely on the basis of the discrepancy in the boundary recitals under Ex.A1 and B1 even without advertng the north-south measurements which is now available on the basis of the Commissioner's report and plan under Ex.C1 and C2?

4.Whether the lower appellate Court has committed a serious error in rendering a judgment in completely misconstruing the principles of onus of proof as well as burden of proof even without advertng the very scope and ambit of Sections 101 to 103 of Indian Evidence Act?"

8.I have heard Mr.M.P.Senthil, learned Counsel appearing for the appellant and Mr.Kadarkarai, learned Counsel appearing for the first respondent.

9.Mr.M.P.Senthil, learned Counsel appearing for the appellant would vehemently contend that the appellate Court was not right in concluding that the plaintiff has not established that there was a common lane on the south of her property. Drawing my attention to the measurements as found in the sale deeds, namely, Ex.A1 to Ex.A3 and the measurements found by the Commissioner, the learned Counsel appearing for the appellant would contend that the plaintiff is in possession of lessor extent than what has been purchased by her in the 'A' schedule property and therefore, it



should be concluded that there was a possibility or probability in the stand taken by the plaintiff that she has left out certain land on the southern side of the 'A' schedule property. Mr.M.P.Senthil, also draws my attention to the evidence of D.W1, wherein, D.W1 has specifically admitted that both of them have been maintaining their northern and southern Walls, by passing through some vacant land situate in between.

10.The learned counsel would further contend that this vital admission of the 1st defendant has been completely overlooked by the learned appellate Judge, resulting in the finding becoming perverse. He would also point out that the learned appellate Judge had gone only by the boundary recitals in Ex.B1, the document which is of the year 1946, overlooking the subsequent evidence, that is made available.

11.Mr.M.P.Senthil, would also rely upon the recitals in Ex.A1, which emanated when there was no dispute between the parties. He would also point out that Ex.A3 was executed by the 1st defendant herself in favour of the plaintiff and her husband, conveying the property, which is situated on the northern and western side of the property purchased by the plaintiff under Ex.A1, sale deed of the year 1991.

12.Contending contra, Mr.Kadarkarai, learned counsel appearing for the first respondent would submit that the plaintiff in her evidence has admitted that the property was measured, at the time of execution of any of the sale deeds, namely, Exs.A1 to A3, in favour of the plaintiff. The learned counsel would further point out that the shortage of certain extent of the property cannot by itself be taken as evidence of the parties having agreed to have a common lane in between their properties.

13.Mr.Kadarkarai, would further point out that the physical features, as found by the Commissioner, would show that there was no possibility of there being a lane between the properties of the plaintiff and the first defendant.

14.I have considered the rival submissions.

15.Adverting to the questions of law framed and the arguments advanced by the learned counsel for the parties, I am inclined to examine the third question of law first.

16.From the report and plan filed by the Commissioner, it could be seen that the plaintiff is not in possession of the actual extent of the land purchased by her under Exs.A1 to A3. Even taking the measurements in Ex.B1, the sale deed of the year 1946, under which, the vendor of the plaintiff had purchased the

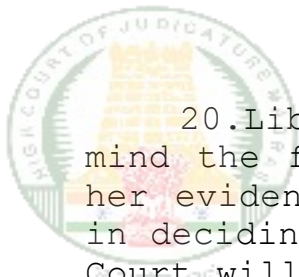


said property, the land, which as of now is in the possession of the plaintiff, is much less than what has been purchased by the plaintiff under Exs.A1 to A3. While the plaintiff would claim that the shortage in the extent is due to the fact that she had left certain extent of property on the southern side for maintenance of her southern Wall, the said claim of the plaintiff is stoutly denied by the first defendant by saying that there are separate boundary descriptions in Ex.B1.

17.But, both the Courts below unfortunately have not adverted to the exact extent that has been possessed by the parties. The appellate Court has gone by the abstract theory of burden of proof. No doubt, it is for the plaintiff to establish her case, as projected in the plaint. But while deciding civil cases, the Courts are always empowered to go by the preponderance of probabilities, without insisting upon the proof beyond reasonable doubt.

18.Going by the preponderance of probabilities in the case on hand and looking into the admission of D.W.1 in her evidence, I am of the considered opinion that the appellate Court has omitted to consider the valuable pieces of evidence that are available on record, which would go long way to show that the plaintiff has some right over the land on the south of her southern Wall. In fact, the 1st defendant has admitted in her evidence that the plaintiff is entitled to 1 ½ feet on the south side of her southern Wall. It is also seen from the Commissioner's report that the rafters, which are beyond the southern Wall have been cut and removed. The existence of such rafters by themselves shows that the plaintiff had some right over the land on the southern side of her southern Wall.

19.The admission by the 1st defendant to the effect that she would take the permission of the plaintiff to maintain the northern Wall has also been totally overlooked by the appellate Court. No doubt, Ex.B1, which is of the year 1946, does not show the existence of any common lane between the properties of plaintiff and the first defendant. The appellate Court was not right in ignoring the material evidence that was available and arriving at a particular conclusion based on the abstract theory of burden of proof, I am constrained to set aside the judgment of the appellate Court and remand the matter to the appellate Court with liberty to the parties to adduce additional evidence in support of their claim. Therefore, the Second Appeal is allowed and the matter is remanded back to the appellate Court. The judgment and decree of the lower appellate Court dated 27.03.2014 is set aside.



20.Liberty to adduce additional evidence is granted bearing in mind the fact that the first defendant has not chosen to produce her evidence of title, which would go long way to help the Court in deciding the issues, that had arisen in the suit. The appellate Court will take the evidence in compliance with Order XLI Rule 28 of the Code of Civil Procedure and proceed to determine the issues, that arise between the parties. In view of the order of remand made, the other questions of law are deemed unnecessary. No costs.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

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Sub Assistant Registrar (CS)

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To

1.The Subordinate Judge,
Thoothukudi.

2.The District Munsif,
Srivaikundam.

Copy to

The Record Keeper-2 copies
VR Section, Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.M.P.SENTHIL, Advocate (SR-5402[F] dated 16/02/2021)

+1 CC to Mr.S.KADARKARAI, Advocate (SR-5239[F] dated 16/02/2021)

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