



S.A(MD)No.194 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 22.06.2022

CORAM: JUSTICE N.SESHASAYEE

**S.A(MD)No.194 of 2011**

**and**

**M.P(MD).No.1 of 2014**

K.S.Thankam

...Appellant/Appellant/Plaintiff

**Vs.**

Sakthidharan

...Respondent/Respondent/Defendant

**Prayer :** Second Appeal is filed under Section 100 of Code of Civil Procedure, against the judgment and decree passed in A.S.No.4 of 2010 dated 30.09.2010 on the file of the Subordinate Judge, Padmanabhapuram confirming the judgment and decree passed in O.S.No.156 of 2005 dated 10.11.2009 on the file of the Additional District Munsif Court, Eraniel.

For Appellant : Ms.J.Anandhavalli  
For Respondent : Mr.C.Godwin

### **JUDGMENT**

The plaintiff in O.S.No.156 of 2005 on the file of Additional District Munsif Court, Eraniel, is the appellant herein.

**2.1** The plaintiff laid the suit for declaration of her title as concerning 'B'



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and 'C' Schedule properties and for certain ancillary reliefs. The suit came to be dismissed, and so was the first appeal in A.S.No.4 of 2010 before the Sub Court, Padmanabhapuram, filed by the plaintiff. Hence, this Second Appeal.

**2.2** The case of the plaintiff is that a certain Chellamma had purchased 39 cents in O.Sy.No.3948A of Eraniel village, Vide Ext.A1/Ext.A2 sale deed dated 01.05.1957 (Ext.A1 is the original in Malayalam and Ext.A2 is its Tamil transliteration). While so, on 10.09.2004, Vide Ex.A3, Chellamma settled a portion of the property that she had purchased under Ext.A1 in favour of the plaintiff. Thereafter, on 28.07.2005, under Ext.A.4, Chellamma settled the balance area to the plaintiff. The dispute is over 4 cents out of these 39 cents, which Chellamma had purchased and settled in favour of the plaintiff and it arises this way:

- Chellamma had purchased 39 cents in O.Sy.No.3948A, correlated to R.Sy.No.429/18. However, as per the resettlement, the extent stated to be in S.No.429/18 is 35 cents. According to the plaintiff, the balance 4 cents is in S.No.429/19. This plot of 4 cents is described in the plaint as 'B' and 'C' Schedules which respectively stated to have an extent of 2.5 cents and 1.5 cents.



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3. The defendant's property is to the north of the plaintiff's property and is in S.No.429/19. It is correlated to O.Sy.No.3949. He had purchased an extent of 29 cents under Ext.B1-sale deed, dated 22.11.1984 and subsequently, purchased another 2 cents Vide Ext.B2-sale deed dated 26.10.2005. His contentions are: (a) that the defendant's vendor had purchased an extent of 25 cents under Ext.B4, dated 15.10.1963 in O.Sy.No.3949, that it was correlated to R.S.No.429/19 and the same extent was retained. In other words, the extent of the property which the defendant's vendor possessed and that which the defendant has purchased has not seen a change before and after resurvey; and (b) That at any rate, the boundary determined for the survey falls in S.Nos.429/18 and 429/19 had become final.

4. The matter went to trial and before the trial court, the plaintiff examined herself as P.W.1 and produced Ext.A1 to Ext.A11, of which, the title documents in Ext.A1, Ext.A3 and Ext.A4 have already been introduced. On the side of the defendant, he examined himself as D.W.1 and he had produced Ext.B1 to Ext.B5, of which, Ext.B1, Ext.B2 and Ext.B4 have already been referred to. The trial court appointed a Commissioner for local



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inspection and the report of the Commissioner was taken on evidence as Ext.C1 to Ext.C3. The Commissioner was examined as C.W.1. Besides, the Surveyor, who assisted the Commissioner, was also examined as C.W.2.

5. On appreciating the evidence before it, the trial Court thought it fit to dismiss the suit, which finding later came to be confirmed by the first appellate court. The line of reasoning of the trial Court is that P.W.1 in her cross examination has deposed that a part of her property has been taken for widening the road on the south. The Commissioner on his part says that the western owner of the plaintiff's property had marginally encroached into the plaintiff's property. This is also admitted by P.W.1 in her cross examination. The trial court proceeded to hold:

- While the plaintiff has sought relief as concerning her title over 'B' and 'C' schedule items of property, they have not been properly described in the body of the plaint;
- Even if the aspect of inadequate description of 'B' schedule property is kept aside, yet there is a discrepancy in describing the property in terms of the boundaries. While the Commissioner might have identified a certain triangular piece of property as 'B' schedule property, that plot does not fit in with the boundary description as in



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the plaintiff;

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- While the Commissioner's report provides various aspects of information yet it does not identify the property in terms of the boundaries and hence, it cannot be acted upon;
- The plaintiff concedes that she has parted away with some property for widening the road on the south and the extent so lost is not specifically stated which aspect she concedes even in her cross-examination;
- That apart, the Commissioner finds that western owner has encroached to an extent of 0.75 cents on the west. This implies the very extent available in 'A' schedule property becomes doubtful. Inasmuch as 'B' and 'C' schedule properties are stated to be part of 'A' schedule property, they created more confusion which the plaintiff has not adequately cleared or established.

6. In the appeal preferred by the plaintiff in A.S.No.4 of 2010 before the Sub Court, it adopted the line of reasoning as the trial court. Hence, the Second Appeal. This appeal is admitted for considering on the following substantial questions of law:

*(i) Is not the First Appellate Court in error in overlooking*



*the fact that Ext.A.4 is prior to Ext.B.3 and ignoring the fact that the plaintiff has better title than the defendant?*

*(ii)Is not the First Appellate Court in error in ignoring the fact that the defendant has not established the title of the vendor under Ext.B.2?*

*(iii)The Commissioner having identified the property in terms of Ext.A1/A2 and also identified 2.50 cents property in Sy.No.429/19 within the boundary of Ext.A.1 on the north, is not the First Appellate Court in error in denying the plaintiff's right to have his title declared atleast to the extent proved by the Commissioner's report?*

7. Arguing extensively with reference to the Commissioner's plan and the title deed, the learned counsel for the appellant submitted:

1. In Ext.A.1, the plaintiff's grand mother Chellamma has purchased 39 cents within specified boundaries in Re-Survey No.3948/A. Some 45 years later, Chellammal settled 35 cents out of the said 39 cents under Ext.A.3. The plaintiff's grand-mother in 2003 i.e 5 years later, had settled the balance 4 cents. This entire extent of 39 cents comes



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within Re.Survey No.429/18 whole and 429/19 part. If the Commissioner's report is reckoned, only 0.75 cents is found to have been encroached by the owner of the property to the west of the plaintiff's property, and some portion is lost in the south, when it was attributed by the plaintiff for widening the road, the point is about northern plot. The Commissioner has identified a plot measuring 2.5 cents on southern extremity of Re.Survey No.429/19. It is a perfect triangle with its acute angle pointing towards west and base line with the western boundary of the plaintiff's property. This 2.5 cents necessarily must be part of plaintiff's property less the extent available even as per Ext.A.1. She added that the southern boundary is a natural boundary as it is a road, and there are compound walls in all three sides namely south, west and partly on the east. She added that the same error might have occasioned during re-settlement or re-survey but a surveyor cannot divest title over the property by merely determining the boundary of a survey field. She added that finality attached to the boundaries of the survey field in terms of Section 13 of the Tamilnadu Survey and Boundaries Act, attached only to the boundaries of the particular survey field, and it cannot be considered as determining the extent of title, a title holder has. Reliance was



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placed on the judgment of this Court in ***Rukkaaiah Nachiar Vs.***

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***P.M.S. Mohamed Aamima Beevi and 5 others*** [2020(6) CTC 390].

- Both the courts below have made easy the process of adjudication. When the plaintiff and the defendant claim title under two separate sources of title of adjacent properties, and if a dispute arises as to whom the portion of the property belong, the court is required to evaluate the title of both the parties and then apply the rule of preponderance of probability, and decide who among the rival sides has a better title. Reliance was placed on the judgment in ***Tuticorin Diocesan Trust Association, through its procurator at Tuticorin and others Vs. Thavamani and others*** [2003(1) CTC 478].
- The defendant claims title of certain property on the north based on two title deeds. Ext.B.1 that deals with the property in Re-Survey No. 429/10 and not 429/19. Even if it is kept aside, southern boundary description of the property purchased by the defendant under Ext.B.1 does not reconcile with what is available, and it cannot be disputed now. It is not in dispute that Chellamma had purchased the property under Ext.A.1 and this is primarily covered under Re-survey No. 429/18 and partly in Re-survey No.429/19. However, the defendant



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can claim title to any property, which lies to the north of the plaintiff's property located in Survey No.429/19. Chellamma was in possession of this property for 47 years, between 1957 to 2004. If the defendant has purchased it in 1984, some 27 years after Ext.A.1, then his southern boundary should be Chellamma's property. However, in Ex.B.1, sale deed, southern boundary is denoted as one Kollappan's property. It is in this background, Ext.B.2 emerges suddenly, where the same vendor who executed Ext.B.1 sold another two cents to the defendant. Time difference between Ext.B.1 and Ext.B.2 is 21 years. In between, Chellamma had passed away, and the property is settled in favour of her grand daughter, the plaintiff herein. Indeed Ext.B.2 was executed some 3 months after Ext.A.4 settlement deed.

Summing up, the learned counsel submitted that, if on a comparison of the boundary description of the defendant's property, the Commissioner's report should not have been rejected entirely, because the Commissioner has found 37 cents within certain boundaries which may well match the available extent within the property covered under Ext.A.1. The differential area of 2 cents can well be adjusted as against the extent encroached on the west and that which was lost in widening the road on the south. The courts below ought to have at least granted a decree to the extent the plaintiff could



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prove her case, to be specific for 37 cents.

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8. The learned counsel for the respondent/defendant submitted that as per Ext.B.1 and Ext.B.2, the defendant is entitled to a combined extent of 25 cents and 6.25 cents. The Commissioner has found that Re.Sy.No.429/19 has 25 cents. And, the predecessor of the defendant had obtained title to the same under a partition deed of the year 1941 (a document not produced by the defendant, nor is it available on record) and explained how the title has passed successively. The learned counsel would strongly emphasis that an encroachment was made by the western owner, and there is lack of clarity of the extent of the property lost by the plaintiff on the southern side abutting the road. Unless there is clarity regarding the extent of property lost on the south it will be impossible to ascertain no decree can be passed against the plaintiff. Thirdly, one of the reasons dismissing the suit by the Courts below is that the lack of clarity in describing 'B' and 'C' schedule property and going by the boundary description, no property matching the description as given in the plaint could be located on lie. Indeed, even the Commissioner did not identify the B-schedule property with reference to their boundaries. He submitted that since the findings on facts is concluded, a bare possibility of a better view may not be a reason for this Court to



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interfere with the said findings of the courts below.

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9. In response, the learned counsel for the appellant/plaintiff submitted that till Ext.B.2 was executed, there was no difficulty. The plaintiff does not dispute the property conveyed under Ext.B.1. This document says that 23 cents on the south in Re.Sy.No.429/10 has been conveyed to the defendant. Two cents covered under Ext.B.2 necessarily has to be on northern side of Ext.B.1. The southern boundary of Ext.B.1 strangely is denoted not as plaintiff property or her grand-mother Chellamma property but to certain Kolappa pillai's property. Secondly, the Courts below ought to have considered the correlation register in determining the extent available. The learned counsel submitted on instruction, that the plaintiff would be satisfied with that area which is denoted in Ext.C.2 Commissioner plan as area covered within VJI measuring 2.5 cents and that she would be giving up right over the rest. In other words, she would submit that the plaintiff would be happy with 34.5 cents in Re.Sy.No.429/18 and another 2.5 cents in Sy.No.429/19 part. She re-emphasize that where both sides claimed title from two different sources, then it is imperative that the Court must evaluate the title of both parties independent of each other and then arrive at a just conclusion as between the rival claims.



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**10.** After carefully weighing the rival submissions, this Court understands that notwithstanding the lack of clarity in describing 'B' and 'C' schedules of properties in the plaint, the plaintiff intends to confine her right over 37 cents, out of which there is hardly any dispute over 35 cents, or 34.5 cents. The difference is over 2.5 cents or thereabouts, and if at all it could be found it must be found within the space denoted by VJI as denoted in Ext.C.2 plan. This is the first aspect. The second aspect on facts is that notwithstanding the boundary description given to the property sold under Ext.B.1 more particularly the southern boundary stated therein, it is not disputed by the plaintiff that the defendant does not own any property to the north of her property.

**11.1** If the line of reasoning of the courts below is analyzed, it appears to this Court that they have opted to travel along a familiar lane within their comfort zone, when it could have applied themselves more on their approach to the dispute before them. Here it is necessary to restate the fundamental facets that influence the adjudicatory process of civil litigations:

- A civil dispute is decided, and at all times must be decided, on the



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basis of preponderance of probability;

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- In order the rule of probability may be applied, there must be more than one option available to the Court, and not just only option. This is largely determined by the nature of rights litigated and the quality of defense offered to resist the plaintiff's right to remedy; and
  - The rule on burden of proof.

If these aspects are subjected to further scrutiny, it can be seen that rules on burden of proof operate up to the point of creating options for the court, and thereafter the rule of preponderance of probability takes over. To state it differently, following the principles on burden of proof belongs to the litigants and applying the rules of probability belong to the Court.

**11.2** How then could the parties create options for the Court? This essentially depends on how a defendant chooses to take on the cause of action presented against him. Here a defendant may (a) come up with a sweeping denial of the plaintiff's title to the right the latter asserts for supporting the cause of action for the suit; or (b) assert a title in himself from the same source to which the plaintiff also traces his title; or (c) assert a title in him from a source different from the one from which the plaintiff



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claims her title.

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**12.1** If the parties to the litigations position themselves in any of the foregoing ways, then rule of probability may have to encounter different options, whereas the application of rule on burden of proof remains a constant in all situations. Rule of burden of proof may be stated in its most rudimentary form: The burden is on him who asserts the positive aspect of a fact. In other words, every assertion of existence of a fact alone need to be proved and not its negative (though asserted by the defendant in the written statement such as denial of plaintiff's title without anything more), as the negative of a fact asserted can only be inferred and cannot be proved. Whether the Court should consider a fact asserted as proved, or its negative as contended by the defendant is established, will now depend on the extent to which the plaintiff could prove the positive aspect on the existence of the fact asserted. It is hence the principle that the plaintiff should not draw sustenance for establishing his case from the weaknesses, if any, in the case of the defendant, but must stand by the quality of evidence he brings on to the table to establish his case. Here rule of probability is limited to assessing the quality of proof of plaintiff's case, and there may not be options available to the court to evaluate any relative preponderance.



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**12.2** However, this may mildly vary where both sides claim title to the same right, either from the same source or from different sources. Here both sides assert the existence of a certain fact in the manner they claim. This would now mean that both sides are under a burden to prove the right in the manner they assert. And, when once both sides discharge their respective burden, Courts will be presented at least with two options to choose from, and now the court would apply the rule of preponderance of probability to select the best of the options made available before it.

**13.** Reverting to the dispute before the Court, the nature of defense raised implies that both sides claim title from different sources, and hence both sides are under a burden to prove the case which they assert, and have to create options for the Court to employ the rule of preponderance of probability. Hence, it may not be appropriate for the Court to have a unifocal approach to the case of the plaintiff alone, as that has the potential to place a premium on any unmerited defense to the defendant and bless with him a right that might have been denied to him if the rule of preponderance of probability is granted its operational space.



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**14.** The trial court ought to have attempted to summon the correlation register (which often is preserved like a classified defence secrets by revenue officials in certain districts) and tried to ascertain where the properties claimed by the parties are located. After all, court playing a proactive role in aid of justice is integral to justice administration. This Court is therefore, left with very little option but to remand the matter back to the first appellate court. But should it be remanded for a mere 2.5 cents? It is not the extent but the right – the right to property of a citizen which is of concern to this Court. It should not be lost to a citizen without the court giving its fullest to ascertain if it could be secured on law and fact.

**15.1** The first appellate court shall preferably appoint the same Commissioner, if he is available and is also willing to undertake the responsibility for doing what is hereinbelow required to be done. And, if he is not available, then to appoint a new Advocate commissioner with a reasonable standing on the civil side and is also regular in his appearance before the Court, and inter alia direct him do the following:

- Without altering the southern boundary of the property covered under Ext.A-1 as denoted in Ext.C-2 plan, the Commissioner is required to



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plot the property of the defendant in terms of Ext.B.1 and Ext.B.2, also on the basis of any prior title deeds of the defendant's property in the light of Ext.B3 and Ext.B4.

- Before the Commissioner visits the property as directed above, the defendant shall produce before the Court the copy of the partition deed of the year 1941, which finds a mentioning in his written statement and referred to in Ext.B3 and Ext.B.4. Then the first appellate Court may take that into account, and give such necessary instructions to the Commissioner regarding plotting of the property of the defendant.
- If the defendant does not produce the said partition deed within a stipulated time, then the Court may direct the Commissioner to execute his warrant and let the defendant face the consequence during final hearing.

**15.2** The First Appellate Court is also required to summon the correlation registers of the properties of both the plaintiff and defendant as corresponding to their old survey number from the Collectorate, Nagercoil and is required to mark the same as Court documents.



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**15.3** After collecting information as is directed above, the first appellate Court is required to ascertain whether the plot covered within VJI in Ext.C.2 should be treated as part of plaintiff's property or part of the defendant's property, and accordingly decide the case.

**16.** To conclude, this Second Appeal is allowed, and the judgment and decree dated 30.09.2010 passed in A.S.No.4 of 2010 on the file of the Subordinate Judge, Padmanabhapuram is set aside. The matter is remanded to the First Appellate Court for addressing the aspects as indicated in earlier paragraphs in the manner provided. The parties are permitted to adduce oral and documentary evidence only to the extent needed for the purposes indicated above. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes/No

Internet: Yes/No

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To

- 1.The Subordinate Judge, Padmanabhapuram.
- 2.The Additional District Munsif, Eraniel.
- 3.The Section Officer,  
VR Section,  
Madurai Bench of Madras High Court,  
Madurai.



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**N.SESHASAYEE, J.,**

CM

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