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S.A.No.109 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on 09.02.2024	Judgment Pronounced on 01.03.2024
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THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.109 of 2018

Kannan

..Appellant

Vs.

1.Thirupavi

2.Indiragandi

..Respondents

PRAYER: These Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 21.07.2010 passed in A.S.No.78 of 2007 and Cross Appeal in A.S.No.78 of 2007 on the file of the Subordinate Judge, Kallakurichi, reversing the judgment and decree dated 22.08.2007 made in O.S.No.714 of 2003 on the file of the Principal District Munsif, Kallakurichi.

For Appellant : Mr.R.Nandhakumar

For Respondents
For RR1 & 2 : Mr.S.Udayakumar



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JUDGMENT

This Second Appeal has been filed against the judgment and decree dated 21.07.2010 passed in A.S.No.78 of 2007 and Cross Appeal in A.S.No.78 of 2007 on the file of the Subordinate Judge, Kallakurichi, reversing the judgment and decree dated 22.08.2007 made in O.S.No.714 of 2003 on the file of the Principal District Munsif, Kallakurichi.

2.The plaintiff is the appellant herein in the present Second Appeal.

3.The parties are described as per their litigating status before the Trial Court.

4.The suit was filed on the basis that the suit property originally belonged to the plaintiff's parents, Thangavel Gounder and Chinnammal, as per the Sale Deed dated 15.06.1967. According to the plaintiff, in the Sale Deed, instead of giving the North-South measurement as 6 yards and East-West measurement as 16 yards, it was wrongly mentioned as East-West measurement as 6 yards and North-South measurement as 16 yards.



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Thangavel Gounder and his wife orally partitioned the properties and out of 0.02 cents in S.No.64A/11A, the western part of 0.01 cent was allotted to Thangavel Gounder. Thangavel Gounder had three sons including the plaintiff and his brother's son Pavadai was also in the care and custody of Thangavel and during the lifetime of the father, he gave all three sons and the said Pavadai, his brother's son, a $\frac{1}{4}$ share each in his properties.

5.It is the further case of the plaintiff that he purchased an extent of 0.01 cent (i.e) East-West 4 feet in S.No.64A/11A from Chinnammal under a Sale Deed dated 05.05.1994 and even in the said Sale Deed, the measurements were wrongly mentioned. Subsequently, in an by the Sale Deed dated 13.08.1997, the plaintiff purchased $\frac{1}{4}$ share of his brother Iyyasamy in S.No.64A/11A. According to the plaintiff, his another brother, Narayanasamy sold $\frac{1}{4}$ share of the property by an oral Sale and similarly, the brother's son of Thangavel, Pavadai also orally sold his $\frac{1}{4}$ share to the plaintiff. Thus, the plaintiff became entitled to East-West 48 feet in S.No.64A/11A.



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6.It is the case of the plaintiff that on the North side of the suit property, the plaintiff and his brothers have Thottam in S.No.64A/10, where haystacks were stored and the property was also used for tethering cattle and dumping waste. The suit property, according to the plaintiff, was left as a pathway for taking cattle's cart to the plaintiff's property in S.No.64A/10. On the East of the suit property, one Marimuthu Pillai owned lands and there was a dispute between the legal heirs of Marimuthu Pillai and the 2nd defendant. The allegation of the plaintiff is that 1st defendant having purchased the property of the 2nd defendant, attempted to encroach into the plaintiff's property and put up constructions. The plaintiff therefore instituted a suit for declaration to title, permanent injunction with an alternative prayer for mandatory injunction.

7.The 1st defendant filed a written statement denying the plaintiff's allegations that the boundaries were wrongly mentioned in the Sale Deed dated 15.06.1967. It is the case of the 1st defendant that he has purchased the property from the 2nd defendant, by way of registered Sale Deed dated 30.10.1998 and ever since he has been in possession, having constructed a titled house and enjoying the same absolutely.



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8. The 2nd defendant filed a written statement stating that even under Sale Deed dated 15.06.1967, the plaintiff's father was given only a pathway right and not any absolute right and also stated that the measurement of the property was wrongly mentioned as yards instead of feet in the Sale Deed. The oral partition, under which the plaintiff claimed rights are denied by the 2nd defendant, according to the 2nd defendant, 11 cents in S.No.64A/11, absolutely belonged to Marimuthu Pillai, who adopted one Jayaraman, under a deed of adoption on 14.09.1967 and in O.S.No.217 of 1981, the said Jayaraman was declared to be entitled to $\frac{3}{4}$ share and the wife of Marimuthu Pillai, Kasambu Ammal was entitled to the remaining $\frac{1}{4}$ share. The said Kasambu Ammal had executed a Will bequeathing her share to one Chinnasamy under the Will dated 11.12.1980. The 2nd defendant, being wife of Jayaraman, partitioned the properties with Chinnasamy, under which the 2nd defendant got 3 cents, which he sold to the 1st defendant on 30.10.1998. The 2nd defendant also stated that the plaintiff was never in possession and enjoyment and that the suit was barred by limitation.



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9.The 1st defendant filed an additional written statement stating that under the Partition Deed dated 06.03.1996, the suit property belong to the 2nd defendant, Indiragandhi and pursuant to the decree in O.S.No.217 of 1981, the 1st defendant and her vendor have been in possession for over the statutory period and therefore, they have also prescribed title by adverse possession.

10.The Trial Court dismissed the plaintiff's suit seeking declaration of title and permanent injunction. However, the Trial Court granted relief of mandatory injunction, directing removal of the offensive construction put up by the 1st defendant in the plaintiff's land and directed the 2nd defendant to maintain the pathway as a pathway.

11.Aggrieved by the mandatory injunction granted, the defendants have preferred an appeal in A.S.No.78 of 2007 and the plaintiff preferred a cross appeal in the said First Appeal in so far as the relief of declaration and permanent injunction being negated.



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12.The First Appellate Court, after re-appreciating oral and documentary evidence available on record and also taken into account the pleadings of the parties, allowed the appeal filed by the defendants and set aside the decree in respect of the mandatory injunction and also the cross appeal filed by the plaintiff was dismissed.

13.Aggrieved by the judgment of the First Appellate Court as well as the cross appeal, the plaintiff preferred the above Second Appeal on 12.12.2023, on the following substantial question of law:

(i) Whether the finding of first appellate Court that decree for mandatory injunction granted by trial Court was unsustainable when plaintiff failed to identify 2 cents in the sit survey number is contrary to evidence available on record?

14.I have heard Mr.R.Nandhakumar, learned counsel for the appellant and Mr.S.Udayakumar, learned counsel for the respondents.

15.The learned counsel for the appellant has taken me through Ex.A1, Sale Deed and referred to the measurements set out thereunder. He also placed reliance on the report of the Advocate Commissioner and stated that



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the plaintiff had established his entitlement by production of Ex.A1 to Ex.A8 and the defendants have taken mutually contrary stands by setting of the plaintiffs adverse possession by way of filing additional written statement, after having claimed the title to the suit property under the Registered Sale Deed. He would therefore pray for the Second Appeal being allowed and the judgment and decree of the Trial Court being set aside.

16.Per contra, the learned counsel for the respondents invited my attention to the findings rendered by the First Appellate Court and would contend that in Ex.A1, there is clear recital that the property was sold to the purchaser, only for the purpose of a pathway and therefore, the plaintiff could not claim any absolute right under Ex.A1. The plaintiff's claim of 2 cents under Ex.A1 is with four specified boundaries and it is not a dispute that the plaintiff's father had a property in S.No.64A/10, which was lying to the North of the property in S.No.64A/11A.

17.Section 11 of Transfer of Property Act, 1882, runs thus:

“Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest



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shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such directions.

[Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transfer may have to enforce such direction or any remedy which he may have in respect of a breach thereof.]”

In view of the above provision, the purchaser is entitled to take the property purchased and deal with the same, as if there was no direction in the Sale Deed.

18.The mandate of Section 11 of Transfer of Property Act, has been rightly applied by the First Appellate Court and held that the purchaser under Ex.A1, cannot be restricted from enjoying the property purchased under the said document and that he had to use it only as a pathway. Even under Ex.A.2 and Ex.A3, similar rights of enjoyment of pathway and covenants share that the property should be used only as a pathway. However, in all



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these documents, the clauses are clearly repugnant to Section 11 of the Transfer of Property Act. The First Appellate Court has also found that the plaintiff has been successful in establishing his entitlement for 2 cents under various registered documents, which have been exhibited on his side. However, noticing that the plaintiff had sought declaration of title to the suit property set out in the plaint plan, the First Appellate Court noticed that the plaintiff was actually claiming 3 cents in the suit and 1 cent more than his actual entitlement.

19.The Advocate Commissioner's report is also found to be not helpful to the Court to decide the lay of the suit property, especially, when in the stated survey number, the revenue records filed by the plaintiff in Ex.A4, Ex.A5 and Ex.A6 are only in the joint names of Thangavel Gounder and others and it does not in any way help the plaintiff's case to establish his possession over the suit property.

20.Coming to the Advocate Commissioner's report, the Advocate Commissioner has found the properties to be comprised in S.No.64A/11A and S.No.64/11B and he has also noticed encroachment in the suit property,



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which he has shown in Ex.C2, Plan, and also mentioned in Ex.C1, report.

The Advocate Commissioner has indicated that the suit property is vacant except for construction put up by the 1st defendant in a portion of the suit property.

21.In such circumstances, the plaintiff who claims declaration ought to have also proved that he was in physical possession and separate possession of the suit property, namely 2 cents. The First Appellate Court therefore rightly non suited the plaintiff for the relief of permanent injunction, as the plaintiff has not been able to locate the suit property on ground. The First Appellate Court held that a proper remedy available for the plaintiff was to file a regular suit for partition, as his entitlement of 2 cents were not ascertainable and consequently, the First Appellate Court also held that the plaintiff would not be entitled for relief of mandatory injunction.

22.Even though the learned counsel for the appellant would state that referring to the Plaint Plan at page No.7 of the typed set of papers, marking the suit property as B, C, D and E, from the report of the Advocate Commissioner, I do not find that the plaintiff's version of the lay of the suit



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property stands proved or established. In fact, the Trial Court also found that the plaintiff had not produced any evidence or examined any witness to establish the mistakes in the measurements. Admittedly, the plaintiff has approached the Court, admitting that there is mistake in the registered Sale Deed, the plaintiff ought to have taken steps to correct the said mistake, on the contrary, the mistake has been carried forward in subsequent documents also. Thus, without rectification of the registered documents, the plaintiff cannot seek for declaration of his title, that too in a suit filed against the adjoining owner and alleging that there has been an encroachment.

23.In fine, I do not find any illegality or perversity in the findings rendered by the First Appellate Court and the substantial question of law is answered as against the appellant herein. In fine, this Second Appeal is dismissed. There shall be no order as to costs.

01.03.2024

Index : Yes/No
Speaking Order/Non-Speaking Order

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To

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



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P.B.BALAJI., J.

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Pre-delivery judgment made in

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