



S.A.(MD).No.411 of 2008

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13.08.2024

CORAM:

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

S.A.(MD).No.411 of 2008

and

C.M.P.(MD)No.2688 of 2018

Gomathy

... Appellant

/Vs./

Thangaraj

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the Judgment and Decree dated 08.03.2005, made in A.S.No.131 of 2002 on the file of the Principal Sub Court, Kumbakonam, reversing the Judgment and Decree, dated 17.06.2002, made in O.S.No.121 of 2001 on the file of the Principal District Munsif Court, Valangaiman.

For Appellant : Mr.G.Gomathi Sankar

For Respondent : Mr.V.K.Vijaya Raghavan

JUDGMENT

The present second appeal is filed against the judgment and decree, dated 08.03.2005, passed in A.S.No.131 of 2002 on the file of Principal Sub Court, Kumbakonam, reversing the judgment and decree, dated 17.06.2002, passed in



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WEB O.S.No.121 of 2001 on the file of the Principal District Munsif Court, Valangaiman.

2. The plaintiff in the suit is the appellant herein and the defendant in the suit is the respondent herein. For the sake of convenience, the parties are referred as plaintiff and defendant, as per the ranking in the suit.

3. The suit is filed for declaration to declare that the plaintiff is the absolute owner of the entire suit property, consequently, to direct the defendant to deliver vacant possession of the encroached portion after removing the wall and fence at his own cost.

4. The brief facts as stated in the plaint is that the plaintiff is the absolute owner of the property situated in R.S.No.216/7A through sale deed, dated 24.02.1975. The property covered under the sale deed is not the subject matter of the suit. The plaintiff purchased 3 1/3 cents (10 kuli) of land adjacent eastern side under the registered sale deed, dated 07.04.1980 and had put up a fence to cover the property and this is the suit property. Under the sale deed, dated 24.02.1975



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the plaintiff had purchased 9 cents including the house and under sale deed, dated 07.04.1980, the plaintiff purchased the suit property 3 1/3 cents, therefore, totally 12 1/3 cents. The husband of the plaintiff was employed in the Army and he retired from service. During the service in the Army, he had purchased the above said two properties in the name of the plaintiff. After retirement, the plaintiff's husband is working in a private company at Chennai. The plaintiff and her husband used to visit the suit property and renew the fence. Earlier, the S.No. 216/7, which is now subdivided as 216/7A admeasuring 0.02.0 Ares and 216/7B admeasuring 0.04.0 Ares, the remaining balance in R.S.No.216/7 is only 5 kulis. The defendant has purchased the said 5 kulis from one Ramalingam. Taking advantage of the fact that the plaintiff is residing at Chennai, the defendant has destroyed the fence and has encroached upon the portion of the suit property on 15.11.2000. Immediately, the plaintiff applied for survey measurement. On 22.11.2000 and 23.11.2000, the Surveyor came and measured the property. The defendant objected to the measurement and he removed the peg marks put up by the surveyor. Again, at the request of the plaintiff, the surveyor came on 05.12.2000 and measured the land of both the plaintiff and the defendant. But the defendant brought a Village Administrative Officer from another village and



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measure the property. The Surveyor informed both the parties that his measurement is absolutely correct and the defendant is wrongfully refusing for the correct measurement. In order to protect his illegal possession, the defendant has filed a caveat before the Court. Since the defendant is falsely claiming right over the suit property which was purchased by the plaintiff thereby, created a cloud over the title of the plaintiff. The encroachment by the defendant is just east of the land belonging to the plaintiff. There is a lane between the plaintiff's property and the defendant's property. The lane absolutely belongs to the plaintiff. By raising a wall, the defendant has encroached upon the lane portion belonging to the plaintiff and has also put up a fence on the end of the wall. Therefore, the defendant is bound to remove the wall and fence and to deliver the vacant site to the plaintiff. The plaintiff has leased out the house in R.S.No.216/7A to a tenant / lessee and the plaintiff's brother is looking after the same. In the suit property in R.S.No.216/7B, the vacant site is being managed by the plaintiff's brother. In spite of several protest by the plaintiff's brother, the defendant has encroached the portion of the suit property to an extent of roughly 2 cents. The encroachment is on the eastern side of the plaintiff's house and on the southern side of the plaintiff's property. The wall raised by the defendant will be roughly 11 feet * 50



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feet South to North. The fence is roughly 26 feet East to West and 1.2 feet North to South. The encroachment on the Southern side will be 11 feet East to West and 50 feet South to North and 26 feet East to West and 12 feet North to South in the backyard portion. Hence, the suit was filed for declaration and injunction.

5. The defendant has filed a written statement denying all the averments stated in the plaint. The description of the property and the sketch given in the plaint are not correct. It is true that the plaintiff purchased the house property situated in R.S.No.216/7A under registered sale deed, dated 24.02.1975. The plaintiff's vendor had only 7 cents in R.S.No.216/7A and not 9 cents. Narayanasamy Naidu executed a settlement deed in favour of his wife Neelavathiammal on 22.10.1966 and had settled only 7 cents in R.S.No.216/7A in favour of his wife. Subsequently, the above said Narayanasamy Naidu and his wife Neelavathiammal along with their minor children sold the property in favour of Varadharajulu on 05.01.1971. Even though he had only 7 cents, he has sold 9 cents to Varadharajulu Naidu and others. On 24.02.1975 the plaintiff had purchased 9 cents, but the vendor has right only 7 cents and not 9 cents. The settlement deed, dated 22.10.1966, clearly shows that the vendor has right only for



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7 cents and not for 9 cents. Hence, the plaintiff has got right only for 7 cents in R.S.No.216/7A. The total extent in R.S.No.216/7 is 14 cents. Narayanasamy got 7 cents and Natesa Nayakar got 7 cents. The said Natesa Nayakar executed a settlement deed in favour of his wife Periyamayagathammal on 12.12.1956. Subsequently, the Periyamayagathammal died and her son Ramalingam executed a registered sale deed in favour of the defendant Thangaraj on 31.12.1993. The defendant has purchased $3\frac{2}{3}$ cents out of 7 cents in R.S.No.216/7. The plaintiff has purchased $3\frac{1}{3}$ cents out of 7 cents in R.S.No.216/7 from Periyamayagathammal on 02.04.1980. The plaintiff purchased 7 cents through sale deed, dated 24.02.1975 and $3\frac{1}{3}$ cents through sale deed, dated 02.04.1980. Hence, she is the owner for $10\frac{1}{3}$ cents and not for $12\frac{1}{3}$ cents as mentioned in the plaint. The averments made in para 4 of the plaint is not correct the defendant has purchased $3\frac{2}{3}$ cents (10 kuli) from Ramalingam. The defendant measured the property at the time of purchase. He never destroyed the fence, never encroached the portion of the suit property, especially, the defendant never trespassed on 15.11.2000. The defendant is in possession and enjoyment of the suit property from the date of the purchase on 31.12.1993. The Surveyor measured the property of the plaintiff as $12\frac{1}{3}$ cents. Hence, the defendant



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WEB objected to the same. The plaintiff is having only 10-1/3 cents in R.S.No.216/7.

The Surveyor failed to hear the objections of the defendant. The lane absolutely belongs to the defendant wherein he has put up wall. The sale deed contains wrong measurements. Varadharajulu Naidu was not having 9 cents. Hence, without any right of possession the plaintiff has come forward with the present suit. There is no cause of action. Hence, the defendant prayed that the relief for declaration possession cannot be granted.

6. After considering the above pleadings, the following issues were framed by the Trial Court:

1. Whether the plaintiff is entitled to declaration?
2. Whether the plaintiff is entitled to possession?
3. Whether the plaintiff is entitled to claim right over the suit property?
4. To what other relief?

7. The plaintiff has marked Exhibits A1 to A5 and examined PW1 and PW2. The defendant has marked Exhibits B1 to B4 and examined DW1 and DW2.



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After hearing the rival submissions, the suit was decreed as prayed for and the defendant was directed to hand over the possession within a period of one month.

8. Aggrieved over the same, the defendant has preferred an appeal in A.S.No.131 of 2002 and the Appellate Court had framed the following points for consideration:

1. Whether the plaintiff is entitled to declaration and possession of the suit property?

2. Whether the Trial Court judgment is correct?

After hearing the rival arguments and after perusing the documents, the appeal was allowed the appeal and the judgment & decree rendered by the Trial Court was set aside. Aggrieved over the same, the present second appeal is preferred by the plaintiff.

9. The second appeal was admitted on the following substantial question of law:



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“Whether the judgment and decree of the Court below is perverse on account of its misconstruction of documents in Exhibits A1 to A5 and Exhibit B2?”

10. The plaintiff has admittedly purchased 9 cents through registered sale deed, dated 24.02.1975 and 3-1/3 cents through registered sale deed, dated 07.04.1980, in Survey No.216/7 and the said sale deeds are marked as Exhibits A1 and A2. Originally, one Kuppamuthu Naicker was the owner of the property in R.S.No.216/7 and the said property admeasures only 14 cents. After his demise, his two sons namely, Pavadai Naicker and Nadesa Naicker became the owners of the property and they divided 7 cents each through Ex.A4, dated 07.07.1956. The said Pavadai Naicker has sold 9 cents to Narayanasamy Naidu erroneously and the mischief started here. Even though the said sale deed shows 9 cents, subsequently, the said Narayanasamy Naidu had settled the property through settlement deed, dated 22.10.1966 marked as Exhibit B2 to his wife Neelavathiammal, wherein he had settled only 7 cents. Subsequently, the said Narayanasamy Naidu and his wife Neelavathiammal along with minor children had sold the property to Varadharajulu Naidu through registered sale deed, dated 05.01.1971, marked as



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Exhibit A5 / Exhibit B1 but sold 9 cents, which is erroneous. Subsequently, Varadharajulu Naidu sold the said 9 cents through registered sale deed, dated 24.02.1975, marked as Ex.A1 to the plaintiff and the mischief continued.

11. The above is erroneous and mischief can be proved by another transaction. The said Nadesa Naicker had executed a settlement deed, dated 12.12.1956, in Ex.B3 and settled 7 cents in favour of his wife Periyannayagi Ammal. The said Periyannayagi Ammal executed a registered sale deed, dated 02.04.1980, in Ex.A2, whereby she sold 3-1/3 cents out of 7 cents to the plaintiff. The said Nadesa Naicker's son Ramalingam had executed a sale deed, dated 21.12.1993, to the defendant, which is marked as Ex.B4 and sold the remaining 3-2/3 cents out of 7 cents to the defendants. From this transaction it is evident that the said Pavadai Naicker and Natesa Naicker was having 7 cents each.

12. When the Pavadai Naicker is having only 7 cents, it is not known how he sold 9 cents to Narayanasamy Naidu. The sale has not clearly stated the reason for stating 9 cents. Even though the said Narayanasamy Naidu has rectified the mistake and mentioned 7 cents in his Settlement Deed dated 22.10.1966, but when



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he sold the property through Exhibit A5 / Exhibit B1, dated 05.01.1971, again he has mentioned as 9 cents. Therefore, the said Varadharajulu Naidu also executed a sale deed, dated 24.02.1975, by mentioning 9 cents to the plaintiff. Therefore, it ought to be held that 9 cents mentioned in the sale deed, dated 07.07.1956 and the subsequent sale deeds, dated 05.01.1971 and 24.02.1975, are errors. The said vendors had erroneously mentioned the extent in the property as 9 cents. The said Narayanasamy Naidu has realized the mistake. Hence, while executing the settlement deed, dated 22.10.1966, he has mentioned only 7 cents. Subsequently, the mistake is carried on to the subsequent sale deeds also. This is corroborated with the sale deed executed by the Nadesa Naicker clan wherein Nadesa Naicker has dealt with the 7 cents of the property alone. Hence, the real issue would be how Pavadai Naicker got 9 cents instead of 7 cents and the same ought to be proved by the plaintiff. The plaintiff has not submitted any clear evidence to prove that Pavadai Naicker was holding 9 cents of the property.

13. Therefore, this Court is of the considered opinion that the said Pavadai Naicker is not having any pre-existing right of 9 cents but has pre-existing right only 7 cents. The sale deeds mentioned as 9 cents are erroneous. Therefore, the



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plaintiff's predecessor titled namely, Pavadai Naicker, Narayanasamy Naidu, Neelavathiammal and Varatharajulu Naidu are not having any pre-existing title to sell 9 cents in favour of the plaintiff. Therefore, the sale deed dated 24.02.1975 has conveyed only 7 cents to the plaintiff and through sale deed, dated 02.04.1980, has conveyed only 3-1/3 cents to the plaintiff. Totally, the plaintiff is having only 10-1/3 cents and not 12-1/3 cents as claimed by the plaintiff. Hence, the Appellate Court has correctly rendered the finding and there is no perverse or misconstruction of documents. Therefore, the substantial question of law is held against the plaintiff and in favour of the defendant.

14. Therefore, the judgment and decree passed by the Appellate Court is confirmed and the judgment and decree passed by the Trial Court is set aside. Hence, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes / No

NCC : Yes / No

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1. Principal Sub Court, Kumbakonam.
2. Principal District Munsif Court, Valangaiman.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

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Judgment made in
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