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**(2011) 12 MAD CK 0056**

**Madras High Court (Madurai Bench)**

**Case No:** S.A. (MD) No. 1075 of 2011 and M.P. (MD) No. 2 of 2011

Lakshmi

APPELLANT

Vs

Mariappan

RESPONDENT

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**Date of Decision:** Dec. 1, 2011

**Hon'ble Judges:** G. Rajasuria, J

**Bench:** Single Bench

**Advocate:** Lakshmi Gopinathan, for the Appellant; S. Subbiah, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Honourable Mr. Justice G. Rajasuria

1. This Second Appeal is focussed by the original defendant animadverting upon the judgment and decree dated 21.03.2011, passed in A.S. No. 33 of 2010 by the learned Subordinate Judge, Sivakasi in confirming the judgment and decree dated 23.02.2010, passed in O.S. No. 350 of 2004 by the learned District Munsif, Sivakasi. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

2. A re"sume" of facts absolutely necessary and germane for the disposal of this second appeal would run thus:

The plaintiff, filed the suit for declaration and mandatory injunction on the main ground that his vendor Anusia purchased the suit property from the admitted original owners of the suit property vide her sale deed -Ex.A.1 dated 07.03.1981 and in turn he purchased the same from her vide sale deed Ex.A.2 dated 03.07.1995. While so, the defendant, according to the plaintiff, barged into a portion of the said property purchased by him and constructed a hut. In order to get her vacated alone, the present suit has been filed.

3. The defendant by way of resisting the suit filed the written statement setting out the pleas that she purchased the suit property from one M.R.Jeyaraj, the power

agent of the admitted original owners and she has been in possession and enjoyment of the same. Accordingly, she prayed for the dismissal of the suit.

4. Whereupon, the relevant issues were framed by the trial Court.

5. During trial, the plaintiff examined himself as P.W.1 and marked Exs.A.1 to A.8 on his side. The defendant examined herself as D.W.1 and marked Exs.B.1 to B.3 on her side. During the pendency of the suit, an Advocate Commissioner was appointed and he visited the suit property and submitted Ex.C.1, his report with plan after measuring it and noting the physical features.

6. Ultimately, the suit was decreed by the trial Court, as against which the appeal was filed by the defendant for nothing but to be dismissed.

7. Being aggrieved by and dissatisfied with the judgments and decrees of the Courts below, the defendant preferred this Second Appeal on various grounds and also suggesting the following substantial questions of law:

(A) Whether the courts below could ignore the suit documents namely Ex.B1 to B3 filed by the appellant to establish his case?

(B) Whether the courts below were justified in decreeing the suit on the basis of commissioner's report when the commissioner has not properly identified the suit property?

(C) Whether the courts below were justified in decreeing the suit on the basis of contradictions in the boundaries alone?

(D) Whether the Advocate Commissioner measured the suit properly that too in the absence of the assistant of Government Surveyor and also public records and Maps concerned?" (Extracted as such)

8. I would like to fumigate my mind with the principles as found enunciated and enshrined in the following decisions of the Honourable Apex Court:

(i) [Hero Vinoth \(minor\) Vs. Seshammal,](#)

(ii) [Kashmir Singh Vs. Harnam Singh and Another,](#)

(iii) State Bank of India and others v. S.N.Goya reported in 2009 1 L.W. 1.

9. The aforesaid precedents would indicate and exemplify that unless any substantial question of law is involved, the question of entertaining a Second Appeal would not arise. Having that in mind, I heard both sides.

10. The learned counsel for the appellant/ defendant, drawing the attention of this Court to the Commissioner's Report as well as the various portions of the evidence would pilot her argument, which could tersely and briefly be set out thus:

(a) The advocate Commissioner did not take the assistance of a qualified Surveyor to identify the suit property with reference to the documents filed on both sides; but on the other hand, he, of his own accord based on the plaintiff's direction located the suit property and perfunctorily filed Ex.C.1, his report with sketch, which is ex-facie and prima-facie wrong and untenable.

(b) The defendant is not relying on her husband's sale deed, which is entirely a different one, but the defendant purchased the suit property independently in her own name as per the sale deed -Ex.B.1 dated 15.07.2002 and in such a case, the Commissioner as well as the lower Court got themselves confused and ultimately the trial Court came to the wrong conclusion.

(c) The first appellate Court also failed to thoroughly go into the factual aspects but simply and blindly confirmed the judgment and decree of the trial Court.

(d) The defendant should be given an opportunity of getting the suit property located with the help of a qualified Surveyor and even this Court might give direction to the Advocate Commissioner to visit the suit property with the assistance of the qualified Surveyor to identify the suit property with reference to revenue Records and the documents of both sides. Accordingly, she prayed for setting aside the judgments and decrees of the Courts below and for dismissing the suit.

11. In a bid to mince meat and shoot down, torpedo and pulverise the arguments as put forth and set forth on the side of the defendant, the learned Counsel for the plaintiff would advance his arguments, which could pithily and precisely be portrayed thus:

(a) This is not a case of mistaken identity.

(b) Ex.A.1 is the sale deed dated 07.03.1981, by which the plaintiff's predecessor Anusia purchased the suit property from the admitted original owners of it and in turn the plaintiff purchased the suit property from her under Ex.A.2 -the sale deed dated 03.07.1995. However, the defendant long after the emergence of Ex.A.1, alleged to have purchased the suit property from the power of attorney of the admitted owners by Ex.B.1 -the sale deed dated 15.07.2002.

(c) The boundaries in those deeds would demonstrate and display that the power of attorney of the admitted original owners sold the very same property, which had already been sold to the plaintiff's predecessor Anusia; wherefore, the defendant who subsequently purchased the suit property cannot have any better title as against the plaintiff. Accordingly, he prayed for the dismissal of the Second Appeal.

12. At the outset itself, I would like to extract the schedule of property as found in Ex.A.1 and also the schedule property as found in the plaintiff:

(Vernacular matter deleted)

A mere reading of them would demonstrate and display that the description as found in Ex.A.1 and the description as found in the plaint do tally with each other.

13. At this juncture, it is just and necessary to extract hereunder the schedule of property as found specified in Ex.B.1 -the Sale deed dated 15.07.2002 executed in favour of the defendant:

(Vernacular matter deleted)

From the perusal of the same, it is crystal clear, so to say, palpably and pellucidly, obviously and axiomatically that the description of the boundaries found in Ex.A.1 and the plaint, by and large do tally with the description as found in Ex.B.1.

14. The defendant's husband, no doubt purchased a plot to the west of the plaintiff's plot and that is found stated in Ex.A.1 as well as in Ex.B.1. One Ramasamy also purchased one property to the East of the suit property, that is the property found in Exs.A.1 and B.1. On the Northern side road is situated and that is also found specified in both Exs.A.1 and B.1. On the Southern side of the suit property, the vendors remaining land is situated. But in Ex.B.1 the Southern boundary specified therein is stated to be that of one Shanmuganithi. Here, the plots on the West as well as on the East in both the deeds do tally and the road also is situated on the North, wherefore, it is crystal clear that the property found specified in Ex.B.1 is the same property, which is contemplated in Ex.A.1. Ex.A.1 is dated 07.03.1981 executed by the admitted original owners. In Ex.B.1 emerged on 15.07.2002, so to say, 20 years thereafter and it was executed by the power of attorney of the same admitted owners.

15. In such a case, I recollect the following maxims:

(i) "Qui prior est tempore potior est jure." [The person who is prior in time is stronger in right.].

(ii) "Nemo dat qui non habet" [No one gives who does not possess.]

16. Glaringly and axiomatically, Ex.A.1 is virtually anterior in point of time and under which the title for the suit property passed from the original owners to the plaintiff's vendor and in turn as per Ex.A.2 to the plaintiff and in such a case under Ex.B.1 it cannot be taken that the same property was transferred in favour of defendant. This is not a case of mistaken identity of property, but this is a case, where the power of attorney sold the suit property illegally, which was already sold to the plaintiff's vendor under Ex.A.1 and who in turn sold it to the plaintiff under EX.A.2.

17. Unambiguously and palpably, the perusal of the Commissioner's Report would indicate and evince that the Commissioner visited the suit property and identified it with the help of both the parties. The sketch, which he had drawn reveals and portrays that the defendant constructed a hut measuring East-West 12-1/2 feet and

North South 17-1/2 feet on the South-Eastern corner of the suit property. As such, I could see no legality on the part of the Commissioner in executing the warrant.

18. There is nothing to indicate and exemplify that the property found exemplified in Ex.B.1 is different from that of the property found in A.1.

19. The question of once again the Commissioner visiting the suit property and measuring it with the help of a qualified Surveyor would arise only when there is wrong identity of the property. In this factual matrix and scenario, this Court is of the view that there is no perversity or illegality in the judgments and decrees of the Courts below.

20. A fortiori, I could see no question of law, much less any substantial question of law involved in this matter and the Second Appeal deserves to be dismissed.

21. In the result, the Second Appeal is dismissed. No costs. Consequently, connected M.P.(MD) No. 2 of 2011 is dismissed.

22. The learned counsel for the appellant/ defendant, on hearing the judgment pronounced would pray for granting sufficient time for the defendant to vacate the suit property and handover the same to the plaintiff. Hence, I am of the view that sufficient time could be granted to the defendant. Accordingly, three months" time from today is granted to the defendant for vacating the suit property and handing over vacant possession of the same to the plaintiff, provided the appellant/ defendant files an affidavit within 15 days from today to that effect. The learned counsel for the respondent/ plaintiff would pray that the E.P. filed before the executing Court may be kept pending, till the appellant/defendant hands over vacant possession of the suit property to the respondent/plaintiff and the same is accordingly, ordered.