

**(2013) 06 MAD CK 0135**

**In the Madras High Court**

**Case No : S.A. No. 903 of 2011 and M.P. No. 1 of 2011**

M. Marimuthu

APPELLANT

Vs

Kuppayammal, Thangappayyan @ Thangarasu and  
Sundarambal

RESPONDENT

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**Date of Decision : 05-06-2013**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 100

**Citation : (2013) 06 MAD CK 0135**

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

**Bench : Single Bench**

**Advocate : T. Murugamanickam, for the Appellant; N. Manokaran for Respondents 1 and 2, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

G. Rajasuria, J.—This second appeal is focussed by the plaintiff, inveighing the judgment and decree dated 22.09.2010 passed by the learned Subordinate Judge, Bhavani in A.S. No. 10 of 2010 confirming the judgment and decree dated 18.12.2009 passed by the learned I Additional District Munsif, Bhavani in O.S. No. 208 of 2007. The parties, for the sake of convenience, are referred to here under according to their litigative status and ranking before the trial Court.

2. A summation and summarisation of the facts as stood uncurtained, which are absolutely necessary for the disposal of this second appeal would run thus:

a] The plaintiff filed the suit seeking the relief of declaration of title and injunction in respect of the immovable property found described in the schedule of the plaint measuring an extent of 654 sq. ft, on the main ground that the plaintiff's father purchased the suit property vide sale deed Ex. A1 dated 15.09.1956 from one Betha Gounder wherein, the suit property is found described as the one situated on the extreme northern portion of it. However, the defendants without any manner of right, are interfering with his enjoyment.

Accordingly, he prayed for decreeing the suit.

b] Per contra, denying and refuting the allegations/averments in the plaint, the defendants 1 and 2 filed the written statement, the gist and kernel of it would run thus:

The same vendor who sold the property to the plaintiff's father as per Ex. A1, also sold as per Exs. A2 and A3, two portions of his property in favour of D1's mother and D2's father respectively. In both the Exs. A2 and A3, it is found specified that those purchasers were entitled to use the pathway laid by the vendor himself for his enjoyment. There is no question of encroaching into the plaintiff's property.

Accordingly, they prayed for the dismissal of the suit.

c] D3 remained exparte.

d] Whereupon issues were framed by the trial court.

e] Up went the trial, during which, the plaintiff examined himself as PW1 along with P.W. 2 and marked Exs. A1 to A6. On the side of the defendants, the second defendant examined himself as DW1 and marked Ex. B1 and the Court documents Exs. C1 and C2 were also marked.

f] Ultimately, the trial court dismissed the suit; as against which, appeal was filed by the plaintiff for nothing but to be dismissed by the first appellate court, confirming the judgment and decree of the trial court.

g] Challenging and impugning the judgments and decrees of both the courts below, the plaintiff has preferred this second appeal on various grounds and also suggesting the following substantial question of law:

a) Whether a vendor who has not retained any right over the property sold under Ex. A1, can subsequently confer such right to a subsequent purchaser?

[extracted as such]

3. Heard both sides.

4. The learned counsel for the appellant/plaintiff would pyramid his argument, which could succinctly and precisely be set out thus:

In Ex. A1, it is found specified that the northern boundary of the plaintiff's property was one Pathayammal's property; as such between Pathayammal's property and the plaintiff's property, there was no pathway or gap at all. However, placing reliance on Exs. A2 and A3, both the courts below erroneously held as though the suit property forms part of a pathway and that the plaintiff cannot lay claim over it, warranting interference in this second appeal.

5. Per contra, the learned counsel for D1 and D2/respondents 1 and 2 placing reliance on Exs. A2 and A3 and also the Commissioner's report and the Field

Measurement Book Sketch would put forth and set forth his argument to the effect that those two documents, viz., Exs. A2 and A3 are ancient documents and from one and the same vendor, the plaintiff's father as well as D1's mother and D2's father purchased their respective plots each measuring three cents. It is specified in those two ancient deeds, the factum of the existence of a well trodden pathway situated therein and these aspects have been dealt with by both the courts below thoroughly and absolutely no question of law much less substantial question of law is involved in this matter, warranting any interference in this second appeal.

6. At the outset itself, I would like to fumigate my mind with the following recent decision of the Hon'ble Apex Court reported in Union of India (UOI) Vs. Ibrahim Uddin and Another, an excerpt from it would run thus:

59. Section 100 CPC provides for a second appeal only on the substantial question of law. Generally, a second appeal does not lie on question of facts or of law. In State Bank of India and Others Vs. S.N. Goyal, , this Court explained the terms "substantial question of law" and observed as under: (SCC p. 103, para 13)

13..... The word "substantial" prefixed to "question of law" does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. "Substantial questions of law" means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties..... any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law..... There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case.

(emphasis added)

7. In the same precedent, the following decisions are found referred to concerning the entertaining of second appeals.

(1) Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.,

(2) Vijay Kumar Talwar Vs. Commissioner of Income Tax, Delhi,

(3) AIR 1947 19 (Privy Council)

(4) (1949) 17 ITR 269

(5) Oriental Investment Co. Ltd. Vs. Commissioner of Income Tax, Bombay,

(6) Jagdish Singh Vs. Natthu Singh,

(7) Prativa Devi Vs. T.V. Krishnan,

- (8) Smt. Satya Gupta Alias Madhu Gupta Vs. Brijesh Kumar,
- (9) Ragavendra Kumar Vs. Firm Prem Machinery and Co.,
- (10) Molar Mal (Dead) Through L.Rs. Vs. M/s. Kay Iron Works(P) Ltd.,
- (11) Bharatha Matha and Another Vs. R. Vijaya Renganathan and Others,
- (12) Dinesh Kumar Vs. Yusuf Ali,
- (13) Jai Singh Vs. Shakuntala,
- (14) Kashmir Singh Vs. Harnam Singh and Another,

8. A mere running of the eye over those precedents would connote and denote, exemplify and demonstrate that the second appeal cannot be entertained as a matter of course unless any substantial question of law is involved.

9. The centri-fodder issue is concerning the description of the properties in Exs. A1, A2 and A3.

a] Ex. A1 emerged on 15.09.1956 and the description as found therein is extracted here under for ready reference:

VERNACULAR (TAMIL) PORTION DELETED

Similarly, it is just and proper to extract here under the schedules of properties as found detailed in Ex. A2 dated 09.06.1958 and Ex. A3 dated 09.08.1960.

VERNACULAR (TAMIL) PORTION DELETED

(emphasis supplied)

Exs. A2 and A3 emerged shortly after the emergence of Ex. A1. No doubt, in Ex. A1, the path way is not found mentioned. However, in Exs. A2 and A3 such pathway is found mentioned. The fact that has to be disambiguated in this case is as to why the vendor after specifying in Exs. A2 and A3 that there existed a pathway adjacent to the property sold to D1's mother and D2's father, failed to specify the said pathway as the western boundary of their plots, for which I would like to point out that it is not uncommon on the part of the villagers to ignore such insignificant or pocu curante boundaries being specified as boundaries, but to specify the distant property as the significant boundary.

10. The maxim Veritas demonstrationist tollit errorem nominis [The truth of the description removes the error of the name ] is squarely applicable in favour of the defendants.

11. A document has to be read in entirety and not only the boundaries to discern and understood the kernel and gist of it, in view of the maxim Verba generalia generaliter sunt intelligenda General words are to be understood generally.

12. Here, the plaintiff undoubtedly, is owning three cents of land as per Ex. A1. Similarly, D1 and D2 are also enjoying their respective three cents of land as per

their Exs. A2 and A3. The existence of that "L" shaped pathway of which, a portion is described as ABCD portion in plaint is found exemplified in the FMB 1992 itself as pathway and a specific number is also assigned to it. In such a case, both the courts below were right in simply discarding the claim of the plaintiff.

13. There is nothing to indicate and exemplify that ever since 1992, the plaintiff had raised his little finger as against the description of the "ABCD" portion as part of the "L" shaped pathway mentioned in the Field Measurement Book and also as against the assigning of a separate number 1096/9 to it. No doubt, mere changes in the revenue records would not defeat the valuable right if any, of the parties concerned. But, in this case, the demarcation in the Field Measurement Book is backed by the description as found in Exs. A2 and A3 by the original owner himself and those documents are ancient documents.

14. Hence, I could see no perversity or illegality in the judgments passed by both the courts below in handling the matter.

15. I would like to recollect and call up the maxims-

(i) *affirmantis est probare* He who affirms must prove.

(ii) *Affirmanti non neganti incumbit probatio*: The burden of proof lies upon him who asserts and not upon him who denies.

16. My mind is reminiscent and redolent of the maxim *ubi jus ibi remedium*-where there is a right, there is a way.

17. Here the plaintiff lays claim on Ex. A1 and under that he could claim only three cents of land, which is very much available with him and scarcely and hardly could it be stated that the plaintiff over and above that is entitled to any portion beyond his three cents of land to the month of it, which he described as "ABCD" portion in plaint. A fortiori, both the courts below were right in dismissing the suit, warranting no interference in this second appeal. On balance, this second appeal is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.