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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.11.2014

Date of decision: 05.06.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.S.RAMANATHAN

SECOND APPEAL No.74 of 2007
and M.P.No.1 of 2007
and
WRIT PETITION No.28430 of 2003

S.A.No.74 of 2007

The Commissioner,
Bhavani Municipality,
Bhavani.

... Appellant/Plaintiff

vs.

1.C.Ramasamy (Deceased)

2.Thangamani, W/o.Late.C.Ramasamy

3.Stalin

4.Dayalammal, D/o.Late.C.Ramasamy

... Respondents/Defendants.

[Respondents 2 to 4 brought on record
as LR's of the deceased sole respondent
vide order of Court dated 13.10.2014
made in M.P.Nos.2 and 3 of 2011 in
S.A.No.74 of 2007]

W.P.No.28430 of 2003

1.C.Ramasamy (Deceased)

2.Thangamani, W/o.Late.C.Ramasamy

3.Stalin

4.Dayalammal, D/o.Late.C.Ramasamy

... Petitioners

[Petitioners 2 to 4 substituted as LR's of
deceased petitioner as per order dated 15.2.2011
in W.P.M.P.No.651 of 2010 in W.P.No.28430 of 2003]



vs.

The Commissioner,
Bhavani Municipality,
Bhavani - 638 302,
Erode District.

... Respondent

PRAYER : Second Appeal filed under Section 100 of the Code of Civil Procedure praying to set aside the Judgment and Decree passed by the Subordinate Judge, Bhavani in A.S.No.7 of 2005 dated 28.03.2006 confirming the Judgment and Decree passed by the II Additional District Munsif, Bhavani in O.S.No.289 of 2003 dated 20.12.2004.

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records pertaining to the order of the respondent dated 30.9.2003 made in Letter No.55/2003/A3 and 56/2003/A3 - O.Mu.No.1886/2003/A3 and 1887/2003/A3 - Letter No.45/2003/A3 and 46/2003/A3, quash the same and consequently permit the petitioner to proceed with the construction as per the approval and sanction order dated 31.7.2003 made in Letter No.55/2003/A3 and 56/2003/A3.

Mr.P.S.Jayakumar : for the appellant in
S.A.No.74 of 2007

Mr.N.Manokaran : for the sole respondent in
S.A.No.74 of 2007
Sole respondent died(steps taken)
Not ready notice regarding
R2 to R4 and

for the petitioner in
W.P.No.28430 of 2013

Mr.V.Subbarayan : for the respondent in
W.P.No.28430 of 2013

COMMON JUDGMENT

Second Appeal No.74 of 2007

The unsuccessful plaintiff is the appellant in the Second Appeal. The appellant filed the suit in O.S.No.289 of 2003 on the file of the District Munsif, Bhavani for declaration that the appellant Municipality is the absolute owner of the suit property shown as "ABCD" in the rough plan and praying for consequential permanent injunction restraining the defendant, his men and agents from in any way putting up further construction over the suit property shown in the plan as "ABCD" and for mandatory injunction



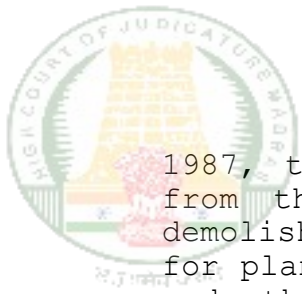
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directing the defendant to remove the encroachment and to deliver possession of the suit property shown in the plan as "ABCD" to the appellant Municipality. The suit was in respect of the property situate in T.S.No.2/1 and 2/2 in Bhavani Sub-Registration District, Bhavani Taluk and Bhavani Municipal Limit and the encroached area is measuring 6.40 Metre North-South, measuring an extent of 0.77 cents as shown in the plaint plan marked as Ex.A.1. The learned trial Judge partly decreed the suit holding that the appellant Municipality is entitled to the suit property in T.S.No.2/1 and dismissed the suit in respect of the suit property in T.S.No.2/2 holding that the appellant failed to prove that the property in Survey No.2/2 wherein the disputed portion marked as "ABCD" in Ex.A.1 situate in T.S.No.2/2 belongs to the Municipality, declined to grant the relief of injunction and mandatory injunction and also delivery of possession of the property in respect of T.S.No.2/2, the portion marked as "ABCD" in the Rough Plan Ex.A.1. Aggrieved by the same, the appellant filed A.S.No.7 of 2005 on the file of the Subordinate Court, Bhavani and the learned First Appellant Judge concurred with the findings of the learned trial Judge and dismissed the Appeal and aggrieved by the same, the present Appeal is filed by the appellant.

2. The case of the appellant/plaintiff in brief is as follows:-

The suit property in T.S.No.2/1, T.S.No.2/2 in Block No.27, Bhavani Town, absolutely belongs to the plaintiff/appellant and the defendant/respondent purchased the property situate on the eastern side of the suit property under three sale deeds. The defendant/respondent is the owner of Survey No.2/3 and he has no right over the property in T.S.No.2/2 and the disputed property shown as "ABCD" in Ex.P.1 is situate in Survey No.2/2. It belongs to the plaintiff/appellant. The defendant was granted permission to put up construction in his property by the plaintiff but the defendant encroached upon the road belonging to the plaintiff/appellant and put up construction and therefore, by order dated 30.09.2003, the planning permission given to the defendant was cancelled and explanation was called for from the defendant and without giving proper explanation, the defendant filed W.P.No.28430 of 2003 on the file of this Court and obtained interim orders. According to the plaintiff, the extent of property encroached upon by the defendant is having an extent of 336 sq.ft (0.77 Cents) and it belongs to the Municipality and the defendant encroached upon the same and put up construction and therefore, the suit was filed for the relief stated above.

3. The defendant contested the suit stating that he purchased the property under three sale deeds Exs.B.5, B.6 and B.7 and those properties are situate east of the road and as per his sale deeds, the western boundary is shown as 12 feet Municipal road and the defendant did not encroach upon 12 feet of municipal road. It is further stated that under three sale deeds, the total extent of property purchased by the defendant was 2785 sq.ft., and in the year



1987, the defendant constructed a building after getting permission from the Municipality and on 31.7.2003, the defendant wanted to demolish the existing building and put up a new building and applied for planning permission and that was also granted by the Municipality and that planning permission was valid till 2006 and during construction of the building, the plaintiff cancelled the planning permission without any notice and the defendant has not encroached upon the property belonging to the plaintiff and therefore, the suit is liable to be dismissed.

4. The trial Court framed the following issues for consideration:-

(i) Whether the suit property belonged to the plaintiff?

(ii) Whether the plaintiff was entitled to the relief of declaration?

(iii) Whether the plaintiff was entitled to permanent injunction?

(iv) Whether the plaintiff was entitled to the relief of mandatory injunction?

(v) Whether the plaintiff was entitled to the recovery of possession of the suit property?

(vi) To what relief the plaintiff is entitled to?

5. The plaintiff/appellant examined a Junior Engineer of the Municipality as PW.1 and a Draftsman in the Taluk Office as PW.2 and one more witness as PW.3 and marked 13 Exhibits. The defendant examined himself as DW.1 and marked 10 Exhibits. An Advocate Commissioner was appointed by the Court to inspect the suit property and the Advocate Commissioner filed a report and two plans and those were marked as Exs.C1 to C3.

6. The trial Court tried issues 1 to 5 together and held that the plaintiff was the absolute owner of the suit property in T.S.No.2/1 and in respect of T.S.No.2/1, the plaintiff was entitled to the decree of declaration. The trial Court further held that the plaintiff failed to prove that it is the title holder of the property in T.S.No.2/2 and therefore, the plaintiff is not entitled to the relief of declaration in respect of the property in T.S.No.2/2. According to the plaintiff, the encroachment committed by the defendant was only in respect of T.S.No.2/2 and as the plaintiff failed to prove its title to T.S.No.2/2, the relief of injunction, recovery and possession sought for by the plaintiff cannot be given.



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7. The First Appellate Court framed the following points for consideration:-

(i) Whether the judgment of the trial Court was without proper appreciation of evidence?

(ii) Whether the judgment of the trial Court in dismissing the suit filed by the Bhavani Municipality can be sustained?

(iii) Whether the plaintiff before the trial Court, Bhavani Municipality, had established its case that the defendant had encroached the land belonging to the Municipality, the tar road belonging to the Municipality?

(iv) Whether the plaintiff before the trial Court is entitled to the relief of declaration of title to the survey number 2/27?

(v) Whether the plaintiff before the trial Court is entitled to the relief of permanent injunction against the defendant and mandatory injunction to demolish the encroachment on Survey No.2/2?

The First Appellate Court discussed in detail the evidence both oral and documentary and answered Point (i) in favour of the respondent/defendant and against the appellant and also answered the other points against the appellant and aggrieved by the same, the Second Appeal is filed.

8. The Second Appeal was admitted on the following substantial questions of law:-

(a) Whether both the Courts below were correct in rejecting the claim of the plaintiff by dismissing the suit, when the relief sought for in respect of the property has been classified as Boosthathi Tar Salai as per records?

(b) Whether the Courts below were correct in rejecting the relief in respect of S.No.2/2, while granting the relief of declaration in respect of S.No.2/1 when both the properties have been classified as Boosthathi Tar Salai?

9. The learned counsel appearing for the appellant submitted that the Courts below without properly appreciating the Exhibits filed by the appellant erred in holding that the appellant failed to



prove his title in respect of T.S.No.2/2. He submitted that Ex.A.9 - Town Survey Register maintained by the Taluk Office of Bhavani clearly proved the case of the appellant and in Ex.A.9, it has been clearly stated that T.S.No.2/1 is a Panchayat Tar Road and T.S.No.2/2 as Boosthathi Tar Road. He also submitted that the learned Advocate Commissioner also inspected the property with the help of a draftsman from Taluk Surveyor Office and as per Exs.C.2 and C.3, the respondent/defendant has encroached upon the portion marked as "ABCD" to an extent of 336 sq.ft (0.77 Cents). He therefore submitted that having regard to Ex.A.9 and Exs.C.2 and C.3, the appellant has proved that T.S.No.2/2 is classified as Boosthathi Tar Road and therefore, it vested with the Panchayat and later with the Municipality and as per Exs.C.2 and C.3, the respondent has encroached upon T.S.No.2/2 to an extent of 336 sq.ft (0.77 Cents) shown as "ABCD" in Ex.A1 and these aspects were not properly appreciated by the Courts below and therefore, submitted that even though the respondent was originally granted permission to put up construction in the suit property, the permission was cancelled by order dated 30.9.2003 and the cancellation of the permission was also marked as Ex.A.8 and thereafter, show cause notice was given. The respondent/defendant without giving proper explanation, filed Writ Petition No.28430 of 2003 and obtained interim order and therefore, the appellant/plaintiff was constrained to file the suit for declaration and as the plaintiff/appellant has proved title through revenue records, the Courts below ought to have decreed the suit in entirety and erred in rejecting the suit in respect of T.S.No.2/2. Therefore, the Courts below ought to have decreed the suit in respect of the property in T.S.No.2/2, which has been declared as Boosthathi Tar Road which only means that the land originally belonged to the individual and later, the same was given to the Government for public purpose and having given the land for public purpose, it is not open to the respondent/defendant to encroach upon the same and to put up construction. Therefore, the Appeal has to be allowed. He also relied on the judgment reported in (2000)3 M.L.J.10 in the matter of A.Komalavalli vs. The Madras Area Defence Services Co-operative House Construction Society Ltd., in support of his contention.

10. On the other hand, learned counsel appearing for the respondent submitted that the respondent/defendant purchased the property situated on the eastern side of the road under three sale deeds marked as Exs.B.5, B.6 and B.7 and in the year, the respondent sought for permission from the Municipality from putting up construction in the property purchased by him under Exs.B.5 and B.6 and permission was granted under Ex.B3. Under Ex.B.4, Special Officer, Municipal Office, Bhavani issued the certificate to the effect that the property in Town Survey No.824/2 and 3 measuring an extent of 205.00 sq.metres belongs to the respondent and Tmt.Maqbul John and planning permission was given to these persons by proceedings No.90/81-82 and he submitted that old Survey Nos.2 and 3 are now reclassified as now T.S.No.2/2 & 3 and these two Exhibits would prove that the respondent was granted permission even in the



year 1987 for putting up construction and even in the year 2003 when the respondent/defendant wanted to demolish the existing construction and put up new construction in the same place, that was approved and permission was given as evidenced by Exs.B.3 and B.4 and as per the sale deeds Exs.B.5 to B.7 the western boundary is 12 feet road which is situate in T.S.No.2/2 and even according to the Commissioner's Report, the measurement was not taken from the undisputed survey stone as it was not available in that area and it is admitted in the Commissioner's report that Bhavani Tar Road is not having uniform width when it goes towards south and as a mater of fact, the buildings on the western side of the defendant were found on the alleged Bhavani Tar Road and that was approved by the Municipality and according to the Commissioner's Plan, Boosthathi Tar Road in T.S.No.2/2 ends with the respondent's property and that would also prove that the case of the appellant cannot be right. He also submitted that PW.2, Taluk Surveyor also admitted that Boosthathi Tar Road means the land belongs to the pattadar and T.S.No.2/2 belongs to Pattadar and there was no record to prove that the land in T.S.No.2/2 was given to the Panchayat or Municipality. Considering all these aspects, both the Courts below have rightly held that in respect of T.S.No.2/2, the appellant failed to prove his title and dismissed the suit and therefore, there is no need for any interference with the judgment of the Courts below.

11. As stated supra, the Second Appeal was admitted on the substantial questions of law as stated above. The appellant is the plaintiff and the appellant filed the suit for declaration, injunction and for recovery and possession claiming that T.S.No.2/2 is a road vested with the Municipality and the defendant/respondent encroached upon that property. To prove that T.S.No.2/2 is a public road, the plaintiff/appellant relied upon Ex.A.9, the Taluk Office record wherein in the Town Survey Register T.S.No.2/2 is mentioned as Boosthathi Tar Road having an extent of 0.77 sq.metres. Except this record, there is no other document filed by the appellant to prove his claim over T.S.No.2/2. Though the suit was filed in respect of T.S.No.2/1 and 2/2, insofar as T.S.No.2/1 is concerned, the suit was decreed as the respondent did not make any claim in respect of T.S.No.2/1 and the dispute is only with respect to T.S.No.2/2. The trial Court as well as the First Appellate Court dealt with the phrase "Boosthathi Tar Road" mentioned in Ex.A.9. It is not disputed that the word "Boosthathi" refers to patta land belonging to private individuals and the same was also admitted by PW.2 in evidence. It is a Tar Road on patta land and no evidence was let in by the appellant to the effect that the pattadars who are the owners of the land on which road was laid dedicated the same to the panchayat or Municipality.

12. In the judgment reported in (2000)3 M.L.J.10 supra, it has been held that unless private parties to whom the land belongs execute conveyance deed in favour of panchayat, the panchayat or local bodies cannot claim such roads as public road. It is also



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held in the same judgment that if a road itself formed in a private property and so long as it is not dedicated as public road, nobody can claim as a matter of right to pass through or to make use of the same as pathway. As stated supra, the appellant failed to prove dedication of the road in T.S.No.2/2 by the owners of the property. Therefore, when there is no dedication by the owners, merely as it is stated in Ex.A.9 that T.S.No.2/2 is Boosthathi Tar Road, it cannot be presumed that it is a road belonging to the Municipality.

13. In the judgment reported in (2014) 2 Supreme Court Cases 269 in the matter of Union of India and others vs. Vasavi Cooperative Housing Society Ltd and others, it has been held that the revenue records do not confer title. Even if the entries in the revenue record state that T.S.No.2/2 is a Boosthathi Tar Road, that itself would not confer any title. The plaintiffs have to show independent of those entries, that the land was dedicated to the appellant by the owners. Therefore, on the basis of Ex.A.9, the appellant cannot claim any right over T.S.No.2/2 and claim that it is a public road. It is seen from the Commissioner's Report that surveyor was not able to locate the survey stone as per the Town Survey Records and he measured the property by using the measurements available with the houses and buildings in the street and the request of the respondent to surveyor to measure the area using Bhavani river which is on the western side of the suit property was not considered. Further, it is admitted that the defendant had already put up construction in his property after getting permission from the Municipality even in the year 1987 and thereafter, in 2003, he applied for permission to put a new construction in the same place and that was granted by the appellant. As per Exs.B.1 and B.2, western boundary of the property belonging to the defendant is only 12 feet road and at the time of granting permission to construct the building by the defendant, no claim was made by the appellant on the western boundary as the land in T.S.No.2/2 is a public road. These aspects were properly appreciated by the Courts below and considering the oral and documentary evidence, both the Courts below have rightly held that the appellant failed to prove its title in respect of the land in T.S.No.2/2 and being the plaintiff/appellant, it has to prove its title and it cannot take advantage of the weaknesses of the defendant and having failed to prove its title, the appellant is not entitled to the relief prayed for.

14. I have gone through the judgment of the Courts below and I am satisfied that the Courts below have given cogent reasons for arriving at the conclusion that the appellant failed to prove its title in respect of T.S.No.2/2 and the disputed portion "ABCD" shown in Ex.A.1 is running through T.S.No.2/2 and in the absence of any title, the plaintiff cannot restrain the defendant from putting up construction in T.S.No.2/2. Hence, the substantial questions of law are answered against the appellant. I hold that the Courts below rightly granted the decree of declaration in respect of T.S.No.2/1 and rejected the claim of the appellant in respect of T.S.No.2/2 and the



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appellant failed to prove its title in respect of T.S.No.2/2 and Ex.A.9, the Survey Register did not confirm title to the appellant in respect of T.S.No.2/2. Hence, the judgment and decree of the Courts below are confirmed. The Second Appeal is dismissed. The connected Miscellaneous Petition is closed. No costs.

W.P.No.28430 of 2003

15. The petitioner in W.P.No.28430 of 2003 was the defendant/respondent in the Second Appeal No.74 of 2007. The respondent/appellant issued Memo dated 30.9.2003 cancelling the planning permission given to the petitioner/defendant and the same was challenged in this Writ Petition.

16. The respondent/Municipality initially granted permission to the petitioner to put up construction and later cancelled the permission by the impugned order without giving any notice or show cause notice and the reason for cancellation as stated in the impugned notice is that the measurement given by the petitioner in his plan is more than the measurement given in the FMB Sketch and therefore, the petitioner has encroached upon the property belonging to the Municipality and therefore, the permission was cancelled. It is not in dispute that before cancelling the planning permission, no opportunity was given to the petitioner to submit his explanation and admittedly, show cause notice calling for the explanation was issued after cancellation of planning permission by the impugned order dated 30.9.2003. Further, the Second Appeal No.74 of 2007 filed by the respondent/Municipality was dismissed holding that the respondent/Municipality failed to prove its title in respect of the property in T.S.No.2/2, which was claimed to have been encroached by the petitioner. Therefore, once the claim of the Municipality in respect of the property in T.S.No.2/2 is negatived holding that the Municipality has no title over the property in T.S.No.2/2, even assuming that the petitioner/defendant put up construction in T.S.No.2/2, the same cannot be questioned by the respondent/Municipality. Therefore, the impugned notice dated 30.9.2003 issued by the respondent/Municipality cancelling the planning permission given to the petitioner is set aside and the Writ Petition is allowed. No costs.

asvm

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar



To

1. The Subordinate Judge,
Bhavani.

2. The Second Additional District Munsif,
Bhavani.

3. The Commissioner,
Bhavani Municipality,
Bhavani.

+ 1 cc to Mr.N.Manoharan, Advocate SR 27277

+ 1 cc to Mr.S.Parthasarathy, Advocate SR 27111

lrs(co)
prk30/6

Judgment in
S.A. No.74 of 2007
and M.P.No.1 of 2007

and

W.P.No.28430 of 2003