

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.11.2016

PRONOUNCED ON : 15.11.2016

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.51 of 1996

R.Moses

...Appellant

Vs

1.Kubendra Singh

2.Chatta Singh

3.Vasu Singh

... Respondents

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 04.08.1995 passed in A.S.No.73 of 1994 on the file of the District Additional Special Court, Krishnagiri reversing the judgment and decree dated 16.12.1992 passed in O.S.No.232 of 1988 on the file of the learned District Munsif, Krishnagiri.

For Appellant : Mr.S.Udhayakumar

For RR1 & 2 : No Appearance

For R.3 : Dismissed vide order dt20.03.2013

JUDGMENT

This second appeal is directed against the judgment and decree of the First Appellate Court reversing the judgment and decree of the trial Court.

2.The case of the appellant/plaintiff is that, he purchased the suit property bearing S.No.190/1 at Achamangalam Village, Burgur Taluk at Krishnagiri District on 06.11.1987 under the registered sale deed for valuable consideration from one Mr.R.Selvaraj. The total extent of the land is 1.59 acres. While he is in absolute possession and enjoyment of the said property, the defendants who are the neighbouring land owners had developed animosity against him over his refusal of contribution to construct a temple. They are causing frequent disturbance to the plaintiff's possession and enjoyment of the suit property by trying to trespass into the suit land and destroying the standing crops. Alleging attempt to trespass and disturbance to the peaceful possession of the suit property, the suit for temporary injunction and appointment of Advocate Commissioner to identify the suit property filed.

3.The defendants in their written statement, contended that the vendor of the plaintiff never enjoyed any portion beyond the pathway on the East of the property and the pathway in between the land of the plaintiff and the defendants is found in the Commissioner's report. There is a clear ridge between the land of the plaintiff and the defendant. The trees which are claimed by the plaintiff are in fact planted by the defendants and their predecessor-in-title. It is enjoyed by them as their property. The plaintiff has destroyed those trees and also claiming right over the Well found to be situated on the land of the defendants. Though, the plaintiff's title does not convey any right over the Well, he claims 10 feet East to close 120 meters North to South which is a portion exclusively with the defendants' and their ancestors. After obtaining an exparte injunction in the suit, the plaintiff has encroached upon a piece of their land.

4.The defendants in their written statement had pleaded that the land of the plaintiff lay West of the pathway and the disputed portion absolutely belong to the defendants. Even if, the disputed portion forms part of S.No.195/1, the plaintiff and his predecessor in title never enjoyed the same and it was the defendants and their predecessor alone were in possession and enjoyment of the same for

over a statutory period and any defect in title will be rescued by law of adverse possession.

5. With this plea, the parties went on trial and the trial Court has framed the following issues:-

“(i) Whether the plaintiff is entitled for the relief of declaration in respect of the suit schedule property as prayed for ?;

(ii) Whether the plaintiff is entitled for injunction ?;

(iii) Whether the plaintiff has any cause of action over the suit ?;

(iv) Whether the plaintiff is not entitled to file a suit as there is no cause of action ?

(v) What other reliefs the plaintiff is entitled to ?”

6. After appreciating the evidence let in by the parties, the trial Court has found that the plaintiff has purchased 1.59 acres of land from one Mr. Selvaraj and the land is situated in S.No.195/1. The land of the defendants is in S.No.195/2. The Commissioner who has inspected the suit property has gone beyond the scope of his warrant and has without noting down the physical feature of S.No.195/1, in its proper perspective, has spoken about S.No.195/2B and 2C. The trial Court on appreciation of the Commissioner's report and sketch, has observed that the Commissioner who is not experienced in measurements have not properly measured S.No.195/1 with boundaries and furnished these boundaries. On appreciation of Exhibits A.1 & A.3, the trial Court has concluded that these documents do not speak about any pathway as one of the boundaries and therefore, the plea of the defendants that there is a pathway on the West of the plaintiff's property owned by the defendants is not true. Having held so, the trial Court has allowed the suit for declaration that S.No.195/1 is owned by the plaintiff and he is entitled for injunction against the defendants in so far as S.No.195/1 to the extent of 1.59 acres.

7. Aggrieved by this, the defendants have approached the First Appellate Court and the First Appellate Court on re-appreciating the

evidence has accepted the Commissioner's report and held that there is a pathway running South-West and a round Well is found in S.No.195/2 owned by the defendants. In respect of Commissioner report – Ex.C.1 and sketch Ex.C.2, the First Appellate Court has not agreed with the finding of the trial Court. Since, the Commissioner's report and sketch have not been objected by the defendants, the First Appellate Court has held that, it has to be accepted. With this premise, the First Appellate Court has reversed the finding of the trial Court and dismissed the suit. Hence, the plaintiff has preferred this second appeal.

8.While admitting this second appeal this Court has formulated the following substantial question of law:-

“1.Whether the lower appellate Court is not correct in law in reversing the well considered judgment of the lower Court ?

2.Whether the lower Appellate Court has correctly held that the survey No.195/1 belongs to the defendants ?

3.Is not the lower Court correctly traced the title of the plaintiff based on the sale deed, patta and kist paid receipts in his favour ?”

9.The learned counsel for the appellant read through the judgment of the trial Court and the First Appellate Court and pointed out that while the trial Court has found that the Commissioner's report has not thrown any light in respect of the boundaries of S.No.195/1 which is the subject matter of the suit, the First Appellate Court has accepted it for a simple reason that it was not objected by the parties. The First Appellate Court has erred in doing so and even while appreciating the evidence of the Commissioner's report, he has not properly applied his mind. Above all, it is the contention of the learned counsel for the appellant that when the suit was filed for declaration in respect of S.No.195/1, to the extent of 1 acre 59 cents, the First Appellate Court has gone into the pleadings of the defendants in their written statement and given a finding amounting to a relief which was not prayed or pleaded by the defendants.

10.This Court on going through the judgment of the First Appellate Court finds that there is force in the submission made by the learned counsel for the appellant in this score.

11.The very specific case of the plaintiff is that he has purchased 1.59 acres of land in S.No.195/1 from Mr.Selvaraj through a valid sale deed and he is in possession and enjoyment of the property. While so, the defendants are disturbing his peaceful possession. If the defendants have any right or claim over the pathway and a Well alleged to be in their land, they should have sought relief in this regard independently. Contrarily in the suit for injunction, Lower Appellate Court has granted title over a pathway and Well to the defendants even without a prayer.

12.This Court, is constrained to point out one more serious infirmity in the judgment of the First Appellate Court. While appreciating the Commissioner's report, the First Appellate Court has observed that, "the Commissioner has surveyed the land with the help of the Village Administrative Officer, the report and sketch were prepared with the help of Surveyor and the Commissioner has mentioned that he saw the F.M.Sketch of property and found that the

Well is found in the defendants property". This Court on examination of Commissioner's report and Sketch – Exs.C.1 & C.2, find the Commissioner has not annexed the F.M Sketch nor stated that from whom he has got that. Further, curiously the Commissioner has also stated that, "on memo, given by the defendants Counsel, he again inspected the properties of the plaintiff and the defendant, in the presence of learned counsel for the defendants alone". The report does not say when he made this inspection and whether the Village Administrative Officer was present at that time.

13.From the Commissioner's report - Ex.C.1, it appears that he inspected the disputed properties on 30.04.1998. At that time, the plaintiff counsel, the Village Administrative Officer and the plaintiff were present but, the defendants were not present. He has not mentioned the name of the Village Administrative Officer or whether he was assisted by Surveyor and he was presented with proper revenue documents. This is the reason why the trial Court has not given much credence to the commissioner's report. Whereas, the First Appellate Court overlooking all these aspects, has relied upon the Commissioner's report and dismissed the suit and also contrarily granted declaratory relief to the defendants, in respect of Well even without a prayer. For these reasons, this Court is constrained to set

aside the judgments passed by the Courts below.

14. In the result, the second appeal is allowed. Since, the commissioner's report is not adequate to throw enough light about the physical feature of S.No.195/1, the matter is remanded back to the trial Court for proper appreciation of evidence, appointing a new advocate commissioner to note down the physical feature of the suit property and arrive at appropriate conclusion. There shall be no order as to costs.

15.11.2016

jbm

Index: Yes/No

To

1.The District Additional Special Court,
Krishnagiri.

2.The District Munsif,
Krishnagiri.

Dr.G.JAYACHANDRAN.J.,

jbm

**Pre Delivery Judgment made in
Second Appeal No.51 of 1996**

15.11.2016