

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :30.11.2016

Pronounced on : 20.12.2016

CORAM

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

**Second Appeal Nos.105 of 2008 and 1193 of 2009
and
M.P.Nos.1 and 2 of 2008 and M.P.No.1 of 2009**

Abdul Wahab

.. Appellant in
S.A.No.105/2008

The Nilgiris District Co-operative
Milk Producer's Union Ltd., a
Co-operative Institution constituted
under the Tamilnadu Co-operative
Societies Act and having its office
at New Dairy Complex
and Represented by its Managing
Director, M.Gnanaguru.

..Appellant in
S.A.No.1193 of 2009

/vs/

The Nilgiris District Co-operative
Milk Producer's Union Ltd.,
Rep.by its Managing Director,
M.Gnanaguru,
Managing Director's Quarters,
Old Dairy Complex,
Ettines Road, Ootacamund,
Nilgiris.

..Respondents in
S.A.No.105 of 2008

Abdul Wahab

.. Respondent in
S.A.No.1193 of 2009

Common prayer: Second Appeals filed under Section 100 of Civil Procedure Code against the judgment and decree dated 29.08.2007 and made in A.S.No.8 of 2007 on the file of the District Judge of the Nilgiris at Udhagamandalam, confirming, modifying respectively the judgment and decree dated 19.04.2007 and made in O.S.No.116 of 2005 on the file of the Subordinate Judge, Udhagamandalam.

For appellant	:Mr.V.Raghavachari for Mr.N.IstiaqAhmed in S.A.No.105/08
For appellant	:Mr.V.Ayyadurai, AAG-II for Mr.G.Munirathinam in S.A.No.1193 of 2009
For Respondent	:Mr.V.Ayyadurai, AAG-II for Mr.G.Munirathinam in S.A.No.105/08
For Respondent	:Mr.G.Suryanarayanan in S.A.No.1193/09

COMMON JUDGMENT

These two appeals are directed against the judgment and decree dated 29.08.2007 and made in A.S.No.8 of 2007 on the file of the District Judge of the Nilgiris at Udhagamandalam, modifying the judgment and decree dated 19.04.2007 and made in O.S.No.116 of 2005 on the file of the Subordinate Judge, Udhagamandalam.

2. The brief facts leading to these appeals are as under:-

One Mrs.Sarah Varkey is the common vendor of the

contesting parties. On 30.01.978, she had sold 3.48 acres of land in Old S.No.1163/1[New S.No.1011/5] to Tamil Nadu Dairy Development Co-operative Union Limited, at Gudalure Village and Taluk. The sale deed is Ex.A1. In the said sale deed, the vendor has described four boundaries of the property and it indicates that the vendor has retained land on all the four sides of the property sold. One and half years later (i.e.)on 28.9.1979, she has sold 9 cents of land to one Sarabee, W/o Mohideen. The said sale deed is Ex.B1. As per the description of the property in the sale deed Ex.B1, the said 9 cents lie on the north of land sold to the Tamil Nadu Dairy Development Co-operative Union Limited by the vendor. Later, in turn, the said Sarabee had sold the said 9 cents to one K.Abdul Wahab, vide sale deed dated 3.12.1982, which is Ex.B2. While so, on 18.12.1996, the Managing Director of the Nilgiris District Co-operative Milk Producer's Union lodged a complaint stating that Abdul Wahab and his men are trying to trespass into the land by removing the fence. In the said complaint, they have mentioned about the civil suit in O.S.No.113 of 1996 pending between them and Abdul Wahab on the file of the District Munsif Court, Gudalur.

3. It is admitted by both the parties that the suit in O.S.No.113 of 1996 was filed by Abdul Wahab against the Nilgiris District

Co-operative Milk Producer's Union Limited and Assistant Manager of the first defendant for the relief of permanent injunction restraining the defendants and their men from interfering the plaintiff's peaceful possession and enjoyment of the suit property, which was purchased by the plaintiff from one Mrs.Sarabee, vide the registered sale deed of the year 1982 and also admitted that that suit was decreed in favour of the plaintiff.

4. While so, the Nilgiris District Co-operative Milk Producer's Union Limited also has filed a suit in O.S.No.116 of 2005, which is subject matters of the appeals for declaration that the defendant Abdul Wahab has encroached upon the plaintiff's land to an extent of 9.350 cents and to direct the defendant to deliver the possession of the encroached land to the plaintiff and also consequential injunction restraining the defendant from putting up the permanent or temporary constructions in the suit schedule property.

5. The trial Court, on the basis of the pleadings has framed the following issues:-

"1.Whether the plaintiff is entitled to the prayer of injunction?

2. Whether the plaintiff is entitled to the permanent injunction?

3. To what relief?"

6. The trial Court, after considering the evidence such as Ex.A1 to A19; Ex.B1 to B18; Ex.C1-Commissioner's Report and Ex.C2-Plan; and the ocular evidence of P.W.1 and 2 and D.W.1, has decreed the suit as prayed for.

7. Aggrieved by the finding of the trial Court, the defendant viz., Abdul Wahab has preferred an appeal in A.S.No.8 of 2007 before the first appellate Court and the first appellate Court in the course of hearing the appeal, has admitted two documents as additional documents on behalf of the appellant/plaintiff and they were assigned as Ex.A20 and Ex.A21, which are the clarification letter dated 21.8.2007 given by the Assistant Director (in-charge), Survey and Land Records, Udhagamandalam and sketch dated 22.8.2007 was given by the Licenced Building Surveyor to the Gudalure Municipality. The first appellate Court, on re-appreciation of evidence and relying upon the newly admitted documents, which were marked as Exs.A20 & 21, has modified the trial Court's judgment to that effect that the plaintiff is entitled to a decree as

prayed for only in respect of the green washed portion of the decree.

8. Aggrieved by this finding, the appellant/defendant has preferred the second appeal in S.A.No.105 of 2008 and as against the modification of the trial Court decree, the appellant/plaintiff has preferred the second Appeal in S.A.No.1193 of 2009.

9. At the time of admission, the learned counsel for the appellant in S.A.No.105 of 2008 submitted that both the Courts below have over looked to appreciate the fact that both the plaintiff and defendant prayed for title through the common vendor under the description of the boundary in Ex.A1. The title deed of the plaintiff clearly indicates that the northern boundary is remaining portion of S.No.163/1 and the same being retained by the vendor. Later, vide Ex.B1 the vendor has sold 9 cents of her land to the defendant morefully describing its southern boundary as the land owned by the plaintiff. When there is no discrepancy in the description of the property nor the extent of property held by the respective parties, the Courts below ought not to have granted the relief sought for by the plaintiff. Furthermore, Exs.A20 and A21, which were admitted in evidence at the appellate stage were the documents prepared behind the back of the appellant without notice.

They are not a conclusive proof in view of the recital found in Ex.A14, which is the survey report made in co-ordination with Revenue Divisional Officer, Gudalur and Assistant Director of Survey and Land Records. It is also submitted by the learned counsel appearing for the appellant that the respective sale deeds of the party contains the sketch of the property alienated by Mrs.Sara Varkey. However while marking Ex.A1 and Ex.B1, the sketch was not enclosed and omitted to be marked. Sale deeds along with sketch has to be admitted in evidence as additional documents. To that effect, the appellant has taken out an application under Order 41 Rule 27 of Civil Procedure Code and the same is numbered as C.M.P.No.1 of 2008 in S.A.No.105 of 2008.

10. The learned counsel appearing for the respondent in S.A.No.105 of 2008, who is also the counsel appearing for the appellant in S.A.No.1193 of 2009 submitted that the lower appellate Court ought not to have disallowed the claim of 2.97 cents in favour of Abdul Wahab the defendant based on Ex.B3-patta, since the patta was obtained by the defendant, without notice to the plaintiff.

11. Further, the learned counsel for the plaintiff/appellant in S.A.No.1193 of 2009 submitted that the lower appellate Court ought

not to have relied upon the judgment and decree passed in the earlier suit in O.S.No.113 of 1996, which is only for bare injunction and the title or extent of property in dispute had never been decided. It was contended that the finding of the lower appellate Court that the plaintiff/appellant did not claim any right in S.No.1011/5B and the ownership of deeds of land vested with the defendant/respondent in S.A.No.1193 of 2009, is wrong.

12. From the submissions made by the learned counsel appearing for the respective parties and the judgments of the Courts below, it is clear that the sketch annexed with the document of title deed viz., Exs.A1 and B1, were not placed before the Court for proper appraisal. It is also borne out by records that while admitting Exs.A20 and A21, the lower appellate Court has not given adequate opportunity to the appellant. However, he has heavily relied upon it for modifying the decree of the trial Court. It is brought to the notice of this Court by the learned counsel for the appellant in S.A.No.105 of 2008 and the respondent in S.A.No.1193 of 2009 that (1) where a boundary is disputed, the survey officer, after making such enquiry as he considers necessary, shall determine the boundary and record it in accordance with his decision. The survey officer shall record in writing the reasons for his

decision. (2) Notice to parties to the dispute and to registered holders of lands affected. Notice of every decision for the survey officer under Section 10(1) shall be given in the prescribed manner to the parties to the dispute and other registered holders of the lands the boundaries of which may be affected by the decision.

13. It was also pointed out that under Order VII, Rule 3 of the Code of Civil Procedure, "where the subject matter of the suit is immovable property, the plaint shall contain a description of property sufficient to identify it, and in case, such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

14. Pointing out the suit schedule, the learned counsel submitted that the subject matter of the suit property has not been properly described. This Court finds force in the submission made by the learned counsel appearing for the appellant.

15. Apart from, describing their survey number and total extent sold to them, the portion of the land alleged to have encroached by the defendant, has not been properly described and the sketch

submitted along with the plaint and green washed portion as found in the plaint sketch also does not give any idea about the suit property in dispute. As pointed out earlier, the sketch annexed to the respective sale deeds are also not placed before this Court. Only at the stage of appeal, one of the party has come out with the sketch, which is very crucial document to ascertain and de-mark the respective portion of the contesting parties. When and what exactly the land or area over which, the dispute is in question for consideration. In the absence of clear and proper description of the property in the plaint mere supply of a rough sketch map by annexing the same to the plaint and the evidence to the above effect, it will be difficult to the Court to pass decree and even if, such a decree is passed, it could be in-executable or would render otiose.

16. In these cases, both the parties derived the title from a common vendor viz, Sara Varkey. Their documents are almost executed during the same period and it is only now at second appeal stage brought to light that the sale deed contains a map annexed, but it was not presented before the Courts below by either of the party. Though the sketch has been annexed to the plaint, it is seen that a rough sketch does not carry any demarcation of property and further, it is also contrary to the sale deed-Ex.A1 and Ex.B1.

17. Therefore, this Court is of the opinion that the plaintiff has laid the plaint without proper description of the suit schedule property. Even if there is a decree, it is in-executable and the decree holder cannot harp upon Ex.A21-sketch, which was prepared by the surveyor without notice to the party adverse to it namely the appellant in S.A.No.105 of 2009.

18. So, in the interest of justice, this Court remands the matter back to the trial Court to appoint an Advocate Commissioner and to inspect the disputed property along with the District Surveyor and also submit the report along with sketch. The measurement shall be done by the District Surveyor, after giving due notice to both the parties. The rights of the party to let in fresh evidence and mark documents and the other incidental relief are left open. The judgments and decrees passed by the Courts below are set aside and ***the Second Appeals are allowed*** and the matter is remitted back to the trial Court for fresh consideration. The trial Court shall re-admit the suit under its original number in the file of the civil suit and determine the suit afresh. If any evidence is recorded during the original trial, it is a subject to all just exceptional evidence during the trial, after remand. It is made clear that

the parties are entitled to let in fresh evidence or mark documents in the manner known to law. No costs. Consequently, connected Miscellaneous Petitions are closed.

20..12.2016

ari

Index:yes/no

Internet:yes/no

To

- 1.The District Judge of the Nilgiris at Udhagamandalam
- 2.The Subordinate Judge, Udhagamandalam

Dr.G.Jayachandran, J.

ari

**Judgements made in
S.A.Nos.105/2008 and 1193/2009**

20..12.2016