

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 26.09.2018

DELIVERED ON: 01.10.2018

CORAM:

THE HON'BLE MRS.JUSTICE R. HEMALATHA

S.A.No.799 of 2001

D.Vishalakshi ... Appellant/Appellant/Plaintiff

Vs.

1. Govt. of Tamil Nadu,
Represented by District Collector,
Salem.

2. Superintending Engineer,
PWD Salem and Dharmapuri Circle,
Salem - 7.

3. Tahsildar (Head Quarters),
Salem.

... Respondents/Respondents/Defendants

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the decree and judgment dated 18.08.1999 passed by the Principal Sub Judge, Salem in A.S.No.23 of 1998 upholding the decree and judgment dated 28.11.1997 passed by the II Additional District Munsif, Salem in O.S.No.1192 of 1989.

For Appellant : Mr.R.Nagasundaram
for Mr.T.R.Rajaraman

Respondents : Mr.M.Venkadesh Kumar,
Government Advocate (Civil Side)

JUDGMENT

The plaintiff in O.S.No.1192 of 1989 on the file of the II Additional District Munsif, Salem who is also the appellant in A.S.No.23 of 1998 on the file of the Principal Sub Judge, Salem has filed the present second appeal.

2. The appellant/plaintiff filed the suit in O.S.No.1192 of 1989 before the II Additional District Munsif, Salem seeking for a declaration of her title to the suit 'A' schedule property

and for a permanent injunction restraining the defendants from interfering with her peaceful possession and enjoyment over the suit 'A' schedule property. She has also prayed for declaring that she has perfected her title in respect of 'B' schedule property. Suit 'A' schedule properties are patta lands situate in survey numbers 89/1, 89/3 and 92/4 of Neikarapatty Village, Salem and they were purchased by the plaintiff's husband Duraisamy Nadar. After the death of Duraisamy Nadar, the appellant/plaintiff has been in possession and enjoyment over the said property by raising crops and also paying land revenue. According to the appellant, there were 19 coconut trees and other trees in suit 'A' schedule property.

2(i) The 'B' schedule property consists of survey numbers 85/2 and 87 of Neikarapatty Village measuring 5 cents. Though the said property is a government land, she and her predecessors in title were in continuous possession and enjoyment for more than 65 years and had thus, prescribed title by adverse possession and prescription. It is the contention of the appellant/plaintiff that there are coconut trees and standing sugarcane crops in the 'B' schedule property also and that the government had lost its right over the said property.

2(ii) The plaint was subsequently amended, wherein it is contended that the respondents/defendants under the guise of renovation of water channel, had cut down the coconut trees and also sugar cane crops in 'A' and 'B' schedule properties and had annexed 15 cents of patta land belonging to the appellant/plaintiff. The appellant/plaintiff has therefore, prayed for a mandatory injunction directing the respondents/defendants to remove the encroachments made by them in their property in survey No.89/1. In the prayer column, the encroached portion is indicated as 15 cents in survey number 89/1, as described in the advocate commissioner's report and plain (Ex.C1 to Ex.C4).

3. The 3rd respondent/3rd defendant filed a written statement and the same was adopted by the respondents 1 and 2. In the written statement, it is contended that the lands in survey number 87 is a road poromboke land (government land) and on the east of the said land, there is a channel maintained by Public Works Department. According to them, there were 29 coconut trees in the government land and the water channel was renovated by Public Works Department and Revenue officials. It is also their contention that properties were measured and a 'B' memo was issued to the appellant/plaintiff. In fact, on an earlier occasion, a notice dated 18.10.1989 was issued under Section 8 of Act 1905 to the plaintiff by the defendants stating that the water channel and the road are essential for common usage and that supply of water for Poolavari, Chittanor,

Neikarapatti Villages is only through the said water channel. The plaintiff was also issued a notice directing to remove the encroachment made by her in the 'B' schedule property. The notice issued under Sections 6 and 7 of the Encroachment Act was refused to be received by the plaintiff and therefore, on 17.08.1989 and 09.09.1989, notices were affixed in the plaintiff's property and thereafter, the encroachment made by the plaintiff was removed. It is also their contention that the advocate commissioner did not measure the suit property with the help of FMB sketch and also without ascertaining the boundary stone. According to the respondents/defendants, the measurements made by the advocate commissioner cannot be accepted.

4. The trial court after framing necessary issues and after full contest, dismissed the suit. Aggrieved over the same, the appellant/plaintiff preferred first appeal in A.S.No.23 of 1998 before the Principal Sub Judge, Salem. The appeal was also dismissed and the appellant/plaintiff is before this court in this second appeal.

5. The following substantial question of law was raised in this second appeal.

Whether the learned Judge is correct in dismissing and rejecting the relief of declaration of title when there is sufficient material to prove the title of the plaintiff?

6. Heard Mr.R.Nagasundaram, learned counsel appearing for Mr.T.R.Rajaraman, appearing for the appellant and Mr.M.Venkatesh Kumar, Government Advocate (Civil Side) appearing for the respondents.

7. Though the appellant/plaintiff initially filed the suit for declaration and permanent injunction in respect of 'A' and 'B' schedule properties, subsequently, amended the plaint contending that the respondents have encroached upon 15 cents of land in survey number 89/1, under the guise of renovation of water channel. Therefore, the appellant/plaintiff sought for a relief of mandatory injunction directing the respondents to remove the encroachment made by them over the suit 'A' schedule property.

8. Mr.R.Nagasundaram, counsel for the appellant drew the attention of this court to the advocate commissioner's report Ex.C1, wherein, it is stated by the advocate commissioner that "The boundary line is between points B and C on the west. The green colour marked portion in plan 'A' and the encroached portion end is being converted as channel. The said portion measures about 0.06.0 hectares equivalent to 0.15 cents. Plan B

is an enlargement of an area encroached by the defendants.

9. It is pertinent to point out that Ex."C1 is only an interim report. Even the advocate commissioner in para 4 of the Ex.C1 has contended thus.

"On 19.10.1989, I measured the lands in S.No.89/1 and 3 and noted the physical features thereon. As there was no light, I could not continue the work. The counsel for plaintiff was also present with the plaintiff. After due execution of commission Mr.A.Nithiyanandam, Advocate, counsel for defendants, gave a memo on 21.10.1989 to re-visit the suit property and measure the property with the help of qualified surveyor. Further more, the plaintiff counsel gave a memo on 25.10.1989 requesting to file the report. Hence, I file this interim report."

Subsequently, he visited the suit property on 19.10.1989, 18.02.1990 and 15.04.1990 and as there was no response from the respondents, he treated the interim report as final report and filed a memo to that effect.

10. The plaintiff has not measured the suit properties with the help of Taluk Surveyor. Though survey number 89 was sub-divided, the surveyor employed by the appellant did not take steps to ascertain the point from where he should measure the suit properties. For example, he found two stones in point B and he has taken one stone for measuring the properties. The reason assigned by the Advocate Commissioner is that one stone appeared old and on the other stone nothing was written.

11. Mr.R.Nagasundaram, counsel for the appellant would contend that the respondents did not file their objection to advocate commissioner's report and at the fag end of trial, an attempt was made by them to file their objection. However, the petition in I.A.No.148 of 1997 filed by the respondents to receive their objections to advocate commissioner's report was dismissed by the trial court. He would therefore contend that the first appellate court and the trial court should not have referred to the objections raised by the respondents.

12. No doubt, it is true that the petition in I.A.No.148 of 1997 to receive the objections of the respondents for the advocate commissioner's report was dismissed and the same was not challenged by way of revision/appeal by the respondents. The taluk surveyor Subramani, who was examined as Dw4 on the side of the defendants has deposed that they did not encroach upon the plaintiff's patta land and they had already measured the 'B' schedule property based on records. He has also

deposed that the advocate commissioner without ascertaining the survey stones took measurements and the same was objected by him. This evidence of Dw4 assumes significance, because, immediately after the advocate commissioner took the measurements of suit 'B' schedule property, Dw4, submitted a report (Ex.B4) to the Tahsildar contending that the advocate commissioner without taking into account the stones and various points shown by him and the Revenue Inspector started measuring the properties. It is further contended though it was explained to the advocate commissioner that no stones were found in survey No.90 and survey number 89/B and the measurements cannot be taken without fixing the stones, the advocate commissioner proceeded further without paying heed to their words.

13. It is clearly stated in Ex.B4 that the advocate commissioner was totally biased and that the measurements taken by the advocate commissioner at some points wrongly showed as if there was no water channel at all and that the patta land of plaintiff extends upto road. This is clearly indicated in Ex.B4 by Dw4. No contra evidence was adduced on the side of the plaintiff in this regard.

14. Previously, the Deputy Inspector of Survey has submitted a report (Ex.B5) to the Tahsildar in P.R.53/89/P.C. dated 01.09.1989 that the land in survey No.87 is a government land, in which, there is a road and water channel and on the eastern side, the properties of the plaintiff is situate. It is also mentioned that on the instructions of Home Minister, the Executive Engineer, PWD (South Division), District Revenue Inspector of Survey (North) measured the entire land in survey number 87 and boundary stones were put up. It is further mentioned that unless the coconut trees and sugarcane crops are removed, the water channel cannot be renovated.

15. In this back drop, the measurements taken by the advocate commissioner, without consulting the revenue officials cannot be accepted. The advocate commissioner has also clearly indicated in his interim report (Ex.C1) that, he could not finish his work due to poor lighting and that the respondent's counsel requested him by handing over a memorandum to him to revisit the suit property. It is further stated by the advocate commissioner, that he had to file the interim report as per the request made by the plaintiff's (appellant's) counsel.

16. The learned counsel appearing for the appellant mainly relied on the advocate commissioner's report. The appellant has not also specifically indicated the 15 cents of land allegedly encroached by the respondents in his plaint. The appellant's counsel showed the encroached portion marked in

advocate commissioner's report. The advocate commissioner's report cannot be considered in the light of the facts that the advocate commissioner did not measure the properties properly. He did not also seem to take into account the objections raised by the respondents. The oral and documentary evidence adduced on the side of the respondents clearly show that there is no encroachment in the land of the appellant. The appellant, who filed the suit for declaration and injunction should prove her case to the hilt. The appellant has also deposed that her lands were not measured out at the time of purchase.

17. The learned counsel appearing for the appellant would contend that he is not pressing the suit as far as declaration of his title to 'B' schedule property. Both the courts below had concurrently held that the appellant has not proved her title to 'B' schedule property. Further more, the plaintiff claims title to government land by adverse possession and prescription. The concept of adverse possession can only be used as a shield and not as a sword. Even otherwise the appellant has not proved her possession over 'B' schedule property well over the statutory period prescribed by law. The very fact that proceedings were initiated by the respondents to evict the appellant from 'B' schedule property clearly shows that the appellant has not prescribed title to 'B' schedule property by adverse possession and prescription. As far as 'A' schedule property is concerned, there is no dispute and both the courts below are right in dismissing the suit filed by the appellant. The reasons assigned by both the courts below are based on facts and are also well founded. I therefore, do not see any reason to interfere with the findings of both the courts below. Hence, the appeal is liable to be dismissed.

18. In the result, the second appeal is dismissed. No costs.

Sd/-

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Assistant Registrar (CS-VII)

//True copy//

Sub Assistant Registrar

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To

1. The Principal Subordinate Judge, Salem

2. The II Additional District Munsif, Salem.

3. The Section Officer, VR Section, High Court, Madras -104.

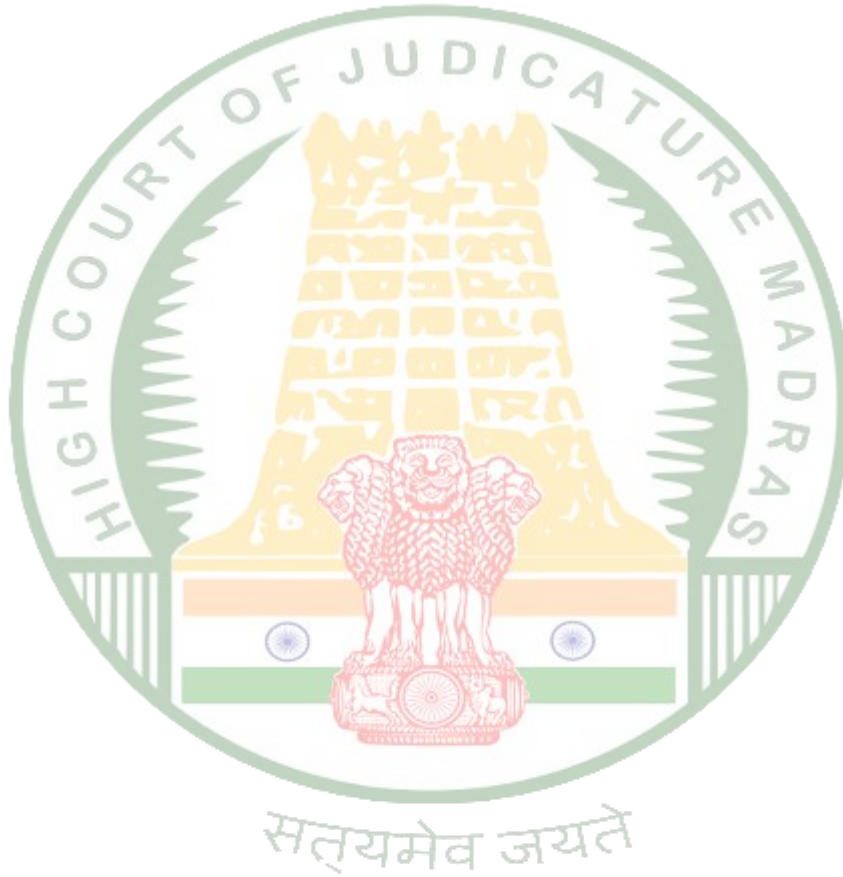
+1cc to Mr.J.R.Rajaraman, Advocate SR.No.68470

+1cc to Additional Government Pleader SR.No.67779

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NM(CO)

GMV (19/11/2018)



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