

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 14.09.2017

Judgment Pronounced on : 09.11.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.456 of 2006
and CMP.No.19276 of 2016

Sebasthian ... Appellant/Appellant/Defendant

Vs.

1.Dhavameri Ammal

2.Sowrimuthu ... Respondents/Respondents/Plaintiffs

This second appeal has been filed under Section 100 of CPC, against the Judgment and Decree dated 25.02.2005 made in A.S.No.41 of 2004 passed by the learned Principal Subordinate Judge, Mayiladuthurai confirming the Judgment and Decree dated 29.01.2004 made in O.S.No.194 of 1996 passed by the learned District Munsif, Sirkali.

For Appellant :Mr.S.Sounthar

For Respondents: Mr.G.Ethirajulu

JUDGMENT

This second appeal arises out of the the Judgment and Decree dated 25.02.2005 made in A.S.No.41 of 2004 passed by the learned Principal Subordinate Judge, Mayiladuthurai confirming the Judgment and Decree dated 29.01.2004 made in O.S.No.194 of 1996 passed by the learned District Munsif, Sirkali.

2.Brief facts of the case is as follows:-

According to the plaintiffs, the suit property originally belonged to Government by acquisition proceedings. After acquisition, the suit property was assigned to one Sabastian as per Order in M.R.IV/446/17-170/A2 dated 10.06.1983. After assignment the said sabastian was in possession and enjoyment of the suit property by paying sale price to the Government and kist. The said Sabastian died in the year 1987 leaving behind

his wife the first plaintiff and his son the second plaintiff. Both the plaintiffs are in possession and enjoyment of the same by paying the kist payable to the Government. The defendant is having property next to the plaintiff's property and residing on the west and north of the suit property. In between the properties of plaintiffs and defendant there is live fence. On 01.08.1996 while the plaintiffs were away from the village, the defendant altered the eastern fence from about 6 feet north south. When the plaintiffs questioned the same and asked the defendant to remove the encroachment through mediators, the defendant gave evasive reply. Hence the plaintiffs came forward with this suit for recovery of possession. In the plaint plan, the original fence was shown as A B and the new fence put up by the defendant as C D. Hence, the plaintiffs seeks to entertain the suit.

3. On the other hand, according to the defendant, the allegations made in the plaint are all denied. Originally, the fence was situated only in C D portion and it was never situated in the A B portion as stated by the plaintiffs. The above said property is in possession and enjoyment for more than 70 years with the defendant and his forefathers. Further more, the alleged land claimed by the plaintiffs is the nanja land and the defendant's property including the alleged encroached portion is more than 2 feet higher than the plaintiffs land and there are trees in line in the C D portion and the same more than 40 years old. The suit land comprised in Survey No.388/14 was not at all assigned to the plaintiffs. Hence, the defendant seeks to dismissal of the suit.

4. After contest, the trial Court decreed the suit as prayed for. Aggrieved upon that the defendant preferred the appeal before the lower appellate Court and after contest, the lower appellate Court dismissed the appeal by confirming the decree and judgment of the trial Court. Now, the unsuccessful defendant has come forward with this second appeal.

5. The following substantial question of law were framed by this Court for consideration.

1) Whether the Courts below are justified in law in coming to the conclusion that respondents were assigned 14 cents in suit S.No.388/4, when assignment order, reads assignment is in respect of land in S.N.No.388/14

2) Whether the Courts below are justified in relying on assignment records produced by respondent when the official competent to speak about the same was not examined before the

Court, especially when there is material contradiction in the documents.

c) Whether the Courts below are erred in law in considering surveyors report and plan when he measured land in S.No.388/4 instead of S.No.388/14 as mentioned in warrant of appointment?

6. The learned counsel for the appellant/defendant would submit that as per the assignment order S.No.388/14 land measuring 14 cents assigned to one Sabastian, but the Surveyor measured the land in S.No.388/4 instead of S.No.388/14 as mentioned in the Commissioner's warrant and filed his report. Both the Courts below failed to consider this material contradiction and came to the conclusion that the said Sabastian was assigned 14 cents of land in S.No.388/4 only and not S.No.388/14. The above said finding is arrived at without any basis of evidence from the competent authority namely, Land Assignment Officers. It is against law since the title is based upon the assignment order. Further more, both the Courts below failed to consider long possession and enjoyment of the suit property by the defendant and his forefathers. Therefore, the interference of this Court is sought for and seeks to allow the appeal.

7. Per contra, the learned counsel for the respondents/plaintiffs would submit that after elaborate discussion of both oral and documentary evidences, both the Courts below came to the correct conclusion and there is no infirmity in the findings. Further more, the same question with regard to S.No.388/14 and S.No.388/4 was raised by the defendant in the lower appellate Court and after analysing the land acquisition notification annexure, the first appellate Court came to the conclusion that as per FMB there is no survey number as 388/14 on field and came to the conclusion that in the assignment order Ex.A1, the survey number is mistakenly mentioned as 388/14 instead of 388/4, and negatived the claim of the defendant. Now, in the second appeal also the same factual mistake is claimed as question of law and the same is untenable and it cannot be raised as a question of law. There is no merits in the second appeal. Therefore, the respondent plead that the second appeal has to be dismissed.

8. I have heard the rival submissions and perused the materials available on record.

9. On perusal, the scope of the suit is very limited. The plaintiff came forward with the suit for recovery of possession. According to the plaintiffs, the suit property originally

belonged to the Government by acquisition proceedings. After acquisition, the suit property was assigned to one Sabastian as per Order in M.R.IV/446/17-170/A2 dated 10.06.1983. After assignment the said sabastian was in possession and enjoyment of the suit property by making payment of sale price payable to the Government and also kist payable to the Government. The said Sabastian died in the year 1987 leaving behind his wife the first plaintiff and his son the second plaintiff. Both the plaintiffs are in possession and enjoyment of the same by paying the kist to the Government. On the other hand, according to the defendant, the above said property is in possession and enjoyment of the defendant and his forefathers for more than 70 years. Further more, the alleged land claimed by the plaintiffs is the nanja land and the defendant's property including the alleged encroached portion is more than 2 feet higher than the plaintiffs land and there are trees in line in the C D portion which are more than 40 years old. The suit land comprised in Survey No.388/14 was not at all assigned to the plaintiffs. Both the plaintiffs and defendant are adjacent land owners and on the north of the plaintiffs property, the defendant is having property and encroached A B C D portion as shown in the rough sketch and claiming right over the same as part and parcel of his property and the defendant is in possession and enjoyment of the property more than 70 years in which 40 years old tress were available and his claim was not properly appreciated and discussed by the Courts below. These are the contentions raised on the side of the defendant/ appellant.

10.As per the claim of the plaintiffs, the defendant has encroached 6 feet north south by moving the east - west fence during their absence from the village. It is the specific case of the plaintiffs, but the defendant denied the same and put forth his defence stated that the encroached portion of 6 feet and the defendant's property is higher than 2 feet from the plaintiffs property and further more there is life fence which demarcate the plaintiffs' property and defendant's property and the defendant and his forefathers are enjoying the above said prosperities for more than 70 years. Thus. According to the defendant, there is no encroachment and this is the specific defence of the defendant.

11.Admittedly, the suit property is situated in Nagapattinam District, Sirkali Taluk, Erukkur Village in Survey No.388. It is also not disputed them. One Sebastian, who is the husband of the first plaintiff and father of the second plaintiff was assigned 14 cents of land in S.No.388/4. To prove the same, on the side of the plaintiffs Ex.A1 was produced which is the assignment order and also produced Ex.A3 which is the proceedings of the Land Reforms Additional Authorised Officer in M.R.IV/446/17-170/A2 dated 10.06.1983 and produced Ex.A2 Kist receipts for

fasalis 1402 and 1403. These are the documents produced by the plaintiffs to prove their title. On the side of the defendant, he has produced Ex.B1 which is the lease deed executed between Thiruvaduthurai Aathinam and one Periya Nayagam. Ex.B2 to Ex.B16 were marked before the lower appellate Court. The above said documents are house tax receipts and Manai Pakuthi [ground lease] receipts and photographs is the property with negative. In addition to that to find out the encroachment, the trial Court has appointed Survey Commissioner and the Surveyor filed his report along with plan. These are the documents relied on by both parties. As per the findings of the lower appellate Court in Ex.A1 assignment order, survey number is mentioned as 388/14. In Ex.A3 which is the acquisition notice under Section 18(1), in that notice there is an annexure and page 2 of the annexure shows that in S.No.388/4, 14 cents have been enjoyed by the deceased Sabastian. So the lower appellate Court came to the conclusion that in Ex.A1 S.No.388/14 mentioned as wrongly and correct survey number is 388/4. In Ex.C1 and Ex.C2 also there is no survey number as 388/14 in the Errukur Village. Hence, the lower appellate Court accepted the Ex.C1 and Ex.C2 as it corroborates Ex.A3. As such, the trial Court appointed the Commissioner to find out the encroachment with the help of Surveyor. While measuring the properties as per FMB S.No.388/4 extent measured 14 cents, but the available area in the enjoyment of the plaintiffs is only 12 cents. The balance two cents is within the property of the defendant. The defendant's property was also measured as per FMB to find out the encroachment. On the side of the defendant except Ex.B1 no other document is produced to disprove the encroachment. In such circumstances, the public document FMB has to be relied on to find out the encroachment. These are the methods known to law to find out the encroachments. But, the learned counsel for the defendant would submit that contradiction in the survey number have to be spoken by the competent officials, namely, Assignment Officer. Ex.A3 is the original notification, the origin for land acquisition in which S.No.388/4 measuring 14 cents has been mentioned. As per Ex.A3 only the said Ex.A1 document was prepared and issued to the plaintiffs. During preparation of Ex.A1, the mistake is stated to have been committed by the person who prepared the Ex.A1. Thus, if in Ex.A3, the same document survey number 388/14 find place and it differs from Surveyor's report certainly the arguments of the learned counsel for the defendant/appellant is acceptable. But here in Ex.A3 which is dated 13.11.1981, in Annexure -II in Page No.2, the S.No.388/4 is mentioned as measuring 14 cents. Hence, it is apparently error only in Ex.A1 and it need not be explained by the officials of Land Acquisition. Further more, Ex.A3 is corroborated by Ex.C1 and Ex.C2. In such situation, the arguments put forth by the appellant side is not sustainable. The learned counsel for the defendant/appellant raised three

substantial question of law in this appeal and the said questions of law were raised in the lower appellate Court and it was considered and answered properly by the Court below. In view of the above discussion, it is clear that there is no merit in the appeal and the question of law is answered against the appellant/defendant. The point is answered accordingly.

12.In the result, the second appeal is dismissed. No costs. The Judgment and Decree dated 25.02.2005 made in A.S.No.41 of 2004 passed by the learned Principal Subordinate Judge, Mayiladuthurai confirming the Judgment and Decree dated 29.01.2004 in O.S.No.194 of 1996 passed by the learned District Munsif, Sirkali is hereby confirmed. Connected CMP is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal Sub Judge,
Mayiladuthurai.

2.The District Munsiff,
Sirkali.

+1cc to M/S.Mr.S.Sounthar, Advocate Sr.76836
+1cc to M/S.G.BEthirajulu, Advocate sr.76822

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