

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 08.01.2018
CORAM
THE HONOURABLE MR.JUSTICE M.DHANDAPANI
S.A.No.1199 of 1998

1.Angappa Gounder (Deceased)

2.Arunachalam

(2nd Appellant recorded as LR of the deceased 1st and 3rd Appellants vide order of Court dated 22.01.2015 made in Memo dated 15.10.2014 in S.A.No.1199 of 1998)

3.Tmt.Ramayammal (Deceased)

4.Sornam

(4th Appellant brought on record as LR of the deceased 1st and 3rd Appellant vide order of Court dated 22.01.2015 made in C.M.P.No.19 of 2015 to 21 of 2015)

...Appellants/Defendants1 to 3

/Vs/

1.Ragupathy

... Respondents/Plaintiff & 4th Defendant

2.Tmt.Gokilalambal

(Trial Court given up as not party (4th Appellant brought in record as LR of the deceased 1st and 3rd Appellant vide order dated 02/01/2015 made in CMP.No.19 of 2015 to 21 of 2015)

PRAYER: Second Appeals filed under Section 100 of the Civil Procedure Code praying to prefer the Second Appeals against the Decree and Judgment dated 05.11.1997 made in A.S.No.227 of 1996 on the file of the Court of I Additional District Judge-cum-Chief Judicial Magistrate, Erode confirming decree and Judgment dated 30.09.1996 made in O.S.NO.94 of 1990 on the file of the Court of District Munsif (Junior Division Judge) and I Additional District Munsif, Erode.

For Appellants : Mr.A.R.Kumaravelu (For A1)
Mr.C.Prakasam (For A2)

For Respondents: Mr.Naveen Kumar Murthi (For R1)
Given up (For R2)

* * * * *

J U D G E M E N T

The brief facts of the case are as follows:

(i) Initially the properties fell in Survey Nos.177 and 176 totally to an extent of 8.75 acres and those lands initially belonged to one Nallaiah Gounder. The said Nallaiah Gounder and his brothers namely Ramana Gounder and Karupana Gounder partitioned the property in between them under Ex.A2, through a registered Partition Deed, dated 07.08.1958. As per the Partition Deed, the above said Nallaiah Gounder was allotted 1.60 acres. The said Nallaiah Gounder sold the 1.60 acres of property to Marappa Gounder. Thereafter, on 21.05.1983, the plaintiff purchased the property from the legal heirs of Marappa Gounder and Chidambaram Gounder.

(ii) The property is situated in RS.No.649/8. The defendants purchased the property from one Karuppana Gounder, who is none other than the legal heir of Nallaiah Gounder through Ex.B7 dated 20.04.1979 to an extent of 2.03 acres. The said property was sold to one Sengappa Gounder on 20.04.1959. Thereafter, the above said Sengappa Gounder sold the property to one Palaniappa Gounder on 22.06.1977. The said Palaniappa Gounder sold the property to the first defendant on 26.07.1978. Though, initially, the extent is 2.037 acres, an extent of 2.07 acres of land in S.No.178 was sold to the defendants without any documents.

2.On a perusal of the above Sale Deed which was marked as Ex.A2, it was found that there was a three foot path-way leading from S.No.649 A to S.No.175 was situated in "B" Schedule Property. Sale of 1.60 acres purchased by the plaintiff through the said document was marked as Ex.A1 and the defendants property with regard to 2.03^{1/2} acres was marked as Ex.B7. Both the Courts below concurrently held in favour of the plaintiff.

3.Aggrrieved by the same, the defendants filed this Second Appeal before this Court against the order of the Lower Court as well as the Lower Appellate Court.

4.The case of the plaintiff is as follows:

(i) The plaintiff is an absolute owner of the "A" Schedule property having purchased the same on 21.05.1983 for a

valuable consideration of Rs.36,000/- from one Chidambaram Gounder and his minor son. The original Sale Deed was marked as Ex.A1.

(ii) The vendor's Sale Deed was marked as Ex.A2. Accordingly, he filed the suit for declaration. After the purchase, the plaintiff is in possession and enjoyment of the same and he is the absolute owner and paid kist and other Government dues.

(iii) Except the plaintiff, no others have right over the property. When the plaintiff purchased the suit schedule properties, there was a well existed in the South-Western corner and the said well is situated close to the cultivatable land. The entire "A" schedule property is irrigated from the well in S.F.No.682/1, which is 2 fur long away through the underground pipes. Originally, there earthed an underground pipe-line from the well which proceeds towards North-East in the suit schedule property. The said pipeline was not used after the well was closed. As per the Government, the suit property is huge than the land needed by the defendants 1 to 3. While being so, the defendants 1 to 3 requested the plaintiff's to sell CDEFG portion of the suit "A" schedule property to them in the year 1969. Since the plaintiff has refused to sell the property, there was enmity developed in between the plaintiff and defendants. The same was questioned by the plaintiff, thereafter, the defendants filed a vexatious suit in O.S.No.788 before the I Additional District Munsif, showing the portion CDEFG as the part and parcel of the suit. Subsequently, the said suit was withdrawn.

5.The appellants/defendants filed a written statement as follows:

(i) The defendants denied the purchase of A schedule property and also denied the counter claim, the appellants/defendants filed a written statement denying the plaintiff's ownership of the property as well as taking water from the well and the same is irrigated to the A schedule property and he has not admitted that the property is higher than the defendants property.

(ii) The defendants purchased the property long back to the purchase of the property by the plaintiff and he had no intention to purchase any more land as alleged by the plaintiff and it is impracticable to cultivate the land. In view of the lack of labour, agricultural operations have become more uneconomical. Accordingly, he denied the allegations contained in the plaint. The defendants filed a suit in O.S.No.788 of 1989. However, the plaintiff has not understood the concept of filing the suit and the defendants refused to comply with the request and the plaintiff's gathered men armed with deadly

weapons attempted to tress-pass into the suit properties, claiming some imaginary rights, on 16.07.1988 and necessitated the respondent to file a suit in O.S.No.788 of 1988.

(iii) In fact, the above said suit was filed by the defendants based on the advise of the elders, in order to settle the entire issue amicably between the plaintiff and the legal land owner. However, the plaintiff has not co-operated with the defendants, thereby, the entire issue arises. Since, the drained water flow through the defendants land, the same was objected by the defendants, thereby, the plaintiffs filed the vexatious suit before the Lower Court.

6.While pending suit, the plaintiff filed an Interlocutory Application under Order XXVI Rule 1 of the Code of Civil Procedure for appointment of an Advocate Commissioner. Accordingly, the Lower Court appointed an Advocate Commissioner. The Advocate Commissioner after inspecting the property, filed a report before the Lower Court and the same was also marked as Ex.P5. On the above ground, the plaintiff filed a suit for declaration.

7.The learned counsel appearing for the appellants raised the following substantial questions of law:

"1) Whether the Courts below are correct in granting decree for declaration in respect of entire property eventhough found that the respondent/plaintiff has purchased only smaller extent of land?

2) Whether the Courts below are correct in granting decree for easementary right of regarding right of a way to the well in the absence of any documentary proof on the side of respondent/plaintiff?

3) Whether the findings of the Court below that the respondents/plaintiff is having easementary right to drain excess water through the appellants/defendants land in the absence of any evidence?

4) Whether the finding of the Courts below that appellants/defendants had encroached upon three feet of land eventhough Exhibits "B1", "B3", "B5", "B6", "B9", "B10" and "B11" marked on their side clearly prove and establish appellants/defendants are in possession of land?

5) Whether the finding of the trial Court that the counter claim by appellants/defendants is not a bar in the earlier suit and still rejecting the counter claim is sustainable in

law?"

8.The learned counsel appearing for the appellants would submit that the appellants purchased the property through Ex.B7 on 20.06.1978, prior to the plaintiff purchasing the property on 21.05.1983. Though, the vendor Nallaiah Gounder sold the property to Sengappa Gounder, the said Sengappa Gounder sold the property to Palaniappa Gounder. From Palaniappa Gounder, the plaintiff purchased the property. Though, initially, the land extent was 2.03^{1/2} cents. When, the defendants purchased the property from Palaniappa Gounder through Ex.B7 it was 2.7 acres and at no point of time, the plaintiff was taking water from the well in order to irrigate the land which is an imaginary one and there is no document was filed before this Court. However, the lower Court as well as the Lower Appellate Court granted Decree in favour of the plaintiff by believing Ex.A1 and other documents filed by the plaintiff.

9.Per contra, the learned counsel appearing for the respondent/plaintiff would submit that initially the entire property was owned by Nallaiah Gounder by way of family partition. The plaintiff purchased the property from Nallaiah Gounder. In the above said sale deed, it is clearly mentioned in the "B" schedule property that there was a three foot path way in between the old Survey Nos.176 to 175 and the same is mentioned in Ex.A1.

10.It is an admitted fact that the "A" schedule property was purchased from Nallaiah Gounder. The defendants also purchased land from Nallaiah Gounder. Accordingly, both the Courts concurrently held that the plaintiff is entitled for the relief and both the Court concurrently held in favour of the plaintiff. The Appellant did not raised any substantial question of law, he raised only questions of facts and this Court is need not interfered with the well considered decree granted by both the Courts below and no question of law was established by the appellants before this Court.

11.On a perusal of Ex.A1 as well as Ex.A3, the plaintiff purchased 1.60 acres from Nallaiah Gounder. The defendants also purchased the property from Nallaiah Gounder. Initially, the defendants property and the plaintiff's property were owned by Nallaiah Gounder. The Lower Appellate Court clearly discussed the matter after perusing the Ex.A1. The boundaries as well as the path way and well also mentioned in Ex.A1 and the defendants property is situated in the South of plaintiff's property and both the Courts concurrently held that the extent of plaintiff's property is less than the defendants property. Naturally, the rain water will flow in the lower land. Accordingly, the Lower Court and the Lower Appellate Court declared that A Schedule property belongs to the plaintiff and the portion encroached by

the defendants also belongs to the appellant. Thereby, the Lower Court granted decree in favour of the plaintiff and the plaintiff is entitled for recovery of the encroached portion from the defendants and held that the plaintiff is entitled to drain the water through the defendants land which was lower from the plaintiff's land.

12.On a perusal of the entire Judgment of the Lower Court as well as the Lower Appellate Court, I do not find any error in the orders passed by the Lower Court. Re-appreciation of the factual finding rendered by the Lower Court as well as the Appellate Court is not permissible. Hence, the substantial questions of law are answered against the appellant.

13.Accordingly, the Second Appeal is dismissed. The Decree and Judgment dated 05.11.1997 made in A.S.No.227 of 1996 on the file of the Court of I Additional District Judge-cum-Chief Judicial Magistrate, Erode confirming the Decree and Judgment dated 30.09.1996 made in O.S.NO.94 of 1990 on the file of the Court of District Munsif (Junior Division Judge) and I Additional District Munsif, Erode is confirmed. No costs.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

1.The I Additional District Judge-cum-
Chief Judicial Magistrate,
Erode.

2.The I Additional District Munsif,
Erode.

3.The Section Officer,
V.R.Section,
High Court, Madras.

+1 cc to Mr.Raghupathy Advocate sr 1493

+1 cc to Mr.C.Prakasam Advocate sr 1477

S.A.No.1199 of 1998

nm(co)

aa13/03/2018