

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

SECOND APPEAL NO.336 OF 2008

M.M.Sri Balaji

... Appellant/Plaintiff

-Vs-

1. The State of Tamil Nadu
Rep. by the District Collector,
Salem - 636 001.
2. The Superintending Engineer,
National Highways,
Salem - 7. ... Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 29.09.2006 made in A.S.No.84 of 2006 on the file of the II Additional Subordinate Judge, Salem, confirming the judgment and decree dated 08.12.2005 made in O.S.No.1239 of 2004 on the file of the II Additional District Munsif Court, Salem.

For Appellant : M/s.V.Rajesh

For Respondents: Mr.M.Venkadesh Kumar
Government Advocate

J U D G M E N T

Challenging the concurrent findings of the Courts below, the appellant preferred the above Second Appeal.

2. Originally, the appellant filed a suit for declaration and title and for permanent injunction restraining the respondents from interfering with his peaceful possession, occupation and enjoyment. The case of the plaintiff is that he derived title to the suit property by virtue of a WILL executed by his grandfather. The suit property falls within S.No.41, Mallur Village, Salem. In the said property, his grandfather constructed rice and flour mill along with godown 45 years ago, under permission from Town Panchayat as well as Health Department. Further, he built 5 shops in S.No.43/1A1, Mallur Village, six months ago after getting building licence. The

National Highway No.7 passes through lands in S.Nos.44, 45 and 46 of Mallur Village, Salem Taluk, which is the eastern boundary of the plaintiff's property. For the purpose of extension of road, the respondents acquired a portion of lands in S.No.43/1 and an award was passed in favour of his grandfather in Award No.44/75 and the property was subdivided as S.No.43/1-AB. Thereafter, the official respondents without conducting any survey, to demarcate the boundary line of S.Nos.44, 45 and 46, claimed that the plaintiff had encroached upon the lands belonging to the Government. The plaintiff has never encroached upon the Government land and his buildings are within his own land. It is the plaintiff's further case that even assuming that he is in possession of the Government lands, he perfected his title by adverse possession and the eviction shall be made by following due process of law. Therefore, he sought for declaration of title of his property in S.No.43/2 and consequential permanent injunction restraining the respondents from interfering with his peaceful possession.

3. Per contra, the defendants have denied the contention of the plaintiff and contended that the plaintiff had encroached upon the land belonging to the Highway in S.Nos.43/1A1, 43/1A2 and 43/1 and 43/2. The competent authorities have measured the property and shown the encroached portion. The plaintiff had agreed to remove the encroachment, but failed to keep up his promise.

4. Based on the above facts, the Trial Court framed appropriate issues and had found that the plaintiff has failed to prove his title in respect of the disputed survey numbers. The question of adverse possession will not arise in this case, as the plaintiff has categorically contended that he has not put up any construction by encroaching upon the Government lands and that failed to prove the animus that he enjoyed the same against their interest and with the knowledge of the respondents. The case of the plaintiff on the basis of doctrine of acquiescence was also negated by the Courts below as the plaintiff has contended that he has built up disputed portion in S.No.43/1 only six months prior to the institution of the suit, however, granted injunction restraining the respondents from evicting the plaintiff without following the due process of law.

5. Aggrieved over the judgment and decree of the Trial Court, the appellant preferred an appeal. The judgment and decree passed by the Trial Court was confirmed by the Lower Appellate Court and the appeal was dismissed. Against the concurrent findings, the appellant preferred this Second Appeal on the following substantial questions of law:

"A. Whether the plan submitted by the Surveyor, who is a subordinate of the respondents can be relied upon in support of the respondent's case?

B. When the Government alleges encroachment on a road, but does not place any material to prove the extent of the road, whether the burden can be placed on an individual to prove, that he has not encroached upon the Government property?

6. Heard the submissions made on either side and perused the materials available on record.

7. On perusal of the pleadings, it is seen that there is a clear pleading by the plaintiff that he had never encroached the Government land and the rice mill and the godown built up by his grandfather is within the land owned by him. In that circumstances, the plea of adverse possession will not arise, as it is not the case of the plaintiff that the rice mill and godown are built encroaching the Government land. On the contrary, it is an admitted case of the plaintiff that the shops in S.No.43/1 were built very recently, that is to say that six months prior to the suit. In that event also, the question of adverse possession as well as doctrine of acquiescence does not arise.

8. The first question of law to be decided is as to whether the plan submitted by the Surveyor, who is the subordinate of the respondents can be relied upon, in support of the respondents case. It could be noted that the judgment is based on the report filed by the Advocate Commissioner vide Exs.C1, C2 and C3. The report filed by the Advocate Commissioner and the plan attached to it clearly indicates the encroached portion. The Advocate Commissioner could have availed the services of a Surveyor. The said Surveyor may or may not be a subordinate to the respondents. But while executing the warrant issued by the Court, the Surveyor shall be treated as an Officer of this Court and not a subordinate of the respondents. Since it is categorically proved through the Court exhibits that there is an encroachment, it cannot be said that the plan submitted by the Subordinate of the respondents is relied on to support the case of the respondents. The plaintiff was given an opportunity to object the Commissioner's report. As per law, it is open to him to cross examine the Advocate Commissioner as well as the Surveyor. Having failed to avail the opportunity to contradict the report and to prove his title, the plaintiff/appellant is not entitled to raise the substantial questions of law, on the grounds of bias. The Courts below have considered the report

submitted by the Advocate Commissioner and the plan attached therewith in proper perspective. Therefore, the first question of law does not merit any consideration.

9. Even though the respondents have not filed any document to prove encroachment, the Court exhibits clearly proved that there is encroachment. The plaintiff is a dominus litis and he is entitled to conduct the suit by arraying necessary parties and by producing relevant documents. In a suit for declaration of title, the burden is on the plaintiff to prove through oral and documentary evidence that he is the title holder. Documentary evidence means documents of title. In the instant case, bracing of title of his grandfather for executing a valid WILL in respect of the suit property is not proved through documentary evidence. Merely because plan approval was granted and tax was collected from the plaintiff's grandfather, it cannot be said that his grandfather was the title holder. The tax receipt and plan approval without the valid title deeds, will not confer any valid right on the plaintiff. On the other hand, the plaintiff himself admits that the Government had acquired the land in S.No.43 from his grandfather and award was also passed in Award No.44/75. In that event, the onus is more on the plaintiff to prove that the building is not on the acquired portion. On the other hand, the plan submitted by the Advocate Commissioner, the encroachment of Government lands to an extent of 2 feet is clearly proved. In that event, the second question of law that the Government failed to prove the encroachment with dimensions, does not merit consideration. Moreover, the questions of law raised are based on actual aspects and does not involve any question of law.

10. In the result, the findings of the Trial Court that the plaintiff has failed to establish his title by relevant documents and also through doctrine of adverse possession and doctrine of acquiescence is very much based on thorough discussion of law and evidence and does not require any interference. The Second Appeal is dismissed accordingly. No costs.

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Assistant Registrar(CO)

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Sub Assistant Registrar

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To

1.The II Additional Subordinate Judge
Salem.

2.The II Additional District Munsif,
Salem.

3.The Section Officer,
VR Section, High Court, Madras. +2 Copies

+1cc to the Special Government Pleader Sr.8664
+1cc to Mr.V.Rajesh, Advocate Sr.8625

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