

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.01.2018

PRONOUNCED ON : 12.02.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.Nos. 311 & 312 of 2003

Chinnakannu @
Angamuthammal

..

Appellant in both
Second appeals

Vs.

1. Muthanpoosari
2. Kaliappan
3. Chinnasamy
4. Muthu

..

Respondents in both
Second appeals

Prayer : Second Appeal is filed under Section 100 of the Code of the Civil Procedure against the Judgment and decree dated 30.12.2002 made in A.S.Nos.10 & 11 of 2000 on the file of the Subordinate Court, Dharmapuri, reversing the judgment and decree dated 13.07.2000 made in O.S.Nos.6 of 1993 & 7 of 1992 on the file of the District Munsif, Dharmapuri.

For Appellant in
both Second appeals

: Mr.S.Saravana Kumar
for Mr.M.Sudhakar

For Respondents in
both second appeals

: Mr.P.Dinesh Kumar
for Mr.Sarvabhauman Associates

COMMON JUDGMENT

Second appeal Nos.311 & 312 of 2003 have been directed against the common judgment and decree dated 30.12.2002 passed in A.S.Nos.10 & 11 of 2000 on the file of the Subordinate Court, Dharmapuri, reversing the common judgment and decree dated 13.07.2000 passed in O.S.Nos.6 of 1993 & 7 of 1992 on the file of the District Munsif Court, Dharmapuri.

2. Parties are referred to as per their rankings in the trial Court.

3. O.S.No.7 of 1992 has been laid for the reliefs of declaration and permanent injunction.

4. O.S.No.6 of 1993 has been laid for the reliefs of declaration, possession, mandatory injunction and Permanent injunction.

5. The case of the plaintiff, in brief, in O.S.No.7 of 1992, is that she is the absolute owner of the lands in survey No.606, Thadangam Village together with half right in the Well, bailing yard situated in S.No.606/2 and the first defendant is the paternal uncle's son of the plaintiff and the defendants 2 to 4 are the sons of the first defendant

and the suit property consisting of half right in the Well and bailing yard irrigation channels situate therein belonged to Kali poosari the father of the plaintiff and he had acquired the same in a family partition between himself and his brother, who is the father of the first defendant and Kali poosari executed a settlement deed in favour of his wife Kandammal and Kandammal settled the suit property in favour of the plaintiff on 22.07.1964 and since then, it is only the plaintiff, who has been exercising her common right and enjoyment in the suit property and the suit is only with regard to the common Well, bailing yard and irrigation channel in Survey No.606/2 and both the plaintiff and the first defendant have each half right in the common Well, pathway, bailing yard, irrigation channels and other easementary rights in connection with the use and enjoyment of the suit Well and while so, as per the arrangement / agreement entered into between the parties, both had installed each one oil engine in the suit Well in the year 1984 and accordingly, been irrigating their lands respectively through their oil engines erected by them and subsequently, the oil engine put up by the plaintiff developed some snags and had to be removed for necessary repairs and after carrying out the repairs, when the plaintiff made necessary arrangements for installing the same in the suit Well, the defendants joined together and prevented the

plaintiff from installing the same claiming that they are the absolute owners of the suit Well and that, the plaintiff has no right in the same. However, the defendants are not entitled to obstruct the plaintiff from using her common right in the suit Well and hence, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

6. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts. It is false to state that the defendants are not entitled to Warry and other vacant portions adjacent to the suit Well other than the right to draw water from the suit Well and as per the settlement deed in favour of the plaintiff, she has been granted common right in the suit Well and the same is also reflected in the settlement deed executed in favour of the plaintiff and accordingly, the defendants had been drawing water from the suit Well by putting up an oil engine and it is false to state that the plaintiff had put up oil engine in the suit Well to draw water and the same went into repair and it is false to state that the defendants attempted to interfere with the plaintiff's right to put up oil engine in the suit Well after carrying out the repairs and the plaintiff has not approached the Court with clean hands. Inasmuch as the suit Well is common to both

the plaintiff and the defendants, the plaintiff is not entitled to obtain the reliefs against the defendants, they being the co-owners and hence, the suit is liable to be dismissed.

7. The case of the plaintiff, in brief in O.S.No.6 of 1993, is that the suit lands described in schedule "A" of the plaint originally belonged to Venkataraman S/o. Goundappan and he sold the same along with the other properties in favour of Kalli under a registered sale deed dated 12.07.1915 and Kalli in turn gifted away the said properties in favour of his wife Kandammal under a registered gift deed dated 14.08.1959 and Kandammal, the mother of the plaintiff settled the same in favour of the plaintiff by a registered gift deed dated 22.07.1964 and since then, it is only the plaintiff, who has been in possession and enjoyment of the plaint "A" schedule properties and other lands and in the year 1984 or so, the defendants encroached a portion measuring 12 feet width and 219 feet length on the southern side of "A" schedule lands by using force and accordingly, the plaintiff approached the elders in the Village to give the portions encroached by the defendants, which are shown in the plaint "B" schedule but the defendants had erected a Gobar Gas Plant on the western portion and further, the defendants delayed the entrustment of the encroached

lands to the plaintiff and instead secured patta in respect of the encroached portions by using their influence and accordingly, made attempts to interfere with the plaintiff's common right in the Well situated to the West of the "A" schedule lands and hence, the plaintiff was forced to institute the suit in O.S.No.7/1992 on the file of this Court for appropriate reliefs and the defendants also put up unlawful foundation in the encroached portion to the East of Gobar Gas Plant put up by them and the defendants did not heed to the advice of the elders and hence, the plaintiff had been necessitated to lay the suit for appropriate reliefs.

8. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts. The plaint plan is incorrect and misleading and there is no portion as "ABCD" shown in the plaint plan and to the south of AB line, the plaintiff is not entitled to any property and never been in possession of the same and the portion to the south of AB line belonged to the first defendant and his father and for the past several years, it is only the defendants and their predecessor in title, who had been enjoying the said property running to the south of AB line by putting up regular structure and therefore, the case of the plaintiff that the defendants had encroached into the "B" schedule

property during October 1984 is false and on the other hand, the Gobar Gas plant had been erected by the defendants 8 years prior to the filing of the suit and the building has also been constructed by the defendants at the time of erecting the Gobar Gas plant and the properties situated in survey No.606 was subdivided as 606/1,2,3 & 4 and the plaintiff's lands are subdivided in Survey No.606/3 and the defendants' lands are subdivided in Survey No.606/4 and the common Well and bailing yard etc., had been subdivided in Survey No.606/2 and the portion shown as ABCD in the plaint plan is situated only in Survey No.606/4 and therefore, the plaintiff cannot lay any claim of right over the B schedule property and the plaintiff has laid the false suit in O.S.No.7 of 1992 against the defendants and the plaintiff, without any cause of action, has laid the suit and hence, the suit is liable to be dismissed.

9. Both the above suits were jointly tried and accordingly, it is found that in support of the plaintiff's case, Pws 1 & 2 were examined and Exs.A1 to A10 were marked and on the side of the defendants, Dws1 to 3 were examined and Exs.B1 to B13 were marked. Exs.C1 to C8 were also marked.

10. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to accept the plaintiff's case and accordingly, granted necessary reliefs in favour of the plaintiff. On appeal preferred by the defendants, the first appellate Court, on an appreciation of the materials placed, was pleased to set aside the common judgment and decree of the trial Court and by way of allowing the appeals preferred by the defendants, dismissed the above said suits laid by the plaintiff. Impugning the same, the present second appeal has been laid.

11. At the time of admission of the second appeal No.311 of 2003, the following substantial questions of law were formulated for consideration:

" (a) Whether the judgment and decree of the learned Subordinate Judge are vitiated by the failure on his part to frame necessary points for determination in the appeal as required under Order 41, Rule 31 of the Civil Procedure Code?

(b) Whether the learned Subordinate Judge was right in dismissing the suit of the plaintiff on the ground that sub divisions have been

made by the revenue authorities and patta has been issued by the revenue authorities to larger extent in the name of the respondents?"

12. At the time of admission of the second appeal No.312 of 2003, the following substantial questions of law were formulated for consideration:

" (a) Whether the judgment and decree of the learned Subordinate Judge are vitiated by the failure on his part to frame necessary points for determination in the appeal as required under Order 41, Rule 31 of the Civil Procedure Code?

(b) Whether the lower Appellate Court was right in reversing the judgment and decree of the trial Court without independently assessing the evidence and stating the reasons for not agreeing with the conclusions of the trial Court?

(c) Whether the learned Subordinate Judge was right in traversing beyond the pleadings and dismissing the suit on the basis of assumed claim?"

13. The relationship between the parties is not in dispute. The first defendant is the paternal uncle's son of the plaintiff and the defendants 2 to 4 are the sons of the first defendant. The suit property in O.S.No.6 of 1993 is found to be common half right in the Well situated in Survey No.606/2, old Survey No.606 and the bailing yard, bailing ghat and irrigation channels annexed thereto measuring an extent of 0.01.0 Hectare. The plaintiff claims common right in the suit property as above stated and the reliefs sought for by the plaintiff only is as regards the above said common right of the plaintiff. With reference to the same, according to the plaintiff, inasmuch as the defendants interfered with her right to use the common suit Well, while installing the oil engine, she has been necessitated to lay the suit for appropriate reliefs. The defendants as such have not disputed the entitlement of the common right of the plaintiff in the suit Well as above described. According to the defendants, they also being the co-owners of the suit property, the plaintiff, as such, is not entitled to obtain the reliefs sought for in the suit.

14. The documents of title produced by the plaintiff and exhibited in the matter as well as the documents of title produced by

the defendants and exhibited in the matter would go to disclose that the plaintiff is entitled to common right in the suit property as claimed. Accordingly, it is found that the defendants are not entitled to obstruct the plaintiff's enjoyment of her common right in the suit property and it is, accordingly, found by the trial Court, that the plaintiff is entitled to obtain the reliefs sought for in O.S.No.7 of 1992. The first appellate Court also, on an appreciation of the materials placed, though holding that the plaintiff is entitled to common right in the suit property, finding that, the defendants are also owning common right in the suit property, on the footing that the defendants being the co-owners in respect of the same, the plaintiff is not entitled to obtain the reliefs sought for against the defendants.

15. However, considering the case of the plaintiff in the right perspective, the plaintiff is not attempting to disturb the defendants' right to enjoy the suit property as such. In fact, the plaintiff has admitted the common right of the defendants in respect of the suit property and the reliefs sought by the plaintiff is only to prevent the defendants from obstructing the enjoyment of her common right in the suit property. It is found that the problems had arisen between the parties as regards the suit property involved in O.S.No.6 of 1993 and

in the light of the same, it is the claim of the plaintiff, during the course of evidence, as if the suit property exclusively belongs to her and that, the defendants do not own any right in the same. However, when the materials placed disclose that both the plaintiff as well as the defendants have equal share in the suit property involved in O.S.No.7 of 1992, it is found that accordingly, the defendants' counsel during the course of his arguments in the second appeal fairly conceded that the plaintiff is entitled to common right in the suit property and the other subject matter involved in the said suit i.e. O.S.No.7 of 1992 and accordingly, to the queries posed by this Court, accepted that the plaintiff could be granted the reliefs sought for in O.S.No.7 of 1992.

16. In the light of the above discussions, it is found that though the first appellate Court has formulated the sole point for determination, inasmuch as under the said point, the first appellate Court has discussed the case of the respective parties in entirety, in my considered view, the judgment of the first appellate Court is not vitiated for want of formulating separate points of determination, as such. Further the same is also found to have not seriously prejudiced the case of either parties. However, it is seen that the first appellate Court has failed to assess the materials placed on record in the proper

perspective and disturbed the well considered reasonings and conclusions of the trial Court without assigning sufficient cause and also the first appellate Court has erred in traversing beyond the pleadings and thereby, erroneously rejected the plaintiff's suit on the footing that the plaintiff is attempting to disturb the defendants enjoyment of their right in the suit property involved in O.S.No.7 of 1992. The substantial questions of law formulated in the second appeal No.312 of 2003 are accordingly answered.

17. Insofar as the suit property involved in O.S.No.6 of 1993 is concerned, from the documents placed by the parties, particularly, as seen from the documents marked as Exs.A1 to 3 marked on behalf of the plaintiff, it is found that the plaintiff's husband Kili alias Ramar had acquired 1/3 share in Survey No.605/2 measuring 0.87 cents and survey No.606 measuring 0.77 cents in all totally measuring an extent of 1.64 acres in the above said two survey numbers and thus, it is seen that the 1/3 share acquired by him by way of Ex.A2, had been settled by him in favour of his wife Kandammal by virtue of a settlement deed dated 14.08.1959 marked as Ex.A3 and accordingly, Kandammal by virtue of Ex.A1 settlement deed dated 22.07.1964 had settled the same in favour of the plaintiff. It is thus found that the

plaintiff would be entitled to claim only 1/3 share in the above said two survey numbers and it is found that the 1/3 share in the above said properties comprised in the above said two survey numbers would come only to 0.55 cents and not more than that. Similarly, the other 1/3 share in the above said two survey numbers in all measuring a total extent 0.54 ½ cents had been acquired by the first defendant by way of Ex.A10 dated 21.12.1944 from Perumal Gounder and accordingly, it is seen that the defendants as such are entitled to 0.54 ½ cents in respect of the above said two survey numbers. Accordingly, it is noted that the other 1/3 share belongs to another party and thus, it is found that insofar as the survey No.606/6 is concerned, according to the plaintiff, she is entitled to 29 cents therefore, it is found that the other two sharers are entitled to the remaining extent in Survey No.606. As found earlier the total extent in survey No.606 is 77 cents.

18. Considering the materials placed, both the parties do not challenge the respective title deeds of either parties to claim their properties in the above said survey numbers. Now, according to the plaintiff, the defendants had encroached into a portion of her land situated in survey No.606 and the encroached portion has been shown

as B schedule property and the plaintiff has laid the suit in O.S.No.6 of 1993, only as regards the "B" schedule property.

19. Materials placed also disclose that both the parties had been claiming their respective properties as determined by the revenue authorities and it is further found that the plaintiff's attempts to secure patta from the revenue authorities had end in vain and in all the revenue proceedings, the defendants' claim to their properties had been upheld and accordingly, they had been granted patta in respect of their properties. It is further seen that the defendants are not claiming the right in respect of the properties, to which, they are entitled to, merely on the patta proceedings and on the other hand, as above seen, they claim the right also on the basis of the title deed as above discussed.

20. In the properties of the two survey numbers above discussed, when it is found that the plaintiff in toto would be entitled to claim only 55 cents and the defendants in toto would be entitled to claim 54 ½ cents and other sharer would be entitled to claim the remaining extent, the total extent in the two survey numbers being 1.64 acres, accordingly, it has to be seen whether the defendants had

encroached into the B schedule property as put forth by the plaintiff. In this matter, the commissioner inspection had been done and it is found that twice the commissioner had inspected the properties concerned and also measured the properties with the help of a surveyor with reference to the title deed of the plaintiff dated 22.07.1964 marked as Ex.A1. When the commissioner has inspected the properties concerned, it was noted by him that the survey No.606 had been subdivided as 606/1, 2, 3 & 4 and also noted by him that the lands of the plaintiff are situated in survey No.606/1 and 3 and the lands of the defendants are situated in survey No.606/2 and the common Well and other properties are situated in Survey No.606/4 and accordingly, when the properties of the parties are measured with reference to the settlement deed of the plaintiff dated 22.07.1964 by the advocate commissioner with the help of the surveyor, it has been noted that in survey No.606/3 only an extent of 25 cents remain. However, according to the title deed Ex.A1, the plaintiff had been settled 29 cents in the said survey number. Now, according to the plaintiff, the defendants had encroached the B schedule property and the B schedule property is stated to be measuring 6 cents. Therefore, according to the plaintiff's counsel, based upon the commissioners' report, when he is found to be short of 4 cents in survey No.606/3 and

when as per the title deed Ex.A1, the plaintiff is entitled to be in possession and enjoyment of 29 cents, hence according to him, it is only the defendants, who had encroached into her portion and accordingly, the necessary reliefs should be granted in her favour. However, a perusal of the advocate commissioner's report, further, would go to show that when the defendants' lands located in survey No.606/4 are measured, it was noted by the advocate commissioner that the defendants' land totally measure only 51 $\frac{1}{4}$ cents and as above seen, as per the title deed of the defendants marked as Ex.A10, they are entitled to 54 $\frac{1}{2}$ cents in the properties acquired by them by way of the same. It is not in dispute that the survey No.606/2 consisting of the common suit Well and the other properties are situated in an area measuring 2 $\frac{1}{2}$ cents and when it is seen that both the plaintiff and the defendants are entitled to $\frac{1}{2}$ share in the same, the defendants would be entitled to 1 $\frac{1}{4}$ cents in Survey No.606/2, when on ground, the defendants' property located in Survey No.606/4 is found to be measuring only 51 $\frac{1}{4}$ cents and adding 1 $\frac{1}{4}$ cents to which the defendants are entitled to in survey No.606/2, it is found that on ground, the defendants are in possession and enjoyment of only 52 $\frac{1}{2}$ cents of lands and on the other hand, as per the title deed of the defendants, they are entitled to 54 $\frac{1}{2}$ cents of land. Accordingly,

it is noted by the advocate commissioner, on measuring the properties of both the plaintiff and the defendants, it is found that the plaintiff is short of 4 cents and the defendants are short of 2 ½ cents of land, it should have been two cents of land. Be that as it may, when it is found that both the plaintiff as well as the defendants are found to be in possession and enjoyment of only lesser extent of the property than to which they are entitled to as per their respective title deeds and when it is found that both the plaintiff and the defendants are respectively entitled to only 1/3 share in the survey numbers as above pointed out and accordingly, when it is noted that the plaintiff is entitled to 55 cents of land and the defendants are entitled to 54 ½ cents of land, as rightly put forth by the defendants' counsel, there is no question of the defendants having encroached the B schedule property as put forth in O.S.No.6/1993, which is claimed to be an extent of 6 cents. Therefore, it is seen that the plaintiff, for claiming the shortage of lands in his survey number, has knocked at the wrong door for claiming the reliefs concerned with reference to the same. When on ground, it is found that the defendants are in possession of lesser extent of lands than to which they are entitled to and when accordingly, it is seen that the defendants had been granted patta only in respect of the lands, to which, they are entitled to by the revenue

authorities concerned, it is found that as rightly put forth, the plaintiff, without any cause of action, has instituted the suit against the defendants. It is thus found that the plaintiff has miserably failed to establish that it is only the defendants, who had encroached into her property as put forth by her, when, on ground, it is found that the defendants, as such, have not encroached into the portions belonging to the plaintiff.

21. However, it is contended by the plaintiff's counsel that as per the commissioner's report, one sunshade put up by the defendants is protruding into the property of the plaintiff. Nevertheless, when according to the specific case of the plaintiff, the defendants had only encroached 6 cents of land as detailed in the B schedule property and when it is further found that the defendants are in possession of 51 $\frac{1}{4}$ cents of land in survey No.606/4, coupled with 1 $\frac{1}{4}$ cents of land in survey No.606/2 and when it is found that the plaintiff is in possession of 25 cents of land in S.No.606/3, it is found that the plaintiff is in shortage of only 4 cents of land and when the plaintiff has failed to establish that the defendants had encroached into the portion of any of her lands as described in the B schedule and on the other hand, when it is noted that the defendants are found to be in possession of only

lesser extent of land than to which they are actually entitled to as above discussed, it is found that merely on the above said feature of the sunshade of the defendants projecting into the plaintiff's property, we cannot conclude that it is only the defendants, who had encroached into the B schedule property as claimed by the plaintiff.

22. In the light of the above discussions, it is found that as the first appellate Court has framed the main point for determination, its failure to formulate separate points for determination as such, would not in any manner vitiate the judgement as per Order 41 Rule 31 of CPC, particularly, when the first appellate court has considered all the aspects at controversy between the parties in the main point for determination. The first appellate court has not dismissed the suit of the plaintiff on the footing that the defendants had been granted patta by the revenue authorities to a larger extent. On the other hand, it is found that on ground, when it is seen that the defendants are in possession of only a lesser extent than to which they are actually entitled to, accordingly it is seen that the first appellate court did not find acceptance with the plaintiff's case that the defendants had encroached into her portion of the land viz., B schedule property and has rightly negated the suit laid by the plaintiff. The substantial

questions of law formulated in the second appeal No.311 of 2003 are accordingly answered.

23. In conclusion,

(i) the Judgment and decree dated 30.12.2002 passed in A.S.No. 11 of 2000 on the file of the Subordinate Court, Dharmapuri, are set aside and the judgment and decree dated 13.07.2000 passed in O.S.No.7 of 1992 on the file of the District Munsif Court, Dharmapuri, are confirmed. Accordingly, the second appeal No.312 of 2003 is allowed

(ii) the second appeal No.311 of 2003 fails and accordingly, is dismissed.

(iii) Considering the facts and circumstances of the case, there is no order as to cost. Connected miscellaneous petition, if any, is closed.

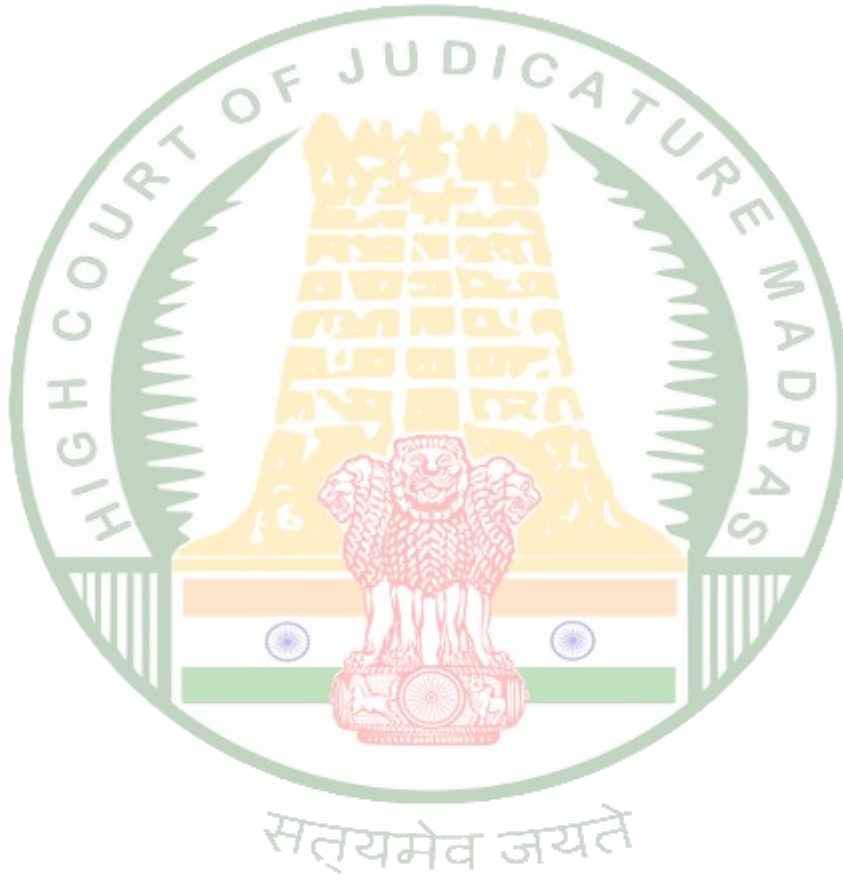
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To

1. The Subordinate Court, Dharmapuri.
2. The District Munsif, Dharmapuri.



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T.RAVINDRAN., J.

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**Pre Delivery Judgment made
in S.A.Nos. 311 & 312 of 2003**

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