

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.04.2019

PRONOUNCED ON : 03.06.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.Nos.2161 of 2002 & 651 of 2004

Ponnachiammal

... Appellant in
both second appeals
651 Appellant/Appellant/
Plaintiff
2161 Appellant/1st Respondent/
Plaintiff
2161 1st Respondent/Appellant/
1st defendant

Vs.

1.Appakudal Town Panchayat
rep.by its Executive Officer,
Pudupalayam Panchayat Office
Appakudal, Bhavani Taluk,
Erode District.

2.The Government of Tamil Nadu
rep.by the District Collector,
Erode District, Erode.

3.The Tahsildar
Bhavani Taluk,
Bhavani, Erode District.

...Respondents 2 & 3/Respondents
2 & 3/Respondents 2 & 3

...Respondents in
both second appeals/
Respondents/Defendants

Prayer in S.A.No.2161 of 2002 :- Second Appeal has been filed under Section 100 of the Civil Procedure Code against the Judgement and Decree dated 19.12.2001 passed in A.S.Nos.57 of 2000 on the file of the Subordinate Judge, Bhavani, reversing the judgement and decree dated 30.06.2000 passed in O.S.No.122 of 1988 on the file of the Principal District Munsif Court, Bhavani.

Prayer in S.A.No.651 of 2004 :- Second Appeal has been filed under Section 100 of the Civil Procedure Code against the Judgement and Decree dated 19.12.2001 passed in A.S.Nos.59 of 2000 on the file of the Subordinate Judge, Bhavani, confirming the judgement and decree dated 30.06.2000 passed in O.S.No.122 of 1988 on the file of the Principal District Munsif Court, Bhavani.

For Appellant in : Ms.D.Sathya
both second appeals for Mr.V.Rajesh

For Respondent No.1: Mr.P.P.Shanmugasundaram
in both second appeals

For Respondent Nos.2 & 3:Mr.N.Manikandan
in both second appeals Government Advocate (CS)

COMMON JUDGMENT

In second appeal No.2161 of 2002, challenge is made to the Judgement and Decree dated 19.12.2001 passed in A.S.No.57 of 2000 on the file of the Subordinate Court, Bhavani, reversing the judgement and decree dated 30.06.2000 passed in O.S.No.122 of 1988 on the file of the Principal District Munsif Court, Bhavani.

2.In second appeal No.651 of 2004, challenge is made to the Judgement and Decree dated 19.12.2001 passed in A.S.Nos.59 of 2000 on the file of the Subordinate Court, Bhavani, reversing the judgement and decree dated 30.06.2000 passed in O.S.No.122 of 1988 on the file of the Principal District Munsif Court, Bhavani.

3.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

4.Suffice to state that the suit has been laid by the plaintiff against the defendants for the reliefs of declaration and permanent injunction.

5.Briefly stated, according to the plaintiff, the property in S.F.No.373 of the suit village belonged to her father and after the demise of her father and mother Palaniammal, it is only the plaintiff and her sister, the 4th defendant, who had succeeded to the abovesaid property and they had been in the possession and enjoyment of the same and it is stated that the plaintiff's mother had planted coconut saplings about 30 in numbers in the abovesaid property and out of them, 25 saplings had grown into full trees and since then, it is only the

plaintiff and the 4th defendant, who had been enjoying the usufructs of the coconut trees as well as the field comprised in S.F.No.372 and the land lying to the north of S.F.No.373 and itari was lying in S.F.No.372 and the thar road had been put up in the said itari portion and accordingly, the plaintiff's mother is said to have put up the fence from west to east on the northern side of the property in S.F.No.373 and the defendants under the mistaken impression that a small portion of the area on the southern side of the abovesaid fence is lying in S.F.No.372 collected penalty charges from the plaintiff and the 4th defendant and in this connection, representation had been made by the plaintiff and the 4th defendant to the authorities concerned but no order has been passed and further, according to the plaintiff, the defendants had been auctioning the usufructs of the coconut trees without any authority including the trees lying in the property belonging to the plaintiff in S.F.No.373 and it is stated that the plaintiff's husband had also participated in the auction, but the same would not in any manner affect the right of the plaintiff in respect of the coconut trees in S.F.No.373 and as the defendants continued to persist in auctioning the coconut trees belonging to the plaintiff lying in S.F.No.373 and thereby, attempted to interfere with her possession and enjoyment of the property belonging to the plaintiff one way or the other, it is put forth that the plaintiff has been necessitated to lay the suit for appropriate reliefs against the defendants.

6.The defendants resisted the plaintiff's suit contending that the plaintiff is not having any right to the portion lying in S.F.No.372 and the claim of the plaintiff that coconut saplings had been planted by her mother in S.F.No.373 is without any basis and on the other hand, it is only the first defendant, who had planted the coconut trees for augmenting the income of the panchayat and accordingly, it is only the first defendant, who had put up the fence and also after due publication had been effected, the auction had been conducted every year qua the usufructs of the coconut trees and several persons including the plaintiff's husband had participated in the auction and therefore, the claim of the plaintiff that the defendants are not entitled to auction the trees lying in S.F.No.372 is unacceptable and though the plaintiff may be the owner of the property lying in S.F.No.373 that would not entitle the plaintiff to claim any right in respect of the land lying in S.F.No.372 and the trees standing thereon and it is false to state that the plaintiff has come to know the auction of the coconut trees on the part of the first defendant only recently, the defendants alone are having title and other interest in respect of the lands comprised in S.F.No.372 and hence, the suit is liable to be dismissed.

7. Based on the materials placed on record by the respective parties and the submissions made, the trial Court was pleased to grant the relief in respect of 14 trees lying in S.F.No.373 as well as the extent of 80 cents of land in the abovesaid survey number and accordingly disposed of the suit. Aggrieved over the same, the first defendant as well as the plaintiff preferred the first appeals. The first appellate Court, on an appreciation of the materials available on record, entertained the appeal preferred by the first defendant and dismissed the appeal preferred by the plaintiff and resultantly, in toto, dismissed the suit laid by the plaintiff. Impugning the same, the present second appeals have been preferred by the plaintiff.

8. The Second appeals have been admitted on the following substantial questions of law respectively:
S.A.No.2161 of 2002

"a. When a report of an advocate commissioner has not been objected to by the defendant in the trial Court, whether it can be a subject matter of an objection in an appeal as contemplated under Section 105 of the Code of Civil Procedure?

"b. When the trial Court has given a categorical finding that none of the defendant's exhibits relate to the suit property, then as a final Court of fact, whether the Lower Court can disturb such findings of the trial Court without assigning any reason?"

S.A.No.651 of 2004

"Whether the judgment of the appellate Court is vitiated on account of total non-application of mind and independent assessment of the records produced by the defendants in the suit?"

9. As regards the position that the land lying in S.F.No.373 belongs to the plaintiff and the 4th defendant through their father is not in serious dispute. According to the plaintiff, her mother had planted the coconut saplings in S.F.No.373 and accordingly, after the trees had grown in full, it is the case of the plaintiff that she and the 4th defendant had been enjoying the usufructs of the same and further contended that the defendants are not entitled to auction the coconut trees lying in S.F.No.373.

10.It is found that the property belonging to the defendants in S.F.No.372 is lying to the north of S.F.No.373. According to the defendants, the coconut trees are lying only in S.F.No.372 planted by the Panchayat and not in S.F.No.373 and it is stated that laying a false claim as regards the coconut trees in S.F.No.372, the plaintiff has come forward with the suit as if the suit trees are all in her lands and hence, the defendants prayed for dismissal of the plaintiff's suit.

11.As could be seen from the materials available on record, it is found that the defendants had been regularly auctioning the coconut trees by way of public auction and from the records marked on the side of the defendants as Exs.B1 to B15, it is found that over a period of time, the usufructs of the coconut trees had been auctioned by the defendants and it is also found that the plaintiff's husband himself had participated in the auction and the same has been accepted by the plaintiff both in the plaint as well as in the course of her evidence.

12.According to the plaintiff, it is only her mother, who had planted the coconut saplings in S.F.No.373, however, during the course of cross examination, the plaintiff has admitted that she does not know, who had planted the coconut saplings and she came to know about the planting of the coconut saplings only through her mother and further, according to her, in the release deed executed in her favour by her sister viz., the 4th defendant after the institution of the suit, there is no reference about the coconut trees and also admitted that her husband participated in the auction of the coconut trees conducted by the defendants. Therefore, when the plaintiff has no knowledge as to who had planted the coconut trees and her claim that her mother planted the coconut trees in S.F.No.373 is found to be based on hearsay evidence and when the release deed executed in her favour by her sister subsequent to the institution of the suit marked as Ex.A1 does not contain any reference about the coconut trees, in such view of the matter, the claim of the plaintiff that the coconut trees are available in S.F.No.373 and the same had been planted by her mother and the same had been in the enjoyment of the plaintiff over a period of time, as such, cannot be accepted sans any proof pointing to the same.

13.On the other hand, as could be seen from the evidence of the President of the Panchayat examined as DW2, it is found that to augment of the income of the panchayat, the coconut trees had been planted by him in S.F.No.372 belonging to the panchayat and accordingly, on growth, the usufructs of the trees had been auctioned by the panchayat regularly and with reference to the above aspects, DW1 examined on behalf of the defendants had tendered evidence and also marked the various registers maintained by the first defendant in connection with the same,

as well as the auction registers pertaining to the auction of usufructs of the trees conducted by the panchayat union over a period of time. Considering the abovesaid materials in toto, as rightly found by the first appellate Court, inasmuch as it is only the defendants, who had planted the coconut trees saplings to augment of the income of the panchayat and enjoying the same and had also auctioned the same, it is found that several persons including the plaintiff's husband had participated in the auction. If really, the coconut trees in dispute are lying in S.F.No.373 belonging to the plaintiff and not in S.F.No.372, there is no need on the part of the plaintiff's husband to participate in the auction conducted by the panchayat with reference to the same. As above noted, absolutely there is no material on the part of the plaintiff to show that the coconut trees had been planted by her mother and enjoyed by her from the days of her mother and that, the same are lying in S.F.No.373, and resultantly, it is found that the plaintiff is mainly resting her claim only on the basis of the commissioner's report and plan and the surveyor plan marked as Exs.C1 to 3. However, as rightly found by the first appellate Court, the commissioner has not clearly observed in his report as to which survey numbers, he had measured, what is the extent of survey number measured by him, what are the boundaries of the survey numbers which he had measured and the extent comprised in each survey number and from what point to what point, he had measured the survey numbers involved in the matter. All the abovesaid factors, in the report of the advocate commissioner marked as Ex.C1, are completely absent and the plan marked as Ex.C2 also does not depict the length and breadth of the properties measured by him and from what point to what point, the measurements had been taken. In such view of the matter, no reliance could be attached to Exs.C1 & C2 for upholding the plaintiff's case. Similarly, as regards the surveyor plan marked as Ex.C3, the advocate commissioner has not whispered which surveyor he had taken for assisting him, whether he is an approved surveyor or not and furthermore, when the surveyor also in his plan has not fixed boundaries of the properties measured by him and also not depicted as to from which point to which point, he had measured the survey numbers, particularly, whether the measurement had been taken based on the survey stones already available or newly fixed in the area, in such view of the matter, when surveyor plan is not disclosing as to how the properties concerned in the matter are identified and measured and furthermore, when the plaintiff has not endeavoured to examine the advocate commissioner as well as the surveyor in support of her case to shed more light on the issues involved in the matter and when as rightly contended by the defendants, if the measurements are not properly taken and the properties had been measured indiscriminately, there is every possibility of the advocate commissioner and the surveyor having erred in

fixing the location of the trees as survey Nos.373 and 372 are lying adjacent to each other, in such view of the matter, I do not find any valid reason to interfere or deviate from the reasonings furnished by the first appellate Court for not accepting the commissioner's report and plan as well as the surveyor plan.

14.As abovenoted, when the plaintiff has miserably failed to establish that the coconut trees had been planted and enjoyed by her mother and on the other hand, accepted complete ignorance with reference to the same and when it is the specific case of the defendants that only the coconut trees lying in S.F.No.372 are auctioned periodically by them and when as above seen, the plaintiff's husband himself had participated in the said auction and when the materials placed on record go to show that the plaintiff and her husband are residing together, to say that the participation of her husband in the auction conducted by the defendants is without prejudice to her claim of right to the coconut trees as put forth in the plaint, as such, cannot be countenanced.

15.If really, the coconut trees are lying in S.F.No.373 and the defendants had been auctioning the same continuously over a period of time without any entitlement, as rightly determined by the first appellate Court at the earliest point of time, the plaintiff would have putforth her objections with reference to the auction conducted by the defendants and on the other hand, it is found that no such resistance had been offered by her in any manner and on the other hand, as the defendants had been, over a period of time conducting the auction only in respect of the trees lying in S.F.No.372 and not with reference to any trees said to be lying in S.F.N.373, accordingly, it is found that without any demur, the plaintiff's husband had also participated in the auction and in such view of the matter, it is found that the plaintiff is unable to place any proof whatsoever to show that the coconut trees are actually lying in S.F.No.373 as claimed by her. When all together it is found that the plaintiff has only relied upon the commissioner's report and plan as well as the surveyor's, plan and when the report and plan of the commissioner and surveyor as above pointed out do not inspire confidence, particularly, when they do not show as to how the properties had come to be measured by them and when furthermore, the plaintiff had also not evinced interest to examine them in support of her case and when the defendants have putforth their objection to the commissioner's report and plan contending that they had not measured the properties by fixing the points within which survey numbers and their respective extents are located, in such view of the matter, it is found that the first appellate Court is fully justified in setting aside the judgment and decree of the trial Court and dismissing

the plaintiff's suit in entirety.

16.As regards the land comprised in S.F.No.373 is concerned, it is not the case of the plaintiff that the defendants are attempting to interfere with her possession and enjoyment with reference to the same. In such view of the matter, it is seen that as regards S.F.No.373, the plaintiff has no cause of action against the defendants. As could be seen from the materials available on record, inasmuch as the plaintiff had attempted to encroach into the property belonging to the defendants, it is found that "B" memo had been issued against her with reference to the same and in such view of the matter, the case of the plaintiff that the defendants under mistaken impression had levied penalty charges against her in respect of S.F.No.373 does not merit acceptance. When with reference to her actual entitlement in S.F.No.373, has not been established by the plaintiff by placing materials pointing to the same, other than Exs.A1 & A2, in all, it is found that the suit laid by the plaintiff against the defendants is devoid of any cause of action and liable to be dismissed. The same having been correctly determined by the first appellate Court, I do not find any reason to interfere with the judgment and decree of the first appellate Court in dismissing the plaintiff's suit by setting aside the judgement and decree of the trial Court. In my considered opinion, no substantial question of law is involved in the second appeals. Be that as it may, the substantial questions of law formulated in the second appeals are accordingly answered against the plaintiff and in favour of the defendants.

17.In support of the contentions as put forth by the plaintiff's counsels, he placed reliance upon the decision reported in 2000 (IV) CTC 329 (Mani Vs.Batchha Sahib and 2 others). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at hand.

In conclusion, the second appeals fail and accordingly, are dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

-s/d-

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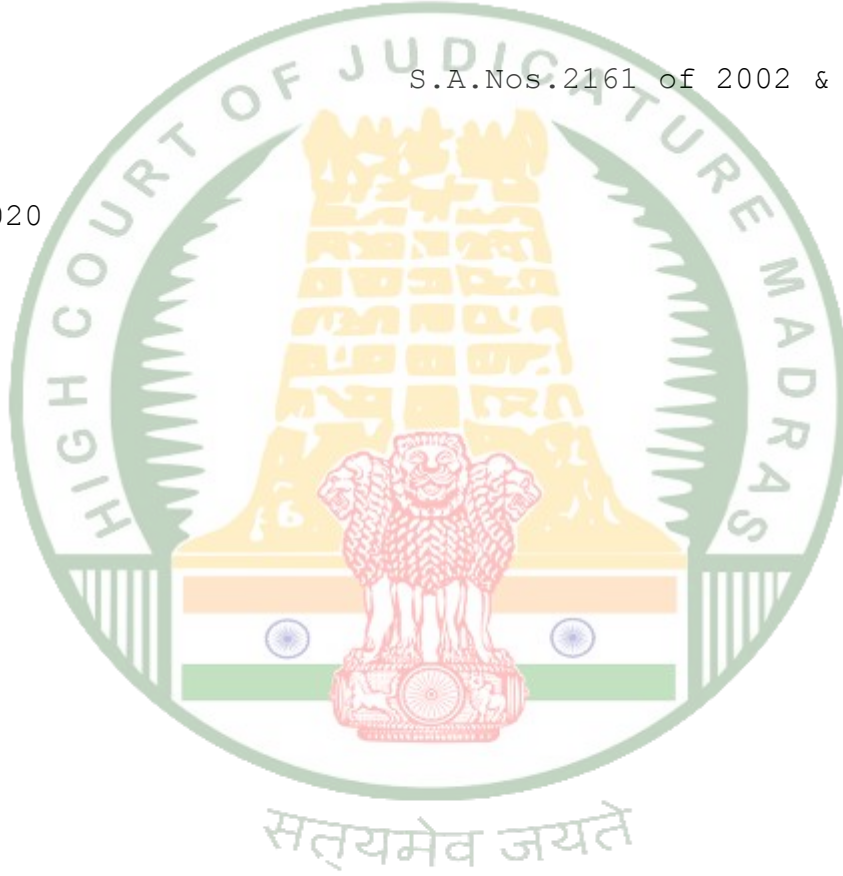
To

- 1.The Subordinate Court, Bhavani.
- 2.The Principal District Munsif Court, Bhavani.
- 3.The Section Officer,
V.R. Section, High Court, Madras.

+1 cc to Mr.S.V.Duraisolaimalai Advocate sr44637
+1 cc to Mr.V.Rajesh Advocate sr44529
+1 cc to the special Government pleader sr44603

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