

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.02.2019

PRONOUNCED ON : 05.03.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1004 of 2005

The Municipal Commissioner
Tiruvavarur.

...

Appellant/II Respondent

Vs.

1.A.James
represented by his power
agent S.Arockiadoss

2.The District Collector,
Tiruvavarur.

...

Respondents/Appellant

Prayer :- Second Appeal has been filed under Section 100 of the Civil Procedure Code against the Judgement and Decree dated 01.04.2004 passed in A.S.No.72 of 2002 on the file of the Subordinate Court, Thiruvavarur, reversing the judgement and decree dated 22.07.2002 passed in O.S.No.57 of 2001 on the file of the District Munsif Court, Thiruvavarur.

For Appellant : Mr.V.Raghupathi

For Respondent : Norepresentation/No appearance
No.1 set exparte vide order dt.19.2.2019

For Respondent: Mr.N.Manikandan
No.2 Government Advocate (CS)

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 01.04.2004 passed in A.S.No.72 of 2002 on the file of the Subordinate Court, Thiruvavarur, reversing the judgement and decree dated 22.07.2002 passed in O.S.No.57 of 2001 on the file of the District Munsif Court, Thiruvavarur.

2.The second appeal has been admitted on the following substantial questions of law:

"(1).Whether the lower appellate Court is justified in shifting the burden on the defendant instead of plaintiff who has failed to prove his case of his own evidence instead of merely relying upon all the evidence of the defendant?

(2).Whether the lower appellate court has justified in relying upon only certain portion of the oral evidence of the defendant instead of finding that the plaintiff has failed to prove his case?

(3).Whether the question of law regarding estoppel has been correctly applied to the present case by the lower appellate Court?"

3.Considering the scope of the issues involved in the second appeal between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

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

5.The plaintiff has laid the suit against the defendants for the relief of permanent injunction.

6.Admittedly, the suit property, which is a tank lying in T.S.No.2710 and its bank within the specific boundaries by name Edaiyankulam with all its bunds, banks and standing trees etc., belongs to the government and claiming that the plaintiff has acquired the fishery right in the abovesaid tank by way of a sale deed dated 28.07.1994 from Kuppusamy Pillai and consequently, claiming that the suit tank has been in the possession and enjoyment of the plaintiff since the abovesaid sale deed and the plaintiff is enjoying the same by erecting parapet wall, steps, and planting trees on the bank and purchasing the surrounding properties of the suit tank and alleging that the defendants, without any authority, attempted to interfere with the plaintiff's possession and enjoyment of the suit bank as abovestated by endeavouring to alter the the

situation of the tank and put up the building etc., hence according to the plaintiff, he has been necessitated to lay the suit for the relief of permanent injunction.

7.The defendants resisted the plaintiff's suit and contended that the plaintiff has no fishery right in respect of the suit tank as claimed in the plaint and at no point of time, the plaintiff has exercised the fishery right in the suit tank and the suit tank belongs to the Government and vested with the Municipality and therefore, the plaintiff cannot claim to be in the valid possession and enjoyment of the suit tank as put forth in the plaint and according to the defendants, with a view to grab the suit tank, one way or the other, the plaintiff has come forward with the false case and hence, prayed for the dismissal of the plaintiff's suit.

8.In support of the plaintiff's case, PWS1 to 3 were examined and Exs.A1 to 14 were marked. On the side of the defendants, DWS1 & 2 were examined and Exs.B1 to 2 were marked.

9.On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss the plaintiff's suit. On appeal by the plaintiff, the first appellate Court, on a consideration of the materials placed on record and the submissions made, was pleased to set aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the plaintiff, decreed the suit in favour of the plaintiff as prayed for. Impugning the same, the second defendant has come forward with the present second appeal.

10.The suit tank belongs to the Government and the same is not in dispute. The plaintiff claims fishery right in respect of the suit tank and according to the plaintiff, he has acquired the fishery right in the suit tank by way of the sale deed dated 28.07.1994 executed by Kuppusamy Pillai in his favour, which document has come to be marked as Ex.A2. The defendants in toto have challenged the claim of the plaintiff projecting fishery right in the suit tank and according to the defendants, at no point of time, the plaintiff has exercised any fishery right in respect of the suit tank and therefore, according to them, the suit tank is not in the possession and enjoyment of the plaintiff at any point of time as put forth in the plaint and accordingly, prayed for the dismissal of the plaintiff's suit.

11.As abovenoted, the plaintiff claims to have purchased the fishery right in respect of the suit tank by way of Ex.A2 sale deed said to have been executed by his vendor Kuppusamy Pillai. When the abovesaid claim of fishery right in respect of the suit

tank as claimed by the plaintiff is being disputed by the defendants, it is for the plaintiff to establish that his vendor had the competency to alienate or convey the fishery right in respect of the suit tank by way of Ex.A2 sale deed. The materials placed on record go to show that the plaintiff's vendor Kuppusamy Pillai, claiming absolute ownership over the suit tank has preferred a suit against the Government and the Municipality in O.S.No.209 of 1937 and it is seen that the plaintiff's vendor Kuppusamy Pillai claiming the ownership in respect of the suit tank as well as claiming title to the same by way of adverse possession against the Government and Municipality had come forward with the abovesaid suit seeking the reliefs of declaration and permanent injunction against the Government and the Municipality. No doubt, the trial Court, which tried the abovesaid suit, granted the decree in favour of Kuppusamy Pillai as prayed for and the certified copy of the judgement and decree passed by the trial Court in O.S.No.209 of 1937 has been marked as Ex.A3. Challenging the same, the Government has preferred the first appeal in A.S.No.66 of 1939 and the first appellate Court, on a consideration of the materials placed on record in the abovesaid suit, held that the suit tank in question is a Government porambokku tank and accordingly, held that the plaintiff's vendor Kuppusamy Pillai is not entitled to claim any exclusive ownership over the same in any manner and also negatived his claim of adverse title to the suit tank as put forth by him and held that at the most, Kuppusamy Pillai would only be entitled to the fishery right, if any, in respect of the suit tank and resultantly, in toto dismissed the suit laid by the plaintiff's vendor Kuppusamy Pillai. Consequently, it is seen that the reliefs of declaration and permanent injunction sought for by the plaintiff's vendor in respect of the suit tank has been completely rejected by the first appellate Court as above noted and the judgment and decree of the first appellate Court rendered in A.S.No.66 of 1939 on the file of the District Court, Nagapattinam has become final. The certified copy of the judgment and decree of the first appellate Court in A.S.No.66 of 1939 is marked as Ex.A4.

12.No material is placed to show that any challenge has been made by Kuppusamy Pillai against the judgement and decree rendered in the abovesaid first appeal. Therefore, when it is found that by way of the abovesaid judgement and decree, the suit tank absolutely belonged to the Government and when according to the Government, the suit tank has been vested with the Municipality as regards the maintenance of the same, in such view of the matter, the claim of the plaintiff that he has acquired the fishery right in respect of the suit tank from Kuppusamy Pillai by way of Ex.A2 sale deed as such cannot be countenanced in any manner. If really, at the relevant point of time, Kuppusamy Pillai had been exercising any fishery right in

respect of the suit tank one way or the other and continue to exercise the same in a lawful manner during the pendency of the suit proceeding laid by him, at least, seeking protection of the same, Kuppusamy Pillai would have urged the Court to grant the appropriate reliefs in his proceedings. However, as abovenoted, the appellate Court has in toto rejected the suit laid by the Kuppusamy Pillai and in such view of the matter, it is found that inasmuch as the fishery right had not been exercised by Kuppusamy Pillai in respect of the suit tank in a lawful manner, during the pendency of the abovesaid proceedings, no relief has been granted by the appellate Court with reference to the same in any manner. Furthermore, there is no proof placed on the part of the plaintiff that after the disposal of the appeal in A.S.No.66 of 1939 dated 18.03.1940, Kuppusamy Pillai had still continued to exercise the fishery right in respect of the suit tank one way or the other by obtaining necessary permission / licence from the Government in the manner to known to law. When the suit tank is found to be belonging to the Government and the same is found to be vested with the Municipality and the claim of fishery rights by Kuppusamy Pillai in respect of the suit tank cannot be a permanent feature or right entitling him to exercise the same in respect of the suit tank and on the other hand, as determined by the trial Court, the said fishery right could be exercised by Kuppusamy Pillai only on the conditions set out by the Government or Municipality from time to time and accordingly, when there is no material placed on the part of the plaintiff that even after the disposal of A.S.No.66 of 1939, Kuppusamy Pillai had been exercising the fishery right in respect of the suit tank in any manner as per law, his further case that Kuppusamy Pillai had conveyed the said fishery right to him by way of Ex.A2 sale deed as such cannot be countenanced in any manner. When it is found that the fishery right in respect of the suit tank belonging to the Government cannot be owned by Kuppusamy Pillai and could be exercised by him as per the conditions set out by the Government or Municipality from time to time one way or the other and when as above noted, there is no material at all placed on the part of the plaintiff that his vendor had exercised the said right after the disposal of the first appeal in A.S.No.66/1939, there is no material placed on the part of the plaintiff as to how his vendor could have validly conveyed the abovesaid right to the plaintiff by way of Ex.A2 sale transaction, claiming that he has absolute right in respect of the same over the suit tank. As rightly determined by the trial Court, on a perusal of the recitals contained in Ex.A2 sale deed, the plaintiff's vendor Kuppusamy Pillai had claimed that he has been exercising the fishery right in respect of the suit tank absolutely by having ownership over the same by obtaining patta etc., and on the otherhand, when the claim of ownership of Kuppusamy Pillai in respect of the suit bank has been negatived by the appellate Court in A.S.No.66 of 1939 and

when there is no material placed on the part of the plaintiff that thereafter, Kuppusamy Pillai had been exercising such right till the date of Ex.A2 sale deed in a lawful manner, in such view of the matter, the claim of Kuppusamy Pillai in Ex.A2 that he has been exercising the said fishery right absolutely and thereby, conveyed the same to the plaintiff by way of the sale transaction cannot be at all upheld in the eyes of law and therefore, as rightly held by the trial Court, when the fishery right to be exercised in respect of the suit tank could be granted only by the Government or Municipality one way or the other on certain conditions and when as on the date of Ex.A2 sale deed, Kuppusamy Pillai is not said to be having or exercising that right, in such view of the matter, the claim of the fishery right by the plaintiff based upon Ex.A2 sale transaction said to have been executed by Kuppusamy Pillai cannot be sustained in the eyes of law and liable to be rejected.

13. Furthermore, the plaintiff has not placed any acceptable and reliable materials to hold that he has been exercising the fishery right in respect of the suit tank from the date of Ex.A2 sale transaction and if that be so, necessary licence or permission obtained by the plaintiff from the Government or Municipality with reference to the same would have been produced by the plaintiff to sustain his case. On the other hand, no permission or licence appears to have been obtained by the plaintiff from the Government or Municipality concerned with reference to the exercise of fishery right in the suit tank. The plaintiff has come forward with the certain receipts marked as Exs.A6 to A9 to evidence that he has been purchasing fingerlings and rearing the same in the suit tank and thereby, urged that by way of the abovesaid documents, the Court should hold that he has been exercising the fishery right in the said tank. However, as rightly determined by the trial Court, when as per the evidence of the plaintiff, he has exercised fishery right in respect of the other tanks also, when Exs.A5 to A9 are not shown to be relating to the suit tank and furthermore, when Exs.A5 to A9 are also not co-related with each other in any manner, in such view of the matter, merely on the abovesaid set of documents, we cannot conclude that the plaintiff has been exercising fishery right in respect of the suit tank. When the plaintiff has failed to establish that he has obtained a valid permission or licence from the Government or Municipality to exercise the fishery right in the suit tank, the abovesaid documents by itself would not be in any manner useful to sustain the plaintiff's case. Ex.A10 is found to be an estimate and therefore, when there is no indication contained therein that the same is a receipt issued in connection with the maintenance of the suit tank, no credence could be attached to the said document for holding that the plaintiff has been exercising the

fishery right in respect of the suit tank. The plaintiff has produced the statement of accounts marked as Exs.A12 to A14 to point out that he has been incurring expenditure in respect of the maintenance of the suit tank and the same had been incorporated in the statement of accounts marked above. However, during the course of evidence, the plaintiff's agent examined as PW1 has admitted that the statement of accounts projected and marked as Exs.A11 to A14 are not audited by the income tax department and also admitted that the expenditure shown in the abovesaid accounts are not submitted to the income tax department or in the IT returns and in such view of the matter, when the accounts mentioned in Exs.A11 to A14 are found to be not reflected in the IT returns of the plaintiff one way or the other, in such view of the matter, it is seen that the abovesaid statement of accounts had been concocted by the plaintiff for the purpose of the case one way or the other to sustain the reliefs prayed for by him as determined by the trial Court. In such view of the matter, no reliance could be fastened on the abovesaid documents for accepting the plaintiff's case.

14.PWs2 & 3 have tendered evidence as if the suit tank is in the enjoyment of the plaintiff and that, he has been exercising the fishery right in respect of the same. PW2 is in the employment of the plaintiff and though PW3 would claim that he had sold the fish to the plaintiff, however, with reference to the abovesaid avocation, he has not placed any material and furthermore, when the plaintiff has failed to establish his claim of the exercise of fishery right in respect of the suit tank by placing the acceptable and reliable materials such as the permission obtained from the Government or Municipality and other reliable materials pointing to the same, in such view of the matter, on the basis of the unreliable and unacceptable evidence of PWs2 & 3, we cannot uphold the plaintiff's case in any manner.

15.In the light of the determination of the first appellate Court in A.S.No.66 of 1939, the plaintiff cannot be allowed to put forth the case that the Government or Municipality has no title to the suit tank or claim absolute right over the fishery right in respect of the suit tank and when at the most, the fishery rights could be exercised in respect of the suit tank only as per the conditions stipulated by the Government or Municipality concerned and when the plaintiff has failed to establish that his vendor exercised such a right, particularly, after the disposal of A.S.No.66 of 1939 and that, he had exercised such a right after Ex.A2 sale transaction and as above noted, when the documents projected by the plaintiff do not point to the same in any manner, the appellate Court is found to have erred in accepting the plaintiff's case in toto by

proceeding to determine the case by shifting the burden on the defendants and when the ownership of the suit tank cannot be at all claimed by the plaintiff in any manner and when the Government has come forward with the specific case that the suit tank is presently vested with the Municipality, the first appellate Court is found to have committed a material patent error in accepting the plaintiff's case on the mere footing that the records pertaining to the suit tank vesting with the Municipality had not been projected by the defendants one way or the other and in my considered opinion, the same would not in any manner be helpful to sustain the plaintiff's case, particularly, when the plaintiff has miserably failed to establish that he and his vendor had been exercising the fishery right in respect of the suit tank in an absolute and complete manner and when with reference to the same, there is absolutely no proof placed on the part of the plaintiff and the suit tank has been held to be owned only by the Government and when the Government has taken a particular stand that the suit tank has been vested with the Municipality, in such view of the matter, it is seen that the first appellate Court, without any basis, on a wrong and improper appreciation of the materials placed on record, had overturned the well considered judgement and decree of the trial Court and in such view of the matter, the reasonings and conclusions of the first appellate Court for accepting the plaintiff's case being found to be totally perverse, illogical and irrational, resultantly, the judgment and decree of the first appellate Court are liable to be set aside. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendants.

For the reasons aforesaid, the Judgement and Decree dated 01.04.2004 passed in A.S.No.72 of 2002 on the file of the Subordinate Court, Thiruvarur are set aside and the judgement and decree dated 22.07.2002 passed in O.S.No.57 of 2001 on the file of the District Munsif Court, Thiruvarur, are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

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Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1.The Subordinate Court, Thiruvarur.

2.The District Munsif Court, Thiruvarur.

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

+lcc to Mr.V.Raghupathi, Advocate sr.20415

+lcc to Special Government Pleader sr.21676

S.A.No.1004 of 2005

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