

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:07.08.2019

Pronounced on :19.08.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No.37 of 2015

and

M.P.No.1 of 2015

1.B.Singu
2.Parvathy

...Defendants / Respondents / Appellants

Vs

1.K.N.Bellie Gowder
2.The District Revenue Officer,
Nilgiris, Udagamandalam.
3.The Tahsildar,
Kundah, Nilgiris.
4.The President,
Ithalar Panchayat, Ithalar,
Nilgiris.

... Plaintiff / Appellant / Respondents

RR2 to 4 impleaded vide order
of Cour dated 28.03.2019 made
in CMP.No.2792 of 2017 in
S.A.No.37 of 2015 (PDAJ).

PRAYER: The Second Appeal filed under Section 100 of CPC,
against the judgment and decree of the Sub Court, Udagamandalam,
in A.S.No.3 of 2014 dated 31.07.2014 reversing the judgment and
decree of the District Munsif, Udhagamandalam, in O.S.No.153 of
2008 dated 21.01.2014.

For Appellants : Mrs.R.Gouri

For Respondents : Mr.N.Damodaran, for R1.
Mr.N.Manikandan,
Government Advocate,
for RR2 to 4.

JUDGMENT

The defendants in O.S.No.153 of 2008 on the file of the District Munsif Court, Ootacamund are the appellants herein.

2. The plaintiff, K.N.Bellie Gowder, has filed the suit for a declaration, that he is the owner of the suit schedule property and for a consequential mandatory injunction directing the defendants to demolish and remove the construction put up within the suit property and for a permanent injunction from putting up further construction and for costs of the suit. By Judgment and Decree dated 21.01.2014, the learned District Munsif, dismissed the suit.

3. The plaintiff then filed A.S.No.3 of 2014 before the Sub Court, Nilgiris at Uthagamandalam. By judgment and decree dated 31.07.2014, the appeal was allowed and the Judgment and Decree of the Trial Court was set aside. Three months' time was granted for demolition and removal of the construction.

4. Challenging that Judgment, the defendants have filed the present Second Appeal. The Second Appeal had been admitted on 18.02.2015, on the following three substantial questions of law:

"1.Whether the lower Appellate Court was right in reversing the decree and judgment of the Trial Court when it is in the report of the Commissioner that the plaintiff is in possession of 10 cents though he has claimed only 3 cents?

2.Whether the lower Appellate Court was right in reversing the decree and judgment of the Trial Court by holding that the defendants have encroached upon a portion of the suit property viz., 3 cents when absolutely there is no evidence for the same?

3.Whether the lower Appellate Court was right in reversing the decree and judgment of the Trial Court on the basis of the Commissioner's report which does not specifically indicate that the defendants have encroached upon any portion of the 3 cents comprised in Survey No.259/27, which is the suit property?"

O.S.No.153 of 2008 (District Munsif Court, Ootacamund):-

5. The plaintiff claimed that he was the absolute owner of the suit schedule property. The suit schedule property was described as land measuring 0.03 acre (3 cents) in R.S.No.174/2, O.S.No.259/27 in Ithalar Panchayat, Uthagamandalam, Nilgiris. The boundaries have not been given in the schedule to the plaint.

6. The plaintiff claimed that patta had been granted to him by the proceedings dated 29.03.1979 of the Tahsildar, Uthagamandalam. He claimed that he had dug foundation for the purpose of constructing a house. The defendants were his immediate southern side neighbours. The plaintiff claimed that the defendants also put up construction and had encroached into the suit property to an extent of 100 Sq.ft. The plaintiff was aggrieved by such construction. He therefore filed the suit seeking declaration of title, mandatory injunction to remove the construction and permanent injunction from putting up further construction.

7. The 2nd defendant filed a written statement, denying the allegations. She claimed that her grandfather, namely, Bola Bella Gowder owned several properties in and around Ithalar Village. He had also encroached to an extent of 20 cents of Natham land in O.S.No.259/27. He had constructed a building in 6 cents of land and had kept 6 cents as a Keri in front of his house and had kept 4 cents in the backyard of his house for Kitchen Garden and had put up a cow shed in the remaining 4 cents. It was stated that on 06.03.1961, he executed a sale deed in favour of Janakiammal, the elder sister of the 2nd defendant for an area of 3 cents. The 2nd defendant claimed that after his death, his legal heirs had allotted one portion with 3 cents of land to his daughter, B.Rani. The remaining 4 cents of land was allotted to the 2nd defendant's father, B.Bellie Gowder. It was also stated that the said Bellie Gowder had further given 3 cents of the land to the 2nd defendant to put up a house. The 2nd defendant specifically denied the allegation of encroachment. She claimed that Ithalar Panchayat had granted approval of her building plan and she had put up a construction. The 2nd defendant claimed that the suit should be dismissed.

8. On the basis of the said pleadings, the learned District Munsif, Uthagamandalam, framed the following issues for trial:

"1.Whether the plaintiff is entitled to the relief of declaration and consequential mandatory injunction as prayed for?

2.Whether the plaintiff is entitled for the relief of permanent injunction as prayed for?

3.Whether the suit is bad for misjoinder of parties?

4.To what other relief?"

9. The following additional issues were also framed:

"1.Whether the boundaries mentioned in the schedule of property is incorrect?

2.Whether the Court fee paid is incorrect?"

10. During trial, the plaintiff was examined as PW-1. He also marked Exs.A1 to A6. Exs.A1 and A2 were the notarized copy of proceeding of the Tahsildar and the Patta granted to the plaintiff. Exs.A3 and A4 were the Correlation Certificate and Possession Certificate. On the side of the defendants, the 1st defendant was examined as DW-1. Exs.B1 to B4 were marked. Exs.B1 and B2 were the Building plan approval and Building plan fee receipt. Ex.B3 were a series of House tax receipts. Ex.B4 were a series of Electricity bill receipts. During trial, an Advocate Commissioner had also been appointed. His report and sketch were marked as Exs.C3 and C4.

11. On analysis of the oral and documentary evidence, the learned District Munsif thought it fit to dismiss the suit by judgment dated 21.01.2014. The learned District Munsif, observed that the plaintiff had not taken any steps to object to the construction built by the defendants and had filed the suit after the completion of the construction. It was also found that the 2nd defendant property was in O.S.No.259/27, which was in no way connected with the suit property. It was also found that foundation for construction of house in the entire extent of 3 cents in O.S.No.259/27 had been put up as early as in the year 1979. It was also found that the report of the Advocate Commissioner in Ex.C3 had not been objected by the plaintiff. In the said report, it was stated that the defendants have encroached 7 sq.mts. of land on the southern most boundary of the suit schedule property. The learned District Munsif, finally, held that the plaintiff was not entitled to the reliefs

of declaration and mandatory injunction. The learned District Munsif, finally, dismissed the suit.

A.S.No.3 of 2014 (Sub Court, Uthagamandalam):-

12. The plaintiff then filed the said first appeal. By judgment dated 31.07.2014, the learned Sub Judge, re-appraised the evidence. The learned Sub Judge, held that the appellant / plaintiff had approached the Court at the earliest point of time. It was also found that the respondents / defendants continued with illegal construction even after the institution of the suit. The First Appellate Court also relied on the report of the Advocate Commissioner, who had stated that the defendants have encroached to an extent of 7 sq.mts. of the plaintiff's land. It was also found that the defendants have not denied the title of the plaintiff. Finally, the learned Sub Judge, allowed the appeal and set aside the order of the Trial Court and granted three months time for demolition and removal of the construction.

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13. Challenging that judgment, the defendants have filed the present Second Appeal. As stated above, the second appeal had been admitted on the following three substantial questions of law:

"1.Whether the lower Appellate Court was right in reversing the decree and judgment of the Trial Court when it is in the report of the Commissioner that the plaintiff is in possession of 10 cents though he has claimed only 3 cents?

2.Whether the lower Appellate Court was right in reversing the decree and judgment of the Trial Court by holding that the defendants have encroached upon a portion of the suit property viz., 3 cents when absolutely there is no evidence for the same?

3.Whether the lower Appellate Court was right in reversing the decree and judgment of the Trial Court on the basis of the Commissioner's report which does not specifically indicate that the defendants have

encroached upon any portion of the 3 cents comprised in Survey No.259/27, which is the suit property?"

14. Heard Mrs.R.Gouri, learned counsel for the appellants and Mr.N.Damodaran, learned counsel for first respondent and Mr.N.Manikandan, learned Government Advocate for the respondents 2 to 4.

15. During the course of hearing, my learned predecessor, on 15.11.2016, made the following observation:

"After hearing the matter for a while, it appears that there is a dispute between the parties in respect of a small portion measuring 100 sq.ft. said to have been encroached by the defendants whereas it is contended that the encroached portion does not belong to the plaintiff and on the other hand, he is in possession and enjoyment of more than three cents, as found by the Commissioner's report. Therefore, prima facie it appears to the Court that one of the party has encroached the poromboke land belonging to the Government and nature of such encroachment has to be seen only by getting a report from the concerned Revenue Officials. Therefore, the appellants are directed to implead the concerned Revenue Officials as party respondent in this appeal for proper adjudication of the matter. Post the matter after two weeks."

16. Thereafter, the appellants have impleaded as additional respondents, the District Revenue Officer, Nilgiris, the Tahsildar, Kundah, Niligiris and the President, Ithalar Panchaya, Ithalar, Nilgiris. Since, it had been observed that one of the parties had encroached the poromboke land belonging to the Government and the nature of such encroachment has to be seen only by getting a report from the concerned Revenue Officials, this Court called upon a report to be filed, to indicate whether the suit property was Government land or not.

17. It is thus seen that the Revenue records will have to be perused before a finding can be given on the issues raised in the plaint and the written statement. That would be an examination of facts. This would naturally mean that the three

respondents who have been impleaded would play a pivotal role in deciding the nature of the land and in determining the relief sought. It is seen that the three newly impleaded respondents have to necessarily produce the entire Revenue records. Both the defendants and the plaintiff will have to be provided with an opportunity to question those records. This would require evidence to be taken. It is trite in law to point out that no amount of evidence without necessary pleadings can be examined. The pleadings can be filed only by the parties in the suit.

18. In the present case, the District Revenue Officer and the Tahsildar and also the President of Ithalar Panchayat have been impleaded as 2nd, 3rd and 4th respondents. I hold that to have effective adjudication of the issues, they must also be impleaded as 3rd, 4th and 5th defendants in O.S.No.153 of 2008 on the file of the District Munsif, Uthagamandalam. Then they could produce the Revenue records and also file a written statement explaining the nature of land and whether there have been encroachments.

19. Naturally, the defendants and the plaintiff should also be given an opportunity, if they seek, to file additional pleadings. The corollary which follows is that the parties would necessarily have to adduce further evidence. All this could require that the judgments of both the First Appellate Court and Trial Court, must be set aside and the parties must be relegated back to the Trial Court to begin afresh to decide the issues raised. However, it is seen that the Advocate Commissioner's report shows that the plaintiff is in possession of 10 cents, though he has claimed only 3 cents and also that the defendants have encroached to an extent of 3 cents. There is no indication in the Advocate Commissioner's report that the defendants have actually encroached upon any portion of the 3 cents of land comprised in S.NO.259/27 which is the suit property. It is thus seen that both the Courts below have adjudicated the suit in the absence of necessary parties to the suit and without perusal of the revenue records. Mis-joinder of the necessary parties is fatal to every suit. In order to do justice to both the parties, it would only be appropriate that both the judgments of the Trial Court and First Appellate Court are set aside and the Advocate Commissioner's report and plan, Exs.C3 and C4 are also set aside and the related documents Exs.C1 and C2 are also set aside.

20. Both appellants and the respondents are relegated back to the Trial Court. Since this Court had impleaded the District Revenue Officer, the Tahsildar and also the President of Ithalar

Panchayat as 2nd, 3rd and 4th respondents, the plaintiff is directed to implead them as defendants 3, 4 and 5 respectively, by filing necessary application before the Trial Court. The learned District Munsif, may grant an opportunity to the said newly added defendants to file necessary written statements and also grant an opportunity to the plaintiff and the defendants to file additional pleadings if necessary. Additional issues may then be framed and the parties may then be invited to adduce evidence restricted to such fresh pleadings.

21. The evidence already recorded and the documents already marked on the side of the plaintiff and the defendants shall be retained as records of the Trial Court. Further evidence if any may be recorded on the side of the plaintiff and the defendants and further additional documents may be marked subject to the admissibility, proofs and relevancy. These must relate to the additional pleadings now permitted be filed.

22. However, the Advocate Commissioner's report and plan, Exs.C3 and C4 and the related documents Exs.C1 and C2 are eschewed and effaced from the records and the reports are specifically set aside. The parties, if they deem necessary, may seek appointment of a fresh Advocate Commissioner and it is hoped that if an Advocate Commissioner is appointed, he/she would be directed to take the assistance of a Surveyor and also examine the Revenue records before filing a report. The newly impleaded defendants may also produce necessary Revenue records for appreciation by the learned District Munsif.

23. With these observations, without answering the substantial questions of law, but however, setting aside the report of the Advocate Commissioner and related documents (Exs.C1, C2, C3 and C4) and also setting aside the judgement dated 21.01.2014 in O.S.No.153 of 2008 and the judgement dated 31.07.2014 in A.S.No.3 of 2014, the Original Suit O.S.No.153 of 2008, is remanded back for further proceedings in accordance with the observations made above to the District Munsif Court, Uthagamandalam. Since the suit is of the year 2008, it is hoped that the learned District Munsif would bestow personal attention to dispose of the suit without any unnecessary adjournments. Both the plaintiff and defendants are directed to co-operate in early adjudication of the additional issues raised before the Trial Court.

24. With these remarks, the Second Appeal is allowed. The judgement dated 31.07.2014 of the First Appellate Court in

A.S.No.3 of 2014 and the judgement dated 21.01.2014 of the Trial Court are set aside. O.S.No.153 of 2008 is remanded back to the file of the District Munsif Court, Uthagamandalam for continuation of the proceedings in accordance with the directions given above. No order as to costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar(CS V)

True Copy

Sub-Assistant Registrar

To

1.The Sub Court, Udhagamandalam.

2.The District Munsif, Udhagamandalam.

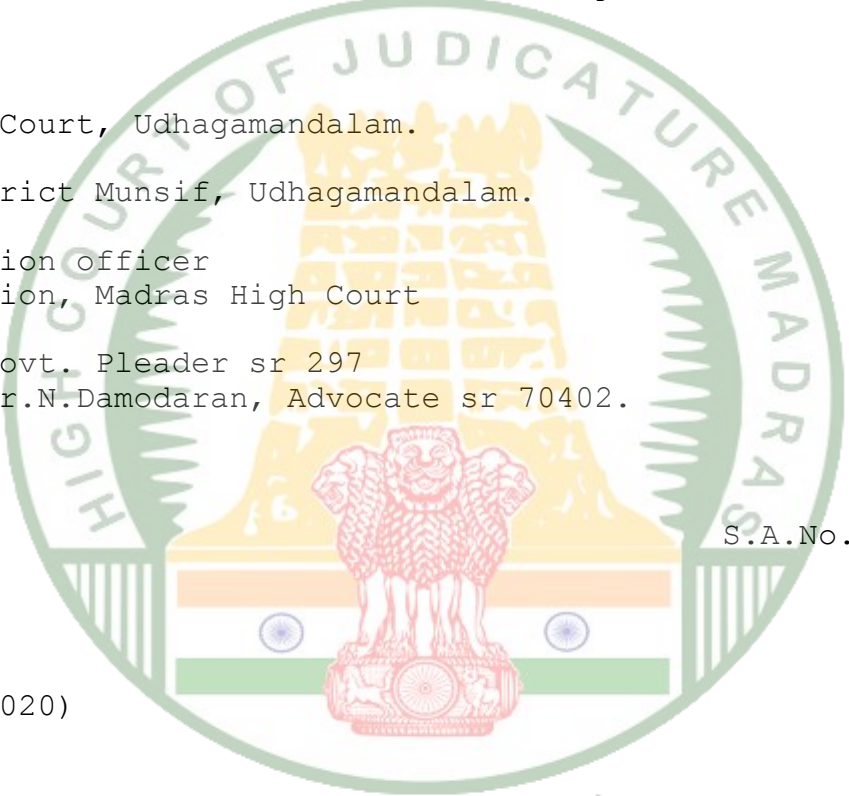
3.The Section officer
VR Section, Madras High Court

+1 CC to Govt. Pleader sr 297

+1 CC to Mr.N.Damodaran, Advocate sr 70402.

S.A.No.37 of 2015

PP(CO)
SP(05/02/2020)

The seal of the Madras High Court is a circular emblem. It features a central golden temple gopuram (tower) with a red lion standing in front of it. The lion is facing forward and is flanked by two smaller lions. Below the lion is a red wheel (Chakras) with a central hub. The entire emblem is set against a background of horizontal stripes in orange, white, and green. The words "HIGHER COURT OF JUDICATURE MADRAS" are written in a circular border around the emblem. Below the emblem, the Sanskrit motto "सत्यमेव जयते" (Satyameva Jayate) is written in Devanagari script.

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