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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

S.A.No.766 of 2012

Natarajan ...Appellant/1st Respondent/Plaintiff

Vs.

1. Muniya Gounder ...1st Respondent/Appellant/1st Defendant

2. The Superintending Engineer
Tamil Nadu Electricity Board
Villupuram

3. The Executive Engineer (O&M)
Tamil Nadu Electricity Board
Ulundurpet

4. The Assistant Executive Engineer (O&M)
Tamil Nadu Electricity Board
Periyasevalai, Ulundurpet

5. The Junior Engineer (O&M)
Tamil Nadu Electricity Board
Thiruvannainallur (Town)
Tirukoilur Taluk

...Respondents 2 to 5/Respondents
2 to 5/Defendants 2 to 5

PRAYER: The Second Appeal has been filed under Section 100 of the Civil Procedure Code to set aside the decree and judgment dated 10.08.2011 mad in A.S.No.109 of 2009 on the file of I Addl. Subordinate Judge, Villupuram reversing the judgment and decree dated 09.09.2009 made in O.S.No.221 of 2004 on the file of II Additional District Munsif, Ulundurpet.

For Appellants : Mr.R.Krishna Prasad
for M/s. Sarvabhauman Associates

For Respondents : Mr. R.Raja Rajan for R1
Mr.V.Viswanathan for R2 to 5

J U D G M E N T

Plaintiff is the appellant. Aggrieved over the reversal of the decree granted in his favour in the Trial Court, has



preferred the above Second Appeal.

2. Originally, the plaintiff filed a suit for declaration and permanent injunction with respect to 'A' schedule property, declaration and recovery of possession with respect to 'B' schedule property, mesne profits and for a mandatory injunction not to draw water from the bore well in the 'A' schedule property and for a direction to the defendants 3 to 5 disconnect electricity service connection No.372 and for costs.

3. The Trial Court framed appropriate issues and decreed the suit. Against which, the respondent/defendant preferred an appeal which was allowed. Aggrieved over the same, the appellant preferred the above second appeal and the same was admitted before this Court on 31.07.2012 on the following questions of law:

"1. Whether the Lower Appellate Court is correct in law in overlooking Exs.C1 to C4 especially when the Commissioner and Surveyor both submitted the report that the encroachment of 2 feet in S.F.No.48B/7A and this 2 feet portion is part of S.No.48B/7B?

2. Whether the Lower Appellate Court is correct in law and reversing the judgment and decree of the Trial Court on the ground that the adjacent lands had not been measured when such a plea has not been taken by the defendant himself?"

4. Heard the submissions of both the sides.

5. The admitted facts are that originally the land in dispute belong to one Pitchaikaran. He sold an extent of 0.04 cents in S.No.48B/7 and 0.21 cents in S.No.48B/15 in favour of one Palani Gounder on 21.03.1981. Thereafter, the said Palani Gounder executed a sale in favour of one Raghava Gounder to an extent of 0.76 cents of lands comprised in S.No.48B/7-0.04 cents, 48B./16-0.28 cents, 48B/15-0.44 cents. Thereafter, he sold an extent of remaining 25 cents in S.No.48B/7 in favour in one Kanna Gounder (1st defendants father) on 25.06.1984. The said Raghava Gounder has sold the 0.76 cents in favour of the plaintiff on 28.07.1992. All the three owners, viz., Kanna Gounder, Raghava Gounder and Natrajan the plaintiff were shown as the joint pattadhars. On 07.10.2002 vide Ex.B2 a sub-division had taken place in which the property belonging to Kanna Gounder was subdivided as S.No.48B/7A measuring 0.10.0 Ares. The property of the plaintiff measuring 0.04 cents was subdivided as 48B/7B and it was recorded in the name of his vendor Raghavan and himself. Thereafter, in June 2004 Patta No.1275 was issued in favour of the 1st defendant wherein four items of properties.



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totalling to 23 Ares.

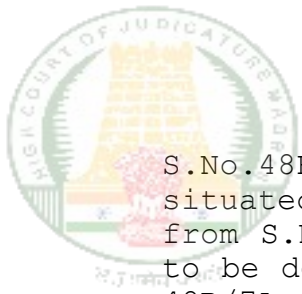
48B/7A	0.10.0 Ares
57/1B	0.4.5 Ares
57/1C	0.4.5 Ares
57/1G	0.4.0 Ares

6.The plaintiff was given Patta on 01.04.2004 for his four cents. There is no dispute with regard to the above facts.

7.According to the plaintiff, he dug a well in the year 1993 measuring 15X15 feet and irrigating his 'A' schedule lands. Due to the scarcity of water, he sunk a bore well and cultivating sugarcane crops. On 02.04.2004, the 1st defendant attempted to trespass into the land and destroy the bore. Taking that as a cause of action, he filed a suit for declaration and for permanent injunction. Thereafter, he had also claimed prescriptive title on the basis of enjoyment of the property for 22 years prior to the suit. Thereafter, he amended the suit for recovery of possession on the basis of the report submitted by the Advocate Commissioner. During the pendency of the suit, the 1st defendant was given electricity service connection for the bore well. Therefore, he further amended the suit to one of recovery of possession and mesne profits and mandatory injunction restraining the 1st defendant from drawing water from the bore well and for disconnection of the electricity service connection as against the defendants 3 to 5.

8.The Trial Court has considered the report submitted by the Commissioner and that the admission of D.W.1 to the effect that his father purchased 25 cents on 25.06.1984 and 1st defendant purchased 4 cents on 28.07.1992 and as per the sale deed, he has no objection for granting a declaration title and also after considering the report of the Advocate Commissioner, the 1st defendant is holding an excess of 2 cents over and above the 25 cents purchased by him concluded that there is an encroachment of 2 cents and the plaintiff is entitled to get declaration of title for 4 cents and recovery of 2 cents from S.No.48B/7A. However, the Trial Court has also found that the plaintiff has failed to prove that he dug a well and put up the motor shed and therefore he is not entitled to simultaneous relief of injunction and possession and ordered a recovery of possession excluding the well. Consequently, granted mandatory injunction of drawing water from the bore well as well as for disconnection of electricity service connection.

9.The Lower Appellate Court having found that the plaintiff originally prayed for declaration of his title with respect to 0.04 cents amended his relief for recovery of 2.3 cents in



S.No.48B/7A. When a declaration is sought for the property situated in 48B/7B, the recovery of possession cannot be ordered from S.No.48B/7A. The description of the property was also found to be defective. Originally recovery was sought for 2.3 cents in 48B/7A later it was amended as 0 Ares. Therefore, with the defective and improper description of the property the plaintiff is not entitled for the same. Secondly, the Lower Appellate Court has found that the Trial Court having found that the plaintiff has failed to prove that he dug the well and put up a motor shed and declined the relief of possession of the well ought not to have ordered recovery of possession excluding the well as it is common sense well is attached to the ground.

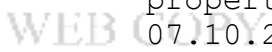
10.Further,the measurement made by the Advocate Commissioner was with respect to S.Nos. 48B/7A and 7B, whereas the Ex.A3 sale deed mentions the properties in S.Nos. 48B/7, 48B/16 and 48B/15. To find out as to whether there is deficit of land as per Ex.A3 the entire property mentioned in the schedule should have been measured, whereas the measurement was made only in piecemeal and without any materials, it was reported that there was encroachment of 2 cents. Therefore, also the Lower Appellate Court refused to rely on the Commissioner's report and reversed the judgment.

11. From the Exhibits A1 and A2 it could be seen that the properties in S.No.48B/7 to an extent on 0.04 cents and 48B/15 to an extent of 0.21 cents were sold to Palani Gounder. The said Palani Gounder has sold the 48B/7 to an extent on 0.04 cents along with his other properties in S.No.48B/16 and 48B/15 measuring an total extent of 0.76 cents. Therefore, it is clear that the plaintiff must be in possession of 0.76 cents . But the patta was issued to him vide Ex.A4 in Patta No.1161 only in respect of 0.04 cents of land. The remaining properties which were purchased under Ex.A3 were not at all mentioned therein. On a perusal of Ex.A1 and A2, shows Kanni Vaikal as a Northern boundary for both 48B/15 and 48B/7. A perusal of Ex.B1 shows that an extent of 25 $\frac{1}{4}$ cents were sold by Palani Gounder in favour of Kanna Gounder in 48B/7. The Eastern boundary of the land is shown as Raghava Gounder's land. Therefore, it is clear that Eastern boundary of the 1st defendant land is Raghava Gounder's land. Whereas the boundary mentioned in Exs.A1 and A2 shows the Eastern boundary as one of Mannagatti Ammal, but the Northern boundary as Kanni Vaikal for all the properties. The FMB sketch marked as Ex.B5 and the sketch annexed along with the Commissioner's report shows that Eastern boundary of S.No.7A and Western boundary of 7B in straight line. Ex.B1 was purchased on 25.06.1984 and Ex.A3 was purchased on 28.07.1992. Thus, the 1st defendant's father purchased the property 8 years before the purchase made by the plaintiff. In that event, the plaintiff's Western boundary should have been shown as property of Kanna



Gounder father of 1st defendant. Whereas it was shown as Gopula Gounder's land. If that be so, 48B/7B should be an extended land beyond 48B/7A. Therefore, as found by the Lower Appellate Court, the boundaries were not properly mentioned in the Ex.A3 and in the plaint as well. The plaintiff originally filed a suit for declaration and injunction with respect to his property in S.No.48B/7B on the fact that he was in possession of the entire 0.04 cents of land. Later on the basis of the report filed by the Advocate Commissioner, it was amended as one of recovery of possession. A perusal of the Advocate Commissioner's report shows that North Eastern corner of 48B/7A and North West corner of 48B/7B as the disputed possession. The measurements found in the village records and FMB sketch appears to be correct, but it was reported that the 1st defendant is in possession of 27 cents under 48B/7A which is in excess of the land his father has purchased. But there is absolutely no pleading in the plaint or any materials to show the land was encroached and is in possession of the 1st defendant. Further more, when the FMB sketch as well as the Village record shows the Eastern boundary of the 1st defendant as straight line, it could not be comprehended as to how the triangle of the land is said to have been encroached. Further, when the Commissioner's warranted to measure the properties comprised in Ex.A3 and B1 they have chosen to measure only part of the properties. They measured only 48B/7A and 48B/7B leaving out the remaining properties in 48B/16 and 48B/15. Without measuring the total 76 cents, one cannot ascertain there is a deficit of 2 cents. Therefore, the Commissioner's report cannot be relied for its defective execution of warrant. Lower Appellate Court has also rightly find that the Commissioner's report does not disclose a complete picture.

12. The evidence of P.W.1 would state that the well dug 16 years prior to the suit and a motor shed was constructed 5 ¼ years prior to the suit. Therefore, the fact remains that the property was purchased only in the year 1992 and he obtained title and got possession only 8 years prior to the suit. It is not the case of the plaintiff that his vendor has already dug the well and it was conveyed to him. It is his case that he dug a bore well 16 years back, which is quite improbable. Whereas, the evidence of D.W.1 and D.W.2 goes to show that well was dug in the year 1995 immediately after the purchase of land under Ex.B1 dated 25.06.1984. Further evidence that the bore well was dug 5 years prior to the suit. Therefore, the case of the 1st defendant that his father purchased the property and dug the well and obtained electricity service connection in the name of their grand father and used it for irrigation for the past 16 years is supported by evidence. Whereas, the digging of the well even before the purchase of the land by the plaintiff and put up motor shed appears to be false. The Court below has rightly held



13. It is pertinent to note that the sub division of the property was done in 2002. Ex.B2 is the proceedings dated 07.10.2002 clearly proves that the 1st defendant was given patta in respect of 25 cents and the plaintiff was given patta for 4 cents. Obviously, the sub division must have been done after taking measurements. If there was encroachment, the plaintiff would have objected then and there. The well and the motor shed were found to be within the S.No.48B/7A. Once the subdivision was made and it was accepted by the defendant the well situated within the four boundaries of 48B/7A, the plaintiff cannot take a new stand on the basis of the Commissioner's report that there was encroachment.

15.As found by the Lower Appellate Court, when a bore well was dug in plaintiff's land he will not keep quite till the 1st defendant obtains electricity service connection. As observed above, at the time of filing of the suit, the plaintiff was under the impression that he was enjoying 4 cents only after filing of the report of the Commissioner, he has developed his case to one of enjoyment and recovery of possession. The original cause of action was that the 1st defendant is attempting to destroy the bore well dug by him in his land. The evidence of D.W.1 goes to show that the plaintiff has his own well and bore well and that he has an electricity service connection. The plaintiff as P.W.1 also would admit that he has an electricity service connection in S.C.No.272 and that he dug a well in 2 cents of his land. But there is no whisper about the well and bore well dug by the plaintiff in the pleadings. Therefore, it is clear that the plaintiff has not come out with clear picture and clear description of his property. Only because the 1st defendant as D.W.1 has stated that he is enjoying the property purchased under Ex.B1 by his father to an extent of 25 cents and the plaintiff is enjoying the property purchased by him under Ex.A3 to an extent of 4 cents, it will not amount to proof of encroachment or admission that the declaration as sought for by the plaintiff can be granted. The plaintiff is expected to prove his own case and get the relief. On the other hand, the Trial



Court has wrongly proceeded on the ground that D.W.1 has accepted the title of the plaintiff and thereby admitted the encroachment made by him. Such an presumption is without any material and the finding thereby is absolutely perverse. In the absence of any proof of any encroachment or digging of well or sinking of bore well which could have been easily proved by records or through witnesses. The finding that the plaintiff is entitled to declaration and recovery of possession is not sustainable. Further, when the relief of declaration is sought for, the property situated in 48B/7B, the relief of recovery of possession cannot be granted against any property which is not the subject matter of the suit. The finding of the Lower Appellate Court on this aspect is also not correct. Therefore, it is very clear that the plaintiff has failed to prove his case of injunction and recovery of possession and also thereby for the relief of mandatory injunction.

16.As already discussed, the report of the commissioner vide Ex.C1 to C4 recording the encroachment of the land without measuring the entire extent of the property is defective and unreliable. The finding of the Lower Appellate Court on this aspect is correct and the questions of law answered against the plaintiff.

In fine, the Second Appeal stands dismissed. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

kpr

To

1. The I Addl. Subordinate Judge, Villupuram
2. The II Additional District Munsif, Ulundurpet.

Copy To

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

+1cc to Mr.T.Gandhi, Advocate, S.R.No.39135

S.A.No.766 of 2012

AJB(CO)
RGA(16/06/2022)