



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06.01.2022

CORAM:

THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

S.A.No.1122 of 2021

Kuttaya Gounder ... Appellant /Appellant/Plaintiff

.Vs.

1.Vadivel Gounder

2.Ramamoorthy ... Respondents/Respondents/Defendants

PRAYER: Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree dated 24.02.2021, passed in A.S.No.17 of 2018 on the file of the Subordinate Judge, Gingee confirming the judgment and decree dated 10.01.2018, passed in O.S.No.375 of 2010 on the file of the Additional District Munsif Court, Gingee.

For Petitioner : Mr. S. Shahul Hameed

J U D G M E N T

This second appeal is directed against the judgment and decree of the learned Subordinate Judge, Gingee in A.S.No.17/2018, confirming the judgment of the learned Additional District Munsif Court, Gingee in O.S.No.375/2010.

2.The appellant as a plaintiff, filed the suit in O.S.No.375/2010, seeking the relief of declaration of title in respect of the suit property and for permanent injunction restraining the respondents from interfering with the possession and the enjoyment of the suit property.

3.For the better understanding, it is necessary to know what is the suit property.

3(i). The suit property is an extent of 1.86 acres of land in Thazhakunam Village, in Survey No.40, within the following boundaries: West by canal, North by land belong to Kasiammal, East by Pattai and South by land belongs to Visalatchi Ammal. This property was sold with 2/3 right to draw water from Well, mamool kalvai, kamizhi etc.



4.The case of the appellant is that he purchased the suit property from one Parasurama Gounder on 21.09.1981. There is a total extent of 2.86 acres available in S.No.40. Out of this total extent, 1 acre was settled on 15.12.1960 to the respondents by Pachaiyappa Gounder. The remaining 1.86 acres was purchased by the appellant. There is a Well in S.No.40. On the east of this Well, appellant's 1.86 acres and on the west of this Well, respondents' 1 acre situate. The respondents, suppressing physical features and the fact of sub division, filed a suit in O.S.No.218/2001 against the appellant and his wife. Subsequently, the suit was dismissed for non prosecution. After the disposal of the suit, the respondents tried to encroach the appellant's land claiming that they own 86 cents of their lands there. Therefore, the suit is filed for the aforesaid reliefs.

5.It is seen from the written statement filed by the first respondent that they denied that the respondents tried to encroach appellant's land. The total extent of land available in S.No.40 in 2.86 acres. There is Well in this property and the survey number of the property is 40/2. Appellant's property comes under S.No.40/3. The Well situates with an extent of 0.02.0 acres. The lands of the parties have to be measured after deducting the area of Well namely 0.05 cents. There is a mamul canal running from the Well and it measures 2 cents. This extent has also to be deducted, while taking the extent of the land belong to the parties. Appellant fails to understand that both the parties do not possess the extent mentioned in the title deeds. Approximate extent was given in the title deeds of the parties. The western boundary of the appellant's property is mamul vaikaal. Both the parties are drawing water from the common Well, using the common canal. It is not correct to state that the respondents tried to create a new canal. In O.S.No.218/2001, interim injunction was granted and then appellant filed appeal before the Sub Court, Gingee. The sub Court Gingee dismissed the appeal. The suit was primarily filed for the reason that the appellant tried to obliterate the common canal. After dismissal of the appeal, appellant has not taken any steps to obliterate the canal. Therefore, the suit was not prosecuted. This suit has no merits and it is liable to be dismissed.

6.On the basis of the pleadings, the trial Court framed the following issues.

- 1.Whether, the plaintiff is entitled to the relief of declaration as prayed for?
2. Whether the plaintiff is entitled to the



relief of permanent injunction as prayed.

3. To what other relief the plaintiff is entitled to.

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7. During the trial before the trial Court, P.W.1 and P.W.2 were examined. Ex.A1 to A7 were marked. D.W.1 was examined and Exs.B1 to B4 were marked. That apart, Exs.C1 and C2, Commissioner's report and plan were also marked.

8. On going through the oral and documentary evidence, the trial Court found that the appellant purchased through Ex.A1 sale deed only to the extent of 1.80 acres and therefore, the declarative prayer for 1.86 acres cannot be granted and in this view of the matter, the suit was dismissed. Challenging the said judgment, the appellant filed appeal in A.S.No.17/2018.

9. The learned first appellate Judge also found from the oral and documentary evidence that appellant has failed to establish that he was in possession and enjoyment of 1.86 acres and that he admitted that respondents have not claimed any right in 86 cents. In this view of the matter, the learned first appellate Court found that there is no cause of action for filing the suit and dismissed the appeal by confirming the judgment of the trial Court. Challenging the said judgment, appellant has filed this second appeal.

10. The learned counsel for the appellant submitted that both the Courts below have relied heavily on Exs.C1 and C2, Advocate Commissioner's Report to record the finding that the appellant was in possession and enjoyment of 1.80 acres and not in a possession of 1.86 acres. The Advocate Commissioner has not measured the property of the respondents. Without measuring the property of the respondents, a proper finding cannot be given as to the entitlement of appellant's claim.

10(i). Further it is submitted that appellant's land is shown lying till the dotted line shown in FMB Sketch. This dotted line should have been drawn further west. This factor would have been known, if the property of the respondents was also measured. When that was not measured, the report given by the Advocate Commissioner is incomplete and decision based on the Advocate Commissioner's Report is also not correct. It is also submitted that appellant filed objection to Commissioner's Report and it was not considered by the Advocate Commissioner and the Court. Therefore, he prayed for setting aside the judgment of the Courts below and for allowing this second appeal.



11. Considered the submission of the learned counsel for the appellant and perused the records.

12. Admittedly, the entire extent of 2.86 acres in S.No. 40, originally belonged to Parasurama Gounder. Parasurama Gounder's son, Pachaiyappa Gounder settled 1 acre, out of this 2.86 acre, in favour of respondents on 15.12.1960. The remaining 1.86 acre was sold to the appellant through Ex.A1 sale deed on 21.09.1981. This 1.86 acre was sold with specific four boundaries. Therefore, appellant cannot claim anything beyond this four boundaries. On the west of this 1.86 acres, the boundary is shown as canal. This canal is for the use of both the appellant and respondents. The canal is a fixed boundary. The Advocate Commissioner along with surveyor and the Village Administrative Officer inspected the suit property. The mandate given to the Advocate Commissioner was to inspect the suit property alone. The Advocate Commissioner was appointed at the instance of the appellant. The appellant wanted only his property to be measured with the help of surveyor. He has not sought for measuring the property of the respondents. Therefore, it is not now open to the appellant to claim that the respondents' property should also have been measured. As already found that there is a fixed boundary on the West. That is, a canal, which is used by both the parties. On the East, there is a pattai. It is also a fixed boundary.

13. The Advocate Commissioner with the help of surveyor, the revenue records found that appellant is in possession of 1.80 acres with his four boundaries. It is not known, whether the properties were measured at the time of purchasing the suit property under Ex.A1. If the properties were measured and purchased, giving exact measurement with the details of East-West, North-South and total extent, then he can say that there is reduction in the property purchased and there is a possibility of encroachment by the respondents. That is not the case here. The details of measurement by East-West, North-South and total extent are not specifically given in Ex.A1 sale deed. Only four boundaries are given. It is the settled proposition of law that boundaries prevail over the extent. Therefore, whatever the extent available within the four boundaries given in Ex.A1, that alone is entitled to the appellant. As per the oral and documentary evidence, Exs.C1 and C2, Commissioner's Report, it is found that there is an extent of 1.80 acres available to the appellant with the four boundaries given in Ex.A1.

14. It is also to be taken note of the fact that there is a common Well and common Canal. It is seen from the written



statement filed by the respondents that the extent of 5 cents for common Well and extent of 2 cents for common canal have to be excluded for calculating the extent. There is a merit in this claim. It is also pleaded by the respondents in the written statement that even if the property of the respondents is measured, there is a possibility of reduction of extent of the land than what is mentioned in their settlement deed.

15.From the oral and documentary evidence, it is found that the appellant is entitled to 1.80 acres within four boundaries. Appellant has not made out a case that respondents tried to encroach his property. It is admitted by the appellant that respondents have not tried to encroach his property, that is 86 cents. Therefore, both the Courts below have rightly found that the appellant has not made out the case for entertaining the suit against the respondents and rightly dismissed the suit.

16.This Court finds no reason to interfere with the judgment of the Courts below and no substantial question of law arise for consideration in the second appeal. In fine, this Court confirms the judgment passed in A.S.No.17/2018, on the file of the Subordinate Judge, Gingee confirming the judgment passed in O.S.No.375 of 2010, on the file of the Additional District Munsif Court, Gingee and dismisses the second appeal. There shall be no order as to costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

AT

To

1.The Subordinate Judge, Gingee.

2.The Additional District Munsif Court,
Gingee.

+1cc to Mr.S.Shahul Hameed, Advocate SR.No.1546

S.A.No.1122 of 2021

CP(CO)

GN(16/02/2022)