



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.899 of 2010

WEB COPY

Jayakumar

... 1st Defendant / Appellant / Appellant

-Vs-

1.Isravel
2.Ismavel
3.Manohar
4.Aani Rose
5.Devi Jesudhas
6.Ashin Rubi

... Defendants 2 to 4 and Lrs of the original
Plaintiff / Respondents 2 to 7 / Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 06.04.2010 made in A.S.No.48 of 2007 on the file of the Subordinate Judge, Kuzhithurai confirming the judgment and decree dated 21.02.2007 made in O.S.No.442 of 2001 on the file of the learned II Additional District Munsif Court, Kuzhithurai.

For Appellant	: Mr.K.N.Thampi
For R4 to R6	: Mr.V.M.Balamohan Thampi
R1 to R3	: Dispense with

JUDGMENT

The first defendant in O.S.No.442 of 2001 on the file of the II Additional District Munsif Court, Kuzhithurai is the appellant in this second appeal.

2. The suit was filed by one Davidson for the relief of declaration, recovery of mesne profits and demarcation. The appellant herein contested the suit. He filed written statement controverting the plaint averments. The court below framed as many as eight issues. The plaintiff examined himself as P.W.1 and marked Ex.A1 to Ex.A12. The appellant examined himself as D.W.1 and one Maria Yesudhasan was examined as D.W.2. Ex.B1 to Ex. B17 were marked. An Advocate Commissioner was appointed and her report and plan were marked as Court Exhibits 1 & 2. She was also examined as C.W.1. After consideration of the evidence on record, by judgment and decree dated 21.02.2007, the trial court partly decreed the suit by granting declaration of title over the area of 630 square links shown in the commissioner's report as 'B C D' - Ex.C2 and the plaintiff was also held entitled to recover the same from the first defendant. Ex.C2 was appended to the decree. Aggrieved by the



same, the first defendant filed A.S.No.48 of 2007 before the Sub Court, Kuzhithurai. By the impugned judgment and decree dated 06.04.2010, the decision of the trial court was confirmed and the first appeal was dismissed. Challenging the same, this second appeal came to be filed. During the pendency of the first appeal, the plaintiff had passed away and his legal heirs came on record. The second appeal was admitted on 21.12.2010 on the following substantial questions of law:-

"1. Whether the courts below have not correctly decided the plea of non-joinder of necessary parties as the Government and Killiyur Panchayat Union has not been made as parties to the suit, especially, when the original plaintiff did not furnish the particulars like extent, boundaries etc., of the portion acquired by the Government for the formation of a channel while admitting such acquisition?

2. Whether the courts below have committed an error in not non-suited the plaintiffs for the relief sought for on the ground of suppression of material facts relating to the acquisition of a portion of the suit property for forming the channel and the fact of dismissal of his earlier suit in O.S.No.135 of 1977?

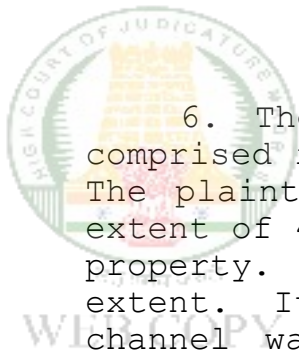
3. Whether the courts below have committed an error in not properly considering the fact that the original plaintiff in the former suit, namely O.S.No.135 of 1977 had claimed right in respect of three and a half cents of land including the portion acquired for the formation of the channel, whereas, in the present suit, the claim is for a larger extent, namely four cents?

4. Whether the courts below are not wrong in decreeing the suit, when the plaintiffs have failed to make it clear as to how much was the extent acquired by the Government for forming the channel and how much is the balance extent available to which the plaintiffs are entitled, especially when the plaintiffs have not given necessary particulars of demarcation of the property available after the acquisition for the purpose of forming the channel?"

3. The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellant and set aside the impugned judgment and decree and dismiss the suit in *toto*.

4. Per contra, the learned counsel appearing for the legal heirs of the deceased plaintiff submitted that the impugned judgment and decree do not warrant any interference.

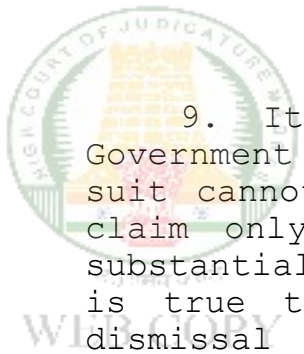
5. I carefully considered the rival contentions and went through the evidence on record.



6. The suit property measures an extent of 4 cents and is comprised in R.S.No.793/13 in Nattalam Village in Vilavancode Taluk. The plaintiff however did not ask for declaration over the entire extent of 4 cents. He conceded that a road had been laid on the suit property. He wanted declaration of title only for the remaining extent. It has been brought out in evidence that apart from road, a channel was also laid across the suit property. The plaintiff anchored his entire case on the basis of what is known as oodukoor award dated 21.01.1953 marked as Ex.A1. Ex.A2 is its tamil translation. The genuineness and validity and the binding nature of the oodukoor award is not questioned. The only defence taken by the appellant was that whatever was allotted to the plaintiff under oodukoor award no longer exists because on the said land, a tar road was built and a channel is also presently running. If the tar road and the channel are taken into account, there is nothing left for the plaintiff to claim.

7. The learned counsel would point out that the plaintiff had earlier filed O.S.No.135 of 1977 before the first Additional District Munsif Court, Kuzhithurai against the Government and the local body seeking the relief of declaration of title, possession and for recovery of possession. The trial court vide judgment and decree dated 27.09.1978 dismissed the said suit. The plaintiff had also admitted that pucca road had been laid across the suit property. This document was marked as Ex.B1. Having suffered a dismissal, the plaintiff made several efforts to wriggle out of the consequences. Following therefrom, he was not successful. Later, he filed one more suit in O.S.No.216 of 1981. It was this suit that was allowed to be dismissed as withdrawn with liberty to file a fresh suit. The dismissal of the earlier suit would come in the way of granting relief in the present proceedings. The learned counsel appearing for the appellant contended that the report and plan drawn by the Advocate Commissioner are thoroughly faulty.

8. I am not persuaded by the objections raised by the learned counsel appearing for the appellant. The courts below have concurrently rendered a finding that the report and plan drawn by the Advocate Commissioner can very well be accepted. The Advocate Commissioner had located the four cents of land allotted to the plaintiff under Ex.A1-oodukoor award. It has also been specifically found that a substantial portion of the said property had already been consumed by the tar road and the channel. What remains is only 630 square links. The said tiny portion has been shown in the commissioner's report as 'B C D'. The courts below have concurrently rendered a finding that the first defendant who is having a property on the western side had annexed the same. Therefore, the courts below have apart from declaring the plaintiff's title over the portion marked as 'B C D' in Ex.C2 also directed the first defendant to surrender the same. These are pure findings of fact. In exercise of jurisdiction under Section 100 of



9. It is true that the plaintiff failed to implead the Government and the local body as parties to the suit. However, the suit cannot be said to be bad on this ground. The plaintiff had claim only against the appellant herein. Therefore, the first substantial question of law is answered against the appellant. It is true that the plaintiff had not made any reference to the dismissal of O.S.No.135 of 1977. Nor did he whisper about the formation of the channel over the suit property. The courts below did not choose to non-suit the plaintiff on this ground. The courts below after a thorough analysis of the evidence on record have rendered a finding that the road as well as the channel have been formed across the suit property and what was available for the plaintiff is only a tiny extent of land. When the courts below have not chosen to non-suit the plaintiff on the ground of suppression of facts, in exercise under Section 100 of C.P.C., the question of this Court interfering on this ground will not arise at all. The 2nd, 3rd and 4th substantial questions of law are also answered against the appellant. I do not find any ground to interfere. The impugned judgment and decree are confirmed. The second appeal is dismissed. No cost.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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To

1.The Subordinate Judge,
Kuzhithurai.

2.The II Additional District Munsif,
Kuzhithurai.

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The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court, Madurai. (2 COPIES)

+1 CC to M/s.K.N.THAMPI, Advocate (SR-15455[F] dated 30/03/2022)

+1 CC to M/s.V.M.BALAMOZHANTHAMBIL, Advocate (SR-15839[F]
dated 31/03/2022)

Judgment made in
S.A.(MD)No.899 of 2010
29.03.2022

KMV (CO) GC (13.04.2022) 4P 7C

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