



S.A. No. 1173 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2024

CORAM

THE HONOURABLE Ms. JUSTICE R.N.MANJULA

S.A. No. 1173 of 2011
and M.P. No. 1 of 2011

Rajulu Naidu

...Appellant

Vs.

1.Mannangatti
2.Kannan
3.Marimuthu

...Respondents

PRAYER: Second Appeal is filed under section 100 of the Code of Civil Procedure, 1908, to set aside the judgment and decree dated 29.04.2011 made in A.S. No. 30 of 2010 on the file of the II Additional Subordinate Judge of Cuddalore, dismissing the judgment and decree dated 26.02.2010 made in O.S. No. 290 of 2005 on the file of the Additional District Munsif of Cuddalore.

For Appellant : Mr.R.Gururaj

For Respondents : Mr.N.Thiagarajan (R1)
No appearance (R2 & R3)

JUDGMENT

The appellant is the plaintiff, who has filed a suit for declaration that 'A' schedule property is a public Odai and for permanent injunction to restrain the



defendants from obliterating any portion of the 'A' Schedule property. The trial Court has dismissed the suit. The first appeal preferred by the appellate Court also dismissed by confirming the judgment of the trial Court. Aggrieved over that, the plaintiff has filed the second appeal.

2. The facts of the plaint filed by the plaintiff in brief are as follows:-

There is a Odai in Survey No. 83/1, Ranganathapuram Village and it is maintained by the Government for the benefit of the public. The very shape of the survey number as found from the field map suggests that it is only an Odai. The Odai runs to several kilometers and drains itself into the Perumal Eri, which is a big lake and it is described as 'A' Schedule. The width of the Odai varies between 12 feet and 30 feet. The Odai branches out into two directions and irrigates the lands lying on the two sides of its course. The plaintiff has purchased the property adjacent to the Odai, which is described as 'B' schedule property. Item No.1 of 'B' Schedule property has been purchased by virtue of a registered sale deed dated 22.12.2003 and item nos. 2 to 4 of 'B' schedule property has been purchased by virtue of a registered sale deed dated 23.09.2004. The lands are situated on the side of the Odai in the 'A' schedule which are lying adjacent to each other between two courses of



the Odai. The total area of the Odai is 09.00.00. The defendants have no property in the said place and they have been illegally cultivating in the Odai Poramboke, which is unauthorized and highly objectionable. The Government is collecting penal charges from the defendants for a few years. The defendants have no rights whatsoever to cultivate on the Odai Poramboke. The defendants are making concerted efforts to obliterate the Odai along with the lands of the plaintiff by filling it with soil and do cultivation. The defendants had given a complaint to the Legal Services Authority against the plaintiff and on notice, the plaintiff had appeared before the Legal Services Authority. As the defendants are causing trouble by obliterating the Odai, the plaintiff has filed a suit for declaring that the 'A' Schedule is Odai and for permanent injunction to restrain the defendants from obliterating any portion of the Odai.

3. The facts of the written statement filed by the defendants in brief are as follows:-

There is no Odai even according to the property details as found in the plaintiff's sale deed in respect of the 'B' schedule property. The plaintiff has set an imaginary and non-existing case against the defendants without any



cause of action. The plaintiff has obliterated the burial ground and removed the boundary stones demarcating the Renganathapuram boundary and illegally occupied two acres of land in the Renganathapuram boundary through illegal means. The plaintiff is not the title owner of the 'B' schedule property as it has been assigned to an ex-service man with a condition not to encumber. The suit is bad for non-joinder of necessary parties and mis-joinder of parties. The defendants have been cultivating lands for decades. The plaintiff has no grievance over the same and the plaintiff is not entitled to claim any relief.

4. On the basis of the submission made, the trial Judge has framed the following issues:-

“1. Whether the defendants are attempting to obliterate the 'A' Schedule property 'Odai' poramboke?

2. Whether the suit lake cause of action?

3. Whether the suit is bad for non-joinder of necessary party?

4. Whether the plaintiff is entitled to the relief of



declaration and injunction as prayed for?

5.To what relief the plaintiff is entitled to?

and Additional Issue:-

(1) Whether the suit is barred by Section 91 of CPC?”

5. During the course of the trial, on the side of the plaintiff, three witnesses have been examined as PW1 to PW3 and Exs.A1 to A9 were marked and on the side of the defendants, five witnesses have been examined as DW1 to DW5 and Exs.B1 to B14 were marked.

6. At the conclusion of the Trial and on appreciating the materials available on record, the Trial Court has dismissed the suit and the first appeal preferred by the plaintiff challenging the judgment and decree of the Trial Court before the First Appellate Court has also been dismissed the appeal by confirming the judgment and decree of the Trial Court. Aggrieved over the same, the Second Appeal has been preferred.

7. The learned counsel for the appellant submitted that Exs.A6 and A7 which are 'A' Register and Field Map would show that the 'A' schedule - Odai,



but that has been ignored by both the trial Court and the First Appellate Court. The Commissioner has also filed a plan and a report stating that the Odai is in existence as claimed by plaintiff and also shown in the Field Map and the same was also not considered. The defendants have been paying the penal charges for possession of the Odai for several years and he himself has admitted the same by giving complaint before the Legal Services Authority which is evidenced from Exs.A8 and A9. Hence, the judgment of the First Appellate Court should be set aside. The Courts below have wrongly arrived at a conclusion that it is not Odai Poramboke.

8. The learned counsel for the respondents submitted that without impleading the Government the plaintiff is not entitled to file the suit. The defendants have not caused any personal wrong to the plaintiff and the Courts below has rightly dealt the matter and dismissed the suit.

9. Based on the above submissions of both side counsels and on perusal of records, the Second Appeal had been admitted on the following substantial questions of law:-

(1) Were not the Courts below at gross error in failing to refer



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to Exs.A6 and A7, 'A' Register and 'Field Map' which clearly show that the suit 'A' schedule property is 'Odai'?

(2) Were not the lower Courts at grave error in stating as if there was no cause of action when defendants claim to be in possession of Odai for several years and when they have filed Exs.B1 to B14, penal charges receipts and when they have approached Legal Aid Board, evidenced by Exs.A8 and A9?

(3) Did not the lower Courts commit grave error in stating that the government was a necessary party when there is no trouble from government and when the relief itself is only in support of the government?

(4) Were not the Courts below grossly wrong in stating as if only a public interest litigation would lie and as if the suit was not maintainable?

(5) Did not the Courts below commit grave error in ignoring the Advocate /Commissioner's report?"

10. On perusal of the record, it is seen that the First Appellate Court has admitted the existence of the Odai as stated in the 'A' schedule property but



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has made an observation that the plaintiff does not make any right or title over the Odai. For the reasons best known to the plaintiff, he has not chosen to implead the Government as a party. He never complained to the Government authority by alleging that the defendants have been causing trouble to the plaintiff in enjoying the water in the Odai for irrigating his lands situated on the bunds of the Odai. The defendants' cultivation over poramboke property has not been denied by the defendants and in fact, they have been paying penal tax to the Government. It is the Government who has to take action against the defendants, if at all they want to evict the defendants by removing the encroachment and recover the Government property.

11. No doubt the private parties cannot set up any title over the Government properties or damage the public property by preventing any individual from enjoying it by causing public nuisance. The Courts below have adverted into Section 91 Code of Civil Procedure(CPC). The plaintiff has not resorted to file a suit under Section 91 to alleviate the alleged public nuisance by getting leave of the Court. However, the plaintiff has pleaded that his personal right is affected and hence, he has straight away filed a suit without seeking any recourse to Section 91 of CPC. But the plaintiff could



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have had a better case by impleading the Government also a party. Because it is the Government who has to initiate action to alleviate public nuisance and recover the public property. The pleadings of the plaintiff does not disclose anything about the Government's action or inaction against the defendants on the complaint if any, filed by the plaintiff.

12. The learned counsel for the appellant submitted that there is no cause of action against the Government, because the Government is not causing any disturbance to the right of the plaintiff in using the Odai water. But the plaintiff has filed a suit to declare that the 'A' schedule property is a Odai Poramboke and to restrain the defendants from obliterating the same. Such a relief cannot be claimed in the absence of owner, viz., Government, in whose favour the plaintiff himself confirms the title. So the suits can be effectively only in the presence of the Government who is the interested party. Unfortunately, the plaintiff had not impleaded the Government as a party to the suit proceeding.

13. The learned counsel for the appellant cited a decision of the Hon'ble Supreme Court of India held in *Hari Ram -vs- Jyoti Prasad* reported in 2011



2 SCC 682, in support of his contention that the Government need not be a party and in the suits of this nature. In the said judgment, it is held as under:-

17. *At this stage it would be apposite to refer to and rely upon Section 22 of the Limitation Act, 1963, which reads as follows:*

“22. Continuing breaches and torts.—In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or tort, as the case may be, continues.”

18. *This Court had the occasion to deal with Section 22 of the Limitation Act, 1963 in **Sankar Dastidar -vs- Banjula Dastidar [(2006) 13 SCC 470 : AIR 2007 SC 514]** in which the Supreme Court held that when a right of way is claimed, whether public or private, over a certain land over which the tortfeasor has no right of possession, the breaches would be continuing, to which the provisions of Section 22 of the Limitation Act, 1963, would apply. Therefore, in our considered opinion the plea that the suit is barred by limitation has no merit at all.*

....

....

21. *In SCC para 14 of the said judgment, it was also held that any member of a community may successfully bring a suit to assert his right in the community property or for protecting such property by seeking removal of encroachment therefrom and that in such a suit he need not comply with the requirements of Order*



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1 Rule 8 CPC. It was further held in the said case that the suit against alleged trespass even if it was not a representative suit on behalf of the community could be a suit of this category.

22. In that view of the matter and in the light of the aforesaid legal position laid down by this Court, we hold that the suit filed by Respondent 1-plaintiff was maintainable.”

14. As stated in the above judgment without resorting to a representative suit under Order 1 Rule 8 for removing the encroachment in the public property, an individual can also file a suit. However in the above judgment it is stated that the Government is not a necessary party and the suit can be maintained even without impleading the Government as a party. The position of law dealt with by the Supreme Court in the above judgment is entirely different and hence the above judgment cannot help the submissions made by the appellant.

15. The Courts below have rightly arrived at a conclusion that the suit is bad for non-joinder of parties. Though the trial Court has made an observation that the plaintiff has not proved that the 'A' Schedule property is Odai, the First Appellate court has made an observation that the suit 'A' schedule property is found to have been entered as Odai in the 'A' Register



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and in the field map. However the relief has not yet been granted to the plaintiff, because the Government has not objected to the defendants' enjoyment over the Odai Poramboke. Had the plaintiff impleaded the Government, the stand of the Government could have been understood by the Court and the suit could have been effectively disposed in the presence of the Government. As the Government is a necessary party, the suit is bad for non-joinder of necessary parties. Hence, all the substantial questions of law are answered against the appellant.

16. In the result, the Second Appeal is dismissed by confirming the judgment and decree dated 29.04.2011 made in A.S. No. 30 of 2010 on the file of the II Additional Subordinate Judge of Cuddalore. Consequently, connected Miscellaneous Petition is closed. No costs.

18.12.2024

Index : Yes/No
Speaking order : Yes/No
NCC : Yes/No
Maya



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To

1. The Judge
II Additional Subordinate Court
Cuddalore
2. The Judge
Additional District Munsif Court
Cuddalore.
3. The Section Officer,
V.R. Section,
High Court, Madras.



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R.N.MANJULA, J.

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