



S.A.No.536 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.01.2024

CORAM

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

S.A.No.536 of 2013
and C.M.P.No.12280 of 2022

1.K.B.Natarajan

2.K.B.Malliga

(1st plaintiff, Lakshmi died
during the pendency of the suit,
hence not shown as an appellant)

...Appellants / Appellants / Plaintiffs

Vs.

K.M.Bellie

...Respondent / Respondent / Defendant

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code, seeking to set aside the judgement and decree dated 15.02.2013 made in Appeal Suit No.28 of 2012 on the file of the Court of the Subordinate Judge and Appellate Authority of the Nilgiris at Uthagamandalam, confirming the Judgment and decree dated 08.12.2010 made in Original Suit No.89 of 2001 on the file of the Court of the District Munsif of Coonoor.



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For Appellants : Mr.V.Ravi
For Respondent : Ms.Chitra Maragatham

JUDGEMENT

The unsuccessful plaintiffs in O.S.No.89 of 2001 on the file of the District Munsif Court, Coonoor are the appellants herein.

2. O.S.No.89 of 2001 was presented for declaration of title and for permanent injunction for the suit 'B' Schedule mentioned property.

3. The case of the plaintiffs is that the property originally belonged to one K.B.Hutchi. He had executed a Will in favour of his son and wife, Subbi on 05.11.1984. Subsequently, the said Subbi had executed a Will, dated 29.03.1996, bequeathing the property in favour of one Radhakrishnan. The said Radhakrishnan sold an extent of 2 cents to K.H.Bellan, the father of the second plaintiff. This sale was in Document No.1515 of 1989, dated 23.10.1989. K.H.Bellan, in order to put up a construction over the property, availed loan from Coonoor Taluk Co-operative House Building Society and had mortgaged the said property in favour of the society.



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4. K.H.Bellam passed away on 26.09.1997. He left behind as his legal heirs one Malliga and K.B.Natarajan. They are the plaintiffs in the present suit. They alleged that the only access to the house constructed by K.H.Bellam is through the front yard of the property, which abuts the Government road. The defendant, K.M.Bellie, in order to grab the property, claims that this portion of front yard left apart by K.H.Bellam, by putting up a construction belongs to him. On 17.07.2001, the plaintiff thwarted the attempt of the defendant to put up the construction over the vacant space, and hence being left with no other option, he filed a suit for declaration of his title with respect to 'B' Schedule property and for consequential injunction. It has to be mentioned that 'B' Schedule mentioned property is a part of 'A' Schedule mentioned property and 'A' Schedule property is the property purchased by K.H.Bellam on 26.06.1989 from Radhakrishnan.

5. It is the case of the defendant that the subject matter of the property belongs to him and not to the plaintiffs. According to him, 10 x 10 sq.ft., which is the subject matter of 'B' Schedule had been given a separate Survey number, namely, S.No.22/1A3. The defendant claimed the property by way of a purchase under two sale deeds bearing Document No.661 of 1942 and



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No.342 of 1963. It is by virtue of these sales that the defendant's father

J.B.Mahalingam became entitled to the aforesaid extent.

6. The parties went to trial in O.S.No.89 of 2001 before the District Munsif Court, Coonoor. On the side of the plaintiffs, K.B.Natarajan, the second plaintiff examined himself as P.W.1 and through him, Ex.A1 to Ex.A7 were marked, and through cross examination of P.W.1, on behalf of defendants Ex.B1 and Ex.B2 were marked. The defendant entered the witness box and examined himself as D.W.1 and he filed documents as Ex.B3 to Ex.B10. The learned trial Judge, after considering the evidence before the Court and the respective pleadings of the parties, dismissed the suit in and by way of a judgement, dated 08.12.2010.

7. Aggrieved by the said judgement and decree, a regular appeal was preferred before the Sub Court, Nilgiris, Uthagamandalam in A.S.No.28 of 2012. The learned Subordinate Judge was pleased to confirm the judgement and decree in and by way of the judgement, dated 15.02.2013. It is against this concurrent judgement that the present Second Appeal has been preferred.



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WEB COPY 8.This Second Appeal was admitted on 06.11.2015 on the following substantial questions of law:

(i) Whether the Courts below were right in holding that the 'B' Schedule property does not form part of the 0.2 cents of land purchased by the plaintiff without verifying the actual position ? and

(ii) Whether the Courts below have committed patent error in accepting the case of the defendant that the defendant has got title for the 'B' Schedule property ?

9. I heard Mr.V.Ravi, for the appellants and Ms.Chitra Maragatham, for the respondent.

10. Mr.R.Ravi, the learned counsel would argue as follows:

(a) The Courts below had failed to appreciate that the plaintiffs had proved their title to the extent of 10 x 10 sq.ft namely, the 'B' Schedule mentioned property.



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(b) He would contend that the proof of the Will is not necessary in the present case because the purchase had been made by K.H.Bellan as early as on 23.10.1989.

(c) He would further plead that apart from the 'B' Schedule mentioned property, there is no other access to the plaintiffs' property, and therefore, the suit has to be decreed in order to enable the plaintiffs to have an access to the Government road.

(d) Finally, he would draw my attention to the application filed in C.M.P.No.12280 of 2022, and would say that a licensed surveyor has given a sketch and plan and the same should be received in evidence in the Second Appeal in exercise to the powers under Order 41 Rule 27 CPC.

11. Ms.Chitra Maragatham, the learned counsel would resist these



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pleas on the following grounds:-

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(i) that the Second Appeal arises against concurrent finding of facts and this Court should not re-appreciate the evidence.

(ii) She would point out the discrepancy in the schedule of property of the purchase made by K.H.Bellan and that of the 'B' Schedule.

(iii) She would invite the attention of the Court to Ex.B2, which is an admitted document marked during cross examination, and would state that the access to the plaintiffs' property was obstructed by the plaintiffs themselves by placing stones on the steps in front of the house.

(iv) Finally, she would submit that the requirements of Order 41 Rule 27 CPC have not been complied with, and therefore, this Court should not admit the additional evidence.



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WEB COPY 12. I have carefully considered the arguments of both sides.

13. I have to remind myself that in a suit for declaration of title and for injunction, the plea or defence raised by the defendant pales into insignificance, if the plaintiffs have not proved their title to the property. The burden lies on the plaintiffs to prove their title, and only thereafter, the onus shifts to the defendant to demonstrate that the case of the plaintiffs is erroneous. Unfortunately, for the plaintiffs in this case, as would be seen later, they have not discharged the initial burden.

14. It is pertinent to note here that the original sale deed under Ex.B1, dated 23.10.1989 was not produced by the plaintiffs. The explanation that is given by the plaintiffs is that the documents were available with Coonoor Taluk Co-operative Housing Society, and therefore, it could not be produced. To substantiate the mortgage, they had produced Ex.A6, which is a notice demanding payment of balance amount from the Coonoor Taluk Co-operative Housing Society. Nothing prevented the plaintiffs from producing a certified copy of the registered Document, dated 23.10.1989 or even by



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causing a subpoena of the said document from the housing society for being marked in the suit. It was the defendant who marked Ex.B1, namely a certified copy of the sale deed, that is the document on which the plaintiffs relied upon in the cross examination of P.W.1. The very fact that the plaintiffs had not produced their title documents before the Court either the original or the certified copy, constrains this Court to look against the plaintiffs. Perhaps, the plaintiffs did not produce the same in order to avoid the Court taking into consideration the four boundaries that had been given under Ex.B1. The four boundaries that had been given under Ex.B1 read as follows:

"கிழக்கு - பெள்ளன் பூமி
மேற்கு - ஊர் பொது பூமி
வடக்கு - ஊர் பொது பூமி
தெற்கு - ஊர் பொது பூமி"

15. A reading of this property shows that the father of the vendor of the plaintiffs was in possession of the property on the Eastern side and the remaining three sides are the common properties of the village. Curiously



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enough, coming to the 'A' Schedule mentioned property, which is the entire

extent of 2 cents purchased under Ex.B1, the following schedule is shown:

North : Property of Rangaswamy, Subramani and Raju

South : Government Road

East : Government Drainage

West : Defendant's property

16. The plaintiffs have not explained how the schedule of the property changed between the purchase made under Ex.B1 and the present suit. The Eastern side of the property, which is shown as K.H.Bellan's property, has suddenly converted itself into Government drainage. Similarly, the property which was shown as Government property on the Northern side in the suit is shown as belonging to Rangaswamy, Subramani and Raju. Therefore, the burden heavily lies upon the plaintiffs to explain this discrepancy in the description of the property. Under Order VII Rule 3 of the Code of Civil Procedure, the description of the property should be specifically given, and in default thereof, the suit has to fail.

17. I have to look against the plaintiffs on account of the ground that

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they have not produced the original sale deed or a certified copy thereof, and it was the defendant who produced it under Ex.B1 and that too at the time of cross examination. On account of the fact that the plaintiffs have withheld the original documents from the Court, I am constrained to draw adverse inference against the plaintiffs. The adverse inference that I draw is, if the plaintiffs had produced the original of Ex.B1 or a certified copy thereof, the discrepancy in the description of the properties between the purchase made by K.H.Bellam and the present 'A' Schedule property would have been revealed. In order to avoid the same, the plaintiffs have not produced the said document.

18. Another fact which constrains me to look against the plaintiffs is that they have not proved how Hutchi gets right over the suit property. The two documents that have been filed in order to show that the predecessor in title of the plaintiffs have title to the property are the Wills dated 05.11.1984 and 29.03.1996. A Will is not a document of title; therefore, the plaintiffs have miserably failed to prove that Hutchi had title to the property, and as a result of which, their father's vendor, Radhakrishnan, acquired the property, which then fell on the plaintiffs upon the death of K.H.Bellam. Unless and



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until the plaintiffs can unequivocally trace their right to the property in a suit for title, they will not be entitled to a declaratory decree. Since no previous title document having been filed, especially the title document of Hutchi, the plaintiffs would also fail on this ground.

19. I should add here that K.B.Hutchi is none other than the uncle of the plaintiffs and nothing prevented the plaintiffs from producing either the original title documents of Hutchi or a certified copy thereof.

20. I take note of the fact that the trial Court, as well as the Lower Appellate Court, has, despite the non production of the title documents of Hutchi, still probed into the issue of title and found a serious discrepancy in the description of the property between Ex.B1 and the suit scheduled property. Therefore, I do not find any error insofar as this finding of the trial Court as confirmed by the Lower Appellate Court is concerned, that the plaintiffs have not proved their title to 'B' Schedule mentioned property.

21.The learned counsel for the appellant would vehemently contend that Ex.B2 has not been proved in the manner known to law. In fact, one of



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the questions of law suggested was that the photographs should have been marked through a photographer, and it should not have been admitted in evidence.

22. A careful perusal of the evidence given in the suit shows that Ex.B2 had been marked in evidence through P.W.1 himself if he had disputed Ex.B2, the question of filing the document through a photographer would have arisen. In this case, when P.W.1 had himself admitted to the document, therefore, the question to adducing further proof does not arise. Hence, I reject the submission of the learned counsel.

23. I now move on to the next submission on the identification of the property. It is the case of the plaintiffs that they have an occupation of 1 and $\frac{1}{4}$ cents of property, and the remaining $\frac{3}{4}$ cents of the 2 cents purchased by their father has been left out as an open space. The defendant would contend that the plaintiffs are in occupation of 972 sq.ft, which is over and above their entitlement of 2 cents. 1 cent of the property corresponds to 435.5 sq.ft and 2 cents would amount to 872 sq.ft. Whether the plaintiffs' construction is 972 sq.ft. as alleged by the defendant or 872 sq.ft. as claimed by the plaintiffs



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should have been proved by taking out an application for appointment of an Advocate Commissioner. Even that basic effort had not been taken by the plaintiffs to prove that their construction is only 1 and $\frac{1}{4}$ cents and the remaining extent of the 2 cents has been left out in open. Nothing prevented the plaintiffs from taking out an application for appointment of an Advocate Commissioner pending the suit. The plaintiffs should have done so, especially, in the light of the categorical stand of the defendant that the plaintiffs are in occupation of more than 100 sq.ft. than what they are actually entitled under Ex.B1. Despite this specific defence, the plaintiffs have not even lifted a little finger to discharge the burden on them. Having failed before the trial Court, it is not open to the plaintiffs to try to fill up the lacunae in the second appellate stage by filing C.M.P.No.12280 of 2022.

24. It is here that I have to consider the authorities cited by the learned counsel for the appellant, that an application for letting of additional evidence can be entertained in the second appellate stage also. He relied upon ***Uttaradi Mutt vs. Raghavendra Swamy Mutt***, reported in **2019 (3) CTC 799** and ***Chakkarabani and other vs. Gopal Gounder and others***, reported in **2020 (1) MWN (Civil) 387**.

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26. The other judgement produced in *Chakkarabani and other vs. Gopal Gounder and others*, reported in **2020 (1) MWN (Civil) 387**, was the situation where a public document was produced as additional evidence. The learned Single Judge held that a public document can be produced as evidence before the Second Appellate Court. I fail to understand how it helps the appellant in this case.

27. What has been produced by way of additional evidence in this case is a private plan drawn by a licensed surveyor. Such a document cannot be treated as a public document. Therefore, this judgement does not help the petitioner.

28. Furthermore, on going through the records, I found that the appellants had moved an application in M.P.No.2 of 2014 for appointment of an Advocate Commissioner. This application was dismissed on 02.11.2015, granting liberty to the petitioners to renew the application at the time of final disposal. However, the plaintiffs / appellants have not taken the benefit of liberty granted by this Court on 02.11.2015. An Advocate Commissioner can be appointed in the second appellate stage, if a case had been made out by the



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plaintiffs. As pointed out above, the plaintiffs have failed to explain the discrepancy in the schedule of property and the reason why they have not taken out the application for the appointment of an Advocate Commissioner before the Courts below.

29. The learned counsel for the appellants would then refer to ***Union of India and another vs. Ranchod and others***, reported in **(2007) 14 SCC 326**, in order to argue that provisions of Order 41 Rule 31 CPC had not been complied with by the Appellate Court, and therefore, the appeal deserves to be allowed. I have to point out that in the said judgement, the Supreme Court confirmed its previous view in ***G.Amalorpavam vs. R.C.Diocese of Madurai***, reported in **(2006) 3 SCC 224**. A reading of the above judgement states as follows:

"Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisal of the respective cases and weighing and balancing of the evidence, facts and the other



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considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination."

30. In other words, the Supreme Court had taken a view that Order 41 Rule 31 CPC is not a straight jacket formula rendering a judgement void for not framing points of determination. Such failure can be ignored if there is substantial compliance with it and the higher Appellate Court is in a position to ascertain the findings of the Lower Appellate Court.

31. Going through the judgement of the Lower Appellate Court, I find that the learned Judge has considered the points raised by the respective parties and has complied with the requirements as laid down above. I am aided to discern from the judgement that the learned Judge has applied his mind to the facts of the case, and only thereafter, he entered upon a judgement on 15.02.2013. Therefore, I find compliance with the requirements of Order 41 Rule 31 CPC and the argument that it has not been complied with and therefore it has to be set aside does not appeal to me.



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32. Finally, the learned counsel for the appellants would argue that Ex.B6 is the revenue record which had been given in favour of the defendant without any enquiry, and therefore, he would state that the defendant is not entitled to rely upon the same. He would rely upon two judgements namely, *Anjammal and others vs. Vaithilingam and others*, reported in **2022 SCC OnLine Mad 1672** and *A.Dhanalakshmi vs. District Collector and others*, reported in **2020 SCC OnLine Mad 2441**. These two judgements dealt with cases where revenue records were sought to be produced in order to substantiate the case of title.

33. I have come to a conclusion that the plaintiffs have not proved their title to the property, and therefore, their suit should fail. Insofar as the validity of Ex.B6 is concerned, this Court would have been pushed to look into it, if and only if, the plaintiffs have proved their title to the property. Since the plaintiffs have failed even at the first hurdle, I am not concerned with the defence or the validity of Ex.B6 produced by the defendant. It



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would suffice to say that the plaintiffs, not having proved their title to the property, are not entitled to a declaratory relief.

V.LAKSHMINARAYANAN,J.

Anu

34. This Second Appeal stands dismissed. The judgement and decree of the Subordinate Judge, Nilgiris, Udhagamandalam in A.S.No.28 of 2012, dated 15.02.2013, in confirming the judgement and decree of the learned District Munsif cum Judicial Magistrate, Coonoor in O.S.No.89 of 2001, dated 08.12.2010 stands confirmed. Costs throughout. Consequently, the connected miscellaneous petition is also dismissed.

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Anu

Index : Yes/No

Neutral Citation Case : Yes/No

To:

1. The Subordinate Judge, Nilgiris
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