
(2015) 02 MAD CK 0220
In the Madras High Court
Case No : S.A. No. 860 of 2008

Samboornammal

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 12-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2015) 3 MLJ 701

Hon'ble Judges : P.R. Shivakumar, J.

Bench : Single Bench

Advocate : V.P. Sengottuvel, for the Appellant; Jayaram, Spl. Govt. Pleader, Advocates for the Respondent

Final Decision : Dismissed

Judgement

P.R. Shivakumar, J.—This second appeal is directed against the decree of the lower appellate court, namely the Court of Principal District Judge, Erode dated 12.03.2008 made in A.S.No. 89 of 2007 confirming the decree passed by the trial court, namely the court of District Munsif cum Judicial Magistrate, Perundurai dated 21.12.2006 made in O.S.No. 174 of 2004 dismissing the said suit.

2. The suit was filed by the appellant herein, originally on the file of First Additional Subordinate Judge, Erode as O.S.No. 90 of 2002 praying for: 1) a declaration that the re-survey conducted by the respondents 1 and 2 in respect of the suit property was invalid, improper and not binding upon the appellant/plaintiff for want of service of notices under Sections 9 and 10 of the Tamil Nadu Survey and Boundaries Act, 1923; 2) a mandatory injunction directing restoration of the boundaries of the suit land so that the appellant/plaintiff would get a total extent of 7.2 acres purchased by her in 1965; 3) a declaration that the appellant/plaintiff is entitled to an extent of 7.22 acres in the suit survey fields and 4) a permanent injunction restraining the respondents 3 to 6 from trespassing into any portion of the suit property and from causing any

obstruction for the use of the east-west pathway running on the northern portion of the suit land. Subsequently, the suit came to be transferred on the point of jurisdiction to the court of District Munsif cum Judicial Magistrate, Perundurai and renumbered as O.S.No. 174 of 2004.

3. The above said prayer was made on the basis of the plaint averments that the appellant/plaintiff purchased 7.02 acres comprised in old survey No. 1131 and 0.20 acres comprised in old survey No. 1152/B of Thenmugam Vellode village, Perundurai Taluk, Erode District; that the entire extent of 7.22 acres comprised in those survey numbers form a single block; that after having purchased the same, she put up a cattle shed on the north-eastern corner of the said land and formed an east-west pathway in the northern portion of the suit land to reach the cattle shed from the main road running on the west of the suit land; that a month prior to the filing of the suit, the third respondent made an attempt to obstruct the appellant/plaintiff from taking her cattle along the east-west pathway claiming that the said pathway and a portion of the suit land on the north-western portion had been tagged with the survey Nos. 1130 and 1128 lying on the north of the suit land and that on her taking a survey measurement, she found that an extent of 7.00 acres alone was available with her and the said anomaly occurred due to the shifting of the northern boundary line towards south and also the western boundary line towards further west. Contending further that in the re-survey she was granted patta for R.S.No. 1144 comprising an extent of 2.09.0 hectares equivalent to 7.13 acres, which included a portion encroached by the appellant/plaintiff in the Highway poramboke lying on the west of the suit land; that if the encroached portion of the highway poramboke was deducted, the actual extent available to her in the suit land would be only 7.00 acres; that the same was the result of the wrong fixation of the northern and western boundary lines during the re-survey that took place without serving notices on the appellant/plaintiff under Sections 9 and 10 of the Tamil Nadu Survey and Boundaries Act, 1923 and that hence she was constrained to approach the trial court with the suit for the reliefs stated supra, she had prayed for the above said reliefs in the suit.

4. The official respondents, namely respondents 1 and 2/defendants 1 and 2, did not contest the suit and they remained ex-parte. The private respondents, namely respondents 3 to 6/defendants 3 to 6 alone contested the suit based on the averments made in the written statement of the third respondent/third defendant, which was adopted by the respondents 4 to 6/defendants 4 to 6. According to them, the land of the appellant/plaintiff has been fenced on all the four sides and there exists a cart track on the north of the northern fence of the suit property. It is also their contention that the said cart track, which has been in existence for several decades, is being used by all the villagers; that the claim of exclusive ownership of the cart track made by the appellant/plaintiff is not sustainable; that the general re-survey was done after due publicity and serving on all the land owners with the necessary notices of the re-survey proceedings; that the suit challenging the re-survey proceedings came to be initiated not

within the time limit prescribed under the provisions of the Tamil Nadu Survey and Boundaries Act 1923 and that hence the suit should be dismissed non-suiting the appellant/plaintiff for the reliefs sought for in the plaint.

5. Based on the pleadings of the parties, the trial court framed five issues, which are as follows:

1. Whether the plaintiff is entitled to a declaration against the respondents 1 and 2 based on the re-survey?

2. Whether the plaintiff is entitled to seek a mandatory injunction?

3. Whether the plaintiff is entitled to a declaration that 7.22 acres of land belongs to her?

4. Whether the plaintiff is entitled to a permanent injunction as prayed for?

5. To what relief?

6. The contesting parties went for trial based on the above said issues. In the trial, one witness was examined as PW1 and six documents were marked as Exs.A1 to A6 on the side of the appellant herein/plaintiff, whereas two witnesses were examined as DWs.1 and 2 and 20 documents were marked as Exs.B1 to B20 on the side of the contesting respondents, namely respondents 3 to 6/defendants 3 to 6.

7. At the conclusion of trial, the learned trial judge, heard the arguments advanced on both sides, appraised the evidence both oral and documentary adduced on both sides, and upon such an appreciation, came to the conclusion that the claim of the appellant/plaintiff was not established and the same could not be sustained. The learned trial judge also held that the appellant/plaintiff made an attempt to seek a claim of title to the public cart track that runs on the north of the suit land belonging to the appellant/plaintiff and that hence, on facts, she was not entitled to the relief of declaration of title, mandatory injunction and permanent injunction as prayed for in the plaint.

8. Aggrieved by the judgment and decree of the trial court dated 21.12.2006, the appellant/plaintiff preferred an appeal before the lower appellate court (District Court, Erode) in A.S.No. 89/2007. The learned Principal District Judge, Erode, after hearing, concurred with the findings of the trial court and dismissed the appeal by judgment and decree dated 12.03.2008 confirming the decree of the trial court dated 21.12.2006 made in O.S.No. 174/2004. As against the said decree of the appellate court dated 12.03.2008, the appellant/plaintiff has brought-forth the present second appeal on various grounds set out in the memorandum of grounds of second appeal.

9. At the time of admission of the second appeal, as mandated by Section 100 of the Code of Civil Procedure, 1908, the following question was formulated as substantial question of law involved in the second appeal.

Substantial Question of Law:

"Whether the lower appellate court is right in confirming the judgment and decree of the trial court when it is found that the mandatory notice under Section 9(2) of the Tamil Nadu Survey and Boundaries Act, 1923 has not been served on the petitioner and that there is no evidence that the notice under Section 9(2) was served on the plaintiff?"

10. The arguments advanced by Mr.V.P.Sengottuvel, learned counsel for the appellant, by Mr.Jayaram, learned Special Government Pleader for the official respondents, by Mr.V.Bharathidasan, learned counsel appearing for the respondents 3 and 4 and by Mr.A.Sundaravadhanan, learned counsel appearing for the respondents 5 and 6 were heard. Judgments of the courts below and the materials available on record were also perused. This court paid its anxious consideration to the same.

11. For the sake of convenience, the parties are referred to in accordance with their ranks in the original suit.

12. After having suffered a dismissal of the suit in the hands of the trial court and also the dismissal of the appeal in the hands of the lower appellate court, the appellant/plaintiff has come forward with the present second appeal against the decree of the lower appellate court confirming the decree passed by the trial court. In short, the second appeal is directed against the decree based on the concurrent findings of the courts below. The short case of the appellant/plaintiff is that she purchased an extent of 7.22 acres comprised in the suit survey fields (7.02 acres comprised in old survey No. 1131 and 0.20 acres comprised in old survey No. 1152/B) under a sale deed dated 29.04.1956 marked as Ex.A1, but in the re-survey, the extent had shrunk to 7.13 acres; that when she caused a measurement to be taken, she found that the northern boundary of the suit land had been shifted towards south annexing 0.22 acres with the survey field lying on the north of the suit survey fields and on the other hand, 13 cents of land comprised in Highways poramboke lying on the west of the suit survey fields, which had been encroached upon by the appellant/plaintiff, had been tagged with the suit survey fields and that thus only an extent of 7.00 acres in the suit survey fields is available with her.

13. In this regard, there is a clear admission made by the plaintiff, who deposed as PW1 that there is a fence on all four sides of the suit properties and that on the north of the northern fence there is a cart track. Besides making the above said admission, she also made an admission during cross examination that she had not provided the boundaries for the suit property in the plaint schedule. However she would state that she had serious objections for appointment of a Commissioner to note down the physical features of the suit property and she asserted her stand that no Commissioner should be appointed. A certified copy of the parent document under which Janaki Ammal, the vendor of the plaintiff, had purchased the suit property has been produced as Ex.A6. Neither in Ex.A6 nor in

Ex.A1, under which the plaintiff purchased the property from Janaki Ammal, the boundaries of the property sold have been furnished.

14. In Ex.A1 in the description of property, an extent of 7.02 acres comprised in S.No. 1131 and an extent of 0.20 Acres comprised in S.No. 1152/B together forming a total extent of 7.22 acres in Thenmugam Vellode village, Perundurai Taluk, Erode District was shown to be the property conveyed. Besides providing the extent and the survey numbers, the boundaries of the property conveyed under the said sale deed have not been furnished. Even in Ex.A6, the very same description, without boundaries, has been provided. Under the said circumstances, it is not known how the appellant/plaintiff claims that the property purchased by her extends beyond the northern fence of her property and it includes the east-west cart track on the north of the suit property connecting the north-south road on the west of the suit property.

15. The FMBs of old S.Nos. 1131 and 1152 have been produced as Exs.A3 and A4 respectively. Though under Ex.A3, the area comprised in old S.No. 1131 is stated to be 7.02 acres, S.No. 1152/B has not been separately shown in Ex.A4 and only the total extent of the entire survey number 1152 has been provided as 4.83 acres. Though the plaintiff would have claimed that out of 7.22 acres purchased by her under Ex.A1, only an extent of 7.00 acres is available with her, it is her contention that in the re-survey, an extent of 22 cents was wrongly tagged with the property lying on the north of the suit survey field and the same was the reason why the extent of the plaintiff's property had diminished by 22 cents. However, it is admitted by the plaintiff that as per the re-survey, she was given patta for an extent of 7.13 acres equivalent to 2.89.0 hectares. There seems to be an obvious discrepancy in tallying the extent. In order to explain the same, the plaintiff has come forward with the plea that she had encroached upon the highway poramboke lying on the west of the suit survey fields and due to the shifting of the western boundary of the suit survey fields towards further west, the excess extent of 13 cents came to be tagged with the suit survey fields. However, she has not chosen to state actually how much extent of land from the Highway poramboke lying on the west of the suit survey field was encroached upon and was tagged with her property in the re-survey.

16. Similarly, she did not make any concrete plea as to how much extent forming the northern portion of the suit property was claimed by the defendants 3 to 5 to be theirs by virtue of alleged tagging of a portion of the suit survey fields with the property lying on its north. At one place the plaintiff claimed that 22 cents of land had been wrongly tagged with the property lying on the north of the suit property. However in the paragraph dealing with the cause of action, the plaintiff has stated that the defendants 3 to 6 attempted to obstruct the plaintiff from making use of the pathway running west to east in the northern portion of the suit land and that the plaintiff's right and title to an extent of 17 cents of land came to be disputed by the defendants 3 to 6. From the said plea, it shall be quite obvious that the plaintiff herself was not sure as to the extent of land,

which was allegedly annexed with the northern survey fields and claimed by defendants 3 to 6 to be theirs.

17. In addition, the plaintiff has also not chosen to file any rough sketch showing the boundaries of the actual extent of property purchased by her and to what extent the northern and western boundaries had been shifted towards south and west respectively. Above all, it is the clear admission of PW1 that her property has been fenced on all four sides. It is also an admission made by her that the property purchased by her under Ex.A1 is fenced on all four sides. Though the plaintiff showed hesitation in admitting the existence of the cart track on the north of the suit property by referring to it as a pathway, during cross examination she admitted that there is an east-west cart track lying on the north of the suit property. The defendants 3 to 6 are none other than the legal heirs of the father of the plaintiff. It is also the admission of the plaintiff as PW1 that, after her purchase, she put up a fence on all four sides of the property purchased by her and that there is a pathway in between the property purchased by her and the property of her father called veppangadu, which situates on the north of the suit property. Though she would assert that she had put up the fence on all the four sides of the property purchased by her, she would admit that the passage referred to her is a cart track and the said cart track lies on the north of the northern fence of her property. If at all the plaintiff wanted to have a pathway or cart track within her property for her exclusive use, she would have very well formed it within the property encompassed by the fence and she would not have put up the fence leaving the portion occupied by the pathway/cart track.

18. On the other hand, the contesting defendants have taken a clear plea that the property purchased by the plaintiff has been fenced on all four sides and the fence was in existence for more than 60 years; that the entrance for the property of the plaintiff from Arachalur road running on the west of the property is provided on the southern most part of the western boundary of the suit property; that the east-west cart track that runs on the north of the suit property is in existence for more than 60 years; that the contesting defendants and all the members of the village are using the same to reach their lands on further east; that like others, the plaintiff is also entitled to use the said cart track; that the plaintiff was never prevented by the contesting defendants from using the public cart track along with the other members of the public and that the suit has been filed by the plaintiff speculatively with false, incorrect and ambiguous pleadings.

19. Though there was no plea made in the plaint that the northern fence was shifted further towards south, an attempt was made during the trial to contend that the northern fence had been shifted by the contesting defendants. But the said attempt resulted in a failure, as the witnesses examined on the side of the contesting defendants, categorically denied such suggestion. The evidence of DW1 was also supported by the testimony of DW2. Upon a meticulous consideration and appreciation of evidence, the learned trial judge came to the conclusion that the plaintiff was not able to prove that the east-west cart track

that runs on the north of the northern fence of the plaintiff's property was also part and parcel of the property purchased by the plaintiff under Ex.A1 and that on the other hand, the contesting respondents/defendants were able to prove that the northern fence and the cart track on the north of the northern fence of the plaintiff's property was in existence for more than 60 years and the same was a public cart track used by the plaintiff, contesting defendants and other members of the public belonging to the village. The learned trial judge, with a clear vision also, held that the plaintiff was not entitled to a declaration that she was entitled to a total extent of 7.22 acres without describing the same with boundaries and other particulars. The said finding of the trial court was confirmed by the learned lower appellate judge on re- appreciation of evidence. The concurrent findings of the courts below in this regard cannot be said to be perverse.

20. It is an admitted fact that the re-survey was conducted from 1965 to 1975. Patta as per the re-survey had been issued to the plaintiff and she was enjoying the property paying the kist as per the re-survey. After a lapse of more than 25 years, the plaintiff chose to file the suit contending that there was a mistake committed in the re-survey and that the re-survey proceedings would not be binding on her since she was not served with notice under Sections 9 and 10 of the Tamil Nadu Survey and Boundaries Act, 1923. The plaintiff purchased the property comprised in Old S.Nos. 1131 and 1152/B under a sale deed dated 29.04.1956. It is her assertion that after she purchased the suit property, she alone was cultivating the same and she was visiting the suit property almost daily. However, she would contend that the shifting of the northern and western boundaries of the suit property in the re-survey came to be noticed by her only a week prior to the filing of the suit. It is not her case that the northern boundary had been shifted towards south and thereafter re-survey was conducted. It is also not her case that after the re-survey, taking advantage of the mistake committed by the survey authorities during the re-survey, the contesting respondents encroached upon a portion of her property on its north. It is her assertion that when she measured the suit property before the filing of the suit, she was shocked to note that only an extent of 7.00 acres as per the old survey number was available, besides tagging of 13 cents from the Highway poramboke on the western side. She is not able to say when the encroachment was made.

21. It is not her contention that the extent as per the re- survey measurement is not available on ground. On the other hand, she has clearly and categorically admitted that the extent as per the patta issued based on the re-survey is very much available. Under such circumstances, without stating when a part of her property was encroached upon, the plaintiff has chosen to file the suit for a mandatory injunction for a direction to shift the northern boundary towards further north so as to include 22 cents more in her patta as per the re-survey. Though the plaintiff might have stated that she was not served with notice under Section 9 and 10 of the Tamil Nadu Survey and Boundaries Act, 1923, it has not been substantiated by reliable evidence. In any event, the fact that she was in

enjoyment of the property as per the patta issued in the re- survey, which was completed in the year 1975 itself and she waited for more than 25 years and then filed the suit as if she was not served with notice under Section 9 and 10 of the Act, will make it clear that she wanted to take advantage of the passage of more than two decades by which the records of the Re-Survey Authorities regarding the service of notice would have become impossible of being traced.

22. On the other hand, clear evidence came to be adduced on behalf of the contesting defendants that public notices were issued before the general re-survey and every individual land owner was given notice of the re-survey. It has also been established by clear evidence by the contesting defendants that the plaintiff also got knowledge of the re-survey at the time of the re-survey itself. The laches on the part of the plaintiff will make the said contention of the contesting defendants more probable and the case of the plaintiff regarding the absence of service of notice or knowledge of the re-survey quite improbable. Though the official defendants, namely defendants 1 and 2, have not produced the evidence in proof of service of notice under Section 9(2) of the Tamil Nadu Survey and Boundaries Act, 1923, considering the above mentioned aspects, the courts below, have rendered a correct and concurrent finding that the plaintiff failed to substantiate her contention that she was entitled to any of the reliefs prayed for in the suit, namely 1) a declaration that the re-survey conducted by the respondents 1 and 2 in respect of the suit property is invalid, improper and not binding upon the appellant/plaintiff for want of service of notices under Sections 9 and 10 of the Tamil Nadu Survey and Boundaries Act, 1923; 2) a mandatory injunction directing restoration of the boundaries of the suit land so that the appellant/plaintiff would get a total extent of 7.22 acres purchased by her in 1965; 3) a declaration that the appellant/plaintiff is entitled to an extent of 7.22 acres in the suit survey fields and 4) a permanent injunction restraining the respondents 3 to 6 from trespassing into any portion of the suit property and from causing any obstruction for the use of the east-west pathway running on the northern portion of the suit land. Based on such finding, the courts below have concurrently held that the suit filed by her is bound to be dismissed.

23. Hence this court holds that the lower appellate court has not committed any error in confirming the decree of the trial court and that the question framed as the substantial question of law in the second appeal has got to be answered accordingly against the appellant.

24. In view of the foregoing discussions, this court finds no reason to interfere with the findings of the courts below; that there is no merit in the second appeal and the same deserves to be dismissed and that the decree of the trial court dismissing the suit as confirmed by the decree of the lower appellate court deserves to be confirmed.

In the result, the second appeal is dismissed. However, there shall be no order as to cost.