



S.A.Nos.482 and 483 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.03.2024

CORAM:

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.Nos.482 and 483 of 2013

and

M.P.Nos.1 and 1 of 2013

1. Kandasamy (died)
2. Saradha
3. Murugesan

... Appellants
in both S.As

(Sole appellant died and appellants 2 and 3 impleaded as legal heirs of the deceased sole appellant viz., Kandasamy vide Court order dated 12.08.2022 made in C.M.P.Nos.13371, 13374 and 13376 of 2022 in S.A.No.482 of 2013 and C.M.P.Nos.13360, 13362 and 13365 of 2022 in S.A.No.483 of 2013 by TVTSJ)

Vs.

1. Ramamoorthy

2. Kamala

... Respondents 1 & 2
in both S.As

3. Kili

... 3rd Respondent
in S.A.No.483 of 2013



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COMMON PRAYER: Second Appeals filed under Order XLII Rule 1 r/w Section 100 of the Code of Civil Procedure, 1908 against the judgment and decree in A.S.Nos.40 and 41 of 2010 dated 20.09.2012, on the file of the Subordinate Judge at Tirupattur in reversing judgment and decree in O.S.No.44 of 2005 and O.S.No.118 of 2006 dated 31.08.2010 on the file of the District Munsif Court at Tirupattur.

For Appellants
in both S.As : Mr.M.Himavanth

For Respondents : Mr.Pa.Sudesh Kumar
in both S.As for Mr.J.Ramakrishnan

C O M M O N J U D G M E N T

The present second appeals arise out of the common judgment and decree of the Court of the Subordinate Judge, Tirupattur, in A.S.Nos.40 and 41 of 2010, dated 20.09.2012. These two appeals came up before the learned Subordinate Judge, Tirupattur arising out of two suits in O.S.No.44 of 2005 and O.S.No.118 of 2006 on the file of the District Munsif Court, Tirupattur.



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2. O.S.No.44 of 2005 was presented for the relief of injunction restraining the defendant from encroaching upon the suit property and laying a new cart track over the suit schedule mentioned property.

3. O.S.No.118 of 2006 was filed for injunction restraining the defendants from preventing the plaintiff using A,B,C,D marked portions in the suit plaint.

4. The claim of the plaintiffs in O.S.No.44 of 2005 is that the property belong to one Kili Gounder. Kili Gounder had purchased the property from Kuttiyappa Gounder. Kuttiyappa Gounder had purchased the property from one Karian. It is the case of the plaintiffs that the defendant used to pass through the suit property, and attempted to encroach upon the same, a month prior to the presentation of the suit, by attempting to lay a cart track in the middle of the suit property. Therefore, the plaintiffs have come forward with the suit for injunction.



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5. On being served with summons, the deceased appellant, i.e., Kandasamy who was the defendant in O.S.No.44 of 2005, filed a detailed written statement. It is stated in the written statement that the suit property originally belonged to Karian. Karian sold the property to Kuttiyappa Gounder on 01.09.1982, who in turn sold the property to Kili Gounder on 22.10.1982. On the same day, Kuttiyappa Gounder had sold an extent of 31 cents in favour of Kili, the vendor of the plaintiffs. The remaining 17 cents that he had purchased was sold in favour of the defendant. The sale deed dated 24.07.1995 under which the respondents / plaintiffs had purchased the property was to an extent of 35 cents; whereas Kili himself was in possession of only 31 cents. In both the sale deeds dated 22.10.1982, it had been specifically mentioned that there is a cart track leading from Tirupattur to Velakalnatham road. The defendant was using the cart track but since it was objected by the plaintiffs, he was constrained to file the other suit, namely, O.S.No.118 of 2006. According to him, he had no intention of creating a right over the suit property because there is already a right in existence over the same. Since the



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plaintiffs have filed the suit in O.S.No.44 of 2005, the defendant also decided to join the litigation game and filed O.S.No.118 of 2006. He prayed for the same relief that he had sought for in the written statement to defeat the claim of the plaintiffs in O.S.No.44 of 2005. As a separate suit had been presented for a positive relief which is sought for in the denial of other suit, the learned trial Judge decided to hear both the matters together.

6. The learned trial Judge framed the following issues in O.S.No.44 of 2005:

- "1. வழக்கு சொத்து வாதிகளின் சுவாதீனத்திலும், அனுபவத்திலும் உள்ளதா?
2. 22.10.1982-ந் தேதியிட்ட கிரயம் செல்லத்தக்கதா?
3. வழக்கு சொத்தின் நடுவில் சாலை அமைக்கப்படுவது உண்மையா?
4. வழக்குக்கு வழக்குமூலம் இல்லையா?
5. வாதிக்கு அவர் கோரும் பரிகாரம் கிடைக்கத்தக்கதா?
6. எப்பரிகாரத்துக்கு?"



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7. The learned trial Judge framed another set of issues in O.S.No.118 of 2006:

- "1. வாதி கூறுவதுபோல் வழக்கு சொத்து உள்ளதா?
2. வழக்கு வரைபடம் சரியானதா?
3. வழக்குக்கு வழக்குமூலம் இல்லையா?
4. வாதிக்கு கிடைக்கத்தக்க இதர பரிகாரம் யாது?"

8. On the side of the plaintiffs, P.W.1 to P.W.4 were examined and Exs.A1 to A3 were marked. On the side of the defendant, D.W.1 to D.W.4 were examined and Exs.B1 to B5 were marked.

9. After a detailed trial, the learned trial Judge came to a conclusion that both the plaintiffs and the defendant are entitled to access the Tirupattur to Velakalnatham road and decreed the suit in O.S.No.118 of 2006 and dismissed the suit in O.S.No.44 of 2005. He placed heavy reliance upon the Advocate Commissioner's report which had been marked in the suit.



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10. Appeals had been preferred against both the decrees, by the plaintiffs in O.S.No.44 of 2005, who were the defendants in O.S.No.118 of 2006. The learned Subordinate Judge allowed the appeals on the following grounds:

(i) That the defendant in O.S.No.44 of 2005 should not have filed the separate suit but should have only made a counter claim in O.S.No.44 of 2005 with respect to the cart track.

(ii) The Advocate Commissioner's report shows the extent and the length of the cart track, whereas the plaintiffs have not specifically pleaded the length. Therefore, the Advocate Commissioner's report cannot be used for the purpose of corroborating the pleadings and hence, he allowed both the appeals.

Against the said reversal of the decree, the present second appeals have been filed before the Court.



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11. This Court admitted the appeals on 21.03.2019 on the following substantial questions of law:

“1. Whether a decree for permanent injunction be granted in the absence of any finding to such effect by the appellate Court?

2. Having framed an issue as an important point to determine the relief claimed in the suit, can the suit be decreed without answering the said issue?

3. Is the lower appellate Court right in non-suiting the appellant herein on the ground that instead of filing a counter claim a separate suit is being filed?

4. When the relief claimed in the suit is for uninterrupted usage of suit passage and when its existence and usage is categorically admitted by the defendant, is the onus still rest on the plaintiff?

5. Having accepted the existence of pathway in paragraph 23 of its Judgment, is the lower appellate Court justified in dismissing the claim of the appellant?”

12. I have heard Mr.M.Himavanth for the appellants and Mr.Pa.Sudeshkumar for the respondents.



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13. Mr.M.Himavanth would draw my attention to the two sale deeds dated 22.10.1982 and would point out that both the appellants as well as the vendor of the respondents were given access from their lands to Tirupattur to Velakalnatham road. He would also point out from the schedule of the property in the plaint in O.S.No.44 of 2005 that the plaintiffs have specifically conceded to the fact that it was the 'மாழில் வழி நடை பாத்தியம்'. Therefore, he would submit that when the plaintiffs themselves conceded to the fact that the pathway exists, the question of creating a fresh pathway by the defendant does not arise. He would further point out that the failure to file counter-claim under Order VIII Rule 6(a) of CPC is not bar to file a fresh suit and therefore, seeks interference from the hands of this Court.

14. Mr.Pa.Sudeshkumar would submit that it is not in dispute that it is mentioned in the sale deed that the parties have an access to the Tirupattur to Velakalnatham road. However, the property of the appellants has an alternate access of 1^{1/2} feet passage which is situated on



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the western side of the disputed pathway. He would point out that வண்டிபாதை begins in the main road land and gradually gets restricted to 3 feet as it reaches the plaintiffs land. He would state that this land was never granted to the appellants and therefore, they are not entitled to use the same. He would also point out that the cart track should run through a length of about 10 feet; whereas the Commissioner's report shows only 3 feet and it was hence the apprehension of the respondents / plaintiffs that the defendant might create a 10 feet passage over his land.

15. I have considered the arguments of both sides and have carefully gone through the records available before the Court below.

16. It is not in dispute that the original owners of the property are one Karian and others. They have sold the property in favour of Kuttiyappa Gounder. Kuttiyappa Gounder had sold the suit schedule mentioned property on the same day, namely, 22.10.1982, in favour of the deceased appellant, namely, Kandasamy, and in favour of the vendor



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of the respondents. In both the documents, the following extract is found

"திருப்பத்துர் to வெலக்கல் நத்தம் போகும் மெயின்
ரோட்டிலிருந்து வடக்கு புறம் போகும் வண்டிவழி பாத்யம்".

17. Thus, it is clear that the common vendor had granted an access to both the appellants as well as to the respondents' vendor from their lands to Tirupattur to Velakalnatham road. Therefore, the question of creation of the fresh pathway for the defendant in O.S.No.44 of 2005 does not arise.

18. However, the apprehension that had been expressed by Mr.Pa.Sudeshkumar is real and genuine. What had been granted was only a pathway to an extent of about 70 feet. The same gradually reduces to an extent of 3 feet in width. For a cart track, if it is established, it requires about 10 feet in width. If the defendant wanted the cart track over the property, it would result in the encroachment of the plaintiffs' property in O.S.No.44 of 2005. However, the 3 feet pathway right has been granted



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to both the parties by the common vendor and has not been given only to the respondents before me to obstruct the use of that pathway by the appellants. The alternate route that has been substantiated by Mr.Pa.Sudeshkumar does not lead to Tirupattur to Velakalnatham road. Therefore the pathway which has been mentioned in both the sale deeds dated 22.10.1982 is the common pathway running from Tirupattur to Velakalnatham road. The judgment of the lower Appellate Court without reference to the two parental deeds dated 22.10.1982 requires to be interfered with and accordingly, the same is interfered with.

19. The Advocate Commissioner's report can certainly not be relied upon for the purpose of creation of new right. Yet, a report of an Advocate Commissioner forms part of the evidence under Order XXVI Rule 10 of CPC. In this particular case, both the parties have not objected to the Advocate Commissioner's report and the plan which had been filed along with the report.



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20. A perusal of the report shows that after the 10 feet வண்டிபாதை gradually reduces to 3 feet pathway, it extends till the defendant's house to a length of 40 feet. Hence, the solution that has to be given is that the Advocate Commissioner's report will form part of the decree in the suits. Both the plaintiffs and the defendant in O.S.No.44 of 2005 will be entitled to use the pathway to an extent of 3 feet till it reaches the 10 feet pathway. The defendant in O.S.No.44 of 2005 will not be entitled to increase the pathway from 3 feet to 10 feet as sought by him in the other suit.

21. In fine, these Second Appeals are allowed. The substantial questions of law are answered in favour of the appellants and against the defendant in the respective suits. The judgment and the decree in A.S.Nos.40 and 41 of 2010 on the file of the Subordinate Judge, Tirupattur are set aside and the judgment and the decree of the Court of the District Munsif at Tirupattur in O.S.No.44 of 2005 and O.S.No.118 of 2006 are restored. For the sake of clarity, the Advocate Commissioner's



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report, Ex.C2, shall form part of the decree. As the parties are neighbours, I am not inclined to impose costs. Consequently, connected miscellaneous petitions are closed.

26.03.2024

Index:Yes / No

Speaking Order :Yes / No

Neutral Citation:Yes / No

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To

1. The learned Subordinate Judge,
Tirupattur.
2. The learned District Munsif
Tirupattur.



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V.LAKSHMINARAYANAN, J.

vji

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