



S.A.No.770 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.03.2024

CORAM

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.770 of 2013

and

M.P.No.1 of 2013

K.Jegadhambal

.. Appellant

Vs.

Nataraj Alias P.Palanisamy

.. Respondent

Prayer : The Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree dated 22.11.2012 made in A.S.No.14 of 2012 on the file of the Sub Court, Gobichettipalayam, reversing the judgment and decree, dated 20.02.2012 made in O.S.No.261 of 2001 on the file of the District Munsif Court, Gobichettipalayam.

For Appellant : Mr.P.Saravana Sowmiyan

For respondent : Mr.B.Mani Bharathi
for Mr.A.Chinnaraj



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JUDGMENT

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The present Second Appeal arises out of the judgment and decree of the Court of the learned Subordinate Judge at Gobichettipalayam in A.S.No.14 of 2012, dated 22.11.2012 in reversing the judgment and decree of the Court of the learned District Munsif at Gobichettipalayam in O.S.No.261 of 2001, dated 20.02.2012.

2. O.S.No.261 of 2001 was filed by the appellant for three reliefs. The first relief was that she wanted a removal of encroachment over the 'A' schedule mentioned property. The second relief was that not to interfere with her right and the common pathway shown as B, C and D in the plaint plan and the third relief was for an injunction restraining the defendant, her neighbor, from interfering with her live fence and barbed iron fence placed in 'AB' portion in the second item of the 'B' schedule property.

3. On service of summons, the defendant entered appearance and filed a written statement stating that he has not encroached as alleged with respect to the 'AB' portion. It was his further case that the Item No.1 of the 'B' schedule property lies entirely over his land and the plaintiff does not



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have any right over the property and he sought for dismissal of the suit.

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4. On the basis of these pleadings, the parties went to trial and the learned Trial Judge framed the following issues :

“ 1. தாவா 'ஏ' செட்யூலில் குறிப்பிடப்பட்டுள்ள நீலவண்ணமிட்ட பகுதியைப் பொறுத்து வாதி சுவாதீனம் பெறத்தக்கவரா ?

2. 'பி' செட்யூல் 1-வது அயிட்டத்தில் குறிப்பிடப்பட்டுள்ள 'ஏபிசிடி' வண்டித்தடத்தைப் பொறுத்து வாதி கோரியபடி விளம்புகை மற்றும் நிரந்தர உறுத்துக்கட்டளைப் பரிகாரம் பெறத்தக்கவரா ?

3. 'பி' செட்யூல் 2-வது அயிட்டமான தாவா வரைபடத்தில் 'ஏபி' என்று காட்டப்பட்டுள்ள உயிர்வேலியைப் பொறுத்து நிரந்தர உறுத்துக்கட்டளைப் பரிகாரம் பெற வாதி தகுதிபடைத்தவரா ?

4. வேறு என்ன பரிகாரம் ? ”

5. On the side of the plaintiff, she examined herself as P.W.1, his vendor as P.W.2 and an independent witness as P.W.3 and she marked Ex.A1 to Ex.A10. On the side of the defendant, he examined himself as D.W.1, the Surveyor who visited the site as D.W.2 and marked Ex.B1 to Ex.B15. During the course of trial, an Advocate Commissioner had been



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called upon to visit the property on more than one occasion and he submitted the multiple reports. His reports and plan were marked as Ex.C1 to Ex.C6.

6. On the basis of the oral and documentary evidence, the learned Trial Judge came to the conclusion that the plaintiff has proved the case and therefore, decreed the suit as prayed for.

7. Aggrieved by the said decree, the defendant preferred an appeal on the file of the learned Subordinate Judge at Gobichettipalayam. This appeal was taken on file as A.S.No.14 of 2012. After re-appreciating the evidences, the learned Appellate Judge came to the conclusion that the plaintiff has not proved his case and therefore, allowed the appeal and dismissed the suit.

8. It is against the said reversal of the judgment, the present Second Appeal has been filed before this Court.

9. When this appeal was taken up for admission, this Court did not



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admit the same but had ordered notice regarding admission on 22.07.2013.

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10. On service of notice, Mr.A.Chinnaraj entered appearance on behalf of the respondent.

11. I heard Mr.P.Saravana Sowmiyan for the appellant and Mr.B.Mani Bharathi for the respondent.

12. Mr.P.Saravana Sowmiyan would contend that on the basis of the Advocate Commissioner's report, the trial Court had correctly come to the conclusion that the defendant had encroached on the plaintiff's property described as 'A' schedule in the plaint. He would point out that Advocate Commissioner had visited the property twice and had filed a document under Ex.C1 and he would also invite my attention to the final report filed by the Advocate Commissioner under Ex.C4. He would state the finding of the lower Appellate Court that there is no encroachment on the 'A' schedule mentioned property is erroneous.



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13. Insofar as the 1st Item of 'B' schedule mentioned property is concerned, the submission of Mr.P.Saravana Sowmiyan is that he had examined the plaintiff's vendor, namely, Nachimuthu Gounder who had clearly and categorically deposed that the Item No.1 cart track had been laid for convenient enjoyment by both Kalianna Gounder i.e., the vendor of the defendant and his vendor atleast 35 years before the presentation of the plaint.

14. He would further state that the Advocate Commissioner had gone to the site and had submitted a report which states that five cents of the plaintiff's property and 11 cents of defendant's property had been utilized for the purpose of pathway. Insofar as the Item No.2 of the 'B' schedule mentioned property is concerned, he would point out that the clear and categorical finding given by the Trial Court had not even been discussed by the lower Appellate Court. Therefore, he would pray that this Second Appeal be allowed and the judgment and decree of the Trial Court be restored.

15. Mr.P.Saravana Sowmiyan suggested the following question of law

:



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“ a) Whether the First Appellate Court is right in law in dismissing the suit on the ground that the plaintiff has not established the right of easement by prescription and necessity especially when the plaintiff and his predecessors in title has been using the land as right peacefully and openly without any interruption for 35 years ?

b) Whether the Advocate Commissioner's report is sufficient evidence under Order XXVI Rule 10 of CPC to prove the right accrued to the plaintiff over the suit cart-track and encroachment made by the defendant ?

c) Whether the First Appellate Court has considered the plea of acquisition of right by prescription and necessity in the light of rights conferred under the Easements Act 1882 ?

d) Whether the First Appellate Court failed to assign sound reasons with proper discussions as mandated under Order XXXI Rule 31 of CPC ? ”

16. Mr.B.Mani Bharathi would contend that an Advocate Commissioner's report cannot be conclusive with respect to the encroachment. He would point out that the property of the plaintiff is 2 feet



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higher than the property of the defendant which would not be the case, incase, as accepted by the plaintiff, a JCB had been utilized for the purpose of leveling the property. He would also point out that a stone structure had been erected over the very same area in the 'A' schedule by the defendant for the purpose of storing water to carry on cultivation.

17. Insofar as the Item No.1 in the 'B' schedule mentioned property is concerned, he would point out that the documents that are relied upon by the plaintiff, namely, Ex.A4 to Ex.A6 does not disclose any pathway at all. Apart from that, even the story, that Kalianna Gounder and Nachimuthu Gounder had laid the pathway, is doubtful because Kalianna Gounder had died some time ago in the year 1969, whereas, Nachimuthu Gounder had obtained the property only in the year 1975.

18. I heard both sides on the aforesaid questions of law and also carefully perused the records as well as the judgments of the Courts below.

19. As rightly contended by Mr.B.Mani Bharathi, the source of title for removal of encroachment must not be the Advocate Commissioner's



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report. The Advocate Commissioner merely visits the site and submits a report for the perusal of the Court. He is the eyes and ears of the Court and cannot create a title for the first time. The Advocate Commissioner in this particular case has not measured the plaintiff's property or the defendant's property. The reason given for not measuring both the properties is that, on the defendant's property, sugar cane cultivation was going on and on the plaintiff's property also, cultivation activities had been carried out. The mere fact that cultivation was going on does not mean, that the Advocate Commissioner could have evaded from his duty on measuring the property.

20. Unless and until, the property of the plaintiff and the property of the defendant were measured and if excess is found at the hands of the defendant, the Court could have granted a decree for encroachment. As the Advocate Commissioner had annexed the Ex.C5/surveyor's plan and reading it along with his reports under Ex.C4 and Ex.C6, it is concluded that there had been encroachment over the property. This erroneous approach in the Trial Court has rightly been interfered with by the lower Appellate Court and does not require any re-consideration at the hands of this Court.



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21. With respect to the pathway, the plaintiff is the subsequent purchaser. The property originally belonged to one Sennimalai Gounder and his family. In the division between Sennimalai Gounder and his family, 4.75 acres had been allotted to him. This 4.75 acres were divided between Sennimalai Gounder and his son, granting him a half share. On the very next day, Sennimalai Gounder had executed a settlement deed granting all the rights that he had obtained under the partition deed in favour of his son, Nachimuthu Gounder. These partitions and settlements were evidenced under Ex.A4 to Ex.A6.

22. None of these properties have been given as the 1st Item of the 'B' schedule property to Sennimalai Gounder or to Nachimuthu Gounder. Nachimuthu Gounder projected a case as if he and the defendant's vendor had created this pathway for the beneficial enjoyment of both the parties. The plaintiff projected a further case, that in order to prevent any third party from entering into the property, that the plaintiff and defendant had gone together and installed a gate and had kept it under lock and key. When the Advocate Commissioner visited the suit site, the gate to the pathway which was under lock and key, was opened only by the defendant and not by the



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plaintiff. Therefore, the story of the gate having been placed in common, does not stand a moment's scrutiny.

23. Apart from that, Nachimuthu Gounder had specifically deposed that the property that he had obtained by way of a settlement deed in the year 1975, had been enjoyed by him and he and Kalianna Gounder had created the pathway. A careful examination on the evidence as well as the judgment of the lower Appellate Court have lead me to conclude that this is not possible since Kalianna Gounder had died six years earlier, under Ex.A6. If that is the situation, the question, of dead man and a living one joining together and creating a pathway, is a big too much for this Court to swallow.

24. Therefore, the finding of the lower Appellate Court with respect to Item No.1 of 'B' schedule property deserves confirmation and it is accordingly, confirmed. With respect to Item No.2, the Trial Court had given a detailed explanation for decreeing the suit but I could not even find one sentence in the judgment of the lower Appellate Court, as to why she interfered with that part of the decree.



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25. The existence of barbed iron fence and live fence are clear from the reports of the Advocate Commissioner under Ex.C2, Ex.C4 and Ex.C5. The defendant does not claim any share in the property of Nachimuthu Gounder or Sennimalai Gounder. He claims only the property that he purchased from Kalianna Gounder.

26. Under this circumstances, the fence which had been laid over the plaintiff's property deserves to be protected. Accordingly, that portion of the judgment of the 1st Appellate Court alone is being interfered with.

27. In fine, the Second Appeal is partly allowed. The judgment and decree of the learned Subordinate Judge at Gobichettipalayam in A.S.No.14 of 2012, dated 22.11.2012 is confirmed insofar as the prayer A and B is concerned. It is set aside insofar as the prayer C is concerned. In other words, the suit in O.S.No.261 of 2001 will stand decreed with respect to prayer C alone. With respect to prayer A and prayer B, the suit shall stand dismissed.



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28. Considering that the parties are neighbors, there shall be no order as to costs. Consequently, the connected Miscellaneous Petition is closed.

11.03.2024

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Index: Yes/No

Speaking Order : Yes/No

Neutral Citation: Yes/No

To

1. The Sub Court,
Gobichettipalayam
2. The District Munsif Court,
Gobichettipalayam

V. LAKSHMINARAYANAN, J.

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