



S.A.No.936 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.02.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.936 of 2021
and
C.M.P.No.17743 of 2021

S.Ramalingam

... Appellant

Vs.

S.Selvaraj

... Respondent

PRAYER: Second Appeal filed under Section 100 of C.P.C. to set aside the judgment and decree dated 27.01.2020 in A.S.No.10 of 2019 on the file of the Subordinate Court, Rasipuram, dismissing (*sic* allowing) the appeal by confirming (*sic* reversing) the judgment and decree dated 05.01.2019 in O.S.No.149 of 2016 on the file of the District Munsif Court, Rasipuram.

For appellant : Mr.S.Saravanakumar

For respondent : Mr.D.Chitra Maragatham



JUDGMENT

The plaintiff has filed the above second appeal challenging the judgment and decree passed by the learned Sub Judge, Rasipuram, in A.S.No.10 of 2019, in and by which, the learned Judge has reversed the judgment and decree dated 05.01.2019 in O.S.No.149 of 2016 on the file of the District Munsif Court, Rasipuram.

2. The facts of the case which are necessary for disposing of this second appeal are set out hereinbelow and the parties are referred to in the same array as before the Trial Court.

FACTS OF THE CASE:

2.1. The plaintiff has filed a suit in O.S.No.149 of 2016 for declaration of his title to the suit schedule property and for injunction restraining the defendant, his men and agents from interfering with his peaceful possession and enjoyment of the suit schedule property.

2.2. It is the case of the plaintiff that the suit property



originally belonged to his father and mother. The defendant is none else than the brother of the plaintiff. Their parents had executed two sale deeds dated 12.09.2006 in favour of the plaintiff and the defendant. The total land that belonged to the parents was an extent of 2.47 acres comprised in S.F.No.11/1B. The plaintiff and the defendant were given an extent of 1.17 acres of land each comprised in the S.F.No.11/1B and 3 cents of land was kept in common being the well portion and 10 cents of land was kept in common towards the pathway.

2.3. The plaintiff would submit that, after the sale, each of them have been in possession and enjoyment of their respective shares. While so, on 12.09.2006, when the plaintiff applied for subdividing the lands, the defendant was preventing the sub-division. The plaintiff is in possession and enjoyment of his portion from the date of sale and except the plaintiff, no other person has any right or interest over the suit property. While so, when the plaintiff had attempted to



put up a small shed in his property, the defendant objected to the same and the defendant started giving pinpricks to the plaintiff by giving police complaint. Therefore, the plaintiff has come forward with the suit in question.

2.4. The defendant has filed a written statement *inter alia* denying the allegations contained in the plaint and submitting that the plan submitted by the plaintiff did not describe the real features of the property. He would admit to the fact that the properties originally belonged to their parents who had executed two sale deeds dated 12.09.2006 in favour of the plaintiff and the defendant within specific boundaries.

2.5. The defendant would further submit that the properties are yet to be sub-divided. Therefore, the defendant had requested his other brother *viz.*, Pachamuthu and his mother *viz.*, Poovaiyammal on 16.09.2013 to sub-divide the properties, to which, there was no



response from them. The defendant would further submit that the plaintiff and the defendant had no right to draw water from the common well to the other lands except the lands in S.F.No.11/1B. The defendant would deny that he had obstructed the plaintiff and submitted that there was no cause of action for the suit and therefore, he sought for the dismissal of the suit in question.

2.6. An additional written statement was filed by the defendant in which he would submit that the plaintiff had sold his 1/3rd common share in the well and common 1/2 share in the common lands comprised in S.F.No.11/1B to his brother Pachamuthu without the permission of the defendant and this suit has been filed by suppressing this fact. Therefore, the defendant would submit that his brother Pachamuthu is also having right over the lands in S.F.No.11/1B and his non-joinder to the proceedings as a party is bad.

2.7. Further, the defendant would submit that the extent of 10



cents of land was kept as common pathway only for the plaintiff and the defendant. Therefore, the plaintiff has no right to execute the sale deed in favour of his brother viz., Pachamuthu. Therefore, the defendant has reiterated his prayer for the dismissal of the suit.

2.8. The plaintiff has filed a reply denying the contentions in the additional statement and contended that the defense of non-joinder had to be taken at the earliest point in time and therefore, failure to plead this in the earlier written statement amounts to a waiver.

TRIAL COURT:

3. The Trial Court had framed the following issues and additional issues.

“1.Whether the plaintiff is entitled to get declaratory relief in respect to the suit property as prayed for?

2.Whether the plaintiff is entitled to get permanent injunction as prayed for?

3.To what other relief the plaintiff is entitled to?”



4. The plaintiff has examined himself as P.W.1 and marked Exs.A1 to A5. The defendant has examined himself as D.W.1 and marked Exs.B1 to B6.

5. The Trial Judge, on considering the evidence on record, decreed the suit as prayed for. The learned Judge held that the defendant has not denied the the plaintiff's right and title to the suit property, but, his only defense is that the plaintiff had sold his 1/3rd common share in the well and 1/2 common share in the 10 cents of land which is the common pathway, to his brother viz., Pachamuthu without his permission. The Trial Court held that the declaration was sought only with reference to 1.17 acres of land in S.F.No.11/1B. The description in the suit schedule and the description shown in Ex.A1 were similar and relying upon this fact and the documentary evidence, the Trial Court has decreed the suit. The plaintiff has not asked any relief with reference to the common well or the common pathway and therefore, there is no necessity to implead Pachamuthu as a party to



the proceedings.

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6. Aggrieved by the said judgment and decree of the learned District Munsif, Rasipuram, the defendant has filed an appeal in A.S.No.10 of 2019.

LOWER APPELLATE COURT:

7. The learned Judge held that the suit schedule property included the common well and the common pathway and therefore, not impleading Pachamuthu was fatal to the case. The learned Judge has also held that the failure to implead the other sharers dis-entitled the plaintiff to the decree. The Lower Appellate Court has also taken out a very strange reasoning that the plaintiff has not proved his possession which plea has not been taken by the defendant.

8. The Lower Appellate Court has come to the conclusion solely based on the fact that the plaintiff had sold the common well and a portion in the common pathway to the other brother viz.,



Pachamuthu and therefore, it is clear that the plaintiff was not in possession of the suit property. The Lower Appellate Court has also held that the plaintiff has not proved any cause of action.

9. Aggrieved by the said judgment and decree, the plaintiff is before this Court.

10. Heard the learned counsel on either side and perused the materials available on record.

11. After hearing the arguments of the learned counsel on either side, the following substantial questions of law are taken for consideration.

“1.Whether the Lower Appellate Court was right in dismissing the suit for declaration without considering Ex.A1 and Ex.A2 since the suit prayer for declaration is limited only with regard to 1.17 acres land in S.F.No.11/1B and not in respect of common well and common pathway?

2.Whether the Lower Appellate Court was right in



misconstruing that the schedule of property in the plaint included the common well and common path by overlooking the suit schedule?

3.Whether the Lower Appellate Court was right in reversing the findings of the Trial Court without framing necessary points for determination?”

DISCUSSION:

12. It is an admitted fact that the plaintiff and the defendant were given an equal share in the lands in S.F.No.11/1B of Oilpatty Village, Rasipuram Taluk, within specified boundaries. They were given an extent of one acre and 17 cents of land each, under the sale deeds dated 12.09.2016, which have been marked as Exs.A1 and A2. An extent of 3 cents was kept in common for well and 10 cents towards the common pathway. The sub-division of the properties is yet to be done.

13. The plaintiff's case is that the defendant is not permitting the sub-division. Be that as it may, both the parties have taken



possession of their respective shares as provided under the sale deeds.

When the plaintiff had attempted to put up a small shed in his property, the defendant had started interfering with his possession and therefore, the suit has been filed.

14. The Lower Appellate Court has set aside the judgment and decree of the Trial Court on the following three grounds.

- (a) the sub-division had not been effected;
- (b) the plaintiff is not in possession of the property; and
- (c) the suit is bad for non-joinder of necessary parties.

15. The findings of the learned Sub Judge, Rasipuram, is that the plaintiff was not entitled to decree, since the properties are yet to be sub-divided by the Revenue Authorities. This finding of the Lower Appellate Court is absolutely puerile, inasmuch as, both the plaintiff and the defendant had purchased the property within specified boundaries and have been in possession and enjoyment of



their respective properties. The failure to sub-divide the properties would not render the purchase by each party invalid. Sub-dividing the property is only to update the Revenue records to keep it in tune with the deed of sale.

16. The Lower Appellate Court has come to the conclusion that the plaintiff is not in possession and enjoyment of the suit property only on the ground that the plaintiff has sold his share in the common well and common pathway to Pachamuthu and therefore, it is clear that the plaintiff is not in possession and enjoyment of the property. Such an observation runs contrary to Exs.A1 and A2, wherein, the properties within specified boundaries have been sold to the plaintiff and the defendant respectively, and both have taken possession of the same. D.W.1, in his evidence, had also admitted to the same as extracted hereinbelow.

“ வா.சா.ஆ.2 ல் வாதி நிலத்திற்கும், பொதுகிணறு பாகத்திற்கும்



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தென்புறம் உள்ள நிலத்தில் நான் கிரயம் பெறுவதாக குறிப்பிட்டுள்ளது. தாவா சொத்து எனது நிலத்திற்கு வடபுறம் உள்ளதாக வாதி வழக்குறையில் குறிப்பிட்டுள்ளார் அது சரிதான். வாதிக்கு பாத்தியப்பட்ட சொத்தை அபகரிக்கும் நோக்கத்தில் நான் வழக்கு நடத்தி வருகிறேன் என்று சொன்னால் சரியல்ல. கிணறு பாகத்திற்கும் வழக்கிற்கும் சம்மந்தம் இல்லை என்று சொன்னால் சரியல்ல. வாதி கிணற்றில் முழு உரிமையும் கேட்கவில்லை. 10 செண்ட் நிலத்தை பொருத்தும் வாதி எந்த பரிகாரமும் கேட்கவில்லை. பத்திரப்படி வாதி பரிகாரம் கேட்டுள்ளார் என்றும் தாவாப்படி தீர்ப்பாக வேண்டுமென்று சொன்னால் சரியல்ல. 10 செண்ட் நிலத்தை பொருத்தும் கிணறுபாகத்தை பொருத்தும் நான் வழக்கு தாக்கல் செய்துள்ளேன். வாதிக்கு இடைஞ்சல் செய்யும் நோக்கத்தில் இந்த வழக்கை தாக்கல் செய்துள்ளேன் என்றால் சரியல்ல.”

17. The presumption of the Lower Appellate Court that the plaintiff has also sought for a relief also with reference to the common pathway and the common well as these are included in the schedule is totally unwarranted inasmuch as the plaintiff has not included the common well and the common pathway in the suit schedule since the



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plaintiff's case is that the defendant had interfered with his possession of the property purchased by him measuring 1.17 acres from his parents.

18. The Trial Court has, in very great detail, considered the evidence in the pleadings and decreed the suit. The Lower Appellate Court has not given any reason as to why the findings of the Trial Court are erroneous. Therefore, the substantial questions of law are answered against the defendant.

Accordingly, this second appeal is allowed and the judgment and decree of the Lower Appellate Court *viz.*, Sub Court, Rasipuram is reversed. Consequently, connected C.M.P. stands closed. No costs.

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Index : Yes/No
Speaking order/non-speaking order
ssa

To

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1. The Subordinate Judge, Rasipuram.
2. The District Munsif, Civil Judge (Junior Division), Rasipuram.
3. The Section Officer, V.R.Section, High Court, Madras.

P.T.ASHA, J.,

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