



S.A.No.858 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.01.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No. 858 of 2021
&
C.M.P. No. 16373 of 2021

C.N.Gokulan

...Appellant

Vs.

A.Amirthalingam

...Respondent

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 23.01.2021 made in A.S.No.64 of 2019 on the file of the I Additional Subordinate Judge, Erode, confirming the Judgement and Decree dated 06.08.2019 made in O.S.No.451 of 2015 on the file of the Principal District Munsif, Erode.



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For Appellant : For Mr. M.V. Venkateseshan.
Senior Counsel
for Mr. Sathya

For Respondent : Mr. A.Sundara Vadhanan.

J U D G M E N T

The defendant is the appellant before this Court. The facts which has led to the filing of the above Second Appeal is herein below set out and the parties are referred to in the same rank as before the Trial Court.

2. The plaintiff has filed the above referred suit for declaration that the plaintiff is the absolute owner of the suit property, to direct the defendant to deliver the possession of the suit property after removing the super structure put up thereon and for granting permanent injunction restraining them from interfering with the



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plaintiff's peaceful possession and enjoyment of the property. The suit property has been described as follows:

“Erode Registration District, Erode Sub Registration District, Erode Taluk, Erode Town, within the Erode Co-operation limits, New Ward-C, Block No.19, New T.S.No.156, 159, 160 and 161/part. In this an extent of 63-1/2 Square feet with asbestos roofing walls at a admeasuring 6 feet in east and west and 10’ 4-1/2” in north and south situate within the following boundaries,

North of the property of S.Kumar; .

South of the property of Kathirvel,

East of the property of B.Matharadevi;

West of the property of the defendant,

The subject matter of the property is given as “BCDE” portion in rough plan.

3. It is the case of the plaintiff that he was entitled to the property with building described as ABCDEF in the plaint plan admeasuring 28 1/2 feet East West on both sides and 10 feet and 4 1/2 inches north South on both sides on R.K.V.Road, Erode. One



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Chinnasamy was a tenant in respect of the aforesaid property. The plaintiff had sold the portion marked ABEF under two registered sale deeds dated 06.12.2006 and 07.12.2006 to one Athiappa son of Marappa Gounder. The property measured 22 ½ feet east - west and 11 feet north south. The plaintiff had retained an extent of 6 feet east - west on both sides and 10 feet 4 ½ inches north south on both sides. This area was described as BCDE in the plaint plan and is the suit property.

4. The property that was purchased by Athiappan from the plaintiff was sold by him to the father of the defendant under a sale deed dated 29.03.2007. However, in the sale deed, the portion which has been retained by the plaintiff has been shown as a common passage. Thereafter the said Nesan, the father of the defendant has executed a registered settlement deed dated 20.02.2015 in favour of the defendant, where once again this extent has been shown as a common passage.



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5. The plaintiff would submit that the defendant demolished the existing super structure in the suit property and put up construction hurriedly without obtaining necessary plan. The plaintiff had issued a registered notice stating that the defendant cannot put up any door or window on his western wall (BE) to access the suit property. However, the defendant had ignored the same and continued to put up construction in the suit property by making projection into it. The defendant had issued a reply dated 07.07.2015 stating that the suit property is a common passage. Therefore, the plaintiff has come forward with the suit.

6. The defendant had filed a written statement inter alia contending that the allegations in the plaint was false and further the plaint plan was a self serving document. The defendant would submit that the plaintiff has not stated as to how the suit property belonged to him. The defendant would submit that the plaintiff's brother had file a



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suit in O.S.No.366 of 1975 on the file of the sub court, Erode to partition the property. Ultimately a final decree was passed in which the plaintiff and his brother were allotted properties described in the C schedule. The plaintiff does not have an exclusive right to the common lane, suppressing this he has sold the property to Athiyannan on 06.12.2006 and 07.12.2006 showing the common lane as a boundary though the same does not belong to him exclusively.

7. The defendant would submit that the 6 feet lane proceeds from Kongalamman Temple and this extent was excluded and retained for common enjoyment while allotting the property to the plaintiff. The said Athiyannan sold the property to the father of the defendant showing the lane as common pathway. Since then, the defendant's father is in enjoyment of the property and using the lane as a pathway.

8. The defendant would submit that the plaintiff has lost his



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right to the property pursuant to the sale deeds dated 06.12.2006 and 07.12.2006. Further, the plaintiff has initiated proceedings against Chinnasamy stating that they had leased out the suit property to him and that he was in arrears of rent. The said proceedings was pending for over 5 years for appointment of commissioner in I.A.No.250 of 2010. Even in this petition, the plaintiff has admitted that he was out of possession. The defendant would submit that the plaintiff cannot claim the common lane as his exclusive property.

9. An additional written statement was filed in which the defendant would contend that the suit property is a North - South lane and it is in the enjoyment of the defendant. He would submit that no documents have been produced to show title and further the plaintiff is a stranger to the property.

10. The Trial Court had framed the following issues:

1. Whether the plaintiff is in possession and



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enjoyment of the suit property?

2. Whether the suit property is a passage?

3. Whether the plaintiff is entitled for the relief of permanent injunction as prayed for?

4. To what other reliefs are entitled to plaintiff?

11. On 08.06.2016, the Trial Court had framed the following additional issue:

1. Whether the plaintiff is entitled for the relief of declaration and delivery of possession as prayed for?

12. The plaintiff examined himself as P.W.1. Ex.A.1 to Ex.A.14 were marked on the side of the plaintiff. On the side of the defendant three witnesses were examined including the defendant, who had examined himself as D.W.1. No documents were marked on the side of the defendant.



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13. The Trial Court on considering the evidence decreed the suit with reference to declaration and delivery of possession and dismissed the same with reference to the relief of permanent injunction, against which the defendant had filed an appeal in A.S.No.64 of 2019 on the file of the I Additional Sub Court, Erode. The learned Sub Judge has also confirmed the judgement and decree of the Trial Court.

14. Challenging the same, the defendant has come forward with this Second Appeal. The Second Appeal has been admitted on the following substantial questions of law:

"(1)Whether the Courts below are right in decreeing the suit for declaration and possession of the respondent when the bit of land which is the part of lane excluded under Ex.A.1 was not to be recovered by the respondent as plaintiff?"



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(2)Whether the Courts below are not right in considering when the servient tenement has been alienated the easmentary right in the alleged land also goes to the purchaser. When such is the case whether the Courts below are right in decreeing the suit when the servient tenement has admittedly sold under Ex.A.1?

(3)Whether the Courts below have not properly appreciated the Compromise Decree in Ex.A.1 and committed error of law in granting declaratory and possessory decree to the plaintiff for the bit of locked up land?

(4)Whether the Courts below are right in decreeing the suit for 63 sq.ft., when there is no whisper of retention of the said property by the plaintiff in Ex.A.2 and Ex.A.3?



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(5)Whether the Courts below have not committed a serious error of law in appreciating the documentary evidence, when under Ex.A.4 the purchaser under Ex.A.2 and Ex.A.3 has sold only 172 sq.ft. of land and retained remaining with himself. When such is a case whether the Courts below are right in granting a decree for 63 sq.ft. Against the appellant/defendant without impleading of purchaser under Ex.A.1 and Ex.A.3?"

15. Heard the learned counsels on the either side.

16. The suit property has been described by the plaintiff as a “vacant site” and as a “common passage” by the defendant. The plaintiff would submit that there was an existing superstructure, which was demolished by the defendant who had thereafter started putting up construction there on. Both parties have traced their title to



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the compromise in O.S.No.336 of 1975, which is marked as Ex.A1.

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17. In Ex.A.1 compromise decree in O.S.No.336 of 1975, the Sub Court, Erode, the suit property has been described as the C Schedule and Clause 3 of the Final Decree would read that the C Schedule properties are jointly allotted to the plaintiffs 1 to 3 therein, who are the plaintiff herein and his brothers Vadivel and Udayakumar. The C Schedule has been described as follows:

“1, 2, 3 வாதிகள் (கதிர்வேலு, உதயகுமார், அமிர்தலிங்கம் ஆகியோர் அடைய வேண்டிய சொத்துக்கள் விபரம் (வரைபடங்கள்)

1,2 களில் மஞ்சள் கலரில் காட்டப்பட்டுள்ளது.

தாவா 5 வது சொத்தின் மீதி இடத்தையும், 2வது சொத்தின் மீதி இடத்தையும் மற்றும் தாவா 6,7,8,9,10 ஆகிய சொத்துக்களையும் 1 முதல் 3 வாதிகள் கூட்டாக எடுத்துக் கொண்டு பின்வருமாறு பிரித்துக் கொள்கிறார்கள்.

தாவா 5வது மீதி இடத்திற்கும் 2 வது மீதி இடத்திற்கும் (கிழக்கு), ஆர்.கே.வி. சாலைக்கும் (மேற்கு),



கொங்களம்மன் கோவில் தெருவிற்கும் (வடக்கு) 3வது நபர் இடத்துக்கும் (தெற்கு) அதாவது கதவு எண்கள் 17 - பியில் ஒரு பகுதி 16ல் ஒரு பகுதி, 18, 18 ஏ, 22, 23, 23 ஏ ஆகியவைகள் அடங்கிய இடத்தின் விஸ்திரணம் கி.மீ. 48' 32' இதில் அடங்கிய மொத்த இடத்தின் மத்தியில் பொதுவில் அதாவது கொங்களம்மன் கோவில் தெருவிற்கும் வடக்கு, 3வது நபர் இடத்திற்கும் தெற்கு. இந்த இடத்தில் 6 அடி பொது சந்து விட்டு சந்துக்கு, மேற்கிலும், கிழக்கிலும், கிழக்கு மேற்காக, 3 சம பாகங்களாக பிரித்துக் கொண்டு அதில் தெற்கு பக்கத்தில் 3 சம பாகங்களாக பிரித்துக் கொண்டு அதில் தெற்கு பக்கத்தில் ஆர்.கே.வி. ரோட்டிற்கும் மேற்கு, தாவா 5வது 2வது மீதி இடத்திற்கும் கிழக்கு, 2வது பாக இடத்திற்கு தெற்கு கொங்களம்மன் கோவில் வீதிக்கும் வடக்கு இதில் அடங்கிய (பொது சந்து நீங்கலாக) உள்ள இடத்தை 2ம் வாதி உதயகுமார் எடுத்துக் கொள்ள வேண்டியது. அதற்கு அடுத்தாற் போல் வடபுறம் இருக்கும் அதாவது 5வது சொத்து 2 வது சொத்து ஆகியவைகளின் மீதி இடத்திற்கும் கிழக்கு ஆர்.கே.வி. ரோட்டிற்கும் மேற்கு 3வது பாக இடத்திற்கும் தெற்கு, 1 வது



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பாக இடத்திற்கும் வடக்கு, இதில் (பொது சந்து நீங்களாக) உள்ள இடத்தை 3ம் வாதி அமிர்தலிங்கம் எடுத்துக் கொள்ள வேண்டியது. அதற்கு அடுத்தாற் போல் வடபுறமிருக்கும் தாவா 5வது 2வது மீதி இடத்திற்கும் கிழக்கு ஆர்.கே.வி. சாலைக்கும் மேற்கு, 3 வது நபர் இடத்திற்கும் தெற்கு, 2 வது பாக சொத்துக்கும் வடக்கு, (பொது சந்து நீங்களாக) உள்ள இடத்தை 1ம் வாதி கதிர்வேல் எடுத்துக் கொள்ள வேண்டியது. மேலும் பொது சந்துக்கு மேற்கில் கதிர்வேல் பாகத்தில் வடகோடியில் வடபுறம் ஓரமாக கட்டப் போகும்படிக்கு, 1, 2 வாதிகள் ஆகிய பங்குதாரர்கள் பொது சந்துக்கும், மேல்புறம் அடைந்து கொள்ளும் இடத்தில் அவரவர்களின் இடத்தில் 1 அடி, 3 வது பாக சொத்துக்களுக்கு, ஷையாருக்கு ஒதுக்கும் சொத்துக்கு சேர்ந்தாற்போல் தெற்கு பாகத்தில் ஒதுக்கி விட வேண்டியது.

1,2,3 வாதிகள் (கதிர்வேலு, உதயகுமார், ஆமர்தலிங்கம்) அடையும் சொத்துக்கள் (வரைபடிம் 2ல் மஞ்சள் கலரிட்டது),

மேற்கு கொங்களம்மன் கோவில் தெருவில் 2 லக்கமிட்ட வீட்டில் மேற்கு கொங்களம்மன் கோவில் வீதிக்கும் (மேற்கு), கோயில் இடத்திற்கும், சென்னியப்ப கவுண்டர் இடத்திற்கும்



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(கிழக்கு) விசி இராமசாமி இடத்திற்கும் (தெற்கு) 4,5 வாதிகள் இடத்திற்கும் (வடக்கு) இதன் மத்தியில் உள்ள காலி இடத்தையும் வீட்டையும், 1 முதல் 3 வாதிகள் (கதிர்வேலு, உதயகுமார், அமிர்தலிங்கம்) பொதுவில் அனுபவித்துக் கொள்ள வேண்டியது. 1 முதல் 3 வாதிகள் தலா பத்தாயிரம் (ரூ.10,000/-) சேர்த்து 4,5 வாதிகளுக்கு 1,2,3 வாதிகளின் இடத்திலிருக்கும் கட்டிட மதிப்பிற்கு பதிலாக ரூ.30,000/- கொடுத்து விட வேண்டும். இந்த இடத்தின் விஸ்திரணம் கிமீ 75 x 55

18. A reading of this deed will clearly show that as per the terms of the compromise the 6 feet common passage was to be formed by the plaintiffs 1 to 3 therein as regards the 1st item in the C Schedule. The 2nd item was to be retained in common. There is no evidence to show that this 6 feet passage has been formed. P.W.2 Udayakumar who is the brother of the plaintiff and the 2nd defendant in the earlier suit O.S.No.336 of 1975 has deposed that no lane was formed to the West of their properties on account of the existence of the superstructure.



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19. The plaintiff while selling the property to Athiappan under Ex.A.2 has clearly described the western boundary as the “Property measuring 6 feet in width and 20 $\frac{3}{4}$ feet in length kept in common between him and his brother Udayakumar. Ex.A.3 does not refer to this property as a boundary.

20. Therefore a mere perusal of the sale deeds would clearly indicate that this extent has not been conveyed and nor has it been referred to as a common passage, however while selling the property to the defendant's father under Ex.A4, Athiappan has clandestinely referred to this area as a common passage.

21. The defendant has himself admitted in his cross examination that there was a super structure in this vacant site. He has stated as follows:



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“தாவாச் சொத்திற்கு மேற்கூரை ஆதியிலிருந்து இருந்தது என்றால் சரிதான்... பாகப் பிரிவினையில் நடுவில் 6 அடி தடம் என்று கண்டிருக்கும் பகுதி எப்போதும் தடம் ஏற்படுத்தப்படவில்லை. அது ஏற்கனவே இருந்த கட்டிடங்கள் அப்படியே இருக்கிறது என்றால் சரிதான். சமரச இறுதிநிலைத் தீர்ப்பாணையுடன் இணைக்கப்பட்டுள்ள வரைபடித்திலேயே உத்தேச தடம் என்றுதான் கண்டு எழுதப்பட்டுள்ளது என்றால் சரிதான். கதிர்வேல், குமார், கூாதி ஆகியோர் இடத்திற்கு கிழபுறம் ஆர்.கே.வி. ரோடு இருப்பதால், மேற்சொன்ன 6 அடி தடம் போடப்பட்ட வேண்டிய அவசியம் இல்லை என்றால் சரிதான். இதற்கு வடபுற பகுதியில் தடம் என்று சொல்லக்கூடிய இடத்தில் கதிர்வேல் மெத்தை வீடு கட்டிவிட்டார் என்றால் எனக்கு தெரியாது. ஆனால், முழைய கட்டிடம் அப்படியே உள்ளது என்றால் சரிதான். மேற்படி 12 கடை எனக்கு நினைவு தெரிந்த காலத்திலிருந்து இருந்து வருகிறது என்றால் சரிதான்.

22. This would clearly show that though it has been referred as a common lane, the said common lane was not formed as there was a



super structure on this land as on the date of the partition and the final decree only refers to it as a proposed lane. The defendant has also admitted to the fact that this lane has not been formed in is evidence. His admission during his cross examination is extracted below:

“தாவா தடம் சமரச இறுதிநிலைத்
தீர்ப்பாணை பிறப்பிக்கப்பட்டபோது உத்தேச தடம்
என்று விடப்பட்ட தடம் என்றும் அதன்படி தடம்
எப்போதும் ஏற்படிவில்லை என்றால் சரிதான்.
கதிர்வேல், குமார் வாதி ஆகியோர்கள் தடம்
வேண்டாம் என்று முடிவு செய்து விட்டார்கள்
என்றால் சரிதான். அவரவர்களுக்குள் இருக்கும்
தடத்தை அவரவர் வைத்துக் கொள்ள வேண்டியது
என்று முடிவு செய்துவிட்டார்கள் என்றால் சரிதான்.

23. Therefore, it is clearly evident that no right to the lane has been conveyed to the defendants and the defendants did not have any easement right to the lane which has not been formed. Therefore, substantial questions of law 1 to 3 is answered in favour of the



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appellant. It is further seen that despite orders of injunction, the defendant has continued with the construction and completed it in an utter disregard to the orders of this court. This is a blatant and contumacious act on the part of the defendants.

24. The defendants have also taken a plea of limitation. Both the Courts below have considered the same in detail and have stated as to why this argument would not hold water. The denial of the title by the defendant is only in the year 2009 when the Rent Control Petition was filed. Originally the suit has been filed on 31.07.2015 for the relief of declaration and delivery of position. Therefore, the suit is well within time. The issues raised in the substantial questions of law 3 was not the point in issue either before the Trial Court or the Appellate Court. Therefore, these questions are answered against the defendant.

25. Taking note of the conduct of the defendant in asserting



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right to property, which was not conveyed to his predecessor in title and in continuing to put up construction despite interim orders of this Court, the defendant has to be put on terms. If not the sanctity of an order passed by a Court would be sullied and becomes a toothless order.

26. In the result, the Second Appeal stands dismissed and the defendant shall pay a sum of Rs.50,000/- to the plaintiff by 31.03.2024. Consequently, the connected Civil Miscellaneous Petition is closed. No costs.

29.01.2024

Index : Yes/No
Internet : Yes/No
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To

WEB COPY

- 1.The I Additional Subordinate Judge,
Erode.
- 2.The Principal District Munsif,
Erode.



WEB COPY



S.A.No.858 of 2021

P.T. ASHA, J,

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29.01.2024