

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04 - 06 - 2015

CORAM:

THE HON'BLE TMT. JUSTICE PUSHPA SATHYANARAYANA

S.A. No. 219 of 2015

and

M.P. No. 1 of 2015

K. Govinda Mandiri (died)

1. Govindammal

2. Kesavan

3. Balan

... Appellants/Plaintiff 2, 3 & 5

Vs.

1. G. Rajamanickam

2. G. Kasi

3. G. Shanmugam

4. Jagannathan

... Respondents/Defendants & 4th Plaintiff

Appeal under Section 100 of the Civil Procedure Code, against the judgment and decree dated 15.12.2014 passed by the Subordinate Judge, Gudiyatham, in A.S. No. 42 of 2012 confirming the judgment and decree passed by the District Munsif, Gudiyatham, in O.S. No. 293 of 2002 on 19.10.2012.

For Appellant : Mr. R. Margabandhu

JUDGMENT

The plaintiffs who were non-suited by the concurrent findings of the Courts below as regards their prayer for permanent injunction restraining the defendants from interfering with their peaceful possession and enjoyment of the suit property and also for mandatory injunction against the defendants directing them to remove the fence and hut put up by them and the flower pots in the suit property, challenge the same by way of the present Second Appeal.

2. The case of the plaintiffs is that the suit property, which is a pathway, was purchased by the first plaintiff's father under Ex. A.1 registered sale deed dated 12.10.1961 from the defendants to enable them to reach their lands situated in S. No. 239/1. It is stated that the portion marked as ABEF in the plan is situated in S. No. 237 while the portion of the suit pathway marked as BCDE is situated in S. No. 239/2. According to the plaintiffs, since there was an attempt to trespass the suit pathway marked as ABEF in the plan situated in S. No. 237, the suit was filed by them.

3. Resisting the suit, the defendants filed written statement denying the allegations made by the plaintiffs. According to the defendants, the land bearing S. Nos. 237/72, 237/71, 238/22 and 235/23 belongs to the defendants 2 and 3 and the plaintiffs did not have any manner of right in the same.

4. In order to strengthen the case of the plaintiffs, the second plaintiff Govindammal examined herself before the trial Court, as P.W.1 and examined two more witnesses as P.W.2 and P.W.3 and marked Exs. A.1 to A.4. To disprove the case of plaintiffs, the defendants 2 and 3 examined themselves as D.W.1 and D.W.2 respectively besides examining one Prabavathi, Revenue official, as D.W.3 and marked Exs. B.1 to B.14. Report filed by the Advocate Commissioner was marked as Court Exhibit Ex.C.1.

5. The trial Court, on consideration of the evidence adduced by the parties and the submissions made by the learned counsels, by judgment dated 19.10.2012, having found that the plaintiffs have not proved that they are in possession and enjoyment of the entire suit property, held that the suit, without seeking the relief of declaration of title, is not maintainable and accordingly, dismissed the same. On appeal, the Lower Appellate Court concurred with the finding of the trial Court and dismissed the same. Questioning the same, the plaintiffs have filed the present Second Appeal.

6. The only point that arises for consideration in this Second Appeal is whether the concurrent finding of the Courts below needs to be interfered with.

7. Heard the learned counsel appearing for the appellants and perused the records.

8. The plaintiffs who claim to have used the suit pathway from 1961 should prove the existence of the pathway and the usage of the same from the date of purchase. Further, though the plaintiffs claim title under Ex. A.1, it is pertinent to note that it does not mention the measurement and, therefore, it is the burden of the plaintiffs to establish that they had been using the pathway from the date of purchase. The plaintiffs also failed to establish their possession over the suit property by placing any revenue records whereas the defendants have proved their title and possession by producing Exs. B.3 and B.4 patta issued in favour of the defendants 2 and 3 respectively also supported by the oral evidence of D.W.3, a Revenue official and the same is not disputed by the plaintiffs.

9. From a perusal of the records, it is seen that the measurement of the pathway is 3' X 130' in S. No. 237 and 3' X 25' in S. No. 239/2. The plaintiffs claim to have right in the same on the strength of the partition in the year 1964 by which the first plaintiff is said to have been allotted the same. However, the measurement is not mentioned anywhere in the plaint nor is there any mention in Ex. A.1. Though the plaintiffs produced sale deed Ex. A.1, the defendants have denied the title and usage of the suit property by the plaintiffs. But the plaintiffs have chosen to file the suit for permanent injunction and mandatory injunction without seeking the relief of declaration of title.

10. Further more, though it is mentioned in the plaint that the suit property is in S. No. 237, admittedly, the same is not mentioned in the Ex.A1 based on which the suit is filed. Unfortunately, the Advocate Commissioner, who was appointed at the instance of the plaintiffs, though filed his report Ex. C.1, had not filed a sketch with measurement to identify the suit pathway and as such, the same is also not useful for the plaintiffs to substantiate their case. In such circumstance, the Courts below also could not place much reliance on the report of the Commissioner as the same is not clear and categorical about the existence of the pathway.

11. The Courts below being the final Courts of facts have concurrently found that the plaintiffs have failed to establish their possession, enjoyment and right over the suit property. The plaintiffs have also not proved the cause of action which gave rise to the filing of the suit. The Courts are duty bound to give effect to the inference drawn from the evidence on record. In the present case, the Courts below could not come to a conclusion that the plaintiffs are entitled to the right of pathway as claimed in the plaint in spite of Ex. A.1 of the year 1961 as they failed to produce any other evidence substantiating their claim.

12. In my opinion, since the courts below have clearly recorded a finding on the claim of title to the suit property, in this Second Appeal filed under Section 100 C.P.C. against the concurrent judgments, no substantial question of law would arise for consideration. There are no error of jurisdiction or law or perversity on the face of the records. Hence, a re-appraisal of the evidence to arrive at a different conclusion than the one concurrently arrived at by the Courts below, is not warranted. This Court is also not expected to embark upon such re-appraisal of evidence in the Second Appeal. I do not find any reason to differ from the concurrent finding rendered by the Courts below.

For the foregoing reasons, the Second Appeal fails and the same is dismissed and the judgment and decree passed by the learned District Munsif, Gudiyatham, in O.S. No. 293 of 2002 on 19.10.2012 as

confirmed by the judgment and decree dated 15.12.2014 passed by the learned Subordinate Judge, Gudiyatham, in A.S. No. 42 of 2012, are affirmed. However, there will be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

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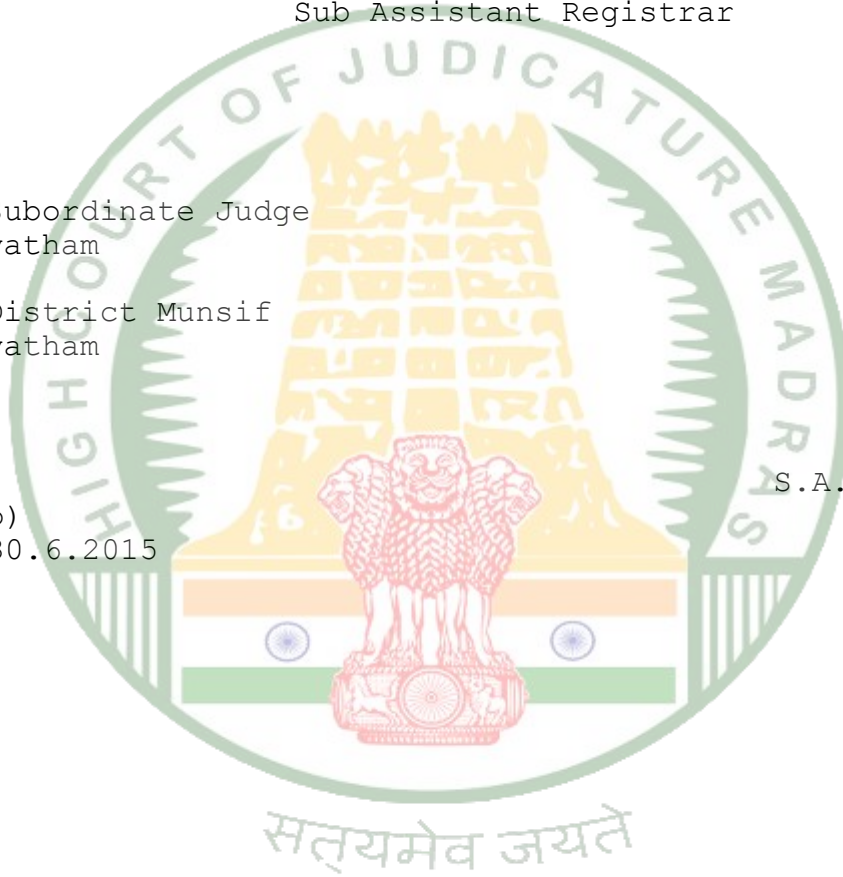
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To

1. The Subordinate Judge
Gudiyatham
2. The District Munsif
Gudiyatham

ug (co)
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