

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 28 .1.2015

CORAM

THE HON'BLE MR.JUSTICE R.MAHADEVAN

S.A.No.1775 of 2003
and
CMP.No.16228 of 2003

Sengodan ...Appellant/Defendant

vs.

Manickam ...Respondent/Plaintiff

Second Appeal against the judgment and decree dated 16.6.2003 and made in A.S.No.50 of 2001 on the file of the learned Subordinate Judge, Sankari, confirming the judgment and decree dated 28.3.2001 and made in O.S.No.96 of 1998 on the file of the learned District Munsif, Sankari.

For appellant : Fr.A. Xavier Arul Raj

For respondent : Mr.C.S.K. Sathish

JUDGMENT RESERVED ON : 18.12.2014

JUDGMENT

The judgment and decree, dated 16.6.2003 and made in A.S.No.50 of 2001 on the file of the learned Subordinate Judge, Sankari, confirming the judgment and decree dated 28.3.2001 and made in O.S.No.96 of 1998 on the file of the learned District Munsif, Sankari, are under challenge in this memorandum of second appeal.

2. The appellant is the defendant in the suit in O.S.No.96 of 1998, whereas the respondent is the plaintiff.

3. For easy reference and for the sake of convenience, the appellant may hereinafter be referred to as the defendant and the respondent be referred to as the plaintiff wherever the context so require.

4. The necessary facts leading to the filing of the suit are as under:-

a. The plaintiff had occupied a Natham vacant site 35 years ago, in which, he had put up a thatched shed and thereafter, he constructed a tiled house, bearing Door No.105. The plaintiff has been paying house tax till date. The Government had issued HSD Patta in the name of the plaintiff with specific boundaries. A public road measuring 13 x 60 feet is running near the house of the plaintiff and there is no other way to reach the plaintiff's house.

b. The defendant's house is situated in the eastern side of the plaintiff's house and he tried to encroach the suit pathway and put up a construction therein. The defendant has no manner of right, title or interest over the suit pathway at any point of time. However, the defendant is illegally interfering with the peaceful enjoyment of the suit pathway.

c. On 22.4.1998, the defendant tried to destroy the suit pathway along with his men, which was thwarted. Hence, the present suit for permanent injunction.

5. The defendant resisted the suit by filing written statement contending that though the plaintiff had stated that he occupied the house site 35 years ago, he produced the house tax receipts only from the year 1981 and there is no pathway running east-west direction in front of the plaintiff's house. It is also stated that the plaintiff has one thatched shed and one terraced building with five feet pathway on its east and that a common pathway is running on the northern side of the plaintiff's house, which is facing southern side. The defendant has only four feet pathway in front of his house, which is used as entrance to his house. The rough plan enclosed with the counter may be treated as part and parcel of the written statement. The

plaintiff has fraudulently obtained the HSD Patta, which is not connected with the suit property. Hence, the defendant prayed that the suit may be dismissed.

6. Based on the material proposition of facts arising from the pleadings of the parties to the suit, the trial Court has formulated as nearly as three issues for better adjudication of the suit. In order to substantiate their respective cases, both the plaintiff and the defendant were directed to face the trial. Accordingly, the plaintiff has examined himself as P.W.1 and during the course of his examination Exs.A1 and A2 were marked. On the other hand, the defendant has examined himself as D.W.1 and one more witness was examined and during the course of their examination Exs.B1 to B3 were marked. That apart Exs.C1 and C2 were also marked.

7. On evaluating the evidences both oral and documentary, the trial court had proceeded to decree the suit.

8. Having been aggrieved by the impugned judgment and decree of the trial Court, dated 28.3.2001, the defendant had preferred an appeal in A.S.No.50 of 2001 on the file of the learned Subordinate Judge, Sankari.

9. That appeal was partly allowed modifying the judgment and decree of the trial Court.

10. Being not satisfied with the judgment and decree of the first appellate court, the present second appeal has been filed by the defendant.

11. The second appeal has been admitted on the following substantial question of law:-

" Whether the lower courts went wrong in decreeing the suit in the absence of any documentary or independent oral evidence to prove the claim of the plaintiff?"

12. Heard FR.A. Xavier Arul Raj, learned Counsel appearing for the appellant/defendant and Mr.C.S.K. Sathish, learned counsel appearing for the respondent/plaintiff.

13. The learned counsel for the appellant submitted that the trial court failed to consider the report and the sketches of the Commissioner under Exs.C1 to C3, wherein it is stated that only 3 feet lane alone is available in front of the defendant and the plaintiff's house, however, the court below decreed the suit as prayed for, which is perverse.

14. The learned counsel for the appellant submitted further that the courts below ought to have demanded the plaintiff to substantiate his case with revenue records to show the existence of the pathway measuring 60 x 13 feet.

15. The learned counsel for the appellant has contended that since there is an alternate and permanent pathway leading to the house of the plaintiff as per the Commissioner's report and the same has been corroborated by the evidence of D.W.1 and D.W.2, the suit should not have been decreed. Further, the learned counsel contended that the suit was not filed in representative capacity and Order 1 Rule 8 CPC was not complied.

16. In support of his contentions, the learned counsel for the appellant has relied on the following decisions:-

- (i) Dinesh Kumar vs. Yusuf Ali (2010-4-L.W.783)
- (ii) State of Tamil Nadu represented by the Collector, Virudhunagar at Kamarajar District vs. Madasami and 11 others (2012(2) CTC 315)
- (iii) Bishop of Thanjavur Diocese, Secretary, Diocese of Tajore Society, Thanjavur & another vs. Savari Nayagam and another (2014-4-L.W.335)

17. On the other hand, the learned counsel for the respondent has submitted that considering oral and documentary evidence, the trial court has decreed the suit as prayed for, however, the lower appellate court has modified the judgment and decree of the trial Court restricting the suit pathway to an extent of 7 x 60 feet and therefore, nothing warrants the interference of this court with the judgment and decree of the lower appellate court.

18. Now the question to be decided is whether there is suit pathway as claimed by the plaintiff, if so, what is the extent of such pathway?

19. It is the case of the plaintiff (respondent herein) that there is no other way except the pathway to reach his house and he has been in possession and enjoyment of his house for the past 35 years.

20. On the other hand, it is the case of the defendant (appellant herein) that there is an alternate way, which is being used by the plaintiff and he never uses the suit pathway to reach his house.

(i) To substantiate his claim that the finding of the lower courts are not supported by evidence, the learned counsel for the appellant/defendant has relied on the decision in Dinesh Kumar vs. Yusuf Ali (2010-4-L.W.783). The relevant portions are as follows:-

"24. There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter. (Vide Jagdish Singh Vs. Nathu Singh, AIR 1992 SC 1604; Smt. Prativa Devi Vs. T.V. Krishnan, (1996) 5 SCC 353; Satya Gupta @Madhu Gupta Vs. Brijesh Kumar, (1998) 6 SCC 423 Ragavendra Kumar Vs. Firm Prem Machinery & Co., AIR 2000 SC 534; and Molar Mal Through Lr. Vs. M/s. Kay Iron Works Pvt. Ltd., AIR 2000 SC 1261).

25. Thus, the law on the subject emerges to the effect that Second Appeal under Section 100 CPC is maintainable basically on a substantial question of law and not on facts. However, if the High Court comes to the conclusion that the evidence on record recorded by the courts below are perverse being based on no evidence or based on irrelevant material, the appeal can be entertained and it is permissible for the Court to re-appreciate the evidence. The landlord is

the best Judge of his need, however, it should be real, genuine and the need may not be a pretext to evict the tenant only for increasing the rent."

(ii) State of Tamil Nadu represented by the Collector, Virudhunagar at Kamarajar District vs. Madasami and 11 others (2012(2) CTC 315). In the said judgment it is held that the Government has no say in the right accrued to person, who occupied a Gramanatham Land and the extent so occupied by such person has to be considered towards his enjoyment of said property. The said judgment is not related to this case.

(iii) To prove that the respondent/plaintiff failed to establish his case under Order 1 Rule 8 CPC, the learned counsel for the appellant/defendant relied on the decision in Bishop of Thanjavur Diocese, Secretary, Diocese of Tajore Society, Thanjavur & another vs. Savari Nayagam and another (2014-4-L.W.335). The finding of the Madurai Bench of this Court is as follows:

"48. The object of enactment of the provisions of Order I Rule 8 of the Code of Civil Procedure is to facilitate the decision of question in which a large body of persons are interested without recourse to the ordinary procedure, where each individual has to maintain an action by a separate suit. The principle of a representative suit is to prevent a defendant from being vexed and molested by other similar suits by other persons of a particular body. Furthermore, Order I Rule 8 C.P.C., is in the public interest so as to avoid multiplicity of litigation. The condition necessary for it's application is that the persons on whose behalf the suit is brought must have the same interest, that is either the interest must be common or they must have a common grievance.

49. But, in the present suit, it is not established by the plaintiffs that the interest of larger body of persons are affected by the

conduct of the defendants. Since the suit claim itself has not been substantiated by the plaintiffs, the Judgment and Decree of both the Courts below are deserve to be set aside."

(iv) In the decision in The Executive Officer, Kadathur Town Panchayat, Harur Taluk, Dharmapuri District vs. V.Swaminathan and others (2004 (3) CTC 270), it is held that the Panchayat cannot treat persons in occupation to Grama Natham land as encroachers and seek to evict them. The said judgment is not applicable to this case.

21. D.W.2, who has been examined on the side of the defendant, has stated in his chief examination that on the west of the suit pathway he is having patta land.

22. Further, in the Commissioner's report, it is stated as under:-

"பிரதிவாதி வீட்டை ஒட்டி தெற்கில் காலியாக காணப்பட்ட பகுதி, சுமார் 3 அடி அகலத்திற்கு தடமாக காணப்பட்டது.....பிரதிவாதி கட்டிடத்திற்கு தெற்கில் உள்ள தடம் கிழமேல் தடமாக காணப்பட்டது மேற்படி தடமானது சுமார் 60 அடி நீளம் ஆகும். மேற்படி தடத்தில் சைக்கிள் சென்றதற்கான டயர் அச்சம் காணப்பட்டது. "

23. From the evidence of D.W.2 and on the basis of the Commissioner's report Ex.C.1, this Court finds that there is pathway and such pathway is being used by the plaintiff and since the defendant has interfered with the peaceful enjoyment of such suit pathway, the plaintiff has filed the present suit seeking permanent injunction.

24. However, ultimately, on an analysis of the oral and documentary evidence, there is no proof to show the correct measurement of the suit pathway and therefore, the trial Court has decreed the suit as prayed for, whereas the first appellate court considering the space available in front of the house of the plaintiff, has come to the conclusion that there should be 7 feet breadth and 60 feet length and accordingly, it has modified

the judgment and decree of the trial court.

25. In the absence of any documentary evidence to show the measurement of the pathway and the land being natham poramboke, it is not proper to decide the measurement of the suit pathway. However, the Advocate Commissioner, in his report, has stated that there is three feet vacant land on the south of the defendant's house and the same is running east west and it is having the length of 60 feet. This is the only clear and categorical documentary evidence in respect of the suit pathway.

26. In the absence of any evidence both oral and documentary even on either side, this Court has to rely solely on the report of the Advocate Commissioner and that too in the absence of any objection to that report and therefore, based on the report and the plan of the Advocate Commissioner, this Court finds that permanent injunction could be granted only in respect of the suit pathway measuring 3 feet breadth and 60 feet length.

27. Accordingly, the permanent injunction is granted only in respect of the suit pathway measuring 3 feet breadth and 60 feet length.

28. For the aforesaid reasons, the second appeal is allowed partly modifying the judgment and decree of the lower appellate court to the extent as indicated above. However, there will be no order as to costs. Connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

/mra

To

1. The Subordinate Judge,
Sankari.

2. The District Munsif,
Sankari.

1 CC to Fr.A. Xavier Arul Raj, Advocate SR.No. 4661

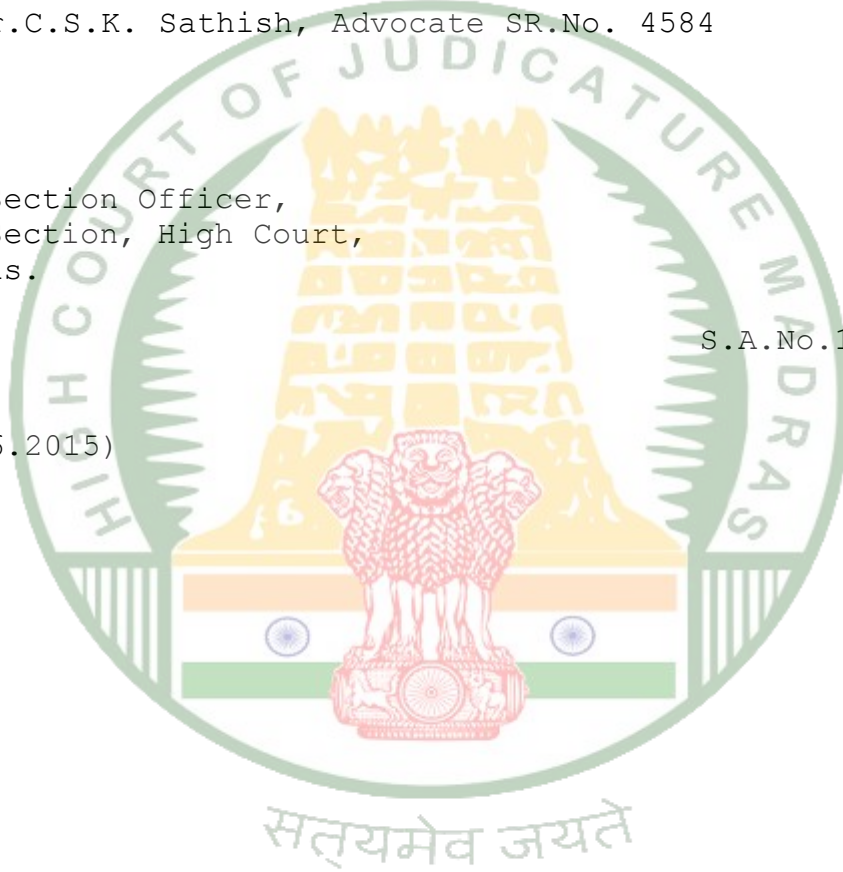
1 CC to Mr.C.S.K. Sathish, Advocate SR.No. 4584

Copy to

The Section Officer,
V.R.Section, High Court,
Madras.

S.A.No.1775 of 2003

SV (CO)
PSI (02.06.2015)



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