THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.01.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.447 of 2013

Karpagam .. Appellant/Plaintiff

- Vs -

1. Chinnadurai

2. The Director,
   Special Panchayat,
   4th Floor, Kuralagam,
   Chennai - 600 108.

3. Assistant Director,
   Special Panchayat, Cuddalore.

4. District Collector,
   Villupuram District,
   Villupuram.

5. Acting Officer,
   Special Panchayat,
   Manalurpettai,
   Thirukkoilur Taluk.

6. Fire Officer,
   Fire Department,
   Sandapettai, Thirukoilur. .. Respondents/Defendants.

Prayer:- Second Appeal filed under Section 100 of C.P.C., against the Decree and Judgment dated 22.02.2010 made in A.S.No.55 of 2009 on the file of the learned Principal Subordinate Judge, Villupuram setting aside the Decree and Judgment dated 27.01.2009, made in O.S.No.146 of 2006, on the file of the learned Principal District Munsif, Thirukovilur.

For Appellant : Mr.B.Harikrishnan

For Respondent 1 : Mr.J.Saravanavel

For Respondents 2 to 6 : Mr.T.Jayaramaraj
Government Advocate (C.S.)

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J U D G M E N T

The plaintiff in O.S.No.146 of 2006 on the file of the learned Principal District Munsif, Thirukovilur is the appellant. The respondents are the defendants in the suit. The said suit was filed for a direction to the defendants 1 to 4 to remove the plaintiff from the alleged encroachment of 'A' schedule property and for mandatory injunction to the defendants 1 to 5 to remove the machines put up for roasting puffed rice from the 'B' schedule property. The Trial Court decreed the suit by decree and judgment dated 27.01.2009. As against the same, the 6th defendant filed an appeal in A.S.No.55 of 2009 on the file of the learned Principal Subordinate Judge, Villupuram. By decree and judgment dated 22.02.2010, the lower appellate Court allowed the appeal and set aside the decree and judgment of the trial Court and dismissed the suit. As against the same, the plaintiff is before this Court with this second appeal.

2. I have heard Mr.B.Harikrishnan, learned counsel appearing for the appellant, Mr.J.Saravanavel, learned counsel appearing for the 1st respondent and Mr.T.Jayaramaraj, learned Government Advocate (CS) appearing for the respondents 2 to 6 as well as perused the records carefully.

3. The case of the plaintiff is as follows:

(i) This suit has been filed in representative capacity, representing the villagers of Manalurpettai Village, Thirukovilur Taluk. According to the plaintiff, the 'A' schedule property is comprised in Survey No.57/2A23, which is a public road. According to him, the 6th defendant has encroached upon the same and he has put up a superstructure. So far as the 'B' schedule property is concerned, the same has been described by means of four boundaries and neither the Survey No. nor the extent is mentioned. According to the plaintiff this property is also a poramboke land, upon which the 6th defendant has put up a mill for roasting puffed rice and thus causing public nuisance to the residents and the plaintiff has got her land just on the north of the 'B' scheduled property. According to the plaintiff, the 6th defendant has got no right whatsoever over the 'A' and 'B' scheduled properties and therefore she filed the above suit.

(ii) In the written statement, the 6th defendant contended that originally the property was comprised in S.Nos.57/2A, 57/3 and 57/4 and 57/7 which was a poramboke land belonging to the Government and the Government in order to give house site to the landless poor, plotted out the said lands and assigned the same to various beneficiaries. Plot No.19 was assigned to one Munusamy S/o Arumugam of Manalurpettai Village. According to the 6th defendant, he purchased the same from the assignee under

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Ex.B2. Thus, according to the 6th defendant, he was in possession and enjoyment of the property purchased by him and the said property is not a poramboke land at all. It is his specific case that 'A' schedule property is not a road at all.

(iii) The 4th defendant in his written statement has almost admitted the case of the 6th defendant. In other words, the 4th defendant supported the case of the 6th defendant.

4. Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiff three witnesses were examined and as many as 10 documents were exhibited. On the side of the 6th defendant one Mr.Palani was examined as D.W.1 and the 6th defendant examined himself as D.W.2 and as many as 30 documents were exhibited.

5. During trial, an Advocate Commissioner was appointed and his report was marked as Ex.C1 and the rough sketch prepared by him was marked as Ex.C2. Third party documents were marked as Ex.X1 and X2. X1 is the patta issued by the Government on 19.06.2005 and Ex.X2 is the application made by one Chinnadurai on 19.06.2005 for getting assignment patta. Having considered all the above, the trial Court decreed the suit, which was reversed by the the lower appellate Court and that is how the plaintiff is before this Court with this second appeal.

6. The learned counsel for the appellant would submit that the lower appellate Court was not right in dismissing the suit without considering the Commissioner's report which clearly proves that the 'A' scheduled property is a road upon which the 6th defendant has encroached. So far as the 'B' scheduled property is concerned, according to the learned counsel for the appellant, though the plaintiff failed to prove that the 'B' scheduled property is a poromboke land, still running a mill in the residential locality is a great nuisance and on that ground, the lower appellate Court ought to have confirmed the decree and judgment of the trial Court.

7. The learned counsel appearing for the first respondent would vehemently oppose this appeal. According to him, the frame of the suit itself is not correct and therefore on that score by itself the suit is liable to be dismissed. According to him, though the suit has been filed in a representative capacity, the mandatory provision contained in Order 1 Rule 8 of the Code of Civil Procedure has not been followed. Therefore, it will be too difficult to pass any decree binding the entire villagers.

8. Secondly, according to the learned counsel appearing for the first respondent there is no proof of existence of any road more particularly as has been described as 'A' scheduled

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property in the plaint. The 'B' scheduled property though in the plaint is stated as a poromboke land, the same has not been proved. Thus, according to the learned counsel, the plaintiff has failed to prove his case and therefore the lower appellate Court was right in reversing the decree and judgment of the trial Court.

9. Having heard the learned counsel on either side and upon perusing the records, I find the following substantial questions of law are involved in this second appeal viz.,

> (a) Whether the lower appellate Court is right in reversing the decree and judgment of the trial Court by ignoring the Advocate Commissioner's report which states about the existence of a road ?
>
> (b) Whether the suit framed without following the provisions contained in Order 1 Rule 8 of the Code of Civil Procedure is liable to be dismissed ?
>
> (c) Whether the suit is liable to be dismissed for want of proper description of the property ?

10. So far as Order 1 Rule 8 of the Code of Civil Procedure is concerned, the learned counsel for the first respondent would submit that the said provision was not followed and the learned counsel for the appellant would submit that it is not a defect in the eye of law. In my considered view, since the dispute is in respect of the alleged road which is to be used by the general public, this Court cannot pass a decree in favour of the plaintiff or binding the villagers. If Order 1 Rule 8 has not been followed, it is for the plaintiff to take steps to rectify the same, at least now, so that the lower Court will be in a position to pass a binding decree on the villagers also.

11. Now turning to the existence of the road, the plaintiff has not produced any document to show that there exists a road as the same has been described as 'A' scheduled property. The crucial question is whether there exists a road or not ? The trial Court has relied on the Advocate Commissioner's report, where the Commissioner has mentioned that there is a road. In my considered view, the Advocate Commissioner's report is of no use because it is secondary in nature. The primary evidence shall be the revenue records to prove that there exist a road. In the absence of the same, it cannot be held that there exists a road, simply based on the Advocate Commissioner's report, which is not based on any revenue record. Thus, the lower appellate Court was right in holding that the plaintiff has not

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proved that there is a road. But on that score, if the suit is dismissed in toto, it would give a wrong indication as though the Court is approving that there is no road. The lower appellate Court itself ought to have remanded the matter back to the trial Court for giving a factual finding as to whether there is a road or not by framing appropriate issues.

12. So far as the description of the property is concerned, the 'B' schedule property has been described only by means of four boundaries and neither the extent nor the survey number has been given. Without proper description, it is difficult to identify the 'B' schedule property. Similarly, so far as 'A' schedule property is concerned, it is stated to be a road. The 6th defendant under Exs.B1 and B2 can claim only for 3 cents. The extent of neither 'A' schedule property nor 'B' schedule property is given. Even the 6th defendant has not given any details but he only claims possession of 3 cents. Exs.B1 and B2 have not been correlated with the property. Thus, we cannot put the 6th defendant to any disadvantageous position for the lapse committed by the appellant / plaintiff.

13. In the light of the above fundamental defects which I have noticed, in order to do justice between the parties, these defects are to be cleared by letting in additional evidence. For these reasons, I am inclined to remand the matter back to the trial Court for enabling both the parties to either amend the pleadings or file additional pleadings and also let in evidence additionally and thereafter dispose of the suit. If Order 1 Rule 8 of C.P.C has not been complied with so far, the plaintiff is permitted to file a petition under Order 1 Rule 8 of the Code of Civil Procedure and after complying with the said provision, the trial Court shall dispose of the suit.

14. In the result, the second appeal is allowed and the decree and judgment of the trial Court as well as that of the lower appellate Court are set aside and the suit is remanded back to the trial Court for fresh disposal. The plaintiff is at liberty to comply with Order 1 Rule 8 of the Code of Civil Procedure, if the same has not been complied with so far. The plaintiff is at liberty to amend the suit properly and rectify the defects mentioned above. Similarly the defendant will be at liberty to file additional written statement, if any. The Trial Court shall permit the parties to let in further evidence, if

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need be and thereafter, the Trial Court shall dispose of the suit after affording sufficient opportunity to the parties. There shall be no order as to cost.

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s/d-
Assistant Registrar(CO)

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Sub-Assistant Registrar

To

1. The Principal Subordinate Judge, Villupuram.

2. The Principal District Munsif, Thirukovilur.

3. The Section Officer,
VR Section, Madras High Court.

+ 1 cc to Spl.Govt.Pleader (CS), SR 2865

+ 1 cc to Mr.B.Harikrishnan, Advocate SR 2613

+ 1 cc to Mr.J.Saravanavel, Advocate SR 2590

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