IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.11.2016

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Second Appeal No.111 of 2015
and
M.P.No.1 of 2015

Kaliammal ... Appellant/Defendant

vs.

Revathi ...Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of C.P.C. against the judgment and decree passed by the learned Subordinate Judge, Namakkal dated 27.03.2014 in A.S.No.15 of 2013 reversing the judgment and decree passed by the learned Principal District Munsif, Namakkal, Namakkal District in O.S.No.697 of 2008 dated 08.10.2012.

For Appellants : M/s.R.Radha
For Respondent : No Appearance

J U D G M E N T

The appellant is the defendant in a suit for bare injunction. The respondent as the plaintiff sought to restrain the defendant from interfering with her right of using the suit pathway which according to her, is a common pathway belonging to the plaintiff and the defendant.

2.The defendant contested the suit by claiming exclusive right over the suit pathway. Thus, she disputed the claim of the plaintiff seeking to enjoy the suit lane as a common lane.

3.Before the trial court, the plaintiff examined herself as PW1 and another person by name Nagammal as PW2. She marked Exs.A1 to A4 in support of her claim. On the other hand, the defendant apart from examining herself as DW1, also examined one Ramayee as DW2. She marked Exs.B1 to B4. An Advocate Commissioner was appointed by the trial court who in turn after inspection filed the report and plan marked as Exs.C1 and C2.

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4.The trial court after considering the rival pleadings of the parties and the evidence let in by them, came to the conclusion that the suit lane is not common to both the parties as pleaded by the plaintiff and thus, dismissed the suit.

5.The plaintiff filed an appeal. Before the Appellate Court, the plaintiff sought to mark additional documents by filing I.A.No.69 of 2013. The documents which were sought to be marked before the Appellate Court are adangal, FMB and a memorandum of Tahsildar. The Appellate Court disposed of the main appeal as well as the said interim application on the same day thereby allowing the said interim application and the marking of those documents as Exs.A5 to A8 and consequently based on those documents and also on appreciation of Ex.B4, a parent document of the defendant, allowed the appeal and decreed the suit.

6.Challenging the reversing finding, the present second appeal is filed by the defendant. At the time of admitting the appeal, the following substantial questions of law were raised:-

> "1.Whether the first appellate court was right in reversing the decree and judgment of the trial court when the plaintiff has not described the suit lane either by means of survey number or four boundaries and the extent?
>
> 2.Whether the first appellate court was right in holding that the suit lane is a common lane when the defendant also has not described the lane in the written statement?
>
> 3.Whether the first appellate court was right in passing the decree which appears to be unworkable?"

7.In this appeal, notice was ordered to the respondent. Though the same was served on her, she has not chosen to appear before this court either in person or through counsel. Her name is printed in the causelist today.

8.The learned counsel for the appellant submitted that the lower Appellate Court erred in law relying upon the documents marked as additional evidence by allowing the application filed under Order 41 Rule 27 CPC simultaneously along with the appeal without following the procedure contemplated under the code of Civil Procedure while admitting the additional evidence. Thus, she submitted that the defendant was not given an opportunity to disprove those documents.

9.Apart from raising such preliminary objection, the learned counsel further submitted that the lower Appellate Court has not

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appreciated the documents already filed by the defendants before the trial court in a proper and perspective manner. Her contention is that the lower Appellate Court has totally misconstrued Ex.B4, the parent document of the defendant, to come to the conclusion as though such document has given right to the parties to the suit to enjoy the subject matter lane as a common lane, while careful consideration of the recitals of such document would only show that such lane was described as common lane for the vendor of the defendant viz., one Marappa Gounder and one Sankaran as could be seen from Ex.B1 sale deed. She also submitted that none of the documents filed by the plaintiff before the trial court viz., Exs.A1 to A4 referred the suit lane as the common lane thereby vesting any right on the plaintiff.

10.Heard the learned counsel for the appellant and perused the materials placed before this court.

11.The respondent herein filed the suit for permanent injunction to restrain the appellant herein from interfering with her right of enjoyment of the subject matter lane by claiming the same as a common lane enjoyable by the plaintiff and the defendant. On the other hand, the defendant by filing the written statement, specifically denied such claim of the plaintiff and contended that it is her exclusive property with which the plaintiff cannot have any right of enjoyment. Therefore, from the pleadings of the parties, it is evident that the claim of the plaintiff in respect of the subject matter lane is disputed. In other words, while the plaintiff claims the lane as a common lane, the defendant claims it as her exclusive property. Needless to say that such disputed question of title over the suit property cannot be adjudicated in a suit for bare injunction.

12.Moreover in this case, as rightly pointed out by the learned counsel for the appellant, a careful perusal of the recitals and the description of the property made in Exs.B4 and B1 would show that the subject matter lane was described as a common lane between the vendor of the defendant and one Sankaran. However, the Appellate Court without making a comparative reading of Exs.B4 and B1, misconstrued the recitals under Ex.B4 alone as though the said lane is a common lane between the plaintiff and the defendant. In any event, as I pointed out earlier, such disputed question of title over the suit property has to be relegated only to be agitated in an appropriate suit seeking for declaration and for consequential relief. Therefore, I find that the Appellate Court is not justified in granting the decree of injunction by misconstruing Ex.B4. Moreover, it is also seen that the Appellate Court has allowed the application filed by the plaintiff under Order 41 Rule 27 CPC to mark additional evidence at the appellate stage

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simultaneously while disposing the appeal. I find that such course of procedure adopted by the Appellate Court without giving due opportunity for the parties to prove or disprove those documents by following the procedure contemplated under Order 41 Rule 28 CPC, cannot be accepted as a proper course. As I have already pointed out that there is a title dispute between the parties in respect of the suit lane which issue cannot be gone into and decided in the present suit for injunction, no purpose would be served in remitting the matter for complying with the requirement under Order 41, Rule 28 CPC.

13.Moreover, in this case, the respondent has not chosen to contest the appeal inspite of notice served on her. Considering all these aspects, I am of the view that the lower Appellate Court has erred in decreeing the suit and accordingly, the same is liable to be set aside. Consequently, the substantial questions of law raised in this appeal are answered in favour of the appellant. Thus, the appeal is allowed and the judgment and decree passed by the appellate court are set aside. However, it is open to the respondent to file an appropriate suit if she so chooses. If any such suit is filed, the same shall be considered and decided on merits and in accordance with law. No costs. The connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

vri
To

1.The Subordinate Judge,
Namakkal,
Namakkal District.

2.The Principal District Munsif,
Namakkal, Namakkal District.

+1cc to Mr.SenthilNathan, Advocate Sr.63036

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