

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.06.2017

CORAM:

THE HON'BLE MR.JUSTICE S.VAIDYANATHAN

Second Appeal Nos.655 and 656 of 1999

S.A.No.655 of 1999:

1. Ramasamy
2. Pappammal ... Appellants/Defendants

Vs.

Kalammal ... Respondent/Plaintiff

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 09.11.1998 passed in A.S.No.38 of 1997 by the II Additional Appellate Authority and II Additional District Judge, Coimbatore, confirming the judgment and decree dated 24.12.1996 passed by the II Additional District Munsif, Coimbatore in O.S.No.1265 of 1990.

S.A.No.656 of 1999:

Ramasamy ... Appellant/Plaintiff

vs.

1. Kalammal
2. Ayyasamy ... Respondents/Defendants

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 09.11.1998 passed in A.S.No.56 of 1997 by the II Additional Appellate Authority and II Additional District Judge, Coimbatore, confirming the judgment and decree dated 24.12.1996 passed by the II Additional District Munsif, Coimbatore in O.S.No.1626 of 1990.

For Appellant/Appellants

in both Appeals : Mr.Hariharan for Mr.V.Nicholas

For Respondent/Respondents

in both Appeals : No appearance

C O M M O N J U D G M E N T

The above Second Appeals are directed against the common judgment and decree dated 09.11.1998 passed in A.S.Nos.38 and 56 of 1997 by the II Additional Appellate Authority and II

Additional District Judge, Coimbatore, confirming the common judgment and decree dated 24.12.1996 passed by the II Additional District Munsif, Coimbatore in O.S.Nos.1265 and 1626 of 1990.

2. O.S.No.1265 of 1990 is filed by one Kalammal seeking the relief of permanent injunction and mandatory injunction to remove the compound wall in the suit property and O.S.No.1626 of 1990 is filed by one Ramasamy seeking the relief of permanent injunction.

3. Originally, the suit property belonged to one Rangasamy Naicker, who had four sons viz. Ramasamy (the 1st defendant in O.S.No.1265 of 1990), Thimmaraj, Ayyasamy and Chinna Ayyasamy. The said Thimmaraj had two wives, viz. Ramakkal and Kalammal (plaintiff in O.S.No.1265 of 1990). Thimmaraj had a son viz. Ayyasamy (2nd defendant in O.S.No.1626 of 1990) through his first wife, Ramakkal and Thimmaraj had no issues through his second wife, Kalammal. Ramasamy, the plaintiff in O.S.No.1626 of 1990 and who is also the 1st defendant in O.S.No.1265 of 1990 had a wife viz. Papammal, who is the 2nd defendant in O.S.No.1265 of 1990.

4. There was a partition between the sons of Rangasamy Naicker and himself and respective properties were shared between the parties. The first wife of Thimmaraj, viz. Ramakkal and her son, Ayyasamy had executed a Release Deed on their western half of the property in favour of Kalammal, the second wife of Thimmaraj. Thimmaraj and his son Ayyasamy sold their Eastern half share of their property in favour of Papammal, wife of Ramasamy.

5. There was a pathway measuring an extent of 3 feet breadth in Kalammal's (plaintiff in O.S.No.1265 of 1990) property. Since Ramasamy tried to obstruct the said pathway, Kalammal filed O.S.No.1265 of 1990 against Ramasamy and his wife Papammal and obtained an order of interim injunction in I.A.No.1010 of 1990. Aggrieved by the same, the appellant herein i.e. Ramasamy filed O.S.No.1626 of 1990 and constructed a compound wall to prevent the usage of pathway.

6. The Trial Court, on a consideration of the entire oral and documentary evidence, tried both the suits together and decreed the suit filed by Kalammal in O.S.No.1265 of 1990 and dismissed the suit filed by Ramasamy in O.S.No.1626 of 1990. Aggrieved by the same, Ramasamy filed A.S.No.56 of 1997 and Ramasamy along with his wife, Pappammal filed A.S.No.38 of 1997. The First Appellate Court, dismissed both the appeals, thereby confirmed the judgment and decree of the Trial Court. Aggrieved

by the same, Ramasamy is before this Court by way of the present Second Appeals.

7. This Court, on 29.04.1999, admitted both the Second Appeals on the following substantial questions of law:

S.A.No.655 of 1999:

(i) When it is for the respondent to establish the provision of a passage independent of the weakness if any, in the case of the appellants and having failed to substantiate it, whether courts below are correct in granting the relief to her?

(ii) When there is no evidence to prove that the attestation by the 1st appellant was in the nature of consent to provide a passage and that when there is no necessity for a consent from him, whether the courts below are correct in taking the attestation as giving the rights to the respondent for providing a passage to her.

S.A.No.656 of 1999:

"(i) When it is for the respondents to establish the provision of a passage independent of the weakness if any, in the case of the appellants and having failed to substantiate it, whether courts below are correct in negating the claim of the appellant?

(ii) When there is no evidence to prove that the attestation by the appellant was in the nature of consent to provide a passage and that when there is no necessity for a consent from him, whether the courts below are correct in taking the attestation as giving the rights to the respondents for providing a passage to them?"

8. Learned counsel for the appellant contended that the Courts below failed to see that the respondents herein did not establish that a passage was set apart for having access to their property and that they are having a right of easement of necessity even in the said passage. It is also his contention that if at all there was any intention to provide a passage to the property of Thimmaraj, it would have been specifically stated in the Sale Deed executed by him in favour of the wife of the appellant herein.

9. According to the learned counsel appearing for the respondents, the way to the house of the respondents is blocked by the appellant/Ramasamy, as could be seen from Ex.C2 - Sketch and there is no evidence marked on the side of the

appellant/Ramasamy to show that there is a pathway to their property. Hence, it is the case of the learned counsel for the respondents that the Courts below have rightly decreed the suit in favour of Kalammal and the same requires no interference.

10. Heard the learned counsel on either side, gave careful consideration to their submissions and perused the material documents available on record.

11. Admittedly, the appellant Ramasamy Naicker has purchased a property adjacent to Kalammal's property and according to the appellant/ Ramasamy, the Trial Court ought to have granted the relief in his favour. An Advocate Commissioner was appointed and he submitted a Report vide Ex.C1 to show that there was a partition and that there was a division between the properties and it has been decided that the parties to the suit will have to enjoy the common pathway. The Trial Court, based on the Advocate Commissioner's Report, came to the conclusion that the two wives of Thimmaraj came to an understanding and Rammakal, the first wife of Thimmaraj, had released 50% of her share, vide Ex.A2 to Kalammal, the second wife of Thimmaraj, while retaining the right with regard to her share in respect of the pathway.

12. Moreover in the Release Deed, dated 16.02.1974, executed by the first wife of Thimmaraj and his son Ayyasamy, in favour of his second wife, Kalammal, there was a mention about the passage in the schedule of the property and that the said Release Deed was also attested by the appellant/Ramasamy and Kalammal (plaintiff in O.S.No.1265 of 1990) is having the right of easement of necessity to her pathway, as she has no other pathway and she is entitled to use the said pathway. Kalammal established that the passage/pathway was set apart for having access to her property and she had proved her case through oral and documentary evidence, more particularly, based on the above said Release Deed. The attestation by the appellant/Ramasamy is thus in the nature of consent to provide a passage/pathway to the plaintiff/Kalammal.

13. The substantial questions of law are accordingly answered in favour of the plaintiff/Kalammal and against the appellants herein and the Second Appeals are liable to be dismissed.

14. In view of the above discussion, the concurrent findings of the Courts below do not warrant any interference by this Court under Section 100 CPC. It is settled law from a catena of decisions of the Supreme Court and this Court that the findings of facts concurrently recorded by the Trial Court, as also by the First Appellate Court, could not be legally upset by

this Court, sitting in Second Appeal under Section 100 CPC, unless it is shown that the findings are perverse, being based on no evidence or that on the evidence on record, no reasonable person could come to that conclusion. Further, the scope for interference with the concurrent findings of fact, while exercising jurisdiction under Section 100 CPC, is very limited, and re-appreciation of evidence is not permissible, and if the Trial Court and the First Appellate Court misdirected themselves in appreciating the question of law or placed the onus on the wrong party, certainly, there is a scope for interference under Section 100 CPC. This Court finds no illegality or perversity in the concurrent findings of both the Courts below, and hence, they are liable to be confirmed.

In fine, the Second Appeals are dismissed, confirming the judgment and decree of the Courts below. No costs.

Sd/-

Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

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To

- 1.The II Additional Appellate Authority and
II Additional District Judge, Coimbatore.
- 2.The II Additional District Munsif,
Coimbatore.
- 3.The Section Officer, V.R.Section,
High Court, Madras.

+1cc to M/S.V.Nicholas, Advocate Sr. 42958
+1cc to M/S.V.Nicholas, Advocate Sr. 42959

Common Judgment in
S.A. Nos.655 and 656 of 1999

SKV(CO)
VR(10/10/2017)