

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.01.2017

Coram

The Hon'ble Mr. Justice M.M.SUNDRESH

Second Appeal No.841 of 2015
and
M.P.No.1 of 2015

1.Kolandaivel (deceased)

2.Kandasamy

3.K.Mani

... Appellants/LRS of Defendant

(Appellants 2 and 3 are brought on
record vide order dated 27.07.2016 in
C.M.P.Nos.12000 and 12001 of 2016
in S.A.No.841 of 2015)

Vs

Periasamy

.... Respondent/Plaintiff

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 25.04.2014 made in A.S.No.17 of 2012 on the file of the Subordinate Judge, Namakkal, reversing the judgment and decree passed in O.S.No.137 of 2003 dated 29.11.2011 by the District Munsif cum Judicial Magistrate, Paramathi.

For Appellants

.. Mr.T.S.Rajamohan

For Respondent

.. Mr.N.Manokaran

JUDGMENT

The defendant, who suffered a decree at the hands of the lower appellate Court in reversing the judgment and decree of the trial Court, has filed this second appeal. During the pendency of the appeal, the appellant died and by the order of this Court dated 27.07.2016, the legal representatives of the deceased original appellant were brought on record as appellants 2 and 3.

2.At the time of admission, the following substantial question of law has been framed:

Whether the lower appellate Court was right in holding that it is the burden of the defendant to prove that the well in question lies in his property comprised in Survey No.52/4, whereas the plaintiff claims that the well in question lies in his portion of the property comprised in Survey No.52/4?

3.The suit property consists of three items. We are not concerned with Item Nos.2 and 3 as by consent, there was a decree, which was not appealed against. The first item of the suit property admittedly belonged to one Palaniappan. Under Ex.A6 corresponding Ex.A1, he sold an extent of 1.45 acres in favour of the original appellant and one Kathavarayan. The sale was with respect to 1.45 acres out of 1.60 acres. Thereafter, the original appellant purchased the share of Kathavarayan under Ex.B2. As there existed a remaining extent of 15 cents after the demise of Palaniappan, the plaintiff/respondent purchased the remaining extent of 15 cents. In that 15 cents, there exists a well. The suit has been laid on the premise that the defendant (since deceased) is interfering with the enjoyment of the said well along with the suit property.

4.The trial Court dismissed the suit inter alia holding that Ex.A6/Ex.B1 speaks about the existence of a pathway and therefore ,it should have been for 15 cents to the exclusion of 1.45 acres sold therein and hence there cannot be any sale of the said extent under Ex.A1 in favour of the plaintiff. The lower appellate Court reversed the judgment and decree of the trial Court on the premise that Ex.B1 is very clear as it conveys only 1.45 acres to the defendant. The service connection was acquired in the name of Palaniappan after the sale of 1.45 acres in favour of the defendant and thereafter, obtained in his name. It is he who dug up the well. Though the plaintiff has relied upon the earlier suit, it being not inter se the same parties, it was accordingly eschewed. What is important is the boundary as mentioned under Exs.A1 and B1. The plaintiff has proved his possession and enjoyment under Exs.A1, A5, A7, A8 and A9. There is no material to hold that the well is situated in 1.45 acres belonging to the defendant. Accordingly, the lower appellate Court allowed the appeal, by reversing the judgment and decree of the trial Court. Challenging the same, the present second appeal has been filed.

5.Learned counsel appearing for the appellants submits that there is no extent that is available for sale in favour of the plaintiff. The transaction is fraudulent. It is the defendant who dug up the well. Though the sale deed speaks about 1.45 acres, the total extent is 1.60 acres including the pathway attached to it. The Advocate Commissioner appointed by this Court during the pendency of the second appeal has committed an error. Thus the judgment and decree of the Courts below will have to be reversed.

6.Learned counsel appearing for the respondent/plaintiff submits that the lower appellate Court has taken into consideration Exs.A1 and B1 while decreeing the suit as prayed for. There is no material produced by the appellants to show that the defendant has dug up the well. The well was dug up even prior to the purchase of the suit property by the plaintiff. Thus, no interference is required.

7.Ex.B1, in specific terms, speaks about the extent of 1.45 acres out of 1.60 acres. It is curious to note that the parent deed of Ex.B1 which is Ex.A5 speaks about 1.60 acres thus belies the case of the appellants. It is the case of the appellants that the defendant (since deceased) dug up the well. Unfortunately, there is no material in support of it. On the contrary, even prior to the purchase of the suit property - Item No.1 by the plaintiff, an application was made by Palaniappan viz., the vendor of the parties and service connection has been obtained. Therefore, it cannot be said that Ex.A1 has been obtained by fraud. This Court is unable to appreciate as to how the trial Court has given a finding of forgery without understanding the meaning of it. Existence of pathway is something different to a well. If the entire extent of 1.60 cents is sold by Palaniappan, there cannot be any necessity to keep the pathway without having title over the suit property any longer. Ex.B5 relied upon by the appellants does not help their case as it is not inter se parties.

8.In such view of the matter, this Court does not find any substantial question of law involved in this appeal, warranting interference. Hence the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1.The Subordinate Judge,
Namakkal.

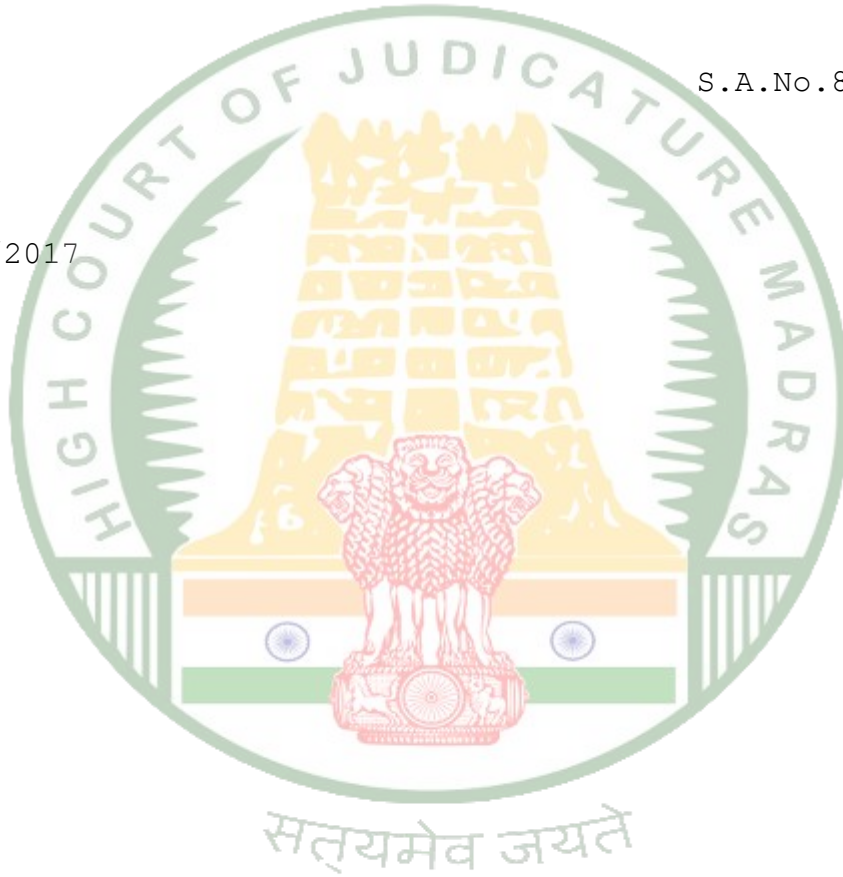
2.The District Munsif cum Judicial
Magistrate, Paramathi.

+lcc to Mr.N.Manokaran, Advocate Sr.4524

+lcc to Mr.T.S.Rajamohan, Advocate Sr.4318

S.A.No.841 of 2015

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srg 20/02/2017



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