

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.12.2016

PRONOUNCED ON : 03.01.2017

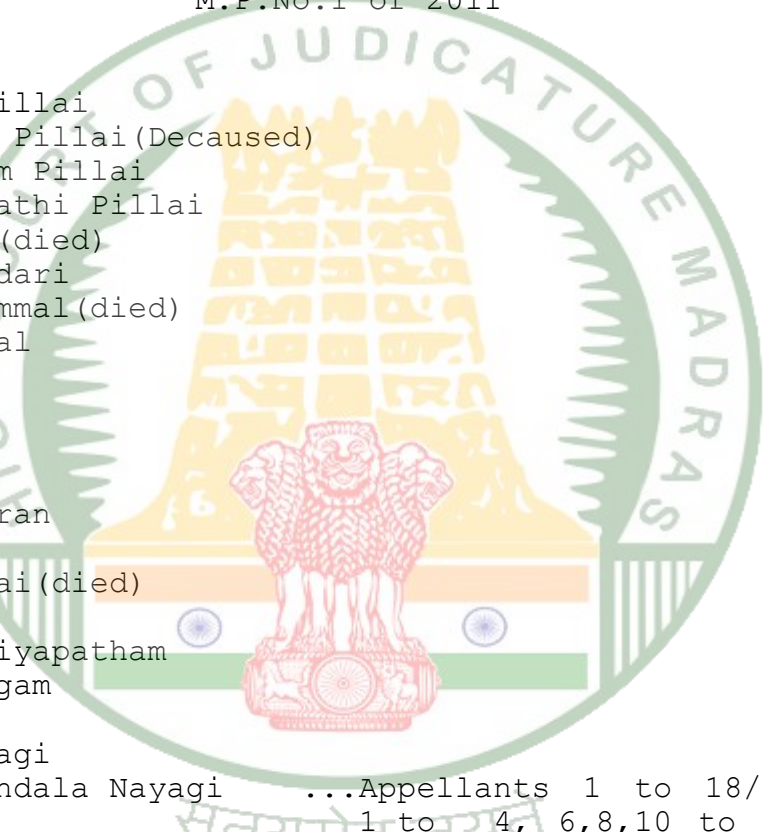
CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.380 of 2011

&

M.P.No.1 of 2011

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- 1.Mahalingam Pillai
2.Sabhanayagam Pillai (Deceased)
3.Gnanaprakasam Pillai
4.Nadanasabhapathi Pillai
Pragathammal (died)
5.Sivagama Sundari
Sivagangai Ammal (died)
6.Parvathi Ammal
7.Rajeshwari
8.Jayalakshmi
9.Umapathy
10.Kumaravel
11.Chandrasekaran
12.Manonmani
Natesan Pillai (died)
13.Manivasakam
14.Paasi @ Aadiyapatham
15.Selvavinayagam
16.Thilagam
17.Anandha Nayagi
18.Sugandha Kundala Nayagi ...Appellants 1 to 18/Respondents
1 to 4, 6,8,10 to 14, 16 to
19/ Defendants 2 to 6,8,10 to 16.
19.Devaki
20.Akilanayagam
21.Mangalanayagi ... Appellants 19 to 21

Cause title accepted vide Order of
this Court dated 15.03.2011 and
made in M.P.1/11 in Sa(SR).97717/2010)

(Appellants 19 to 21 brought on record
as legal heirs of the deceased
2nd appellant vide order of this Court
dated 25.11.2016 made in
CMP.Nos.18908 & 18909 of 2016
in S.A.No.380 of 2011)

Vs.

Pitchapillai

... Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 15.03.2010 made in A.S.No.3 of 2006 on the file of the Additional Subordinate Court, Virudhachalam, reversing the Judgment and Decree dated 23.12.2004 made in O.S.No.98 of 1993 on the file of the II Additional District Munsif Court, Virudhachalam.

For Appellants : Mr.R.Shivakumar for
M/s.K.M.Vijayan & Associates

For Respondent : Mr.V.Raghachari

JUDGMENT

The defendants in this Second Appeal have challenged the judgment and decree dated 15.03.2010 made in A.S.No.3 of 2006 on the file of the Additional Subordinate Court, Virudhachalam, reversing the Judgment and Decree dated 23.12.2004 made in O.S.No.98 of 1993 on the file of the II Additional District Munsif Court, Virudhachalam.

2.The suit has been laid by the plaintiff for declaration and permanent injunction and in the alternative for declaration and possession and the plaintiff has also claimed easementary right in respect of the suit property and consequential permanent injunction thereof and damages.

3.The suit property in dispute is, depicted within ABCD portion, the lane measuring $92\frac{1}{2}$ feet in the 'A B' line and 3 feet in the 'B D' line and $2\frac{1}{2}$ feet in the 'A C' lane, as shown in the plaint plan marked as Ex.A1. It could be seen that the plaint had been amended and finally the suit property has come to be described as above. Now, according to the plaintiff, the suit property inclusive of the disputed lane belongs to him ancestrally, thus the source of title to the suit property claimed to be ancestral, according to the plaintiff, there is no document as such for the same.

4. However, it could be seen from the evidence adduced on record that the suit property inclusive of the suit lane has been in the possession and enjoyment of the plaintiff for more than 50 years and above. In this connection, the fourth defendant examined as DW1, has admitted that to his knowledge, the plaintiff's house has been in existence for more than 50 years and he has no claim or right over the plaintiff's house property. It could therefore be seen that as admitted by DW1, the house property situated immediately adjacent to the suit lane has been in existence for more than 50 years and above and it could therefore be seen as found by the first Appellate Court, the suit lane has also been used for draining rain water from the roof, draining sewage water and for having ingress and egress into the other portions of the suit property by the plaintiff during the abovesaid period.

5. The first Appellate Court has held that inclusive of the suit lane, the plaintiff had been in possession and enjoyment of the suit property for more than 50 years and above. For reaching the above conclusion, the first Appellate Court derived support from the evidence of the plaintiff and also the Commissioner's report marked as Exs.C1 & C2. As rightly held, from the above, it could be seen that the suit lane is situated to the northern side of the plaintiff's tiled house and garden, to the south of the defendants property, to the west of the road and to the east of the vacant site and further it is also noted that the plaintiff had been draining sewage water through the suit lane and also even the rain water had been drained from the roof of the plaintiff's tiled house into the suit lane and also the water line and taps of the plaintiff's property are situated in such a manner so as to drain the water only through the suit lane.

6. Therefore, the first Appellate Court based upon the above said admission of DW1 and also the location and identification of the suit property and also the physical features of the house property of the plaintiff, as seen from the Commissioner's report and plan, proceeded to hold that inclusive of the suit lane, the plaintiff had been enjoying the property described in the plan for 50 years and above.

7. As adverted to above, the suit lane is found to be situated to the south of the defendants' property. In such circumstances, as rightly found by the first Appellate Court, the demarcating lane between the suit lane and the defendants' property has to be fixed so as to find out whether the suit lane, as such is in the exclusive possession and enjoyment of the plaintiff as put forth by the plaintiff. With reference to the above fact, placing reliance upon the Commissioner's report and plan, particularly, Exs.C1 and C2, the first Appellate Court

has found that the 'B D' imaginary line shown in Ex.C2 is the southern most boundary of the defendants' property. In other words, it would be the northern most boundary line of the suit lane. Further, as seen from the Commissioner's report and plan, Exs.C1 and C2 in the portion marked as 'B O', bamboo padal is found and adjacent to the same, on the eastern side, trees are located and the Commissioner has also noted the width of the trees in his report and plan. With reference to the above physical features noted by the Advocate Commissioner, DW1 in his evidence has also admitted that their southern most limit ends with the toilet situated on the extreme southern side and they have no objections to the report and plan of the Advocate Commissioner and further admitted that only within their limits, they have constructed their toilets and they protrude to an extent of 2.2 meters on the southern side and if the imaginary lane is drawn straight across the extended projection, their property boundary line can be fixed. Therefore, based upon the above admission of DW1, vis-a-vis, the Commissioner's report and plan, Ex.C1 & C2, the first Appellate Court had found that the imaginary 'B D' line shown by the Commissioner will be the northern most boundary of the suit lane and accordingly, the first Appellate Court has found that to the south of the imaginary 'B D' line, the defendants have no manner of right and title and accordingly, the first Appellate Court has also noted that the defendants' are not in possession and enjoyment of any portion situated to the south of 'B D' line, shown in Ex.C2. Such being the position, the first Appellate Court has noted that the plaintiff had been having access only through the suit lane for reaching his garden from the house property.

8.The first Appellate Court has also noted that the defendants have claimed that they have put up the bamboo padal found in the suit lane at 'B O' portion and the first Appellate Court has also found that there is no need for the defendants to put up the bamboo padal at 'B O' portion since their southern limits ends with 'B D' lane. Therefore, cumulatively found that the suit lane had been in the possession and enjoyment of the plaintiff for several years for having access to reach his other portions of the suit property including the garden and also for draining rain water, sewage water and also for taking cattle etc.

9.The first Appellate Court has also upheld the plaintiff's case, taking support from the evidence of the independent witnesses examined as PW2 and 3 and also found that their evidence has remained steady and unshaken despite the cross examination by the defendants. The finding of the first Appellate Court that it is only the plaintiff, who is in possession and enjoyment of the suit lane for several years have not shown to be misdirected against the evidence on record or

perverse. The defendants have also taken a plea that there is a lane on the southern side of the plaintiff's house property and therefore the Court should hold that the suit lane is not in possession and enjoyment of the plaintiff. With reference to the same, the commission was reissued and after further inspection, the further report and plan of the Commissioner have been filed, which are marked as Exs.C3 and C4. Based upon the same, it has been found that there is no access to the plaintiff's property through the alleged lane situated on the southern side of the plaintiff's house property. No exception could be taken to the above finding of the first Appellate Court. The trial Court has mainly disbelieved the plaintiff's case on the basis that the suit property has not been properly described and also the description of the suit property given in the plaint did not tally with the plaint plan, marked as Ex.A1. However, as found earlier, the same had been rectified by amending the pleas and the plan as noted by the first Appellate Court.

10.The only point that has been argued by the learned counsel for the defendants in this Second Appeal is that the plaintiff cannot be allowed to take inconsistent pleas i.e., seeking right over the suit lane and also claiming easementary right in respect of the same and as such the plaintiff's case should fail.

11.However, as rightly argued by the learned counsel for the plaintiff, even though the plaintiff had taken inconsistent pleas, during the course of evidence, the plaintiff has given up the plea of easement and chosen to rely upon his claim of absolute right over the suit lane and in such view of the matter according to him the above contention put forth by the learned counsel for the defendants would not constitute a substantial question of law to be decided in this Second Appeal. In this Connection, the learned counsel for the plaintiff placed reliance upon the decision reported in 1999 2 LW page 317(Dhann Pandaram Vs. Kali Pandaram).

12.A perusal of the above decision, would go to show even though the plaintiff has taken the inconsistent pleas but during the course of evidence as he has not pressed the relief claimed by way of easement and has proceeded to claim right over the suit lane on the basis of ownership, it could be seen that the argument of the learned counsel for the defendants that the plaintiff's case should be rejected as such cannot be countenanced.

13.The learned counsel for the plaintiff has also placed reliance upon the decisions reported in 2010(4) CTC 161 (K.Saraswathy Vs. The state of Tamil Nadu, rep. by the Collector of Chennai and 5 others), (2006) 5 SCC 353(Prem Singh and

Others Vs. Birbal and Others), 2013 (9) SCC 152 (Vathsala Manickavasagam and Others Vs. N.Ganesan and Another) and 1966 (1) SCR 606 (Bharat Singh Vs. Bhagirathi). The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the present case.

14. At the end, no substantial question of law is found to be involved in this Second appeal. Resultantly, the Second Appeal fails and is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

sd/
Assistant Registrar (CS III)

/true copy/

Sub Assistant Registrar

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To

1. The Additional Subordinate Judge,
Virudhachalam.
2. The II Additional District Munsif,
Virudhachalam.

+1cc to Mr.V.Raghachari, Advocate Sr.No.410

+1cc to Mr.K.M.Vijayan Associates, Advocate SR.No.178.

S. A.No. 380 of 2011

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