

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.01.2017
PRONOUNCED ON : 27.02.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.687 of 2011
&
M.P.No.1 of 2011

Selvaraj Appellant/3rd Plaintiff

Vs.

1. J.Elumalai
2. The Commissioner,
Villupuram Municipality,
Villupuram. Respondents/Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 30.03.2011 made in A.S.No.63 of 2010 on the file of the Principal District Judge, Villupuram, confirming the Judgment and Decree dated 30.01.2010 made in O.S.No.151 of 2004 on the file of the Additional District Munsif Court, Villupuram.

For Appellant : Mr.N.Suresh

For Respondents : No Appearance

JUDGMENT

Challenge in this second appeal is made by the third plaintiff against the Judgment and decree dated 30.03.2011 made in A.S.No.63 of 2010 on the file of the Principal District Judge, Villupuram, confirming the Judgment and Decree dated 30.01.2010 made in O.S.No.151 of 2004 on the file of the Additional District Munsif Court, Villupuram.

2.The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal:

'Whether the judgments and decrees of the courts below in dismissing the suit filed by the plaintiffs are based upon the perverse findings and conclusions and misdirected

against the evidence on record''.

3.The suit has been laid by the plaintiffs for declaration, permanent injunction, mandatory injunction and damages.

4.According to the plaintiffs, the larger extent of the property comprised in R.S.No.463/11 are owned by them and in this connection reliance is placed upon the documents marked as Exs.A1 to A4. Further, according to the plaintiffs, out of the original extent owned by the plaintiffs in the above said survey number, after the sale of a certain portion of the property comprised therein, according to the plaintiffs, on the date of the suit they owned an extent of 44 feet north south and 85 feet east west and further according to the plaintiffs, the suit property is a portion of the above said extent situated on the northern side. Now according to the plaintiffs, the suit property measures north south 6 feet and east west 85 feet situated to the south of Rajagopal's property, to the north of plaintiffs remaining extent in the suit survey number, to the east of Chakrapani Chettiar's property and to the west of Rajagopal Street, out of 10 cents in the suit survey number. Further, according to the plaintiffs, as regards the extent of 38 feet north south in the total extent they had put up construction over the same and let out to the third parties for non residential purposes.

5.Pending suit, the plaintiffs 1 and 2 had died, only the third plaintiff is prosecuting the suit. Now therefore, according to the plaintiffs, they were having title to an extent of 44 feet north south and 85 feet east west in the suit survey number on the date of the suit and the suit property is a portion of the above said property. It appears and also admitted by the third plaintiff examined as PW1 that pending suit he had alienated to one Shakila Begum an extent of 44 feet north south and 42 feet east west in the suit survey number through Exs.B1 and B2, Sale Deeds. It could therefore be seen that even during the course of the trial proceedings, the third plaintiff had alienated the suit property as such to one Shakila Begum under Exs.B1 and B2. In such view of the matter, it has not been explained by the third plaintiff as to how he would be still entitled to seek the relief of declaration in respect of the suit property as described in the plaint. It has not been pleaded or spoken to during the course of evidence that even after the sale under Exs.B1 & B2, the plaintiff had still retained any portion in the suit property as described in the plaint so as to continue the suit. Further, for seeking the reliefs sought for it has not been explained by the third plaintiff as to why the purchaser Shakila Begum has not been impleaded as a party to the suit proceedings. After selling the suit property, if at all anything has been retained by the third plaintiff has to be properly described so as to enable the

courts to find out whether the third plaintiff still has title to the said portion. However, despite the alienation of the suit property under Exs.B1 & B2 and when even thereafter, the third plaintiff has not been established to have still retained any portion in the suit property to himself, it does not stand to reason as to how the third plaintiff could continue the suit, particularly, with reference to the relief of declaration sought for. It is therefore very obvious that the relief of declaration as such cannot be granted in favour of the third plaintiff as regards the suit property when it has not been established that the third plaintiff still owns the same by adducing acceptable and reliable evidence.

6.Now according to the third plaintiff, the defendants 1 and 2 are attempting to interfere with his possession and enjoyment of the suit property without authority and therefore had sought the relief of permanent injunction.

7.Per contra, it is the case of the defendants that from time immemorial, the suit property and the other extent adjacent to it had been used by the public as a lane for having access and at no point of time, the suit property has been in the possession and enjoyment of the third plaintiff as such and therefore, the third plaintiff is not entitled to obtain the relief of permanent injunction. Despite the above defence put forth by the defendants, no scrap of paper has been placed by the third plaintiff to show that he is in the possession and enjoyment of the suit property as described in the plaint.

8.As adverted to earlier, Exs.A1 to 4 are the title deeds under which the third plaintiff has claimed title to the suit property. Exs.A5 to A7 are the notices exchanged between the parties and Ex.A8 is the FMB copy. Other than the above said documents, no acceptable evidence has been placed by the third plaintiff to establish that he is still in the possession and enjoyment of the suit property.

9.It is also found that in respect of the suit property as such, a case was filed in O.S.No.125 of 1997 and it is admitted that a compromise had been arrived at in the said case between the parties to the above said suit and it is also admitted that pursuant to the compromise, the third plaintiff had relinquished an extent of 1 ¼ feet north south in the suit property. In such view of the matter, it is evident that out of 6 feet north south, the third plaintiff had relinquished 1¼ feet as per the compromise decree entered into in O.S.No.125 of 1997. It is also found that even as per the Commissioner's report and plan marked in O.S.No.125 of 1997, the certified copy of the same being marked as Ex.B3 and B4 in the present suit, the suit property has been only shown as a lane. It is therefore very obvious that even during the year 1997 or much earlier to that,

the property had been used only as a lane by the people in general and accordingly, it has been described as a lane by the Commissioner in Exs.B3 and B4.

10.Be that as it may, as per Exs.B3 and B4 and also as per the admission of PW1, an extent of $1\frac{1}{4}$ in the suit property had been relinquished pursuant to the compromise decree entered into in the above said suit. When the third plaintiff has not established that he is still retains the possession and enjoyment of the remaining extent of the suit property, it is evident that he would not be entitled to obtain the relief of permanent injunction as sought for. Therefore, the courts below have rightly rejected the case of the third plaintiff as regards the relief of permanent injunction sought for by him.

11.As adverted to earlier, even in O.S.No.125 of 1997, the suit property has been described only as a lane. Now as per the Commissioner's report and plan marked in the present suit as Exs.C1 and C2, it could be seen that the third plaintiff for putting up a stair case has made use of a width of $1\frac{3}{4}$ feet and therefore, deducting the same from the suit property and as seen already deducting $1\frac{1}{4}$ feet relinquished by the third plaintiff, pursuant to the compromise decree entered into in O.S.No.125 of 1997, at the most the third plaintiff would be entitle only to an extent of 3 feet north south. When it is found that even the said extent coupled with the other extent i.e., 44 feet north south had been alienated to Shakila Begum under Exs.B1 and B2, it does not stand to reason as to how the third plaintiff would still be able to maintain the suit for permanent injunction. In any event, the third plaintiff has not placed any material to show that he is in the possession and enjoyment of the suit property or any lesser extent in the suit property and therefore, the courts below have rightly negatived the relief of permanent injunction sought for by the third plaintiff.

12.As seen above, according to the defendants, the suit property and the other adjacent extent had been from time immemorial used as a lane by the general public. This could be seen from Exs.B3 and B4, the Commissioner's report and plan marked in O.S.No.125 of 1997 also. Not stopping there, even the third plaintiff examined as PW1 has admitted that the suit property is being used as a lane by the general public. In this connection, the third plaintiff examined as PW1 has admitted that in the past, there had been a lane in the suit property and it is correct to state that only through the suit property there can be access and for having access from Nalayiram Street to Jawaharlal Nehru Road, the people have access only through the suit property. Therefore, it could be seen that as seen from the admission of PW1, the third plaintiff, the suit property has been used only as a public lane for ingress and egress by the

public for reaching from Nalayiram Street to Jawaharlal Nehru Road.

13.Now, according to the third plaintiff, the first defendant and the second defendant colluded together and had put up gravel and cement mortar in the suit property despite objection on 01.06.2005 and therefore, according to the third plaintiff, he has been necessitated to seek the relief of mandatory injunction and damages as against the second defendant. When it is found that the suit property has not been established to be in the possession and enjoyment of the plaintiffs at any point of time and on the other hand when as seen from Exs.B3 and B4 and also the admission of PW1, the suit property has been used as a lane by the general public for a long period of time, the case of the third plaintiff that the defendants had colluding together and trespassed into the suit property and put up gravel and cement mortar, as such, cannot be accepted in any manner.

14.On the other hand, according to the defendants, the suit property had been all along used only as a lane by the public and accordingly the gravel and cement mortar had been laid on the same. It is also found from the Commissioner's report and plan marked as Exs.C1 & C2 that the suit property and the other extent adjacent to it i.e., to an extent of 11 feet north south on the eastern side and 13 ½ feet north south on the western side, had been used only by the public as a lane for having ingress and egress to the other portions and the adjacent roads. It is also found by the Commissioner that during the course of his inspection, he had directly witnessed the general public using the suit property and the other extent as a public lane by taking vehicles etc and therefore, it is clear that the suit property had been used only by the general public from time immemorial. Only on account of the same, it is found that the third plaintiff is unable to place any material to establish that he still retains possession and enjoyment of the suit property or any lesser extent thereof by adducing acceptable and reliable evidence.

15.As per the pleadings set out, it is found that the third plaintiff had made complaint about the interference given by the first defendant in respect of the possession and enjoyment of the property belonging to them even during the year 2001. It is stated that the first defendant had demolished concrete pillars etc and further the panchayat had been conveyed with reference to the said incident. However, according to the first defendant there is no interference on his part during that period as put forth by the third plaintiff and on the other hand inasmuch as the third plaintiff had without any basis laid a claim over the suit property by putting up construction etc. The same was prevented by the public and at the intervention of the elders

and the local leaders, a settlement was arrived at and the third plaintiff was paid a sum of Rs.25,000/- to the public, so that he may not cause disturbance to the residents and the general public in using the suit property as a lane. The receipt of Rs.25000/- at that point of time has been admitted by the third plaintiff. However, he would state that the said amount had been given as compensation to him for illegally demolishing the compound wall etc in the suit property, but with reference to the same, there is no clear cut evidence on either side. However, it is found that even during 2001, there had been a dispute between the parties as regards the usage of the suit property and even at that point of time it is found that only the general public had been using the suit property as such as a lane for having ingress and egress. There is no material on the part of the third plaintiff to show that the said sum of Rs.25000/- had been given to him by way of compensation.

16. Be that as it may, when the third plaintiff has not established that he still retains any title after Exs.B1 and B2 in the suit property and the third plaintiff having not established his possession and enjoyment of the suit property particularly, on the date of the suit and further the third plaintiff having not established the alleged encroachment made by the defendants 1 and 2 on 01.06.2005, it is found that the third plaintiff is not entitled to maintain the suit even for the relief of mandatory injunction and damages. Further, the third plaintiff during the course of cross examination has clearly admitted that through the suit property the vehicles such as auto, van passes through and it is correct to state that the first defendant had not interfered with his possession and enjoyment of the suit property. Therefore, when it is clearly admitted by the third plaintiff that the first defendant as such has not interfered with his possession and enjoyment of the suit property and when it is not established by the third plaintiff that during 2001 that the first defendant had demolished his compound wall etc in the suit property, when the other evidence projected in the matter also disclosed that the suit property has been for a long period of time used only as a public lane by the general public it could be seen that the plaintiffs without any cause of action has laid the suit against the defendants.

17. The plaintiffs counsel contended that the defendants have failed to establish the plea of easementary right and relinquishment on the part of the plaintiffs etc and in such view of the matter, the plaintiffs case should be accepted. Similarly, it is also contended by him that the second defendant has not placed any record to show that the suit property had been earmarked as a public lane in the records maintained by it and therefore, the plaintiffs case should be accepted.

18.However, the mere failure on the part of the defendants to establish their defence by itself would not entitle the plaintiffs to seek and obtain the reliefs sought for in the plaint sans proof and evidence. Further, when it is even admitted by the third plaintiff that for a long period of time, the suit property has been used only by the general public as such by taking vehicles etc, the non production of any record with reference to the same by the second defendant would not in any manner undermine the defence putforth by the defendants that the suit property is used only as a public lane.

19.In the light of the above discussions, as rightly found by the courts below when the third plaintiff has failed to establish that he is still owns any extent in the suit property and when no material is produced on the part of the third plaintiff to show that he is in the possession and enjoyment of the suit property and further when it is admitted by the third plaintiff that from time immemorial, the suit property has been used only by the public as a public lane and when it is admitted that the first defendant has not interfered with the plaintiffs possession and enjoyment of the suit property and when it is also found that the suit property is being used only by the general public and further when the third plaintiff has not established the alleged encroachment made by the defendants on 01.06.2005, the courts below have rightly held that the third plaintiff is not entitled to obtain the reliefs sought for in the plaint.

20.The authorities relied upon by the plaintiffs counsel in support of his contentions reported in AIR 1978 MAD 97 (K.Mohideen Ibrahim Vs. M. Muhammed Abdullah), AIR 1967 MAD 164 (Chidambara Thevar Vs. T. Vedayya Thevar and others), AIR 1986 (2) MLJ 81 (E.Elumalai Chetty Vs. Naina Mudali and Others) are found to be, in the light of the above discussions, not applicable to the facts and circumstances of the present case.

21.In conclusion, it is found that the courts below have properly appreciated the evidence on record in the correct prospective and based upon the proper reasonings had rejected the reliefs sought for by the plaintiffs. No infirmity is found in the findings and conclusions of the courts below for rejecting the plaintiffs case.

22.Accordingly, the substantial question of law formulated in this second appeal is answered against the plaintiffs and in favour of the defendants.

23.In the result, the second appeal fails and accordingly, is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar(CO)

//True Copy//

Sub-Assistant Registrar

To

1. The Principal District Judge,
Villupuram.
2. The Additional District Munsif Court,
Villupuram.
3. The Section Officer,
V.R. Section, High Court
Madras

+ 1 cc to Mr. N. Suresh, Advocate, SR 12886

Pre-delivery order in
S. A.No. 687 of 2011

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