



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.DURAI SWAMY

S.A.(MD).No.443 of 2011&
M.P.(MD).No.1 of 2011

Padmavathy

..Appellant/Defendant/Defendant

Vs.

Sundararajan

..Respondent/Appellant/Plaintiff

Prayer:-Second Appeal is filed under Section 100 of CPC against the judgment and decree dated 09.02.2011 made in A.S.No.26 of 2010 on the file of the Additional Sub Court, Thanjavur for partly modifying the judgment and decree, dated 22.06.2009 made in O.S.No.138 of 2005 on the file of the District Munsif Court, Thanjavur.

For Appellant :Mr.T.Lajapathi Roy
For Respondent :Mr.K.Vaithilingam

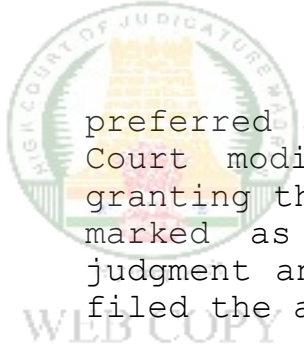
JUDGMENT

Aggrieved over the judgment and decree passed in A.S.No.26 of 2010 on the file of Additional Sub Court, Thanjavur, modifying the judgment and decree passed in O.S.No.138 of 2005 on the file of District Munsif, Thanjavur, the defendant has filed the above second appeal.

2. The respondent/plaintiff filed the suit in O.S.No.138 of 2005 for permanent injunction. The suit property is in T.S.No.1330. According to the plaintiff, he is in possession and enjoyment of the property. Further, according to the plaintiff, who is the brother of the defendant, the adjoining western side property in T.S.No.1331 was allotted to the defendant in the Will dated 20.04.1988. The property in T.S.No.1330 was allotted to the plaintiff by their father Kaliyaraju Naidu, who had died on 20.11.1990.

3. The defendant contended that the plaintiff cannot claim any right in T.S.No.1331, which absolutely belong to her. Before the Trial Court on the side of the plaintiff, 2 witnesses were examined and 5 documents Ex.A1 to Ex.A5 were marked. On the side of the defendant, she was examined as DW1 and 6 documents Ex.B1 to Ex.B6 were marked.

4. The Trial take into consideration the oral and documentary evidence let in by both the parties, dismissed the suit. Aggrieved over the judgment and decree of the Trial Court, the plaintiff



preferred an appeal in A.S.No.26 of 2010 and the lower appellate Court modified the judgment and decree of the Trial Court by granting the decree for permanent injunction in respect of a portion marked as 'CDPO' in Ex.C2, Commissioner's plan. Against the judgment and decree of the lower appellate Court, the defendant has filed the above second appeal.

5. Heard Mr.T.Lajapathi Roy, learned counsel for the appellant and Mr.K.Vaithilingam, learned counsel for the respondent.

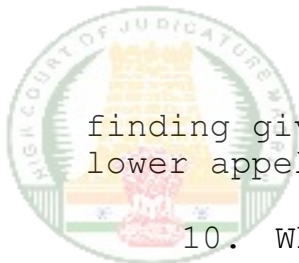
6. At the time of admission of the second appeal, the following substantial questions of law arose for consideration:-

- 1) Whether the right of easement is applicable only for necessity or whether right of easement can be extended for convenience?
- 2) Whether the judgment and decree of the Courts below is vitiated for non consideration of the oral and documentary evidence in proper perspective? and
- 3) Whether the Court below is right in entertaining the inconsistent plea of the respondent/plaintiff even partially?"

7. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it could be seen that the suit property is in T.S.No.1330. The defendant contended that the plaintiff, who is her brother, is claiming right in respect of T.S.No.1331, which absolutely belongs to her, by virtue of Ex.A1/Will, dated 20.04.1988. The said Will was executed by the father of the plaintiff and defendant allotting the property in T.S.No.1330 to the plaintiff and T.S.No.1331 to the defendant. The Commissioner's report and Plans were marked as Ex.C1 to Ex.C3 before the lower appellate Court.

8. Before the Trial Court, the plaintiff in his evidence clearly admitted that he is entitled to the property in T.S.No.1330 and that he is not entitled to the property in T.S.No.1331 as per the Will. The lower appellate Court while confirming the finding of the Trial Court erroneously decreed the suit in respect of the portion marked as 'CDPO' in Ex.C2/Commissioner plan.

9. On a perusal of the judgment of the lower appellate Court, it is clear that the lower appellate Court has not given any finding with regard to the said portion. In the absence of any finding given by the lower appellate Court with regard to the portion 'CDPO', the lower appellate Court should not have granted a decree for permanent injunction. The plaintiff has not produced any evidence to show that he is in possession and enjoyment of the portion marked as 'CDPO'. Only in the operative portion of the judgment, the lower appellate Court had granted a decree for permanent injunction in respect of portion marked as 'CDPO'. It is settled position that the Courts below should give acceptable findings for modifying or reversing the judgment and decree of the Trial Court. In the absence of any



finding given by the lower appellate Court, the decree passed by the lower appellate Court is liable to be set aside.

10. When the plaintiff himself admitted that he is entitled only to T.S.No.1330, he cannot claim any right in T.S.No.1331. Admittedly, portion marked as 'CDPO'/Ex.C2-Commissioner plan is in T.S.No.1331. In these circumstances, the judgment and decree of the lower appellate Court are liable to be set aside.

11. The substantial questions of law 2 and 3 are decided in favour of the appellant. The judgment and decree of the lower appellate Court are set aside and the judgment and decree of the Trial Court are restored. The Second Appeal is allowed. No costs. Connected miscellaneous petition is closed.

Sd/
Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar.

To

1.The Additional Subordinate Judge, Thanjavur.

2.The District Munsif, Thanjavur.

3.The Section Officer, VR Records,
Madurai Bench of Madras High Court, Madurai.

+1CC to M/S.T.Lajapathi Roy, Advocate, SR.No. 5870

Judgment made in
S.A.(MD).No.443 of 2011 &
M.P.(MD).No.1 of 2011
02.02.2017

jikr

AM/PM PN/16.02.2017/3P/5C