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Reserved on: 19.01.2017

Delivered on: 23.01.2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.01.2017

CORAM:

THE HONOURABLE **MR. JUSTICE M. DURAISWAMY**

S.A. (MD) No. 476 of 2011

1.A.Subramani (died)

2.S.Saravanan .. Appellants/Appellants/Defendants 1 and 2

3.N.Santhakumari

4.S.Shanmugam

5.S.Vijayakumari

6.D.Pushpavalli

7.S.Renuga Devi

8.S.Swaminathan

9.K.Pankajavalli

Appellants 2 and 3 to 9 are brought
on record as L.Rs., of the deceased
1st appellant vide court order dated
14.11.16 made in C.M.P. (MD) No. 4042
of 2016.

Vs.

1.P.R.Chellamani ... 1st Respondent/1st Respondent/
Plaintiff

2.The District Collector,
Dindigul District,
Dindigul.

3.The Executive Officer,
Natham Panchayat,
Natham.

... Respondents No.2&3/Respondents 2&3/
Defendants No.3&4

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree passed in A.S.No.47 of 2007 on the file of the Principal Subordinate Court, Dindigul dated 08.10.2010 confirming the Judgment and Decree passed in O.S.No.13 of 2006, on the file of the District Munsif cum Judicial Magistrate, Natham, dated 16.02.2007.



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For Appellants

: Mr.D.Rajkumar
for Mr.M.P.Senthil

For Respondents

: Mr.H.Lakshmi Shankar
for R.1
:Mr.R.Anandha Raj
Government Advocate
for R.2
: No Appearance
for R.3

JUDGMENT

The above Second Appeal arises against the Judgment and Decree passed in A.S.No.47 of 2007, on the file of the Principal Subordinate Court, Dindigul, confirming the Judgment and Decree passed in O.S.No.13 of 2006, on the file of District Munsif cum Judicial Magistrate, Natham.

2. The defendants 1 and 2 have filed the above Second Appeal. The first appellant died during the pendency of the Second Appeal and his legal representatives were brought on record as the appellants 3 to 9. The first respondent is the plaintiff and the respondents 2 and 3 are the defendants 3 and 4. The plaintiff filed the suit in O.S.No.13 of 2006 to declare the suit pathway as a common pathway of the plaintiff and the defendants and for mandatory injunction to remove the superstructure put up in the suit property.

3. The brief case of the plaintiff is as follows:

(i) According to the plaintiff, the suit property is in new S.No.496. The said Survey Number was sub-divided into 16 parts. The common pathway situates in S.Nos.496/4, 8 and 16. The suit property is in S.No.496/8. On the north of the suit pathway, the land belonging to Kandasamy and others in S.No.496/7 is situated. On the south of the pathway, the plaintiff had a gate in S.No.496/8. The house constructed in S.No.496/7 is more than 50 years old. Except the suit pathway in S.No.496/8, there is no other alternative passage for the house in S.No.496/7. The plaintiffs and the defendants 1 and 2 used the suit pathway to reach the road in S.No.496/16.

(ii) On 25.05.2001, the plaintiff purchased the property from Kandasamy. The defendants 1 and 2 own house in S.No.496/6 by encroaching an extent of 43' east-west. The plaintiff objected the encroachment made by the defendants 1 and 2. The third defendant also cancelled the planning permission granted in favour of the first defendant. The plaintiff sent a notice to the defendants 1 and 2 and 4. The first defendant sent a reply stating that the suit pathway is not a common passage. In these circumstances, the plaintiff filed the suit.



4. The brief case of the defendants 1 and 2 is as follows:

According to the defendants 1 and 2, the measurements were not correctly given in the plaint schedule. One Andiapillai sold 1/4th share by a deed of sale dated 06.04.1935 to Arunachalam Pillai. Similarly Thavasia Pillai also sold his share to Arunachalam Pillai. The first defendant as the legal heir of Arunachalam Pillai is in possession and enjoyment of the properties belonging to Arunachalam Pillai. Except the first defendant, no one has got right or title over the properties. After the sale made by Andiapillai in favour of the first defendant's father, Kandasamy Pillai did not have any right in the property. In the panchayat topo sketch, it was wrongly mentioned as common passage. Since the first defendant is in possession and enjoyment of the property for several years, he has prescribed title by adverse possession. Only at the instigation of some third party, the plaintiff has filed the suit. The first defendant is putting up construction only after obtaining planning permission from the panchayat. In these circumstances, the defendants 1 and 2 prayed for dismissal of the suit.

5. The brief case of the fourth defendant is as follows:

According to the fourth defendant, the common pathway is in S.No.496/4, 8 and 16. The pathway has been used as common pathway for several years. The extent mentioned in S.No.496/8 is correct. Since the defendants 1 and 2 encroached into the common passage, the planning permission was cancelled by the fourth defendant. The defendants 3 and 4 are not necessary parties. In these circumstances, the fourth defendant prayed for dismissal of the suit.

6. Before the trial Court, on the side of the plaintiff, P.W.1 was examined and 9 documents viz., Exs.A.1 to A.9 were marked. On the side of the defendants, D.W.1 was examined and 8 documents viz., Exs.B.1 to B.8 were marked. The Advocate Commissioner's reports and plans were marked as Exs.C.1 to C.4. The trial Court, after taking into consideration the oral and documentary evidences let in by both parties, decreed the suit. Aggrieved over the judgment and decree of the trial Court, the defendants 1 and 2 filed an appeal in A.S.No.47 of 2007 and the lower Appellate Court also confirmed the judgment and decree of the trial Court and dismissed the appeal. Aggrieved over the concurrent findings of the Courts below, the defendants 1 and 2 have filed the above Second Appeal.

7. Heard Mr.D.Rajkumar, learned Counsel appearing for the appellants, Mr.H.Lakshmi Shankar, learned Counsel appearing for the first respondent and Mr.R.Anandha Raj, learned Government Advocate appearing for the second respondent.

<https://hcc.judges.org.in/>

8. At the time of admission of the above Second Appeal, the



following Substantial Questions of Law arose for consideration:

"(i) Whether the Courts below is right in holding that the respondents are entitled to the property by virtue of the sale deed Ex.A.1 dated 25.05.2001 executed by one Kandasamy, S/o Andiappa Pillai especially when Andiappa Pillai sold the property in favour of appellants' father under Ex.B.2?

(ii) Whether the Courts below is right in not considering the absence of evidence regarding the enjoyment of the suit property as a common pathway which would lead to legal inference the alleged easementary right get extinguished?

(iii) Whether the Courts below is right in granting a decree for mandatory injunction especially when the construction has been put up to the knowledge and acquiescence of the respondent?"

9. On a careful consideration of the materials available on record and the submissions made by the learned Counsel appearing on either side, it could be seen that the plaintiff had filed the suit contending that the suit passage is a common passage belonging to the plaintiff and the defendants 1 and 2. However, the defendants 1 and 2 contended that the plaintiff has no exclusive right over the suit property. Ex.A.1 is the sale deed dated 25.05.2001 executed by one Kandasamy in favour of the plaintiff. The suit passage is in S.No.496/8. The defendants 1 and 2 have their house in S.No.496/6. Since the defendants encroached the suit passage, the planning permission granted by the fourth defendant in favour of the first defendant was cancelled. The fourth defendant also, in their written statement, have stated that they have cancelled the planning permission granted in favour of the first defendant, since the construction was put up in a common passage in S.No.496/8. The Advocate Commissioner's reports and plans also support the case of the plaintiff to the effect that the defendants 1 and 2 had encroached into the common passage. That apart, even in the panchayat topo sketch, the suit passage has been mentioned as common passage.

10. The defendants 1 and 2 in their written statement have stated that they have been in continuous and uninterrupted possession over the suit passage for well over a statutory period and hence, they have prescribed title by adverse possession. It is settled position that the plea of adverse possession can be sought only as against the true owner. When the defendants 1 and 2 are claiming the property by way of adverse possession, that implies that they are admitting the title of the plaintiff. The defendants 1 and 2 cannot take a contrary stand in the written statement by disputing the title of the plaintiff in one place and claiming title by adverse possession in another place. By oral and documentary evidences, the plaintiff had clearly established



that the suit passage is a common passage of the plaintiff and the defendants 1 and 2.

11. The contention of the defendants 1 and 2 that the plaintiff also put up construction in the passage and therefore, he has not approached the Court with clean hands, cannot stand for the reason that the defendants have not filed any counter claim for the removal of the alleged construction put up by the plaintiff in the suit passage. If really, the plaintiff had put up construction in the common passage, the defendants 1 and 2 should have initiated appropriate proceedings for the removal of the alleged construction put up by the plaintiff. Even in the written statement, the defendants 1 and 2 have not stated that the plaintiff also put up construction in the common passage. In the absence of any pleadings to that effect, the contention raised by the defendants 1 and 2 is liable to be rejected. The earlier Advocate Commissioner's report and plan were scraped at the instance of the defendants 1 and 2 and a new Advocate Commissioner was appointed who had also filed his report before the trial Court. The second report and plan filed by the Advocate Commissioner supports the case of the plaintiff. From the reports of the Advocate Commissioner, it is clear that the defendants 1 and 2 had made encroachment in the common passage and also put up construction in the common passage.

12. From the available evidence it is also clear that the plaintiff had raised his objection at the earliest point of time for the encroachments made by the defendants 1 and 2 in the common passage. Therefore, the defendants 1 and 2 cannot contend that the plaintiff had kept quiet when they put up construction in the passage. The Courts below have concurrently decreed the suit by granting a decree for declaration and mandatory injunction to remove the superstructure put up by the defendants 1 and 2 in the common passage. Taking into consideration the oral and documentary evidences let in by the parties, the Courts below have rightly decreed the suit.

13. In these circumstances, I do not find any ground much less any substantial question of law to interfere with the concurrent findings of the Courts below. The Second Appeal is liable to be dismissed. Accordingly, the same is dismissed. There shall be no order as to costs.

Sd/-

Assistant Registrar

/True Copy/

Sub Assistant Registrar(CS)



To

1. The Principal Subordinate Court, Dindigul.

2. The District Munsif cum Judicial Magistrate Court,
Natham.

Copy to : The Section Officer,
VR Section,
Madurai Bench of Madras High Court, Madurai.

+1cc to Mr.M.P.Senthil Advocate in SR. No.3686
+1cc to M/s.H.Lakshmi shankar Advocate in SR. 3519

JS/PM-PN/09.02.2017:6P/6C

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