

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.12.2018

CORAM :

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.173 of 2008

1.M.Ramasamy (Died) Appellant/Respondent/Defendant

2.T.Shenbagavalli
W/o. Late Ramasamy

3.M.R.Sree Swega Appellants

[Appellants 2 & 3 are brought on record as Lrs of the deceased, sole appellant Vide order of Court dated 28.03.2008 made in MP.No.3 of 2008 in SA.No.173/2008]

[3rd Appellant declared as major and her mother T.Shenbagavalli discharged from the guardianship Vide order of Court dated 29.11.2018 made in CMP.No.21429 & 21433 of 2018 in SA.No.173/2008]

..Vs..

Pushpa Chandrasekar Respondent/Appellant/Plaintiff

Prayer : Second Appeal filed under Section 100 of CPC against the judgment and decree of the Subordinate Judge at Pollachi, dated 31.10.2007 in A.S.No.26 of 2006 reversing the judgment and decree of the District Munsif at Pollachi dated 21.3.2006 in O.S.No.363 of 1999.

For Appellants : Mr.G.Ponnambala Thiagarajan

For Respondent : Mr.C.R.Prasanan

JUDGMENT

This appeal is preferred by the defendant in O.S.No.363 of 1999 on the file of Subordinate Court, Pollachi. The suit was laid for declaration of right of way over suit B-schedule property and for permanent injunction. On 21.03.2006, the suit

was dismissed, whereupon the plaintiff had preferred the first appeal in A.S.No.26 of 2006 before the Sub Court, Pollachi. The first Appellate Court Vide its judgment and decree dated 31.10.2007, reversed the finding of the Court below and allowed the appeal. Aggrieved by the same, the defendant has come forward before this Court. Parties would be referred to by their rank before the trial Court.

2. The entire case falls within a narrow compass, and therefore, the rival contentions are stated only to the extent required. A certain Thirumalaisamy owned a property in Survey No.167/43 of Marcha Naickenpalayam Village. He later formed a layout in this property. On 15.06.1994, Vide Ext.A1, sale deed, Thirumalaisamy had sold plot Nos. 4,5,6 and 7 to the plaintiff. These plots are located from east to west. The southern boundary of the property sold to the plaintiff is described as a 20 ft. pathway. This pathway/street is described as B-schedule property in the plaint. Subsequent to the sale in favour of the plaintiff, Thirumalaisamy had sold an extent of 3,572 sq.ft. in plot No.8 to the defendant under Ext.B1, sale deed dated 31.10.1994. The northern boundary of the plot sold to the defendant is shown as plot No.7 in Ext.B1, sale deed. The southern boundary of Ext.A1 and the northern boundary of Ext.B1 sale deed, would not reconcile. While the southern boundary of the property covered in Ext.A-1 sale deed is shown as 20 ft. pathway, in Ext.B-1 sale deed, the northern boundary is shown as plaintiff's property. According to the plaintiff, defendant's plot lies to the further south of the pathway referred to in Ext.A-1, sale deed. Since the defendant asserted title over the pathway separating the plaintiff's plot from defendant's plot, the plaintiff laid the suit for declaration and for consequential relief of permanent injunction and for mandatory injunction.

3. In his written statement, the defendant would partially admit the existence of 20 ft. pathway to the south of plot No.7, but would contend that it extends only to an extent of 8 ft. from east to west along the southern boundary of the plaintiff's plot. This would imply, notwithstanding the description of the northern boundary in Ext.B-1, sale deed, the defendant thus admit the existence of the pathway to the north of his property in plot No.8 and to the south of plaintiff's property in plot No.7 at least partially.

4.1 The dispute went to trial, and before the trial Court, both the parties examined themselves as P.W.1 and D.W.1. The plaintiff has produced his title document as Ext.A-1 and for explaining the boundary description he backs up Ext.A-1 with Ext.A2 plan, which according to him was given to him by his vendor Thirumalaisamy. The defendant too has produced Ext.B-3,

plan, which according to him, has been given to him by the same Thirumalaisamy.

4.2 Interestingly, while Ext.A2 supports the boundary description as given in Ext.A1, sale deed, so far as Ext.B1, sale deed is concerned, it is not entirely supported by Ext.B-3, plan. The case of the defendant as pleaded in the written statement stems from Ext.B-3, plan, which indicates the existence of 20 ft. pathway upto 8 ft. from east to west of plot No.7.

4.3 In the process of appreciating the evidence before it, the trial Court relied excessively on the site measurements and the total extent given in Ext.B-1 sale deed under which the defendant claims title. Curiously enough, even though Commissioner was appointed, he was not required to measure the defendant's property to ascertain whether the measurements given in Ext.B-1 supports the total extent stated therein. The trial Court proceeded to decree the suit. It may be instantly recorded here, that when there is an ambiguity in describing the property, the boundaries shall always be preferred to the extent, and in every case where extent is asserted to prevail over boundaries, stronger evidence is required. Here, the trial Court appeared to have lost its way.

4.4 When the plaintiff approached the first Appellate Court in A.S.26 of 2006, the first Appellate Court rectified the same and has held in favour of the plaintiff, relying on the southern boundary description in Ext.A-1. It also relied on Ext.B10 and Ext.B13, which would indicate the existence of an electrical street-lamp post at the western extremity of what the plaintiff describes as 'B Schedule' pathway. This electric post also finds place in the Commissioner's Report. It is in this setting, the defendant has come before this Court in the present second appeal.

5. During the pendency of this appeal, the defendant died and his legal representatives are brought on record. At the time of admission, the following substantial questions of law were framed :

- 1) When the question of the document executed earlier in point of time prevailing over the later document would arise only in a case, where both related to the same property, whether the lower Appellate Court is correct in law in applying the said principle to the present case where Exhibit B1 and A1 do not relate to the same property?
- 2) When the appellant has specifically purchased an extent of 3272 sq.ft. under Ex.B1, whether the respondent is entitled to claim easementary right over the same by virtue of Exhibit A1-sale deed?

- 3) When the scribe or the attesting witness of a document is not bound by the contents thereof, whether the lower Appellate Court is correct in law in holding that the appellant is bound by Exhibit A1-sale deed, to which he was only a scribe, contrary to the provisions of Section 115 of the Evidence Act, 1872?
- 4) When the appellant has purchased a specific extent of 3572 sq.ft. under Ext.B1 registered sale deed, whether the lower Appellate Court is correct in law in holding that the appellant is entitled to a lesser extent, in contravention of Section 91 of the Evidence Act, 1872?

6. This Court must record here, what is now debated solely is a question of fact in constructing a document and in doing so, the first Appellate Court has considered them the most legal way and has also backed its conclusion by relying on a critical evidence of an electric lamp post at the western extremity of the pathway. Apart from the failure of the defendant to establish that his entire northern boundary extends till the southern boundary of the plaintiff's plot especially when he concedes contrary to his pleadings that a pathway does exist to an extent of 8 ft. to the south of plaintiff's plot, there is no reason for the TNEB to fix a street-lamp post in a private property at the western extremity or rather the north-west corner of suit B-schedule pathway, which is a dead-end, unless the street/pathway stretches till the western boundary of B-schedule property. This piece of evidence strengthens the case of the plaintiff and simultaneously the case of the defendant more improbable.

7. In conclusion, this Court finds that the questions raised are fundamentally one on facts, and the same has been decided in the best way possible by the first Appellate Court. Consequently, this Court finds no merit in the appeal and the same is hereby dismissed and the judgment and decree of the Subordinate Court, Pollachi, dated 31.10.2007 in A.S.No.26 of 2006, reversing the judgment and decree of the District Munsif Court, Pollachi dated 21.3.2006 in O.S.No.363 of 1999, is hereby confirmed. No costs.

ds

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1. The Subordinate Judge,
Pollachi

2. The District Munsif,
Pollachi

+2CCs to Mr.C.R.Prasanan, Advocate, Sr.No.84798

S.A.No.173 of 2008

Kak(10/04/2019)



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