

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.04.2018  
PRONOUNCED ON : 24.04.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.1142 of 2004  
and C.M.P.No.8192 of 2004.

M.K.Sathyamoorthy ...Appellant/Plaintiff in O.S  
Vs.

V.Munirathinam Mandiri (Deceased)  
M.Ramalingam  
M.Gajendran  
M.Nithiyanandam

(R2 to R4 are brought on record as  
Lrs of the deceased sole respondent  
vide order of the Court dated 04.03.2008  
in C.M.P. Nos.2651 to 2653/2007)

...Respondents/Defendants in O.S

Prayer: Second Appeal filed under Section 100 of Civil  
Procedure Code, against the judgment and decree of the  
Subordinate Judge, Gudiyatham, Vellore District dated 30.12.2003,  
made in A.S. No.2 of 2003 confirming the judgment and decree of  
the District Munsif, Gudiyatham, Vellore District dated  
31.01.2003 made in O.S. No.312 of 1995.

For Appellant : Mr.T.Dhanyakumar  
For Respondents: Mr.D.Rajagopal

JUDGMENT

This second appeal is directed against the judgment and  
decree dated 30.12.2003, passed in A.S.No.2 of 2003, on the file  
of the Subordinate Court, Gudiyatham, confirming the judgment  
and decree dated 31.01.2003 passed in O.S. No.312 of 1995 on the  
file of the District Munsif Court, Gudiyatham.

2. Parties are referred to as per their rankings in the  
trial Court.

3. Suit for permanent injunction.

4. The case of the plaintiff, in brief, is that he is the absolute owner of the suit property having acquired the same from the joint family by way of a partition held on 22.02.67 and since then, it is only the plaintiff who has been in possession and enjoyment of the suit properties by paying kist etc., and the defendant has no manner of right, title or interest in respect of the suit properties and he is a stranger and however, attempted to interfere with the possession and enjoyment of the suit properties by trespassing into the same, which was prevented and hence, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts. It is false to state that the plaintiff got the suit properties from the joint family by way of partition held on 22.02.67 and that he has since then been in possession and enjoyment of the suit properties by paying kist etc., The plaintiff is not in possession and enjoyment of the suit properties as described in the plaint and the plaintiff must strictly prove the boundaries mentioned in the plaint schedule and there is a common cart way in the plaint schedule properties and the same is being used as a common cart way by the adjacent land owners and the said common cart way is in existence for more than 100 years and the same is mentioned in the boundaries of the B schedule properties of the partition deed dated 22.02.67. However, the plaintiff has deliberately suppressed the same and failed to disclose in the schedule of properties and the plaintiff has also falsely disclosed, as if there is a well in survey number 9 and infact, no such well is in existence and the suit properties have not been properly described with ulterior motive and the plaintiff has come forward with the false case as if the defendant is attempting to interfere with his possession and enjoyment and hence, the suit laid by the plaintiff, without any cause of action, is liable to be dismissed.

6. In support of the plaintiff's case PW1 was examined, Exs.A1 to A51 were marked. On the side of the defendant, DWs 1 and 2 were examined, Exs.B1 and B2 were marked. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss the suit laid by the plaintiff.

7. In the appellate court, it is found that an additional witness was examined by the plaintiff as PW2 and further, it is seen that the additional documents have come to be marked as Exs.A52 to A56. The first appellate Court, on an appreciation of the materials placed on record, was pleased to confirm the judgment and decree of the trial Court and thereby, dismissed the appeal preferred by the plaintiff. Challenging the same,

the present second appeal has been laid.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

"1. Whether the lower Courts were correct in accepting the report of the Advocate Commissioner, who was appointed at the instance of the defendant when neither the plaintiff nor the defendant marked the report as an exhibit and when the Advocate Commissioner was not examined either by the parties of the Court?

2. Whether the defendant, whose purchase was held to be invalid, could be said to have any right over the cart track in view of the invalidation of his sale?

3. Whether the lower Courts were correct in not drawing an adverse inference against the defendant for not entering the witness box?"

9. The plaintiff has laid the suit simplicitor for permanent injunction. The plaintiff claims title, possession and enjoyment of the suit properties by way of the partition effected on 22.02.67, which document has come to be marked as Ex.A1. It is the specific case of the defendant that the suit properties had not been properly described in the plaint and there is a common cart way in the suit properties, which is used by all concerned and the plaintiff had deliberately suppressed the same in the plaint schedule and hence, the plaintiff is not entitled to the reliefs sought for.

10. As rightly determined by the Courts below, on a perusal of the partition deed marked as Ex.A1 vis-a-vis the plaint schedule properties, it is found that the plaintiff has not given the correct description of the suit properties and had suppressed the common cart way given to the plaint schedule properties as the boundaries and thus, it is evident that the plaintiff has not described the suit properties with correct boundaries and come forward with the suit seeking for the equitable relief of permanent injunction based on misleading particulars, particularly, not giving the correct description of the suit properties. That by itself, as rightly determined by the Courts below, would disentitle the plaintiff to claim the equitable relief of permanent injunction.

11. That apart, as seen from the evidence of the plaintiff himself, there is a common cart way existing in the plaintiff's schedule properties. Further, the same is also buttressed from the commissioner's report and plan, which forms part of the Court records. The commissioner's report and plan have not come to be marked by either of the parties. However, as rightly determined by the Courts below, when at the instance of the parties concerned, the commissioner had inspected the properties and filed his report and plan as per the Order 26 Rule 10 of CPC, the report of the Advocate commissioner forms part of the Court records. It is thus found that the Court is entitled to rely upon the records available. Accordingly, it is seen that the Courts below also found support as to the existence of the common cart way from the commissioner's report and plan and as above seen, the same has been admitted by the plaintiff himself during the course of his evidence and further, the common cart way is found to be mentioned in the plaintiff's title deed marked as Ex.A1. Thus, it is found that the existence of common cart way is reflected in the title deed, the commissioner's report and plan, as also admitted by the plaintiff himself. For ulterior purpose, the plaintiff has suppressed the same and by giving incorrect description of the plaintiff's schedule properties, is seen to have laid the suit seeking for the equitable relief of permanent injunction.

12. The plaintiff attempted to put forth a case as if the common cart way reflected in Ex.A1, partition deed absolutely belongs to the family of the plaintiff. However, the said contention has been rightly negated by the Courts below. The abovesaid partition has been effected between the plaintiff and his brother. From the plaintiff's brother, the defendant has acquired the properties. Thus, it is found that when there is no recital contained in Ex.A1 that the common cart way described therein is intended for the exclusive use of the plaintiff as such and on the other hand, the common cart way is intended to be used by all the sharers of the abovesaid partition document and when further it is seen that the defendant has acquired the properties by way of purchase from the plaintiff's brother Venkatesan, as rightly determined by the Courts below, the defendant is also entitled to use the common cart way and the plaintiff cannot prevent the defendant from enjoying the same. That apart, there is no material placed on record worth acceptance that the common cart way is in the exclusive possession and enjoyment of the plaintiff and it is thus found that the plaintiff cannot lay any exclusive claim of right or title or interest over the common cart way.

13. As rightly determined by the first appellate Court, the additional oral evidence and documents projected by the plaintiff during the first appeal proceedings are not in any way

useful to sustain the plaintiff's case of his exclusive claim of title, possession and enjoyment of the common cart way. As rightly determined, the above said documents would be of no purpose or use to help the plaintiff's case.

14. Despite the defence putforth by the defendant that the plaintiff has no title, possession and enjoyment of the suit properties as described in the plaint and further, when the plaintiff has not given the clear description of the suit properties in the plaint schedule and suppressed the common cart way deliberately, though the same is reflected in the partition deed Ex.A1, as rightly determined, the plaintiff should have sought the relief of declaration for sustaining his case. The said relief has not been sought for, for the reasons best known to the plaintiff and on that score also, the plaintiff's suit should fail.

15. In the light of the above reasons, it is found that though the commissioner's report and plan had not come to be marked and further, the plaintiff has filed his objections to the same, however, as rightly determined by the Courts below, when the plaintiff has not placed any material to fortify his objections preferred as regards the commissioner's report and plan and further, the plaintiff having also not endeavoured to scrap the commissioner's report and plan and take out a fresh commission, it is seen that the Courts below are justified in also placing reliance upon the commissioner's report and plan, though the same are not exhibited in the suit as such, as they form part of the Court records. The plaintiff cannot take advantage of the defendant not entering the witness box in support of his defence version as such and when the plaintiff has come forward with the suit seeking the specific relief of permanent injunction being the equitable relief, it is for the plaintiff to establish his case by placing acceptable and reliable materials. The plaintiff cannot be allowed to pick holes in the defendant's version and thereby endeavour to succeed in his case. Therefore, the abovesaid argument putforth by the plaintiff that the defendant has not entered into the witness box, by itself, would not be a criteria for upholding the plaintiff's case in the absence of any material worth acceptance to sustain the plaintiff's case. Inasmuch as the defendant has purchased the property from the plaintiff's brother, it is seen that the defendant is also entitled to use the common cart way as reflected in the partition deed Ex.A1. The substantial questions of law formulated in this second appeal are accordingly answered against the plaintiff and in favour of the defendant.

16. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

s/d-  
Assistant Registrar (CS-V)

True Copy

Sub-Assistant Registrar

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To

1. The Subordinate Court,  
Gudiyatham, Vellore District
2. The District Munsif Court,  
Gudiyatham, Vellore District.
3. The Section Officer,  
V.R.Section,  
High Court, Madras. (2 copies)

+1 CC to Mr.T. Dhanyakumar, Advocate sr 30162.  
+1 CC to Mr.D. Rajagopal, Advocate sr 31462

S.A.No.1142 of 2004

SKV(CO)  
SP(10/05/2018)

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