

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :03.07.2018
PRONOUNCED ON :20.07.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN
S.A.No.1761 of 2004

1.Mohammed Sehrif alias Sait

2.Dr.Mohammed Haniffa

3.Mohammed Ali Appellants/Defendants

Vs.

1.K.Dhandapani

2.K.Rajendran

3.K.Balasubramaniyan Respondents/Plaintiffs

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree made in A.S.No.8 of 2004 dated 27.04.2004 on the file of Sub Court, Udagamandalam in allowing the Appeal in part and the judgment and decree made in O.S.No.5 of 1997 dated 04.03.2003 on the file of the District Munsiff Court, Kothagiri.

For Appellant : Mr.K.V.Sanjeev Kumar

For Respondents : Mr.Srinath Sridevan

सत्यमेव जयते
J U D G M E N T

1. In this Second Appeal, challenge is made to the judgment and decree dated 27.04.2004 passed in A.S.No.8 of 2004 on the file of the Subordinate Court, Udhagamandalam, partly allowing the Appeal preferred against the judgment and decree dated 04.03.2003 passed in O.S.No.5 of 1997 on the file of the Principal District Munsif Court, Kothagiri.

2. The parties are referred to as per the rankings in the trial court.

3.Suit for permanent injunction.

4. The case of the plaintiffs in brief is that the plaint schedule property measuring a total extent of 0.08 ½ acres of land together with the residential buildings was purchased by the plaintiffs' father in the year 1964 and enjoyed by him till his death and thereafter the plaintiffs had become the owners of the suit property by inheritance and enjoying the same . One Late. K.M.Abdul Kadhar Sahib was the owner of the land situated on the western side of the suit property and the first defendant is the son of K.M.Abdul Kadhar Sahib and the defendants 2 and 3 are the sons of first defendant and in the abovesaid land, houses had been built up. In between the suit property and the land of the defendants, there is a lane with a width of 4 to 5 feet and drainage. Both the lane and drainage exclusively belong to the plaintiffs and used by the plaintiffs and their tenants as the approach pathway to the common Rose Cottage Main Road on the northern side of the suit property and the lane in between the suit property and the land of the defendants and the drainage portion had been in the exclusive possession of the plaintiffs' father and subsequently the plaintiffs and the defendants have no right or title or interest over the suit property and the lane and the drainage as abovedescribed and while so, the defendants without any manner of right, attempted to trespass into the suit property and put up the revetments on the lane and caused interference to the enjoyment of the plaintiffs to the lane and drainage portion and hence the plaintiff had been necessitated to lay the suit for appropriate reliefs.

5.The case of the defendants in brief is that the suit is not maintainable either in law or on facts. The defendants are not aware whether the plaintiffs are the present owners of the suit property. It is true that the defendants own and enjoy the buildings situated on the western side of the suit property and the buildings were constructed by the Late.K.M.Abdul Kadhar Sahib in the year 1947 itself and there is a drainage and lane in between the property belonging to the defendants and the property belonging to the plaintiffs and the lane does not belong to the plaintiffs and the lane serves as the passage only to the defendants and the plaintiffs have never used the lane at any point of time and it is false to state that the plaintiffs have been using the lane as an approach pathway to Rose Cottage Main Road on the northern side. It is false to state that the defendants attempted to trespass into the suit lane and put up the revetments and the back doors of the plaintiffs' property always remained closed and never been used till date and on the other hand, the access to the buildings of the defendants is only through the lane and the western side of the drainage is the eastern boundary of the defendants' property and the plaintiff has no right whatsoever in the lane and the drainage portion and hence there is no cause of action to institute the

suit and the suit is therefore liable to be dismissed.

6. In support of the plaintiffs' case, P.W.1 has been examined. Exs.A1 to A8 were marked. On the side of the defendants, D.W.1 was examined. Exs.B1 to B16 were marked. Exs.C1 to C4 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to grant the relief of permanent injunction in so far as the 2 ft width drainage portion running north-south between Rose Cottage Main Road on the northern side and Government Odai on the southern side and accordingly disposed of the suit in favour of the plaintiffs. Aggrieved over the same, the defendants preferred the First Appeal. The First Appellate Court, on an appreciation of the materials placed on record, holding that 5 ft lane as shown in the Commissioner's report and plan, is a common lane and accordingly excluding the abovesaid 5 ft lane, granted the relief of permanent injunction in favour of the plaintiffs as regards the remaining portion of the suit property and accordingly disposed of the Appeal. Impugning 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.

- i. "Whether the lower appellate court is right in granting the equitable right of injunction to the respondent/plaintiff when there is no oral or documentary evidence to prove the legal right over suit schedule property.
- ii. Whether the lower appellate court is right in observing that the finding of Advocate Commissioner makes it clear that the suit schedule property is the common lane when the legal position is that Advocate Commissioner can only note physical features but should not render findings."

9. The suit has been laid simpliciter for the relief of permanent injunction. Though the plaintiff has described the suit property as 0.08 ½ acres of land within the specific boundaries in the suit survey number, it is found that the issue between the parties is only as regards the lane portion measuring 4 to 5 feet in width plus the drainage portion lying on the western side of the property belonging to the plaintiffs and the eastern side of the property belonging to the

defendants. Thus, it is seen that the suit has come to be laid by the plaintiffs only as regards the lane and the drainage portion lying to the west of the plaintiffs' property and the east of the defendants' property and Rose Cottage Main road on the northern side and Government Odai on the southern side. Now the plaintiffs claim exclusive right over the abovesaid lane and drainage portion and in this connection, for sustaining the abovesaid claim of the plaintiffs, the plaintiffs mainly rely upon the sale deed dated 26.02.1964 marked as Ex.A1. The other documents projected by the plaintiffs as Exs.A2 to A8 are house tax receipts and therefore, it is evident that they are not in any way connected with the property in dispute between the parties. As regards the purchase of 0.08 ½ acres of land by way of Ex.A1 by the plaintiffs' father, the defendants have not raised any issue. The only issue is whether the lane and the drainage portion lying to the west of 0.08 ½ acres of land also forms part of the property purchased under Ex.A1. However, it is seen that on a reading of Ex.A1, the recitals do not in any manner point to the acquisition of the lane and drainage portion under the said document i.e., Ex.A1 and therefore it is evident that the plaintiffs cannot lay any claim of right over the lane and drainage portion by way of Ex.A1 sale deed. When the plaintiffs' claim exclusive right, title and interest in the lane and drainage portion and when the defendants have stoutly challenged the plaintiffs claim of right to the same, still the plaintiffs had not endeavored to seek the relief of declaration with reference to the property in dispute. It is found that, when the defendants are fighting tooth and nail and asserting that it is only they have exclusive right and usage to the lane and drainage portion in dispute, the plaintiffs should have sought for the relief of declaration as regards the property in dispute i.e., the lane and drainage. The plaintiffs, despite the denial of the title of property in dispute by the defendants, having not chosen to seek the relief of declaration, it is found that the suit laid by the plaintiffs simpliciter for the relief of permanent injunction is not maintainable in the light of the decision of the Apex Court reported in AIR 2008 SCC 2033 [Anathula Sudhakar Vs.P.Buchi Reddy (dead) by Lrs and Others].

10. According to the plaintiffs, they are using the lane portion as an access for reaching the Rose Cottage Road on the northern side. It is found that the backyard portion of the plaintiffs' property is adjacent to the lane. It is further evident that as rightly put forth by the defendants, the plaintiffs would not have any need and necessity to use the lane for having access to Rose Cottage Main Road lying on the northern side. On the other hand, it is found that the buildings put up by the defendants in their property, all face only towards the lane portion and it is found that it is only the defendants who would be in the need of the lane portion for

having access to the Rose Cottage Main Road and accordingly, the trial court also noted that the usage of the lane portion by the defendants is found to be more probable and accordingly declined to grant the relief of permanent injunction as regards the lane portion of the suit property. It is also evident that there are steps and cement flooring made in the lane portion and it is not even pleaded by the plaintiffs that it is they, who had raised or put up the steps and cement flooring on the lane portion as noted by the Advocate Commissioner. Thus, it is found that the front entrance of the house put up by the defendants in their property are all facing towards the lane portion and accordingly, it is seen that, it is only, who would be having the necessity to use the lane portion and the plaintiffs' property rear portion always being found to remain closed, it is seen that there is no necessity on the part of the plaintiffs to have any access through the lane portion to Rose Cottage Main Road on the northern side. Further the plaintiffs have not examined any of their tenants to establish any need for using the lane portion for having access to the main road on the northern side. When the plaintiffs front entrance are on the eastern side and their rear portion is only lying adjacent to the lane portion, it is seen that there is no necessity at all for the plaintiffs to use the lane portion as such and in such view of the matter, the trial court is found to be justified in declining the relief of permanent injunction in respect of the lane portion. Challenging the same, the plaintiffs' have not preferred any appeal. It is thus found that decree of the trial court declining the relief of permanent injunction in favour of the plaintiffs as regards the lane portion has become final and the plaintiffs cannot be allowed to reagitate the same in this Second Appeal.

11. However, the trial court on the footing that the document Ex.A1 also recites about the right of water course to the plaintiffs as recited therein, construing that the same would only pertain to the drainage portion at the rear portion, on that footing, granted the relief of permanent injunction in respect of the 2 ft drainage portion running north-south. As above pointed out, when there is no clear recital contained in Ex.A1 that any such right had been granted to the plaintiffs' with reference to the 2 ft drainage portion running north-south and when the plaintiffs have not established that they are draining their waste and other effluents only through the abovesaid drainage at the rear side, it is found that merely because the right of water course has been recited in Ex.A1, it cannot be construed that it only pertains to the drainage portion measuring 2 ft on the western side of the plaintiffs' property purchased under Ex.A1. As put forth by the defendants' counsel, when it is found that the property purchased by the plaintiffs, by way of Ex.A1 is described as lying to the east of

the land of K.Abdul Kadhar Sahib, the first defendant's father, accordingly, it is seen that the plaintiffs had not been granted any right in the drainage portion measuring 2 ft width forming part of the property belonging to the defendants and in such view of the matter, merely because some water course right is mentioned in Ex.A1, without any basis or material, the trial court had proceeded to hold that the said recital would only encompass the right of drainage measuring 2 ft width lying on the western side of the plaintiffs' property. If that had been the intention of the parties pertaining to Ex.A1, a clear recital with reference to the same would have incorporated in the sale deed as inclusive of the right of drainage portion measuring 2 ft width running north-south and on the other hand, when it is found that the property conveyed under Ex.A1 is shown lying to the east of the land belonging to the defendant's father, it is found that the plaintiffs cannot be allowed to seek any right or interest in respect of any portion of the property of the defendants and when it is found that the lane and drainage portion forms part of the property belonging to the defendants and accordingly when it is further seen that it is only the houses which had been put up in the defendants' property are facing the lane portion, it is found that the usage of the lane portion by the defendants is found to be more probable and hence, it is seen that the trial court had erred in granting the relief of permanent injunction as regards the drainage portion measuring 2 ft width running north-south as determined by it.

12. As above seen, the plaintiffs had instituted the suit seeking the relief of permanent injunction as regards the lane portion measuring 4 to 5 ft width lying on the western side of the property purchased under Ex.A1. The trial court had declined the said right to the plaintiffs. Despite the same, the plaintiffs have not preferred any Appeal challenging the same. It is only the defendants who had preferred the Appeal challenging the judgment and decree of the trial court granting the relief of permanent injunction as regards the 2 ft drainage portion lying on the western side of the plaintiffs' property.

13. While so, it is found that the first appellate court without any material whatsoever has proceeded to hold that the 4 to 5 ft width lane lying in between the plaintiffs' property and the defendants' property could only be a common lane as the same connects the Government Odai on the southern side and the main road on the northern side, accordingly, proceeded to hold that it is a common lane and so holding, excluding the abovesaid common lane portion, granted the relief of permanent injunction in favour of the plaintiffs as regards the 0.08½ acres of land purchased them by way of Ex.A1. Challenging the abovesaid

determination of the first appellate court, the present Second Appeal has been preferred.

14. It is not the case of anyone, either the plaintiffs or the defendants that lane measuring 4 to 5 ft in between the properties of the parties in dispute is a common lane. On the other hand, the plaintiffs claim the said lane to be their exclusive lane. Per contra, the defendants claim the said lane to be their exclusive lane. There is also no material placed on record to determine that the said lane portion is a common lane. While the position being above, it does not stand reason as to how the first appellate court had proceeded to determine that it is a common lane used by one and all including the plaintiffs and the defendants for having access to the Government Odai Portion on the southern side and to Rose Cottage Main Road on the northern side. The reasonings of the first appellate court for determining that the lane portion in dispute is a common lane is that as it connects the public properties as abovestated. However, with reference to such a determination, there should be materials placed on record. In such view of the matter, the determination of the first appellate court based on the Commissioner's report and plan ipso facto without any material that the lane in dispute is a common lane used by one and all has no legs to stand and accordingly, it is found that the abovesaid determination of the first appellate court is liable to be set aside. As above noted only on the basis of Commissioner's report and plan, the first appellate court had endeavored to determine that the lane in dispute is a common lane. However, as rightly put forth by the defendants' counsel, the Commissioner's report and plan could only be utilized for noting and understanding the physical features of the property in dispute and not for the determination of the title of the property in dispute. It is seen that the first appellate court has committed a serious error in determining that the lane in dispute is a common lane based on the Commissioner's report and plan. To that extent, the judgment and decree of the first appellate court are liable to be set aside.

15. The lane portion is not shown to be forming part of the property belonging to the plaintiffs purchased under Ex.A1. Even the drainage portion is not shown to be lying within the limits of the property acquired by the plaintiffs by way of Ex.A1. Accordingly, it is found that the trial court had erred in granting the relief of permanent injunction even as regards the 2 ft drainage portion in favour of the plaintiffs. As abovenoted, the determination of the first appellate court that the lane in dispute measuring 4 to 5 ft lying in between the properties of the parties and related to the lis is a common lane cannot be upheld. The judgment and decree of the first appellate court determining that the lane in dispute is a

common lane and thereby the further determination of the first appellate court that the plaintiffs are entitled to obtain the relief of permanent injunction as regards the other portions of the suit property thereby impliedly granting the plaintiffs the right to use the common lane is found to be unsustainable. The plaintiffs have not show their entitlement to use the said lane as belonging to them exclusively or belonging to them in common. It is thus found that the first appellate court had erred in granting the reliefs in favour of the plaintiffs as abovestated, when there being no proof in support of the plaintiffs' right, either oral or documentary and in such view of the matter, the right granted in favour of the plaintiffs by first appellate court sans material whatsoever as determined by it is liable to be set aside. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiffs and in favour of the defendants.

16. In conclusion, the judgment and decree dated 27.04.2004 passed in A.S.No.8 of 2004 on the file of the Subordinate Court, Udthagamandalam are set aside and similarly the judgment and decree dated 04.03.2003 passed in O.S.No.5 of 1997 on the file of the Principal District Munsif Court, Kothagiri granting the relief of permanent injunction in respect of 2 ft drainage portion running north-south are also set aside. Resultantly, the suit laid by the plaintiffs in O.S.No.5 of 1997 is dismissed with costs. Accordingly, the Second Appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar (CS-VIII)

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Sub Assistant Registrar

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To

1. The Subordinate Judge,
Sub Court, Udagamandalam.
- 2.The District Munsif.
District Munsiff Court,
Kothagiri.

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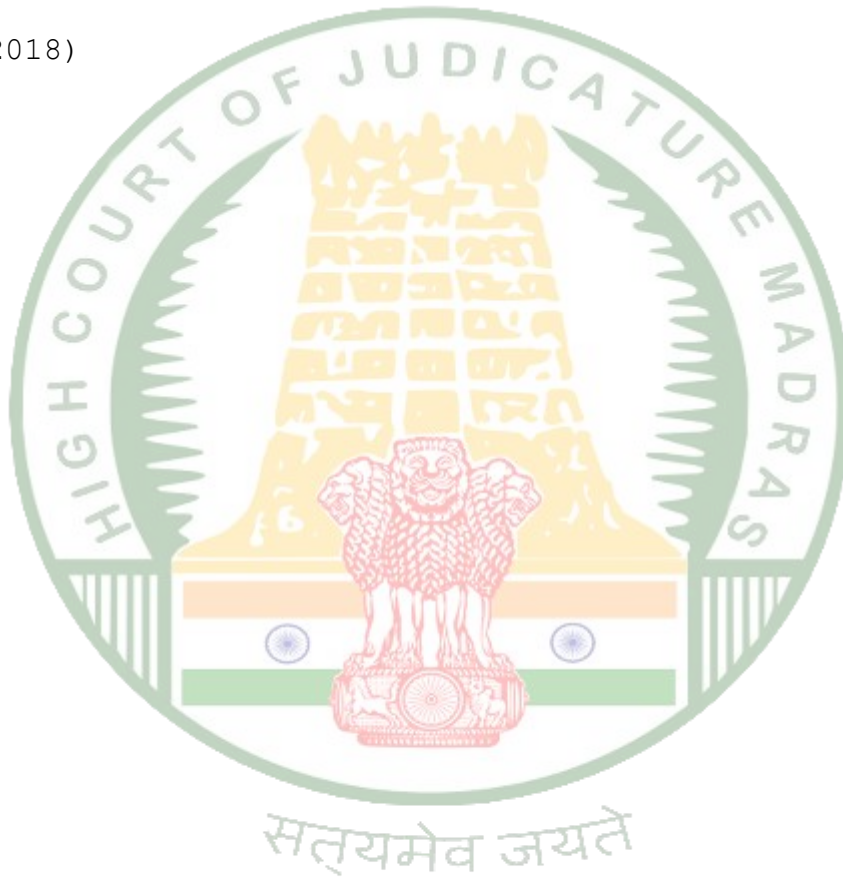
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The Section Officer,
VR Section,
High Court.

+1cc to Mr.Royan Law Associates Advocate, S.R.No. 48705
+1cc to Mr. Srinath Sridevan, Advocate, S.R.No. 48833

S.A.No.1761 of 2004

NRJK (CO)
GN (22/10/2018)



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