

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.06.2018

PRONOUNCED ON : 02.07.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.2039 of 2004

1. Kittammal

2. Palanisamy grounder

... Appellants/Plaintiffs
Vs.

Velusamy

...Respondent/Defendant

Prayer :-

Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 15.07.2004 passed in A.S.No.14 of 2004 on the file of the Subordinate Court, Dharapuram, confirming the Judgment and Decree dated 05.03.2004 passed in O.S.No.236 of 2002 on the file of the District Munsif Court, Dharapuram.

For Appellants : Mr.N.Manokaran

Respondent : Mr.S.Saravanan

JUDGMENT

In this second appeal, challenge is made to the Judgement and Decree dated 15.07.2004 passed in A.S.No.14 of 2004 on the file of the Subordinate Court, Dharapuram, confirming the Judgment and Decree dated 05.03.2004 passed in O.S.No.236 of 2002 on the file of the District Munsif Court, Dharapuram.

2. The second appeal has been admitted on the following substantial question of law:

" When the recitals in Ex.A4 to which the defendant is a party, show that the property forming the subject matter of the present suit belongs to the plaintiffs, would not the defendant be estopped in law from contending otherwise?"

3. In view of the limited controversy involved in the subject matter, the factual aspects of the case need not be gone

into in detail.

4. Suffice to state that the suit has been laid by the plaintiffs for declaration and permanent injunction.

5. The suit property is described as ABCD portion in red colour in the plaint plan. To the abovesaid ABCD portion, the plaintiffs claim title, possession and enjoyment and according to the plaintiffs, the same is in their exclusive possession and the defendant cannot lay any claim of title, possession and enjoyment of the same and hence, the need for the suit.

6. Per contra, the defendant has raised the defence that the ABCD portion shown in the plaint plan is the common pathway/street to one and all and hence, the plaintiffs cannot lay any independent claim to the same and therefore, prayed for the dismissal of the plaintiffs' suit.

7. Both the Courts below have accepted the defence version. Challenging the same, the present second appeal has been laid.

8. As determined by the Courts below, when the plaintiffs rely upon Exs. A1 & A2 for sustaining their claim of title, possession and enjoyment of the suit property, as per Ex.A1, when it is found that the property comprised therein is stated to be situated only to the South of north south street and further, in Ex.A2 also while describing the property comprised therein, it has been mentioned only as lying to the south of north south street and Muthusamy Gounder's house, accordingly, when the documents projected by the plaintiffs Exs.A1 & A2 do not show any exclusive title to the suit property accruing to the plaintiffs as such and further more, when the first plaintiff examined as PW1 has admitted that the sale deed Ex.A1 only portrays the common enjoyment of the ABCD portion shown in the plaint plan, accordingly, it is found that as determined by the Courts below, the ABCD portion has been only intended and used as the common pathway by one and all and the plaintiffs do not have any separate and exclusive entitlement to the same as such.

9. However, the plaintiffs, without laying stress on their documents viz., Exs.A1 & A2, choose to lay a claim of title to the abovesaid ABCD portion based on the title document of the defendant marked as Ex.A4. No doubt, in Ex.A4, the property described therein has been shown lying to the west of the first plaintiff's site and on that footing, it is contended by the plaintiffs that by way of Ex.A4, the defendant has admitted the title of the plaintiffs in respect of the ABCD portion. However, it is found that thereafter, the defendant has taken the rectification deed from his vendor marked as Ex.B6 and by

way of the same, the abovesaid boundary recitals had been corrected as the concerned property is lying only to the west of the common pathway and street. Thus, it is found that when the title deed of the defendant marked as Ex.A4 had been suitably and lawfully rectified by way of Ex.B6 and when further Ex.B6 rectification deed has come into existence prior to the institution of the suit, the contention projected by the plaintiffs that the abovesaid rectification deed had been brought about by the defendant only with a view to defeat the plaintiffs' right in respect of the suit property, as such, cannot be readily accepted considering the facts and circumstances of the case.

10. No doubt, it is found that the plaintiffs had put up some cement construction in the ABCD portion and thereby, urged that it is only they, who had been enjoying the ABCD portion in their own right by putting up the cement construction etc., and as the defendant had not objected to the same at any point of time and on the other hand, acquiesced to the same, despite his knowledge about the cement construction put up by the plaintiffs and accordingly, it is argued that if the ABCD portion had been the common pathway to one and all, the defendant, at the earliest point of time, would have objected to the construction put up by the plaintiffs in the same and thus, in that view of the matter, it is argued that the plaintiffs' title, possession and enjoyment of the suit property should have been upheld by the Courts below and accordingly, it is contended that the Courts below had erred in dismissing the plaintiffs' suit. However, the above contention as such does not merit acceptance. No doubt, at one point of time, it is found that the plaintiffs had put up a septic tank in the ABCD portion and on that footing, we cannot assume that the plaintiffs have title to the ABCD portion without ignoring the disentitlement of the plaintiffs to the same on the strength of their alleged title deeds Exs.A1 and A2 as above noted. No doubt, at the earliest point of time, the defendant has not raised any objection to the cement construction put up by the plaintiffs in the suit property. According to the defendant, the said construction had been put up in 1989. Per contra, it is argued by the plaintiffs that the cement construction had been put up in 1963 itself and accordingly, the plaintiffs had been enjoying the same over a long period of time and hence, the plaintiffs have acquired title to the suit property as such and thereby, prescribed title to the suit property by way of adverse possession also. However, there is no material forthcoming on the part of the plaintiffs to safely hold that the alleged cement construction had been put up by the plaintiffs in the suit property during 1963 and thereby, became entitled to claim right to the suit property by way of prescription. With reference to the abovesaid claim of enjoyment of the suit property right from

1963 onwards, no acceptable document is forthcoming on the part of the plaintiffs other than Exs.A1 to A4 and as above discussed, Exs.A1 & A2 do not point out the title of the suit property in favour of the plaintiffs and from Exs.A3 & A4, we cannot come to the conclusion that they had been in the possession and enjoyment of the suit property as the absolute owners right from 1963 onwards. Thus, it is found that the plaintiffs cannot be allowed to raise the plea of enjoyment of the suit property from 1963 onwards to the knowledge of one and all including the defendant and thereby, claim title by prescription in the absence of any material pointing to the same. Further, as noted by the Courts below, the documents marked as Exs.B2 to B4 also go to show that the ABCD portion has been only treated as the common pathway by one and all and the same would also go to discredit the claim of ownership of the plaintiffs in respect of the suit property as their own exclusive property.

11. As regards the claim of title to the suit property by way of prescription, as above discussed, when the plaintiffs have not established clearly that the suit property has been in their possession and enjoyment beyond the statutory period and to the knowledge of one and all by exercising absolute title, with reference to the same, openly and continuously by exhibiting animus attitude to one and all, in the light of the principles of law outlined in the decision reported in CDJ 1997 MHC 764 (Singaravelu Mudaliar and Others Vs. Lakshmi Ammal) relied upon by the defendant's counsel, it is found that the parameters for establishing the plea of adverse possession not having been established by the plaintiffs, particularly, by placing acceptable documents and when the so called document on the part of the defendant with reference to the abovesaid claim of the plaintiffs is found to be not advancing the case of the plaintiffs to claim the right by way of prescription, particularly, when according to the defendant, the stone construction had been erected only during 1999 and he had not objected at that point of time on account of the smooth relationship which he had with the plaintiffs and further, according to the defendant, when only the plaintiffs started interfering with his possession and enjoyment, he had been necessitated to object the construction put up by the plaintiffs and in such view of the matter, it is found that the defendant cannot be held to have acquiesced to the hostile possession and enjoyment of the suit property by the plaintiffs as their own and in such view of the matter, the plea of adverse possession projected by the plaintiffs for claiming title to the suit property as such cannot be accepted. As rightly contended by taking the plea of adverse possession, impliedly, the plaintiffs have admitted the title of the defendant and others in respect of the suit property.

12. The commissioner's report and plan marked as Exs.C1 to C4 by itself would not be useful to sustain the claim of title to the suit property by the plaintiffs. As rightly determined by the Courts below, the parties cannot be allowed to rely upon the commissioner's report and plan for claiming title to the property in dispute and such being the position, it is found merely because that the commissioner had noted the enjoyment of the suit property by the plaintiffs that by itself could not be construed that the plaintiffs are having a valid title to the suit property.

13. Considering the materials placed on record, as above discussed, when it is found that the suit property has been described as the public pathway and enjoyed by one and all and accordingly, when the plaintiffs have failed to establish their independent title to the suit property as such, it is found that the contention projected by the plaintiffs that the defendant has failed to establish the claim of the usage of the suit property as a public pathway by one and all and on that basis, the plaintiffs' case should be accepted, in my considered opinion, the above contention does not merit acceptance. The plaintiffs having come forward with the suit seeking specific reliefs, should establish their case by placing acceptable and reliable materials. The plaintiffs cannot be allowed to point to the weakness of the defence version and thereby, endeavour to succeed in their case without placing any proof in support of their case. When the materials available on record go to disclose that the suit property had been described as the public pathway or street in all the documents and the document of title of the defendant also had been since rectified and the plaintiffs having failed to establish their title to the suit property by prescription as above discussed, it is found that the Courts below are justified in negating the reliefs sought for by the plaintiffs.

14. The question as to the failure of the defendant to establish the suit property as the public pathway/street does not assume importance, particularly, when the plaintiffs have failed to establish their claim of exclusive title to the same. In such view of the matter, the contention of the plaintiffs' counsel that unless the plaintiffs are shown to have transferred the suit property to the Panchayat for the common enjoyment of the same, the suit property cannot be deemed to be the public pathway / street vested with Panchayat as projected by the defendant cannot be countenanced as that question does not arise, inasmuch as the plaintiffs have failed to establish their exclusive title of the suit property as above discussed. Therefore, the further consideration as to whether the plaintiffs had transferred their alleged right in respect of the

suit property to the Panchayat need not be gone into when the said exigency does not arise. In such view of the matter, the decisions relied upon by the plaintiffs' counsel reported in (2000) 3 M.L.J.10 (A.Komalavalli Vs. The Madras Area Defence Services Co-operative House Construction Society Ltd.,) & 2015 (4) CTC 25 (The Commissioner, Bhyavani Municipality, Bhavani Vs. C.Ramasamy (Deceased) and three others) would not apply to the facts and circumstances of the present case.

15. In view of the above discussions, merely because, the document marked as Ex.A4 described the subject matter of the suit as belonging to the plaintiffs in the boundary recitals that by itself would not be sufficient to construe that the suit property belongs to the plaintiffs, particularly, when the same had been since rectified lawfully by the defendant by way of Ex.B6. In such view of the matter, there is no question of any estoppel on the part of the defendant in disputing the alleged claim of title to the suit property by the plaintiffs. Therefore, it is seen that the boundary recitals contained Ex.A4 by itself would not entitle the plaintiffs to seek any exclusive claim of title to the suit property. The substantial question of law formulated in the second appeal is answered against the plaintiffs and in favour of the defendant.

In view of the above discussions, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

sms

To

1. The Subordinate Judge, Dharapuram.
2. The District Munsif Court, Dharapuram.
3. The Section Officer, V.R.Section,
High Court, Madras.(2 Copies)

+1cc to Mr.N.Manokaran, Advocate, S.R.No.42467
+1cc to Mr.S.Saravanan, Advocate, S.R.No.42135

S.A.No.2039 of 2004

KJI (CO)

CS/31/07/18