

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :02.07.2018

PRONOUNCED ON:19.07.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.2156 of 2004

Marappan

...Appellant

Vs.

1.Selvakumar

2.Palaniappan

3.Karuppayee

4.Palanisamy

5.Lakshmi

...Respondents

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 27.01.2004 made in A.S.No.62 of 2002 on the file of the Principal District Court, Namakkal (Transferred A.S.No.100 of 1996 Sub Court, Namakkal) partly reversing the judgment and decree dated 08.08.1996 made in O.S.No.419 of 1995 on the file of the Principal District Munsif Court, Namakkal.

For Appellant : Mr.N.Manokaran

For RR1 and R2 : Mr.S.Senthilnathan

RR3 to R5 : No appearance

Set exparte

Vide order of Court dated 02.07.2018

J U D G M E N T

Challenge in this second appeal is directed against the judgment and decree dated 27.01.2004 passed in A.S.No.62 of 2002 on the file of the Principal District Court, Namakkal, partly reversing the judgment and decree dated 08.08.1996 passed in O.S.No.419 of 1995 on the file of the Principal District Munsif Court, Namakkal.

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

3. Suit for permanent injunction.

4. The case of the plaintiff in brief is that the plaintiff has filed a plan along with the plaint and the plaintiff's property has been shown as "P" in the plaint plan and the property belonging to the defendants 1 to 3 has been shown as "D" and the property belonging to the defendants 4 and 5 has been shown as "D1" in the plaint plan. The suit property belonged to the plaintiff's parents by virtue of the sale deeds dated 16.11.1942 and 13.05.1963 and accordingly the plaintiff's parents and thereafter, the plaintiff has been in possession and enjoyment of the suit property shown as "P" in the plaint plan and on account of continuous and long enjoyment of the suit property for more than 50 years, the plaintiff has also prescribed title to the suit property by way of prescription and other than the plaintiff, no one is entitled to the suit property and the above said sale deeds clearly depict the measurements, extent and the boundaries of the suit property and the house put up in the suit property bears the door No.3/65 and it is only the plaintiff, who has been paying the tax for the above said superstructure. Accordingly, the plaintiff has been enjoying the suit property and the defendants being enraged over the refusal of the plaintiff to sell his property at a low price, are attempting to interfere with the plaintiff's possession and enjoyment of the suit property and hence left with no other alternative, the plaintiff has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants in brief is that the suit laid by the plaintiff is not maintainable either in law or on facts. The plaintiff has projected the plaint plan without showing the pathway in the property shown as "P" and the said pathway is already reflected in village records and even in the Commissioner's report and plan, the pathway has been shown as R2 to R4 for the access to their property shown as "D". On the above ground, the suit is liable to be dismissed. The plaintiff and his predecessors in interest had been enjoying the suit property only excluding the pathway shown as R2 to R4 and therefore, it is false to state that the plaintiff has been in possession and enjoyment of the suit property described in the plaint without any interference right from the days of his predecessors in interest and the plaintiff has to establish the same and it is false to state that the defendants enraged over the refusal of the plaintiff to sell the suit property at a low price, interfered with his possession and enjoyment of the suit property, the plaintiff has no cause of action to lay the suit and hence the suit is liable to be dismissed.

6. In support of the plaintiff's case, P.W.1 was examined. Exs.A1 and A2 were marked. On the side of the defendants' D.Ws.1 to 3 were examined and Exs.B1 and B2 were marked. Exs.C1 and C2 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 decree the suit as prayed for. On Appeal, the first appellate court, on an appreciation of the materials placed on record, disposed of the Appeal preferred by the defendants 2 and 4 by confirming the judgment and decree of the trial court in all aspects excepting the portion shown as R1 to R4 in Exs.C1 and C2 and accordingly disposed of the First Appeal. Aggrieved over 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 findings of the First Appellate Court is correct in law in granting the relief to the defendants merely on the basis of the report of an advocate commissioner in the absence of any pleadings or evidence either oral or documentary to confer right on the defendants to use the suit property which is exclusively belongs to the plaintiff under Ex.A1 and Ex.A2?

(ii) Whether the Report and plan of the Advocate Commissioner has any binding effect on the First Appellate Court in the absence of any other oral or documentary evidence more particularly it could only help the court for appraisal of the situation and for better understanding of the evidence of the parties and it cannot be the sole basis for a judgment?

9. The suit has been laid by the plaintiff for permanent injunction. The plaintiff claims title to the suit property as described in the plaint on the strength of the sale deeds dated 16.11.1942 and 13.05.1963 marked as Exs.A1 and A2. According to the plaintiff, the suit property belonged to his parents by way of purchase as per the abovesaid sale deeds and accordingly, it is his case that his parents and thereafter he, who had been in possession and enjoyment of the suit property, as described in the plaint continuously for more than 50 years and inasmuch as the defendants interfered with his possession and enjoyment of the suit property without any authority, according to him, he has been necessitated to lay the suit for appropriate reliefs.

10. The defendants in the written statement have not, as such, disputed the title of the plaintiff to the suit property on the strength of the sale deeds marked as Exs.A1 and A2 and all that they would plead is that the plaintiff has suppressed the pathway R2 to R4 in the suit property as pointed by the Advocate Commissioner, in his report and plan marked as Exs.C1 and C2 and according to the defendants, the above said pathway has been used by them for their access to their property and accordingly put forth the defence to resist the plaintiff's suit.

11. Thus, it is found that the defendants have not impugned the title deeds of the plaintiff marked as Exs.A1 and A2 on the basis of which the plaintiff claims title to the suit property. As rightly analyzed by the trial court, when the description of the properties available in Exs.A1 and A2 with the description of the property belonging to the plaintiff shown as "P" in the plaint plan, it is found that there is no discrepancy whatsoever, accordingly, it is seen that the plaintiff has prepared the plaint plan only as per the description of the properties contained in Exs.A1 and A2 and it is thus found that as rightly determined by the trial court, there is no pathway in existence by one pavayee's husband's land and the defendants' land and such being the position, now relying upon the Commissioner's report and plan, according to the defendants, to the east of Pavayee's husband land, there is a pathway running north-south and the said pathway branches towards west as RR1 and again turns towards north as R2-R4 and thereby the pathway reaches the defendants' house. However, when such a pathway is not depicted in the sale deeds marked as Exs.A1 and A2 which had come into the existence during 1942 and 1963 and when the plaintiff's property shown as "P" in the plaint plan coincides in all particulars with the description of the property found in Exs.A1 and A2 as analyzed and determined by the trial court, it is seen that merely from the Commissioner's report and plan marked as Exs.C1 and C2, we cannot presume that there is a pathway as R1-R6 on ground. Even as per the Commissioner's report and plan, it is found that the pathway shown as R4-R6 is not in use and found to be full of shrubs and trees and as per the Commissioner's report and plan, the pathway shown as R2-R4 seems to be in use. However, when as per the documents of title projected by the plaintiff, there is no pathway available in the plaintiff's property, particularly, no pathway available between the Pavayees' house and the defendants' land, it is found that merely because, the Commissioner has noted the existence of some pathway as depicted in his plan, we cannot presume that such a pathway is available on ground as determined by the first appellate court. That apart, the defendants have not pleaded in the written statement as to what is the nature of the right they seek to enforce in

respect of the alleged pathway as pointed out by the Advocate Commissioner. Very vaguely they had averred that the plaintiff has come forward with the suit seeking the reliefs suppressing the pathway in the suit property and other than that, the defendants have not claimed as to the nature of the right they seek to enforce in respect of the alleged pathway as depicted in the Commissioner's report and plan. It has not been made clear as to whether the defendants are seeking any easementary right in respect of the said pathway, by way of necessity, grant or prescription or they seek to enforce any absolute right over the said pathway or any common right over the said pathway and accordingly when the defendants have not projected the nature of the right, they seek to enforce in respect of the alleged pathway and if at all the defendants have any semblance of right over the alleged pathway and if the same had been in existence in the plaintiff's property i.e., the suit property, the same would have been reflected in the documents of title pertaining to the defendants property. However, conveniently the defendants have not filed any documents of title as regards the their properties and with reference to the same, no reason is forth coming on the part of the defendants. If really the pathway now sought to be projected and under challenge, as described in the Commissioner's report and plan had been in existence from time immemorial, particularly, in the plaintiff's suit property, definitely the same would have been reflected in the defendants' documents of title conferring some right, in respect of the same in favour of the defendants. However, as above seen, the defendants have suppressed their documents of title and seemed to have relied only upon the Commissioner's report and plan for sustaining some kind of right in the alleged pathway. However, when with reference to the same, there is no clear plea projected by the defendants in the written statement as regards the nature of right, they seek to enforce and the defendants have also not made any counter claim in the written statement as regards the said pathway, it is seen that as rightly put forth by the plaintiff's counsel on the basis of the Commissioner's report and plan, a party cannot be allowed to seek any right with reference to the alleged pathway sans the establishment of any right to the same as per law. As rightly put forth by the plaintiff's counsel, the purpose of the inspection of the properties in dispute by the Commissioner and his report is only to know the physical features obtaining in the suit property and nothing more that and in such view of the matter, when no doubt, the Commissioner in his report and plan had noted the existence of some pathway and even with reference to the same, the pathway shown as R4 -R6 is not in use and when it is seen that there is no reliable material placed by the defendants to show that they have any right over the alleged pathway one way or the other, though the same lies in the plaintiff's property, only on the establishment of any kind of

right, it is found that the defendants would be entitled to seek the relief with reference to the same. Accordingly, it is found that the defendants knowing fully well that they had not been granted any right in respect of the alleged pathway as pointed out by the Commissioner and also not sought to enforce the same in the written statement by making a counter claim and that apart, as above seen, the defendants having failed to establish the nature of right over the alleged pathway which they seek to enforce by producing their documents of title, no doubt the plaintiff has not filed any objection of the Commissioner's report and on that basis alone, we cannot hold that the plaintiff had accepted the pathway right in the suit property. When as per the documents of title projected by the plaintiff marked as Exs.A1 and A2, it is seen that the property comprised therein and described in the plaint plan tally with each other in all aspects as analyzed and found by the trial court and on the basis of the same, when it is found that there is no pathway in existence in the suit property as such and even assuming for the sake of arguments that such a pathway do exist in the suit property, when the defendants have not sought to enforce any right in respect of the said pathway and also failed to establish the nature of the right which they seek in respect of the suit pathway, accordingly, it is found that without being any right vested over the same and without also establishing the same, the approach of the first appellate court in granting the reliefs in favour of the defendants in respect of the alleged pathway cannot at all be countenanced in the eyes of law and thus it is found that the judgment and decree of the first appellate court partly reversing the judgment and decree of the trial court do not merit acceptance in any manner.

12. In the light of the above discussions, the first appellate court is found to have erred in law in granting the relief to the defendants in respect of the alleged pathway merely on the basis of the report of the Advocate Commissioner in the absence of any pleadings or evidence either oral or documentary for the entitlement of any right in favour of the defendants in respect of the same. When it is noted that as per Exs.A1 and A2, the suit property inclusive of the alleged pathway only belongs to the plaintiff, the defendants cannot be allowed to seek any right in respect of the alleged pathway in the suit property, without establishing the same. Further, it is also found that in the absence of the establishment of any right by the defendants as regards the alleged pathway, the first appellate court should not have granted the reliefs in favour of the defendants merely on the strength of the Commissioner report and plan, when it is seen that the Commissioner's report and plan cannot be the basis for conferring the title on a party in respect of subject matter in issue and the Commissioner's report and plan are intended only for the better understanding of the

topography and the physical features of the subject matter and for the better understanding of the evidence of the parties adduced in the matter so as to adjudicate the issues involved in the matter properly.

13. The defendants though have projected Exs.B1 and B2 had not established the same to be true documents by examining the authors of the same and when there is no material placed by the defendants to show that the abovesaid documents had been duly issued by the authorities concerned, in the absence of any official seal contained in the same, the trial court was fully justified in rejecting the said documents. However, in the first appellate court, an additional document has come to the projected by the defendants and marked as Ex.B3 by the first appellate court. When the documents marked as Exs.B1 and B2 have been not established to be genuine by the defendants by adducing acceptable evidence, it is found that the first appellate court had erred in receiving the additional evidence sought to be projected by the defendants on the footing that the same is only the certified copy of Ex.B2 and even assuming for the sake of arguments, the first appellate court had decided that Ex.B3 would be useful to adjudicate the issues involved in the suit, should have given an opportunity to the parties to test the veracity and authenticity of Ex.B3 in the manner known to law and without any exercise in that regard, the approach of the first appellate court in straightaway entertaining Ex.B3 as such cannot be countenanced and it is thus found that the appellate court seems to have accepted the defendants' case purely on the basis of Ex.B3. Further, even assuming for the sake of arguments that Ex.B3 is entitled for acceptance, however, when the defendants have not pleaded and established as to the nature of the right, they seek to enforce in respect of the alleged pathway and when the alleged pathway is found to be forming part of the property belonging to the plaintiff by virtue of Exs.A1 and A2, it is found that the first appellate court has erred in granting the reliefs in respect of the alleged pathway in favour of the defendants without they claiming any right to the same whatsoever and also without any materials placed by the defendants establishing the nature of the right they seek to enforce in respect of the same. Accordingly, the substantial questions of law formulated in the second appeal are answered against the defendants and in favour of the plaintiff.

14. In conclusion, judgment and Decree dated 27.01.2004 passed in A.S.No.62 of 2002 on the file of the Principal District Court, Namakkal particularly, granting the reliefs in favour of the defendants as regards the portion shown as R to R4 in Exs.C1 and C2 are set aside and in other aspects the judgment and decree of the first appellate court are

confirmed. Accordingly the judgment and decree dated 08.08.1996 passed in O.S.No.419 of 1995 on the file of the Principal District Munsif Court, Namakkal are restored in full. Accordingly the Second Appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar (CS-IV)

// True Copy//

Sub Assistant Registrar

To

1. The Principal District Judge,
Principal District Court,
Namakkal.
2. The Principal District Munsif,
Principal District Munsif Court,
Namakkal.

+1cc to Mr.N.MANOKARAN, Advocate SR.No.48255

+1cc to Mr.S.SENTHILNATHAN, Advocate SR.No.47972

Judgment made in
S.A.No.2156 of 2004

GJ(CO)
SMI/23.08.2018

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