

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A. No.1390 of 2007

and

M.P. No.1 of 2007

Rajendran

... Appellant

Sambasiva Chettiar

Vs

... Respondent

Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and decree A.S. No.4 of 2007 on the file of Sub Court, Tirupattur, dated 24.09.2007 in reversing the well considered judgment and decree in O.S. No.238 of 2000 on the file of the District Munsif Court, Tirupattur, dated 14.10.2006.

For appellant : Mr.V. Raghavachari

For respondent : Served - No appearance

JUDGMENT

This Second Appeal has been filed challenging the judgment and decree dated 24.09.2007 passed by the Sub Court, Tirupattur in A.S. No.4 of 2007 reversing the judgment and decree dated 14.10.2006

passed by the Principal District Munsif Court, Tirupattur in O.S. No.238 of 2000.

Brief facts leading to the filing of the Second Appeal :

2.The Appellant is the defendant in the suit O.S. No.238 of 2000 on the file of the District Munsif Court, Tirupattur and the respondent is the plaintiff.

3.For the sake of convenience, the parties herein are referred to as per the rankings in the Trial Court.

4.The plaintiff filed the suit O.S. No.238 of 2000 on the file of the Principal District Munsif, Tirupattur against the defendant seeking for a declaration and permanent injunction that he is the absolute owner of the suit schedule property which is a pathway.

5.It is the case of the plaintiff that by virtue of the sale deeds dated 22.10.1929 and 10.06.1968 which were marked as Exs.A1 and A2, he is the absolute owner of the suit schedule property.

6.It is his case that the defendant is attempting to trespass into the property and therefore, he also seeks a permanent injunction in the suit. But, according to the defendant as seen from his written statement, he has been using the disputed pathway ever since the purchase of the property by sale deed, dated 23.02.1966, which was marked as Ex.B2.

7.According to the defendant, even prior to the Sale deed, dated 23.02.1966(Ex.B2), even in the parent document viz., the Sale deed 22.10.1929 (Ex.A1), there is a reference to a well which is found in the Eastern side of the pathway. Therefore, according to the defendant, the plaintiff is not entitled for the reliefs sought for in the plaint.

8.The Trial Court after framing of issues and after trial dismissed the suit O.S. No.238 of 2000 filed by the plaintiff, based on the Advocate Commissioner's report and Ex.B2 on the ground that he has not established his exclusive ownership of the pathway.

9.Aggrieved by the dismissal of the suit O.S. No.238 of 2000, the plaintiff preferred an appeal before the Sub Court, Tirupattur in A.S. No.4 of 2007.

10.The lower appellate Court by its judgment and decree dated 24.09.2007 reversed the findings of the Trial Court and allowed the appeal filed by the plaintiff.

11.Aggrieved by the same, the defendant has filed this Second Appeal.

12.Heard Mr.V.Raghavachari, learned counsel for the Appellant. Despite service of notice on the respondent and his name having been printed in the cause list today, there is no representation on his side.

Submissions of the learned counsel

13.The learned counsel for the Appellant drew the attention of this Court to the Advocate Commissioner's report as well as the sale deed by which the defendant purchased his property viz, Ex.B2. He also referred to Ex.B1 which is the parent sale deed dated 20.11.1929. Referring to Ex.B1, he pointed out that there is a reference to a well, in which the defendant's predecessors in title was having 1/4th share. He also referred to Ex.B2, sale deed in favour of the defendant, which refers to the common pathway. According to him, the Lower Appellate Court has not considered the Advocate Commissioner's report as well

as Exs.B1 and B2, which clearly indicate that the defendant is entitled to the usage of the common pathway, which is the only access to the well, which is marked Yellow in the sketch attached to the Advocate Commissioner's report. According to him, the Trial Court considered the same and only thereafter dismissed the suit.

14.At the time of the admission of the Second Appeal on 07.12.2007, the following Substantial questions of law were framed by this Court :-

1. When the recitals of 1929 document (Ex.B1) and the revenue records disclose the existence of a common passage and under such circumstance whether the lower appellate court is justified in granting a declaratory relief sought for by the plaintiff?

2. When the recitals of Ex.B1 and B2 clearly establishes the factum of conveyance of the right on the suit lane in favour of the defendant's predecessor in title, whether the lower appellate court is justified in granting a declaratory right based on wrong premise of law?

15.This Court has perused the materials and evidence available on record as well as the impugned judgments of the Courts below .

16.As seen from Ex.B1, which is the parent document for the sale deed dated 23.02.1966 Ex.B2, there is a reference to a well and under the said sale deed, the predecessor in title of the defendant was given $\frac{1}{4}^{\text{th}}$ share in the usage of well. Under Ex.B2, the sale deed through which the defendant became the absolute owner of his property, the defendant was given the right to use the common pathway which has been disputed by the plaintiff. As seen from the sketch attached to the Advocate Commissioner's report which was marked as Exs.C1 and C2, the access to the Well for the defendant is only through the common passage. There is no other access available to the defendant to the said well. This being the case, as rightly pointed out by the learned counsel for the Appellant and as evidenced from Exs.B1, B2 as well as the Advocate Commissioner's report, the plaintiff cannot have exclusive usage of the common passage, which is marked red in the plan attached to the Advocate Commissioner's report.

17.This Court has also perused the deposition of PW1, who has categorically admitted that the defendant had constructed a stairway in the Northern side of his house for bailing out water and further admitted the suit property is used as common pathway to reach the well.

18.The defendant's right to enjoy the suit lane is conveyed to him by his predecessors in title under Ex.B1. The document under Ex.B1, the parent deed and Ex.B2 does disclose the existence of a common passage. Infact, Ex.B3 is a joint patta issued in the name of the plaintiff and the defendant for Survey No.186/5 in which the Well is located.

19. The lower Appellate Court by total non application of mind has misconstrued the Advocate Commissioners report Ex.C1 and has wrongly concluded that the defendant's house is facing on the Southern side and is having access in the Vellore Highway. When there is an absolute right for the defendant to enjoy the suit lane with the plaintiff to access the Well, the lower Appellate Court ought not to have come to the conclusion that since the defendant is having an alternate access from the front portion of his house, he is not entitled for the usage of the common lane.

20.For the foregoing reasons, this Court is of the considered view that the lower Appellate Court by total non application of mind has reversed the findings of the Trial Court, which has rightly

dismissed the suit as the plaintiff has not established the exclusive right of usage over the common pathway.

21.In the result, the substantial questions of law formulated by this Court have to be answered against the plaintiff. Accordingly, the Second Appeal is allowed by setting aside the judgment and decree of the dated 27.09.2007 passed by the sub court Tirupattur in A.S.No.4 of 2007 and confirming the judgment and decree passed by the learned District Munsif, Tirupattur in O.S.No.238 of 2000. No costs. Consequently, connected miscellaneous petition is closed.

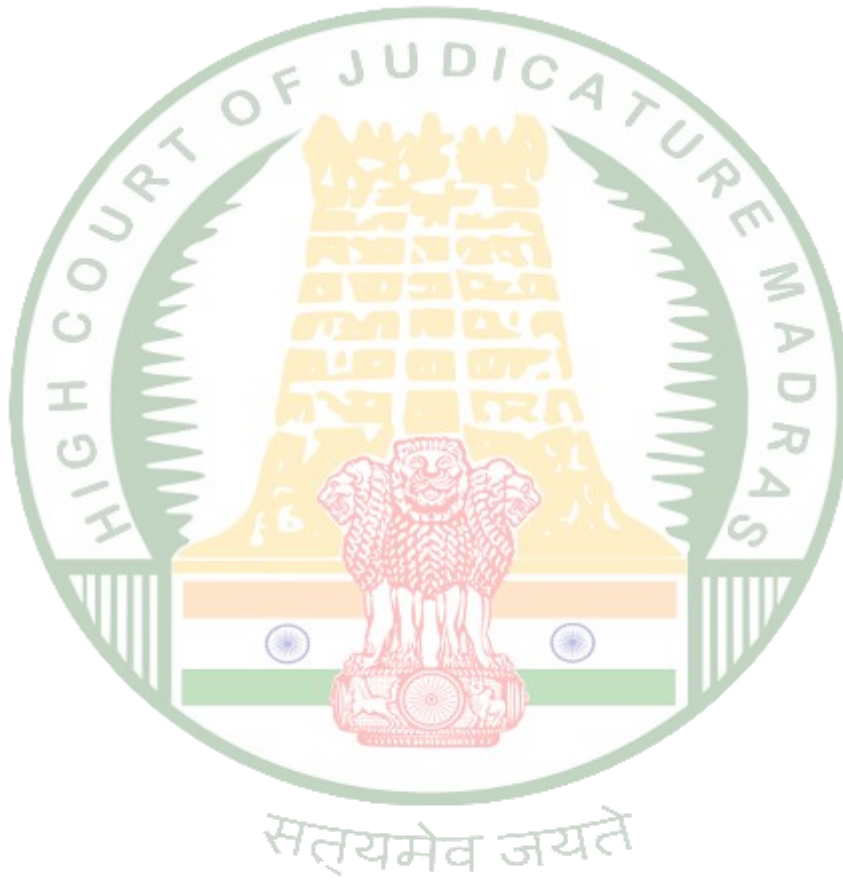
14.11.2019

Index: Yes/ No
Internet: Yes/No
Speaking Order/Non-speaking Order
vsi2

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To

1. The Sub Judge, Tirupattur.
2. The District Munsif, Tirupattur.



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ABDUL QUDDHOSE, J.
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