

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A. No.439 of 2008

Ramasamy Gounder ... Appellant/Appellant/Plaintiff

Vs

Rasu ...Respondent /Respondent/Defendant

Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and decree dated 19.09.2006 made in A.S. No.9 of 2006 on the file of the Additional District Court, Fast Track Court No.IV, Bhavani - confirming the judgment and decree dated 24.11.2003 made in O.S.No.102 of 2001 on the file of the II Additional District Munsif Court, Bhavani.

For appellant : Ms. Zeenath Begum
for Mr.T. Murugamanikkam

For respondent : N. Manokaran

JUDGMENT

This Second Appeal has been filed challenging the concurrent findings of the Courts below.

Brief facts leading to the filing of the Second Appeal

2. The appellant is the plaintiff in the suit O.S. No.102 of 2001 on the file of the II Additional District Munsif Court, Bhavani and the respondent is the defendant.

3. The suit was filed for a declaration to declare that the plaintiff's easementary right of cart track in the suit properties and the plaintiff has also sought for a permanent injunction restraining the defendant from interfering with the plaintiff's usage of the suit cart track.

4. It is the case of the plaintiff that the suit cart track is absolutely owned by her and his forefathers were

also using the suit cart track for more than 250 years. It is the case of the plaintiff that the defendant has illegally put up temporary obstructions in the suit cart track by placing stones and dry thorns. According to the plaintiff, the defendant is a politically influential person and he is preventing the plaintiff from using the suit cart track. Under these circumstances, the suit has been filed by the plaintiff seeking for declaration and permanent injunction.

5. A written statement has also been filed by the defendant denying the allegations contained in the plaint. According to the defendant, the suit cart track does not belong to the plaintiff. It is his case that even when the defendant purchased the property on 11.02.1998 under a sale deed, there was no suit cart track, as claimed by the plaintiff. Further, it is the case of the defendant that as seen from the written statement that the defendant and his father have filed a suit in O.S. No.157 of 2001 against the plaintiff for an injunction restraining the plaintiff from interfering with his peaceful possession and enjoyment of the cart track, which is claimed by the plaintiff. Therefore, according to the defendant, the plaintiff is not entitled for an easement by necessity of the usage of the suit cart track. According to him, the question of prescriptive right or right of necessity to the plaintiff for usage of cart track does not arise at all.

6. The Trial Court after framing of issues and after trial dismissed the suit filed by the plaintiff in O.S.No.102 of 2001 on the ground of res judicata, as the defendant has already instituted the suit pertaining to the same property and has obtained a declarative relief against the plaintiff in the said suit declaring that the subject matter of the property comprised in Survey Nos.284 of 2002 and 284 of 2003 belongs to the defendant.

7. Aggrieved by the dismissal of the suit, the plaintiff preferred an appeal before the Additional District Judge, Fast Track Court IV, Bhavani in A.S.No.9 of 2006. The Lower Appellate Court by its judgment and decree dated 19.09.2006 passed in A.S. No.9 of 2006 confirmed the findings of the Trial Court and dismissed the appeal filed by the plaintiff.

8. Aggrieved by the same, this Second Appeal has been filed by the plaintiff in the suit.

9. Heard Ms.Zeenath Begum, learned counsel appearing for the appellant and Mr.N.Manokaran, learned counsel appearing for the respondent.

10. At the time of the admission of the Second Appeal on 20.09.2016, the following Substantial question of law was framed by this Court :-

Whether the finding that the present suit is barred by res judicata can be sustained, wherein there is no pleading to such effect?

11. It is not in dispute that the defendant in the suit has obtained a judgment and decree against the plaintiff in O.S.No.157 of 2001 before the II Additional District Munsif Court, Bhavani and the Court had granted the declarative relief in respect of the properties comprised in Survey Nos.284 of 2002 and 284 of 2003.

12. The disputed cart track which is the subject matter of the suit O.S. No.102 of 2001 instituted by the appellant also falls under the same survey Nos. Viz., 284 of 2002 and 284 of 2003. A categorical stand has been taken by the defendant in the suit O.S. No.102 of 2001 that there is no cart track in existence. Before the Trial Court, excepting for filing kist receipts which were marked as Ex.A1 and A2 and the notice sent by the plaintiff to the Inspector of Police, Anthiyur dated 28.06.2001 which was marked as Ex.A3, the plaintiff has not filed any other document to establish her title over the suit cart track.

13. The judgment and decree passed in O.S. No.157 of 2001 in favour of the defendant and his father was marked as Exs.B1 and B5.

14. The Trial Court has considered the judgment and decree Exs.B1 and B5 as well as the earlier decree passed in favour of the defendant's vendor, which were Exs.B2 and B3 and only thereafter, the Trial Court has come to the conclusion that the plaintiff is not entitled for the relief claimed in the plaint.

15. It is settled position of law that when a party who approaches the Court for any relief will have to establish his or her title through proper evidence. In the instant case, excepting for filing kist receipts and a notice, no title deed or any other documentary evidence has been produced by the appellant to establish that he is the absolute owner of the suit cart track. Further, as seen from Exs.B1, B2, B3 and B5, there is already a verdict given by a Court that the subject properties which the plaintiff claims in the suit O.S. No.102 of 2001 belongs absolutely to the defendant. Therefore, both the Courts below have rightly concluded that the plaintiff is not

entitled for the relief of declaration and permanent injunction, as prayed for in O.S. No.101 of 2002.

16. The learned counsel for the appellant has cited the decision of the Hon'ble Supreme Court in the case of V.Rajeshwari vs. T.C.Saravanabava reported in 2004 II LW 373, wherein the Hon'ble Supreme Court has held that the foundation of res judicata must be on the pleadings and the issue must be framed and tried.

17. The Hon'ble Supreme Court further held that a plea not properly raised in the pleadings at the stage of trial would not be permitted for the first time at the appellate stage.

18. In the case on hand, a specific pleading was taken in the written statement by the defendant in the suit that he has already filed a suit O.S. No.157 of 2001 against the plaintiff seeking declaration that he is the absolute owner of the properties comprised in Survey Nos.284 of 2002 and 284 of 2003, where the disputed cart track is located. Therefore, the Trial Court has considered the said judgment and decree passed in O.S No.157 of 2001 and only thereafter has come to the conclusion that the suit is hit by res judicata and the plaintiff is not entitled for the relief claimed in the plaint.

19. Therefore the judgment of the Hon'ble Supreme Court relied upon by the learned counsel for the appellant is not applicable to the facts of the instant case.

20. In the result, the judgment and decree of the Courts below are confirmed. The Substantial questions of law formulated by this Court at the time of admission of this appeal is answered against the appellant. Accordingly, the Second Appeal is dismissed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

vsi2

To

1. The Additional District Judge,
Fast Track Court No.IV,
Bhavani.

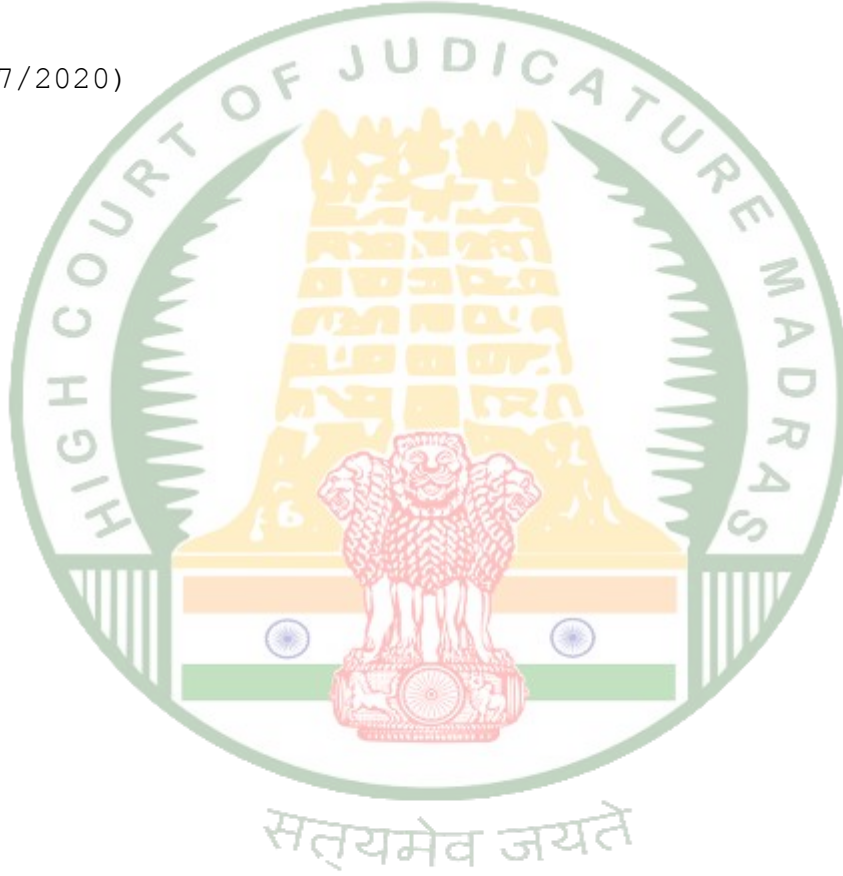
2. The II Additional District Munsif,
Bhavani.

Copy to:
The Section Officer,
VR Section, High Court, Madras-104.

+1cc to Mr.V.Rajesh, Advocate, S.R.No.95017
+1cc to Mr.N.Manokaran, Advocate, S.R.No.94832

S.A. No.439 of 2008

PM(CO)
CB(22/07/2020)



WEB COPY