

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.12.2019

CORAM:

THE HONOURABLE Mr. JUSTICE G.K. ILANTHIRAIYAN

S. A. No. 1121 of 2003

1. Ranga Gounder
2. Arunachalam
3. Loganathan

... Appellants/Appellants/
Plaintiffs

-vs-

Kandapadayachi @ Kandasamy Padayachi ... Respondent/Respondent/
Defendant

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree passed by the Civil Judge Senior Division (Sub-Judge), Kallakurichi, in A. S. No. 366 of 1996 dated 11.09.1997 confirming the judgment and decree in O. S. No. 796 of 1992, passed by the District Munsif, Kalakurichi, dated 29.01.1996.

For Appellants : Mr. R. Balasubramanian

For Respondent : Notice served- no appearance

J U D G M E N T

This Second Appeal is directed as against the judgment and decree dated 11.09.1997 made in A. S. No. 366 of 1996 on the file of the (Sub-Judge), Kallakurichi, confirming the judgment and decree dated 29.01.1996 in O. S. No. 796 of 1992 on the file of the District Munsif, Kalakurichi.

2. For the sake of convenience, the parties are referred to, as per their ranking in the trial Court.

3. The case of the plaintiffs in brief is that, the suit schedule property was purchased by the father of the first plaintiff on 01.06.1963. Thereafter, the second and third plaintiffs being the sons of first plaintiff i.e., Ranga Gounder are in possession and enjoyment of the property. The suit property comprised in S. A. No. 5/4 measuring 35 cents have been enjoyed by the plaintiffs. Therefore, the defendant has no right or title over the suit schedule property. In fact, the defendant

had separate pathway to reach his land comprised in S. A. No. 5/3. Even then, the defendant tries to put up a road in the land belonging to the plaintiffs comprised in S. A. No. 5/4.

4. Resisting the same, the defendant filed a written statement and stated that, only through the suit schedule property there is a pathway to reach his land. In fact, the property belonging to the defendant was purchased from one Ramasamy and subsequently, he objected the said pathway. The defendant already filed a suit in O. S. No. 641 of 1994 and the same was decreed in favour of the defendant in respect of very same property. Suppressing the said fact, the plaintiffs come forward with the present suit. Therefore, the defendant prayed for dismissal of the suit.

5. On the side of the plaintiffs, PW1 and PW2 were examined and Exs. A1 to A8 were marked. On the side of the defendant, DW1 was examined and Exs. B1 and B2 were marked. The Advocate Commissioner report and his plan were marked as Exs. C1 and C2. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court dismissed the suit filed by the plaintiffs. Aggrieved by the same, the plaintiffs filed an Appeal Suit in A. S. No. 366 of 1996 and the same was also dismissed. Aggrieved by the same, the plaintiffs preferred this Second Appeal.

6. At the time of admission of the Second Appeal, the following substantial questions of law were framed :-

- " i) Whether or not the Courts below erred in holding the suit as barred by res judicata when especially earlier suits viz., O. S. No. 641 of 1984 and O. S. No. 729 of 1985 were disposed off ex-parte / abatement wherein there was no full and final adjudication of the rights of the parties?
- ii) Whether or not the Courts below failed to note that the judgment made in O. S. No. 641 of 1984 was ex-parte order going into the merits of cases and the same will not operate as res judicata in the instant case as held in the case reported in AIR 1971 S.C. page 664?
- iii) Whether or not in the Lower Appellate Court was justified in upholding the case of the defendants when especially the defendants have miserably failed to establish the pathway in S. No. 5/3 was exclusively used by third party by letting oral and documentary

evidence?

iv) Whether or not the Courts below failed to shift the burden on the defendant to establish that the pathway in S. No. 5/3 was exclusively used by third party alone?

Notice."

7. Heard Mr. R. Balasubramanian, learned counsel appearing for the appellants.

8. It is seen that in respect of the very same property, already the defendant filed a suit in O. S. No. 641 of 1994 and the same was decreed in favour of the defendant. Thereafter, the defendant also filed an Execution Petition as against the said Ramasamy, who is none other than the vendor of the defendant, in which, the said Ramasamy filed an undertaking affidavit that he will not interfere with the peaceful possession and enjoyment of the suit property. Recording the said submission, the EP was closed. Now the plaintiffs also filed a suit for the same relief in respect of the very same property as against the defendant. Further, the plaintiffs did not prove their title or right over the suit schedule property. Therefore, the present suit is hit by res judicata and it is not maintainable.

9. Considering the above facts and circumstances, this Court is of the opinion that the Courts below rightly considered the evidence on record both orally and documentary and dismissed the suit. Therefore, this Court does not find any point to interfere with the judgment and decree passed by the Court below.

10. In the light of the above discussions, the substantial questions of law formulated in the Second Appeal are answered accordingly in favour of the defendant and against the plaintiffs.

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11. Accordingly, this Second Appeal is dismissed with costs.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

To

1. The Civil Judge Senior Division (Sub-Judge),
Kallakurichi.

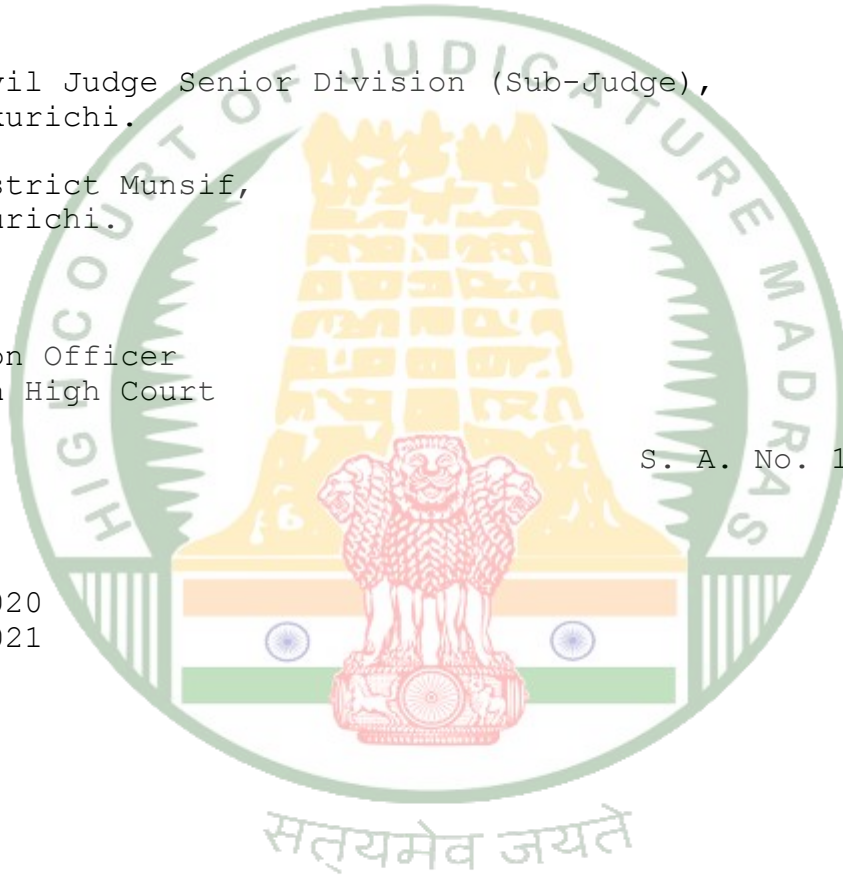
2. The District Munsif,
Kallakurichi.

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The Section Officer
VR Section High Court
Madras

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