

IN THE HIGH COURT OF JUDICATURE AT MADRAS  
DATED : 12.11.2019  
CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A. No.477 of 2007  
and  
MP No.1 of 2007

Sivasankaran

... Appellant/Defendant

Vs

S.B. Raman

.... Respondent/plaintiff

Second Appeal filed under Section 100 of the Code of Civil Procedure as against the judgment and decree of A.S. No.47 of 2006, dated 11.01.2007 on the file of the Subordinate Judge, Uthagamandalam, hereinafter called the "the lower Court" reversing the Judgment and decree in O.S. No.101 of 2001, dated 13.03.2006 on the file of the District Munsif Court, Coonoor.

For Appellant : Mr.S.L.Sudarsanam  
For Respondent : No appearance

JUDGMENT

This Second Appeal has been filed challenging the judgment and decree dated 11.01.2007 passed by the Subordinate Judge, Uthagamandalam in A.S. No.47 of 2006 reversing the judgment and decree dated 13.03.2006 passed by the District Munsif, Coonoor in O.S. No.101 of 2001.

Brief facts leading to the filing of the Second Appeal :

2.The appellant is the defendant in the suit O.S. No.101 of 2001 on the file of the District Munsif Court, Coonoor and the respondent is the plaintiff.

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

4.The plaintiff filed a suit against the defendant in O.S. No.101 of 2001 seeking for an injunction restraining the

defendant from interfering with his peaceful possession and enjoyment of the suit schedule property.

5.As seen from the plaint averments, the grievance of the plaintiff is that the defendant is using the foot path belonging to the plaintiff having a width of 2 feet and totally measuring 1 ½ cents unauthorisedly without the plaintiff's permission.

6.A written statement has been filed by the defendant in the suit denying the allegations of the plaintiff and stating that the pathway is common for all the residents in the locality. It is the case of the defendant that the plaintiff is not the owner of the said pathway having a width of 2 feet and totally measuring 1 ½ cents.

7.The Trial Court after framing issues and after trial dismissed the suit on 13.03.2006 on the ground that the plaintiff has not established his title over the 2 feet pathway measuring 1 1/2 cents.

8.Aggrrieved by the dismissal of the suit, the plaintiff filed an appeal before the Sub Court at Uthagamandalam in A.S. No.47 of 2006.

9.By judgment and decree dated 11.01.2007 in A.S. No.47 of 2006, the lower appellate Court reversed the findings of the Trial Court based on the Advocate Commissioner's report and allowed the appeal filed by the plaintiff and granted the injunction as prayed for in the suit.

10.Aggrrieved by the judgment and decree dated 11.01.2007 passed in A.S. No.47 of 2006, this Second Appeal has been filed by the defendant in the suit.

11.At the time of the admission of the Second Appeal, the following Substantial questions of law were formulated by this Court :-

- a) Whether the Lower Court is right in holding that the burden of proof to prove the case lies with the Defendant instead of the Plaintiff?
- b) Whether the Plaintiff is liable to prove his case with proper documents and evidence or the Defendant is liable to prove the case?
- c) Can the lower court insist on the Defendant to prove the case in a bare injunction suit filed by the Plaintiff instead of Plaintiff proving his case before the trial Court?
- d) Is the Lower Court right in ignoring the admissions made by the Plaintiff regarding the

existence of the footpath and that the Defendant has easementary right over the passage and his usage of the said passage for more than 60 years?

e) Is the lower court right in granting permanent injunction against the person who has been using the passage with all rights for more than 60 years and it has been admitted by the Plaintiff that the passage is an absolute necessity for the Defendant to approach his property?

12. Heard Mr. S.L.Sudarsanan, learned counsel for the appellant. Despite service of notice on the respondent and a counsel having entered appearance in this Second Appeal, there is no representation on their side.

Submissions of the learned counsel

13. According to the learned counsel for the appellant, the pathway which is the subject matter of the dispute is being used by the residents of the locality for the past 60 years without any interruption whatsoever. He also drew the attention of this Court to the judgment and decree passed by the Trial Court and to the findings contained therein. He referred to the findings of the Trial Court, wherein, the Trial Court has observed that the plaintiff has not filed any documentary evidence to establish his title over the pathway having a width of 2 feet measuring 1 1/2 cents.

14. He also drew the attention of this Court to the admission made by the plaintiff (PW1) that the passage is being used by the residents for the past 60 years to reach the western side.

15. He also drew the attention of this Court to the photographs which were marked as Ex.A3, A4 and A5 and pointed out that the subject passage was being used by the residents to reach the Western side of the property. According to him, the Trial Court has rightly considered the evidence available on record and has dismissed the suit filed by the plaintiff. However according to him, the lower Appellate Court has misapplied the Advocate Commissioner's report (Ex.C1) and has erroneously come to the conclusion that the plaintiff is entitled for injunction.

16. He drew the attention of the Court to the Advocate Commissioner's report and submitted that the Advocate Commissioner report does not say anything about the disputed pathway. It only gives the description of the suit schedule property. According to him without properly applying its mind to the Advocate Commissioner's report, the lower Appellate Court has come to the conclusion that the plaintiff is the owner of the pathway measuring 1 1/2 cents. Therefore, according to him,

the judgment and decree passed by the lower appellate court has to be set aside.

Discussion :

17.This Court has perused and examined the judgments of the Courts below as well as the materials and evidence available on record. At the outset, it is very clear that there is a bonafide dispute as regards the pathway, which the plaintiff claims ownership. The plaintiff has filed the suit only for a bare injunction.

18.It is well settled by the Judgment of the Hon'ble Supreme Court in the case of Anathula Sudhakar vs. P. Buchi Reddy and Others reported in (2008) 4 SCC 594 that where the defendant asserts title and there is a threat of dispossession by the defendant, the only remedy available to the plaintiff is to file a suit for declaration of title and a suit for injunction simpliciter is not maintainable.

19.The Hon'ble Supreme Court has laid down general principles in Anathula Sudhakar's case referred to supra as to when a mere suit for permanent injunction will lie and as to when it is necessary to file a suit for declaration, possession and for injunction as a consequential relief which is reproduced hereunder:

11.1 - When a Plaintiff is in lawful or peaceful possession of a property and such possession is disturbed or threatened by the defendant, a suit for injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

11.2 - Where the title of the Plaintiff is not disputed, but he is not in possession his remedy is to file a suit for possession and seek in addition, if necessary an injunction. A person out of his possession cannot seek the relief of injunction simpliciter, without claiming the relief for possession.

11.3 Where the Plaintiff is in possession but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also threat of dispossession from the defendant, the Plaintiff will have to sue for declaration of title and consequential relief of injunction. Where the title of the Plaintiffs is under cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

20.It is now settled position of law that when there is a bonafide dispute raised by the defendant, a bare injunction suit is not maintainable and a suit for declaration of title will have to be filed.

21.In the case on hand, the plaintiff has himself admitted in his oral evidence as seen from his cross examination that the disputed pathway is being used by the residents of that locality to reach the Western side of the property for the past 60 years. The title deeds which were marked as Exs.P1 and P2 on the side of the plaintiff pertain to the suit schedule property and does not pertain to the disputed pathway having a width of 2 feet and totally measuring 1 ½ cents.

22.It is the case of the plaintiff that he is the owner of the 1 ½ feet pathway. Therefore, it is for him to establish his title over the same. As seen from records and the evidence available on record, the plaintiff has not established his title over the 1 1/2 cents having 2 feet pathway.

23.This Court has also perused and examined the Advocate Commissioner's report which was considered by the lower Appellate Court for having come to the conclusion that the plaintiff is entitled for injunction. The Advocate Commissioner's report has only furnished the details of the suit schedule property and does not mention anything about the disputed pathway having a width of 2 feet and totally measuring 1 ½ cents. However, the lower appellate court by total non application of mind has given a finding that the Advocate Commissioner has filed a report as if the 1 ½ cents pathway belongs to the plaintiff.

24.The burden of proof is on the plaintiff to establish his title over the 1 1/2 cents pathway which he has miserably failed in the instant case.

25.For the foregoing reasons, this Court is of the considered view that the lower appellate Court has reversed the findings of the Trial Court without any application of mind and the judgment and the decree of the lower appellate Court suffers from perversity.

26.In the result, the judgment and decree of the lower appellate Court in A.S. No.47 of 2006, dated 11.01.2007 is hereby set aside and the judgment and decree passed by the Trial Court in O.S.No.101 of 2001, dated 13.03.2006 is confirmed. The Substantial questions of law formulated by this Court at the time of admission of this appeal are answered in favour of the appellant. Accordingly, the Second Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

vsi2

To

1. The Subordinate Judge, Uthagamandalam.
2. The District Munsif, Coonoor.
3. The Section Officer, V.R.Section, High Court.

+1cc to M/s.S.L.Sudarsanan, Advocate, S.R.No.93971

S.A. No.477 of 2007

सत्यमेव जयते

WEB COPY