

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21.06.2019

CORAM:

The Hon'ble Mr.Justice N.Seshasayee

S.A.No.1164 of 2004

Venugopal Naidu

Plaintiff/Respondent/Appellant

Vs

1.Dhandapani Naidu

2.Radhakrishna Naidu

Defendants/Appellants/Respondents

Prayer:- Second Appeals filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 07.01.2002 in A.S.No.65 of 2001 on the file of the Principal District Judge, Cuddalore reversing(modifying) the judgement and decree dated 23.03.2001 and made in O.S.No.494 of 1998 on the file of the District Munsif Court, Cuddalore.

For Appellant : Mr.R.Gururaj

For Respondents : R1-died

R2-No appearance

JUDGMENT

The plaintiff who was successful before the trial court in his suit for declaring that the suit property is a common lane, and also for mandatory injunction for removal of certain obstruction put up by the defendants, but, suffered a modification made to the decree of the trial court by the first appellate Court when it declined mandatory injunction, has come forward with the present appeal. Parties would be referred to by their rank before the trial Court.

2.The facts on which plaintiff has found the cause for his action are:

- The suit property is a north-south running lane, which run between properties of the plaintiff and the defendants. Other than the properties of the parties, properties of third parties also lie to the east and west of this lane. Somewhere in the middle of the lane, on the north is situate a common well. The lane itself has been left to have access to the well.

- Earlier, one Venkatasamy Naidu had instituted O.S.No.761 of 1929 before the District Munsif Court, Cuddalore, wherein the Court had declared that the lane in question is a common lane. Subsequently, the first defendant himself had filed O.S.No.1717 of 1974, in which, the character of the suit property as a common lane has been upheld yet again. While so, the second defendant, the son of the first defendant had purchased a portion of the property to the west of the lane Vide sale deed dated 06.09.1984 from one Pavunambal Ammal. In this sale deed, the western boundary is described as a common lane.
- Be that as it may, the defendants, who have their property to the west of the lane have obstructed the common pathway by constructing a bathroom, a toilet and a small water tank on the common lane. This construction, made sometime in August, 1998, when the plaintiff and his family were away from the property, has reduced the width of the lane. Hence, the suit for declaration, that the suit property is a common lane, and for consequential prohibitory injunction and also for a decree of mandatory injunction that the construction put up by the defendants be removed.

3. In the written statement filed by the defendants it is admitted that the lane was a common lane but, it was contended that the bathroom was in existence for some 22 years prior to 1988, the year in which the present suit was laid. It is further stated that earlier the first defendant had filed O.S.No.291 of 1979 against certain Ramasami Naidu and that for a declaration that the lane is a common lane, in which, the Commissioner has visited the property and filed a report indicating the existence of a bathroom even then. Therefore, it is wrong to contend that the construction was newly made.

4. Before the trial Court, both sides have adduced oral evidence as well as documentary evidence. Of them, the critical documents relevant for the current parties are Ext.A.3, the decree passed in O.S.No.761 of 1929, Ext.A.8, the judgment in O.S.NO.291 of 1979, and Ext.B.1, the Commissioner's report filed in O.S.NO.291 of 1979. This apart, in the present suit a Commissioner has been appointed and he has filed his own report alongside the plan. They are marked as Ext.C.1 and Ext.C.2. The Commissioner himself was examined as P.W.2.

4. On appreciating the evidence before it, the trial Court has decreed the suit in entirety. Challenging the same, the defendants preferred first Appeal in A.S.No.65 of 2001 before the Principal District Court, Cuddalore. Taking note of existence of bathroom in Ex.B.1, Commissioner's report filed in the earlier suit, the first Appellate Court modified the decree

of the trial Court, and held that in spite of the construction of the bathroom of the defendants on the common lane, there is still space available to reach the common well. Aggrieved by the same, the plaintiff has come forward before this Court.

5.The appeal is admitted on the following substantial questions of law;

Whether the Judgments and decrees of the Courts below are sustainable in law, as the entire evidence which is relevant to decide the issue and the relevant question of fact applicable to the facts of the case were not taken into consideration?

6.The learned counsel for the appellant submitted that in all the earlier suits referred to, such as the one evidenced by Ex.A.3, the decree passed in O.S.No.761 of 1929, O.S.No.291 of 1978(Ex.A.8) and the reference made in the later mentioned suit to O.S.No.1717 of 1974 have one point in common: A finding that the suit property is a common lane. When it is admitted as a common lane, it is impermissible for the defendants to put up a construction obstructing it even partially. Even if it were to be presumed that there existed a bathroom as per Ex.B.1, the fact remains that a new bathroom was constructed along with a toilet. Since the earlier Commissioner's report does not refer to a toilet, at no rate, the defendants have a right to put up a construction obstructing the common way, which, they themselves have established in the decree that they have obtained in O.S.No.1717 of 1974 and O.S.No.291 of 1978.

7.The respondents/defendants have been served with the notice of this appeal, but they chose not to appear.

8.This Court finds merit in the submissions of the learned counsel for the appellant for the following reasons;

- If Ext.A.3 and Ext.A.8 were scrutinised, the issue that is involved in them is, whether the suit lane is a common lane or not. Indeed, in O.S.No.291 of 1979, certain Ramasami Naidu had put up a wall obstructing the entire common lane to the south of the well, and the first defendant herein had approached the Court to have the common wall demolished. Now turning to the present Suit, while the defendants have pleaded that the bathroom, which the plaintiff has alleged, has been put up by them some 22 years ago, at the time when the suit was laid, yet, they have not pleaded anything to justify its existence on the common lane. They have neither claimed any title to put up the construction, nor have they claimed adverse possession in the manner known to law.

- Turning to the Judgment of the first Appellate Court, it is not so much about whether there is a passage still available after the construction of the bathroom in question but, it is all about whether the defendants have right to put up a construction there. Courts decide issues, and resolve disputes based on legally recognised rights of parties. Where rights do not accommodate, what may be essentially a wrong, then, courts should not countenance it.
- Turning to Ex.B.1, the Commissioner's report, per se, it is only a piece of evidence made available in a decision in O.S.No.291 of 1979. In that suit, the present plaintiff is not a party, nor the availability of bathroom is a subject matter. Thirdly, Ex.B.1, Commissioner's report is only a piece of evidence which the Court in O.S.No.291 of 1979 has considered. But, that contention of the evidence is not conclusive, and even cannot bind to the present plaintiff who is not a party to that suit. When the bathroom in question was not the subject matter of earlier litigations, no amount of credence can be given to the Commissioner's report in Ex.B.1, filed in O.S.No.291 of 1979.

9. For the over coming reasons, this Court finds reasons to interfere with the judgment and the decree of the first Appellate Court and decides the substantial questions of law in favour of the plaintiff. Accordingly, it allows this appeal and sets aside the decree in A.S.No.65 of 2004, dated 07.01.2002 passed by the Principal District Judge, Cuddalore and restores the decree passed by the trial Court in O.S.No.494 of 1998. No costs

Sd/-

Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

tsg

To

1.The Principal District Judge,
Cuddalore.

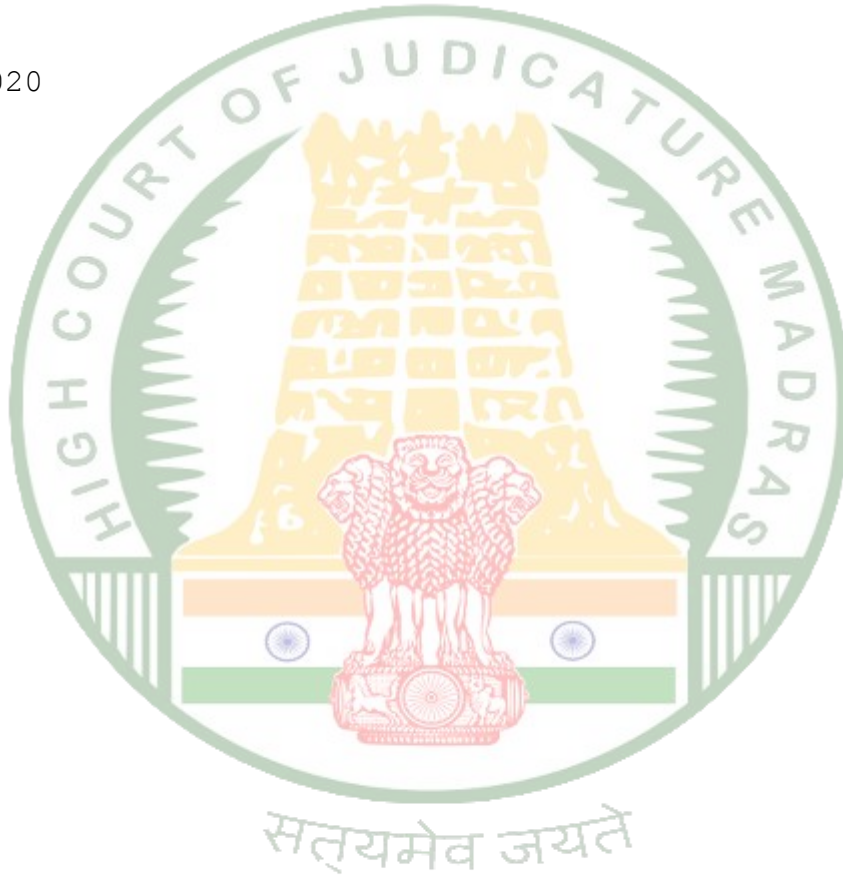
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2.The District Munsif Court,
Cuddalore.

3.The Section Officer
VR Section, High Court, Madras.

S.A.No.1164 of 2004

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