

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :11.11.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A. No.945 of 2007

&

M.P.No.2 of 2007

R.A.Ramajayam

... Appellant/2nd Plaintiff

Vs

1.S.Sengamalai

2.Senthil

3.Baby Lakshmi

... Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 C.P.C. against the judgment and decree in A.S.No.252 of 1997 dated 22.03.2006 on the file of the Subordinate Court, Namakkal, reversing the judgment and decree in O.S.No.207 of 1996 dated 27.03.1997 on the file of the Principal District Munsif Court, Namakkal.

For Appellant : Mrs.S.Uma Maheswari

For Respondents : No appearance

JUDGMENT

This Second Appeal has been filed challenging the Judgement and decree dated 22.03.2006 passed by the Sub Court, Namakkal in A.S.No.252 of 1997 reversing the Judgement and decree dated 27.03.1997 passed by the Principal District Munsif Court, Namakkal in O.S.No.207 of 1996.

2. This Court at the time of admission of this second appeal, formulated the following substantial questions of law:

" i) Whether the lower appellate court has properly considered the recitals in the schedule in the partition deed, namely, Exhibit A1, wherein it is stated that the eastern boundary of the plaintiff's property is bounded by the house belonging to one Chidambarathu Chettiar, while reversing the well considered judgment of the trial Court?

ii) Whether the lower appellate court is right in law in dismissing the suit based on the report of the advocate commissioner while admittedly the

defendants have not produced any material evidence to show that the suit passage is a common passage and when the defendants have not established their right over the passage?

iii) Whether the lower Appellate court is right in law in allowing the appeal while the appeal has abated against the first plaintiff in the suit? "

3. For the sake of convenience, the parties are referred to as per their ranking in the suit.

Brief facts leading to the filing of this Appeal:

4. The Appellant is the second plaintiff and the respondents are the first and third defendants in the suit O.S.No.207 of 1996. The plaintiffs filed the suit against the defendants seeking for the relief of declaration that they are the absolute owners of the passage measuring 3 ½ feet which is the subject matter of dispute. It is the case of the plaintiffs that by virtue of a partition deed dated 04.05.1949 (Ex.A1), they became the absolute owners of the suit schedule property. According to them, the passage measuring 3 ½ feet is covered under the partition deed (Ex.A1). It is also their case that patta Ex.A2 dated 30.03.1992 has also been issued in their favour. It is their case that the defendants are their neighbours and they are interfering with their peaceful possession and enjoyment of the suit schedule property by constructing a bathroom in their property and letting out the sewage waste into the passage measuring 3 ½ feet belonging to the plaintiffs. The suit was filed for declaration to declare that the plaintiffs are the absolute owners of the suit schedule properties which includes the 3 ½ feet passage and they have also sought for an injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the passage measuring 3 ½ feet which is included in the suit schedule property.

5. The defendants filed their written statement denying the allegation contained in the plaint. According to them, the 3 ½ feet passage is a common passage which is used by all the residents in that area. Further, it is their case that there are two more persons by named Pushparaj and Rathinam who are also entitled to the usage of the common pathway and since the plaintiffs have not impleaded them as parties to the suit, the suit ought to be dismissed for non-joinder of necessary parties. Therefore, according to them, the plaintiff is not entitled for a declaration and also for relief of permanent injunction.

6. The Trial Court after framing the issues and after trial, decreed the suit in favour of the plaintiff and granted both the relief of declaration as well as the permanent

injunction by the Judgement and decree dated 27.03.1997 passed in O.S.No.207 of 1996. Aggrieved by the Judgment and decree dated 27.03.1997 passed in O.S.No.207 of 1996, the defendants in the suit preferred an appeal before the Subordinate Court, Namakkal in A.S.No.252 of 1997.

7. The lower Appellate Court by its judgement and decree dated 22.03.2006, however reversed the findings of the Trial Court and allowed the appeal filed by the defendants in the suit relying upon the Advocate Commissioner's report. Aggrieved by the judgment and decree dated 22.03.2006 passed in A.S.No.252 of 1997, this Second Appeal has been filed by the second plaintiff who is the Appellant herein.

Submission of the learned counsel:

8. Heard Mrs.S.Uma Maheswari, learned counsel for the Appellant. Despite service of notice on the respondents and their names having been printed in the cause list today, they have not been represented in this second appeal.

9. The learned counsel for the Appellant submits that there is total perversity in the findings of the lower appellate court. According to her, Despite Ex.A1, the partition deed and Ex.A2 patta standing in the name of the second plaintiff, the lower appellate court has reversed the findings of the Trial Court based on the Advocate Commissioner's report. Referring to the Advocate Commissioner's report, the learned counsel for the Appellant would submit that the Advocate Commissioner's report does not reveal that the defendants are the owners of 3 ½ feet passage. She also drew the attention of this Court to Ex.A1 and Ex.A2 and submitted that 3 ½ feet passage falls in new survey No.275 of 1992 in which the suit schedule properties is also situated and the patta Ex.A2 is also issued only for Survey No.275 of 1992. She also submitted that no documents were filed by the defendants to establish their case that 3 ½ feet passage is a common pathway and utilised by the residents in that locality.

10. According to her, the plaintiffs have completely discharged their burden of establishing their case by proving that they are the absolute owners of the suit schedule properties in which the 3 ½ feet passage is situated. According to her, the Trial Court has rightly considered the materials and evidence available on record and has decreed the suit in favour of the plaintiff. However, according to her, the lower appellate court by total non application of mind and by not considering the evidence available on record has erroneously reversed the findings of the Trial Court by allowing the appeal filed by the defendants.

Discussion:

11. This court perused and examined Ex.A1 and Ex.A2 relied upon by the learned counsel for the Appellant. This court also perused Ex.C1, the Advocate Commissioner's report as well as Ex.C2, the sketch attached to the Advocate Commissioner's report.

12. As rightly contended by the learned counsel for the Appellant, the lower appellate court, by total non application of mind and without any basis has come to the conclusion that 3 ½ feet passage is a common passage. The Advocate Commissioner's report (Ex.C1) as well as the sketch (Ex.C2) attached thereto does not reveal that 3 ½ feet passage is a common passage as alleged by the defendants in the suit. But however, by not applying its mind and without any basis, the lower appellate court has erroneously held based on the Advocate Commissioner's report that 3 ½ feet passage is a common passage. Instead of confirming the findings of the Trial Court, the lower appellate court has erroneously reversed the findings of the Trial Court without any basis.

13. There is absolute perversity found in the findings of the lower appellate court, since Ex.A1 and Ex.A2 clearly establish the title of the plaintiff over the suit schedule properties which includes the 3 ½ feet passage which is the subject matter of the suit.

Conclusion:

14. For the foregoing reasons, the substantial questions of law 1 and 2 are answered in favour of the Appellant. Since the learned counsel for the Appellant at the time of her submissions, gave up her right to argue as regards the third substantial questions of law, the same has not been considered in this second appeal. Since the substantial questions of law No.1 and 2 are answered in favour of the Appellant, this second appeal is allowed. The Judgement and decree dated 22.03.2006 passed by the Sub Court, Namakkal in A.S.No.252 of 1997 is hereby set aside and hence, the Judgement and decree dated 27.03.1997 passed by the Principal District Munsif Court, Namakkal in O.S.No.207 of 1996 is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True copy//

Sub Assistant Registrar

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To

1. The Sub Court, Namakkal
2. The Principal District Munsif Court, Namakkal
3. The Section Officer,
VR Section, High Court, Madras

+1cc to Mr.C.Jagadish, Advocate SR.No.93605

S.A. No.945 of 2007

CNR(CO)
GMY(27/07/2020)