

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.04.2019

CORAM

THE HONOURABLE MR. JUSTICE V.BHARATHIDASAN

S.A. 91 of 2019
and
C.M.P. 2054 of 2019

D.S.Robert Jesudoss ... Appellant/Plaintiff

Vs.

1. F.Antony Caroloine
2. F.Arokiya Raj
3. F.Alice Kumari
4. F.Augustine Xavier ... Respondents/Defendants

Prayer :- This Appeal has been filed under Section 100 of C.P.C. against the Decree and Judgment passed in A.S. No.250 of 2017 on the file of the XVIII Additional City Civil Court at Chennai, dated 24.07.2018 reversing the Decree and Judgment passed in O.S. No.1494 of 2014 dated 13.09.2017 on the file of the I Assistant Judge of City Civil Court at Chennai as set aside and consequently the suit in O.S.No.1494 of 2014 is dismissed.

For Appellant : Mr.P.M.Bakthavatsalam

For Respondents : Mr.N.V.N.Margendeyan

JUDGMENT

The plaintiff, who lost the appeal before the first appellate court has filed the present Second Appeal.

2. The appellant/plaintiff has filed a suit for granting permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of 3 x 10 ft. lane, which is part of the suit schedule property. The Trial Court earlier decreed the suit, and in the appeal filed by the defendants, the lower appellate court has reversed the findings and dismissed the suit. Now, challenging the same, the present Second Appeal has been filed.

3. The case of the plaintiff in brief is as follows :-

The plaintiff's father one D.Sigamani was in possession and enjoyment of the extent of 832 sq.ft. of land and also constructed a house therein and residing there for the past 30 years, and he has been in possession and enjoyment of the

property with right, title and interest ever since 1954. By virtue of settlement deed dated 25.04.1984, he has settled the property in favour of plaintiff. The defendants are having the property adjacent to the plaintiff's property and there is 3 x 10 ft. lane facing on the northern side of the suit property. The defendants are the owners of the property to an extent of 920 sq.ft., and they have no right or title over the said lane, and only the father of plaintiff has been enjoying the lane for more than 60 years. No documents have been filed by the defendants to show that they are the owners of the above suit lane and only, the plaintiff has an exclusive right over the disputed lane. Now, the defendants are trying to construct a wall in order to obstruct the pathway, and the plaintiff has raised an objection that there was a pathway existing. Since the defendants are trying to interfere with the plaintiff's right of using the pathway, the present Suit has been filed.

4. The 4th defendant has filed a written statement denying the averments made in the plaint and stated that the plaintiff has failed to prove that he is in continuous possession and enjoyment of the disputed pathway, and also categorically stated that there was no such pathway at all as claimed by the plaintiff. Further, the plaintiff do not have any right or title over the pathway, and the settlement deed claimed by the plaintiff was a sham and nominal document, and it is not binding on the defendants. The Encumbrance Certificate filed by the defendants also shows their title, and the plaintiff cannot claim right over the pathway.

5. The Trial Court after relying upon the evidence of 4th defendant, who was examined as D.W.1 came to a conclusion that the defendants have permitted the plaintiff to use the suit lane, and the plaintiff has also proved the possession and enjoyment of the suit lane, and thereby, decreed the suit. Challenging the judgment and decree passed by the Trial Court, the defendants have filed an appeal in A.S. No.250 of 2017 on the file of XVIII Addl. City Civil Court, Chennai, and the lower Appellate Court after considering the entire materials and evidences both oral and documentary, especially considering the Ex.A1 settlement deed, by which, the plaintiff claiming title, came to a conclusion that the disputed pathway is not part of the property belong to the plaintiff, and especially, the disputed lane was shown on the northern boundary of the plaintiff's property. As per Ex.A1, Settlement deed, the plaintiff cannot claim for title over the property. That apart, the lower Appellate Court after considering the Advocate Commissioner's report has held that there is no such pathway available, and the alleged pathway was covered in the defendants kitchen area. Considering all those materials, the lower Appellate Court has come to a conclusion that the plaintiff has not only proved the possession of the alleged pathway, also failed to prove that

there was any pathway in existence, thereby allowed the appeal and dismissed the suit. Now, challenging the same, the present Second Appeal has been filed.

6. In the grounds of appeal, the appellant has raised the following question of law :-

- 1) Whether the first appellate court is correct in A.S. No.250 of 2017 to set aside the judgment order passed by the trial court in O.S.No.1494 of 2014?
- 2) Whether the respondents can be allowed to encroach or trespass into the land belonging to the appellant?
- 3) Whether U/S.41 of the Indian Evidence Act in a second part of final judgment passed at competent court operate as a conclusive proof as to the time at which such legal character was conferred, taken away or that a person was entitled to a legal character or specific things absolutely and existence of a decree in favour of the appellant in provisions suit in Suit No.5556 of 1994 and A.S. No.171 of 2000 as stated in grounds. The first appellate court not discusses and observed about in page 13 para 12 of the judgment in O.S.No.5556/94 by the Trial Court?
- 4) Whether the plaintiff's suit for permanent injunction without seeking declaration of title is maintainable under the law and dictum of Hon'ble Supreme Court Judgment for praying restraint the interference of defendants as a simpliciter as observed at para 10 of the judgment.
- 5) Whether on facts plaintiff ought to have filed a suit for declaration of title and injunction?
- 6) Whether the first Appellate Court has exceed its jurisdiction, firstly re-examining question of fact, secondly by going into the questions which were not pleaded that too without seeking amendment of the plaint and to include in issues in Trial Court itself about the declaration of title and recovery of possession, as observed at para 10 of the judgment.
- 7) Whether commissioner's report without permission of the court and without seeking by petition from any of the parties to the suit may examine the Commissioner as court witness or witness of party and his report and evidence touching the matter

of possession can be examined under order 26 Rule 10 of CPC suo motu by the trial court when there is no question of dissatisfaction of report and no objections were filed by both parties against the commissioner's report. The Commissioner's report clearly reveals at para 6 that the said passage is not open and accessible and it is covered by defendant's kitchen.

- 8) Whether the first appellate court can be considered substantial evidence without examine the Commissioner as a witness and it can prove title or possession of the disputed land under Order 26 Rule 9 of CPC
- 9) There is substantial question of law involved in this Second Appeal pertaining to validity of Advocate Commissioner's report, C1 & C2 without receipt of any objections and non-prayer of declaration of title and recovery of possession without seeking any amendment proposal and formulation of issue in this regard.
- 10) When the Commissioner's report is a satisfactory and acceptable for both parties, there is no necessity and need to raise the objections against the Advocate Commissioner report and enquiry with the Commissioner's report. No one has filed any objections and permission to examine the Commissioner. That being the position, Trial Court has discretion to allow or disallow with Commissioner's report, as per order in 2006 (4) CTC 258 (Mad) (MB) Gunaraj Vs. Bakyalakshmi under Order 26 Rule 10(3) of C.P.C."

7. I have heard the submissions made by Mr.P.M.Bakthavatsalam, learned counsel appearing for the appellant as well as Mr.N.V.N.Margendeyan, learned counsel appearing for the respondents, and perused the relevant materials carefully.

8. This is the suit for permanent injunction. The dispute is in respect of a pathway measuring 3 x 10 ft., which is running north to south. The case of the plaintiff is that the disputed pathway is exclusively belongs to his father one D.Sigamani, and during his life time, he has executed a settlement deed in favour of plaintiff, which was marked as Ex.A1. As per the Settlement deed, the plaintiff is having the title over the pathway. But, perusal of the Ex.A1 settlement deed, it clearly shows that only an extent of 832 sq.ft. of land

belongs to D.Sigamani, which was settled in favour of plaintiff, and in the schedule of the suit property, the lane has been shown as northern boundary. Therefore, from Ex.A1, it is clear that the plaintiff can claim title to an extent of 832 sq.ft., and he is not entitled for any right or title over the disputed pathway. When the plaintiff has no right or title over the disputed pathway, then the suit must be for a declaration either claiming easmentary right or any other right over the pathway, and he cannot maintain a injunction suit. That apart, in the suit, the Advocate Commissioner was appointed, and he has inspected the property and he has filed a detailed report, wherein he has stated that there is no pathway is available, and it has been covered by the defendants kitchen. The relevant portion of the advocate commissioner's report is reproduced hereunder :-

"I had inspected the disputed passage, photo of the same in page No.16 of the annexure, which is on the north of the aforementioned property. The said passage is not open and accessible as it is unavailable and is covered by defendant's kitchen area, which is fully built."

The plaintiff has not filed any objection to the Advocate Commissioner's report.

9. From the Advocate Commissioner's report, it could be seen that there is no pathway available as claimed by the plaintiff, and now, the defendants have put up a kitchen therein. Apart from that, in the suit schedule property, the land comprising of 832 sq.ft. was shown, in which the disputed lane only shown as northern boundary. Even though the plaintiff has disputed the suit schedule property, he has clearly admitted that the lane is on the northern boundary. In the said circumstances, the plaintiff has failed to prove his title over the pathway, and the plaintiff and his predecessors are using the same for more than 60 years. Considering all those materials, the lower Appellate Court has rightly come to a conclusion that the plaintiff has failed to prove his title, and thereby dismissed the appeal. I find no infirmity or irregularity in the judgment and decree passed by the lower appellate court and no substantial question of law arises for consideration in the present Second Appeal. In the result, the present Second Appeal stands dismissed. No costs. Consequently, the connected Civil Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

rpp

To

1. The XVIII Addl. Judge,
City Civil Court, Chennai.

2. Ist Assistant Judge,
City Civil Court, Chennai.

Copy To
The Section Officer,
VR Section, High Court, Madras

+2cc to Mr.P.M.Bakthavatsalam, Advocate SR.No.33338

+1cc to Mr.N.V.N.Margendeyan, Advocate SR.No.33234

S.A. 91 of 2019
and
C.M.P. 2054 of 2019

MP (CO)
GMY (06/09/2019)



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