

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.11.2019
PRONOUNCED ON : 21.11.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.690 Of 2005

1. Krishnammal
2. Arumugam
3. Nangaiyammal ... Appellants/Defendants

Vs.

P. Chinnasamy ... Respondent/Plaintiff

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the decree and the judgment dated 01.11.2004 rendered in A.S.No.152 of 2001 on the file of the Additional District Judge, Salem, modifying the decree and the judgment dated 30.04.2001 rendered in O.S.No. 450 of 1994 on the file of the Second Additional District Munsif, Salem.

For Appellants : M/s. Rita Chandrasekar
for M/s. Meenakshi

For Respondent : M/s. D.Shivakumaran

JUDGMENT

This second appeal has been filed by the defendants against the judgment and decree passed by the Additional District Judge, Salem, in A.S.No.152/2001 dated 01.11.2004 modifying the judgment and decree passed by the II Additional District Munsif, Salem, in O.S.No.450 of 1994 dated 30.04.2001.

2. The respondent herein had filed a suit in O.S.No.450 of 1994 on the file of the II Additional District Munsif, Salem, to restrain the defendants and their men by means of permanent injunction from interfering with the usage of the 5 feet lane to reach Mariamman Temple as mentioned in the plaint plan. The learned II Additional District Munsif, Salem, by the judgment dated 30.04.2001 had decreed the suit as prayed for with costs. Aggrieved by the same, the defendants had filed an appeal in A.S.No.152 of 2001 on the file of the Additional District Judge, Salem. The learned Additional District Judge, Salem, by the judgment dated 01.11.2004 had modified the judgment and decree passed by the Trial Court to the effect that the plaintiff is at

liberty to file a suit for appropriate relief within a year and till then, the defendants were directed not to disturb the enjoyment of the plaintiff. Feeling further aggrieved, the defendants have filed the present Second Appeal.

3. For the sake of convenience, the parties are referred to as described before the Trial Court.

4. The averments made in the plaint are in brief as follows:

The first defendant is the wife and the second defendant is the mother of the third defendant. The suit property is a plot, for which, patta was granted by Thasildar, Salem, in the year 1987. Subsequent to grant of patta, the plaintiff had constructed a thatched shed thereon. The plaintiff has been living with his family members for all these years. The plaintiff has been paying tax due to the Panchayat. The defendants 1 and 2 were given patta to the contiguous property on the east of the suit property. In front of the house of the plaintiff and defendants, there is a 4 feet lane running east-west which from the plaintiff's house, comes towards east and turns towards north leading to Mariamman Temple on the north. The defendants encroached the entire stretch of 5 feet earmarked for the lane on the east of the defendant's house and tried to annex the same with their house. The same was objected to by the plaintiff, but the defendants did not heed. Hence the plaintiff was constrained to file a suit for permanent injunction.

5. The averments made in the written statement filed by the third defendant and adopted by the defendants 1 and 2 are in brief as follows:

The allegations that the patta was granted in the year 1987 in respect of the suit property is false. The alleged patta does not contain any particulars in respect of suit lane. Already the defendants 2 and 3 had filed a suit in O.S.No.235 of 1988 on the file of the District Munsif, Salem, against one Perumal and 5 others for their claim of novel right of using of pathway over the defendants' house property and that the said suit was decreed as prayed for on 28.02.1992. The plaintiff in the present suit is the son of Perumal who is the first defendant in O.S.No.235 of 1988. Further he is son-in-law of the third defendant in that suit. The present suit has been filed at the instigation of the defendants in O.S.No.235 of 1988. The judgment and decree passed in O.S.No.235 of 1988 will operate as res judicata. It is true that the defendants are the owners of the property situated on the southern side of the plaintiff's family house. It is false to say that in front of the house of the plaintiff and the defendants, there is a 4 feet lane running East-West, which from the plaintiff's house comes towards East and turns towards North leading to Mariamman Temple on the

North. There is no such pathway in existence. Therefore the defendants prayed to dismiss the suit.

6. The averments made in the additional written statement filed by the third defendant and adopted by the defendants 1 and 2 are in brief as follows:

The space left by the defendants abutting their houses on the North, East and West cannot be termed as passage for the plaintiff to reach Mariamman Temple. There are no separate passage for each house to reach the Mariamman Temple in the village. The plaintiff had not come with clean hands. The Commissioner's report filed in REP.No.66/93 in O.S.No. 235 of 1998 would falsify the case of the plaintiff. Therefore, the defendants prayed to dismiss the suit.

7. Based on the aforesaid pleadings, the learned II Additional District Munsif, Salem, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as P.W.1 and marked Exs.A1 to A5 as exhibits. On the side of the defendants, the third defendant was examined as D.W.1 and 5 more witnesses were examined as D.Ws.2 to D.Ws.6. The defendants had marked as Exs.B1 to B25 as Exhibits. The Advocate Commissioner's report and plan were marked as Exs.C.1 and C.2 respectively.

8. The learned II Additional District Munsif, Salem, after considering the materials placed before her, found that the suit property in O.S.No.235 of 1988 and the suit property in the present suit are totally different properties and hence the decree passed in O.S.No.235 of 1988 is nothing to do with the present suit. She further found that the Advocate Commissioner's report and plan would show the existence of the pathway and hence the plaintiff is entitled to use the same. Accordingly, she decreed the suit as prayed for with costs. Aggrieved by the same, the defendants had filed an appeal in A.S.No. 152 of 2001 on the file of the Additional District Judge, Salem. The learned Additional District Judge by the judgment dated 01.11.2004 had modified the judgment and decree passed by the trial Court to the effect that the plaintiff is at liberty to file a suit for appropriate relief within a year, till then, the appellants shall not disturb the enjoyment of the plaintiff. Finally, with the aforesaid observations, the learned Additional District Judge had dismissed the appeal with costs. Feeling further aggrieved, the defendants have filed the present Second Appeal.

9. This Court at the time of admitting the second appeal has formulated the following substantial questions of law:

" (1) When the Appellate Court itself found concurrently with the trial Court that the plaintiff had not established his case over his right, can

decree the same suit, even granting liberty to the respondent to file another suit for higher and different reliefs.

(2) Even then the plaintiff has not chosen to withdraw his case under order XXIII Rule 1 of Code of Civil Procedure, to enable him to file a fresh suit on the same cause of action, can the Court, with all the defects, grant the relief to the plaintiff even granting a time to institute another suit, for the basement of his title."

10. Heard Mr.Rita Chandrasekar for M/s. R.Meenakshi learned counsel for the appellants/defendants and Mr. D.Sivakumaran learned counsel for the Respondent/Plaintiff.

11. Substantial Questions of Law 1 and 2:

The learned counsel for the appellants has submitted that the First Appellate Court has categorically held that the plaintiff has not established that he is having a right to use the suit space which is situated between the houses as pathway to reach the Mariamman Temple. She further submitted that the First Appellate Court, further held that the plaintiff has not proved to use the said pathway as a matter of right. She further submitted that after finding so, it has held that the plaintiff is at liberty to use the said passage as a pathway and if the plaintiff feels that he has got right to use the said passage as a matter of right, it is for him to file a suit for appropriate relief within a year and till then, the appellants/ defendants should not disturb the enjoyment of the plaintiff. She further submitted that the observation is totally against its own findings. She further submitted that admittedly the plaintiff has not filed any cross objection against the findings of the First Appellate Court. She further submitted that the plaintiff has not filed any suit as per the direction of the First Appellate Court within the stipulated time and as such, the plaintiff has no right to claim any pathway over the aforesaid space and therefore, she prayed to allow the second appeal and set aside the judgments and decrees passed by the Court below and dismiss the suit.

12. Per contra, the learned counsel for the respondent/plaintiff has submitted that the Commissioner's report and plan would clearly show that there is a space in front of the house of the defendants and as such, plaintiff is entitled to use the same as a pathway for going to Mariamman Temple. Taking into consideration of the aforesaid facts, the First Appellate Court has held that the plaintiff is entitled to use the said pathway and in the said factual findings, this court cannot interfere and therefore, he prayed to dismiss the second appeal.

13. A perusal of the judgment of the First Appellate Court shows that the learned First Appellate Court Judge has held that the plaintiff has not specifically pleaded in the plaint, the nature of the easement on which he has framed the suit. He further found that even though the plaintiff has filed the suit for permanent injunction, he has not produced any documentary evidence to show that the suit property is provided with the pathway right. Further he held that the plaintiff has not produced any document to prove the pathway is in existence. He further found that the Commissioner's report would show that there is a space to reach the southern side, but since the plaintiff has not produced any documentary evidence to show that he has used the said space as a pathway it would not be proper to grant injunction. Finally he held that the plaintiff has to file appropriate suit for appropriate relief within a year, till then, the appellants should not to disturb the enjoyment of the plaintiff. As against the said findings, the plaintiff has not filed any cross objection. Since the First Appellate Court has granted the relief only for a limited period that is for only one year, within the said period, the plaintiff should have filed a proper suit for proper remedy. But it is stated that the plaintiff has not filed any suit based on the aforesaid directions of the First Appellate Court. Therefore, the plaintiff is not entitled to claim any right over the said space which runs in front of the house of the defendants. Accordingly, the substantial questions of law are answered in favour of the appellants/defendants. Hence this Court is inclined allow this appeal.

14. In the result, the second appeal is allowed. The judgments and decrees passed by the Courts below are set aside. The suit in O.S.No.450 of 1994 on the file of the II Additional District Munsif, Salem, is dismissed. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Additional District Judge,
Salem.

2. The Second Additional District Munsif,
Salem.

Copy to

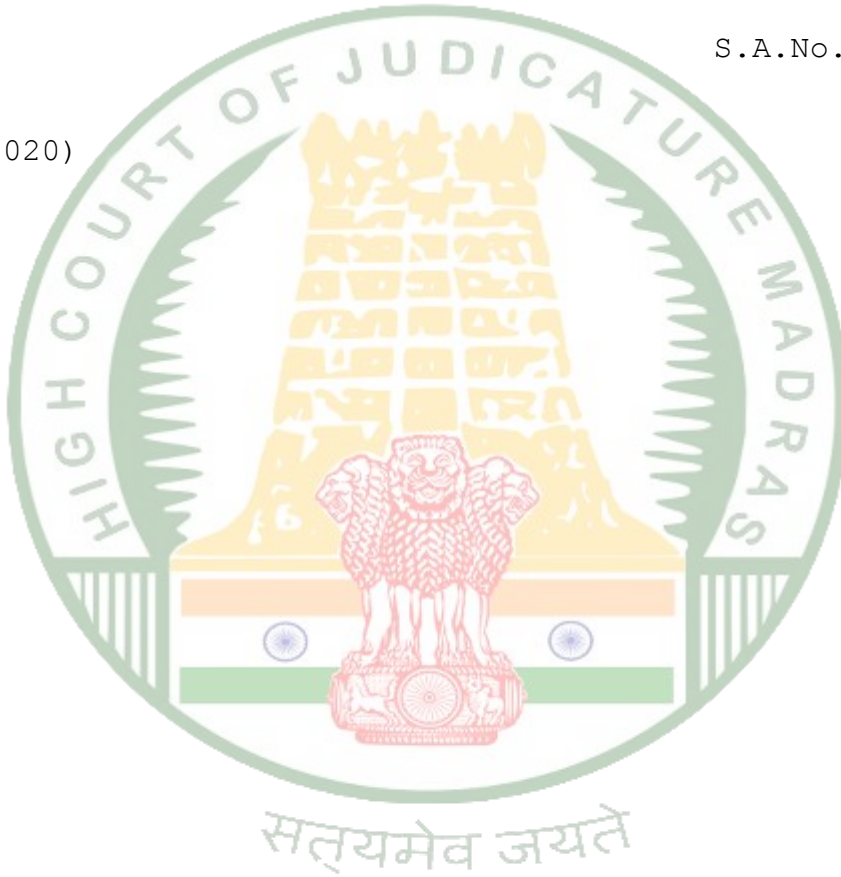
The Section Officer, VR Section,
High Court, Madras.

+1 CC to Ms.R. Meenakshi, Advocate sr 97276.

+1 CC to Mr.D. Shivakumaran, Advocate sr 96938.

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