



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 13.06.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

WEB COPY

S.A. (MD) No.255 of 2019

and

C.M.P. (MD) No.4733 of 2019

R.Alphonse

... Appellant/Appellant/
Plaintiff

Vs.

1.M.Francis Maria Antony (Died)

2.Rajammal

3.T.Roase Florence

4.F.Maria Reegan

... Respondents/Respondents/
Defendants

(Memo taken on record in respect of death
of R1 vide order dated 01.04.2019
R2 to R4 who were already on record
are recorded as Lrs of R1 as per
order dated 01/04/2019 made in
CMP.No.1508/2018 in SA.SR.No.35517/2017)

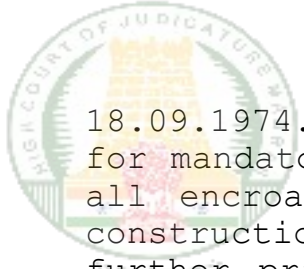
Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree in A.S.No.48 of 2015, dated 15.02.2017 on the file of the II Additional Subordinate Court, Nagercoil partly allowing the judgment and decree in O.S.No.165 of 2011, dated 03.07.2015 on the file of the Principal District Munsif Court, Nagercoil.

For Appellant	: Mr.S.Ramesh
R1	: Died
For R2 to R4	: Mr.K.P.Narayanakumar

JUDGMENT

The plaintiff in O.S.No.165 of 2011 on the file of the Principal District Munsif Court, Nagercoil is the appellant in this appeal.

2.The plaintiff filed the suit for permanent injunction restraining the defendants 1 to 3 from constructing any wall or structure above the west to east wall on the northern side of Item No.I and on its upper surface and from doing any constructions, which would damage the northern wall of Item No.I of the plaintiff. The plaintiff also wanted a decree for demarcation of 3 feet pathway provided as per the sale deed, dated 07.05.1984 with reference to the measurements of 'B' schedule property as per partition, dated



18.09.1974. The further relief in the suit was for granting a decree for mandatory injunction directing the defendants 1 and 2 to remove all encroachments in Item No.3 of 'A' schedule property and the construction thereon and for recovery of possession. The plaintiff further prayed for permanent injunction restraining the defendants from interfering and disturbing his pathway right in and over Item No.3 of 'A' schedule property. Except the first prayer, which is in respect of Item No.1, the other reliefs are pertaining to Item Nos.2 and 3 in plaint "A" schedule.

3.The case of the plaintiff is that Item Nos.1 and 2 belonged to him by virtue of a sale deed, dated 07.05.1984. According to the plaintiff, the total extent of Item No.1, which belonged to his father, is 3-1/4 cents. As per the said sale deed, the plaintiff got the northern half of 3-1/4 cents and the one half of the building in Item No.1. Though there is no dispute with regard to the northern portion of what the plaintiff's father was entitled to, namely, 3-1/4 cents, with regard to the Item No.2, the plaintiff claims to have acquired the same by way of sale deed, dated 07.05.1984, in respect of northern 3/4 cents out of 1½ cents. The plaintiff admitted that he has sold the said property to one Gnanaprakasam. However, he claimed pathway right, which is described as Item No.3 in the plaint "A" schedule. It is admitted that suit 'B' schedule belongs to defendants 1 and 2.

4.The defendants contested the suit by filing a detailed written statement. Since it is admitted that the plaintiff himself has sold the property, described as Item No.2, in favour of one Gnanaprakash, it is contended by the defendants that the plaintiff has no right in respect of Item No.2. The defendants specifically stated that the sale deed, dated 07.05.1984 was between the plaintiff and his father and that therefore, the recital of the document is not binding on the defendants 1 and 2, as they are not parties to the sale deed. It is also the specific case of the defendants that the pathway described as Item No.3 in plaint 'A' schedule is not in existence, even as per revenue records and that therefore, the suit is not maintainable. It is further contended that the entire property was sub divided as per the enjoyment and based on the title deeds of respective parties. Stating that the plaintiff was never in possession in Item Nos.2 and 3 in 'A' schedule, it was contended that the plaintiff has no cause of action for filing the suit.

5.It is further stated that since the first defendant has put up a construction in his own land, his enjoyment as per revenue records should be protected. It is also contended that the first defendant executed a settlement deed in favour of the fourth defendant and that the fourth defendant is in possession of the property in respect of 1.71 cents comprised in R.S.No.L10/16-8. The revenue records are also stated to be in favour of the defendants in respect of portion of the land shown as pathway, which is described as Item No.3 in plaint 'A' schedule.



6. After considering the entire evidence, the trial Court came to the conclusion that in the sale deed under Ex-A2, between the plaintiff and his father, they refers to a 3 feet pathway. However, the original partition deed, dated 18.09.1974, did not refer to such 3 feet pathway. It was, therefore, found that neither the plaintiff nor his father established their title in respect of 3 feet pathway. It was further observed by the trial Court that the plaintiff's father had no right to execute the sale deed in respect of the disputed pathway to the plaintiff as per the subsequent sale deed, under Ex-A2, dated 07.05.1984.

7. Since it is admitted that the plaintiff himself has alienated 3-1/4 cents to one Gnanaprakasam, the plaintiff was held to be the owner only in respect of 1-5/8 cents described as Item No.1 of plaint 'A' schedule property. Having regard to the fact that there is no evidence (except Ex-A2), to prove pathway in Item No.3 in "A" schedule as Item No.2 had already been sold by plaintiff, the trial Court found that the plaintiff has not proved his title in respect of Item Nos.2 and 3 in suit 'A' schedule property. As a result, the suit was dismissed in entirety, even though the defendants have no serious objection with regard to Item No.1 in suit 'A' schedule property.

8. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No.48 of 2015 before the II Additional Subordinate Court, Nagercoil. However, the appellate Court partly allowed the appeal by holding that the plaintiff is entitled to for the relief of permanent injunction restraining the defendants from constructing any wall or construction above the western and southern wall on the northern side of the suit 'A' schedule property in Item No.1. With regard to the plaintiff's claim in respect of Item Nos.2 and 3 of suit 'A' schedule, the findings of the trial Court was upheld. With regard to the existence of pathway, the Appellate Court also concurred with the trial Court and found that the pathway described as Item No.3 of suit 'A' schedule property was never allotted to the plaintiff's father and that plaintiff's father cannot convey, what he was not entitled to. As a result, the plaintiff's claim in respect of Item No.2 and 3 in suit 'A' schedule on the basis of subsequent sale deed under Ex-A2 was held unsustainable. Aggrieved by the judgment and decree of the lower appellate Court, as regards Item Nos.2 and 3 of suit 'A' schedule property, the plaintiff has preferred the above second appeal.

9. In the memorandum of grounds, the appellant has raised the following substantial questions of law:

"1. Whether both Courts below are justified in dismissing the suit with respect to the relief of Demarcation, Mandatory Injunction, Pathway right and Recovery of possession of 3rd item in the "A' schedule property ignoring or without properly considering the Ex-A2?



2. Whether the courts below are right in dismissing the suit when the plaintiff has clearly and categorically proved beyond doubt that the defendant has encroached the pathway (3rd Item in "A" Schedule property) belonging to the plaintiff through deposition of PW-1 and PW-2?

3. Whether or not the burden of proof in proving the right and title over the encroached portion of the pathway namely, 3rd Item of "A" schedule property is on the part of the defendant?

4. Whether the Courts below are right in dismissing the suit without framing the points for determination with regard to the right and title over the disputed common private pathway, namely, 3rd Item of "A" schedule property?"

10. The learned Counsel for the appellant submitted that admittedly the plaintiff and his brother jointly executed a sale deed in respect of Item No.2 to one Gnanaprakasam on 20.12.1988 along with the pathway right. It was submitted by the learned Counsel for the appellant that the plaintiff's right in respect of suit pathway (Item No.3 in suit "A" schedule) has been reiterated in Ex-B3 and this document was not considered by Courts below. It was further stated that the Courts below ought to have drawn inference that the plaintiff's claim in respect of Item No.3 in suit 'A' schedule is proved by document Ex-B3. This Court is unable to accept the arguments of the learned Counsel for the appellant.

11. The Courts below have relied upon document, Ex-B3. This document was executed on 30.12.1988. By this document, Item No.2 of plaint 'A' schedule property was transferred to one Maria Gnanaprakasam and this document also is in respect of 3 feet pathway. Since the plaintiff himself has acquired right over the 3 feet pathway under Ex-A2 sale deed, allegedly executed by his own father, the dispute is with regard to the existence of 3 feet pathway described as Item No.3 in plaint 'A' schedule. The source of title for the plaintiff's father is only the partition deed under Ex-A1. So long as, the partition deed does not confer any right in respect of pathway, described as Item No.3 in plaint 'A' schedule, the plaintiff cannot derive his title in respect of plaint 'A' schedule without any other document. The plaintiff and his father are bound by the partition deed, under Ex-A1. In such circumstances, a subsequent sale deed under Ex-A3, a self serving document, cannot create any right. Further the submission of appellant by referring to Ex-A3 is not even raised in the grounds of appeal.

12. Since the plaintiff's title for Item No.3 in plaint 'A' schedule is not traceable by any lawful source and the partition deed, which was prior to the document Ex-A2, the existence of pathway cannot be assumed. The plaintiff has sold Item No.2 long before suit. Hence the plaintiff/appellant is not entitled to any relief in respect of Item Nos.2 and 3. This Court find no merits in this appeal. The Courts below have considered all the documents and



materials available on record in a proper manner and arrived at findings giving sufficient reasons. The learned Counsel for the appellant is unable to point out any material irregularity or perversity in the judgment and decree of the Courts below. This Court do not find any substantial questions of law arises for consideration in this appeal, especially having regard to facts established.

13. Accordingly, this second appeal is dismissed and the judgment and decree in A.S.No.48 of 2015, dated 15.02.2017 on the file of the II Additional Subordinate Court, Nagercoil partly allowing the appeal and modifying the judgment and decree in O.S.No.165 of 2011, dated 03.07.2015 on the file of the Principal District Munsif Court, Nagercoil, are confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar (CS)

To

1. The II Additional Subordinate Judge,
Nagercoil.
2. The Principal District Munsif,
Nagercoil
3. The Section Officer,
VR Section, (2 copies)
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.K.P.NARAYANA KUMAR, Advocate (SR-68631[F] dated 13/06/2019)

+1 CC to Mr.V.RAGHAVACHARI, Advocate (SR-69002[F] dated 17/06/2019)

S.A. (MD) No.255 of 2019
13.06.2019

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