



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. 261 of 2019

and

C.M.P. (MD) No. 4978 of 2019

A.B.S. Anto

... Appellant/Appellant/Defendant

Vs.

Donald Devarajan

... Respondent/Respondent/Plaintiff

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the decree and judgment, dated 25.01.2019 passed in A.S.No.37 of 2014 on the file of the Subordinate Court, Padmanabhapuram, by confirming the judgment and decree, dated 14.03.2014 passed in O.S.No.457 of 2009 on the file of the District Munsif Court, Padmanabhapuram.

For Appellant

:Mr.C.Bharathi

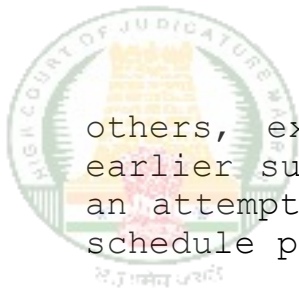
JUDGMENT

The defendant in the suit in O.S.No.457 of 2009 on the file of the District Munsif Court, Padmanabhapuram, is the appellant herein.

2.The respondent herein, as plaintiff, filed the suit in O.S.No.457 of 2009 before the District Munsif Court, Padmanabhapuram for declaration of his right of pathway over the plaint 'B' schedule property and for consequential relief of permanent injunction and mandatory injunction directing the defendant/appellant to remove the compound wall newly put up by him in the suit 'B' schedule property.

3.The brief facts that are necessary for the disposal of this appeal are as follows:

3.1.The suit 'A' schedule property originally belonged to one Devadhasan and the plaintiff's father got the suit 'A' schedule property through a partition suit in O.S.No.239 of 1983. The suit 'B' schedule property is stated to be the pathway, that was earmarked even in the final decree in O.S.No.239 of 1983. The plaintiff, therefore, contended that he is entitled to use the suit 'B' schedule as pathway to reach his house absolutely, as it was earmarked and recognised even in the final decree, that was passed in the earlier suit for partition. It is admitted that the defendant has purchased the entire property, that was allotted to



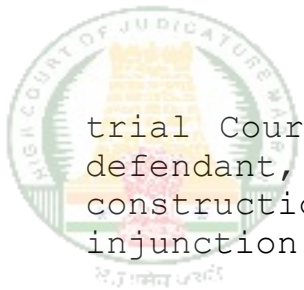
others, except the share allotted to plaintiff's father in the earlier suit for partition in O.S.No.239 of 1983. Since there was an attempt to put up a compound wall by the defendant in suit 'B' schedule property, the plaintiff filed the present suit.

3.2.The suit was contested by the defendant mainly on the ground that no pathway is available on ground and that the defendant has purchased all the properties, except the property, that was allotted to the plaintiff's father in the earlier suit in O.S.No.239 of 1983. It is the specific case of the defendant that the parties to the previous suit enjoyed the 'B' schedule property along with their respective plots allotted to them, as absolute owner and that there was no such pathway, that was available and enjoyed by the plaintiff, pursuant to the final decree that was passed in the previous suit for partition. It is further stated that the plaintiff has an alternative pathway on the western and southern side of suit 'A' schedule property. It is also contended by the defendant that the final decree in the previous suit is not binding on him, as he is not a party to the proceedings.

3.3.Before the trial Court, the plaintiff examined his Power of Attorney as PW-1 and marked Ex-A1 to Ex-A5. The defendant examined himself as DW-1 and examined the Advocate Commissioner as DW-2. Apart from oral evidence, the defendant marked Ex-P1 to Ex-P7. During the pendency of the suit, an Advocate Commissioner was appointed and his report and plan were marked as Ex-C1 and Ex-C2.

3.4.The trial Court rejected the contentions of the defendant and decreed the suit as prayed for. Though the defendant is not a party to the previous suit for partition, the trial Court held that the final decree that was passed in the previous suit in O.S.No.239 of 1983 is binding on the defendant and that the defendant, who purchased the properties from all the sharers, who got allotment in the previous suit for partition, cannot resist the claim of the plaintiff on the ground that he is not a party to the earlier suit. The trial Court also relied upon the report of the Advocate Commissioner and plan and found that the pathway in suit 'B' schedule is in existence. It was observed that the plan appended to the final decree cannot be ignored. With reference to the final decree, a specific finding was rendered by the trial Court that Plot No.6 was allotted as common pathway and that the said pathway to the suit 'B' schedule, as claimed by the plaintiff.

3.5.The further submission of the defendant that the plaintiff had an alternative pathway and therefore, the plaintiff is not entitled to get a decree declaring his easementary right was negated by the trial Court in view of the specific finding in the final decree that the plaintiff is entitled to get a decree for easement by grant, the



trial Court negated the contention of the defendant. Since the defendant, who purchased the property in 2008, cannot put up a construction before his purchase, the relief of mandatory injunction was also granted by the trial Court.

4. Aggrieved by the same, the defendant preferred an appeal in A.S.No.37 of 2014 before the Subordinate Court, Padmanabhapuram. The appellate Court also concurred with the findings of the trial Court and dismissed the appeal. Aggrieved by the same, the present second appeal has been filed by the defendant.

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

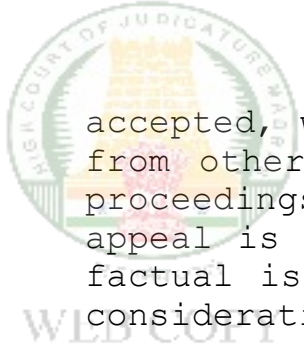
"1. Whether the judgment and decree of the Courts below are sustainable in law in view of the categorical admission made by the PW-1 in respect of suit pathway?

2. Whether the Courts below are right in holding that the plaintiff/respondent is entitled for the reliefs as prayed for, despite the fact that 'B' schedule property in toto is not covered under the documents relied on by the plaintiff/respondent?

2. Whether the Courts below is legally correct in accepting the oral evidence of PW-1 who is power of attorney of the plaintiff and thereby he is barred from deposing in the place of and instead of his principal as per the dictum laid down by the Apex Court?"

6. The learned Counsel for the appellant reiterated the points raised in the memorandum of grounds. Though it is stated that the admission of plaintiff has not been considered by the trial Court, the learned Counsel for the appellant is unable to point out such admission. It is a simple case, where, the defendant resisted the claim of the plaintiff on the basis of sale deed obtained by him from the other sharers, who were allotted specific properties as per the decree in the partition suit in O.S.No.239 of 1983. A person, who has derived right from other sharers cannot set up an independent case and in that sense, he is bound by the judgment in the previous suit for partition and the final decree that was later passed in O.S.No.239 of 1983.

7. Though it is contended before this Court that the suit 'B' schedule pathway in toto is not covered under the previous suit in the final decree proceedings, it is neither pleaded before the trial Court nor substantiated before this Court by any document. It is interesting to note that the defendant has set up a case to grab the property after making an attempt to purchase the property of plaintiff. This Court is unable to appreciate the defence now put forward by the defendant in the suit, ignoring the fact that he is bound by the final decree that was passed in the earlier proceedings. None of the points raised by the appellant can be



accepted, when the position that the defendant is only a purchaser from other sharers and bound by the final decree in the earlier proceedings. In such circumstances, this Court find that this appeal is liable to be dismissed *in limine*. Having regard to the factual issues decided, no substantial question of law arises for consideration.

8. Accordingly, the second appeal is dismissed and the decree and judgment, dated 25.01.2019 passed in A.S.No.37 of 2014 on the file of the Subordinate Court, Padmanabhapuram, by confirming the judgment and decree, dated 14.03.2014 passed in O.S.No.457 of 2009 on the file of the District Munsif Court, Padmanabhapuram, are confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar (CS)

To

1. The Subordinate Judge, Padmanabhapuram.

2. The District Munsif, Padmanabhapuram.

CMR

S.A. (MD) No. 261 of 2019
13.06.2019

KM/ (02.07.2019) 4P 3C