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S.A.(MD)No.97 of 2015

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED : 20.09.2019

JUDGMENT PRONOUNCED : 24.09.2019

CORAM :

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A. (MD)No.97 of 2015

&

Cros.Obj.(MD)No.23 of 2015

&

M.P.No.1 of 2015

S.A. (MD)No.97 of 2015

J.Karuppayyan

...Appellant/Respondent/Defendant

Vs

G.Wilson

...Respondent/Appellant/Plaintiff

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree dated 27.03.2014, made in A.S.No.41 of 2010 on the file of the Subordinate Judge, Kuzhithurai partly confirming the Judgement and Decree dated 29.03.2010 made in O.S.No.18 of 2003 on the file of the II Additional District Munsif, Kuzhithurai.

For Appellant

: Mr.P.Thiagarajan

For Respondent

: Mr.A.Arumugam

for Ajmal Associates

Cros.Obj.(MD)No.23 of 2015

G.Wilson

... Cross Appellant/Respondent

Vs

J.Karuppayyan

...Respondent/Appellant

PRAYER: This Cross Objection Petition is filed under Section 100 r/w under Order 41 Rule 22 of the Code of Civil Procedure, against the Judgement and Decree dated 27.03.2014, made in A.S.No.41 of 2010 on the file of the learned Subordinate Judge, Kuzhithurai, confirming the Judgement and Decree dated 29.03.2010 made in O.S.No.18 of 2003 on the file of the learned II Additional District Munsif, Kuzhithurai.

For Cross Appellant

: Mr.A.Arumugam

for M/s.Ajmal Associates

For Respondent

: Mr.P.Thiagarajan

JUDGMENT

The defendant who is the appellant before this Court has challenged the Judgement and Decree of the Sub Court, Kuzhithurai in A.S.No.41 of 2010, in and by which the learned Judge had reversed the Judgement and Decree of the II Additional District Munsif, Kuzhithurai in O.S.NO.18 of 2003.



2.The suit in question is one for a declaration of the plaintiff's title to the A-Schedule property and for consequential injunction restraining the defendant from entering into the A-Schedule property except C-Schedule property, to declare the plaintiff's title and possession to the B-Schedule property and consequently restrain the defendant by an order of injunction from entering into B-Schedule property and disturbing the peaceful possession of the plaintiff over the B-Schedule property and to declare the title of the plaintiff to the C-Schedule property and permit the plaintiff to recover the C-Schedule property from the defendant after demolishing the compound wall or removing the trespass.

3.The A-Schedule property is described as an extent of 3 cents in R.S.No.517/19A of Nattalam village together with a building therein, bounded on the East by property of Anpayyan, North by property of the plaintiff, West by R.S.No.517/18 belonging to the defendant, South by defendant's property in R.S.No.517/19B.

4.The B-Schedule property is the pathway measuring 5 links in breadth and 67 links in length, stretching from the Irenipuram Nattalam road to the A-Schedule property, bounded on the East by property of Anpayyan and parapet Construction, South by Irenipuram Nattalam road, West by property of defendant in R.S.No.517/19B and North by A-Schedule property.

5.The C-Schedule property is a portion of the A-Schedule property measuring about 230 Square links, which is in the hands of the defendant and bounded on the East by remaining portion of the A-Schedule property, South by property of the defendant in R.S.No.517/19B, West by property of the defendant in R.S.No.517/18 and North by property of the plaintiff. Parties are referred to in the same litigative status as in the Trial Court.

6. Plaintiff's case:

6.1.It is the case of the plaintiff that the suit A-Schedule property measuring an extent of 3 cents originally belonged to his father Gnanakkon Nadar. His father had gifted the said property to the plaintiff, his son on 07.10.1987. The gift deed consisted of 3 cents of land as well as an Arappura building therein. The case of the plaintiff is that there was a pathway lying to the eastern side of the entire extent of R.S.No.517/19 and this pathway would lead from the house of the plaintiff to the Irenipuram Nattalam road which lies to the South of the suit property of the defendant. The width of the pathway is 5 links and the length of the pathway from road to the A-Schedule property is 67 links. This pathway has been described as B-Schedule property (herein after referred to as B-Schedule property). On the Eastern side of the B-Schedule property a parapet wall has been put up, on the Western side a compound walls



plaintiff over the B-Schedule property.

6.2.The plaintiff would contend that the pathway has been in existence for over 25 years and though the pathway was provided for his younger brother Lawrence, he had never used it as he had a direct access to his property from the road and it was only the plaintiff who had been using the said pathway. In fact in the year 1987, his brother had executed a deed relinquishing his right over the B-Schedule property to the plaintiff and since then the plaintiff has been enjoying the B-Schedule property as its absolute owner. In fact, the R.D.O, Padmanabhapuram had passed orders in respect of the pathway in favour of the plaintiff. Therefore the plaintiff would plead adverse possession over the B-Schedule property.

6.3.The property which is lying West of the A-Schedule property belongs to the defendant and on 19.12.1997, the defendant had trespassed into the portion of the A-Schedule property which has been described as C-Schedule property. The defendant had commenced to demolish the wall of the existing building in the A-Schedule property which was obstructed by the plaintiff and therefore the plaintiff was constrained to file a suit O.S.No.100 of 1994, for an injunction not to demolish the wall. The wall has been demolished and compound wall has been put up. While so, the defendant had attempted to close the pathway and therefore the plaintiff was constrained to file an amendment petition which was turned down by the Court below on 18.11.2002. The defendant attempted to disturb the plaintiff's possession and therefore the plaintiff has been constrained to file the present suit. Interestingly, the plaint does not contain any details as to how the defendant had come into possession of the property lying South of the A-Schedule property.

7. Defendant's case:

7.1.The defendant had filed a very detailed written statement, wherein, he would contend that the suit property was part of larger extent of 6 cents which belonged to the share of Gnanakkon, the father of the plaintiff and Lawrence by way of partition of the year 1949. The case of the defendant is that a portion from out of this 6 cents was taken for the road formation on the South and his father executed gift deed in respect of 3 cents and bungalow building to his son Lawrence on 16.11.1985. This road was in existence even before the settlement. After the execution of this gift deed Gnanakkon was left with only 2 cents in the suit survey number.

7.2.However Gnanakkon has executed a gift deed in favour of the plaintiff to an extent of 3 cents though he was only in possession of 2 cents. In the earlier suit O.S.No.100 of 1994, the Trial Court had decreed that the plaintiff was only entitled to an extent of 2 cents and the same was taken up on appeal in A.S.No.163 of 1996. However, the same was later dismissed as "not pressed". Therefore the Decree in O.S.No.100 of 1994 had reached finality.



7.3.The B-Schedule property formed a part of the defendant's property and the gate way was provided by the defendant for his access. The defendant would contend that he had purchased the property on 03.01.1990, under a registered sale deed from the said Lawrence, who is none other than the younger brother of the plaintiff. The defendant would submit that the plaintiff has no right, title or interest to the B-Schedule property which is a part of the A-Schedule property.

7.4.The defendant would further contend that to the North of the suit property, the plaintiff owned lands and this Northern property touches the road on the East and it is through this road that the plaintiff has an access to the main road. The allegations of trespass was stoutly denied by the defendant. The defendant would contend that the suit was barred by the provisions of Order II Rule 2 of the Code of Civil Procedure, since the earlier suit O.S.No.100 of 1994 had been decreed only in respect of 2 cents. The defendant therefore sought for dismissal of the suit.

8. Trial Court:

8.1.The Trial Court had drafted the following issues:

"1.Whether the plaintiff is entitled to get decree for declaration of title and possession over plaint A and B schedule properties against defendant and consequential injunction over the same as prayed for?

2.Whether the plaintiff is entitled to get declaration of title over plaint C Schedule property?

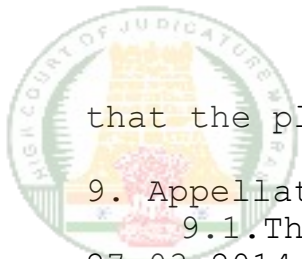
3.Is the plaintiff is entitled to recover plaint C Schedule property from defendant as prayed for?

4.Is the suit barred by Resjudicata in view of decree and Judgement in O.S.No.100 of 1994 of this Court and C.R.P.No.2357 of 2001 of Hon'ble High Court?

5.What other relief the plaintiff is entitled to?"

8.2.The plaintiff examined himself as P.W.1 and two other witnesses as P.W.2 and P.W.3. Ex.A.1 to Ex.A.16 were marked on the side of the plaintiff. The defendant had examined himself as D.W.1 and another witness as D.W.2. Ex.B.1 to Ex.B.22 were marked on the side of the defendant.

8.3.The learned II Additional District Munsif, Kuzhithurai, by Judgement and Decree dated 29.03.2010 dismissed the said suit. The Trial Court has found that the pathway was comprised in S.No.517/19B, whereas, the A-Schedule property was situate in S.No.517/19A. The learned Judge has accepted the defendant's contention that the plaintiff was entitled to 2 cents in



that the plaintiff is not entitled to the relief.

9. Appellate Court:

9.1.The Appellate Court by its Judgement and Decree dated 27.03.2014, partly allowed the appeal. The learned Subordinate Judge, Kuzhithurai, confirmed the decree with reference to the C-Schedule property and reversed the Judgement and Decree in so far as it relates to the A-Schedule and B-Schedule properties. Challenging the said Judgement and Decree the Defendant is before this Court.

10. Second Appeal:

The notice had been ordered in the above matter and the respondent had entered appearance and also had filed a cross-objection petition in Cros.Obj.(MD) No.23 of 2015.

11. Submissions:

11.1.Mr.P.Thiagarajan, learned counsel appearing on behalf of the appellant would put forward the following contentions challenging the Judgement and Decree of the Appellate Court:

a) The instant suit is barred by res judicata as well as the provisions of Order II Rule 2 of the Code of Civil Procedure.

b) Since a portion of the 6 cents had been given for formation of road and 3 cents had been gifted to the defendant's vendor, Lawrence, what remained in the hands of the plaintiff's father was only 2 cents and therefore he could not have gifted the entire extent of A-Schedule property, namely, 3 cents to the plaintiff.

c) The plaintiff has not come forward with specific case as to how he is entitled to the pathway, whether he claims a right by grant or easement of necessity or by prescription.

11.2.He therefore submitted that the Lower Appellate Court had totally ignored the earlier Judgement and Decree passed in O.S.No.100 of 1994 and therefore the Judgement and Decree of the Lower Appellate Court deserves to be set aside.

11.3.Mr.A.Arumugam, learned counsel appearing on behalf of Ajmal Associates for the respondent would submit that;

a) The subject matter of the earlier suit is not the subject matter of the present suit and therefore the same does not act as res judicata in the instant case or as a bar under the provisions of Order II Rule 2 of the Code of Civil Procedure.

b) The physical features as noted in the earlier Commissioner's report which is marked as Ex.A.2, would clearly indicate the existence of a pathway and that apart in Ex.A.1, the pathway has been clearly indicated.

11.4. He would further argue that the plaintiff is entitled to the pathway as he does not have an alternate pathway by reason of fact that the property originally belonged to one person from whom the respondent and defendant derived right. Hence, the plaintiff is



entitled to the use the suit pathway.

12. After hearing the arguments this Court is inclined to frame the following Substantial Questions of Law and counsels on either side have also advanced argument based on the substantial Questions of Law now framed:

"1) Whether the suit is barred by the principles of res judicata view of the earlier suit in O.S.No.100 of 1994 on the file of the Additional District Munsif, Kuzhithurai?

2) Whether the Lower Appellate Court is correct in law in granting the relief of declaration with reference to the A-Schedule property to an extent of 3 cents ignoring the Judgement and Decree in the earlier suit O.S.No.100 of 1994?

3) Whether the Lower Appellate Court was correct in law in granting the relief with reference to the B-Schedule property especially when the plaintiff has not specified his right to the said pathway?

4) Whether the suit is barred by the provisions of Order II Rule 2 of the Code of Civil Procedure?"

13. Discussion:

13.1. In the suit in question the plaintiff is claiming three independent reliefs, that;

a) He is the absolute owner of the A-Schedule property, which is an extent of 3 cents.

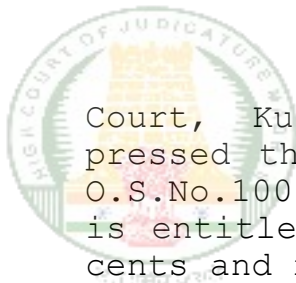
b) He is entitled to an access to the A-Schedule property, through B-Schedule property, the pathway from the road.

c) The defendant has encroached into the C-Schedule property and therefore the plaintiff is entitled to recover the encroached portion.

13.2. As regards the first claim, a perusal of Ex.B.4, which is the Judgement and Decree in O.S.No.100 of 1994 would indicate that, in that suit the same defense was taken by the defendant that the plaintiff is only entitled to an extent of 2 cents and not 3 cents as claimed by him. An issue was framed as issue no.3 by the Additional District Munsif, Kuzhithurai in the suit O.S.No.100 of 1994, which would read as follows:

"Whether Gnanakkon has got subsisting right to execute the gift deed in respect of 3 cents in the suit property in favour of the plaintiff after the execution of the gift deed in favour of Lawrence?"

13.3. The learned District Munsif has returned a finding that the plaintiff is only entitled to an extent of 2 cents and not 3 cents, since 1 cent had been given towards formation of the road and thereafter in the year 1985 the father had gifted 3 cents to his younger son Lawrence and what remained with him was only an extent of 2 cents. Though the decree in O.S.No.100 of 1994 was taken up on appeal by the plaintiff in A.S.No.163 of 1996 on the file of the Sub



Court, Kuzhithurai, however, the plaintiff has ultimately not pressed the said appeal and therefore the Judgement and Decree in O.S.No.100 of 1994 had attained finality. Therefore the plaintiff is entitled to a declaration only with reference to an extent of 2 cents and not 3 cents.

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13.4. The next claim is with reference to the B-Schedule property. A reading of Ex.A.1 along with Ex.A.2, Commissioner's report clearly establishes the existence of the pathway in the settlement deed that Gnanakkon executed in favour of the plaintiff. He has clearly described the existence of the pathway in the property that he has gifted to his younger son Lawrence. From the description of the properties it is also seen that the plaintiff does not have any access to the main road from any other direction. Though the defendant would argue that North of the A-Schedule property the plaintiff owned lands in S.No.517/16, which is also the subject matter of the settlement deed, Ex.A.1 and North of the said lands, namely, S.No.517/16 there exists a pathway. However, a reading of Ex.A.1 would clearly indicate that there is no road/pathway leading to S.No.517/16. Therefore it is crystal clear that apart from B-Schedule property the plaintiff has no other access to reach his property and the property beyond it. Therefore the Judgement and Decree of the lower Appellate Court in so far as it relates to the B-Schedule cannot be set aside. The Commissioner has also noted the existence of the said pathway which is clearly defined by the compound walls on either sides i.e., on the East and West.

13.5. The argument that the suit is hit by res judicata and barred by the provisions of Order II Rule 2 of the Code of Civil Procedure in view of the Judgement and Decree in O.S.No.100 of 1994 of the Additional District Munsif, Kuzhithurai cannot be countenanced for the reason that the earlier suit O.S.No.100 of 1994 was with reference to the wall situate between A-Schedule property and the property of the defendant in the south of the A-Schedule property. The bone of contention was that the wall between the two properties was a common wall and the demolition of that wall by the defendant would weaken the plaintiff's building situate in the A-Schedule property on the North. The issue was not with reference to either the pathway or the right to the A-Schedule property. Therefore the Lower Appellate Court was correct in law in rejecting this contention. I do not find any infirmity in that finding of the Lower Appellate Court.

13.6.(*). As regards third claim, the plaintiff who has filed the cross objection has not been able to substantiate the averments made in the cross objection and therefore, the findings of the court below stands confirmed. The Substantial Questions of Law Nos.1, 3 and 4 are answered in favour of the plaintiff and issue No.2 in favour of the defendant.

