

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.11.2019
PRONOUNCED ON : 08.01.2020

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.1840 of 2002
and
CMP.No.15555 of 2002

S. Munirathinam ...Appellant/Appellant/plaintiff

Vs.

1. Guna
2. C. Krishnan (died)

...1 & 2 Respondents/1st Respondent/Defendants

3. Ganapathi
4. Nisha
5. Usha
6. Nirosha

(R3 to R6 brought on record as L.Rs of the deceased R2 and also R3 to R6 set exparte vide order of court dated 16.09.2019

in CMP.No.15027 of 2018) ...3 to 6 Respondents/LRs of the R2

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree made in A.S.No.48 of 1999 on the file of the Sub-Judge, Vellore dated 28.06.2002 confirmed by the judgment and decree made in O.S.No.266 of 1992 on the file of the Additional District Munsif, Vellore dated 29.09.1999.

For Appellants : Mr.V.V.Sairam

For Respondents : Mr.T.Dhanya Kumar for R1
R3 to R6-set exparte

JUDGMENT

This second appeal has been filed by the plaintiff against the judgment and decree passed by the Sub-Judge, Vellore, in A.S.No.48 of 1999 dated 28.06.2002 confirming the judgment and decree passed by the Additional District Munsif, Vellore in O.S.No.266 of 1992 dated 29.09.1999.

2. The appellant herein had filed a suit in O.S.No.266 of 1992 on the file of the Additional District Munsif, Vellore, for the relief of permanent injunction restraining the

defendants their men, etc., from interfering with his peaceful possession and enjoyment of the suit property. The learned Additional District Munsif, Vellore, by the judgment dated 29.09.1999, had dismissed the said suit. However, she directed the parties to bear their respective costs. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.48 of 1999 on the file of the Sub-Judge, Vellore. The learned Sub-Judge, Vellore by the judgment dated 28.06.2002 had dismissed the said appeal without costs and thereby confirmed the judgment and decree passed by the trial court. Feeling further aggrieved, the plaintiff has 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 suit property is situated in front of the plaintiff's house between the road and the house of the plaintiff. The plaintiff is in occupation of the said property for over a statutory period. The suit property is described as 'ABCD' in the plan filed along with the plaint. The plaintiff's father Sanjeevi Naidu, one Munuswamy Naidu and Chinnappa Naidu are brothers. All the three brothers constructed three houses in the village Natham and the said houses are situated in a line. In front of the aforesaid three houses, there is a common lane running East to West and the houses are facing north. The said lane is of a breadth of 4 feet and the brothers are using the same as common property and they are using the said lane to reach their respective houses. Apart from the said lane, there is some more common property of the brothers and they are in enjoyment of the same. The aforesaid portions are also shown in the plaint plan. The house of the Sanjeevi Naidu is adjoining the road and the portion described in the plan as 'ABCD' is in the possession and enjoyment of the family of Sanjeevi Naidu and they are using the said portion by putting up a thatched shed and using the same as cattle shed. The said Sanjeevi Naidu had two sons viz., the plaintiff and his younger brother. They divided the house property of their father into two shares and the plaintiff got western half of the house. The said portion is adjoining the road of the suit property. Because of the partition, they raised a dividing wall in their house and the plaintiff made an opening on the road side and his younger brother is using the old entrance to reach his portion. Along with his portion, the plaintiff also got the suit property and he is in possession and enjoyment of the same. He continued to use the same as cattle shed.

b) Other brothers of Sanjeevi Naidu never had any possession or enjoyment of the suit property. Chinnappa Naidu,

the brother of Sanjeevi Naidu died leaving behind his wife and his only daughter, the first defendant herein. They succeeded to his properties. The wife of Chinnappa Naidu also executed a registered Will in respect of the properties of Chinnappa Naidu in favour of their daughter (first defendant) In that Will also, it is stated that the entire property which is situated between the road and their house belongs to Sanjeevi Naidu. The second defendant is the husband of the first defendant and he is an influential person. They high handedly demolished the parapet wall put up by the plaintiff around the suit property on 07.03.1992. They are threatening the plaintiff and also claiming that they are also having right in the suit property. The suit property is situated between the road and the plaintiff's house. If at all the said property may be a road poramboke, the plaintiff has to reach his house through the suit property and the defendants have no manner of right or interest to prevent the plaintiff from enjoying the same. Hence, the plaintiff was constrained to file a suit for the relief of permanent injunction to restrain the defendants from interfering with his peaceful possession and enjoyment of the suit property.

5. The averments made in the written statement filed by the second defendant are in brief as follows:

The second defendant does not admit the correctness and truth and validity of the plaint. Even as per the plaint, there is absolutely no opening or entrance on the eastern side towards the disputed portion. The photographs filed by the plaintiff would clearly show that the defendants also have a right over the suit property as common owners. It is true that the said Munuswamy Naidu and Chinnappa Naidu are brothers. The alleged opening was a recent origin. There was neither a cattle shed nor a thatched shed. Even as per the plaint, there is another opening on the eastern side, but to facilitate easy movement for all the three sharers and to reach the upstairs. The disputed portion has been kept in common for the purpose of all the three sharers during occasions and that is why, it is always kept vacant. The suit is bad for non-joinder of necessary parties viz., the brothers of Sanjeevi Naidu. It is surprising as to how the plaintiff got a copy of the registered Will which suggests the capacity of the plaintiff to harass the defendants. The allegation that the defendants have demolished the parapet wall is false. The averments made in the plaint that if at all it may be a road poramboke property shows that the plaintiff has not come to the court with a definite case. He should have stated as to whether the said property belongs to his family or it is a government poramboke. The suit has been filed only to harass the defendants and therefore, the second defendant prayed to dismiss the suit with exemplary costs.

6. Based on the aforesaid pleadings, the learned Additional District Munsif, Vellore, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and she also examined one more witness as PW2. He also marked Exs.A1 to A5 as exhibits. On the side of the defendants, the first defendant examined herself as DW1 and also examined three more witnesses as D.Ws.2 to 4. They marked Exs.B1 to B8 as exhibits.

7. The learned District Munsif after considering the materials placed before her, found that the plaintiff failed to prove that he is in exclusive possession and enjoyment of the suit property. Accordingly, she dismissed the suit. However, she directed the parties to bear their respective costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.48 of 1999 on the file of the Sub-Judge, Vellore. The learned Sub-Judge, Vellore, had dismissed the appeal confirming the judgment and decree passed by the trial court. He also directed the parties to bear their respective costs. Feeling further aggrieved, the plaintiff has filed the present second appeal.

8. This court at the time of admitting the second appeal has formulated the following substantial question of law:

"Whether the Courts below have committed illegality in not drawing adverse inference against the defendants for not producing the Will even though they claim that the suit property is described as common property in the said Will."

9. Heard Mr.V.V.Sairam, learned counsel for the appellant/plaintiff and Mr.T.Dhanya Kumar, learned counsel for the first respondent/first defendant.

10. Substantial Question of law:

The learned counsel for the appellant/plaintiff has submitted that the courts below erred in dismissing the plaintiff's suit. He further submitted that the courts below failed to consider that the plaintiff's house alone abetting the North-South street and as such, the plaintiff alone is entitled to use the suit property which is situated in between the plaintiff's house and the aforesaid street. He further submitted that the courts below, failed to consider that the first defendant is claiming right over the suit property as co-owner, but she did not file written statement. The second defendant is only husband of the first defendant and that being so, he may not have any personal knowledge about the rights and enjoyment of the suit property by the first defendant's parents, but he only filed a written statement. He further submitted that since

the first defendant has not filed any written statement, the evidence adduced by her should not have been accepted by the courts below. He further submitted that even though the defendants claimed that the first defendant's mother Pappammal had executed a registered Will in favour of the first defendant, they failed to produce the said Will and if the said Will is produced before the court, that it would show that the suit property was not included in the said Will and that must be the reason for not producing the said Will before the court and therefore, an adverse inference should have been drawn against the defendants.

11. The learned counsel for the appellant/plaintiff further submitted that since the suit property is a small stretch of land situated between the street and the plaintiff's house, the said stretch of land also should be a road poramboke and for enjoying the same, the plaintiff cannot produce any documentary evidence. He further submitted that it is a common knowledge that since the said small stretch of land is situated between the plaintiff's house and the street, the plaintiff is entitled to use the said land to reach the street. He further submitted that the courts below failed to consider that there is no necessity for the defendants to use the suit property, because the defendants are having separate access to their house through a lane which runs on the north of the row of houses as shown in the plaint plan and therefore, he prayed to allow the second appeal and set aside the judgments and decrees of the courts below and decree the suit as prayed for.

12. Per contra, the learned counsel for the first respondent/first defendant has submitted that admittedly the plaintiff's father Sanjeevi Naidu, one Munusamy Naidu and Chinnappa Naidu are brothers and all the three brothers constructed separate houses in a lane and in front of the said three houses, there is a common lane running East - West and all the three houses are facing north. He further submitted that the plaintiff is the son of Sanjeevi Naidu and the first defendant is the only daughter of Chinnappa Naidu and after the death of the said Chinnappa Naidu and his wife Pappammal, the first defendant being the sole legal representative succeeded to the property of Chinnappa Naidu. He further submitted that admittedly the suit property is situated in between the North-South road and the plaintiff's house and hence the said portion has been kept for common usage of all the three brothers viz., Sanjeevi Naidu, Munuswamy Naidu and Chinnappa Naidu. He further submitted that the plaintiff's father Sanjeevi Naidu also had entrance to his house only on the northern side and only recently i.e., six months prior to filing of the suit, the plaintiff opened an entrance on the eastern side and claiming exclusive right over the suit property. He further submitted

that the suit property has been kept for common usage of all the three brothers and for the purpose of performing family functions.

13. The learned counsel for the first respondent/first defendant further submitted that since the plaintiff has approached the court claiming exclusive right over the suit property, the burden is upon him to prove the same, but he failed to discharge the said burden and under the said circumstances, no adverse inference can be drawn for non-production of the Will executed by the first defendant's mother. He further submitted that the trial court taking into consideration of all the aforesaid facts, had rightly dismissed the suit and the same has been confirmed by the first appellate court and in the said factual concurrent findings, this court cannot interfere and therefore, he prayed to dismiss the second appeal.

14. It is an admitted fact that the plaintiff's father Sanjeevi Naidu, one Munuswamy Naidu and Chinnappa Naidu are brothers. It is also an admitted fact that all the aforesaid three brothers constructed separate houses in the Village Natham and the said houses are situated in a row and in front of the aforesaid houses, there is a common lane running East-West and the houses are facing north. It is also an admitted fact that the said lane is of a breadth of 4 feet and all the three brothers have been using the said lane as a common pathway for reaching their respective houses. In the plaint plan, the houses of three brothers which are situated in a line have been shown. The aforesaid three houses are facing north. The plaint plan also shows that there is a street on the east of aforesaid three line houses. The plaintiff's father's house is situated on the western side abutting the aforesaid North-South street. On further west, the first defendant's father's house is situated and on further west, Munuswamy Naidu's house is situated. A 4 feet lane runs from the aforesaid North-South street towards west for reaching the aforesaid three houses but the property under dispute (suit property) is shown in green colour in the plaint plan and the said property is situated in between the plaintiff's father's house and the aforesaid North-South street. Though in the plaint plan, the measurements of the suit property not mentioned, in the plaint schedule, the aforesaid disputed area has been shown as East-West 6 feet and North-South 16 feet. The aforesaid measurements have not been disputed by the defendants in the written statement or in the evidence. So, it is clear that the disputed area is a small stretch of land admeasuring East-West 6 feet and North-South 16 feet which is situated in between the plaintiff's father's house and the aforesaid North - South street.

15. According to the plaintiff, after the death of his father Sanjeevi Naidu, he and his brother partitioned their house and in the said partition, he was allotted a portion of the house on the western side and his brother was allotted on the eastern side and hence, it has become necessary for him to have an entrance on the western side to reach the North-South street and in such a case, he has to necessarily go only through the aforesaid stretch of land (suit property) which is situated in between his house and the aforesaid street. The defendants have not disputed the fact that the plaintiff and his brother partitioned their house and the plaintiff was allotted a share on the western side and his brother was allotted a share on the eastern side. According to the plaintiff, the suit property is the road poramboke. Though the defendants also claimed right over the suit property, they have not taken a stand that the said property is the patta land and the same belongs to all the three families and in such a case, the plaintiff's case has to be accepted as the suit property is only a road poramboke.

16. At this juncture, it would be relevant to refer to the decision in Subbammal Vs. Venkatachalam and another, CDJ 2011 MHC 215 wherein this court has observed in paragraph No.13 as follows:

"13. Therefore, from the above judgments, it is made clear that a person owning property adjoining the highway, is entitled to have access from all points to reach the highway and his access cannot be prevented by putting up any construction in any portion and it is not an answer that the plaintiff has got access from other points to reach the highway."

17. From the aforesaid decision, it is clear that a person owning property adjoining the highway is entitled to have access from all points to reach the highway and his access cannot be prevented. In this case, the plaintiff's property is situated adjoining of the North-South street and in between the plaintiff's property and the North-South street, a small stretch of land (suit property) is situated and according to the plaintiff, the said land is a road poramboke and the defendants have not adduced any contra evidence to show that the said portion is a patta land and in such a case, the plaintiff is entitled to have access from all points to reach the street. The defendants cannot prevent the plaintiff from using the said stretch of land for his benefits.

18. It is also to be pointed out that the first defendant while examining herself as DW1 has admitted in her evidence that her mother had executed a registered Will in

favour of her, but she has not produced the said Will before the Court. According to the plaintiff, in the said Will, the suit property has not been included and that is why, the defendants have purposely withheld the said document from producing before the court. The defendants have not given any satisfactory explanation for not producing the said Will and under these circumstances, an adverse inference has to be drawn against them, but the courts below failed to consider those facts and hence, the second appeal has to be allowed. Accordingly, the substantial questions of law is answered in favour of the appellant/plaintiff.

19. In the result, the second appeal is allowed. Consequently, connected miscellaneous petition is closed. The judgments and decrees passed by the courts below are set aside. The suit in O.S.No.266 of 1992 on the file of the Additional District Munsif, Vellore, is decreed as follows:-

(1) That the defendants are restrained by means of permanent injunction from interfering with the peaceful possession and enjoyment of the suit property by the plaintiff; and

(2) that 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

gv

To

1. The Sub-Judge, Vellore.

2. The Additional District Munsif, Vellore.

3. The Section Officer, सत्यमेव जयते
VR Section,
High Court, Madras.

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S.A.No.1840 of 2002
and
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