



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 11.02.2020

PRONOUNCED ON : 14.02.2020

CORAM:

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

S.A. (MD) No. 655 of 2006

and

M.P. (MD) No. 1 of 2006

WEB COPY

1. Ramraj
2. Suburam ... Appellants / Appellants / Defendants

Vs.

Loordu ... Respondent / Respondent / Plaintiff

PRAYER: This Second Appeal filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree 03.04.2006 made in A.S.No.28 of 2005 on the file of the Subordinate Judge, Kovilpatti, confirming the judgment and decree dated 21.09.2004 made in O.S.No.216 of 2000 on the file of the District Munsif, Kovilpatti.

For Appellants : Mr.S.Pon Senthil Kumaran
For Respondent : Mr.K.Sulthan Allowdhin

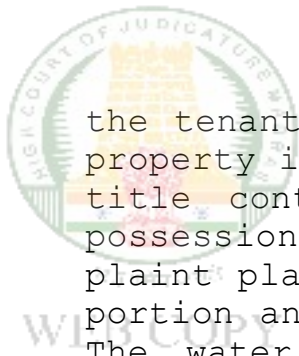
JUDGMENT

Aggrieved over the concurrent finding of the Courts below, granting mandatory injunction to remove the open drainage put up by the defendants on the lane, which belongs to the plaintiff, the present Second Appeal is filed.

2.The parties are referred to as per their rank before the trial Court.

3.The brief fact, leading to file this Second Appeal, reads as follows:-

The plaintiff is the owner of the property shown as ABCD and EFCD in the plan. There are three houses belonging to the plaintiff, which were let out to the tenants. East of the first item, the suit property is situated, which belongs to the plaintiff. East of the above lane, the plaintiff's compound wall is situated, which described as A1B1. The above lane is measuring about 6 feet. In the above lane, east-west side 4 ½ feet, south-west 84 feet and including the compound wall A1B1 measuring about 6 feet are belonged to the plaintiff. The above lane was used by



the tenants, who are residing northern side. The second schedule property ie., lane was enjoyed by the plaintiff and predecessor in title continuously. Thereby, they perfected title by adverse possession. The defendants' property is shown as A1B1GF in the plaint plan, in which the first defendant is residing at southern portion and the second defendant is residing at northern portion. The water from the plaintiff and tenants' houses was drained through the drain situated in the lane and let out to the municipal drainage. Similarly, the defendants also let out their drainage to the municipal lane. When the matter stood thus, the defendants dig a hole in their property and laid drainage in the B schedule property ie., second item of the property. The defendants have no right whatsoever in the A1B1 property. Hence, the suit has been filed for declaration and for mandatory injunction to remove the open drainage.

4. Denying the contention of the plaintiff, the defendants contended that the lane is not belonged to the plaintiff, which is a public lane and it is situated in the town Survey No. 30. It is their contention that A1B1 wall belongs to them, 1 ½ feet in west of A1B1 wall, 71 ½ feet in south-west and 42 ½ feet in north also belonged to the defendants. They were using the above area to maintain the wall and also to drain water from their houses. According to them, originally the property owned by one Arumuga Chettiar. The southern portion of the property was purchased by the first defendant in the year 1978 and the second defendant has purchased half of the property in the year 1988. The drainage was existence long back. Hence, they prayed for dismissal of the suit.

5. Based on the above pleadings, the trial Court has framed five issues. On the side of the plaintiff, P.W.1 and P.W.2 were examined and Exs. A.1 to A.8 were marked. On the side of the defendants, D.W.1 and D.W.2 were examined and Exs. D.1 to D.10 were marked. The Commissioner's reports were marked as Exs. C.1 to C.4 as Court documents.

6. The trial Court, after careful perusal of the documents, has found that the lane is not entirely belonged to the plaintiff. Since the plaintiff has not established her title over the remaining area and since the plaintiff and her tenants are using the lane, the trial Court has granted mandatory injunction to remove the drainage put up by the defendants, adjoining their wall and declared that the entire lane is belonged to the plaintiff. The First Appellate Court has also confirmed the above finding. Against which, the present Second Appeal is filed.

7. While admitting the Second Appeal, the following substantial questions of law have been framed:-

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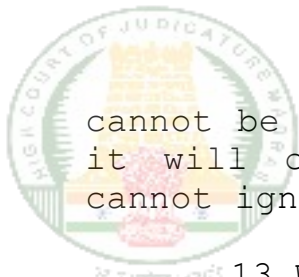
"a. Whether the courts below are right in granting the relief of declaration, when the plaintiff claimed title over the 2nd schedule property under Ex.A.1 as well as by adverse possession since both the pleas are mutually inconsistent as held by the Apex Court in 2004 10 SCC 779.

b. Whether the courts below are right in granting relief on the ground of adverse possession, when the plaintiff's own document, namely, Ex.A.7, shows that the vendors of both the plaintiff and the defendants have jointly enjoyed the 2nd schedule property.

c. Whether the 1st appellate court is justified in not discussing the evidentiary value of Exs.A.5 to A.7 and B.1 to B.5?"

8. The learned counsel appearing for the appellants vehemently contended that the Courts below having found that the plaintiff has not established her title to the lane, has simply granted injunction merely on the ground that the lane was used by the tenants of the plaintiff and the defendants have not measured the property. Such approach is not according to law. The plaintiff has sought declaration on the basis of the title and failed to establish the title. Hence, it is the contention that both the Courts had erred in granting declaration, despite the fact that the plaintiff failed to prove the title to the lane. Admittedly, the property was owned by common owners and the lane was used as a common property. Such being the position, merely because the defendants have not shown any evidence to show that they were maintaining their wall, it cannot be a ground to grant declaration. It is the contention that the open drainage is already closed during the Second Appeal. When the Commissioner has visited the wall, the drainage was well within the area belonged to the defendants. The Courts below mainly granted relief, taking note of the health issues, which is now closed. Therefore, it is the contention that the mandatory injunction and declaration granted by the trial Court will have to be set aside.

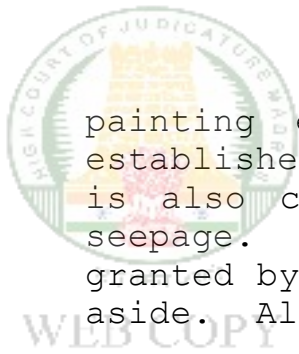
9. The learned counsel appearing for the respondent submitted that both the Courts have found that the lane was all along used by the plaintiff and her predecessor. The defendants are not using the lane. Further, there is no evidence to show that they are using the lane to maintain their wall. Further, the defendants are already draining the seepage from other area and let out through the common municipal drainage. There was no necessity to have another drainage in the common pathway. Hence, it is the contention that both the Courts have factually recorded that the plaintiff is entitled to declaration. Hence, he prayed for dismissal of the appeal.



cannot be inferred. If the open drainage is allowed to continue, it will cause public nuisance and health hazard. This Court cannot ignore subsequent event also.

13. When the appeal came up for argument on 11.12.2019, this Court after hearing both sides, has directed the learned counsel appearing for the appellants to close the open drainage situated in the subject matter of the property. Accordingly, on 06.01.2020, the learned counsel appearing for the appellants has produced photographs, showing that the drainage was closed. At the time, the learned counsel appearing for the respondent submitted that despite the closure of the drainage, the drainage water was coming out and running on the lane. If the drainage water is not coming out, there would not be any issue between the parties. The only grievance of the parties is that the drainage water is overflowing outside. In order to find out the veracity of the submissions of both the learned counsel and find out whether the drainage water is overflowing on the lane, this Court has appointed Advocate Commissioner to find out whether drainage water is overflowing. The Commissioner has filed his report, indicating that there is a seepage of pipeline fixed by the appellants. This Court, by the order dated 20.01.2020, once again directed the Advocate Commissioner to visit the suit property to see that the seepage issue is set right in his presence. Accordingly, the Advocate Commissioner has filed second report, indicating that in his presence, a new pipeline with 2.5 inch diameter fixed by the appellants in the outer wall of their house and water from the first floor of the appellants house flows freely through the said pipe till it reaches the street margin through concealed pipe on the lane and he has also stated that he has not found any leakage in the entire pipeline and original lane is properly closed. There is no objection on the side of the respondent in this regard. The photographs filed by the Commissioner also clearly show that the open drainage is now completely closed by the cement concrete. Since the plaintiff has not established title to the lane as per her own documents, the Courts below have simply granted decree only on the ground of health issues and also adverse possession without any evidence.

14. This Court is of the view that in view of subsequent change in circumstances and the lane is all along shown as a common lane in the municipal records and admittedly, the wall of the defendants is also to be maintained only by way of entry through the lane, there cannot be any declaration in respect of the lane in favour of the plaintiff. The Courts below, since the defendants have not produced any evidence to prove the maintenance of the wall, have granted declaration. Such finding of the Courts below is not on judicial principal. Nobody can expect to prove the evidence of maintaining the wall like by white washing or



painting etc. At any event, the plaintiff herself has not established her title as per her own document. Now, the drainage is also completely closed by cement concrete and there was no seepage. Therefore, this Court is of the view that the decree granted by the Courts below have to be set aside, accordingly, set aside. All the substantial questions of law have been answered.

15. It is made clear that the lane shall be used as a common lane by both sides and the defendants also have right to use the lane to maintain their wall and also repair drainage system in future. Similarly, the plaintiff has right of passage. It is to be noted that both the plaintiff and the defendants' houses are abutting the road, in fact they are not using the pathway for ingress and egress, only the plaintiff's tenants are using the same. Therefore, the lane between the plaintiff and the defendants' house shall be kept as common forever.

16. In the result, this Second Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar (CS)

Myr
To

1. The Subordinate Judge, Kovilpatti.

2. The District Munsif, Kovilpatti.

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The Section Officer, Vernacular Records,
Madurai Bench of Madras High Court,
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+1 CC to M/s. S. PON SENTHIL KUMARAN, Advocate SR-6470 [F]

+1 CC to M/s. K. SULTHAN ALLOWTHIN, Advocate SR-6507 [F]

Judgment made in
S.A. (MD) No. 655 of 2006
14.02.2020

SVM (CO)

TR (16.03.2020) 6P 7C