



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date: 09.09.2020

CORAM

THE HONOURABLE MR.JUSTICE N.SESHASAYEE

S.A(MD)No.705 of 2015

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Mr.S.Raju

:Appellant/Appellant/Plaintiff

Vs.

1.Mrs.V.Saraswathi

2.Mr.Vellaisamy

:Respondents /Respondents/Defendants

PRAYER: Second Appeal is filed under Section 100 of C.P.C, against the the Judgement and decree dated 16.11.2010 passed in A.S.No.128 of 2007 by Additional Sub Court, Dindigul, confirming the judgment and decree dated 03.11.2006 passed in O.S.No.603 of 2003 by Principal District Munsif, Dindigul.

For Appellant : Mr.S.Anand Chandrasekhar
For Respondents : Mr.H.Lakshmi Shankar

J U D G M E N T

The plaintiff who lost successively both before the trial Court as well as before the first appellate Court has approached this Court in this Second Appeal. The parties would be referred to by their rank before the trial Court.

2.The plaintiff had laid the suit for a declaration that the pathway described in the schedule of property is the common pathway of the plaintiff and the defendants.

3.The plaintiff has his property in Sy.No.1138. The Defendants have their property in Sy.No.1139. The suit pathway is shown as lying in between the properties of the plaintiff and the defendants. It is described to have a width of 18 inches and varies to 16 inches.

4.1. The case of the plaintiff is that he and his brothers were entitled to some properties and that he was allotted the property in Sy.No.1138 Vide Ext.A.6, partition deed dated 25.05.2001. So far as the defendants are concerned, they are the purchasers of the property on the north of the suit property in Sy.No.1139 under Ext.B.1, sale deed dated 24.12.1997. The plaintiff contended that after the purchase, the defendants have constructed their property by encroaching into the common pathway, leaving a bare 6 inches. Hence, he laid the suit.



4.2. Disputing the existence of the said common pathway, the defendants have contended that the property to the north of the plaintiff's property originally belonged to one Ayyavu Servai. The plaintiff has his main entrance on the south where there is a street. There has never been a common lane to the north of plaintiff's property. At no point of time, this lane was ever used by the predecessors in title of the plaintiff. Both Ayyavu Servai and the defendants have left 3/4 feet in their property and put up a construction. This 3/4 feet exclusively belong to the defendants.

5.1. The matter went to trial and both sides have produced oral and documentary evidence. The trial Court has appointed three separate Commissioners. The first Commissioner's report and plan are marked Ext.C.1 and Ext.C.2. The second Commissioner's report and plan were marked Ext.C.3 and Ext.C.4, whereas, the third Commissioner's report were marked as Ext.C.5 and Ext.C.6.

5.2. Curiously enough, it has to be underscored, the trial Court did not consider it necessary to follow the settled principle that a fresh Commission can be appointed, only after impeaching the earlier Commissioner's report. However, this is a procedural lacuna which is not likely to affect the ultimate outcome of this appeal. All the three Commissioner's found that there existed a lane as indicated by the plaintiff.

6.1. The trial Court did not rely on Ext.C.1 and Ext.C.2 filed by the first Commissioner since it does not give any measurements. The second Commissioner was appointed at the instance of the defendants in I.A.No.656 of 2003. In this Commission report, the Commissioner has found that there exists a land measuring 2 feet x 21 feet. The second Commissioner has fixed the boundary of both Sy.No.1138 and Sy.No.1139, which respectively belong to the plaintiff and the defendants. Neither side have filed any objection to this Commissioner's report. The Commissioner finds that of this 2 feet width, 3/4 feet falls within Sy.No.1138, which belong to the plaintiff and the balance 1¼ feet falls within Sy.No.1139. He has also indicated that this lane is not in Municipal plan.

6.2. The trial Court accepted the reports of the Second Commissioner, but did not act on it. Instead, the trial Court relied on the description of the property allotted to the plaintiff under Ext.A.6 partition deed. This description does not indicate any common pathway to the north of the plaintiff's property, but, only mentions about the property of the defendants' predecessor as the northern boundary. Taking this into account, the trial Court dismissed the suit. This came to be confirmed by the first appellate Court. Hence, this Second Appeal.



7.This Second Appeal is admitted on the following substantial questions of law:

"1.Are not the Courts below erred in entirely ignoring the existence of a lane found on lie by three Commissioner's?

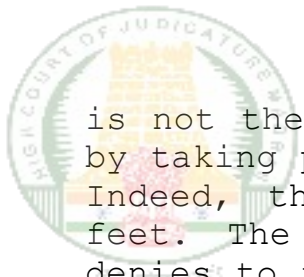
2.Were not the Court below erred in relying only on the boundary description in Ext.A.6 partition deed and another Ext.B.3, sale deed to hold that notwithstanding the existence of the lane between the property of the plaintiff and the defendants, and are not the findings perverse to that extent?"

8.Heard, both sides. Since evidence necessary to resolve the substantial questions of law raised are made available in the form of typed-set of papers, both sides agree to address their arguments finally today.

9.1. The learned counsel for the appellant argued that it is not the case of the appellant/plaintiff that the suit lane is a public lane and that it was so denoted in any of the public records. Only if it is a public lane, it will be shown in the Municipal Records/Revenue Records, and only then it is likely to figure prominently in any document. Therefore, non mentioning of a lane as a common lane in Ext.A.6 partition deed by itself is not conclusive on the non-existence of a lane that is actually available on ground.

9.2. Arguing further, the learned counsel submitted that the second Commissioner, who has taken the pain to identify the properties of the plaintiff in Sy.No.1138 and that of the defendants in Sy.No.1139 was appointed at the instance of the defendants and it is this Commissioner who finds the existence of a lane measuring 2 feet, of which, 3/4 feet is in Sy.No.1138 and remaining 1¼ feet is in Sy.No.1139. This would imply, both the parties have left a certain portion of their property and created a lane. It is not so much about title to the soil, but, usage of the lane as a common pathway that is sought. He added that even though the main road to the plaintiff's property faces south, still the plaintiff may have to go to the rear side, that is the northern side to maintain his property, so is with the defendants.

10.Refuting the contentions of the learned counsel for the appellant, the learned counsel for the respondents argued that it



is not the case of the appellant/plaintiff that a lane was formed by taking part of his property and a part of defendants' property. Indeed, the defendants have put up a sun-shade over this 1.25 feet. The plaintiff by claiming that it is a common pathway, denies to the defendants their right to use their property of 1.25 feet.

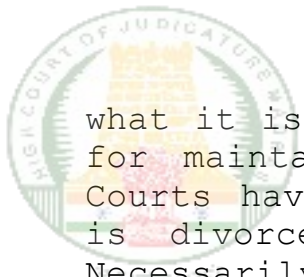
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11.1. Admittedly, there is a lane formation available as mentioned above. If the Court had to visualize a scenario where either the plaintiff or defendants' have to maintain their respective properties abutting this lane, necessarily, one has to enter that. With the total width falling anywhere between 2 feet as stated by the Second Commissioner to 16 inches as stated by the third Commissioner, it is inconceivable that any one could use only a well demarcated $1\frac{1}{4}$ feet, without treading into the other part. This implies, even if the defendants want to maintain the property, their men will necessarily have to use the entire width of the lane and not just their 1.25 feet.

11.2. Secondly, as very rightly contended by the counsel for the appellant, having found the existence of a 2 feet lane on lie, and having appointed 3 different Commissioners and having their reports on the file, the trial Court ought not to have ignored it without any valid reason. If at the end of the day, only the boundary description in Ext.A.1 partition deed or Ext.B.3 sale deed are sufficient then, the trial Court need not even have appointed a Commissioner, much less three different Commissioners.

12.Appreciation of evidence is not only limited to mere perusing the documents, but also contextually understanding how parties have conducted their affairs in reality. Here is a plaintiff and defendant, both of who are entitled to the respective properties in Sy.No.1138 and Sy.No.1139, leave certain space in between their properties from their respective properties. Why should they leave this strip of land between them? In fact, existence of lane is not a contradiction to Ext.A.6, but, consistant with it. It is true that the northern boundary of the property transacted under Ext.A.6 is shown as Ayyavu Servai's property. This property is in Sy.No.1139. Even now, it remains unaltered. The issue is all about how a fractional extent of Sy.No.1139 is used and not whose property it is. This reality in user needs to be recognized.

13.Since this lane is going to be beneficial for the enjoyment of the properties of both the defendants and the plaintiff, this Court necessarily needs to recognize that the lane has to remain



what it is and the plaintiff should have a right to use this lane for maintaining his property. This Court finds that the lower Courts have erred in appreciation of evidence, and its reasoning is divorced from the evidentiary facts on record establish. Necessarily, this Court considers it appropriate to interfere.

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14.Since the learned counsel for the plaintiff/appellant submitted that he would confine his enjoyment of the lane for the purpose of maintaining his property, this Court chooses to mould the relief and holds that the appellant/plaintiff shall be entitled to use the lane to its entire width for any maintenance or such other activities. This would also avoid unnecessary future litigations. Therefore, the Judgement and decree dated 16.11.2010 passed in A.S.No.128 of 2007 by the Additional Sub Court, Dindigul, confirming the judgment and decree dated 03.11.2006 passed in O.S.No.603 of 2003 by the Principal District Munsif, Dindigul is set aside.

15.In the result, the Second Appeal is allowed. No costs.

Sd/-

Assistant Registrar (CS-I)

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Sub Assistant Registrar(CS)

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To

1.The Additional Sub Judge, Dindigul.

2.The Principal District Munsif, Dindigul.

3.The Section Officer-2 copies

V.R.Section, Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.H. LAKSHMI SHANKAR, Advocate (SR-16456[F] dated
10/09/2020)

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