



IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

Reserved on	22.10.2021
Pronounced on	17.12.2021

THE HONOURABLE Mrs.JUSTICE S.KANNAMMAL

S.A.No.850 of 2019 &
C.M.P.No.17530 of 2019

Karupanna Gounder (died)

1. Kaaliyammal
2. Uthiyasamy
3. Murugesan
- 4.Sasikala

...Appellants/Appellants/Defendants

Vs.

1. K.Kumarasamy
2. S.Kumarasamy

...Respondents/Respondents/Plaintiffs

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code to set aside the Judgment and Decree dated 17.09.2018 made in A.S.No.19 of 2017 on the file of the Sub-Court, Dharapuram confirming the Judgment and decree dated 05.04.2017 made in O.S.No.390 of 2010 on the file of the District Munsif Court, Dharapuram.

For Appellants : Mr.R.Shase for
Mr.M.Guruprasad

For Respondents : Mr.A.K.Sridharan

J U D G M E N T

The appellants, who are the defendants before the trial Court, have filed the present Second Appeal under Section 100 of the Civil Procedure Code to set aside the Judgment and Decree, dated 17.09.2018, made in A.S.No.19 of 2017 on the file of Sub-Court, Dharapuram, confirming the Judgment and decree, dated 05.04.2017, made in O.S.No.390 of 2010 on the file of District Munsif Court, Dharapuram.



2. The brief facts leading to the filing of this appeal are as follows:-

2.1. A partition of the suit property took place amongst Karuppanna Gounder, Kumarasamy Gounder and Subramaniya Gounder, after the death of their father, viz., Semalai Gounder, by way of a partition deed, dated 31.05.1972. The respondents, who are the plaintiffs, and sons of Karuppanna Gounder and Subramaniya Gounder filed O.S.No.390 of 2010 for declaration to declare the 6 feet pathway as a cart track running from R.S.No.1532 towards south-east in R.S.No.1529 and permanent injunction against the appellants, who are wife, sons and daughter of Karuppanna Gounder before the learned District Munsif, Dharapuram. Pending the suit, the appellants had filed an interlocutory application in I.A.No.404 of 2013 under Order 26 Rule 9 CPC seeking to measure the properties of the respondents / plaintiffs by contending that the alleged bund does not run towards the south-east land of S.F.No.1529 and the same was allowed.

2.2. The suit filed by the respondents / plaintiffs was resisted by the appellants, by filing a written statement.

3. During the course of trial, the trial Court framed the following issues :

(1) Whether the suit ABCD cart track runs north side on the south eastern portion of S.F.No.1532 and turns eastwards and runs into the land of the plaintiffs in S.F.No.1529 on the southern portion and runs into the land of the second plaintiff in S.F.No.1528 on the northern portion with a width of 6 feet as contended by the plaintiffs ?

(2) Whether it is true that the plaintiffs have encroached upon the land of the defendants in RC No.167/2 on the southern portion to a width of 12 feet by removing the old live fence and formed the suit pathway as contended by the defendants ?

(3) Whether the plaintiffs are entitled to the relief of declaration of their title over the suit ABCD pathway ?

(4) Whether the plaintiffs are entitled to the relief of permanent injunction to use the suit ABCD pathway ?

(5) To what relief the plaintiffs are entitled ?

4. Before the trial Court, the plaintiffs examined themselves as PWs.1 and 2 and marked Exs.A1 to A6. The third defendant examined himself as DW1 and marked Exs.B1 to B15. Exs.C-1 and C-2 were marked as Court documents.



5. The Trial Court, on consideration of the pleadings and on appreciation of the evidence, both oral and documentary, found that the plaintiffs are entitled to get the relief and allowed the Suit, as prayed for, vide judgment and decree, dated 05.04.2017. Aggrieved over the allowing of the Suit, the defendants filed A.S.No.19 of 2017 on the file of Sub-Court, Dharapuram.

6. The lower Appellate Court, on going through the grounds of appeal, formulated the following points for determination :

(i) Whether the trial Court is justified in allowing the suit for declaration and permanent injunction ?

(ii) Whether the appeal is liable to be allowed ?

(iii) To what relief ?

7. The lower appellate Court, on re-appreciation of the evidence and considering the submissions made on either side, confirmed the order of the trial Court, dismissing the appeal. Peeved at the dismissal of the said appeal, the appellants have filed this Second Appeal.

8. This Second Appeal was admitted on the following Substantial Questions of law :

"1. Whether the Court below are right in granting declaratory relief when the plaintiffs had miserably failed to prove the existence and enjoyment of the suit pathway ?

2. Whether the Courts below are right in finding that Ex.P-1 partition deed alone is enough to claim ownership of the pathway, when P.W.2 admitted in his cross examination that there is no necessity for him to access the pathway ?

9. Learned counsel for the appellants submits that there is no such cart track as per the earlier survey numbers as claimed by the respondents nor as per resurvey measurements, which have been done subsequently; that the 1st respondent has a pathway to his land on the northern side and 2nd respondent has a pathway on the eastern side, and that the trial Court failed to appreciate the contentions of the appellants in the suit in O.S.No.390 of 2014 and allowed the relief claimed by the respondents.

10. Learned counsel for the appellants also contends that though the respondents failed to produce any material evidence



to show that the pathway is in exclusive possession of them, the trial Court granted the relief in favour of the respondents. According to him, the recital of document of Ex.P.1 mentions only the direction of the pathway, but does not give any description as to the survey number of the pathway.

11. Learned counsel for the appellant also submits that the Courts below had misread and misinterpreted the evidence of the parties and decreed the suit. He would further submit that both the respondents have separate access to their properties and they failed to establish the existence of the suit pathway by way of unimpeachable evidence and, therefore, the orders of the Courts below are liable to be set aside.

12. In support of his contentions, learned counsel for the appellants has relied upon a decision of the Hon'ble Supreme Court in State of Rajasthan and others Vs. Shiv Dayal and Another, reported in (2019) 8 SCC 637.

13. Per contra, learned counsel for the respondents would contend that all the averments stated by the appellants are false and they have not produced any evidence to disprove the material produced by the respondents. He would further contend that at the instance of the appellants, an Advocate Commissioner was appointed and, after analysing the report of the Advocate Commissioner, orders were passed by the Courts below and, therefore, the said orders do not warrant any interference by this Court. Accordingly, he prayed for dismissal of the Second Appeal.

14. I have heard the learned counsel for the parties and also perused the material available on record.

15. On going through the records, including the orders of the Courts below, it is clear that the Courts below have elaborately dealt with the matter point by point and come to a definite conclusion that the respondents/plaintiffs have clinchingly established their case with relevant documents, including Ex.P-1, Partition Deed. The said Partition Deed clearly provides for a cart track / pathway, which was formed by the parties to the deed in their own property. Moreover, the Advocate Commissioner, appointed by the trial Court, on inspection, stated in his report that there exists a cart track / pathway 'ABCD' in the suit property. Ex.P-1 also specifically mentions the direction of the pathway and the description as to the survey numbers. Only on a careful scrutiny of the documents, the Courts below, after framing the necessary



issues and dealing with the same in extenso, have come to a definite conclusion and decreed the suit as prayed for. Therefore, it cannot be said, as contended by the learned counsel for the appellants, that the Courts below have not framed necessary issues for consideration, while deciding the suit.

16. It is well settled that concurrent findings of facts of Courts below are usually binding on High Court in Second Appeal. This Court is also conscious that the said rule is subject to certain exceptions, as held by the Hon'ble Supreme Court in State of Rajasthan v. Shiv Dayal, (2019) 8 SCC 637, relied upon by the learned counsel for the appellants. In other words, where concurrent finding of fact is recorded de hors the pleadings or it is recorded against any provision of law, or the decision is one which no Judge acting judicially could reasonably have reached, such grounds will constitute substantial questions of law within the meaning of Section 100 of the Code of Civil Procedure. Hence, concurrent finding in such a case can be interfered with in Second Appeal. However, the case on hand is not the one, which attracts the said exceptions. In this case, as I have already stated supra, the Courts below have framed all necessary issues and dealt with the same coherently and concurrently. Therefore, the said decision of the Hon'ble Supreme Court is not of any avail to the appellants.

17. For the foregoing reasons, this Second Appeal is dismissed, as devoid of merit. No costs. Consequently, the connected C.M.P. is also dismissed.

SD/-
ASSISTANT REGISTRAR

// TRUE COPY //

SUB ASSISTANT REGISTRAR

ssd/dixit

To

1. The Sub-Court,
Dharapuram.
2. The District Munsif Court,
Dharapuram.



3.The Section Officer,
V.R.Section,
High Court, Madras-104.

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+1cc to Mr.M.Guruprasad, Advocate Sr.68402

S.A.No.850 of 2019

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