



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 30.11.2021

DELIVERED ON : 03.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A. (MD)No.174 of 2005

WEB COPY

Dhanavelu

... Appellant/Appellant/Defendant

Vs

Nandhagopal @ Jeyaraj

... Respondent/Respondent/Plaintiff

PRAYER : Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the decree and judgment of the Additional Subordinate Judges Court, Kumbakonam passed in A.S.No.94 of 2003 dated 07.10.2004 partly modifying the decree and judgment of the First Additional District Munsif Court, Kumbakonam passed in O.S.No.122 of 1993 dated 21.10.2002.

For Appellant	: Mr.M.R.S.Prabhu Advocate for Mr.V.K.Vijayaraghavan Advocate
For Respondent	: Mr.B.Anandan Advocate

JUDGMENT

The defendant is the appellant herein.

2. The respondent/plaintiff filed O.S.No.122 of 1993 before the First Additional District Munif Court, Kumbakonam, for the relief of mandatory injunction and for recovery of possession. The said suit was filed for an extent of 220 Sq.ft. The suit was decreed as prayed for. The defendant filed A.S.No.94 of 2003 before the Additional Subordinate Court, Kumbakonam. The learned Subordinate Judge had modified the decree and granted a prayer for a lesser extent of 110 Sq.ft. As against the same, the present second appeal has been filed by the defendant.

3. The plaintiff had contended that he has purchased the suit schedule property on 26.09.1991 under Ex.A.3 sale deed and he has also taken possession of the said property. He further contended that the defendant is the owner of the property located on the West of the suit schedule property under Ex.A.4 sale deed dated 02.10.1980. He further contended that the present defendant laid a claim over the property to the West of his property alleging it to be a partition. The plaintiff further contended that the present

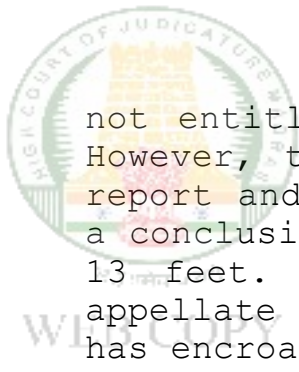


defendant has filed O.S.No.89 of 1990 before the Subordinate Court, Kumbakonam seeking declaration and permanent injunction with regard to the present suit schedule property alleging it to be an exclusive pathway of the defendant. The said suit was dismissed and the present defendant filed A.S.No.131 of 1991 before the District Court, Thanjavur. The said appeal was also dismissed. Thereafter, the defendant had preferred second appeal No.1740 of 1992 before the Principal Seat and the said second appeal was also dismissed. Despite the dismissal of the said suit, the defendant is not handing over the possession of the suit schedule property.

4. The defendant filed a written statement contending that he had purchased two plots namely, Plot Nos.5 and 6 in Survey No.97/7 having an extent of 10 cents under Exhibit A4 sale deed dated 02.10.1980. The defendant further contended that as per the said sale deed, eastern side of the property was shown as pathway by his vendors. Once the eastern side is shown as a pathway, thereafter his vendor will not have any right to sell it to the present plaintiff under Ex.A.3. The defendant further contended that the judgment and decree in O.S.No.89 of 1990 will not operate *res judicate*. The defendant further contended that he claimed exclusive right of pathway and only the said contention was rejected, but still the suit schedule property will continue to be a common pathway to both the parties.

5. The trial Court considered the oral and documentary evidence on either side and came to a conclusion that the present suit schedule property was shown as "B" Schedule in O.S.No.89 of 1990, which was filed by the present defendant. The trial Court also found that the width of the pathway as shown in the said suit was 13 feet and the length was 110 feet. The trial Court also found that the right of the present defendant over the suit schedule pathway was negatived in the previous proceedings and confirmed up to High Court. The trial Court also found that since the claim of the defendant for declaration of title and injunction over the present suit schedule property was negatived in the previous proceedings, the defendant is not entitled to re-agitate about his right over the suit schedule property. On the basis of the said finding, the suit was decreed as prayed for.

6. The defendant has filed a first appeal, the learned Subordinate Judge confirmed the findings of the trial Court holding that the present defendant cannot re-agitate his right over the suit schedule property. The first appellate Court also found that in the previous proceedings, a right claimed by the defendant has been negatived by all the Courts. The first appellate Court also found that the present plaintiff is the 5th defendant in the previous suit and hence, the first defendant is



not entitled to make any claim over the suit schedule property. However, the first appellate Court based upon the Commissioner's report and the measurement given in the previous suit, arrived at a conclusion that the width of the pathway is just 12 feet and not 13 feet. On the basis of the above said findings, the first appellate Court modified the decree and held that the defendant has encroached upon 110 Sq.ft. and not 220 Sq.ft.

7. Aggrieved over the same, the present second appeal has been filed by the defendant. The second appeal has been admitted on the following substantial questions of law:

"1. Whether the sale deed in favour of the respondent dated 26.09.1991 is legally enforceable when the subject matter of dispute between the parties is WAY intended for public use?"

2. Whether the lower appellate Court was correct in dismissing the application filed by the appellant for reception of documents in I.A.No.9 of 2004 in A.S.No.94 of 2003?

3. Was the lower appellate Court correct in rejecting the evidence of D.W.2 surveyor who had stated that no encroachment was committed by the appellant?

8. The learned counsel for the appellant contended that the judgment and decree in O.S.No.89 of 1990 and confirmed in second appeal No.1740 of 1992 will not operate as *res judicata* as against the appellant. He further contended that in the previous proceedings, the present appellant had contended that the suit schedule property is an exclusive pathway and prayed for consequential injunction. There is an observation in the judgment of the first appellate Court in A.S.No.131 of 1991 to the effect that it is not as exclusive pathway of the present defendant. Relying upon the said observation, the learned counsel for the appellant contended that though it may not be the exclusive pathway of the defendant, yet the suit schedule property continues to be a pathway and the plaintiff will not be entitled to seek recovery of possession from him.

9. The learned counsel for the appellant further contended that his sale deed is anterior in point of time i.e dated 02.10.1980 in which, the suit schedule property has been shown as a pathway. The vendors of the appellant have chosen to alienate the pathway in favour of the plaintiff and they have no right to do so.

10. *Per contra*, the learned counsel for the respondent

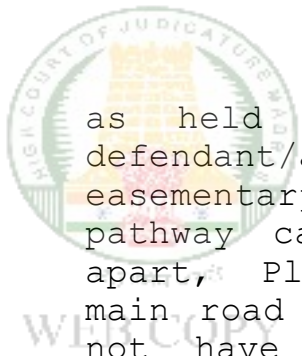


contended that the present appellant claimed exclusive right over the present suit schedule property and sought for permanent injunction in O.S.No.89 of 1990. The trial Court as well as the first appellant Court in the previous proceedings have held that the present appellant does not have any right or possession over the present suit schedule property. The learned counsel for the respondent also drew my attention to the judgment of this Court in second appeal No.1740 of 1992 which was filed by the present appellant. In the said judgment, this Court has categorically held that the appellant has not produced any evidence even remotely to indicate that he had any right to use the pathway, even as an easement. In view of the above said finding, this Court in second appeal, the learned counsel for the respondent contended, that the present appellant cannot re-agitate the said issue again claiming right of pathway in the suit schedule property.

11. I have carefully considered the submissions on either side and perused the oral and documentary evidence.

12. There is no dispute that the present appellant has purchased plot Nos.5 and 6 under Ex.A.4 on 02.10.1980 for an extent of 10 cents. According to the appellant. the Eastern side of these two plots were shown as pathway. The said pathway has been alienated by his vendors under Ex.A.3 in favour of the plaintiff on 26.09.1991 and hence, the said sale deed is not valid. He further contended that the suit schedule property should be maintained as a pathway. A perusal of Exs.A.5 to A.7 will indicate that the present suit schedule properties were shown as "B" Schedule in O.S.No.89 of 1990. The trial Court in the said suit has held that the plaintiff does not have any right or title over the said "B" Schedule property and dismissed the suit. The first appellate Court in A.S.No.131 of 1991 has also confirmed the said finding in second appeal No.1740 of 1992 and held that the present appellant does not even have any right to use the "B" Schedule property even as a pathway. Hence, from the above exhibits, it is clear that the present appellant/defendant does not have any right to use the "B" Schedule property in the previous schedule as a pathway.

13. The suit "B" Schedule property in the previous suit has been purchased by the present plaintiff under Ex.A.3 on 26.09.1991. When the defendant in the present suit, has no right of passage over the suit schedule property as per the judgment in the previous proceedings, the appellant/defendant does not have any legal right to resist the claim of the plaintiff seeking recovery of possession of the said property. The sale deed in favour of the plaintiff is disputed by the present defendant/appellant only on the ground that the pathway cannot be alienated. But the High Court in second appeal No.1740 of 1992



as held that there is no such pathway and the present defendant/appellant, has no right to use the pathway even as an easementary right. Hence, the contention of the appellant that the pathway cannot be alienated is not legally sustainable. That apart, Plot Nos.5 and 6 purchased by the defendant is facing the main road and hence, the defendant cannot complain that he does not have any access to the main road. The plaintiff has established his title over the suit schedule properties and the defendant is not in a position to establish his right to be in possession over the suit schedule properties.

14. The Courts below have found that the defendant has encroached upon the suit schedule properties based upon the Commissioner's report as well as the admission of the defendant. When the present defendant lost the suit, claiming declaration of title and permanent injunction, necessarily he has to give up his possession in favour of the plaintiff. All the substantial questions of law raised by the appellant are factual in character and no substantial questions of law arises for consideration, especially in the light of the judgment in the previous proceedings. The judgment and decree of the first appellate Court are confirmed and the second appeal stands dismissed. No costs.

Sd/-

Assistant Registrar (CS III)

// True Copy //

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Sub Assistant Registrar(CS)

btr/msa

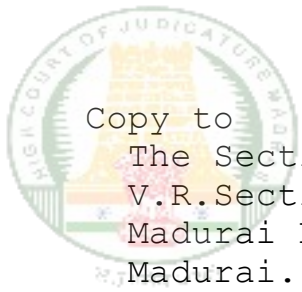
Note :

In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

1.The Additional Subordinate Judge,
Kumbakonam.

2.The First Additional District Munsif,
Kumbakonam.



Copy to
The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

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+1 CC to M/s.V.K.VIJAYARAGAVAN, Advocate (SR-37669[F] dated
07/12/2021)

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