



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE: 01.12.2021

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THE HON'BLE MRS.JUSTICE V. BHAVANI SUBBAROYAN

S.A.(MD) No.646 of 2021

and

C.M.P(MD) No.8656 of 2021

UTHUMAL BEEVI

... Appellant/Appellant/1st Defendant

Vs

ABDUL JAPPAR (DIED)

... Nil / 1st Respondent/1st Plaintiff

1. Mohammed Mustapa
2. Mohammed Iqbal
3. Beer Fathima
4. Kasinammal
5. Mohammed Ali Jinnah
6. Kalima
7. Mohammed Fathima
8. Um Musalma Rahmath
9. Abdul Jabar Badhusa
10. Beer Mohammed

... Respondents 1 to 10/Respondents 2 to 11/ Plaintiffs 2 to 11

11. The Tenkasi Municipality

Rep.by its Commissioner, O/o. Tenkasi,
Municipality, Tirunelveli Road,
Tenkasi Taluk,
Tenkasi District

... 11th Respondent/12th Respondent/
2nd Defendant

Second Appeal filed under Section 100 of CPC to set aside the judgment and decree dated 06.01.2021 made in A.S. No.20 of 2019 on the file of the Sub Court, Tenkasi confirming the judgment and decree dated 25.07.2018 made in O.S.No.528 of 2012 on the file of the Additional District Munsif Court, Tenkasi.

For Appellants : Mr.P.Santhana Krishnan

JUDGMENT

The present second appeal has been filed against the judgment and decree dated 06.01.2021 made in A.S. No.20 of 2019 on the file of the Sub Court, Tenkasi confirming the judgment and decree dated 25.07.2018 made in O.S.No.528 of 2012 on the file of the Additional District Munsif Court, Tenkasi.



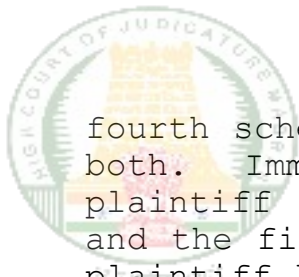
2. For the sake of convenience, the parties are referred to as, as described before the trial Court.

3. The case of the plaintiffs, as per the averments made in the plaint, in short, are as follows:-

(i) The plaintiff had purchased a property on 24.02.1964, for a valid consideration along with the fourth scheduled house and pathway. The plaintiff also purchased the 1st schedule property along with the fourth schedule, including the house and the pathway on 05.05.1965, for a valid sale consideration. The 3rd scheduled property belongs to the first defendant. For the 1 to 3 scheduled properties the fourth schedule property stands as the common pathway and to be used as common place for their use and occupation. In the 4th schedule property, the plaintiff or defendant has got no individual rights and it is a common way and area. The plaintiff first schedule property rain water collected will pass through the fourth scheduled property only to reach common water drainage. As it is used as a common property the first plaintiff is in possession and enjoyment of the same from the date of purchase. The first defendant also uses the fourth schedule property to reach the third schedule property. The sketch would show the exact position of the property situated in the schedule. There is a Manure pit in the said area.

(ii) There arose a dispute between the plaintiff and the first defendant and the defendant filed a suit in O.S. No. 441 of 1994 before the District Munsif, Tenkasi and in the said judgment rendered it was held that the disputed area should be maintained by both the parties and they shall not cause any disturbance to the existing structures and to be treated as common place and the path to be maintained as common pathway and the first schedule property rain and other water pours into the fourth schedule property to reach the drainage in the road. As no other area is available for the water to reach the drainage. Accordingly, the plaintiff and the first defendant were restrained from making any construction in the said path as it would definitely infringe the right of the other party.

(iii) As the first defendant was not in a position to stay alone due to her age had gone to Tenkasi and the first defendant has utilized the said opportunity and in her absence tried to construct a house on 20.11.2012 and knowing that immediately she came to her house and found that the physical features has been totally altered to the maximum extent and they also removed the compound wall in the East- West side and constructed a house between the pillar and also damaged the roof tiles of the plaintiff's house in the first scheduled property due to the damage water started seeping inside and the defendant tried to encroach upon the



fourth scheduled property in total which is the common pathway for both. Immediately the second plaintiff had approached the first plaintiff and also called for a panchayat with the village elders and the first defendant did not accept for the panchayat, hence the plaintiff had given a complaint before the municipality and to the police.

(iv) The first defendant has submitted that he has got every right to construct a house as he has also obtained proper permission from the municipality and he cannot stop the constructions. The complaint was filed on 26.11.2012. The municipality came to the spot with the surveyor and has also measured the property but directed the parties to go for a compromise. The second plaintiff requested the second defendant to measure the property and accordingly the Surveyor came on 29.11.2012 to measure the same. The defendants had obstructed the survey and did not allow them to measure the same.

(v) Hence, on 30.11.2012 the plaintiff filed a complaint before the second respondent. The second respondent did not perform his duty as per procedure, the first defendant's had completed the building construction. Further if the second defendant has given any permission to the first defendant it is against the building rules laid down for the Municipality. Further if the second defendant had given any permission to the first defendant against the building rules of the municipality and the said permission will not bind on her. Further submitted that the said construction would definitely cause inconvenience to the plaintiff to reach his building. Further he submitted that the said rights of the plaintiff are being clandestinely obstructed by the defendants in collusion. At the time of filing the suit, first defendant died and the respondents were added as parties being the legal heirs.

(vi) It is seen that the first defendant has filed a written statement wherein he has stated that the plaintiff has got right over the property in the fourth scheduled, 2 item only and the first and second document does not have any relevance. He had further submitted that as per the Town Survey register this suit is not maintainable and further the documents does have any relevance to the record of the revenue department and further these documents have been made use by the plaintiff for giving a complaint. Further submitted that only after the completion of the building the suit has been filed which is would definitely fall on the doctrine of laches had dismissed the suit and no cause of action arises and further submitted that the disputed property is not correct and further prayed for dismissal of the suit.

4. Resisting the claim made by the 1st plaintiff, the 1st defendant filed a written statement contending *inter alia* that the plaintiff has got right over only the property in the fourth



scheduled, 2 item and the first and second document does not have any relevance. He further submitted that as per the Town Survey and Register, the Suit filed by the 1st plaintiff is not maintainable and further the documents does have any relevancy to the records of the Revenue Department. Further submitted that only after the completion of the building, the suit has been filed, which is would definitely fall on the Doctrine of Latches and therefore, prayed for dismissal of the suit.

5. The second defendant had filed a counter and denied all the submissions made by the plaintiff as if they have not issued any such building permission and if they have issued any such valid permission it has to be proved by the concerned parties only as per the rules and regulations they have given permission and further submitted that if there is any contravention of rule is found the second defendant will not grant any sanction and planning permission. As they are not necessary parties, prayed for dismissal of the same.

6. During trial, the second plaintiff was examined as PW.1 and marked 11 documents as Ex.A1 to Ex.A11. The first defendant herself was examined himself as D.W.1 and one document was marked as Ex.B1. The court document was also marked as Ex.C1 to C5.

7. On analysis of the oral and documentary evidence, the Trial Court had allowed the suit. Aggrieved by the same, the 1st defendant has preferred an appeal in A.S. No.528 of 2012, on the file of the Principal Sub Court, Tenkasi.

8. The first appellate court, after considering the oral and documentary evidence of the parties, had dismissed the appeal suit. Aggrieved by the Judgment and decree passed by the first appellate Court, the present Second Appeal has been filed by the 1st defendant on various grounds.

9. The learned counsel appearing for the appellant/ 1st defendant would vehemently contend that both the courts below erred to consider the valid and vital document produced by the appellant/1st defendant to prove the case and the appellant / 1st defendant had not produced any document to prove her case over the suit schedule property. Further both the Courts have erred to consider the document Ex.B.1 which is the agreement, executed between the 1st plaintiff and the 1st defendant on 26.06.2011, which reveals that the appellant / 1st defendant is entitled to make construction over the suit property. Further both the courts below erred to note that the sale deeds produced by the first plaintiff are not related to the suit property and under the said situation no decision can be taken regarding the suit property unless and until the valid and related document is produced. Further the Courts below erred to note that the 1st plaintiff has unnecessarily impleaded the Tenkasi Municipality as one of the defendant to the



proceedings and infact the Municipality is not a necessary party to the proceeding and the suit can be dismissed on the ground of misjoinder further the appellant / 1st defendant had made construction over the suit property only after getting approval from the Tenkasi Municipality and in the present case also they have appeared and not contested the case of the 1st defendant and the presumption of both the Courts that the construction made by the 1st defendant is proper cannot be accepted.

10. The learned counsel appearing for the respondent / defendant would submit that the well considered Judgments of the Courts below need not be interfered with, as there is no question of law involved in this Second Appeal and prayed for dismissal of the Second Appeal.

11. This Court paid its anxious consideration to the rival submissions made and also carefully perused the materials placed on record.

12. According to the plaintiff, the 1st plaintiff had purchased a property on 24.02.1964, for a valid consideration along with the fourth scheduled house and pathway. The plaintiff also purchased the 1st schedule property along with the fourth schedule, including the house and the pathway on 05.05.1965, for a valid sale consideration. The 3rd scheduled property belong to the first defendant. For the 1 to 3 scheduled properties the fourth schedule property stands as the common pathway and common place for their use and occupation. In the 4th schedule property, the plaintiff or defendant has got no individual rights and it is a common pathway. According to the plaintiffs, they have have right to pass water both dirty and rain water through the 4th schedule property, which is a common pathway to the 1st plaintiff and the 1st defendant. The first defendant also uses the fourth schedule property to reach the third schedule property. The sketch would show the exact position of the property situated in the schedule. Accordingly, the 1st plaintiff and the 1st defendant cannot make any construction in the said path, as it would definitely infringe the rights of the other party. In these, circumstances, the 1st defendant constructed a house encroaching the 4th schedule property, which is a pathway, which was objected by the 1st plaintiff. Hence, on 30.11.2012 the plaintiff filed a complaint before the second respondent. Despite taking action, the second defendant had given permission to the first defendant contrary to the law. Therefore, the 1st plaintiff filed a suit.

13. According to the 1st defendant, he had constructed the building as pex Ex.B1, agreement entered into between the 1st plaintiff and the 1st defendant. The 1st defendant did not violate the terms and conditions contained in Ex.B1. If there is any contravention of Rules the second defendant will not grant sanction and planning permission to construct the building. Hence, the 1st defendant prayed for dismissal of the suit. But, accroding to the 2nd



defendant, the sanction and planning permission has been given as per the Rules.

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14. It is not in dispute that the 4th schedule property is a common pathway. According to the plaintiff, the 1st defendant have no right to construct a building in the 4th schedule property, as it is a common pathway both to the plaintiffs and the defendants. According to the 1st defendant, as per the agreement Ex.B1, dated 26.06.2001, entered into between the 1st plaintiff and 1st defendant, the 1st defendant constructed the building. When P.W.1 was examined on the side of the first defendant, P.W.1 has stated as follows:-

"1ம் பிரதிவாதியும் என் தகப்பனாரான 1ம் வாதியும் 2001ம் வருடம் ஜூன் மாதம் 26ம் தேதி தாவா சொத்து சம்பந்தமாக ஒரு ஒப்புந் தம் செய்து கொண்டார்கள் என்று சொன்னால் அதன் உள்ளடக்கம் எனக்கு தெரியாது. ஆனால் தற்போது என்னிடம் காட்டப்படும் அந்த ஒப்புந் தத்தின் நகலில் உள்ள கையெழுத்து என்னுடைய தகப்பனாருடையதுதான். மேற்படி ஒப்புந் தமானது எங்கள் கைவசம் உள்ளதா தேடிப்பார்த்துதான் சொல்ல இயலும். மேற்படி ஒப்புந் தத்திற்கு உட்பட்டு தான் 1ம் பிரதிவாதி வீடு கட்டியுள்ளார் என்றும் அதனை மறைத்து இவ் வழக்கை தாக்கல் செய்துள்ளோம் என்றும் சொன்னால் சரியல்ல"

15. Furthermore, the defendants have not produced any documents like sale deed, plan approval etc., to prove the fact that the building was constructed based on the terms and conditions contained in the agreement and the defendants has to prove the same, but failed to do so. Therefore, this Court has no hesitation in holding that the construction made by the 1st defendant in the property in dispute is an unauthorized construction. The said agreement is a xerox copy and the said agreement has not been produced.

16. As per the admission made by the 1st defendant, he constructed the building as per Ex.B1, Agreement Deed, executed on 26.06.2001. On perusal of the Advocate Commissioner's Report confirms the fact that there was a building in the common pathway that an unauthorized construction was made over the 4th Schedule in 2nd item of property. On perusal of records it is seen that the 1st defendant had admitted in his cross examination that at the time of filing the suit, he had constructed the building in the east-west direction, as per the permission granted by the plaintiff, but which has not been proved by adducing any evidence. Further, in the town survey register it has been found that it is the common pathway. When that being the case, the plaintiffs or the defendants cannot have an exclusive right over the common pathway and they themselves cannot enter into an agreement and construct a building, which would definitely obstruct the pathway. As per the judgment in O.S.



No.528 of 2012 they are estopped from doing so.

17. In view of the forgoing discussions, this Court finds no reason to interfere with the well reasoned Judgments of the Courts below and also there is no question of law much less substantial question of law arises for consideration in this Second Appeal Accordingly, the Second Appeal is liable to be dismissed.

18. In fine, the Second Appeal is dismissed, confirming the Judgment and Decree in A.S. No.20 of 2019 on the file of the Sub Court, Tenkasi in confirming the Decree and Judgment in O.S.No.528 of 2012 on the file of the Additional District Munsif Court, Tenkasi. The appellants / defendants are directed to vacate the 4th schedule, 2nd item of the suit property, within a period of three months from the date of receipt of a copy of this Judgment. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID 19 pandemic, a web copy of the order may be utilised 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 Subordinate Judge, Tenkasi
2. The Additional District Munisif, Tenkasi

Copy to:

The Section Officer,V.R. Section,
Madurai Bench of Madras High Court, Madurai - 2 Copies

S.A.(MD) No.646 of 2021and
C.M.P(MD) No.8656 of 2021
01.12.2021

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