



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 27.01.2021

CORAM

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

S.A(MD)No.524 of 2020

and C.M.P(MD)No.5800 of 2020

1.Vadivel ... 1st Appellant/2nd Respondent/2nd Defendant

Thangappan (died)

2.Kanagam

3.Thangam Rani

4.Suyambukani

5.Jeya

6.T.Vaigundabalan

7.Lakshmi ...Appellants 2 to 7/Respondents 4 to 9

Vs.

1.Thangathurai ... 1st Respondent/Appellant/Plaintiff

2.Nagercoil Municipality
Rep. by its Commissioner,
Municipal Office,
Nagercoil,
Kanyakumari

...2nd Respondent/3rd Respondent/3rd Defendant

PRAYER:- Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 19.02.2020 made in A.S.No.49 of 2017 on the file of the II Additional Sub Court, Nagercoil by reversing judgment and decree dated 20.04.2017 made in O.S.No.519 of 2012 on the file of the Principal District Munsif, Nagercoil.

For Appellants	:	Mr.P.Arun Jayatram
For R1	:	Mr.S.Meenakshisundaram Senior Counsel for Mr.M.Sengu Vijay
For R2	:	No appearance

J U D G M E N T

The legal heirs of the first defendant and the second defendant in O.S.No.519 of 2012 on the file of the District Munsif, Nagercoil who were able to convince the trial court to dismiss the suit for declaration, permanent injunction and mandatory injunction filed by the plaintiff/first respondent upon its reversal by the lower appellate court have come up with this Second Appeal against the plaintiff and the third defendant.

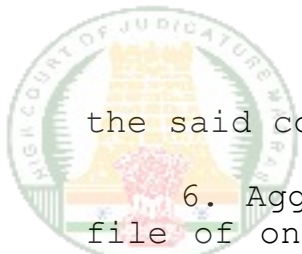


2. The suit was laid by the plaintiff claiming that the suit 'B' schedule property, which is situated north to the suit 'A' schedule property is a public road and the plaintiff being the owner of the suit 'A' schedule property is entitled to access to suit 'B' schedule property from every point of his land that abutts the suit 'B' schedule property. Complaining that the defendants 1 and 2 had encroached upon the suit 'B' schedule property and put up construction thereby preventing the access to the plaintiff, the plaintiff has come up with the above suit. It was claimed that the defendants 1 and 2 had encroached upon a portion of the suit 'A' schedule property also and therefore, the decree for mandatory injunction was also sought for removal of the construction.

3. The suit was resisted by the defendants contending that the suit 'B' schedule property was not a part of the road. According to the defendants, Vadaseri Handloom Co-operative Society had allotted the extent of 5 cents to the first defendant 60 years prior to filing of the suit. Subsequently, according to the defendants, the Nagercoil Municipality laid a road cutting across the five cents allotted to the first defendant leaving a major portion on the north and small portion on the south of the road. The defendants would further contend that while the first defendant had put up a construction on the north of the road and was residing in the same, the second defendant has put up a construction on the south of the road and was residing there. Since mud walls were destroyed, the second defendant had converted the same into the brick house. It was claimed that taking advantage of the same, the plaintiff had launched the present suit in an attempt to grab the land of the defendants 1 and 2.

4. At trial, the wife of the plaintiff was examined as P.W.1 and Exts.A1 to A8 were marked, while the second defendant was examined as D.W.1 and one Malarvizhi was examined as D.W.2. Exts.B1 to B7 were marked on the side of the defendants. The report and plan of the Commissioner was marked as Exts.C1 and C.2 and other document was marked as Ex.C.3.

5. Upon consideration of the evidence on record, the learned trial Judge came to the conclusion that the plaintiff has not established his claim that the suit 'B' schedule property form part of the road. The learned trial Judge took into consideration the description in the plaint in an earlier suit namely, O.S.No.498 of 2002 filed by the present plaintiff seeking a certain relief as against certain other persons with reference to the pathway situated on the western side of his property. Taking note of the description of the northern property as shown in the earlier suit, the learned trial judge namely, the District Munsif Nagercoil, came to the conclusion that the plaintiff's claim that the suit B- Scheduled property is a road or the part of the road is not established. Upon



the said conclusion, the learned trial judge dismissed the suit.

6. Aggrieved, the plaintiff preferred A.S.No.49 of 2017 on the file of on the file of the II Additional Sub Court, Nagercoil. The learned II Additional Subordinate Judge, upon re-consideration of the evidence on record, concluded that the plaintiff had established his claim that 'B' schedule property is a road. The appellate Judge also found that according to the report filed by the Advocate Commissioner there is an encroachment over a portion of the 'A' schedule property, which admittedly belonged to the plaintiff. The appellate court rejected the report and plan of the Advocate Commissioner filed in the earlier suit on the ground that the Commissioner was not examined. On the above finding, the appellate court decreed the suit as prayed for. Aggrieved, the second defendant and the legal heirs of the first defendant are on this Second Appeal.

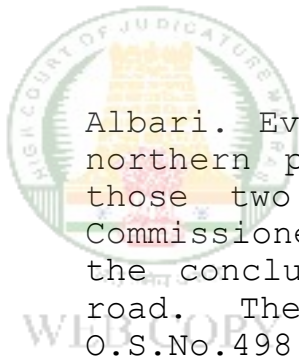
7. Notice was ordered by this Court on 23.11.2020.

8. I have heard Mr.P.Arun Jayatram, learned counsel appearing for the appellants and Mr.S.Meenakshisundaram, learned Senior Counsel for Mr.M.Sengu Vijay, learned appearing for the first respondent.

9. Mr.P.Arun Jayatram, learned counsel appearing for the appellants would vehemently contend that the description of property in the plaint in the earlier suit filed by this very plaintiff showed that the northern boundary is a land belonging to the Society and therefore, the plaintiff is precluded from now contending that it is a road. It is the learned counsel's further contention that even in the Commissioner's plan in the earlier suit, the northern boundary was not shown as road. Therefore, according to him, the learned appellate Judge was not right in relying the recitals in the self serving documents produced by the plaintiff to conclude that the 'B' schedule property in fact is a road.

10. I have considered the submissions of the learned counsel for the appellants.

11. The lower appellate court has found that the plaintiff has established the fact that 'B' schedule property is a part of the road. In order to come to the said conclusion, the learned appellate Judge referred to the documents namely, the sale deeds filed by the plaintiff. Ex.A.2 is a sale deed dated 23.12.1992 in and by which the plaintiff had purchased the suit 'A' schedule property. The boundary description in the said sale deed as pointed out by the appellate court shows that the 'A' schedule property is shown to be bounded on the north by the road. Not stopping there, the plaintiff has also produced the sale deed dated 20.11.1981 under which his vendor Muthuswamy had purchased the property from one Martin Jones

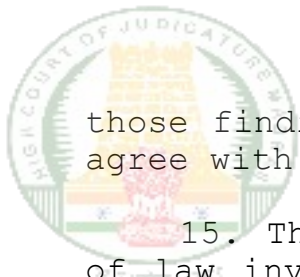


Albari. Even in the description of property in the said document, northern property is shown as road. Considering the recitals in those two documents and physical features pointed out by the Commissioner appointed in this suit, the appellate court has come to the conclusion that the suit 'B' schedule property is in fact a road. The description of the property in the earlier suit namely, O.S.No.498 of 2002 cannot be taken aid of by the plaintiff to seek the relief in the present suit. First of all, the earlier suit did not relate to the property now in dispute. Even otherwise, a reading of the plaint as a whole shows that the plaintiff specifically stated in the said plaint which is marked as Ext.B.1 that there is a 'thar road' on the north of the 'A' schedule property and the property in dispute in that suit is the north-south lane is situated on the west of the plaintiff's property. Even in the pleadings, it is stated that the plaintiff is using the lane to reach the road on the north. These facts have been overlooked by the learned District Munsif and when he concluded that the plaintiff has not established 'B' schedule property is a road.

12. Apart from the above evidence, the Commissioner's report filed in this suit very clearly shows that the northern property is a road and that 'B' schedule property is part of the road. The physical features pointed out by the Commissioner shows that the existence of overhead tank for drawing water from the pipe in the 'B' schedule property was erected by the municipality. This is a factual finding. On the part of the appellants, it is pointed out that in 'B' schedule property or part of the 'B' schedule property is the land that was given to them by the Society. Ofcourse in a suit for declaration of a right and for consequential permanent injunction and mandatory injunction, it is for the plaintiff to prove his case. At the same time, if the defendants set up a tile to property, it is for the defendants to produce certain documents in support of their claim.

13. A perusal of the judgment of the courts below would show that the defendants have not produced even a scrap of paper to establish their claim that the property that was given to the first defendant by the Society was split into two portions for formation of the road and a major portion fell on the north and a very small portion fell on south of the road. In the absence of any such evidence, I am unable to fault the appellate court for having come to the conclusion that the plaintiff has- established his case and is entitled to a decree.

14. Despite his best efforts, Mr.P.Arun Jayatram, learned counsel appearing for the appellants is unable to point out any perversity in appreciation of evidence by the appellate court. The appellate court has considered the entire evidence as a whole and had arrived at certain factual findings. I do not think that I can go into the correctness of those factual findings in the absence of



those findings being based on no evidence. I am therefore unable to agree with the learned counsel appearing for the appellants.

15. There is no question of law much less substantial question of law involved in this appeal to enable me to interfere with the conclusion of the appellate court.

16. In the result, this Second Appeal is dismissed without being admitted. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar (T&P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

To:

1.The II Additional Sub Court, Nagercoil

2.The Principal District Munsif, Nagercoil.

+1 CC to M/s.P.ARUN JAYATRAM, Advocate (SR-2430[F] dated 29/01/2021)

+1 CC to M/s.M.SENGUVIJAY, Advocate (SR-2328[F] dated 29/01/2021)

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and C.M.P(MD)No.5800 of 2020
27.01.2021

SE(CO)

KB(03.03.2021) 5P 5C