



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**

S.A. (MD)No.295 of 2015

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C.Ammavasi

... Appellant/Appellant/Defendant

versus

1. American Mission Church,
Through its Pastorate Members,
P.Inbaraj,
Kovilankulam Village,
Usilampatti Taluk,
Madurai District.

2. B.Raja ... Respondents/Respondents/Plaintiffs

Second Appeal filed under Section 100 of C.P.C. against the Judgment and Decree passed by the learned Subordinate Judge, Usilampatti (Camp), dated 17.04.2014 in A.S.No.117 of 2011 by confirming the decree and Judgment dated 15.03.2011 passed by the learned District Munsif cum Judicial Magistrate No.I, Usilampatti in O.S.No.242 of 2004.

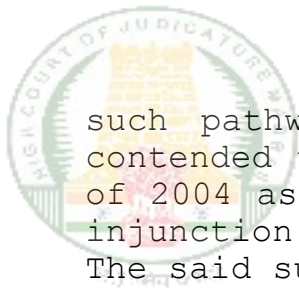
For Appellant : Mr.S.Nateshraj
For Respondents : Mr.Ashok Adhithyan
for Mr.M.Subash Babu for R1
No appearance for R2

JUDGMENT

The defendant in O.S.No.242 of 2004 on the file of the District Munsif, Usilampatti, is on appeal, challenging the Judgment and Decree made in A.S.No.117 of 2011 on the file of the Sub Court, Usilampatti, in and by which, the learned Subordinate Judge chose to confirm the Judgment and Decree made in O.S.No.242 of 2004.

2. The suit was filed by the respondents herein seeking a declaration that the suit property is a common pathway and for permanent injunction restraining the defendant from interfering with the plaintiffs' possession as user of the pathway by putting up a stair case. The suit property is described as a six feet width of common pathway running South-North comprised in R.S.Nos.81/12G, 81/11/C and 10D.

3. The defendant resisted the claim of the plaintiffs contending that the suit property belongs to him and others, in whose favour, a joint patta has been issued and there has been no



such pathway as claimed by the plaintiffs. It is also further contended that the defendant had already filed a suit in O.S.No.228 of 2004 as against one Jeevanantham and Jeyaraj and also sought for injunction restraining them from interfering with his possession. The said suit is said to have been withdrawn now.

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4. At trial, one Inbaraj, Mokkaayan, Rasu and Suresh were examined as P.W.1 to P.W.4. On the side of the plaintiffs, Exs.A1 to A9 were marked. The defendant examined himself as D.W.1 and produced Exs.B1 to B6.

5. Upon consideration of the evidence on record, the learned trial Judge concluded that the suit property is a common pathway and therefore, the defendant cannot put up any construction obstructing the pathway. On the said finding, the learned trial Judge decreed the suit. Aggrieved, the defendant preferred an appeal in A.S.No.117 of 2011. In the Appellate Court, the defendant/appellant filed I.A.No.35 of 2013, seeking leave to produce additional documents. The said application was allowed and documents, that were sought to be produced, were marked as Exs.B7 and B8. The Lower Appellate Court, however, while disposing of the appeal, did not advert to those two documents. In at least one of them, there is a specific reference to the suit pathway. Without adverting to the documents and without following the procedure prescribed under Order 41 Rule 28 C.P.C. for accepting additional evidence, the learned appellate Judge proceeded to dispose of the appeal and confirmed the Judgment and Decree of the trial Court. Hence, the second appeal.

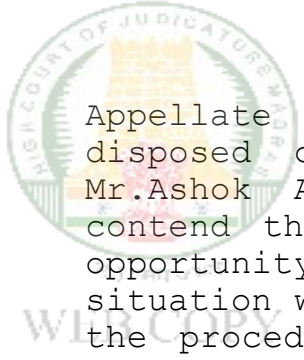
6. The following substantial questions of law were framed at the time of admission.

"(i) Whether the lower Appellate Court has committed an error in law in not following the procedure contemplated under Order 41 Rule 28 of the Code of Civil Procedure, 1908 for recording additional evidence, after allowing the application filed under Order 41 Rule 27 of the Code of Civil Procedure, 1908?

(ii) Whether the lower Appellate Court has committed an error in law in completely omitting to consider the additional documentary evidence in the form of Exs.B7 and B8 produced before the trial Court?"

7. I have heard Mr.S.Nateshraj, learned counsel for the appellant and Mr.Ashok Adhithyan, learned counsel representing Mr.Subash Babu, learned counsel appearing for the first respondent.

8. Mr.S.Nateshraj, learned counsel for the appellant would vehemently contend that the learned appellate Judge, having allowed the application under Order 41 Rule 27 of C.P.C., ought to have considered the documents and pronounced upon them. The non-consideration of the said documents vitiated the findings of the lower Appellate Court. While accepting the position of law that the



Appellate Court, having received the documents, should not have disposed of the appeal without advertng to those documents, Mr.Ashok Adhithyan, learned counsel for the respondent, would contend that the Appellate Court did not give the respondent an opportunity to let in rebuttal evidence on the documents. This situation would not have arisen, if the appellate Court had followed the procedure under Order 41 Rule 28 C.P.C., while allowing the application for additional evidence.

9. Order 41 Rule 28 of the C.P.C. reads as follows:

"28. Mode of taking additional evidence - Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court."

10. If the appellate Court entertains an application for additional evidence, it can either take evidence by itself or direct the trial Court to take such evidence. It can also remit the matter for rehearing upon consideration of the fresh material that is produced.

11. The appellate Court had not followed any one of the above and it had ignored the documents and gone on to affirm the Judgment and Decree of the trial Court.

12. In this factual backdrop, the questions of law raised by the appellant have to be answered in favour of the appellant. Therefore, the Second Appeal has to be necessarily allowed and the Judgment of the Courts below have to be set aside and the matter has to be remitted to the trial Court, requiring the trial Court to permit the parties to lead evidence on the two new documents that have been produced before the Appellate Court and to dispose of the suit in accordance with law.

13. In view of the above, the Second Appeal is allowed and Judgment and Decree of the Courts below are set aside. The suit is remitted to the trial Court. The parties shall be allowed to lead evidence on the two new documents that have been produced before the Appellate Court and marked as Exs.B7 and B8 and the trial Court shall decide the suit after taking into account the said evidence that is to be let in. No costs.



14. Considering the fact that the suit is of the year 2004, the trial Court shall dispose of the suit within one year from the date of receipt of the records from this Court.

Sd/-

Assistant Registrar (CS II)

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Sub Assistant Registrar(CS)

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To

1. The Subordinate Judge,
Usilampatti.
2. The District Munsif cum
Judicial Magistrate No.I,
Usilampatti.

Copy to:

1. The Registrar (Judicial),
Madurai Bench of Madras High Court,
Madurai
2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.(2 Copies)

+1 CC to M/s.M.SUBASH BABU, Advocate (SR-12192[F] dated 18/03/2021)

S.A. (MD) No.295 of 2015

17.03.2021

KK(19.05.2021) 4P 7C