



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.06.2022

Pronounced on : 13.07.2022

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A.No. 1608 of 2000

Srinivasan ... 2nd Defendant/2nd respondent/appellant

Vs.

1. K.Latheef (died)

... Plaintiff/Appellant/Respondent

2. The Executive Officer
Town Panchayat
Kangayam

.... 1st Defendant/1st Respondent/Respondent

3. Mrs. Hasina Begam

4. Abdul Jabbar

5. Abdul Waheeth

... Respondents

[RR 3 to 5 brought on record as LR's of the deceased 1st respondent Viz., K.Latheef vide order of Court dated 10.02.2021 made in CMP.Nos. 9748, 9764 and 9767 of 2019 in S.A.No. 1608 of 2000]



PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree of the learned District Munsif of Kangayam in O.S.No. 3 of 1995 dated 23.02.1996.

For Appellant : Mr.A.K.Kumarasamy
Senior Counsel
for M/s. Kaithamalai Kumaran

For 1st Respondent : died

For 2nd Respondent : Mr.S.V.Durai Solaimalai

For RR 3 to 5 : Mr. R.Kannan
for Mr.V.Raghunathan

JUDGMENT

The 2nd defendant, Srinivasan, in O.S. No. 3 of 1995 on the file of the District Munsif Court, Kangeyam is the appellant herein.

2. The said suit was filed by the 1st Respondent, K. Latheef, originally only against the 2nd respondent herein, the Executive Officer, Town Panchayat, Kangayam, seeking declaration that the plaintiff was entitled to the suit property and for permanent injunction restraining the said Executive Officer, Town Panchayat, Kangeyam from interfering with



the right of the plaintiff to put up construction in the suit property and to enjoy the same. The appellant herein, Srinivasan, got himself impleaded as the 2nd defendant in the suit and contested the claim of the plaintiff.

3. The suit schedule property was described as land measuring 2536 $\frac{3}{4}$ sq. ft., with right to build building therein, situated at Natham S. No. 1209 in Kangayem, Erode District.

4. By judgment dated 23.02.1996, the District Munsif, Kangayam, dismissed the suit. However, by judgment dated 30.04.1999, the Sub Judge, Dharapuram, reversed the decree of the trial court and allowed A.S. No. 33 of 1996 filed by K. Latheef, the plaintiff in the suit.

5. The 2nd defendant, Srinivasan then filed the present second appeal. The second appeal had been admitted on the following substantial questions of law :



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“1. Whether the lower appellate court is justified in giving a finding as regards the 2 feet lane on the west of the appellant’s house overlooking that there is no prayer in the plaint regarding the same ?

2. Whether the lower appellate court is right in granting the relief of declaration of title to an extent of 2536 sq.ft., of site in favour of the plaintiff, overlooking that the measurements given in the plaint are not proved by actual measurements existing on ground with reference to boundaries on all the four sides ?”

O.S. No. 3 of 1995 (District Munsif Court, Kangeyam) :

6. The suit was filed by the plaintiff K. Latheef only against the Executive Officer, Town Panchayat, Kangeyam. Later the 2nd defendant Srinivasan was impleaded. The suit was filed seeking a declaration with respect to the suit schedule property and permanent injunction protecting possession and enjoyment.



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7. In the plaint it was stated that the suit property and appurtenant land originally belonged Subramania Mudaliar and Eswaramurthy Mudaliar. Thereafter, there was a partition on 23.02.1962 among the co-owners. The suit property and further lands were allotted to Eswaramurthy Mudaliar. The plaintiff claimed to have purchased the suit property from the legal heirs of Eswramurthy Mudaliar by Sale Deed dated 28.11.1984. The plaintiff further claimed that on the eastern boundary, he had left out a lane measuring 2 feet wide and had then built his compound wall. He had also built a latrine and bathroom in the 2 feet wide lane. The plaintiff had submitted a plan for demolition and reconstruction of the old buildings. The plaintiff stated that there was never any public lane appurtenant to his property. Claiming interference while putting up construction, the suit had been filed for declaration and permanent injunction.

8. The 1st defendant, Executive Officer, Town Panchayat, Kangeyam, in his written statement however contended that the plaintiff had encroached by 3 feet on the lane on the eastern boundary and had then put up his compound wall. Further east of the compound wall there



is a 2 feet lane. The 1st defendant claimed that they have a right to remove the compound wall and retrieve the 3 feet lane encroached by the plaintiff. It had been further stated that when steps had been taken, the suit had been filed. It was urged that the suit should be dismissed.

9. The 2nd defendant filed I.A. No. 68 of 1995 under Or. 1 Rule 10(2) seeking to be impleaded as a defendant in the suit. The application was allowed. In his written statement, the 2nd defendant denied the averments in the plaint. He specifically denied that the plaintiff was entitled for declaratory relief with respect to the suit schedule property. It was stated that the plaintiff had encroached on to Panchayat the land and had then built his compound wall and is now trying to regularize such encroachment by filing the suit. It was specifically denied that there was a common lane on the eastern boundary of the plaintiff property. The 2nd defendant pleaded that the suit should be dismissed.

10. On the basis of the pleadings, the following issues were framed :



“1. Whether the plaintiff was entitled to the reliefs of declaration and permanent injunction as sought in the plaint ?

2. Whether the plaintiff has any right over the property abutting on the eastern boundary, which is claimed by the 2nd defendant also ?

3. Whether the plaintiff had encroached over the lands of the 1st defendant and if so, is the plaintiff entitled to seek reliefs in the suit ?

4. To what other reliefs are the parties entitled to ?”

11. During trial, the plaintiff examined himself as P.W.1 and another witness, K.V. Abdul Latheef as P.W.2. The 1st defendant examined the Executive Officer of Kangeyam Town Panchayat, S. Kumaraswamy as D.W.1 and the 2nd defendant examined himself as D.W.2.

12. The plaintiff marked Exs. A1 to A6. Exs. A1 and A2 were the parent documents of the property and Ex. A3 was the sale deed in favour



of the plaintiff. Ex. A4 was the plan of the proposed construction by the plaintiff. On the side of the defendants, Ex. B1 to B-10 was the rough plan marked by D.W.1 and Ex.B2 to B4 were parent title deeds and Exs. B7 and B8 were the certified copies of the Commissioner's report and plan. The report and sketch of the Commissioner were marked as Exs. C1 and C2.

13. On the basis of the pleadings and oral and documentary evidence, the trial court found as a fact that the plaintiff had built his compound wall after encroaching 2 feet of the common lane which belonged to the Panchayat. It was further held that the 2 feet of lane further east of the compound wall belonged to the 2nd defendant. It was also found, on comparing the schedule in Exs. A1 and A2 the parent documents that the suit property was bounded on the east by a 4 feet lane, but however in Ex A3, 2 feet of that lane had been included in the schedule and it was therefore held that the plaintiff had actually encroached onto Panchayat lane to a width of 2 feet. The relief of declaration and injunction was therefore denied and the suit was dismissed.



A.S. No. 33 of 1996 (Sub Court, Dharapuram) :

14. The plaintiff then filed the aforementioned appeal suit. The only point framed for consideration was :

“Whether the appeal should be allowed ?”

15. The First Appellate Court held that the plaintiff had proved his title by producing Exs. A1, A2 and A3. It also held that the 1st defendant had failed to prove that the plaintiff had encroached the Panchayat lane and found fault with the 1st defendant for having failed to remove encroachment. The First Appellate Court rejected the contention that Ex. B3 proved that the lane to the east of the compound wall belonged to the 2nd defendant. Reliance was also placed on Exs. C1 and C2 to hold that the lane to the east of the compound wall of the plaintiff's property was a common lane. Holding the findings in favour of the plaintiff, the appeal suit was allowed and the judgment and decree of the trial court was set aside and O.S. No. 3 of 1995 was dismissed.



S.A. No. 1608 of 2000 :

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16. The 2nd defendant then filed the aforementioned second appeal before this Court.

17. The second appeal had been admitted on the following substantial questions of law :

“1. Whether the lower appellate court is justified in giving a finding as regards the 2 feet lane on the west of the appellant’s house overlooking that there is no prayer in the plaint regarding the same ?

2. Whether the lower appellate court is right in granting the relief of declaration of title to an extent of 2536 sq.ft., of site in favour of the plaintiff, overlooking that the measurements given in the plaint are not proved by actual measurements existing on ground with reference to boundaries on all the four sides ?”



18. Even before proceedings to examine the substantial questions of law, it must be pointed out that the First Appellate Court had failed to frame the points for consideration as envisaged under Order 41 Rule 31 C.P.C. A duty is cast on the first appellate court to frame points for consideration. Framing of points would enhance the focus on the issues to be addressed in the appeal.

19. In *Manjula v. Shyamsundar*, (2022) 3 SCC 90, it was held as follows :

“8. Section 96 of the Civil Procedure Code, 1908 (for short “CPC”) provides for filing of an appeal from the decree passed by a court of original jurisdiction. Order 41 Rule 31 CPC provides the guidelines to the appellate court for deciding the appeal. This rule mandates that the judgment of the appellate court shall state:

(a) points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and



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(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

Thus, the appellate court has the jurisdiction to reverse or affirm the findings of the trial court. It is settled law that an appeal is a continuation of the original proceedings. The appellate court's jurisdiction involves a rehearing of appeal on questions of law as well as fact. The first appeal is a valuable right, and, at that stage, all questions of fact and law decided by the trial court are open for reconsideration. The judgment of the appellate court must, therefore, reflect conscious application of mind and must record the court's findings, supported by reasons for its decision in respect of all the issues, along with the contentions put forth and pressed by the parties. Needless to say, the first appellate court is required to comply with the requirements of Order 41 Rule 31 CPC and non-observance of these requirements lead to infirmity in the judgment.”

20. Be that as it may from a perusal of the judgment under appeal



it is clear that the First Appellate Court had taken a pre-determined stand to allow the appeal and to set aside the judgment of the trial Court. The fact that the appellant/plaintiff was alleged to have built his compound wall encroaching 2 feet of Panchayat lane had been completely overlooked. The First Appellate Court had also failed to examine the schedule of the properties as given in Exs. A1 to A3. In Ex. A3, the 2 feet lane is given within the property, whereas in the other documents, it forms the eastern boundary.

21. The 1st substantial question of law surrounds the relief sought in the plaint. The relief sought was for a declaration of title to the suit schedule property, namely 2536 $\frac{3}{4}$ sq.ft., of land. The lane had not been separately given in the schedule. A perusal of Ex. C2, the sketch provided by the Advocate Commissioner, which sketch had been prepared in the presence of the plaintiff and his counsel, shows that there is an open lane after the house of the plaintiff and then the compound wall had been built. To the east of the compound wall there is yet another lane. It is the lane within the compound wall which the 1st defendant claims to have been encroached by the plaintiff. This lane was not shown in the schedule to the title deeds of the plaintiff's property. The property is



bounded on the east by the lane. The fact stares on the face of the record.

Neither of the defendants question the plaintiff's holding of his house site. They are concerned only with the shifting of the compound wall encroaching 2 feet lane, which lane is admitted even by the plaintiff to be Panchayat lane. It is for that purpose that the 1st defendant had refused to accord approval of the building plan submitted by the plaintiff and directed removal of the encroachment, namely to remove the compound wall. This has triggered the institution of the suit. Thus the cause of action itself is the launching of a lawful action by the 1st defendant. The First Appellate Court had stepped into the shoes of the plaintiff, when the plaintiff had not sought any separate declaration with respect to the lane, to grant that relief. I hold that the judgment of the First Appellate Court suffers since it had granted a relief not sought by the plaintiff. The 1st substantial question of law is answered accordingly.

22. The 2nd substantial question of law relates to the burden to prove a fact pleaded by the plaintiff.

23. In *Gurunath Manohar Pavaskar v. Nagesh Siddappa*



Navalgund, (2007) 13 SCC 565, the Hon'ble Supreme Court held as follows in suit for permanent injunction and mandatory injunction :

“10. It is one thing to say that there does not exist any ambiguity as regards description of the suit land in the plaint with reference to the boundaries as mentioned therein, but it is another thing to say that the land in suit belongs to the respondents. It was for the plaintiffs to prove that the land in suit formed part of CTS Nos. 4823/A-17 and 4823/A-18. It was not for the defendants to do so. It was, therefore, not necessary for them to file an application for appointment of a Commissioner nor was it necessary for them to adduce any independent evidence to establish that the report of the Advocate Commissioner was not correct. The suit could not have been, therefore, decreed inter alia on the basis of Ext. P-35 alone. In a case of this nature, even Section 83 of the Evidence Act would not have any application.”

24. In *Parimal v. Veena*, (2011) 3 SCC 545, albeit on different

facts, the Hon'ble Supreme Court had held as follows :



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“19. The provisions of Section 101 of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgment in his favour. Section 103 provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the facts in issue.”

25. In the instant case, the burden was on the plaintiff and only on the plaintiff to prove the measurement of the suit schedule property. The plan of the Advocate Commissioner, Ex. C2 is clear, that the compound wall had been constructed after leaving out 2 feet open lane. The dispute was with respect to that lane. If the plaintiff claims title, then the burden is heavily on him.



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26. The First Appellate Court had misdirected itself on this aspect and I hold that the plaintiff had not proved the measurements as given in the plaint. The 2nd substantial question of law is answered accordingly that the First Appellate Court was wrong in denying the relief of declaration.

Conclusion :

27. In view of the above reasons, I hold that the judgment of the First Appellate Court in A.S. No. 33 of 1996, dated 30.04.1999, passed by the Sub Judge, Dharapuram has to be set aside and the judgment and decree of the trial Court in O.S. No. 3 of 1995, dated 23.02.1996 has to be restored.

28. In the result ;

1. The second appeal is allowed with costs throughout.

C.V.KARTHIKEYAN, J.

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2. The judgment and decree dated 30.04.1999 in A.S. No. 33 of



1996 passed by the Sub Judge, Dharapuram is set aside.

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3. The judgment and decree dated 23.02.1996 in O.S. No. 3 of 1995 passed by the District Munsif, Kangeyam is restored and confirmed.

13.07.2022

Index :Yes/No
Internet:Yes/No
vsg

To

District Munsif,
Kangayam.

Pre-Delivery Judgment made in

S.A.No. 1608 of 2000