



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.06.2022

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A.No. 193 of 2008

K.Thavamani ... Plaintiff/Respondent/Appellant

Vs.

1. Arjunan
2. Rajalingam
3. Sekar
4. Pachiappan ... Defendants/Appellants/Respondents

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree made in A.S.No. 56 of 2006 on the file of the Hon'ble Subordinate Judge at Ranipet, dated 23.04.2007, reversing the Judgment and decree dated 21.03.2005 in O.S.No. 214 on the file of the District Munsif Court, Ranipet.

For Appellant : Mr. Satish Sundar

For Respondents : Mr.P.Mani



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JUDGMENT

This is an unfortunate litigation which has come to this Court by way of Second Appeal filed by the plaintiff in O.S.No. 214 of 2004 which was before the District Munsiff Court at Vellore and which was decreed by Judgment dated 21.03.2005, necessitating the defendants in the suit to file A.S.No. 56 of 2006 before the Sub Court at Ranipet. The learned Sub Judge by Judgment dated 23.04.2007, reversed and interfered with the Judgment of the trial Court and set it aside, necessitating the filing of the present Second Appeal by the plaintiff in the suit.

2. The entire issue surrounds a pathway, which is to the east of the house of the plaintiff / appellant and to the south of the house of the defendants/respondents. Whether such pathway is exclusive to the appellant/plaintiff or whether it is to be in common use and also be enjoyed by the respondents/defendants, to access the main road further south, is the primary issue which was put to test before both the Courts below.



3. Unfortunately on the basis of the very same evidence presented differing findings on facts had been given. The appellant/plaintiff had urged that the pathway which runs south to north, ends at the junction point of the house of the appellant/plaintiff and that it cannot and could not and does not proceed further north to touch the boundaries of the house of the respondents/defendants by stating that there is an obstruction by way of thatched hut and a thorn fence / முள்வேல்.

4. On the other hand, the contention of the respondents/defendants is that this particular path way which is in S.No. 145/5, is not the exclusive property of the appellant/plaintiff and that it is a common pathway and as a matter of fact, they assert that it is Government poromboke land and therefore, there cannot be a restraint in any specific from accessing it in manner known to law.

5. A further examination of the facts would reveal that the appellant had instituted Original Suit as aforesaid in O.S.No. 214 of 2004 seeking permanent injunction restraining the defendants therein, who are all brothers from interfering with their peaceful possession and enjoyment of the particular pathway which is situated in S.No. 145/5.



6. It is the contention of the learned counsel for the appellant that the house of the appellant and also the pathway and even to the east of the pathway, the houses, which are situated were also comprised in one whole block which originally belonged to the forefathers of the appellant and thereafter, by subdivisions, the lands had been subdivided among the cosharers / பங்காளிகள் and they had left out this particular pathway for access to the main road which is further south and runs east to west. It is therefore contended that the said pathway should not and cannot be used by the respondents/defendants.

7. It is also pointed out by the learned counsel for the appellant/plaintiff that the evidence on behalf of the respondents/defendants indicate that they had built their house only three years prior and therefore they cannot lay a claim long continuous use of the pathway.

8. It is however pointed out by the learned counsel for the respondents/defendants that though for all material purposes, the suit relates to a dispute about usage or otherwise of the particular pathway



which had been mentioned above and which is in S.No. 145/5, a the reading of the schedule to the plaint would indicate that the property involved in litigation is actually the house of the plaintiff in S.No. 145/1 and that particular house has as its eastern boundary, the pathway and that the pathway was not stated in the schedule at all and even if the case of the plaintiff was to be taken as a true, still the Court can passes a decree only with respect to the schedule to the plaint and the schedule to the plaint does not mention any pathway as the subject matter of the suit.

9. This appears to be factually correct since the schedule is given to the plaint and a reading shows that it only indicates the house as being the subject matter of the suit. Moreover, if the appellant/plaintiff claims that the pathway was actually a portion of the larger area of land which belonged to the forefathers of the appellant and later they were subdivided among the various cosharers and if the appellant/plaintiff wants to claim exclusive usage and oust the respondents/defendants from using the pathway, then they can do so only if they seek declaration with respect to the title of the pathway. The fact that they did not seek such a relief, according to the learned counsel for the respondents/defendants



further strengthen the stand of the respondents that the pathway was a Government poromboke land and a declaration even if sought would be an exercise in futility. From these issues that it is clear that the plaint as presented suffers from a formal defect.

10. The one legal issue which comes up is, if an observation is made that the plaint suffers from a formal defect, whether this Court can grant permission to either one of the parties to file a comprehensive suit for declaration or whether the plaintiff under Order 23 on the basis that the suit suffers from a formal defect seek withdrawal of the plaint with permission to file a fresh suit on the same cause of action.

11. Order 23 Rules 1, 2 and 3 of the Code of Civil Procedure are as follows:-

“Order XXIII Rule 1: Withdrawal of suit or abandonment of part of claim.-”

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim :



Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.”



12. Order 23 Rule 1 relates to a contingency when a plaintiff takes upon himself to abandon the suit or abandon a part of the claim. The proviso deals with a situation where the plaintiff is a minor or a person, who is incapacitated as provided under Order 32 Rules 1 to 14. If that be the case, under Order 23 Rule 2, an application must be filed accompanied by an affidavit of the next friend and also by a certificate of the Advocate that such abatement is for the benefit of either the minor or the person so incapacitated.

13. Under Order 23 Rule 3 if the Court is satisfied that a suit framed suffers by reason of some formal defect and if there are grounds to ensure the subject matter of the suit or part of the claim to be prosecuted further then permission may be granted to the plaintiff to withdraw the suit with liberty to institute a fresh suit in respect of the same subject matter.

14. The only issue which this Court will have to address is whether such subjective satisfaction of the Court that a particular plaint suffers from a formal defect should emanate from the observation of the Court or on the basis of an application filed by the plaintiff.



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15. In the instant case, the following facts stand out:-

(1) The schedule to the plaint is not with respect to the disputed pathway;

(2) Any decree, either on a Judgment delivered in favour of the plaintiff or against the plaintiff can never therefore contain the pathway as the schedule subject matter of the decree;

(3) The plaintiff had not sought a declaration of title over the disputed pathway;

(4) This will have to be balanced with the specific stand of the defendants that the pathway is a Government promoboke lane.

16. None of the four factors have been properly stated in the plaint and therefore any issue answered either granting permanent injunction or denying injunction would never be a Judgment answering the issues contested by the parties since there are no documentary evidence produced either from the revenue authorities or otherwise that the



pathway exclusively belongs to the plaintiff or that the pathway is a Government poromboke land.

17. One document relied on by the learned counsel for the respondents is the annexure to the report of the Advocate Commissioner. The Advocate Commissioner had actually filed two separate sketches along with the report and all of them had been marked as documents. One of the sketches is certified by the surveyor. But whether it was actually drawn on the place by the surveyor or is an extract of the revenue records is not clear on the face of the document. That particular sketch according to the learned counsel for the respondent does not indicate the existence of a hut or a **முள்செயல்** preventing further access of the pathway. It is further contended that only the sketch drawn by the Commissioner alone reflects a hut and that a wall prevents further access of the pathway. Thus once again disputed facts emerge which can never be resolved on the basis of the pleadings and the documents now available. Parties will have to re-work the pleadings and let further evidence in order to settle the dispute which is still prevails between them.



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18. The issue whether the pathway is used as on date exclusively by the plaintiff or is also used as a common pathway and also used by the respondents/defendants is still in dispute. In the absence of direct evidence on that aspect and in the presence of divergent versions presented on that aspect, I would not enter into any discussion but urge that either one of the two parties take upon themselves at the earliest to file a proper suit seeking all required reliefs.

19. The present plaint certainly suffers from formal defects which have been pointed out above and it is only appropriate that the Court permits the plaintiff to institute a fresh suit on the same cause of action and also seeking necessary reliefs to ensure that a litigation culminates finally. This would also imply that the respondents/defendants can also initiate appropriate proceedings to urge that the particular pathway is a Government Poromboke and also seek necessary relief. At any rate, the suit from which the Second Appeal emanates suffers from formal defects.

20. The substantial question of law pales into insignificance because the plaint suffers from formal defects. I would dispose of the Second Appeal but at the same time grant liberty to institute fresh suit to both the appellants and respondents as stated above.



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C.V.KARTHIKEYAN, J.

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21. Accordingly, the Second Appeal is disposed of. No order as to costs.

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Internet:Yes/No

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To

1. Subordinate Court,
Ranipet.
2. District Munsif Court, Ranipet.

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