

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.06.2022

Pronounced on : 15 .07.2022

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A.No. 16 of 2009

And

M.P.No. 1 of 2009

1. Mrs. Amutha

2. Mr. Muthu

3. Mr. Raja

4. Mr. Kanniammal ... Plaintiffs/Respondents/Appellants

Vs.

1. Mr. Radhakrishnan

2. Mr.Arputham

3. Mr.Velu

4. Mr.Ettiyappan ... Defendants/Appellants/Respondents

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Decree and Judgment dated 06.08.2008 passed in A.S.No. 33 of 2005 by the learned Subordinate Judge at

madurantakkam, Kanchipuram District by reversing the Decree and Judgment dated 13.04.2005 passed in O.S.No. 278 of 2001 by the District Munsif Maduranthakkam, Kanchipuram District.

For Appellants : Mr. N. Nagu Sah

For Respondent : Mr. K.Govi Ganeshan

JUDGMENT

The plaintiffs in O.S.No. 278 of 2001 on the file of the District Munsif Court at Maduranthakkam are the appellants herein.

2. O.S.No. 278 of 2001 had been filed originally by the plaintiff Kalyana Sundaram. He died pending the suit and his legal representatives were brought on record as 2nd to 5th plaintiffs. The suit was filed for permanent injunction restraining the defendants from interfering with possession and enjoyment of the suit property, namely, private land and for costs of the suit.

3. The suit schedule property was described as property in Gandhi

Nagar, Madurantakkam, Kancheepuram District in S.No. 836, measuring North to South 50 feet and East to West 4 feet. By Judgment dated 13.04.2005, the District Munsif Court, Madurantakkam, had decreed the suit with costs and granted permanent injunction.

4. The defendants then filed A.S.No. 33 of 005 before Sub Court, Madurantakkam. Along with the said Appeal suit, the learned First Appellate Judge also took into consideration I.A.No. 92 of 2006 which had been filed seeking permission to file an additional written statement. By Judgment dated 06.08.2008, the Interlocutory Application was allowed and the additional written statement was taken on file and simultaneously, on considering the averments made in the additional written statement, the Appeal Suit was allowed and the Judgment of the trial Court was set aside and the grant of permanent injunction was also set aside. This has necessitated the legal representatives of the plaintiffs to file the present Second Appeal.

5. The Second Appeal had been admitted on the following

substantial questions of law:-

“ a) Whether the First Appellate Court erred in law and misdirected themselves by not noticing that the express admissions made by the defendants themselves that the suit pathway form part of the plaintiff patta property need not to be proved by the plaintiffs as per Section 58 of the Evidence Act?

b) Whether the First Appellate Court erred in law and misdirected themselves in receiving the additional written statement filed by the defendants during the appellate stage?

c) Whether the First Appellate Court erred in law and misdirected themselves by reversing the trial Court's decree and Judgment based on the additional written statement filed by the respondent during the appellate stage?

d) Whether the First Appellate Court erred in law and misdirected themselves in shifting the burden on the plaintiff to prove Ex.B-11, produced by the defendant to show the suit

pathway is a public road, while the survey number of the suit pathway and the survey number of the public road shown in Ex.B11 were totally different?”

O.S.No. 278 of 2001 (District Munsif Court, Madurantakam):

6. The suit in O.S.No. 278 of 2001 had been filed claiming that the original plaintiff and his brothers owned the suit property and adjacent house sites as ancestral properties and were residing there. They then entered into an oral partition which had been confirmed by a subsequent written document. The suit property which is a lane measuring east to west 4 feet and north to south 50 feet was retained for common use of all the co-owners alone. It was a private lane. It was claimed that the general public have no right to use the land.

7. It was further stated that the defendants were residing to the south of the suit property and they have got an access to the main road by a public street further south. It had been further stated that the defendants attempted to trespass into the suit property lane. Claiming protection of possession and private usage, the suit had been filed for

permanent injunction.

8. In the written statement, the defendants claimed that they had been using the said lane for generations to reach the Marriamman Koil Street. The municipality had also put up a tap for supply of water. It was stated that the defendants were using the water from the said tap and were taking it to their houses through the lane. It was therefore contended that the lane was used by the general public. The names of several individuals were also given in the written statement and it was claimed that on their death, their bodies were also taken through the lane for burial / cremation. It was also stated that the alternate way which is stated by the plaintiffs, cannot be used since there are bushes and rocks and patta houses of third parties. It was also stated that the plaintiffs cannot claim exclusive usage of the lane and it was urged that the suit should be dismissed.

9. The learned District Munsif had framed necessary issues, particularly whether the said lane was a private lane or public lane and

whether the plaintiff was entitled for the relief of permanent injunction. During trial, the second plaintiff was examined as PW-1 and another witness was examined as PW-2. The first defendant was examined as DW-1 and two other witnesses were examined as DW-2 and DW-3. On the side of the plaintiffs, a rough sketch of the suit property was marked as Ex.A-1. On the side of the defendants, Exs. B-1 to B-9 were marked. The Commissioner's report and plan was also marked as Ex. C-1 and C-2 and the Town Surveyor report was marked as Ex. X-1. Ex.B-3 was an order of the Commissioner of Madurantakkam Municipality in Na.Ka.No. 4046 / 90/S1, Ex.B-8 was a rough sketch of the suit property, Ex.B-9 was the plan of the surveyor for S.Nos. 69, 70 and 71.

10. In the Judgment, the learned District Munsif extracted the evidence of DW-1, who claimed on the basis of Ex.B-9 and Ex. X-1 that the land was a public lane. It was however found that DW-1 disclaimed all knowledge of the said two documents and also disclaimed knowledge whether the documents related to the suit lane. The learned District Munsif therefore rejected Exs. B9 and X-1. Thereafter, the evidence of the other witnesses were examined and it was found that the defendants

owned properties south of the suit land. It was also noted that DW-1 had admitted that there are other properties between his property and the suit lane. It was therefore held that it was not possible for the defendants DW-1 to access the suit lane. It was also stated that the evidence relating to usage of the suit lane by DW-1 was contrary to the averments in the written statement. It was specifically found that there was no evidence to show that the suit claim extended upto the house of the defendants. It was also observed that DW-2 had further deposed that there is an alternate pathway from the south of the house of the defendants to reach the road. In view of all these factors, the District Munsif held that the defendants claim that they had been using the lane had not been established and that they had an alternate pathway and that the lane was an exclusive lane of the plaintiffs and therefore decreed the suit.

A.S.No. 33 of 2005 and I.A.No. 92 of 2006 (Sub Court, Madurantakam):

11. The defendants then filed aforementioned First Appeal which came up for consideration before the Sub Court at Madurantakkam. The

learned Sub Judge took up for consideration the appeal in A.S.No. 33 of 2005 and also I.A.No. 92 of 2006.

12. The said Interlocutory Application was filed seeking permission to file an additional written statement holding that the said pleadings are necessary. The said application was allowed and thereafter in the appeal, on the basis of the said written statement, the learned First Appellate Judge held that the trial Court should have examined the case of the plaintiffs and should not have addressed the weakness of the defence and therefore found fault with the reasonings of the trial Judge and therefore allowed the First Appeal and thereby dismissed the suit. Questioning such Judgment, the plaintiffs had filed the present Second Appeal.

S.A.No. 16 of 2009:

13. The Second Appeal had admitted the following substantial questions of law:-

“ a) *Whether the First Appellate Court erred*

in law and misdirected themselves by not noticing that the express admissions made by the defendants themselves that the suit pathway form part of the plaintiff patta property need not to be proved by the plaintiffs as per Section 58 of the Evidence Act?

b) Whether the First Appellate Court erred in law and misdirected themselves in receiving the additional written statement filed by the defendants during the appellate stage?

c) Whether the First Appellate Court erred in law and misdirected themselves by reversing the trial Court's decree and Judgment based on the additional written statement filed by the respondent during the appellate stage?

d) Whether the First Appellate Court erred in law and misdirected themselves in shifting the burden on the plaintiff to prove Ex.B-11, produced by the defendant to show the suit pathway is a public road, while the survey number of the suit pathway and the survey

number of the public road shown in Ex.B11 were totally different?”

14. The first substantial question of law relates to the admission of the defendants that the lane is part of patta property of the plaintiffs.

Section 58 of the Indian Evidence Act, 1872 is as follows:-

*“58 Facts admitted need not be proved. —No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: **Provided** that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions. ”*

15. The provision is very clear. When a fact has been admitted, it need not be proved except when the Court calls upon the party to prove that particular fact.

16. In the instant case, it is the stand of the appellants that the suit lane was part of a larger extent of property belonging to their joint family

and that there was a partition among the original plaintiff and his brothers and in that partition deed, they had set apart the lane measuring east to west 4 feet and north to south 50 feet as a common lane exclusive to the co-owners to access the main road. It was claimed that the land was carved out of the existing joint family property. The defendant had admitted to that particular fact. Any evidence recorded on oath has sanctity. The admission of a fact only gives credence to the claim of the plaintiffs that the lane is actually within their patta land. I would therefore hold that the First Appellate Court had misdirected itself in not taking into consideration the admission of the defendants in their evidence that the lane was within the patta property of the appellants.

17. The second substantial question of law is with respect to the receiving the additional written statement and allowing I.A.No. 92 of 2006. I must state that the procedure followed by the First Appellate Court is strewn with errors. A decision can be taken to admit to file on record the additional written statement. If such additional written statement is taken on record then the plaintiffs must be given an opportunity to file a reply statement. It must be further examined

whether the facts pleaded in the additional written statement and in the reply statement require further issues to be drawn and it must be further examined whether such issues require oral and documentary evidence to be adduced to establish the averments additionally pleaded. None of these steps had been taken by the First Appellate Court. I would therefore hold with respect to the second substantial question of law that the First Appellate Court had misdirected itself in its procedure in taking on record the additional written statement and not granting opportunity to the appellants to file a reply statement and is not examining whether further issues had to be framed and whether such issues require oral or documentary evidence to be adduced.

18. The third substantial question of law is with respect to granting a Judgment in the first appeal on the basis of the additional written statement. As stated above, if the additional written statement had been taken on record, opportunity should have been granted to the plaintiffs to file a reply statement if required. Thereafter, the facts in the additional written statement / reply statement should be considered to examine whether there are additional facts stated and disputed,

necessitating issues to be framed. It must be further examined whether such issues require oral and documentary evidences to be adduced.

19. Without following any of these procedures, allowing the Appeal suit on the basis of the additional written statement is a procedure alien in law and therefore, the First Appellate Court Judgment suffers and has to be interfered with on this one ground itself.

20. The fourth substantial question of law is with respect to shifting the burden on the plaintiffs to prove Ex.B9, wrongly given as Ex.B-11, which had been produced by the defendants. A party, who puts forth a document has to prove the document in manner known to law before it can be considered as evidence. The defendants had failed to prove Ex. B-9. That document should have been proved by the author of the document, namely by the particular Government Official, who had prepared the report. Such Official was not examined as witness. The plaintiffs cannot be called upon to prove such document. The defendants have produced the document. They should have examined necessity witnesses to prove such document. I therefore hold that the First

Appellate Court had again erred in shifting the burden on the plaintiffs to prove Ex.B-9.

21. The substantial questions of law have been answered against the respondents herein / defendants.

22. The procedure with respect to taking on record the additional written statement pales into insignificance since the evidence recorded very clearly show that the defendants have an alternate pathway and that the suit lane within the exclusive patta property of the plaintiffs.

23. In view of the above stated facts established very clearly by the trial Court Judgment which considered the evidence in detail. I hold that no purpose would be served in relegating the parties to the First Appellate Court with respect to the issue of additional written statement and further pleadings thereof. The additional written statement does not advance the cause of the respondents.

24. I would therefore allow the Second Appeal with costs and set aside the Judgment and Decree of the First Appellate Court and restore

the Judgment and Decree of the trial Court.

25. In the result:-

i) The Second Appeal is allowed with costs;

ii) The Judgment and Decree in A.S.No. 33 of 2005 dated 06.08.2008 / Sub Court Madurantakkam, is set aside; and

iii) The Judgment and Decree in O.S.No. 278 of 2001 dated 13.04.2005 / District Munsif Court, Maduranthakkam is restored and confirmed.;

iv) Consequently, connected Miscellaneous Petition is closed.

15.07.2022

Index :Yes/No

Internet:Yes/No

vsg

To

1. District Munsif Court, Maduranthakkam.

2. Sub Court, Madurantakkam.

C.V.KARTHIKEYAN, J.

vsg

Pre-Delivery Judgment made in
S.A.No. 16 of 2009
And
M.P.No. 1 of 2009

15.07.2022