



S.A.No.1716 of 2004

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.12.2022

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.1716 of 2004
and
C.M.P.No.13494 of 2004

1.Sivaraman

2.Samkkal

...Appellants/6th Respondent/Defendants 1&2

Vs.

1.Pallikudhathan @ V.Samudi

2.V.Raman

3.V.Thirupathi

4.V.Govindan

5.V.Chinnathai

...Respondents/Respondents 1 to 5/Plaintiffs

6.Gopal

...Respondent/7th Respondent/4th Defendant

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 24.02.2004 in



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A.S.No.2 of 2003 on the file of the learned Subordinate Judge, Tiruppattur, confirming the Judgment and Decree dated 19.12.2001 in O.S.No.1179 of 1983 on the file of the learned District Munsif, Tiruppattur.

For Appellants : Mr.V.Raghavachari

For Respondents : R1 to R6 – Served
No appearance

JUDGMENT

The defendants 1 and 2 are the appellants before this Court. They have challenged the concurrent Judgment and Decree passed in O.S.No.1179 of 1983 on the file of the learned District Munsif, Tiruppattur, confirmed by the learned Subordinate Judge, Tiruppattur in A.S.No.2 of 2003. The suit in question is one for declaration and for permanent injunction. The parties are referred to in the same rank and array as before the trial Court.



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2.It is necessary to briefly allude to the facts of the case which run up to the filing of the Second Appeal as follows:

The suit properties are described as follows:

“N.A.A.Dt., Tirupattur Taluk, Vettapattu Revenue Village,

Item No.1:

*Patta No.91 Survey No.6/3 dry extent 4.70 acres
kist Rs.6.44 and in the same Village*

Item No.2:

*Patta No.90 Survey No.6/4 dry extent 0.11 acre kist
Rs.0.15 with a well situate in 1 item and 5 HP electric
motor pumpset installed therein and 50 fruit bearing
coconut trees and other miscellaneous trees standing
thereon and the abovesaid two items of lands being
bounded by the Natrampalli Village border on the North
the lands of Samakkal D2 and other defendants on South
lands situated in S.No.6/1 and 6/2 and the Natrampalli to*



Tirupattur Main Road on the East and the lands of Chinnammal and the Mango thoppu of Sivaraman vagaira on the West.”

3.It is the case of the plaintiffs that the suit properties are the ancestral joint family properties of the plaintiffs. On 24.05.1938, the plaintiffs 1 to 4 and their father Venkata Gounder had jointly sold 3.20 acres to one Samaraj Boopathy who is the father of the defendants 1 and 2. The lands which have been sold to the defendants' father are situate on the Southern side of the 2nd item of the suit schedule property. It is the case of the plaintiffs that though the Southern boundary in the Sale Deed had been described as “எங்கள் நிலத்திற்கும், கானாற்றுக்கும் பூபதி வகையறா மாந்தோப்புக்கு தெற்கு”, there was no Kanai in existence since the Southern portion of the 2nd item of the suit property in S.No.6/4 was at a lower level than that of the 1st item of the property. *(The rainwater collected from the suit property would flow through this Southern boundary and therefore, the name has been given as Kanai).* The specific case of the



plaintiffs is that they are enjoying both the 1st and 2nd items of the properties, namely, the lands in S.F.Nos.6/3 and 6/4 as a contiguous block. The plaintiffs would further submit that between their land and the defendants' land, there is a well defined ridge which has been marked as AB in the Plaint plan. The Revenue officials have colluded with the defendants and included the defendants' name in the patta in respect of S.No.6/4. The plaintiffs would submit that they are in possession of the suit properties for over 80 years and since the defendants had attempted to destruct the ridge as well as the crops they have come forward with the suit.

4.The 1st defendant had filed a Written Statement which was adopted by the defendants 2 and 4. It is the contention of the defendants that the South of the suit property is the ancestral property of the father of the defendants, Samaraj Bhoopathy consisting of mango groves and cultivable lands. It is the contention of the defendants that the rainwater which runs from the mango grove passed



through S.No.6/4 and drains into Natrampalli - Thirupattur trunk road on the Eastern side. There is a culvert which has been constructed 30 years ago. The defendants used the 2nd item of S.No.6/4 as a cart track and the rainwater flows through the said land during the rainy season for more than 60 years. The defendants would submit that though item No.2, S.No.6/4 belongs to the plaintiffs, the defendants are entitled to the right of enjoyment in S.No.6/4 and they claim title to the S.No.6/4 by adverse possession. The said land is being used as a Kanai during the rainy season, after that it is used as Battai Vazhi for taking the cattle.

5.The defendants would further submit that they have no other pathway to reach the mango grove. It is also their contention that even in the Sale Deed of their father, which has been marked as Ex.B.2, the existence of the Kanai has been clearly mentioned. The defendants would deny that they are attempting to destroy the ridge. A reply statement was filed by the plaintiffs reiterating the contents of the Plaint. The plaintiffs would also submit that the defendants had easy



access to Natrampalli - Thirupattur trunk road and also have a cart track and lorry road on the Southern side of their property.

6.The learned District Munsif, Tiruppattur, before whom the suit was instituted had framed the following issues:

“(1)Whether the plaintiffs are entitled to the declaration of the suit properties?

(2)Whether the plaintiffs are entitled to permanent injunction prayed for?

(3)To what relief?”

7.On the side of the plaintiffs, the 2nd plaintiff has examined himself as PW1 and one Venkattappa Gounder as PW2 and Ex.A.1 to Ex.A.4 were marked. On the side of the defendants, the 1st defendant was examined as DW2 and one Vadiga Gounder as DW2. Ex.B.1 to Ex.B.6 were marked on the side of the defendants. Ex.C.1 to Ex.C.4 have been marked as Court exhibits. Likewise, the third party exhibits were marked as Ex.X.1 to Ex.X.4.



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8.The learned District Munsif, Tiruppattur, on considering the evidence on record decreed the suit as prayed for. The learned Judge took into consideration Ex.C.1 and Ex.C2 the report of the Advocate Commissioner, who was appointed as soon as the suit was filed and relied upon the same wherein the Advocate Commissioner had reported that there is no demarcating line between the Survey Nos.6/3 and 6/4 and both the properties are contiguous. However, Ex.C.3 and Ex.C.4 the Advocate Commissioner had noted down the physical features of the Western side of S.Nos.6/4 and 6/3 and to note down the cart pathway had submitted his evidence. The second Advocate Commissioner had noted down the physical features of the property on the Western side of the S.Nos.6/4 and 6/3 and also noted down the pathway. The evidence of PW1 would indicate that both the properties are contiguous. The trial Court observed that the second Advocate Commissioner's report supports the case of the defendants, but however, did not choose to rely on the same and ultimately decreed the suit. The same was taken up on appeal to the learned Subordinate



Judge, Tiruppattur, in A.S.No.2 of 2003. The Appellate Court more or less followed the Judgment and Decree of the trial Court and dismissed the appeal and confirmed the Judgment and Decree of the learned District Munsif, Tiruppattur. Challenging the same, the defendants 1 and 2 are before this Court.

9.The Second Appeal was admitted on the following substantial questions of law:

“(1)Whether the Courts below are right in decreeing the suit on the basis of the Commissioner's report?

(2)Whether the Courts below have not erred in ignoring the document of the plaintiff under Ex.A.9, which supports the case of the appellants as regards the existence of the Kanai?

(3)Whether Ex.B.4 would not operate as estoppel preventing the plaintiffs from assailing the rights of the defendants?



(4)Whether the document under Ex.B.3 is not admissible under Section 13 of the Evidence Act to prove the nature of the property and its mode of enjoyment?”

10.The respondents 2, 4 and 6 though served have not chosen to enter appearance either in person or through pleader. However, Notice sent to the respondents 1, 3 and 5 have been returned with an endorsement “refused”. Therefore, by order dated 07.12.2022 they were deemed to have received the notice and the Registry was directed to print the name of all the respondents and post the matter on 15.12.2022. Today the names of the respondents have been so printed and there is no appearance on their side and they are set *ex parte*.

11.Mr.V.Raghavachari, learned counsel for the appellants/defendants 1 and 2 would submit that despite Ex.A.1 where the Kanai has been described and also the fact that the joint patta had been issued to the defendants under Ex.B.4, the Courts below have



decreed the suit only on the ground that S.Nos.6/3 and 6/4 constitutes a contiguous block of land. That apart, the joint patta which had been obtained behind the back of the plaintiffs should not be looked into. He would submit that the second Advocate Commissioner's report would clearly indicate the existence of the suit property, namely, Kanai and despite this, the Courts below have erred in declaring the plaintiffs' suit and granting an order of injunction.

12.Heard the learned counsel appearing for the appellants and perused the papers.

13.The admitted case of the parties is that on the suit property formed part of a larger extent of 4.81 acres which was the ancestral joint family property of the plaintiffs. The plaintiffs 1 to 4 and their father had together owned the properties in S.Nos.6/3 and 6/4 of Vettapattu Village, Tirupattur Taluk, They had sold this property to the father of the defendants 1 and 2 one Samaraj Bhoopathy under Ex.A.1 – Sale Deed dated 24.05.1938. The lands which were sold to the father



of the defendants are situate to the South of S.No.6/4. Ex.A.1 is the document under which the lands have been sold to the defendants' father. The North boundary of the properties sold was described as the lands of the vendor, Kanai and mango grove of the defendants. Therefore, the existence of Kanai right next to the defendants property as well as the plaintiff's property stands proved.

14.A reading of Ex.A.1 would indicate that the property which has been sold is just to the South of the said Kanai as also the vendor's land and the defendants' mango grove. A joint patta has also been issued in favour of the defendants which has not been objected by the plaintiffs. It is the case of both the parties that during the rainy season when the water stagnates the same flows through this Kanai and the Sale Deed under which the property has been executed in favour of the defendants' father also refers to this Kanai. The lands in question are cultivable lands and therefore, the stagnation of the water would destroy the crops and this appears to be the reason for providing the rainwater to drain. The defendants have very clearly stated that they



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are not staking any claim to the property in question and they are only having right to drain water and to have the pathway. The documents produced, particularly the Advocate Commissioner's report and plan marked as Ex.C.3 and Ex.C.4, would show that the plaintiffs can access the road directly from his side. Therefore, the defendants cannot claim a right of way and the Courts below have rightly refused the relief. However, with reference to the drainage of rainwater, the document under which the properties were sold clearly describes the Northern boundary as a Kanai and further, the physical features of the lands as noted by the Advocate Commissioner indicates that the water has to drain through the Southern portion of S.No.6/4 and if there is stagnation of water the same would destroy the crops. The Courts below have failed to appreciate Ex.C.1 and C.4 and has proceeded to decree the suit just on the basis of the Advocate Commissioner's report. Therefore, the Substantial Question of Law No.1 is answered against the plaintiffs.



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15.A perusal of the Judgment of both the Courts below shows that there is no discussion on Ex.A.9 and Ex.B.4 which has been issued to the defendants only on account of the fact that they are also in joint enjoyment of the Southern end of S.No.6/4 and the plaintiffs have not chosen to challenge the same for all these years. Therefore, they are clearly estopped from questioning the same. Further, under Ex.B.3 which is an unregistered document, the schedule given thereunder would describe this right. The said document has been taken on file only to prove the nature of the property and the mode of enjoyment.

16.In the light of the above discussions, the defendants are not entitled to a right of way through S.No.6/4. However, since the right to drain water through the Kanai situate on the North has been stated even in Ex.A.1 - Sale Deed which is admitted by the plaintiff and taking into consideration the lie of the two properties the right of the defendant to drain water through the portion described as AB in the Advocate Commissioner's plan Ex.C.2 is recognised.



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Therefore, the Second Appeal is partly allowed and the Judgment and Decree of the Courts below insofar as it relates to the injunction restraining the defendants from interfering with the plaintiffs' possession and enjoyment of the suit property is modified granting the defendant the right to drain the rainwater through the portion shown as AB in Ex.C.1 – Plan. In all other respects, the Judgment of the trial Court stands confirmed. The Substantial Questions of Law No.2 to 4 raised are also answered in favour of the plaintiffs. No costs. Consequently, connected Miscellaneous Petitions is closed.

15.12.2022

Index : Yes/No
Internet : Yes/No
Speaking order / Non speaking order
mps

To
1.The Subordinate Judge,
Tiruppattur.

2.The District Munsif,
Tiruppattur.



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P.T. ASHA, J,

mps

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