



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 25.04.2022

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.455 of 2010

Nadar Mahajana Kilai Sangam
Kundankulam,
through its Secretary,
Amal Raj,
Sanga Office Main Road,
Kudankulam,
Radhapuram Taluk,
Tirunelveli District.

... Appellant / Appellant /
Plaintiff

(Name of the Secretary in Suo motu
vide court order dated 08.03.2022)

-Vs-

1.Balaganesan

2.Moris

... Respondents / Respondents /
Defendants

3.M.Andrews Navamani

... Respondent

(R3 is impleaded vide order dated 02.03.2022 made in
C.M.P.(MD)No.1728 of 2022 in SA(MD)No.455 of 2010)

PRAYER:

Second Appeal filed under Section 100 of the Civil Procedure Code, against the Judgment and decree dated 08.06.2006 rendered in A.S.No.19 of 2006 on the file of the Principal Subordinate Judge, Tirunelveli confirming the decree and the judgment dated 18.10.2005 rendered in O.S.No.45 of 2001 on the file of the Additional District Munsif Court, Valliyoor.

For Appellant : Mr.S.Subbiah
Senior Counsel
for Mrs.P.Jessi Jeeva Priya



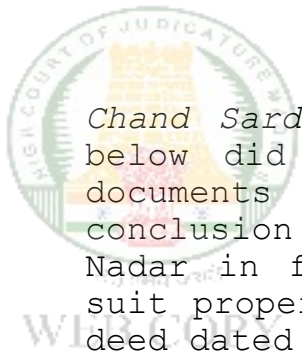
For R1 to R3 : Mr.S.Meenakshi Sundaram
Senior Counsel
for Mr.R.T.Arivu Kumar

JUDGMENT

WEB COPY The plaintiff in O.S.No.45 of 2001 on the file of the Additional District Munsif Court, Valliyoor is the appellant in this second appeal. The suit was filed for mandatory injunction directing the defendants to close the door facing the schedule property.

2. The case of the plaintiff is that the plaintiff schedule property belongs to the plaintiff Sangam and that the defendants have no right or title over the schedule property. Since they attempted to commit encroachment, they had to file a suit. The defendants filed written statement controverting the plaintiff averments. Based on the divergent pleadings, the trial court framed the necessary issues. On the side of the plaintiff Sangam, its Secretary examined himself as P.W.1. One Pandian was examined as P.W.2. Ex.A1 to Ex.A13 were marked. The defendant examined themselves as D.W.1 and D.W.2 and two other witnesses were examined on their side. Ex.B1 to Ex.B17 were marked. An Advocate Commissioner was appointed and his report and plan were marked as Ex.C1 & Ex.C2. The photographs were marked as Ex.C3. After consideration of the evidence on record, the trial court by judgment and decree dated 18.10.2005 dismissed the suit. Aggrieved by the same, the plaintiff filed A.S.No.19 of 2006 before the Principal Sub Court, Tirunelveli. By the impugned judgment and decree dated 08.06.2006, the first appellate court confirmed the decision of the trial court and dismissed the appeal. Challenging the same, this second appeal came to be filed. Though the second appeal was filed way back in the year 2010, only notice was ordered and it was not admitted till date.

3. The learned Senior Counsel appearing for the appellant submitted that the case on hand involves more than one substantial question of law. He pointed out that the trial court had given a categorical finding that the second defendant has no right whatsoever over the schedule property. Though this finding was adverse to the second defendant, he had not chosen to file any cross objection before the first appellate court under Order 41 Rule 22 of C.P.C. It is true that the first appeal also ended against the plaintiff. The contention of the learned Senior Counsel appearing for the appellant is that since the second defendant did not file any cross objection before the court below, he cannot be permitted to attack the said finding before this Court. In this regard, the learned Senior Counsel placed reliance on the decisions reported in **2010 (7) SCC 717** (*Laxman Tatyaba Kankate and another Vs. Taramati Harichandra Dhatrak*) and **(2018) 10 SCC 584** (*Biswajit Sukul Vs. Deo*



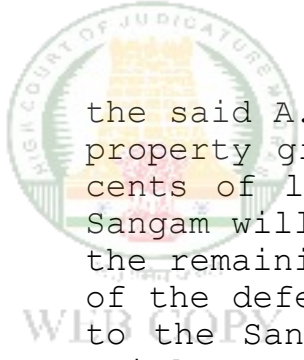
Chand Sarda & others). He would further contend that the courts below did not construe Ex.A1 & Ex.B16 correctly. If both the documents are properly construed, it would lead to irresistible conclusion that the schedule property was already gifted by A.C.Pal Nadar in favour of the plaintiff Sangam under Ex.A1 and that the suit property was specifically excluded while executing Ex.B16-sale deed dated 15.01.1933.

4. Per contra, the learned Senior Counsel appearing for the contesting respondents submitted that the impugned judgment and decree do not call for any interference.

5.The learned Senior Counsel appearing for the contesting respondents submitted that the finding that the contesting defendant does not have any right over the suit property is incorrect. This endeavor on the part of the learned Senior Counsel appearing for the contesting respondents was strongly opposed by the learned Senior Counsel appearing for the appellant by referring to the aforesaid decisions.

6. Now the question that calls for consideration is whether the contesting respondent can be allowed to challenge the findings of the trial court, even though he did not file any cross objection before the first appellate court. I must straight away note that the precedents relied on by the learned Senior Counsel appearing for the appellants squarely support his contention. But then, a recent decision of the Hon'ble Supreme Court reported in **CDJ 2021 SC 513 (Saurav Jain and another Vs. M/s.A.B.P.Design and another)** holds that where the respondent in appeal is not aggrieved by the impugned decree, it is open to him to attack the findings of the court below even without filing any memorandum of cross objection. It is true that the recent decision reported in **CDJ 2021 SC 513** does not refer to the decisions relied on by the learned Senior Counsel appearing for the appellant. However, the recent decision in turn follows an earlier ruling of the Hon'ble Supreme Court reported in **(2003) 9 SCC 606 (Banarsi Vs.Ram Phal)**. It is interesting to note that the Bench-strength in all these decisions is same ie., two Judges. Where the precedents of the superior court are apparently not in consonance with each other, it is open to the High Court to follow the later ruling if it reflects the correct legal position. I am therefore inclined to follow the latest decision of the Hon'ble Supreme Court and hold that it is open to the contesting respondent herein to attack the findings of the court below, even though he did not file any cross objection.

7. The suit property was a part of the larger extent of the property measuring 5 ½ cents. It belonged to one A.C.Pal Nadar. He had gifted 10 ½ cents and the schedule property in favour of the plaintiff under Ex.A1, dated 16.05.1924. The predecessor-in-title of the defendants purchased the remaining extent of land from



the said A.C.Pal Nadar under Ex.B16-sale deed dated 15.01.1933. The property gifted to the plaintiff Sangam under Ex.A1 refers to 10 ½ cents of land situated on the northern side. It also states that Sangam will be entitled to the pathway running through the middle of the remaining 5 ½ cents of the donor. When the predecessor-in-title of the defendants made his purchase under Ex.B16, the pathway gifted to the Sangam was specifically included. It is on this basis the trial court came to the conclusion that the defendants do not have any right over the schedule property, though the suit was dismissed on a technical ground.

8. From the plan submitted by the Advocate Commissioner, the trial court came to the conclusion that apart from the extent occupied by the Sangam under Ex.A1 and the construction put up by the defendants, there still remained 0.82 cents of land on ground. The trial court conjectured that this could very well be lying between the built up portion of the defendants and the schedule property. In which event, the defendants will be entitled to use the same. Only if the boundaries are fixed, the issue raised by the plaintiff can be resolved. Since such a relief was not sought, the trial court denied the relief of mandatory injunction sought for by the plaintiff. The first appellate court also endorsed the approach of the trial court. Since this issue turns essentially on facts, I am of the view that no substantial question of law really arises for consideration.

9. There is yet another aspect of the matter. Even under Ex.A1, what was gifted in favour of the plaintiff Sangam was 10 ½ cents of land lying on the northern side of the suit pathway. The plaintiff may describe the pathway in question as a schedule property. But even in Ex.A1, it has been described only as 20 links pathway.

10. The learned Senior Counsel appearing for the contesting respondent pointed out that in Ex.A1, the suit pathway has been created out of the 5 cents of land remaining with the donor. Thus, what was given to the plaintiff Sangam was only a pathway. Of-course, the property sold by A.C.Pal Nadar under Ex.B16 is bounded on the east and on the west by the suit pathway. The second defendant had purchased the western portion during the pendency of these proceedings. Thus, the eastern boundary of the second defendant is a suit pathway. Even going by the plaintiff's case, when the pathway forms a boundary, certainly, it is open to the second defendant to have the door opening into the pathway. Of-course, the second defendant cannot commit any encroachment on the suit pathway. But then, his right to open the door on the suit pathway cannot be denied. A person can be restrained from opening the window or door only if it affects the civil rights of the adjacent owner. Admittedly, the schedule property is the character of a pathway. Therefore, by opening the door in question, the right of the plaintiff is not in any way affected. No substantial



question of law arises for determination. The impugned judgment and decree is confirmed. The second appeal is dismissed. No cost.

Sd/-

Assistant Registrar

WEB COPY

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

rmi

To

- 1.The Principal Subordinate Judge, Tirunelveli.
- 2.The Additional District Munsif Court, Valliyoor.

Copy To

The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.M. SENGU VIJAY, Advocate (SR-21051[F] dated 26/04/20228)

+1 CC to M/s.P.JESSI JEEVA PRIYA, Advocate (SR-21003[F] dated 25/04/2022)

Judgment made in
S.A.(MD)No.455 of 2010
25.04.2022

MK/07.06.2022/5P/7C