



S.A(MD).No.951 of 2014

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 05.12.2022

CORAM : JUSTICE N.SESHASAYEE

S.A(MD).No.951 of 2014
M.P(MD).Nos.1 and 2 of 2014

1.Karuppayammal
2.S.P.Shanmugam
3.S.Raja
4.S.Ravichandran

...Appellants/Appellants/Defendants

Vs

1.P.Subramanian
2.P.Chelladurai
3.Subramanian
4.Balachander

...Respondents 1 and 2/Respondents 1 and 2
/Plaintiffs 1 and 2
...Respondents 3 and 4/Respondents 4 and 5

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 07.08.2014 made in A.S.No.64 of 2007 on the file of the Additional Subordinate Court, Dindigul, confirming the judgment and decree dated 27.09.2006 made in O.S.No.8 of 2003 on the file of the Principal District Munsif Court, Dindigul.



S.A(MD).No.951 of 2014

For Appellants : Mr.K.Baalasundharam
For Respondents : Mr.V.P.Rajan
for Mr.K.Viralinathan for r1
R2 to R4-Dispensed with

J U D G M E N T

The defendants who lost a suit for declaration of plaintiffs' right of user of pathway over plaint 'A' and 'B' Schedules and for consequential decree of prohibitory injunction successively before the Courts below have approached this Court with this appeal. For narrative convenience, the parties would be referred to by their rank before the trial Court.

2. The facts are:

- The dispute is over a pathway which is detailed in two schedules. The pathway described in 'A' Schedule is stated to measure 14 cents and is in Survey No.686/2B. The pathway described in 'B' Schedule lies as a continuation of the pathway in 'A' Schedule and runs towards the west of the pathway in 'A' Schedule and is comprised in Survey No. 485/5 and is stated to have six cents. Both the Schedules are in



S.A(MD).No.951 of 2014

WEB COPY

Thethupatti Village, Dindigul Taluk.

- The pathway in 'A' Schedule property is part of a larger extent measuring 3.16 acres. This was purchased by the plaintiffs 1 and 2 and their brothers vide Ext.A.2, sale deed dated 01.09.1976. Subsequently, this property and others were partitioned by the purchasers under Ext.A.2 and the entire property covered under Ext.A.2 came to be allotted to the shares of the plaintiffs 1 and 2. In the partition deed, 'A' Schedule property was carved and earmarked as a common pathway for plaintiffs 1 and 2. 'A' Schedule property runs inclined and forms the southern extreme of the property covered under Ext.A.2.
- 'B' Schedule property was purchased in the name of the third plaintiff, who is the wife of the first plaintiff and it comprised in Survey No. 485/5 and it measures six cents. According to the plaintiffs, the pathways in 'A' and 'B' Schedules are the private pathways which exclusively belonged to the plaintiffs 1 and 2.

When they faced certain obstruction from the defendants, they laid the suit.



S.A(MD).No.951 of 2014

WEB COPY

2.1. The second defendant had filed the written statement which was adopted by the other defendants, and in the written statement, they principally contend that:

- 'A' Schedule property in Survey No.686/2B is not the exclusive property of the plaintiffs 1 and 2 but it is a common pathway that belonged to the plaintiffs 1 and 2 and also to these defendants. Indeed, in Ext.A.2, they purchased the entire property excluding the “A” Schedule property and sold this property. Therefore, the plaintiffs are not entitled to have the title declared.
- So far as the “B” Schedule property is concerned, originally the property in Survey No.485/5 belonged to one Alaguperumal Moopanar who enjoyed the property under Patta No.708. Thereafter, Chinnasamy Moopanar, one of the vendors of the plaintiffs 1 and 2 in Ext.A.2 had entered into an exchange with Alaguperumal Moopanar on 22.12.1936. Even in that exchange deed, “B” Schedule property was not included (this document though was not produced before the trial Court but came to be marked before the first appellate Court at



S.A(MD).No.951 of 2014

WEB COPY

the instance of the defendants under Order XLI Rule 27 C.P.C as Ext.B19). In terms of Ext.B.19, the third plaintiff cannot have any exclusive title to “B” Schedule property. In this regard, the third plaintiff's father had earlier filed O.S.No.1100 of 1983 and that came to be dismissed vide Ext.B.5, judgment and Ext.B.9, decree. There was a further appeal in A.S.No.135 of 1992 and that was also dismissed. The third plaintiff's father preferred a second appeal in S.A.No.202 of 2003 and that came to be dismissed vide Ext.B.4, judgment.

- The defendants have a right of easement of necessity over both 'A' and 'B' Schedules of the properties. They do not have any alternate way as claimed by the plaintiffs.

2.2 The dispute went to trial Court and before the trial Court, both sides have adduced oral and documentary evidence. For the plaintiffs, the first and third plaintiffs examined themselves respectively as P.W.1 and P.W.2. Besides, they have also examined another witness as P.W.3 and they produced Ext.A.1 to Ext.A.7 to sustain their cause of action. So far as the



S.A(MD).No.951 of 2014

defendants are concerned, the second defendant examined himself as D.W.1.

The defendants produced Ext.B.1 to Ext.B.18 before the trial Court. On appreciating the evidence before it, the trial Court essentially relied on Ext.A.2, Ext.A.3 and Ext.A.6 to grant a decree in favour of the plaintiffs. Aggrieved by the same, the defendants preferred A.S.No.64 of 2007. Before the first appellate Court, the defendants produced Ext.B.19, exchange deed which was entered into between Alagumoopanar and Chinasamymoopenar who as already indicated was one of the vendors of the plaintiffs 1 and 2 in Ext.A.2. The appeal in A.S.No.64 of 2007 met with same fate as was the suit. Hence, this Second Appeal.

3. This appeal was admitted for considering the following substantial question of law:

“a) Whether the Courts below are correct in fixing the burden of proof on the appellants and arriving at a finding that the appellants have failed to prove the right of cart track especially when the appellants are the defendants in the suit?

b) Whether the Courts below by ignoring material



S.A(MD).No.951 of 2014

evidences submitted by the appellants establishing the right of cart track by production of Ex.B3, Ex.B4, Ex.B5, 6, 8, 9, 10, 11, 12, 13, 14, 18 and Ex.B19 had arrived at perverse findings?

c) Whether the Courts below had arrived at a perverse finding by non-considering of material documents like joint patta, findings arrived in the earlier suit, and the additional evidence produced before the lower appellate Court under Ex.B19 in the four boundaries mentioned therein confirmed the property in question as a cart track as well as Ex.A2 and whether its acts warrants interference?”

4. The learned counsel appearing for the appellants/defendants submitted that:

- The defendants do not dispute that the plaintiffs have purchased some property under Ext.A.2. However, Ext.A.2 shows that the property conveyed is in Survey No.686/2A and it excludes the cart track on the south. The boundary description given to the property conveyed shows that what was intended to be conveyed is the property to the



S.A(MD).No.951 of 2014

WEB COPY

north of the cart track. When the plaintiffs 1 and 2 and their brothers partitioned their properties under Ext.A.3, they converted the cart track on the south as if it is their exclusive pathway belonging to them.

- Ext.B.19 is an exchange deed dated 22.12.1936 which was executed between Alaguperumal Moopanar and Chinnasamy Moopanar. Even in this document, what was conveyed was the property excluding the pathway for accessing the well on the east in Survey No.485/2. The third plaintiff in fact has purchased the property from the vendor who in turn had obtained the property under Ext.B.19. Even in Ext.A.6 itself, it is indicated that what was conveyed was 1/4th share of the vendor excluding the four cents property set aside for the pathway. If it is taken together, the plaintiffs' claim of title over both 'A' and 'B' Schedule property cannot be sustained. The Courts below do not appear to have bestowed adequate care in reading the documents the way it should have been read.



S.A(MD).No.951 of 2014

5. Per contra, the learned counsel appearing for the plaintiffs/respondents submitted that so far as Ext.B.19 is concerned, the plaintiffs have not been given an opportunity under Order XLI Rule 28 C.P.C to lead in rebuttal evidence. As to the rest, he adopted the line of reasoning of the Courts below.

6. This Court, after weighing the rival submissions, deems it necessary to remand the matter back to the first appellate Court, and the reasons are:

- When the defendants were granted leave under Order XLI Rule 27 C.P.C to produce Ext.B.19, it was absolutely necessary for the first appellate Court to grant opportunity to the plaintiffs/respondents to lead in rebuttal evidence under Order XLI Rule 28 C.P.C and that does not appear to have been given to them.
- Ext.A.2 says what was conveyed is in old Survey No.686/2A correlated to Re-Survey No.686/2, and states that 3.16 acres conveyed thereunder lies to the north of the cart track. If there is a property in Survey No.686/2A, that necessarily implies that there are other subdivisions to this survey number. At least there should be another



S.A(MD).No.951 of 2014

WEB COPY

survey number in 686/2B. If Survey Nos.686/2A and 686/2B are the old survey numbers, then unless there is a merger of these two survey numbers, Re-Survey number cannot be 686/2. Even according to the plaintiffs, 'A' Schedule property is in Survey No.686/2B. Now, the survey number is nothing but means to identify the property. In all circumstances, where there is a discrepancy in describing the property either by extent or otherwise, the Court shall have to primarily look to the boundaries. Here under Ext.A.2, the southern boundary is stated to be a cart track. This is a parent document of the plaintiffs 1 and 2 for them to assert the title to “A” Schedule property. This cart track needs to be identified first.

- Turning to “B” Schedule property, Ext.B.19 also indicates that the property set aside for the pathway is not part of the exchange. This also appears to get reflected in Ext.A.6. If there is a pathway such as one indicated in Ext.B.19, then even that needs to be identified. However, an identification if any of Ext.B.19, needs to be weighed along with any rebuttal evidence which plaintiffs might adduce as indicated above.



S.A(MD).No.951 of 2014

7. In conclusion, this Second Appeal is allowed and the judgment and the decree dated 07.08.2014 passed in A.S.No.64 of 2007 by the Additional Subordinate Court, Dindigul, is set aside. The matter is accordingly remanded back to the Additional Subordinate Court, Dindigul and the learned Additional Subordinate Judge, Dindigul, is required to appoint a Commissioner with reasonable standing in the civil bar, and also regular in his appearance in the Court, for measuring and identifying the properties of both the parties in terms of their title deeds, and also to ascertain if the defendants have any alternate pathway. It is made clear that the Commissioner is required to complete his assignment within a period of two months from the date on which he is issued the warrant. The learned Additional Subordinate Judge, Dindigul is required to address the District Collector concerned of the need to make available the Official Surveyor for assisting the Advocate Commissioner. The learned Additional Subordinate Judge, Dindigul, is also required to forward a copy of this judgment to the District Collector concerned. Once the Commissioner files his report, the first appellate Court shall expedite the process of disposing of this appeal within a period of next three months. The parties are directed to appear



S.A(MD).No.951 of 2014

WEB COPY

before the first appellate Court on **19.12.2022**. No costs. Consequently, connected miscellaneous petitions are closed.

05.12.2022

Internet: Yes
Index: Yes/No
ssb

Note: Issue Order Copy on **07.12.2022**.

To

1. The Additional Subordinate Court, Dindigul,
2. The Principal District Munsif Court, Dindigul.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



S.A(MD).No.951 of 2014

N.SESHASAYEE, J.

ssb

S.A(MD).No.951 of 2014

05.12.2022