

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 23.10.2013 passed in A.S.No.15 of 2012 and I.A.No.152 of 2012, on the file of the II Additional Subordinate Court, Nagercoil, reversing the judgment and decree, dated 11.06.2008 passed in O.S.No.57 of 2006 on the file of the District Munsif Court, Nagercoil.

For Appellants : Mr.G.Suriyananth  
Additional Government Pleader  
For Respondents 2 & 4 : Mr.V.Meenakshi Sundaram  
for Mr.R.Murugan  
: R1 & R3 died

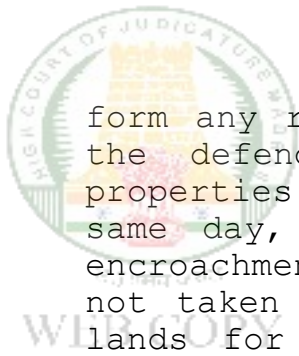
**JUDGMENT**

This Second Appeal is directed against the judgment and decree passed in A.S.No.15 of 2012 and I.A.No.152 of 2012, by the learned II Additional Subordinate Judge, Nagercoil, in reversing the judgment and decree in O.S.No.57 of 2006, passed by the learned District Munsif, Nagercoil.

2. For the sake of convenience, the parties are referred to herein, as per their own ranking as before the trial Court.

3.The case of the plaintiff, as per the averments made in the plaint, in short, is as follows :

The plaint schedule property belonged to the first plaintiff. The first plaintiff purchased the schedule item No.1 on 05.10.1957 from one Shanmugam @ Samuvel Nadar, which is marked as ABCD in the rough plan. On the eastern side also the said Shanmugam @ Samuvel Nadar's property was available. The first plaintiff used the said person's property bund to approach the plaint schedule item No.1. On 26.07.1972, the first plaintiff purchased the plaint schedule item No.2 from the legal heirs of the said Shanmugam @ Samuvel Nadar for his pathway purpose. After purchasing the plaint schedule property, the first plaintiff is in possession and enjoyment of the properties by effective mutation in revenue records. The plaint schedule properties have to be approached through the pathway which branches out from the Azhagiapandiapuram to Thovala Road and it ends EF point. The defendants very recently laid Tar road in the red washed area for the use of public. The defendants 1 and 2 with a view to extent the road attempted to encroach the plaint schedule properties and heaped sand, rubbles, Tar, etc., on 23.01.2006 without the consent and knowledge of the first plaintiff. The first plaintiff gave a complaint to the third respondent on 23.01.2006. The second defendant promised to the first plaintiff that the Panchayat Authorities will not involve in any unlawful activities and will not



form any road within the patta land. On 31.01.2006 the workers of the defendants, laid the rubbles through the plaint schedule properties with a view to extend the road beyond EF point. On the same day, the first plaintiff sent a telegram objecting to the encroachment by forming road in the patta land. The Government has not taken any acquisition proceedings to take the plaint schedule lands for the purpose of formation of road. No notice of the acquisition is issued to the first plaintiff by the defendants. The defendants committed damage to the plaint schedule properties to the tune of Rs.25,000/-. The defendants have no right to encroach the plaint schedule property and form a road without acquiring the land under due process of law. Hence the suit.

4. The suit was filed on 03.02.2006. Along with the suit, the plaintiff filed a petition in I.A.No.120 of 2006 for an order of interim injunction and also another application for appointment of Commissioner. On that day, the Commissioner visited the suit property and filed his report. At the time, the Commissioner had noted the heaping up of sand and rubbles for the purpose of forming road. However, after that, the defendants laid road in the plaint schedule item No.2 which is red washed in Commissioner's plan and also Tar road within the southern side of plaint schedule item No.1 having a length of 61.40 metres and 3 metre width which is shown as red washed in Ex.C.2- Plan. The defendants have no right to encroach the plaint schedule property and form a road after the institution of suit. So the defendants are bound to remove the encroachment. Hence, the suit is filed for permanent prohibitory injunction against the defendants.

5. Originally, the suit was filed before the trial Court for permanent prohibitory injunction. Subsequently, during the pendency of appeal, the appellants filed I.A.No.151 of 2012 to amend and incorporate prayer of mandatory injunction. The same was allowed on 09.04.2013 and the plaint was suitably amended.

6. The defendant filed a written statement contending that the suit is not maintainable either in law or on facts. As per the proceedings of the Director, Special Grade Panchayat, dated 29.09.2005, the existing sand roads are being improved under the plan, the integrated road structure and improvements scheme. In such process, the areas coming under Azhagiapandiapuram Special Grade Panchayath, the existing sand road in Perunthalaikadu to Soolankarai, tar road is being formed. The work of forming road in the said area has been completed. Hence, the suit became infructuous. The area covered under the Tar road comes within the limits of R.S.No.256/2 and 258/1 of Azhagiapandiapuram Village. No road has been formed in S.No.256/1 which is alleged by belonged to the first plaintiff. The State is absolutely entitled to form road in the area which stands classified as "பாது முன்பாகு". No one is entitled to raise any objection in the welfare activities of the

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to the first plaintiff for the formation of Tar road. The Plaintiffs have no cause of action to file the suit and hence, suit has to be dismissed with costs.

7. Before the trial Court, on the side of the plaintiffs, the second plaintiff examined himself as P.W.1 and one Isravel examined as P.W.2 and Exs.A1 to A8 were marked. On the side of the defendants, one Vinitha, Executive Officer was examined as D.W.1 and Exs.B.1 to B.4 were marked. Exs.C.1 and C.2 were marked.

8. On the basis of the rival pleadings on either side, the trial Court, after framing necessary issues and after evaluating both the oral and documentary evidence, has dismissed the suit.

9. Aggrieved by the Judgment and decree passed by the trial Court, the plaintiffs 2 to 4, as appellants, had filed an Appeal Suit in A.S.No.15 of 2012, on the file of the II Additional Subordinate Court, Nagercoil.

10. Originally the suit was filed before the trial Court for permanent prohibitory injunction. Subsequently, during pendency of appeal, the appellants filed I.A.No.151 of 2012 to amend and incorporate prayer of mandatory injunction. The same was allowed on 09.04.2013 and the plaint was suitably amended.

11. In the appeal, the plaintiffs filed an application in I.A.Nos.151 of 2012 and 152 of 2012 for amending the plaint as already the tar road has been laid and to mark additional documents under Order 41 Rule 22 of the Code of Civil Procedure and as per I.A.No.151 of 2012 was allowed and the plaint was amended and I.A.No.152 of 2012 was allowed but it could be seen that that there was no chance given to the defendants to file additional document or for filing any additional written statement. The Appellate Court proceeded further and had allowed the appeal with costs and allowed the applications also and marked Exs.A.9 to A.11 and the judgment of the trial Court in O.S.No.57 of 2006 dated 11.06.2008 was set aside and the suit is decreed as prayed for by granting permanent injunction against the defendants and the defendants are directed to remove the encroachment made in item Nos.1 and 2 of the suit schedule property, which is more clearly mentioned in Ex.C.2 Plan within a period of three months from the date of judgment.

12. The first appellate Court, after hearing both sides and upon reappraising the evidence available on record, had allowed the appeal and reversed the Judgment and decree passed by the trial Court. Challenging the said concurrent Judgments and decrees passed by the Courts below, the present second appeal has been preferred at the instance of the plaintiff, as appellant.

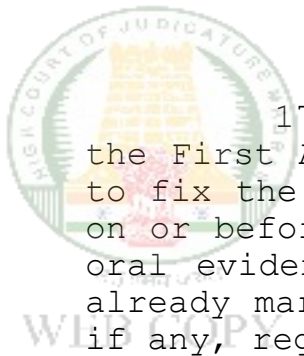


13. Heard the learned counsel for the appellants / defendants and learned counsel for the respondents/plaintiffs 2 to 4 and also perused the materials available on record.

14. On going through the averments made in the appeal grounds, it can be seen that the plaintiffs have not proved their case beyond doubt and they cannot rest on the weakness of the defendants plea. Further the Courts below have not framed the issue as to whether notice under Section 80 (1) of the Code of Civil Procedure was necessary and the parties were heard before dispensing with the issuance of notice under Section 80 (1) of the Code of Civil Procedure. Further, when no road has been formed in R.S.Nos.256/1 and 258/1 of Azhagiapandiapuram Village. The Appellate Court has come to a wrong conclusion that the public road was used for a long period of time, which has been converted into Tar road and it is a "pathai poromboke" and not laid on the plaintiffs property and amendment of prayer was granted by the Appellate Court without giving them the chance to file a counter affidavit on the said application and also the Court below has not considered the Village Map Ex.B.4 to arrive at a correct conclusion and when the plaintiffs have not produced any patta or any other revenue documents to show that they are in possession and enjoyment of the property and as they have stated that patta has lost and they have not taken any steps to make a complaint for the loss of original documents. Further, the trial Court has stated non-joinder of necessary parties, as the first plaintiff died during the pendency of the suit and this question need not be gone into, as this is a separate proceedings and prayed to allow the second appeal.

15. The learned counsel appearing for the respondents fairly submitted that the applications were allowed by the Court below and as pointed out by the learned counsel for the appellants that no opportunity was given to the Government to put forth their defence and hence whether the said lands were encroached upon or not has to be considered by the first Appellate Court and as no opportunity was given to the appellants herein by not providing them an opportunity to file a counter, and allowing the petition for filing a additional written statement for the amended plaint and no chance was given to them to file a counter for accepting the Exs.A.9 to A.11.

16. Considering the facts and circumstances of the case, this Court is of the view that the Second Appeal is to be partly allowed by remanding the matter back to the first Appellate Court for giving them an opportunity for putting forth their defence, if any by filing additional written statement, regarding the amendment of plaint alone and also for producing of additional documents, if any.



17. For this purpose alone, the matter is remanded back to the First Appellate Court and the First Appellate Court is directed to fix the date for hearing as 04.03.2022 and dispose of the matter on or before 31.08.2022. The parties are hereby directed to let in oral evidence regarding additional documentary evidences which has already marked as Exs.A.9 to A.11 and additional written statement, if any, regarding the amended prayer alone.

18. In the result, the Second Appeal is partly allowed to the extent indicated above. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The II Additional Subordinate Judge,  
Nagercoil.

2.The District Munsif,  
Nagercoil.

3.The Record Keeper,  
V.R. Section,  
Madurai Bench of Madras High Court, Madurai. (2 Copies)

**(Registry is directed to send the entire records in O.S.No.57 of 2006 on the file of the District Munsif Court, Nagercoil, to the Appellate Court (II Additional Subordinate Court, Nagercoil) forthwith.)**

+1 CC to M/s.R.MURUGAN, Advocate ( SR-436[F] dated 05/01/2022 )  
+1 CC to M/s.SPL.GP ( SR-583[F] dated 06/01/2022 )

Judgment made in  
**S.A(MD)No.557 of 2015**  
**05.01.2022**

VR(CO)

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