



S.A.No.1119 of 2009
and M.P.No.1 of 2009

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.06.2023

CORAM:

THE HONOURABLE MRS. JUSTICE R. HEMALATHA

S.A.No.1119 of 2009
and M.P.No.1 of 2009

K.Subramanian

..Appellant

vs.

Kasambu @ Baby Ammal (Died)

2.Dhanasekaran

3.Ravisekaran

4.G.Subramaniam

5.Sumathi

6.Uma

..Respondents

(R1 died, RR2 to 6 brought on record as LR's of the deceased R1 vide Court order dated 30.11.2022 made in CMP.Nos.3658, 3659 & 3664 of 2020 in S.A.No.1119 of 2009)

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the decree and Judgment dated 19.12.2008 in A.S.No.78 of 2007 on the file of the II Additional Sub Court, Cuddalore, upholding the decree and Judgment dated 29.08.2007 in O.S.No.281 of 2005 on the file of the Principal District Munsif Court, Cuddalore.



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For Appellant : Mr.K.A.Ravindran

For RR2 to 6 : Mr.T.S.Baskaran

JUDGMENT

The unsuccessful defendant before both the Courts below has filed the present second appeal. The respondent/plaintiff filed the suit in O.S.No.281 of 2005 (Vacation Civil Court O.S.No.40 of 2005) on the file of the Principal District Munsif, Cuddalore, seeking for a relief of declaration of his title to the suit property and for a consequential relief of permanent injunction restraining the appellant/defendant from interfering with his peaceful possession and enjoyment of the suit property. The suit property as described in the plaint is 7 x 138 ft lane situate in Nandhavana Street, Kurinjipadi Village, Cuddalore District, within the boundaries stated therein.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present second appeal would also be indicated.



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3. The case of the plaintiff in nutshell is as follows:

The suit property is marked as BCDE in the plan attached with the plaint. It is a lane situate on the eastern side of the plaintiff's house. The suit property and the house on its western side originally belonged to one Thaiyalnayagi Ammal wife of Vaithilinga Chettiar, who purchased the same under a registered sale deed dated 11.08.1909 (Ex.A1) in the name of Thaiyalnayagi Ammal and it was enjoyed in common by all the members of the said joint family. Her sons divided the said properties under a registered partition deed dated 10.10.1934 (Ex.A2) through which the suit property was allotted to the share of Kumarasamy Chettiar. After his death, his only daughter, the plaintiff succeeded to the suit property. The defendant owns properties on the eastern side of the suit property especially to the east of CD line shown in the plaint plan. The defendant's grand father Murugapa Chettiar had purchased the said property from one Arumuga Chettiar through a registered sale deed dated 12.01.1929 and a copy of the same is marked as Ex.A3. Though the defendant has no title over the suit property, he has been attempting to trespass into the same. One such attempt was made during the year May 2005 and the



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same was prevented by the plaintiff successfully. Since the defendant is threatening the plaintiff that he would demolish the wall and trespass into the suit property, the plaintiff is constrained to file the suit.

4. The suit was resisted by the defendant on the following grounds:

- i. The defendant is in possession and enjoyment of the wall and lane marked as BCDE in the plaint plan.
- ii. The plaintiff does not have any exclusive right over the said lane.

The defendant has been using the lane for the past 75 years and it is common to both the plaintiff and the defendant. The description of the suit property is also wrong and he therefore, prayed for dismissal of the suit.

5. On the basis of the above pleadings, the trial Court Judge framed the following issues :

- i. Whether the plaintiff is entitled for a declaration of his title to the suit property?
- ii. Whether the plaintiff is entitled for a permanent injunction as



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prayed for by him ?

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- iii. Whether the defendant is in possession and enjoyment of the suit property?
- iv. Whether it is true that the plaintiff does not have exclusive right over the suit property as alleged by the defendant ?
- v. Whether the suit property is described properly ?
- vi. Whether the Court fee has been paid properly ?
- vii. To what relief, the plaintiff is entitled?

6. In the trial Court, the plaintiff examined himself and marked Ex.A1 to Ex.A11. The defendant examined himself. However, no documentary evidence was adduced on the side of the defendant. In the trial Court, an Advocate Commissioner was appointed and he filed his report and plan which were marked as Ex.C1 & Ex.C2, respectively and the photograph taken in the site is marked as Ex.C3.

7. After full contest, the learned Principal District Munsif, Cuddalore, decreed the suit filed by the plaintiff vide his decree and judgment dated 29.08.2007 on the following grounds :



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- i. There is no mention about the suit lane in the sale deed of the defendant (Ex.A3).
- ii. DW1 during the course of cross examination admitted that he did not adduce any documentary evidence to show that he also has a right to use the suit pathway.
- iii. The Advocate Commissioner in his report had clearly stated that the defendant is in possession of his property as mentioned in his sale deed.
- iv. Therefore, the defendant cannot have any access to the suit lane.
- v. The defendant had not also examined any independent witness to substantiate his contention that the suit pathway is common to both the plaintiff and him.

8. Aggrieved over the decree and judgment passed by the trial Court, the defendant filed an appeal in A.No.78 of 2007 before the II Additional Sub Court, Cuddalore. The learned II Additional Subordinate Judge, Cuddalore, after analysing the oral and documentary evidence adduced on both sides upheld the findings recorded by the trial Court and dismissed the appeal vide his decree and judgement dated 19.12.2008.



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9. Now the present second appeal is filed by the defendant.

Notice of motion was issued to the respondent and after several adjournments, the case was posted today for final hearing. Substantial questions of law raised by the learned counsel for the appellant in the grounds of appeal are as follows:

- i. "Whether the Courts below are right in decreeing the suit when the Advocate Commissioner has categorically admits that both plaintiff's and defendant's roofs fall down to the suit lane?
- ii. Whether a mere inclusion of the suit lane in the partition deed Ex.A2 creates interest and title to the plaintiff when the parent document Ex.A1 is silent about the same?
- iii. Whether the Courts below are right in decreeing the suit when admittedly the suit lane has been used by both the defendant and the plaintiff?
- iv. Whether the Courts below are right in decreeing the suit when the defendant established the usage of the lane for the past 75 years and the supporting wall of the mother wall runs for 39 feet in the suit lane?



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v. When the measurement in the plaintiff document Ex.A2 varies from the parent document Ex.A1. Whether the Lower Courts are right in granting the decree?

10. Heard, Mr.K.A.Ravindran, learned counsel for the appellant and Mr.T.S.Baskaran, learned counsel for the respondents 2 to 6.

11. Mr.K.A.Ravindran, learned counsel for the appellant would contend that though the defendant has been using the common pathway for the past 75 years, both the Courts below had committed an error and granted a decree of declaration and injunction in favour of the plaintiff.

12. Per contra, Mr.T.S.Baskaran, learned counsel for the respondents 2 to 6 would contend that the defendant is in possession of his property as per his sale deed (Ex.A3). However, he did not adduce any oral and documentary evidence to show that he has been enjoying the suit pathway. According to him, both the Courts below had properly analysed the oral / documentary evidence adduced on both sides and decreed the suit and therefore, no interference is warranted especially when there is no



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substantial questions of law involved in the present second appeal.

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13.The plaintiff has filed the suit for declaration and for permanent injunction in respect of the suit lane measuring 7 x 138 feet. The case of the plaintiff is that the suit property originally belonged to one Thaiyalnayagi Ammal through a registered sale deed dated 11.08.1909 (Ex.A1). Subsequently, all the properties belonging to the family were divided under a registered partition deed dated 10.10.1934 (Ex.A2), in which the suit property was allotted to the share of Kumarasamy Chettiar, the father of the plaintiff. After his death, he (plaintiff) inherited the property under Section 8 of the Hindu Succession Act.

14.The case of the defendant is that the suit property (lane) is a common pathway and the plaintiff cannot claim any exclusive right over the same. However, it is pertinent to point out that the defendant did not adduce any acceptable oral / documentary evidence to substantiate his contention that he also has got a right over the suit lane. In fact, the registration copy of the sale deed of the defendant was marked by the plaintiff as Ex.A3. In Ex.A3 nothing is mentioned about the existence of



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pathway on the western side of the property. The Advocate Commissioner was examined as C.W.1 and he has deposed that the defendant is in possession of his property as per the sale deed (Ex.A3). The defendant was examined as DW1 and he also during the course of cross examination admitted that he did not adduce any documentary evidence to show that he has a right of way through the suit pathway. He further admitted that a drainage pipe line was laid by the plaintiff in the suit lane and that he does not have any access to the suit lane abutting his western side wall. Thus, it is seen from the oral and documentary evidence adduced on both sides that the defendant could not have right to access the suit lane and the photograph (Ex.C4) filed by the Advocate Commissioner also proves the same. Therefore, both the Courts below were right in holding that the plaintiff has got right, title, interest over the suit lane. In fact, there are no substantial questions of law involved in the present second appeal.

15.It is pertinent to mention that this a second appeal under Section 100 of the Code of Civil Procedure where the jurisdiction of the High Court is confined to a substantial question of law. A full Bench of the Supreme Court in ***Bholaram Vs. Ameerchand*** reported in ***AIR 1981***



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SC 1209 has held that the High Court cannot interfere with the concurrent factual findings of courts below in a second appeal. In fine, the second appeal fails and is dismissed.

16.In the result,

- i. the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.
- ii. The decree and Judgment dated 19.12.2008 in A.S.No.78 of 2007 on the file of the II Additional Sub Court, Cuddalore and the decree and Judgment dated 29.08.2007 in O.S.No.281 of 2005 on the file of the Principal District Munsif, Cuddalore, are upheld.

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mtl

Index : Yes/No

Speaking / Non-speaking order



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R.HEMALATHA, J.

mtl

To

1. The II Additional Sub Court, Cuddalore.
2. The Principal District Munsif Court, Cuddalore.
3. The Section Officer, VR Section, High Court, Madras.

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