



S.A.No.1207 of 2006

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20.01.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.1207 of 2006

1.Kannan

2.Pandurangan (Deceased)

3.Saroja

4.Neelavathi

5.Senthamizhselvan

6.Tamizhselvi

...Appellants

Vs.

D.Arunachalam

...Respondent

(6th appellant brought on record as LR of the deceased 2nd appellant vide order dated 12.09.2017 made in C.M.P.No.15702 to 15704 of 2017 in S.A.No.1207 of 2006).



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Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree made in A.S.No.47 of 2005 on the file of the Principal Subordinate Judge, Virudhachalam dated 27.09.2005 confirming the Judgement and Decree made in O.S.No.83 of 2002 on the file of the District Munsif Cum Judicial Magistrate Court, Thittakudi dated 29.11.2004.

For Appellants : Mr.V.Ayyadurai
Senior Counsel
For Mr.V.B.Perumal Raj

For Respondent : Mrs.A.Nilaphar

JUDGMENT

The defendants are the appellants before this Court challenging the Judgement and Decree passed by the Principal Sub Court, Virudhachalam in A.S.No.47 of 2005, in and by which the learned Principal Sub Judge has confirmed the Judgement and Decree passed by the learned District Munsif cum Judicial Magistrate, Thittakudi in O.S.No.83 of 2002. The brief facts are as follows and the parties are referred to in the same rank as before the Trial Court.



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2. The suit in question is filed to declare the suit property (pathway) as common to both the plaintiff and the 1st defendant and for a consequential injunction restraining the defendants from interfering with the plaintiff's usage of the said pathway.

3. The said pathway is a grama natham formed by the plaintiff contributing 1 1/8 feet on his side and the 1st defendant contributing 1 - 1/8 feet on his side. The length of the pathway is 57 feet and the breadth is 2 1/4 feet.

4. The case of the plaintiff is that the right to enjoy the said pathway has been reduced into writing on 31.01.1989 in an unregistered agreement and they have been in enjoyment of the said pathway for over decades. However, on account of recent difference of opinion between the plaintiff and the 1st defendant, the 1st defendant along with the other defendants had trespassed into the suit property on 01.02.2002 and tried to interfere with the plaintiff's enjoyment of the

same. Therefore, the plaintiff has come forward with the suit in question.

5. The 1st defendant had filed a written statement in which the defendants had denied the averments contained in the plaint and they had also contended that the plaintiff had filed an earlier suit in O.S.No.202 of 2001 in respect of the very same pathway for bare injunction. While that suit was pending, the plaintiff had filed the instant suit. The defendants also raised a plea that the plaintiff had an alternative pathway to reach the rear side of his property through his house and it is this pathway that the plaintiff is using. That apart, the defendant had contended that on 10.05.1995, the Special Thasildar had granted patta under the updating survey schemes and they would state that the plaintiff is trying to establish a new right.

6. Further, the plaintiff after obtaining an interim order in the instant suit in I.A.No.429 of 2002 had withdrawn the earlier suit. The defendants had contended that the suit in respect of the very same



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property is not maintainable.

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7. The Trial Court had framed the following issues:

- “1.வழக்கு சொத்தில் வாதிக்கு அனுபவம் எதுவும் இல்லை என்பது உண்மையா?
- 2.வாதி கோரும் பரிகாரம் பெற அருகரா?
- 3.வேறு என்ன பரிகாரம்?

8. The plaintiff had examined himself as P.W.1, the 2nd defendant was examined as P.W.2 and one Mahalingam was examined as P.W.3. Ex.A.1 to Ex.A.7 were marked on the side of the plaintiff. The 1st defendant had examined himself as D.W.1 and one Kannan son of Sellamuthu as D.W.2.

9. The Trial Court on considering the evidence on record had proceeded to decree the suit as prayed for. Aggrieved by the said Judgement and Decree, an appeal was preferred by the defendants in A.S.No.47 of 2005 before the Principal Sub Judge, Virudhachalam.

The Lower Appellate Court also confirmed the Judgement and Decree passed by the Trial Court.

10. Aggrieved by the same, the defendants are the appellants before this Court and this Court was pleased to admit the above Second Appeal on the following Substantial Question of Law:

“1. Whether the Judgement and Decree of both the Courts below are liable to be set aside for want of considering the vital issue as to maintainability of the suit in terms of Section 10 of Code of Civil Procedure and on erroneous finding as regards admissibility and reliability of Ex.A.1 unregistered agreement especially when the execution of the same was not duly proved?”

11. Mr.V.Ayyadurai, learned senior counsel appearing on behalf of the defendants / appellants would rest his entire arguments primarily on the fact that the plaintiff / respondent had earlier filed a suit for bare injunction in O.S.No.202 of 2001 and that during the pendency of the



said suit, present suit had been filed without seeking leave of the Court.

Therefore, it is the contention of the learned senior counsel that the plaintiff cannot maintain the second suit. The learned senior counsel would also contend that the plaintiff has filed a suit on the basis of easement of grant, adverse possession and necessity. The learned senior counsel would submit that the claim under both an easement of grant and adverse possession are mutually contradictory.

12. The learned senior counsel would submit that the plaintiff has, during his cross examination clearly, admitted the filing of the earlier suit and the fact that the subject matter of both the suits are one and the same. The learned senior counsel would further submit that the plea of the present suit being barred by reason of the earlier suit has not been considered by both the Courts below. Further, no issue with reference to the same has been framed either by the Trial Court or by the Lower Appellate Court. Therefore, the Judgement of the Courts below have to be set aside.



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13. The learned senior counsel would also rely upon the Judgement of the Andhra Pradesh High Court reported in **1997 SCC Online AP 694 – Devarapu Narasimharao Vs. Yerrabothula Peda Venkaiah and others**, in support of his contention that the subsequent suit will not lie unless and until liberty is obtained to institute a fresh suit and the suit filed without such leave would definitely be hit by the provisions of Order 23 Rule 1 (4) of the Code of Civil Procedure.

14. Per contra, Mrs.A.Nilaphar, learned counsel appearing on behalf of the plaintiff would submit that this defense about the maintainability of the suit is being seriously contested only before this Court and there is no pleading to this effect. The written statement does not convey the exact defense taken by the defendants in this regard. The learned counsel would submit that despite taking a plea that the subsequent suit which now the subject matter of the appeal is not maintainable in the light of the filing of the earlier suit, the pleadings in the earlier suit has not been filed by the defendants. In

fact, the defendants have not marked any documents on their side and their contentions are unsubstantiated pleadings. The learned counsel would also rely upon the Judgement of the Hon'ble Supreme Court reported in **1997 (1) SCC 99 - Bengal Waterproof Limited Vs. Bombay Waterproof Manufacturing Company and another.**

15. The learned counsel would further submit that the Courts below after appreciating the evidence on record, which includes the Advocate Commissioner's report, had arrived at a finding that the pathway in question existed and that it was in the common enjoyment of both the plaintiff as well as the defendants.

16. The learned counsel would therefore submit that once the Courts below have appreciated the evidence on record and the Judgement passed, this Court sitting in the Second Appeal cannot re-appreciate the evidence. In support of the said argument, the learned counsel would rely upon the Judgement of the Hon'ble Supreme Court reported in **2006 (5) SCC 545 – Hero Vinoth (Minor) Vs. Seshammal.**



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17. Heard the learned senior counsel for the appellants and the learned counsel for the respondent.

18. The Substantial Question of Law refers to Section 10 of the Code of Civil Procedure, which in my considered opinion is an error since Section 10 of the Code of Civil Procedure contemplates the stay of the subsequent suit. The arguments that have been advanced is that the subsequent suit is barred under the provisions of Order 2 Rule 2 and Section 11 of the Code of Civil Procedure. Section 11 of the Code of Civil Procedure would read as follows:

“11. Res judicata. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has



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been heard and finally decided by such Court.

Explanation I: The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II: For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

19. A reading of an Explanation I to Section 11 denotes that the former suit must have been decided prior to the filing of the subsequent



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suit. In the instant case while the earlier suit was pending the subsequent suit had been filed and further the earlier suit has not been *“heard and finally decided”*. Further, as contemplated under Section 11 of the Code of Civil Procedure the earlier suit has been withdrawn later.

20. As regards the contention that the subsequent suit is hit by provisions of Order 2 Rule 2 of the Code of Civil Procedure it is to be taken note that the defendants had not filed the pleading in the earlier suit, so as to enable this Court to appreciate the arguments put forward by them. The underlying principle of Order 2 Rule 2 of the Code of Civil Procedure is that on the date of the filing of the former suit whether the cause of action for subsequent suit had arisen? To examine this, it is essential for the defendants to produce a copy of the pleading in the earlier proceedings. In the instant case, the same has not been produced by defendants. Infact, the defendants have not chosen to file any documents to substantiate their contentions. In the Judgement referred to by the learned counsel for the plaintiff, namely,



1997 (1) SCC 99 – Bengal Waterproof Limited Vs. Bombay

Waterproof Manufacturing Company and another, the learned Judges had referred to the Judgement of the Constitution Bench of the Hon'ble Supreme Court reported as **AIR 1964 SC 1810 - Gurbux Singh vs Bhooralal**, wherein the Bench had observed as follows:

“In order that a plea of a bar under Order 2. Rule 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause



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of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2 Rule 2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. It is common ground that the pleadings in C.S. 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2 Rule 2, Civil Procedure Code. The learned trial Judge, however, without these pleadings being on the record inferred what the cause of action

should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion rightly, that without the plaint in the previous suit being on the record, a plea of a bar under Order 2 Rule 2, Civil Procedure Code was not maintainable”

21. In the light of this authoritative pronouncement and the fact that the defendants have not chosen to file the pleadings in the earlier suit the plea of Order 2 Rule 2 and Section 11 of the Code of Civil Procedure is not available to the defendants.

22. The plaintiff has proved the existence of a common pathway and its usage by both the plaintiff and the defendants. The Advocate Commissioner has also referred to the pathway and its physical features all of which would go to show that the suit pathway is used as a common pathway by both the plaintiff and the defendants.



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23. Therefore, I see no reason to interfere with the Judgements of the Courts below and the Substantial Question of Law is answered against the defendants. Accordingly, the Second Appeal is dismissed. There shall be no order as to costs.

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Index : Yes/No
Internet : Yes/No
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To

1.The Principal Subordinate Judge,
Virudhachalam

2.The District Munsif Cum Judicial Magistrate Court,
Thittakudi



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P.T. ASHA, J,

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