



S.A.Nos.539 and 540 of 2006

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.12.2023

CORAM

THE HON'BLE Mr.JUSTICE C.KUMARAPPAN

S.A.Nos.539 and 540 of 2006

and

C.M.P.Nos.6645 of 2006

1.Annapoorani
2.Mohanraj
3.Kumar
4.Thenmozhi
5.Arulamudhan
6.Kirubavathi

... Appellants in both the appeals

- Vs -

1.Mohanambal
2.Ananda Doss

... Respondents in both the appeals

PRAYER in S.A.No.539 of 2006 : This Second Appeal is filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 24.06.2003 made in A.S.No.25 of 1997 on the file of the Subordinate Judge at Poonamallee by setting aside the Judgment and Decree dated 24.12.1996 made in O.S.No.900 of 1983 on the file of the District Munsif, Poonamallee.



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PRAYER in S.A.No.540 of 2006 : This Second Appeal is filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 24.06.2003 made in A.S.No.1 of 2003 on the file of the Subordinate Judge at Poonamallee by confirming the Judgment and Decree dated 24.12.1996 made in O.S.No.900 of 1983 on the file of the District Munsif, Poonamallee.

For Appellants : Mr.T.Karunakaran
M/s.G.Arulselvi

For R1 : Mr.Srinath Sridevan, Senior
Counsel

For R2 : (Served) No Appearance

COMMON JUDGMENT

S.A.No.539 of 2006 is arising out of the reversal order passed in A.S.No.25 of 1997. whereas S.A.No.540 of 2006 is arising out of a concurrent finding recorded in A.S.No.1 of 2003.

2. Both the above first and second appeals arising against the decree and judgment of the suit in O.S.No.900 of 1983. The said suit was filed with the prayer for declaration and for consequential injunction to



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“B” and “C” schedule properties and also sought for the relief of declaration for “D” schedule pathway.

3. The trial Court dismissed the suit in respect of D schedule property qua the right of access. Against which, the plaintiff preferred an appeal in A.S.No.25 of 1997. However, the suit was decreed in respect of “B” & “C” schedule and declaration and consequential injunction was granted in favour of the plaintiff. Against which, the defendant preferred an appeal in A.S.No.1 of 2003. Since both the second appeals are arising out of a common judgment passed in A.S.No.25 of 1997 and A.S.No.1 of 2003, the said two second appeals are taken together for disposal.

4. The appellants in both the appeals herein are the legal heirs of the first defendant before the trial Court. The respondents 1 and 2 herein are the plaintiff and second defendant respectively before the trial Court.

The brief facts which gives rise to the instant second appeal are.

that:

5. The suit A schedule property was originally belonged to one



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Gabriel. The plaintiff's predecessor-in-title Pushpammal purchased the property from the said Gabriel under sale deed, dated 07.04.1965. Thereafter, the plaintiff purchased the suit property from Pushpammal on 07.05.1981. According to the plaintiff, the plaintiff's predecessor in title had been in possession and enjoyment of "A" schedule property of an extent of 8 cents, by putting up live fence on all the four side, and she was also having access to MTH Road through "Fellowship street" for more than 25 years, which is referred to as "D" Schedule property in the suit. The "B" & "C" schedule properties are part of "A" schedule property. The plaintiff further states that the 2nd defendant is the owner of the site measuring 10 cents on the North of "A" schedule property, According to the plaintiff, from 22.05.1983 onwards, the defendants disputing the title of the plaintiff fenced on the north-eastern portion of the "A" schedule property which is referred as "C" schedule. The 1st defendant has also conspired with the 2nd defendant and disputed the plaintiff's title in respect of north-western portion of the A schedule property, which is referred to as B schedule property. Therefore, the plaintiff has come up with the suit for declaration in respect of B and C



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WEB COPY schedule property, and also seeking for declaration of right of access in respect of D schedule property.

6. The said suit was resisted by the 1st defendant by contending that the 1st defendant had purchased 5 cents of land in S.F.Nos.364/1 and S.F.No.368 from one Govindasamy, under a sale deed dated 07.08.1973. Similarly, the 2nd defendant has purchased the land measuring 10 cents in S.F.No.364/1, now sub-divided as S.F.No.36/1D2 from the very same person Mr.Govindasamy under the sale deed, dated 29.03.1974. As such, both defendants' predecessor-in-title are one and the same person. According to both the defendant, ever since the date of purchase, they have been in actual physical possession and enjoyment of the same. It is also the submission of the defendants that they did not encroach upon the plaintiff's property, and that the plaintiff do not have any right over the "D" schedule property qua the passage. According to the defendants the "D" schedule property is the private road, wherein, the plaintiff has no right of access. Therefore, both the defendants pray to dismiss the suit.



7. Before the trial Court, the plaintiff marked four documents as Exs.A1 to A4 and as Court documents, Seven documents were marked as Exs.C1 to C7. Likewise, the plan of the Surveyor was marked as Ex.X1. On behalf of the defendants, 13 documents have been marked as Exs.B1 to B13. On behalf of the plaintiff and the defendants, each two witnesses were examined as PW1, PW2 and DW1 and DW2 respectively.

8. The trial Court, after considering oral and documentary evidence decreed the suit as prayed for in respect of “B” and “C” schedule property. However, dismissed the suit as against D schedule property. Aggrieved by the said judgment, both the plaintiff and the 1st defendant have preferred two separate first appeals in A.S.No.25 of 1997 and A.S.No.1 of 2003 respectively. The First Appellate Court has dismissed the appeal in A.S.No.1 of 2003 filed by the 1st defendant, in respect of “B” and “C” schedule property. However, the First Appellate Court



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allowed the appeal filed by the plaintiff in A.S.No.25 of 1997 by granting right of access in the “D” schedule property namely “Fellowship Street”. As such by virtue of the order of the First Appellate Court in both the appeal, the suit was eventually decreed as prayed for. Aggrieved with the findings of the First Appellate Court, the first defendant preferred two separate second appeals.

Substantial Question of Law:-

9. At the time of admission of both the second appeals, this Court has formulated the following common substantial questions of law :

1. Whether the finding of the lower appellate Court is correct in respect of D schedule property when the respondents / plaintiffs have not established their case?

2. Has not the lower appellate Court in the absence of material and substantial evidence committed an error in coming to the conclusion that the respondents/plaintiffs are entitled to D schedule property?



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3.Has the respondents/plaintiffs filed the suit for declaration in respect of D schedule property the burden is upon the plaintiffs to prove and establish the same under Section 101 of the Evidence Act which was not at all taken into consideration by the lower appellate Court?

4. The lower appellate Court having come to the conclusion that there is no clear document to accept the case of the plaintiff, as to her right over the D schedule has not committed serious error in holding that the respondents/plaintiffs are entitled to decree of declaration?

However, on perusal of the material, this Court deems it appropriate to formulate the following additional substantial questions of law in respect of S.A.No.540 of 2006.

“(i)Are not both the Courts have erred in coming to the conclusion that the respondents/plaintiffs were entitled to “B” & “C” schedule property in the absence of valid



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documents and substantial evidence.

(ii) Are not that Courts below, have erred in not having appreciated that the burden of proof is on the part of the respondents/plaintiffs as required under Section 101 of Evidence Act.”

Submissions of either side counsel:-

10. The learned counsel for the appellants would contend that the trial Court as well as First Appellate Court erred in holding that the B and C schedule property belong to the plaintiff, he would further contend that the First Appellate Court has wrongly decreed the suit in respect of D schedule property. It is the submission of the learned counsel for the appellants that even according to the Surveyor's Plan, “B” and “C” schedule property is well within the boundaries of the defendants, and that the way in which the B and C schedule property described in the plaint is erroneous. Therefore, the learned counsel would further submit that the decree granted by the trial Court as well as First Appellate Court is perverse and liable to be interfered with.



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11. However, the learned Senior Counsel appearing on behalf of the respondent would vehemently contend that the appointment of the second Commissioner without scrapping the earlier report is erroneous and perverse. The learned Senior Counsel further submits that the findings of fact recorded by both the trial Court as well as the First Appellate Court is well merited and the same cannot be interfered at the second appellate stage. He would also contend that the submission made by the learned counsel for the appellant relying upon the subsequent Commissioner's report, Ex.C6 and Ex.X1 is contrary to law as there are previous Commissioner's Report available on record.

12. I have given my anxious consideration to either side submission.

Analysis of the submissions:-

13. The sum and substance of the submission on either side is,
(i) as to whether the plaintiff has got any right to have an access in respect of D schedule property and (ii) whether the plaintiff has established his



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right and title over the property of “B” and “C” schedule property and the alleged encroachment of the defendants. In respect of “D” schedule property, admittedly, there are no documents available to prove the alleged easementary right over “D” schedule property. However, the learned Senior counsel appearing on behalf of the respondents would vehemently submits that through the electricity pole situate in the “D” schedule property, the plaintiff have been drawing electricity to their premises, therefore, the plaintiff has got right over the said passage. But, this Court is not persuaded by the submission made by the learned senior counsel.

14.Further on perusal of the record, as rightly contended by the learned counsel for the appellants, the title deed of the plaintiff namely Ex.A1 as well as his predecessor-in-title deed - Ex.A2 do not contain any recital as to the alleged plaintiff’s right of access over the “D” schedule property. Further more, in order to have a easement by presumption, the plaintiff ought to have used the said passage for a statutory period. Whereas, the plaintiff purchased the property only during 1981 and filed a suit within a period of two years. Therefore, the question of claiming



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any easementary right by prescription also does not arise in this matter.

Therefore, this Court is of the firm view that the decree granted in respect of “D” schedule property is without any evidence and therefore, this Court is constrained to interfere with the order of both the Courts below.

15. In respect of “B” & “C” schedule property, the learned counsel for the appellant has invited the attention of this Court in respect of Surveyor's Plan-Ex.X1. Wherein, the Surveyor, who was examined as PW2 has categorically stated that “B” and “C” schedule properties are situate within the boundary of the appellant and the surveyor also drawn a plan evidencing such factum. The same is marked as Ex.X1.

16. On perusal of Ex.X1, the “B” and “C” schedule property comes within the boundaries of the defendants 1 and 2. Apart from that, the learned counsel for the appellants/defendants would also invite the attention of this Court in respect of the inscrutable and confounding description of property referred in the plaint as well as in the plaint plan. As rightly submitted by the learned counsel for the appellant, the burden of proof is heavily upon the respondent/plaintiff to establish



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encroachment. Here except his ipse dixit no other documents are in his favour. Whereas the surveyor report Ex.X.1 demonstrate that there are no encroachment. Further the alleged encroachment of “B” and “C” schedule property by 1st and 2nd defendants also appears to be illogical as the 1st defendant has property here “C” schedule and 2nd defendant has property adjacent to “B” schedule. Hence, this Court is in full agreement with the submission made by the learned counsel for the appellants based on the Commissioner's report - Ex.X1.

17. It is also further contended by the learned counsel for the 1st defendant that originally the plaintiff's predecessor in title had 10 cents of property and in that plaintiff has purchased only to an extent of 8 cents through Ex.A1. Therefore, according to the appellant either one of the boundary of the suit property should be his predecessor's remaining property. But, while describing the “A” schedule property, there is no reference as to the remaining extent of 2 cents which belongs to the plaintiff's predecessor-in-title. Therefore, this Court is of the firm view that the plaintiff has not described the suit property in its right



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perspective. Apart from that, on perusing Ex.X1 Plan, the alleged B and C schedule property comes within the boundaries of the defendants. Therefore, this Court is of the view that the findings recorded by the trial Court as well as the First Appellate Court is either without any evidence or by misreading of the same. Therefore, under Section 100 CPC, this Court has ample power to interfere with the palpable perverse concurrent findings. Therefore, in view of the above detailed discussion, the Substantial Questions of Law and additional substantial question of law are decided in favour of the appellants, and S.A. Nos.539 and 540 of 2006 are ordered to be allowed.

18. In the result, both the appeals are allowed. As a concomitant the judgment and decree dated 24.06.2003 made in A.S.No.25 of 1997 and A.S.No.1 of 2003 on the file of the Subordinate Judge at Poonamallee and the Judgment and Decree dated 24.12.1996 made in O.S.No.900 of 1983 on the file of the District Munsif, Poonamallee are hereby set aside. Resultantly, the suit is O.S.No.900 of 1983 is dismissed. No costs.



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ssn

Index : yes/no

Speaking/Non Speaking Order

Neutral Citation Case: Yes/No

To

1. The Subordinate Judge,
Poonamallee.

2. The District Munsif,
Poonamallee.

C.KUMARAPPAN, J.,

ssn



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