



S.A(MD).No.168 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 31.03.2023

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A.(MD)No.168 of 2017
and C.M.P(MD)No.2976 of 2017

Subramanian

.... Appellant/Appellant/Plaintiff
Vs.

The Executive officer,
Panchayat Board,
Gopalsamudram,
Gopalsamudram Village,
Ambasamudram Taluk,
Tirunelveli District

... Respondent/Respondent/Defendant

Prayer : Second Appeal is filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 22.10.2016 passed in A.S.No.47 of 2015 on the file of the Subordinate Court, Ambasamudram confirming the judgment and decree dated 24.11.2014 passed in O.S.No. 120 of 2012 on the file of the District Munsif cum Judicial Magistrate Court, Cheranmahadevi.

For Appellant : Mr.V.Meenakshisundaram
For Respondent : Mr.J.Ashok

J U D G M E N T

This Second Appeal has been filed challenging the concurrent findings of the courts below. The plaintiff in the suit in O.S.No.120 of 2012 on the file of the District Munsif cum Judicial Magistrate Court, Cheranmahadevi, is the appellant herein.



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2. In the forthcoming paragraphs, the parties are described as per their litigative status in the suit.

3. The suit was filed for declaration and for mandatory injunction in respect of 3rd schedule of the suit property. The plaintiff claimed that the 3rd schedule of the suit property is the exclusive pathway of the plaintiff and it is part and parcel of 1st and 2nd schedule of the suit properties.

4. However, before the trial court, as seen from the written statement, the respondent/defendant has denied the contentions of the plaintiff that the suit 3rd schedule property is part and parcel of the suit 1st and 2nd schedule of the properties and the Executive Officer, who has represented the defendant Panchayat Board has stated that they have already constructed a road which is the only access to a graveyard utilized by the villagers.

5. Before the trial court, the appellant/plaintiff filed 8 documents which were marked as Ex.A.1 to Ex.A.8 to substantiate his claim that the 3rd schedule of the suit property is a pathway exclusively belonging to him. On the side of the respondent/defendant, no document was filed. On the side of the appellant/ plaintiff, 1 witness was examined, namely the plaintiff



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himself examined as P.W.1. On the side of the defendant, no witness was examined.

6. The trial court dismissed the suit only on the ground that the appellant/plaintiff has not taken out an application for appointment of an Advocate Commissioner to note down the physical features of the 3rd schedule of the suit property to substantiate their claim that the 3rd schedule of the suit property is a pathway exclusively belonging to the plaintiff and is part and parcel of 1st and 2nd schedule of the suit properties.

7. The lower Appellate Court namely, the Subordinate Court, Ambasamudram, by its judgment and decree dated 22.10.2016 in A.S.No. 47 of 2015, has also confirmed the findings of the trial court by dismissing the first appeal on the very same ground that the appellant/plaintiff has not filed an application for appointment of an Advocate Commissioner for the purpose of noting down the physical features of the 3rd suit schedule property for ascertaining as to whether the 3rd schedule is part and parcel of 1st and 2nd schedule of the suit properties.

8. This Court on 04.04.2017 admitted this Second Appeal by



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formulating the following substantial question of law:

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"Whether the respondent is justified in classifying the plaint 3rd schedule property as public pathway in the absence of any evidence produced in respect of it?"

9. The truth as to whether the 3rd schedule of the suit property is part and parcel of 1st and 2nd schedule of the suit properties can be ascertained only if measurements of all the 3 schedules are taken. Before this Court, the learned counsel for the appellant has filed an application in C.M.P(MD)No. 2976 of 2017 under Order 26 Rule 9 and Section 151 of C.P.C seeking for an appointment of Advocate Commissioner with the help of Taluk Surveyor to make local investigation and measure schedule mentioned properties which is subject matter of the suit in O.S.No.120 of 2012 filed by the appellant on the file of the District Munsif cum Judicial Magistrate, Cheranmahadevi, with the boundary recitals and measurements in Ex.A.1 to Ex.A.6 and also survey records. The application was filed in the year 2017. No counter has been filed by the respondent till date to the said application. The respondent has also not filed any documentary evidence before the trial court to prove their case that the 3rd schedule of the suit schedule property is not part and parcel of the 1st and 2nd schedule of the suit schedule properties.



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The respondent has also not let-in oral evidence before the trial court. The appellant/plaintiff has asserted that the 3rd schedule of the suit schedule property is part and parcel of 1st and 2nd schedule of suit properties and he claims that 3rd schedule of the suit schedule property is his exclusive pathway. The truth can be ascertained only if an Advocate Commissioner is appointed who can seek the assistance of a Taluk Surveyor and measure the suit schedule properties namely Schedule-I, Schedule-II and Schedule-III based on the title deeds of the appellant/plaintiff and the revenue records, which have been marked as exhibits before the trial court and after making investigation, the Advocate Commissioner shall submit a report to the court. The lower Appellate Court could have very well done this exercise as it is empowered under Order 26 Rule 9 C.P.C to *suo motu* appoint an Advocate Commissioner to ascertain the truth with regard to the respective contentions.

10. Since the said exercise has not been done, this Court deems it fit to remand the matter back to the first Appellate Court namely, the Subordinate Court, Ambasamudram for fresh consideration of the first appeal filed by the appellant/plaintiff aggrieved by the judgment and decree of the trial court passed in O.S.No.120 of 2012 on the file of the District



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Munsif cum Judicial Magistrate, Cheranmahadevi for appointing an Advocate Commissioner as per the provisions of Order 26 Rule 9 C.P.C who shall take assistance of a Taluk Surveyor and make a local investigation and measure the suit schedule mentioned properties which is the subject matter of the suit in O.S.No.120 of 2012 on the file of the District Munsif cum Judicial Magistrate, Cheranmahadevi with the boundary recitals and measurements in Ex.A.1 to Ex.A.6 and after survey, submit a report to the first Appellate Court to enable the first appellate court to consider the same on merits and decide the first appeal one way or other based on Advocate Commissioner's report in accordance with law.

11. The application in C.M.P(MD)No.2976 of 2017 filed before this Court under Order 26 Rule 9 and Section 115 of C.P.C can be taken as a request made by the appellant/plaintiff for appointment of an Advocate Commissioner by the lower Appellate Court and by exercising the power under Order 26 Rule 9 C.P.C the lower Appellate Court shall appoint an Advocate Commissioner for the relief sought for in C.M.P.(MD)No.2976 of 2017 filed by the appellant/plaintiff before this Court.

12. For the foregoing reasons, the judgment and decree dated



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22.10.2016 of the lower Appellate Court namely the Subordinate Court, Ambasamudram in A.S.No.47 of 2015 is hereby set aside and the matter is remanded back to the said court for fresh consideration of A.S.No.47 of 2015 on merits and in accordance with law. After appointing an Advocate Commissioner as prayed for by the appellant/plaintiff in C.M.P(MD)NO. 2976 of 2017 before this Court and after receiving the Advocate Commissioner's report, the lower Appellate Court shall decide the first appeal on merits and in accordance with law by affording a fair hearing to both parties.

13. With the aforesaid directions, this Second Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

13. The parties are directed to appear before the lower Appellate Court namely, the Subordinate Court, Ambasamudram on 24.04.2023. The Registry is directed to send a copy of the application in C.M.P(MD)No.2976 of 2017 to the lower Appellate court namely, the Subordinate Court, Ambasamudram for the effective implementation of this judgment.

31.03.2023



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Index : Yes/No
Internet: Yes/No
CM

To,

- 1.The Subordinate Court, Ambasamudram
2. The District Munsif cum Judicial Magistrate Court, Cheranmahadevi.
- 3.The Section Officer,

VR Section,

Madurai Bench of Madras High Court, Madurai.



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ABDUL QUDDHOSE, J.

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