



S.A.No.1358 of 2007

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.02.2024

CORAM

THE HONOURABLE Mr. JUSTICE **G.ARUL MURUGAN**

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1.Gani Sayabu (died)
2.Ayisha Bi
3.Musthafa
4.Mani @ Razack
5.Kannammal (died)
6.Tharapani
7.Aisha
8.Roja
9.Shakila Banu
10.Nilafar Nisha
11.Shamshath Begam
12.Mohammed Bilal
13.Mohammed Ibrahim
14.Shadiq Ali ... Appellants
(Appellants 7 to 13 & 14 were brought on record as
legal heirs of the deceased 1st and 5th appellants vide
order dated 07.09.2022 in C.M.P.Nos.18149, 18152,
18154, 18162, 18163 & 18166 of 2019, respectively)

vs.

Palaniswamy

...Respondent



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Prayer:- Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 08.12.2006 in A.S.No.13 of 2001 passed by the learned Subordinate Judge, Namakkal, reversing the judgment and decree dated 31.10.2000 in O.S.No.456 of 1995 passed by the learned District Munsif, Paramathi.

For appellants : Mr.C.Jagadish

For respondent : Mr.S.Mukunth, Senior Counsel
Asst. by Mrs.T.R.Gayathri for
M/s.Sarvabhauman Associates.

J U D G M E N T

The defendants in the suit preferred this Second Appeal. Pending Second Appeal, the first and 5th appellants died and the appellants 7 to 14 have been substituted as the legal heirs of the deceased. The plaintiff is the respondent in this Second Appeal.

2. This Second Appeal has been filed challenging the judgment and decree dated 08.12.2006 in A.S.No.13 of 2001 on the file of the



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Subordinate Court, Namakkal, reversing the judgment and decree

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dated 31.10.2000 in O.S.No.456 of 1995 on the file of the District
Munsif Court, Paramathi.

3. For the sake of convenience, the parties will be referred to as per their ranking as before the Trial Court.

The brief facts, which gave rise to this Second Appeal, are that:

4. According to the plaintiff, he purchased the suit property through sale deed dated 15.12.1986 in Ex.A1, executed by the Subordinate Court, Namakkal in R.E.P.No.93 of 1986. Pursuant to the purchase, he had been in possession and enjoyment of the property by paying necessary taxes to the panchayat. Since the defendants 3 and 4 claimed that they had a right in passage, which is a portion of the suit property, as per the judgment and decree passed in O.S.No.805 of 1983, they had been added as parties.

5. According to the plaintiff, the defendants were residing on the north side of the suit property and when the plaintiff took steps to fence the property on 03.09.1995, the defendants prevented the same and



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claimed that they will try to encroach upon the suit property. Hence, the plaintiff came up with the suit for permanent injunction.

6. The first defendant resisted the suit by filing written statement disputing that the plaintiff was in possession of the passage in portion of the suit property. It is admitted by the defendants that they were residing in the north side of the suit property. It is the specific case of the defendants that as far as the passage measuring 17 x 70 feet is concerned, they were in possession and enjoyment of the property. Further, according to the first defendant, pursuant to the suit filed by his wife in the year 1983 in O.S.No.805 of 1983 as against the vendor of the plaintiff, decree had been granted in favour of the defendants in respect of the usage of the passage measuring 17 x 70 feet. Therefore, the defendants sought for dismissal of the suit.

Evidence and documents:

7. During trial, on the side of the plaintiff, the plaintiff examined himself as P.W.1 and examined another witness viz., Mr. Natesan as P.W.2 and marked Exs.A1 to A5. On the side of the defendants, the first



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defendant examined himself as D.W.1 and examined

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another witness viz., Mr.Kadhar Basha, as D.W.2 and marked Exs.B1 to B7.

8. In the suit, Advocate Commissioner was appointed and the Advocate Commissioner's report and plan were marked as Exs.C1 and C2, respectively.

Findings of the Courts below:

9. The Trial Court, after considering the evidences and documents, dismissed the suit. The Trial Court found that when the defendants had filed the suit as against the plaintiff's vendor in respect of the passage in the suit property measuring 17 x 70 feet and the decree was passed on 30.08.1985 in Ex.B1, the plaintiff had known about the judgment and decree passed as against his vendor and when the right of the defendants had been declared in that suit, the suit filed by the plaintiff for the relief of permanent injunction in respect of the entire suit property cannot be sustained.

10. Aggrieved by the same, the plaintiff filed appeal in A.S.No.13



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of 2001 on the file of the Subordinate Court, Namakkal. The Lower Appellate Court, after re-appraising the evidences, taking note of the subsequent developments and considering the report of the Advocate Commissioner, found that pending the suit, the defendants had made a construction in respect of the portion measuring 12 x 17 feet, out of the passage claimed by the defendants measuring 17 x 70 feet. The Lower Appellate Court found that much reliance had been placed on the decree passed by the Trial Court in Ex.B1, though it was an *ex parte* decree and further when the title deeds of the defendants in Ex.A4 dated 25.04.1956 showed that the defendants' land surrounded by the plaintiff's vendor's land on one side, whereas in the suit filed in Ex.B1, passage measuring 17 x 70 feet had been shown along with the lands of the plaintiff as boundaries and the Lower Appellate Court allowed the appeal and decreed the suit in favour of the plaintiff granting permanent injunction excluding the portion of the construction made by the defendants measuring 12 x 17 feet.

11. Aggrieved by the said judgment and decree, the defendants are before this Court in this Second Appeal.



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Substantial questions of law:

12. This Court, by an order dated 23.07.2009 framed the following substantial questions of law:

“1. Whether the learned appellate court was right in applying the principle of law that possession follows the title to the suit land which is admittedly Gramanatham land?

2. Whether the learned appellate court was right in holding that the decree in O.S.No.805 of 1983 will not bind the respondent?

3. Whether the learned appellate court was right in holding that the plaintiff had established title in spite of the discrepancies in the extent in Exs.A1, A2 and A5?”

Submissions on both sides:

13. The learned counsel for the defendants/appellants contended that when the plaintiff has filed the suit and sought for the relief in respect of the suit property based on the sale deed dated 15.12.1986 in Ex.A1 showing the extent of the property as 4,320 sq.ft., the plaintiff has not filed the title deeds of his vendor to show that the plaintiff's vendor, in



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fact, owned the extent of 4,320 sq.ft. Further, the sale deed was executed by the Court in the execution proceedings and the plaintiff has not filed any document to show that actually, the possession was handed over by the Court in favour of the plaintiff. The learned counsel further contended that the suit property is a Grama natham land and patta has been issued in favour of the plaintiff in Ex.A2, which shows that the patta has been issued in respect of an extent of 3,619 sq.ft.

14. Further, the learned counsel contended that already, the vendor of the plaintiff had filed a suit as against this plaintiff in Ex.A5, where the plaintiff's vendor claimed only an extent of 2,976 sq.ft and the same was also dismissed on 21.12.1992. Further, the learned counsel contended that the perusal of the Advocate Commissioner's report and plan filed in Exs.C1 and C2 clearly shows that the passage is the only way to ingress and egress of the property of the defendants. The learned counsel further contended that though the Trial Court has rightly taken note of the evidence and documents and dismissed the suit as the plaintiff has not established his possession in respect of the entire extent of the suit property, the Lower Appellate Court erroneously had decreed the suit



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excluding the portion of the constructions made by the defendants. When the Lower Appellate Court has excluded the portion of the construction made by the defendants, it is clear that the plaintiff has not established his possession in respect of the passage measuring 17 x 70 feet and sought for allowing this Second Appeal.

15. Per contra, Mr.S.Mukunth, the learned Senior Counsel for the plaintiff/respondents contended that the sale deed in favour of the plaintiff had been executed by the Court in Ex.A1 on 15.12.1986 in respect of the extent of 4,320 sq.ft. Further, a perusal of the sale deed executed in favour of the mother of the defendants in Ex.A4 dated 24.05.1986, clearly shows that the land of the defendants is bounded on the land of the vendor of the plaintiff and no passage is mentioned in the sale deed in Ex.A4. When admittedly, the title deed of the defendants in Ex.A4, does not show about the existence of the passage and when the suit property has been conveyed by the Court in Ex.A1 and further patta has been issued in favour of the plaintiff in Ex.A2, the plaintiff has established his possession over the suit property. Further, even though the Trial Court has dismissed the suit, the Lower Appellate Court has



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found that the defendants have made some constructions in the portion of the suit property measuring 12 x 17 feet in the passage, allowed the appeal and decreed the suit in favour of the plaintiff only by excluding the portion of the constructions made by the defendants.

16. Further, the learned Senior Counsel contended that when admittedly, the decree referred by the Trial Court in Ex.B1 is only an *ex parte* decree, where the rights of the parties were never contested and decided, that could not be taken as basis to decide that the plaintiff has right over the passage measuring 17 x 70 feet. The learned Senior Counsel contended that the Lower Appellate Court has rightly taken note of the subsequent developments and granted decree only after excluding the portion of the constructions made by the defendants and the appeal filed by the defendants cannot be entertained under Section 100 of C.P.C and therefore, sought for dismissal of this Second Appeal.

17. Heard the learned counsel on either side and perused the materials on record.



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Analysis of the submissions:

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18. Admittedly, it is not a dispute between the parties about the ownership of the respective portions of the lands. The entire dispute revolves around 17 x 70 feet passage claimed by the defendants. According to the plaintiff, he had purchased the suit property measuring 43 x 96 feet through the sale deed dated 15.12.1986 executed by the Subordinate Court in Ex.A1 in the E.P. Proceedings in R.E.P.No.93 of 1986. The plaintiff claimed that pursuant to the execution of the sale deed, he is in possession and enjoyment of the property and also patta has been issued in favour of the plaintiff in Ex.A2.

19. It is the specific case of the plaintiff that the sale deed executed in favour of the defendant's mother in Ex.A4 shows that the lands of the defendants are lying next to the lands of the plaintiff's vendor and existence of the passage is not mentioned even in their sale deed.

20. The sale deed executed in favour of the defendants' mother in Ex.A4 is dated 25.04.1956. Admittedly, the suit property is a grama natham land and the defendants have been in possession of the property



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from 1956. There could have been several developments and undertakings entered into between the defendants and the vendor of the plaintiff. When there was some dispute in respect of the usage of the passage by the defendants, the first defendant's wife has filed the suit as against the plaintiff's vendor in O.S.No.805 of 1983 in respect of the passage measuring 17 x 70 feet and *ex parte* decree has been passed in favour of the defendant's wife in respect of that passage. Admittedly, the plaintiff's vendor did not take any further proceedings as against the decree granted and the decree has become final. In fact, even after the purchase, the plaintiff has not taken any steps as against the decree granted in Ex.B1 as against the defendants. Admittedly, as on date, the decree passed by the Court in Ex.B1 in favour of the defendants as against the plaintiff's vendor is in existence and it will bind the plaintiff.

21. Further, even though an extent of 4,320 sq.ft of the land has been executed in favour of the plaintiff in Ex.A1, no parent title deed has been filed on the side of the plaintiff to show that the plaintiff's vendor was owning an extent of 4,320 sq.ft and they were in possession in those extent of land. When after their purchase on 15.12.1986, patta was



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granted for the grama natham land in Ex.A2 in favour of the plaintiff,
patta was issued only in respect of an extent of 3,619 sq.ft.

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22. Admittedly, the plaintiff, has accepted the patta and has not taken any proceedings as against the same regarding the rest of the land, which he claimed in Ex.A1. It is relevant to note at this juncture that when patta was granted for the grama natham lands, proceedings were undertaken and inspection was conducted and the patta was granted only in respect of a portion of the land, which was in possession of the respective parties. As such, from the issuance of patta in Ex.A2 in favour of the plaintiff for an extent of land measuring only 3,619 sq.ft, it could be seen that the plaintiff is only in possession in respect of these portions of the land. Only in such circumstances, the plaintiff has not taken any proceedings as against the patta granted in his favour to this extent alone.

23. Further, the vendor of the plaintiff has filed the suit as against the plaintiff and the suit was dismissed in Ex.A5. Even in that suit, the plaintiff's vendor has claimed only in respect of 2,976 sq.ft. When the plaintiff's vendor has filed the suit in Ex.A5 only in respect of 2,976 sq.ft and further when the suit was filed by the first defendant's wife as against the plaintiff's vendor in respect of the passage measuring 17 x 70 feet and the same also an *ex parte* decree was granted in Ex.B1, the plaintiff's



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vendor accepted the same and did not take any further proceedings. Further, even after the purchase of the plaintiff himself through the documents in Ex.A1 and claims an extent of 4,320 sq.ft, and when admittedly, the patta for the grama natham lands was granted in Ex.A2 in his favour for an extent only 3,916 sq.ft, he has not questioned the same by taking further proceedings. On taken as a whole, it shows that the plaintiff is in possession of only an extent of 3,619 sq.ft of land based on the patta granted in Ex.A2 and the plaintiff has not established that he is in possession of the passage in respect of 17 x 70 feet, which is disputed and claimed by the defendants to be in their possession.

24. Further, the Advocate Commissioner has been appointed and the report and plan have been filed in Exs.C1 and C2. The Advocate Commissioner's report also shows that the passage measuring 17 x 70 feet, is the ingress and egress into the defendants' property and also found that the defendants have already made constructions in respect of an extent of 12 x 17 feet out of the 17 x 70 feet passage. All these factors show that the defendants used the passage to reach their property and also has now made constructions in respect of the portions. Further,



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when the plaintiff has not filed any relevant document to show that the vendor had an extent more than 3,619 sq.ft as per the patta granted in Ex.A2 and further, when the vendor had been in possession of the excess portion of the land, which is passage, as claimed by the defendants, the Lower Appellate Court has simply by taking note of *ex parte* decree passed by the Trial Court in Ex.B1 and also by taking note of the fact that in Ex.A4, the passage is not mentioned whereas in the suit filed in Ex.B1, the passage is shown as the boundary, inferred that the passage is not in existence, but however by placing reliance on the Advocate Commissioner' report, has allowed the appeal and granted decree for permanent injunction by excluding the portion of the constructions made by the defendants.

25. The findings arrived at by the Lower Appellate Court are not based on documents and evidence available on record and therefore the findings are perverse and hence liable to be interfered with. When the plaintiff has not proved that he is in possession of the entire extent of the suit property, the plaintiff is not entitled for permanent injunction.



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26. As such, the substantial questions of law are answered in favour of the appellants and against the respondent.

27. In the result, this Second Appeal stands allowed and the judgment and decree passed by the Lower Appellate Court is set aside and the judgment and decree passed by the Trial Court is restored. There shall no order as to costs.

13.02.2024.

Internet : Yes
Index : Yes/No
Speaking order/Non-speaking order
apd

To

1. The Subordinate Judge, Namakkal.
2. The District Munsif, Paramathi.
3. The Section Officer, V.R.Section, High Court, Madras.



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G.ARUL MURUGAN,J

apd/drl

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