



S.A.No.1574 of 2010

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.04.2024

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THE HONOURABLE MR. JUSTICE C.KUMARAPPAN

S.A.No.1574 of 2010

1.Naina Malai
2.Muniyan

...Appellants

Vs.

1.Arunachalam
2.District Collector,
O/o. the District Collector,
Namakkal District.
3.Tahsildar
Taluk Officer,
Rasipuram Taluk,
Namakkal District.
4.The President,
Vadugam Panchayat,
Rasipuram Taluk,
Namakkal District

...Respondents

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 27.04.2010 made in A.S.No.12 of 2009 on the file of the Subordinate Judge, Rasipuram, reversing the judgment and decree dated 03.09.2009 made in O.S.No.129 of 2007, on the file of the District Munsif Court, Rasipuram.



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For Appellants : Mr.R.Murali
for M/s.C.Prabakaran
For Respondents : Mr.S.Muthukrishnan for R1
Mr.M.Muthusamy
Government Advocate for R2 and R3
Ms.R.Revathy for R4

J U D G M E N T

The defendants 1 and 2 are the appellants before this Court. The plaintiff is the first respondent, the respondents 2 to 4 are the official defendants.

2. For the sake of convenience, the parties will be referred to according to their litigative status before the Trial Court.

3. The brief facts, which give rise to the instant second appeal are as follows:

The suit property is the public passage having an extent of 5.6 Meter on East-West in S.F.No.115/167, and an extent of 6.8 Meter on North-South in S.F.No.115/139. Whereas the respondents 1 and 2 obstruct the passage and also encroached upon the same. Hence, the plaintiff has come forward with the suit for mandatory injunction and for permanent injunction.



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4. The said suit was resisted by the respondents 1 and 2 by contending that, though the suit property is a public passage, they disputed the extent of the said passage. According to the defendants, the measurements of 5.6 meter and 6.8 meter is without any basis and that there are no encroachments made by them and that they planted coconut trees, and it's age is more than 18 years and that the extent of the passage is only 12 feet. Therefore, it is the contention of the defendants 1 and 2 that the plaintiffs cannot have any remedy. The defendants 3 to 5 have filed a written statement admitting the existence of the passage in S.F.No.115/167 and S.F.No.115/139. They also further admitted that there is a passage as mentioned in the rough plan.

5. Evidence and findings before the Trial Court:

Before, the trial Court, the plaintiff himself was examined as PW.1 and on behalf of the defendants, first defendant was examined as DW.1. On behalf of the plaintiff nine documents have been marked as Exs.A1 to A9. On behalf of the defendants two documents were marked as Exs.B1 and B2. Besides this, two Court documents Ex.C1 and C2 have been marked. The trial Court after having considered the oral and documentary evidence has



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ultimately found that the plaintiff has not proved the title and ultimately dismissed the suit. Aggrieved by the same, the plaintiff preferred the First Appeal, whereas, the First Appellate Court found that there exists a passage and there was an encroachment and ultimately reversed the findings of the trial Court and decreed the suit as prayed for. Not satisfying with the order of the First Appellate Court, the defendants 1 and 2 approached this Court by way of this second appeal.

6. Submission on either side counsel:

The learned counsel appearing for the appellants would vehemently contend that though the defendants admit existence of the passage have categorically disputed the extent of the passage more particularly the measurements of 5.6 meter on East-West, and 6.8 meter on South-West. It is also the contention of the learned counsel for the appellants that the reliance given by the First Appellate Court based upon the Commissioner's report is contrary to law, and it is also contended by the learned counsel for the appellants that while the Commissioner visited the suit property, he has not all given any notice to the defendants. Therefore, contended that such Commissioner's report *ipso facto* cannot be relied by the First Appellate Court.



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It is also the submission of the learned counsel for the appellants that such Commissioner's report has not at all been proved before the Court by examining the Commissioner. Thus according to the appellants the findings recorded by the First Appellate Court is without any evidence. Therefore, it is the contention of the learned counsel for the appellants that such finding is perverse and liable to be interfered. To buttress his contention, the learned counsel for the appellants relied upon the judgment of this Court in ***John Sylem Vs. Chanthana Muthu Pillai (died) and others*** reported in ***1997 (2) MLJ 537*** and another reported judgment which is an appeal preferred against the above reported judgment in 2002 SCC Online Mad 806.

7. However, the learned counsel for the respondents would vehemently submit that the findings recorded by the First Appellate Court is based upon the Commissioner's report and that even in the Commissioner's report there is a reference about the notice that had been given orally to the respondents. It is also contended by the learned counsel appearing for the respondents that there was no objection raised in the Commissioner's report. Therefore, there cannot be any fault upon the First Appellate Court by relying the un-rebutted and un-objected Commissioner's report. On behalf of the



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respondents 3 and 4, Government Advocate has appeared and supported the contention of the respondents.

8. This Court has given its anxious consideration to the submissions made by both sides.

9. The sum and substance of the submissions of the learned counsel for the appellants is that, the Commissioner who has visited the suit property has not at all given notice to the defendants. Based upon such contention, the learned counsel also relied upon the decision in ***John Sylem Vs. Chanthana Muthu Pillai (died) and others case*** (cited supra). Wherein, this Court has held that when no notice was given to the defendants during the visit of the Commissioner such Commissioner's report cannot be relied upon. But while, looking at the facts of the instant case, even in the Ex.C1-Commissioner's report there is a reference about the oral notice.

10. During the arguments, the learned counsel appearing for the appellants would fairly concede that the appellants did not file any objection to the said Commissioner's report. Therefore, when there is a specific reference in



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Commissioner's report about the oral notice given to the defendants, and which factum was not disputed by the defendants, this Court can safely arrive at a conclusion that there was a notice to the defendants about the visit of the Commissioner. Thus, this Court could not find any perversity in relying the Commissioner's report, by the First Appellate Court.

11. On seeing the Commissioner's report there is a measurement of 5.6 feet available on East-West, and 6.8 feet is available on South-West. Further there is also a reference in the Commissioner's report, that such report was prepared with the assistance of Surveyor. Therefore, the findings recorded by the First Appellate Court by relying upon the Commissioner's report is well merited and this Court could not find any perversity. At this juncture, it is pertinent to mention here that, the defendants have not disputed the existence of the public passage, and he is only disputing measurements of such public passages. Therefore, only in that context the First Appellate Court relied upon the un-objected Commissioner's report and decreed the suit as prayed for. Therefore, from the submissions made by the learned counsel for the appellants, this Court could not find any substantial question of law, hence, the Second Appeal stands dismissed.



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12. In nutshell:

(a) The second appeal is dismissed by confirming the judgment and decree passed by the Courts below;

(b) In the facts and circumstances of the case, there shall be no order as to costs.

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Index : Yes/No
Internet : Yes/No
Neutral Citation Case : Yes/No
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To

1. The Subordinate Judge, Rasipuram.
2. The District Munsif Court, Rasipuram.



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C.KUMARAPPAN, J.
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