



S.A.No.341 of 2013

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THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.02.2024

CORAM:

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

SA.No.341 of 2013

1.Sengottaiyan

2.Kandasamy

.. Appellants

Vs.

1.Revathy

2.Rangasamy

3.Sengoda Goundar

4.Saraswathy

5.Rajammal

6.Ravichandran

.. Respondents

PRAYER: Second Appeal is filed under section 100 of Civil Procedure Code, to set aside the judgment and decree as made in A.S.No.13 of



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2011, dated 30.03.2012 on the file of the Subordinate Judge, Thiruchengode reversing the judgment and decree in O.S.No.806 of 2004, dated 25.11.2010 on the file of the Additional District Munsif Court, Thiruchengode.

For Appellants : Mr.R.Bharanidharan

For Respondents : Ms.Adhishree for R1, R2, R4 to R6
for Mr.N.Manoharan

: R3 – Died

JUDGMENT

This Second Appeal arises out of the judgment and decree of the Court of learned Subordinate Judge at Thiruchengode in A.S.No.13 of 2011, dated 30.03.2012 in reversing the judgment and decree of the Court of the Additional District Munsif Court at Thiruchengode in O.S.No.806 of 2004, dated 25.11.2010. By virtue of the aforesaid judgment and decree, the learned Subordinate Judge decreed the suit filed by the respondent herein.



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2. For the sake of clarity and convenience, the parties will be referred to their ranks in the suit.

3. One Revathy purchased a land to an extent of 3.05 acres under the sale deeds, dated 05.03.2003 and 10.07.2003. This sale was made in her favour by three persons namely, Vasantha, Bhuvaneswari and Vanathi. Vasantha, Bhuvaneswari and Vanathi had obtained the properties through a registered partition deed, dated 23.11.1986. This partition was entered into between one Marappagounder and his wife Kaveriyammal and the vendors of the plaintiff.

4. The family of Marappagounder and Vasantha got the same by virtue of a purchase made by their predecessor in title one Chinugounder. Chinugounder had purchased the property on 31.03.1975 from Sengodagounder and others. Chinugounder had only one son by name



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Chennimalaigounder. Chennimalaigounder too had only one son by name Marappagounder. Marappagounder had two sons by name, Kandasamy and Mahalingam. Kandasamy expired leaving behind his mother Kaveriyammal, his wife Vasantha and daughters namely Bhuvaneswari and Vanathi as his legal heirs. When Marappagounder partitioned the property among the members of his family in 1986, these properties fell to the share of Bhuvaneswari, Vanathi and Vasantha.

5. The defendants are the adjacent owners of the property in the same survey number namely Survey No.42 of Kailasampalayam Village, Thiruchengode Taluk in Namakkal District. They resisted the suit by pleading that previously a suit in O.S.No.65 of 1991 had been filed by them for the relief of declaration and for an injunction and that suit had been decreed by the learned District Munsif at Thiruchengode on 07.08.1996. They pleaded that since they have obtained a decree for an extent of 3.05 acres in Survey No.42, the present suit is hit by *res judicata*. Their second contention is that, the 4th



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defendant/Mr.Rangasamy, who is the immediate neighbour had filed another suit in O.S.No.326 of 1997 on the file of the District Munsif Court at Thiruchengode and that suit for injunction had been dismissed and the appeal having been confirmed in A.S.No.74 of 2000, the present suit is also barred by *res judicata*.

6. Apart from this plea of *res judicata*, they pleaded that the plaintiff is having an alternate pathway from the eastern side of the suit property and therefore, she is not entitled for relief of declaration in that suit. They would finally rely upon Ex.B4 to Ex.B6 to argue that these documents do not reflect any pathway and therefore, the suit is not maintainable.

7. Before the Trial Court, the following issues were framed for consideration :

“1. Whether the plaintiff is entitled to the relief of declaration as prayed for ?



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2. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for ?

3. Whether the suit is bad for mis-joinder and non-joinder of necessary parties ?

4. Whether the suit is valued properly and the Court fee paid is correct ?

5. To what other relief the plaintiff is entitled ?”

8. The plaintiff/Revathy entered the witness box as P.W.1 and the 2nd defendant/Kandasamy entered the witness box as D.W.1. On behalf of the plaintiff, four documents were filed and on behalf of the 4th defendant as many as 22 documents were presented. The Advocate Commissioner, who was appointed by the Court submitted his report and plan under Ex.C1 and Ex.C2.

9. After consideration of the oral and documentary evidence, the learned Trial Judge had dismissed the suit as barred by *res judicata*.



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Aggrieved by the same, the plaintiff preferred an appeal which came to be allowed. Against this reversing findings, the present Second Appeal has been filed before this Court.

10. This Second Appeal was not admitted by this Court but notice regarding admission had been ordered on 19.06.2013. On service of the notice, Mr.N.Manoharan, learned counsel has entered appearance for the plaintiff/1st respondent.

11. I Heard Mr.R.Bharanidharan, learned counsel appearing on behalf of the appellants and Ms.Adhishree, learned counsel appearing on behalf of the respondents.

12. Mr.R.Bharanidharan, learned counsel would vehemently contend that the present suit is hit by *res judicata*. The defendants, during the cross examination of the plaintiff have been able to elicit that there is an alternate pathway for the plaintiff and finally, that non-mentioning of



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the pathway under the documents Ex.B4 to Ex.B6 show that there is no pathway in existence and the claim of the plaintiff is fanciful and deserves rejection.

13. Ms.Adhishree, learned counsel would contend that the suit is not hit by *res judicata* as this is a suit for declaration and an injunction based on the pathway granted under a deed and not a suit based on easement of necessity. Finally, she would invite the attention of this Court to the documents under Ex.A1, Ex.A3 and Ex.A4 to show that as early as in 1975, pathway right was granted to her client.

14. She would further rely upon the Ex.C1 and Ex.C2 to point out that the Advocate Commissioner, who visited the property in the year 2005 has been able to see a pathway in existence though not for 20 feet throughout as claimed by the plaintiff but the specific pathway running through A, E, F, D, C and B. She would further argue that the Advocate Commissioner's report had not been seriously objected to nor the



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Advocate Commissioner was subjected to cross examination. The Lower Appellate Court had also accepted the document and hence, there is no necessity to interfere in the appeal.

15. I have carefully perused the records as well as the documents that were produced before this Court by Mr.R.Bharanidharan and I have applied my mind to the submission made on either side.

16. First, on the plea of *res judicata*. In order for *res judicata* to apply, the issue that had been raised in the previous suit should have been directly and substantially in question between the same parties to the proceedings. Insofar as the parties are concerned, there is similarity. However, with respect to the issue gone into by the Court in O.S.No.65 of 1991 and O.S.No.326 of 1997 are concerned, the issue of pathway was not substantially and directly in issue. Mr.R.Bharanidharan had produced Ex.B8 in order to argue that he has filed a suit for declaration of title and for an injunction in O.S.No.65 of 1991 and that suit having been decreed,



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the present suit is barred.

17. It is pertinent to point out that O.S.No.65 of 1991 was a suit for declaration of title and for an injunction filed by the defendants 1 to 3 claiming their rights over 3.05 acres out of the total extent of 9.15 acres situated in Survey No.42. In this suit, the issue of pathway was neither necessary to be gone into nor any finding had been rendered by the Court.

18. It is interesting to point out that the defendants 1 to 3, as the plaintiffs in that suit relied upon Ex.A1 and A3, namely, the sale deed dated 31.03.1975 and the partition deed, dated 23.11.1986 in order to substantiate their case that out of 9.15 acres, they are entitled to 3.05 acres. As plaintiffs, they had accepted this document and today, they cannot turn around and argue that those documents are irrelevant for the purpose of this case. In any event, the pleadings in that suit have not been produced before this Court. As held by the Supreme Court in the case of ***Syed Mohd. Salie Labbai (Dead) By L.Rs and Ors. Vs. Mohd. Hanifa***



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(Dead) by L.Rs and Ors. reported in **(1976) 4 SCC 780**, when the plea of *res judicata* is taken, it is the duty of a person who is taking such a plea to produce the pleadings, the issues raised as well as the judgment and decree rendered in that suit. In fact, the Court had specifically held that it is improper for the Court trying the subsequent suit to come to a decision on *res judicata* on the basis of the summary of the pleadings extracted in the previous judgment.

19. However, in order to satisfy myself, I have gone through the judgment under Ex.B8 as well as the judgment and decree in O.S.No.326 of 1997. I am not able to come to a conclusion that the issue raised in this suit was directly and substantially in issue in the previous suit. Therefore, the plea of *res judicata* has to fail.

20. Insofar as the argument that there is no pathway, I went through Ex.A1 dated 31.03.1975. In the said sale deed, it is specifically mentioned that the purchasers will be entitled to all the rights over the



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land including the “mamool” pathway running over the property. When the property was divided under Ex.A3, the suit pathway has specifically been stated in the said document. What the vendors of the plaintiff namely, Bhuvaneswari, Vanathi and Vasantha obtained, they have transferred to the plaintiff under Ex.A4. In Ex.A4 too, I find that the cart track was mentioned. I am not relying only upon Ex.A4 but upon the antecedent document under Ex.A3 of the year 1986 to come to a conclusion, that there exists a pathway running east west on surveying, in and over Survey No.42.

21. During the pendency of the proceedings, the plaintiff took an application for appointment of advocate commissioner in I.A.No.1432 of 2005. An Advocate Commissioner was also appointed and he has submitted a report. In his report, he has specifically found that the pathway starts from “இட்டேரி” and runs through the entire extent of Survey No.42 and runs in front of the property of the plaintiff, who has constructed a house in the eastern most portion of the property. Though,



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such a specific finding had been given by the Advocate Commissioner, the objection that had been granted to the report is not specific on the non-existence of the pathway but on the contrary, the objection merely states that correct particulars have not been noted by the Advocate Commissioner.

22. Mr.R.Bharanidharan, learned counsel would argue that on account of the fact that the visit had taken place on 05.02.2006 and the report and plan were filed only after a lapse of nearly two years on 28.08.2007, in all possibility, the Advocate Commissioner would have forgotten the lie of the property and therefore, his report cannot be relied upon.

23. I am unable to accept this contention because the defendant had an opportunity to cross examine the Advocate Commissioner in order to elicit from him that the averments made in Paragraph No.3 of their objections is true. However, such a procedure was not adopted by the



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defendants before the Trial Court. It is always possible for an Advocate Commissioner to have made notes during inspection and thereafter, prepare his report. All these aspects would have come into light, if the Advocate Commissioner had been cross examined by the defendants. They had failed to do so and for the mere fact, an objection had been taken, I cannot ignore the report of the Advocate Commissioner. The report is clear and categorical and it tallies with the plan that has been filed under Ex.C2.

24. The comparison of Ex.A1, Ex.A3 and Ex.A4 with Ex.C1 and Ex.C2 makes me to conclude that there is a pathway and consequently, the plaintiff would be entitled for the relief of declaration. Insofar as the submission, that there is non-mentioning of pathway from Ex.B4 to Ex.B6, it is pertinent to know that Ex.B4 to Ex.B6 were the documents which were created between co-owners. Ex.B2 and Ex.B3 show that owners having 2/3rd share in Survey No.42 had entered into the said document. However, the property did not fall out of the family but was



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retained by the members of the same family under those documents.

Being the members of the same family, as concluded by the Lower Appellate Court, it would have not been necessary for them to provide access for their respective shares. Therefore, failure to mention those details in the said document is not fatal to the case of the plaintiff. This is especially so as I have found from Ex.A1 i.e., from 31.03.1975 onwards, there had been a “mamool” pathway in and over the property.

25. Insofar as the relief of injunction is concerned, since the defendants have denied the right of the plaintiff and the plaintiff has substantiated the fact that the pathway exists, the plaintiff will be entitled to the relief of the injunction also.

26. In the light of the above discussion, I do not find any question of law much less any substantial question of law for consideration. I am not admitting the appeal and the same stands dismissed.



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27. The judgment and decree of the Court of the learned Subordinate Judge at Thiruchengode in A.S.No.13 of 2011, dated 30.03.2012 in reversing the judgment and decree of the Court of the Additional District Munsif Court at Thiruchengode in O.S.No.806 of 2004, dated 25.11.2010 stands confirmed. The plaintiff will be entitled to the pathway shown as A, B, C, D, F, E, A running west to east in Survey No.42 as shown in the Advocate Commissioner's report. No costs.

08.02.2024

Index:Yes/No

Speaking Order :Yes/No

Neutral Citation:Yes/No

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To

1.The Subordinate Judge,
Thiruchengode

2.The Additional District Munsif Court,

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V. LAKSHMINARAYANAN, J.

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