



S.A.No.593 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.02.2024

CORAM :

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

S.A.No.593 of 2013

&

M.P.No.1 of 2013 & M.P.No.1 and 2 of 2014

1.Kannan
2.Sampath
3. Arul

.. Appellants

vs.

Elumalai

..Respondent

Second Appeal filed under Section 100 of CPC to set aside the judgment and decree dated 21.12.2012 passed in A.S.No.32 of 2011 on the file of Additional Subordinate Judge at Chengalpattu reversing the judgment and decree dated 14.11.2011 passed in O.S.No.332 of 2008 on the file of learned District Munsif at Chengalpattu.

For Appellants : Mr.T.R.Rajagopalan
Senior counsel
for Ms.Anitha Thomas

For Respondent : Ms.B.Bhuvaneswari

JUDGMENT

The present second appeal arises out of the judgment and decree of the Court of the Additional Subordinate Judge at Chengalpattu in



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A.S.No.32 of 2011 dated 21.12.2012 in reversing the judgment and decree of the Court of District Munsif at Chengalpattu in O.S.No.332 of 2008 dated 14.11.2011.

2. O.S.No.332 of 2008 was presented before the learned District Munsif at Chengalpattu by one Elumalai. The claim of Elumalai is, the suit schedule mentioned property originally belonged to one Sthalasayanan. The said Sthalasayanan sold the property to one Chandrasekaran by way of a registered sale deed dated 05.11.1984. From the said N.Chandrasekaran, the plaintiff purchased the property on 18.09.2006 i.e., a couple of years before the presentation of the plaint. The cause of action was that an attempt was made by the defendants to trespass into a portion of the property which they claimed was a pathway and they attempted to form the same. The plaintiff successfully prevented their acts. In order to protect his right over the property, presented a suit for bare injunction.

3. The defendants, who are residents of the same village, filed a written statement pleading that there is a cart track running in S.Nos.231, 235 (a portion of which is the suit property), 234, 238, 243 (a village



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pond) and 242. According to them, this cart track starts from S.No.228 and runs till S.No.242. This cart track has been used time immemorial by fishermen of the village. The defendants further pleaded that the cart track had been converted into a mud road and it is running on the southern side of the suit property. The cart track passes over the S.No.235 to a width of 12 feet and to a length of 120 feet. They stated that the plaintiff had suppressed material facts and obtained an order of injunction restraining them from using the cart track.

4. The parties went to trial on the basis of these pleadings. The plaintiff examined himself as PW1 and marked Exs. A1 to A21. On the side of the defendants, DW1 to DW4 were examined and Ex.B1-Village map was marked. Pending suit, an application was taken for appointment of an Advocate Commissioner and two documents were filed, namely Exs.C1 and C2. That is the report and plan attached therewith.

5. On the basis of the pleadings and evidence, the trial Court came to the conclusion in the light of Ex.B1 plan, Ex.B4 and the report of the Advocate Commissioner that a road is existing in and over the suit



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property and the plaintiff is not entitled to a blanket injunction over the same. Consequently, the suit for permanent injunction came to be dismissed.

6. Against the dismissal of the suit, a regular appeal was preferred on the file of the Subordinate Judge, Chengalpattu in A.S.No.32 of 2011. The learned Subordinate Judge found that Ex.B1 does not have the signature of the person who has drawn the document and therefore, cast aside the same. Apart from that, in appeal, two documents were received on behalf of the plaintiff / appellant, namely Ex.A24 (series) and Ex.A25. These are the old and new FMB plans. Ex.A24 dated back to 17.09.1906, 31.05.1906 and 05.08.1907. The lower Appellate Judge compared Ex.A24 along with Ex.A25 which are new FMB plans prepared in April and May of 1987, during UDR proceedings and came to the conclusion that since the cart track shown in Ex.B1 and Ex.A24, not being found under Ex.A25, the plaintiff is entitled to a decree. Against the said reversal finding, the present second appeal had been presented to this Court.



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7. At the time of admission, the following substantial questions of law had been framed for consideration on 26.03.2014:

(a) When the existence of the cart track in S.Nos.231, 235, 234, 238, 239, 243 and 242 is established through Ex.B1, Ex.C1 and Ex.C2, is the Court below right in holding that there is no cart track in S.No.235?

(b) Is the Court below right in decreeing the suit when it is established that the cart track in question is necessary for villagers to reach their agricultural lands?

8. Heard Mr.T.R.Rajagopalan, learned Senior Counsel appearing for Ms.Anitha Thomas and Ms.S.Bhuvaneswari, for the respondent.

9. For the sake of convenience, both the substantial questions of law are taken up together as they are interlinked. The parties will be referred to as per their rank in the suit.

10. Mr.T.R.Rajagopalan would submit that from Ex.B1, Ex.C1 and Ex.C2, it is clear that there is a cart track which starts from S.No.228 and runs through S.Nos.231, 234, 235, 238, 239, 242 and terminates at S.No.243. The fact that, road exists had been verified, at the time when Advocate Commissioner visited the suit property and submitted his report along with sketch as Exs.C1 and C2. Therefore, when cart track



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has been established, his submission is, burden is on the plaintiff to prove as to how suddenly the cart track vanished only over his suit property.

11. Ms.S.Bhuvaneswari, would vehemently contend that the documents that have been relied upon are of 1906 and 1907 vintage documents, whereas prior to the purchase, the defendants verified with the FMB that had been issued in April and May of 1987 and in those FMBs which had come into existence during the updating of records (UDR survey), the Cart track is not found. She having obtained the property by way of a purchase under Ex.A2 and Ex.A3 patta, the road not having found, she states that the judgment of the lower appellate Court does not suffer from any error and does not require any interference in the hands of this Court.

12. I have carefully considered the arguments on either side and I have gone through the records.

13. The lower appellate Court has cast aside Ex.B1-Village plan on the ground that it is not shown as to who had issued the same. I summoned the original of the records in order to satisfy myself on the correctness of this finding. On going through Ex.B1, I find that it has been issued by the Central Survey Office, Chepauk, Chennai of



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Government of Tamil Nadu. The said Ex.B1 plan relates to Village No.115, Pattipuram Village, Chengalpattu Taluk, Kancheepuram District.

The evidence on record shows that this village of Pattipulam is a fishing village situated near the Buckingham canal in the vicinity of the town of Mahabalipuram. By comparing the plan with the survey numbers given, I am able to perceive that the village is situated North-South with Bay of Bengal on the eastern side and the Buckingham Canal running on the western side. The village plan also shows that a cart track begins at S.Nos.228 and runs through S.Nos.235, 234, 238, 239, 243, 242 and runs across the Buckingham Canal. This plan had been made ready by Vandyke Survey Office at Chennai and Ex.B1 is a re-printed copy of the same issued in the year 1958.

14. A plan, which had been made ready by the Survey Department, is a public document within the meaning of Section 74 of the Indian Evidence Act. A comparison of Ex.B1 with Ex.A24 produced by the plaintiff himself albeit at the appellate stage, would show the sketch and plan corresponds to the FMB that had been prepared in the year 1906 and 1907. Being a public document prepared in exercise of the sovereign authority of the Government of Tamil Nadu, the document is entitled to be received in evidence under Section 74 read with Section 78 of the



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Indian Evidence Act, I have to presume the genuineness of the certified copy which has been produced under Section 79 of the said Act. Apart from that, under Section 14 (e) of the Indian Evidence Act, judicial and official acts may be presumed to have been properly performed until the contra is proved by the person impugning the same. Therefore, the lower Appellate Court fell in error in ignoring Exs.B1 and A24 and placing reliance upon Ex.A25.

15. The view that I am taking on official records stands supported by two decisions of this Court, namely the ***Commissioner, Rajapalayam Panchayat Union Vs. Madasamy*** reported in ***2007-4-L.W-165*** and ***Karmega Nadar and Others Vs. Muniyandi*** reported in ***2017 SCC OnLine Mad 4471***, one of the Andhra Pradesh High Court in ***Sriramulu Vs. State of A.P*** reported in ***(2002) 2 APLJ 370*** and a recent judgment of Supreme Court in ***M.Siddiq (Ram Janmabhumi Temple) Vs. Suresh Das*** reported in ***(2020) 1 SCC 1***. The relevant paragraphs are paragraph Nos. 1309 and 1314.

16. Now, the argument of Ms.C.Bhuavaneswari that the FMB of the year 1987 does not contain the cart track and therefore, the lower Appellate Court rightly placed reliance upon the FMB and decreed the suit requires to be addressed. When a cart track is found in the Village



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plan as well as in FMB, which had been produced by the plaintiff himself, then the burden is on the plaintiff to show as to how a cart track, which is being used by the public of the village at large, was converted into a private land. If a road which has been existing from time immemorial or at least for more than a century before presentation of the plaint, if it has to vanish only over the property of the plaintiff, it is the duty of the plaintiff to answer the same. The plaintiff should give a convincing answer as to how the cart track runs in survey number on the eastern side of his property at S.Nos.228, 231 and yet again from western side to his property in S.Nos.234, 238, 239, 243 and 242 but is missing only over his land.

17. The Commissioner under Ex.C1 has stated that the length of this cart track is nearly 500 meters. When the road is running to an extent of nearly half a kilometer, it is surprising that it should be obliterated only for a short distance of 120 feet and that too, only after the plaintiff had purchased the property in the year 2006.

18. I queried with Ms.S.Bhuvaneswari if any objection had been filed with respect to the report. She drew my attention to her objection at page 187 of the typed-set of papers to the effect that the Advocate Commissioner does not know the meaning of the road and placing of



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rubbish over the suit property and the land situated in S.Nos.238, 239, 243 and 242 are vacant lands with no pathway. I searched with respect to the objection made as regards the specific finding given by the Advocate Commissioner that the pathway commences at Survey No.228 and runs till 242 including across the village pond but it was in vain. There has been no such objection. In the light of Order XXVI Rule 10 sub-clause (2) of CPC, where no specific objection is taken to the report of the Advocate Commissioner, it has to be treated as an evidence in the suit.

19. The learned Appellate Judge did not take into consideration these aspects and reversed the well written judgment of the trial Court on the ground that in the FMB that had been prepared during UDR survey, there is no mention of a cart track. The learned Appellate Judge failed to appreciate that the Court is duty bound to ask the plaintiff as to how the cart track which was existing suddenly vanished from the map. In case such an explanation is not forthcoming, the Court ought to have looked against the plaintiff instead of looking in his favour.

20. Another infirmity found from the judgment of the lower Appellate Court is that she had received documents under Order XLI Rule 27 of CPC straight away without putting the same under the test as required under Order XLI Rule 28 of CPC but I should add that learned



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Judge has been very fair in the procedural infraction because she not only permitted the plaintiff to file Exs.A22 to A24 in the appellate stage without adhering to Order XLI Rule 28 but she has treated the defendant equally by receiving Ex.B2 under the same provision without adhering to the requirements of law. Under normal circumstances, I should have, taking note of the receiving of the additional documents in the appellate stage without resorting to Order XLI Rule 28, remitted the matter to the lower appellate Court in order to give an opportunity to both sides to establish the documents. However, Ms.S.Bhuvaneswari pointed out that such a course would not be necessary because the documents produced by them in the appellate stage were certified copies of the documents issued by the revenue authorities. She drew my attention to Ex.B2 of the year 16.04.2010 and pointed out being a post suit document, the court need not refer to the same. I agree with the submission and that is the reason why I am basing my judgment placing reliance upon Exs.B1, C1 and C2 and Ex.A24 produced by the plaintiff himself.

21. In the light of the above discussion, I find that the lower appellate Court had not applied the appropriate provision of Indian Evidence Act to Exs.B1, A24 and A25 but concentrated only on FMB that was filed under Ex.A25. It had also not considered the fact that



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burden is on the plaintiff, who has approached the Court, to substantiate as to how the road which has been existing for more than a century vanished a couple of years after his purchase.

22. In fine the judgment of the lower appellate Court is set aside and judgment of the trial Court is restored. The substantial questions of law are answered in favour of the appellant and against the respondents.

23. In fine, this second appeal is allowed and judgment and decree in A.S.No.32 of 2011 on the file of Additional Subordinate Judge at Chengalpattu dated 21.12.2012 in reversing the judgment and decree of the District Munsif at Chengalpattu in O.S.No.332 of 2008 dated 14.11.2011 is set aside and the suit shall stand dismissed. Considering that the parties are neighbours, I am not imposing any costs. Consequently, the connected miscellaneous petitions are closed.

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Index:No
Neutral Citation:No
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To

WEB COPY

1. The Additional Subordinate Judge
Chengalpattu
2. The District Munsif
Chengalpattu



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V. LAKSHMINARAYANAN, J.

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