



S.A.No.915 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.06.2024

CORAM:

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Second Appeal No. 915 of 2013

and

M.P.No.1 of 2013

1. Kannan
2. Sivakumar
3. Bharathi

.. Appellants

Versus

Peddha Perumal @ Masilamani

.. Respondent

Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 07.06.2013 passed in A.S. No. 1 of 2012 on the file of the Sub Court, Mannargudi reversing the judgment and decree dated 28.02.2011 passed in O.S. No. 9 of 2009 on the file of the District Munsif, Mannargudi.

For Appellants	:	Mr. Kingston Jerold
For Respondent	:	Mr. J. Antony Jesus

JUDGMENT

This Second Appeal is filed against the judgment and decree dated 07.06.2013 passed in A.S. No.1 of 2012 on the file of the learned Subordinate Judge, Mannargudi reversing the judgment and decree dated 28.02.2011 passed in O.S. No. 9 of 2009 on the file of District Munsif, Mannargudi.



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2. The Defendants in O.S. No. 9 of 2009 on the file of the learned District Munsif Court, Mannargudi are the Appellants in this Appeal. The said suit was filed by the Plaintiff/Respondent herein for (i) grant of permanent injunction restraining the Defendants, their men and agents from interfering with the peaceful possession and enjoyment of the plaint schedule described properties (ii) to grant a mandatory injunction directing the Defendants to remove the offending construction viz., sun shade through which rain water flows on the Plaintiff's roof and for costs.

3. The case of the Respondent/Plaintiff is that he is residing in the house comprised in Survey No. 1115/2 bearing Door No.10 measuring an extent of 436 square feet since his childhood. The Defendants are having their property on the Northern side of the plaint schedule property. In between the property of the Plaintiff and Defendants, there is a 4 feet lane and it was enjoyed by the Plaintiff and Defendants in common. According to the Plaintiff, between 08.01.2009 and 15.01.2009, he had been to Pilgrimage and taking advantage of the same, the Defendants have put up a construction in their house in such a way that during rainy season, the rain water will flow from their terrace into the hut of the Plaintiff besides there is no space for the rain water to flow and it stagnates into the property of the Plaintiff. Further, the Defendants have attempted to put up a compound wall in the common



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pathway measuring 4 feet and therefore, the suit was filed.

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4. Resisting the plaint averments, the Defendants have filed a written statement contending that the averments based on which the plaint was filed are false and factually incorrect. The Defendants have put up the construction in their own land and the Plaintiff cannot have any qualm or quarrel. The Defendants attempted to put up a stair case leading to the terrace in their own land which is referred to by the Plaintiff as a common lane. There is no common lane in existence in between the land of the Plaintiff and the Defendants, as alleged. The plaint has been filed with false averments and therefore, the Defendants prayed for dismissal of the suit.

5. During trial, the Plaintiff examined himself as P.W-1 and four other witnesses as P.W-2 to P.W-5. That apart, Ex.A-1 to Ex.A-17 documents have been marked by the Plaintiff. On behalf of the Defendants, the third Defendant was examined as D.W-1 and two other witnesses were examined as D.W-2 and D.W-3 and Ex.B-1 to Ex.B-8 documents were marked. An Advocate Commissioner was appointed, who visited the suit property and filed his report along with a detailed plan which were marked as Ex.C-1 to Ex.C-3. Ex.X-1 and Ex.X-2 are the Town Plan maintained by the Revenue Department in respect of Plot Nos.80 and 81.



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6. After completion of trial, the learned District Munsif, Mannargudi by judgment dated 28.02.2011 in O.S. No. 9 of 2009 dismissed the suit. Aggrieved by the same, the Plaintiff has filed the Appeal before the learned Sub Judge, Mannargudi. The first Appellate Court, by judgment dated 07.06.2013 in A.S. No. 1 of 2012 reversed the Judgment and Decree passed by the trial court, which resulted in the filing of the instant Appeal by the Defendants.

7. At the time of admission of this Appeal on 07.02.2014, the following substantial questions of law have been framed for determination and they are as under:-

- 1. Whether the judgment and decree of the lower appellate court is vitiated by its failure to consider the Commissioner's report Ex.C-1 and the plan in Ex.C-3 in its proper perspective?*
- 2. Whether the suit for bare injunction is maintainable in the absence of a prayer for declaration of title by the Plaintiff?*
- 3. Whether the legal rights of the parties over immovable property could be decided on assumptions and surmises without calling for proof and evidence?*

8. The learned Counsel for the Appellants submitted that the suit for bare injunction without the relief of declaration of title to the suit property is not at all maintainable. Further, as per the report of the Advocate Commissioner, the property of the Respondent/Plaintiff ends with his



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compound wall and the lands situated on the North side of the compound wall of the Appellants. The report of the Advocate Commissioner also clearly reveal that the Appellants did not encroach into the property of the Respondent and the sun shade put up by the Appellants lie within their property. Therefore, the plea with respect to encroachment of the plaint described property is legally not sustainable. Consequently, the claim of the Respondent that the plaint described property belonged to him cannot be countenanced besides it was not proved by him through legally acceptable evidence. The Appellate Court did not take note of the fact that description of the property or the exact measurement has not been substantiated by the Plaintiff by attaching a plan with the plaint. Therefore, the claim of the Respondent is not properly explained in the plaint and the relief sought thereof is an illusion.

9. The learned Counsel for the Appellants invited the attention of this Court to the discussion of evidence by the learned District Munsif, in Paragraphs No.10 to 31 and submitted that the judgment of the learned trial Judge, was on proper appreciation of evidence and therefore, the learned District Munsif, Mannargudi dismissed the suit of the Plaintiff. However, the first Appellate Judge, without any reasoning allowed the first Appeal. The learned counsel for the Appellants also taken this Court to paragraph Nos. 12 to 20 of the Judgment of the first Appellate Court and contended that the



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Advocate Commissioner's report was considered as evidence which is legally impermissible. When the suit was filed only for the relief of permanent injunction, appointment of an Advocate Commissioner itself is unnecessary and the Advocate Commissioner was appointed only to fish out evidence, which was not taken note of by the Appellate Court. Even otherwise, the report of the Advocate Commissioner cannot partake the character of a legally acceptable evidence and it can only aid the Court to reach a just conclusion. Further, while discussing the evidence, the learned first Appellate Judge has not adduced any reasons, particularly in Paragraphs 12, 14, 16 and the final portion of the judgment are by and large based only on assumptions and presumptions, whereas the evidence is otherwise.

10. It is the contention of the learned Counsel for the Appellants that the Plaintiff has to seek relief based on legally acceptable evidence. During trial, in the cross examination, the witnesses examined on the side of the Plaintiff have admitted that on the northern side of the Plaintiff's boundary, there is no encroachment. In the concluding paragraph of the judgment of the learned District Munsif, Mannargudi, it has been clearly stated that even though, the Plaintiff had marked so many documents, there is no document produced to show that on the northern side of the property of the Plaintiff, there exists a common lane. It is further pointed out by the learned District Munsif



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that the Plaintiff has admitted in the cross examination that there is no encroachment made by the Defendants in his land. However, the the Appellate Court, based on assumptions and presumptions has reversed the well considered judgment and decree of the Court below and it warrants interference by this Court. Accordingly, the learned counsel for the Appellants prayed for setting aside and judgment of the first Appellate Court and to restore the judgment of the trial Court.

11. Per contra, the learned Counsel for the Respondent/Plaintiff invited the attention of this Court to the prayer of the Plaintiff in the plaint and the contents of the written statement filed by the Defendants. It is the contention of the learned Counsel for the Respondent-Plaintiff that the learned District Munsif, Mannargudi had misconstrued himself regarding the facts of the case. The dispute is with regard to the lane in between the property of the Plaintiff and the Defendants. It is his contention that the rain water falling on the roof of the Defendants property falls and spills over the mud wall of the Plaintiff and causes damage. The Defendants have put up the roof when the Plaintiff was away on pilgrimage to Sabarimala exploiting the absence of the Plaintiff in his house. Therefore, the Plaintiff was forced to file the suit for permanent injunction as well as the mandatory injunction to remove the sunshade on the northern part of the Plaintiff's property.



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12. Also the learned Counsel for the Respondent/Plaintiff invited the attention of this Court to the admissions made by the Defendants in the written statement that there has been a lane in between the property of the Plaintiff and the Defendants and therefore, he would contend that the learned District Munsif, Mannargudi misconstrued the facts whereas the learned first Appellate Judge had on proper appreciation of evidence had granted decree, considering the facts that there had been a lane in between the property of the Plaintiff and Defendants. Such a well considered judgment of the first Appellate Judge cannot be said to be perverse or is not based on assumptions and presumptions. The judgment granting decree for permanent injunction has to be upheld and maintainable. The Second Appeal has no merits and has to be dismissed.

13. On considering the rival submissions and on perusal of the judgment of the learned trial Judge as well as the learned Appellate Judge, it is seen that when the Plaintiff has come up with a plea that there is a lane in between his property and that of the Defendants it is for him to substantiate it with legally acceptable evidence to get a decree. In this case, the Plaintiff admitted that there is no encroachment on the northern side of his property. Also the Plaintiff had admitted in cross examination that he has not marked any document to show the existence of a lane in between the northern side of his



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property and Defendants property. There is no document filed before the trial Court even though Plaintiff had marked Ex.A-1 to Ex.A-17. While so, the observations made by the learned Appellate Judge that there is a lane as per the report of the Advocate Commissioner has to be considered unacceptable. The report of the Advocate Commissioner cannot partake the character of a legally acceptable evidence. The report, plan or sketch of the Advocate Commissioner can be perused by the Courts to aid the conclusion that could be reached on perusal of the documentary evidence. On the other hand, the Appellate Court considered the report of the Advocate Commissioner itself to come to a conclusion that there exists a lane between the property of the Plaintiff and Defendants. In the light of the above, the judgment of the learned Appellate Judge is vitiated. The consideration of the report of the Advocate Commissioner to come to a decision in the Appeal cannot be countenanced. The judgment of the learned first Appellate Court is therefore perverse. The right over the existence of a property cannot be based on assumptions and presumptions without substantial proof and evidence. The Plaintiff was unable to assert his right through proper evidence even though he marked Ex.A-1 to Ex.A-17 but none of the documents pertain to the existence of the lane on the northern side of his property. In the written statement, the Defendants have clearly stated that he had left space in between their property and that of the property of the Plaintiff for which Plaintiff cannot have any qualm or quarrel.



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Also in the written statement, the Defendants have clearly stated that the only contention of the Plaintiff is to prevent the Defendants from conducting the house warming ceremony. The learned District Munsif, on proper appreciation of the evidence made available dismissed the suit, but it was erroneously reversed by the First Appellate Court.

14. In the light of the above discussion, the substantial questions of law (i) to (iii) are answered in favour of the Appellants and against the Respondent.

In the result, the **Second Appeal is allowed**. The Judgment and Decree of the learned First Appellate Judge/Sub Judge, Mannargudi in A.S.No.1 of 2012 dated 07.06.2013 is set aside and the judgment and decree of the learned District Munsif, Mannargudi in O.S.No.9 of 2009 dated 28.02.2011 is restored. No costs. Consequently connected miscellaneous petition is closed.

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Index : Yes/No

Speaking/Non-speaking order



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To
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1. The District Munsif,
Mannargudi.
2. The Subordinate Judge,
Mannargudi.
3. The Section Officer, VR Records
High Court of Madras.

SATHI KUMAR SUKUMARA KURUP, J

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