



S.A No.145 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.06.2024

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THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

Second Appeal No.145 of 2021

and

C.M.P No.3090 of 2021

Duraisamy (Died)
Lakshmi

... Appellant

..Vs..

1.S.Sabapathi
2.S.Manoharan
3.Rajeswari
4.D.Rangaraj

...Respondents

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree dated 29.08.2019 passed in A.S No.119 of 2013 on the file of the II Additional Subordinate Court, Coimbatore, confirming the judgment and decree dated 13.02.2013 in O.S No.309 of 2006 on the file of the II Additional District Munsif Court, Coimbatore. .

For Appellant

: Mr.D.R.Arunkumar

For Respondents

: Mr.A.E.Ravichandran for R4
No Appearance for R1 to R3



S.A No.145 of 2021

J U D G M E N T

WEB COPY This second appeal has been filed by the plaintiff in the suit challenging the concurrent findings of the Courts below.

2. The suit has been filed for declaration in respect of suit schedule property which the plaintiff claims that it is a common pathway to be enjoyed both by the plaintiff and the defendants.

3. In the forthcoming paragraphs, the parties are described as per the litigative status in the suit.

4. The plaintiff has relied upon a parent document namely mortgage deed dated 11.10.1939 registered as Document No.3676 of 1939 for the purpose of establishing that the suit 'B' schedule property is a common pathway to be enjoyed both by the plaintiff and the defendants. The plaintiff claims that the defendants have purchased the property by tracing their title only through the mortgage deed dated 11.10.1939, the suit schedule property is a common pathway which has to be enjoyed both by the plaintiff



S.A No.145 of 2021

and the defendants as per the schedule. The plaintiff had purchased the suit 'A' schedule property under a sale deed dated 14.06.1995 and the suit schedule property adjoins the said property which the plaintiff claims that it is a common pathway to be enjoyed both by the plaintiff and the defendants.

5. However, as seen from the written statement, the defendants had denied that the suit 'B' schedule property is a common pathway to be enjoyed both by the plaintiff and the defendants. The defendants have purchased the entire property under a sale deed dated 23.02.1982. They claimed that they are in possession of their property ever since the purchase. They also claimed that they have obtained patta for the property purchased under a sale deed dated 23.02.1982. They have also pleaded that the suit is barred by limitation as the suit has been filed only in the year 2006. Whereas, the defendants had purchased their property in the year 1982 and they have also obtained re-survey patta for the property in the year 1997.

6. Based on the pleadings of the respective parties, the trial Court namely, the II Additional District Munsif Court, Coimbatore in O.S No.309



S.A No.145 of 2021

of 2006 dismissed the suit filed by the plaintiff by giving the following

findings:

a) The plaintiff has not proved through his oral and documentary evidence that the suit 'B' schedule property is a common pathway to be commonly enjoyed both by the plaintiff and the defendants.

b) The exhibit A1, sale deed standing in the name of the plaintiff and Ex.A2, the sale deed standing in the name of the defendants does not reveal that the suit 'B' schedule property is a common pathway.

c) The FMB sketch marked as Ex.X2 through the Village Administrative Officer (DW2) does not disclose that the suit 'B' schedule property is a common pathway.

7. Aggrieved by the findings of the trial Court while dismissing the suit, the plaintiff filed a first appeal before the II Additional Subordinate Court, Coimbatore in A.S No.119 of 2013. The lower Appellate Court also confirmed the findings of the trial Court. Apart from confirming the



S.A No.145 of 2021

findings of the trial Court, the lower Appellate Court had also held that the suit is barred by limitation since the patta was issued in favour of the plaintiff as early as 1997 and separate four boundaries were also identified, but despite the same, the suit came to be filed only in the year 2006. The lower Appellate Court dismissed the appeal filed by the plaintiff in A.S No.119 of 2013 on 29.08.2019. Aggrieved by the concurrent findings of the Courts below, this second appeal has been filed.

8. This Court had admitted the second appeal on 25.02.2021 by formulating the following substantial questions of law:

1) Whether the Courts below failed to consider the exhibits marked on the side of the appellant Ex.A1 to A16, the Commissioner's report and more particularly Ex.A3, Mortgage Deed dated 11.10.1939, which clearly goes to prove the existence of Ittery in the suit schedule 2 property?

9. According to the learned counsel for the appellant, during the cross examination of DW1, he has admitted that there was a common pathway between the properties. The respective properties is now owned by



S.A No.145 of 2021

the plaintiff and the defendants. Learned counsel for the appellant would submit that both the Courts below by mis-appreciating the evidence available on record have come to the erroneous conclusion that the suit 'B' schedule property is not a common pathway to be enjoyed both by the plaintiff and the defendants. According to the learned counsel for the appellant, as seen from the Ex.A2 mortgage deed, deposition of DW1, advocate commissioner's report and Ex.B5 revenue sketch, which clearly establishes that the suit 'B' schedule property is a common pathway to be enjoyed both by the plaintiff and the defendants.

10. Learned counsel for the appellant drew the attention of this Court to the judgment of the Madras High Court in the case of **Lingappa Gounder vs. Palanisamy Gounder and others** reported in (2006) I M.L.J 423 and would submit that if notice was not issued to the affected party during re-survey, it is not necessary for the affected party to challenge the re-survey proceedings. Hence, according to him, both the Courts below have erroneously held against the plaintiff based on the re-survey patta issued in favour of the defendants without notice to the plaintiff.



S.A No.145 of 2021

11. According to the learned counsel for the respondents/defendants, even under the mortgage deed (Ex.A3), there is no reference to a common pathway as pleaded in the plaint. A common pathway referred to in the mortgage deed (Ex.A3) is on the southern side and is not the suit 'B' schedule property. The learned counsel for the respondents/defendants also drew the attention of this Court to the trial Court's judgment and would submit that the same has been duly considered by the trial Court and only thereafter, findings have been rendered stating that the plaintiff has not proved that the suit 'B' schedule property is a common pathway to be enjoyed both by the plaintiff and the defendants. Referring to the Advocate Commissioner's report relied upon by the learned counsel for the appellant, the learned counsel for the respondents/defendants would submit that the Advocate Commissioner's report has not stated that the common pathway that is the suit 'B' schedule property is commonly enjoyed both by the plaintiff and defendants and the report only discloses that there is a vacant land adjoining the plaintiff's property and the defendant's property which according to the learned counsel for the respondents/defendants belongs to the defendants absolutely. The learned counsel for the



S.A No.145 of 2021

respondents/defendants also referred to the defendants' sale deed dated 22.03.1982 marked as Ex.A2 and FMB sketch marked as Ex.B2 and would submit that the measurements in both Ex.A2-sale deed as well as Ex.B2-FMB sketch is tallied and there is no discrepancy and therefore, the defendants are the absolute owners of the suit 'B' schedule property.

12. Admittedly, the sale deed standing in the name of the plaintiff (Ex.A1) does not reveal a common pathway (schedule B property) to be enjoyed both by the plaintiff and the defendants. The said sale deed has also not been rectified by the plaintiff to include the alleged common pathway (schedule B property) subsequently. Admittedly, the re-survey patta has also been issued for the defendants' property which includes the suit 'B' schedule property in the year 1997. The plaintiff has also admitted the same in his deposition and he has also admitted that in the same year i.e 1997, the plaintiff was also issued patta for his property.

13. The plaintiff also relies upon a mortgage deed of the year 1939 (Ex.A3) for the purpose of establishing that the suit 'B' schedule property is



S.A No.145 of 2021

a common pathway to be enjoyed both by the plaintiff as well as the defendants and have traced. According to the plaintiff, since the defendants have traced their title through the mortgage deed considering it as a parent document, which is of the year 1939, it is clear that the suit 'B' schedule property is a common pathway to be enjoyed both by the plaintiff and the defendants. However, the same was denied by the defendants as they claim that there was no reference to the suit 'B' schedule property (common pathway) in the mortgage deed (Ex.A3). However, the mortgage deed is not a document of title. Title of any property is always traced through a title deed. The mortgage deed (Ex.A3) is of the year 1939 and as seen from the same, it is also not clear that there was a common pathway. The evidence placed on record is not sufficient to prove that the common pathway which is the plaintiff's claim was in existence. Therefore, the contention of the learned counsel for the appellant that there was a reference to a common pathway (schedule B) in the mortgage deed (Ex.A3) has to be rejected by this Court.



S.A No.145 of 2021

14. Admittedly, the plaintiff purchased his property (schedule A) in the year 1995 (Ex.A1). Admittedly, the patta was issued in favour of the respondents/defendants in respect of their property in the year 1997. The suit was filed only in the year 2006. The lower Appellate Court had rightly considered the said facts and had held that the suit is barred by limitation, eventhough the trial Court had not rendered such a finding in its judgment and decree. As the plaintiff, he ought to have discharged his initial burden of proving that the suit 'B' schedule property is a common pathway to be enjoyed both by the plaintiff and the defendants . He has not discharged his initial burden as per Section 101 of the Indian Evidence Act.

15. Only based on the evidence available on record, both the Courts below have rightly held that the suit will have to be dismissed. The substantial question of law framed by this Court on 25.02.2021 is answered against the plaintiff by holding that the exhibits marked on both sides have been rightly appreciated and only thereafter, both the Courts below have come to the right conclusion that the suit will have to be dismissed in view of the fact that the plaintiff has not proved that the suit 'B' schedule property is



S.A No.145 of 2021

a common pathway.

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16. In the result, there is no merit in this second appeal. Accordingly, the judgment and decree dated 29.08.2019 passed in A.S No.119 of 2013, on the file of the II Additional Subordinate Judge, Coimbatore, confirming the judgment and decree passed in O.S No.309 of 2006 dated 13.02.2013 by the II Additional District Munsif, Coimbatore stands confirmed and this Second Appeal stands dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

26.06.2024

Index:Yes/No

Internet:Yes/No

Speaking/Non-speaking order

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To

1.The II Additional Subordinate Judge
Coimbatore.

2.The II Additional District Munsif
Coimbatore

3.The Section Officer
V.R.Section, High Court of Madras.

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S.A No.145 of 2021

ABDUL QUDDHOSE, J.
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Second Appeal No.145 of 2021
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