



S.A.No.38 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.07.2024

CORAM:

THE HON'BLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.38 of 2019
and
C.M.P.No.2294 of 2019

1.Vimala

2.Visalakshi

... Appellants

vs.

P.Jagadeesan

... Respondent

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the Judgment and Decree passed in A.S.No.78 of 2015 dated 14.07.2017 on the file of the I Additional Subordinate Judge at Erode District in confirming the Judgment and Decree made in O.S.No.262 of 2012 dated 30.04.2015 on the file of the I Additional District Munsif Court at Erode District.

For Appellants : Mr.P.Valliappan
Senior Counsel
for M/s.C.Ramaraj

For Respondent : Mr.D.Selvaraj
for M/s.C.S.Saravanan

JUDGMENT



S.A.No.38 of 2019

WEB COPY The present Second Appeal arises out of the Judgment and Decree of the Court of I Additional Subordinate Judge at Erode in A.S.No.78 of 2015, dated 14.07.2017 in confirming the Judgment and Decree of the Court of I Additional District Munsif at Erode in O.S.No.262 of 2012, dated 30.04.2015.

2. The suit in O.S.No.262 of 2012 was presented by the respondent herein seeking for the relief of permanent injunction restraining the defendants, their men, agents, assignees, etc., from interfering in any manner with the plaintiff's common user and enjoyment of suit 'B' schedule mentioned property or to put up any constructions therein. The second relief being for permanent injunction restraining the defendants, their men, agents, assignees, etc., from demolishing the constructions in Item-2 of the 'A' schedule property or interfere with the common possession and enjoyment of the same. During the pendency of the suit, as the title of the plaintiff was denied, he amended the prayer to include the relief of declaration and also for mandatory injunction directing the defendants to remove the constructions put up over



S.A.No.38 of 2019

Item-2 of the 'A' schedule mentioned property.

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3. The case of the plaintiff is that the suit property originally belonged to two brothers namely Chenniappa Gounder and Periyanna Gounder. They divided the property among themselves under the Partition Deed dated 24.01.1945. As per the document, the house properties were divided in Anganams, leaving a part as the passage between the two properties of 'A' schedule to be used exclusively by them. The 'B' schedule property is a lane, which commences from Muthuvelappa Gounder Street and ends in a Municipal lane. The 'A' schedule mentioned property abuts the Municipal lane. The plaintiff pleaded that the heirs of Chenniappa Gounder namely Ramayammal, Chinnasamy, Senthil Kumar and Mahesh Kumar sold the property which fell to the share of Chinnasamy Gounder, the son of Chenniappa Gounder, in favour of one A.Wilson by the registered Sale Deed dated 27.03.1991. The heirs of Chenniappa Gounder not only sold the two anganam house on the southern side of the property but had also alienated their right to use the 3 feet lane common to them. The plaintiff would claim title to the suit property by virtue of the fact that the father of the plaintiff, one



S.A.No.38 of 2019

Palaniappan, had executed a registered Settlement Deed in his favour with respect to Item-1 of the suit 'A' schedule property.

4. In so far as Item-2 of the 'A' schedule property is concerned, the property which was enjoyed by the aforesaid Chinnasamy Gounder, son of Chenniappa Gounder, the plaintiff and his brother purchased the same by way of Registered Sale Deed on 17.09.2003. After enjoying the property in common, on 19.04.2010, the plaintiff's brother Jayachandran alienated his half share in favour of plaintiff by a Settlement Deed. The plaintiff would plead that there is a common lane measuring 3 feet by 125 feet between Item-1 of the suit 'A' schedule property and Item-2 of the suit 'A' schedule property. Apart from the plaintiff and defendants, the suit pathway was to be enjoyed in common by Susairaj, Mallika and Narayanasamy, who had property on the western side of the lane.

5. The plaintiff would further plead that the 1st defendant-Vimala together with her deceased father Balasubramaniam, Narayanasamy and Mallika had presented a suit in O.S.No.263 of 2003 on the file of the District



S.A.No.38 of 2019

Munsif Court at Erode seeking for an injunction on the basis that the 3 feet lane between the two properties exclusively belonged only to the plaintiffs and not to the defendant therein (the plaintiff herein). He would state that the matter went for trial and the suit was dismissed holding that the suit lane is common to the owners on both sides of the lane. As no appeal was filed against the judgment and decree passed in O.S.No.263 of 2003, he they would plead it has become final.

6. The cause of action for the suit arose when the defendants attempted to interfere with plaintiff's possession under the guise of putting up a new construction, wanting to block the 3 feet lane. On these pleadings, he would state that when the suit in O.S.No.263 of 2003 was presented, the plaintiff sought for an injunction and as the injunction was not granted, the defendants taking advantage of the same, had encroached an extent of 5.3 feet by 4.6 feet in Item-2 of the 'A' schedule property and therefore, the plaintiff herein was forced to seek a mandatory injunction to remove the encroachments.

7. On service of summons, the defendants entered appearance and took



S.A.No.38 of 2019

a stand that the property which fell to the share of Chenniappa Gounder.

Thereafter, to Ramayammal and others and it was alienated by them in favour of one A.Wilson and therefore, the family of Chinnasamy Gounder had sold whatever extent they had on 27.03.1991 in favour of A.Wilson leaving nothing in their hands for the purpose of alienation in favour of the plaintiff on 17.09.2003. The plea being that the vendors of the plaintiff having already sold the property in favour of A.Wilson, they did not retain any right, title or interest in the property for the purpose of alienation in favour of the plaintiff. They would then plead that property is an undivided property and hence, the plaintiff cannot seek for an injunction against the co-owner.

8. As the title of the plaintiff was denied, as pointed out above, he came forward with an application for amendment and the application was allowed. After amendment, an additional written statement was filed, pleading that the defendants did not encroach or put up any construction as alleged and that there are no walls on four sides of suit Item 2 of the 'A' schedule property and therefore, sought for dismissal of the suit. They would also state Susairaj, a co-sharer of the property, who had also purchased the property from



S.A.No.38 of 2019

Chenniappa Gounder not having been impleaded in the suit, the suit deserves dismissal.

9. On the basis of these pleadings, the learned Trial Judge recast the following issues on 19.03.2013:-

- “(1) Whether the plaintiff is in possession and enjoyment of the suit A schedule item No.2 as the common ½ share holder?”*
- “(2) Whether the plaintiff is in possession and enjoyment of the suit B schedule property as a common user?”*
- “(3) Whether the plaintiff is entitled to the relief of declaration and consequential injunction over the suit B schedule property as prayed for?”*
- “(4) Whether the plaintiff is entitled to the relief of permanent injunction over the suit A schedule item 2 as prayed for?”*
- “(5) To what other relief?”*

10. After receipt of the additional statements, on 02.02.2015 the following additional issues were framed:-

- “(1) Whether the plaintiff is entitled to the relief of mandatory injunction as prayed for?”*



S.A.No.38 of 2019

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(2) *Whether the suit is barred by limitation?*

(3) *Whether the prayer of mandatory injunction is barred by limitation?*

(4) *Whether the suit is bad for without seeking declaration prayer, the mandatory injunction prayer is unsustainable as stated by the defendants?”*

11. The plaintiff entered the witness box as P.W.1 and the subjected himself to cross examination. On the side of plaintiff, Exs.A1 to A6 were marked. On the side of the defendants, 1st defendant-Vimala was examined as D.W.1 and Exs.B1 to B9 were marked.

12. Pending the litigation, an Advocate Commissioner was appointed in I.A.No.540 of 2013 in order to visit the suit schedule property and submit a report. He visited the property on 24.12.2013 after giving due notice to both sides and submitted a report. He had also annexed two plans to his report, and they were received as Ex.C1 to C3.



S.A.No.38 of 2019

13. On a detailed analysis of the oral and documentary evidence let in by both sides, the Trial Court came to a conclusion that the plaintiff has proved his case and consequently, decreed the suit as prayed for.

14. Aggrieved by the same, the defendants preferred an appeal in A.S.No.78 of 2015 before the learned I Additional Subordinate Judge at Erode. The learned Subordinate Judge, after analysing the facts in detail, came to a conclusion that the appeal deserves an order of dismissal and accordingly, dismissed it. Against the concurrent finding of fact, the present second appeal is before this Court.

15. On 22.01.2019, the second appeal was admitted on the following substantial questions of law:-

"(1)Whether the Courts below are right in holding that the right of the plaintiff over the "B" schedule property is barred by res judicata in lieu of the dismissal of the earlier suit filed by the 1st appellant and others for permanent injunction in O.S.No.263 of 2003?

(2)Whether the Courts below are right in granting a decree of declaration, injunction and mandatory injunction in



S.A.No.38 of 2019

favour of the plaintiff, when he miserably failed to prove his case?

(3)Whether the suit for permanent injunction against a co-owner is maintainable in law?

(4)Whether the Courts below failed to consider Ex.B.2 to appreciate the boundaries mentioned in the plaintiff's document under Ex.A.2?

(5)Whether the Courts below had misconstrued the Partition Deed under Ex.B.1?”

16. On the service of summons, Mr.C.S.Saravanan, learned counsel entered appearance on behalf of the respondent.

17. I have heard Mr.P.Valliappan, learned Senior Counsel for Mr.C.Ramaraj, learned counsel for the appellants and Mr.D.Selvaraj for Mr.C.S.Saravanan, learned counsel for the respondent.

18. Expanding on the question of law, Mr.P.Valliappan, would submit that the suit in O.S.No.263 of 2003 on the file of the District Munsif Court at Erode, between Vimala, Balasubramaniam and two others as against the

10/24



S.A.No.38 of 2019

plaintiff was only a suit for bare injunction and the findings therein would not operate as *res judicata* in the present suit. He would further state that in so far as Item-2 of 'A' suit schedule mentioned property is concerned, both the plaintiff and defendants are co-owners and it is unknown to Civil Law that a suit for injunction is maintainable among co-owners.

19. He would point out to the partition deed that had been entered between Chenniappa Gounder and his brother Periyanna Gounder to state that on the death of Chenniappa Gounder, the property devolved to Chinnasamy Gounder and his legal heirs who had already alienated the property on 27.03.1991 in favour of one A.Wilson and therefore, they could not have alienated the property in favour of the plaintiff and his brother on 17.09.2003. He would state that Ex.B2 had not been properly compared with Ex.A2 and therefore, he would plead that the judgment and decree passed by the Courts below deserve to be set aside.

20. Per contra, Mr.D.Selvaraj, would point out that in O.S.No.263 of 2003, the specific plea raised by Balasubramaniam, Vimala and others, who



S.A.No.38 of 2019

had joined them in presentation of the plaint, that the plaintiff herein (who was arrayed as 1st defendant therein) does not have a right to use the 3 feet passage was rejected. He states that the learned District Munsif Court had come to a conclusion that it was a common passage for the plaintiff and defendants. Therefore, the relief that is sought for in the present suit that the pathway must be used in common by every one who has a right of usage over the same was rightly decreed. This issue having already been gone into by a Court of competent jurisdiction, that issue operates as *res judicata* in the present suit. He would further point out that though he need not initially seek the relief of mandatory injunction for a construction put up pending the litigation by way of abandon caution, the plaintiff sought for the relief on account of the fact that the construction put up by the defendants was reflected in the Advocate Commissioner's report. He would state that the Courts below have properly analysed Ex.B2 and Ex.A2 and have rightly come to the conclusion that the property alienated in favour of A.Wilson is different from the property alienated in favour of the plaintiff and hence, he would plead that the appeal has no legs to stand on.



S.A.No.38 of 2019

21. I have carefully considered the arguments of both sides and have gone through the records.

22. In so far as the first plea of *res judicata* is concerned, it is necessary for me to go through Ex.A4 and A5 namely the Judgment and Decree in O.S.No.263 of 2003 on the file of the learned District Munsif Court at Erode. In Paragraph No.7 of the said judgment, during the course of cross examination, the defendants' predecessor had clearly and categorically stated as follows:-

“முத்துவேலப்பகவுண்டர் வீதியிலிருந்து வரும் தாவா சந்தில் நடந்துகொள்ளும் பாத்தியதைமட்டும் நாங்கள் எக்.எ1ன்படி கிரையம் பெற்றுள்ளோம் என்றால் அது சரிதான். தாவா சந்தை பொதுவில் உபயோகித்துக்கொள்ளும் பாத்தியதை கண்டுதான் எக்.எ1ல் எழுதப்பட்டுள்ளது என்றும், தாவா சொத்தில் அடிமனையை கிரையம் வாங்கவில்லை என்றால் அது சரிதான்”

23. On the basis of this statement, the Court came to the conclusion that the 3 feet passage, which runs between the property of the plaintiff and the defendants, is one and common not only for the parties to the suit but also



S.A.No.38 of 2019

for the other owners. Unfortunately, Mr.P.Valliappan's clients did not prefer any appeal against the said judgment and decree and consequently, the findings of the learned District Munsif Court has attained finality. A finding given in a suit for injunction that the pathway is common to the owners of the property abutting the lane running from Muthuvelappa Gounder Street to Municipal lane would certainly operate as *res judicata* in a subsequent suit where the very same issue is put into consideration for the Court.

24. It is pertinent to point out here that the property originally belonged to two brothers namely Chenniappa Gounder and Periyanna Gounder. Both the parties claim their title to the property through these brothers. The brothers had separated and had entered into a Partition Deed under Ex.B1 as early as 1945. While they divided the house properties in terms of Anganams, they set apart the 'B' schedule pathway of an extent of 3 feet to 125 feet as common to both. The parties to the suit, being purchasers of respective shares of Chenniappa Gounder and Periyanna Gounder, would necessarily be bound by Ex.B1, which has set apart the 3 feet in 'B' schedule property as a common lane.



S.A.No.38 of 2019

25. It is not open to a party, who presented a suit that the lane exclusively belongs to them and having obtained a finding in that suit that the lane is common to the owners abutting the lane, to turn around and plead in the subsequent suit that it exclusively belongs to them and a third party whose property is situated on the north-eastern side of their property. The plaintiff in this suit has not claimed it is his exclusive lane, but he has only sought for a declaration that it is common to both of them. When the said issue had already been considered by the Court in O.S.No.263 of 2003, I am afraid that the same issue cannot be reopened at the hands of the defendants, who had lost the previous case pleading exactly the case that they are pleading today about the exclusivity of the lane.

26. It is here that the argument of Mr.D.Selvaraj, learned counsel for the respondent becomes relevant. He would then submit that the defendants despite having lost the case in O.S.No.263 of 2003 were emboldened to prevent the plaintiff's access to the lane. Hence, he was constrained to file a suit seeking for a declaration that the lane is common. This argument certainly deserves consideration for the simple reason that in a civil proceeding, if the



S.A.No.38 of 2019

suit is dismissed, it does not mean it is a decree in favour of the defendant. If the defendant wants a decree in his/her favour, he/she should workout his/her right independently by way of a separate suit.

27. Perhaps, if the plaintiff in the present case had filed a counter claim in O.S.No.263 of 2003, then the necessity for the present suit would have been obviated. He had not chosen to do so. However, that does not mean he cannot file a suit for declaration that he is entitled to common usage of the lane along with the other co-owners of the property abutting the lane. Therefore, the first substantial question of law urged by Mr.P.Valliappan, is answered against the appellants and in favour of the respondent.

28. The second plea of Mr.Valliappan, is certainly an interesting one and deserves an analysis. According to him, the legal heirs of Chenniappa Gounder namely Ramayammal, his son namely Chinnasamy, and his grandsons namely Senthil Kumar and Mahesh Kumar had alienated the property in favour of one A.Wilson on 27.03.1991. Therefore, Mr.Valliappan, would argue that the plaintiff could not have purchased the same property



S.A.No.38 of 2019

from the aforesaid persons on 17.09.2003. A careful analysis of Ex.B4, which is the Sale Deed executed by the legal heirs of Chinnasamy Gounder in favour of A.Wilson, would show that the property purchased under Ex.A2 is fundamentally different from properties purchased by A.Wilson under Ex.B4.

29. From a comparison of recitals in the aforesaid exhibits with the Commissioner's plan under Exs.C1 and C2, it is clear that Muthuvelappa Gounder Street is on the northern side and the Municipal lane is on the southern side. The property which had been purchased by A.Wilson is the property allotted to Periyanna Gounder in the 'A' schedule mentioned property. Whereas, the plaintiff has purchased from a share of the property, which had been allotted to Chenniappa Gounder. From the description of the property, it is clear that to the south of Muthuvelappa Gounder Street, a house facing southern side to an extent of 2 Anganams was allotted to Chenniappa Gounder. Whereas, to the southern side of the property allotted to Chenniappa Gounder, there stood an other house to an extent of 4 Anganams and this had been allotted to Periyanna Gounder.



S.A.No.38 of 2019

WEB COPY 30. As stated above, a comparison of the documents under Ex.A2 and Ex.B4 would show that they are two different properties and are not one and the same as has been pleaded by Mr.P.Valliappan's client in the Court below. Therefore, the vendors of the plaintiff certainly had a right, title and interest to alienate and accordingly, they did so under Ex.A2 in favour of the plaintiff. Accordingly, the second substantial question of law is answered against the appellants and in favour of the respondent.

31. In so far as the plea of Mr.P.Valliappan that one co-owner cannot maintain a suit for injunction against the other co-owner is concerned, though it is very attractive at the first blush, I have to state, on a deeper scrutiny, it does not have any leg to stand on. One co-owner certainly cannot get an order of injunction against the other co-owner excluding the latter from possession of the property. This does not mean one co-owner can usurp the right by attempting to act in a manner detriment to the right of the other co-owner. From the perusal of Ex.C2, it is clear that the portion which had been kept in common by Chenniappa Gounder and Periyanna Gounder remained as it is



S.A.No.38 of 2019

and the defendants herein attempted to put up a construction pending the litigation.

32. I would agree with Mr.D.Selvaraj that when a construction comes up pending the litigation, it is not necessary for a party to amend the plaint to additionally seek the relief of mandatory injunction. The Court retains with itself the power to grant the relief of mandatory injunction, if it comes to the conclusion that the act of the defendants is contrary to the laws of the land and interferes with the right of the plaintiff as a co-owner.

33. Nevertheless, the relief having been sought for by the plaintiff, we have to consider the same in the light of Ex.C2. The defendants had taken a stand that they have not put up any construction, whereas the report under Ex.C1 read with Ex.C3, which is the plan submitted by the Town Sub-Inspector of Survey, Erode, would show that on the 2nd item of 'A' schedule property leaving an extent of 4.6 feet by 5.3 feet, the defendants had put up a construction in the common area. One co-owner can certainly not act in a manner, which is detrimental to the interest of the other co-owner. In case



S.A.No.38 of 2019

such an act is done and that too taking into account of the fact the Court had not granted an order of interim injunction, then, such a construction necessarily would have to come down by way of a mandatory injunction.

34. Under Section 39 of the Specific Relief Act, the Court has the power to enforce the duty of one party as against the other. One co-owner has a duty not to dispossess another co-owner or as stated above, act in detriment to the interest of the other co-owner. As the defendants have been emboldened to put up a construction pending the litigation, as is clear from the Commissioner's report and the report of the Town Surveyor, no exception can be taken to the decree of mandatory injunction granted by the Courts below.

35. In the light of the above discussion, despite the vehement and persuasive argument of Mr.P.Valliappan, I am constrained to confirm the judgment and decree of the Courts below. Though it is a concurrent finding of fact, since Mr.P.Valliappan had taken pains to lead me through the documents, I independently assessed Exs.A2, A4, A5, B1 and B4, nevertheless I am not in a position to take a different view than that have been



S.A.No.38 of 2019

taken by the Courts below.

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In fine,

- (i) The Second Appeal is dismissed and the Judgment and Decree of the I Additional Subordinate Court at Erode in A.S.No.78 of 2015, dated 14.07.2017 in confirming the Judgment and Decree of the I Additional District Munsif Court at Erode in O.S.No.262 of 2012, dated 30.04.2015 is confirmed.
- (ii) The time for removal of the offending structure is three months from the date of receipt of copy of this order. In case, the structure over the 2nd Item of 'A' schedule mentioned property is not removed by the defendants, within the time stipulated above, at the end of the same, the plaintiff can move an execution petition to remove the structure through the process of Court.
- (iii) As the parties are neighbours and since they have been litigating on an



S.A.No.38 of 2019

interesting question of law, I am not inclined to impose any costs in the
WEB COPY appeal.

(iv) Consequently, the connected civil miscellaneous petition is closed.

03.07.2024

Index : Yes / No
Speaking order : Yes / No
Neutral Citation : Yes / No
dm



S.A.No.38 of 2019

To

WEB COPY

- 1.The I Additional Subordinate Judge,
Erode District.
- 2.The I Additional District Munsif Court,
Erode District.



WEB COPY



S.A.No.38 of 2019

V.LAKSHMINARAYANAN, J.

dm

S.A.No.38 of 2019

03.07.2024