



S.A(MD)No.134 of 2018

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.07.2024

Pronounced on : 06.09.2024

CORAM

THE HONOURABLE MR.JUSTICE P.VADAMALAI

S.A(MD)No.134 of 2018

P.Pooranam

... Appellant/Appellant/
Plaintiff

Vs.

1.A.Sundararajamoorthy
2.S.Muthulakshmi

... Respondents/Respondents/
Defendants

PRAYER :-

This Second Appeal is filed under Section 100 of the Civil Procedure Code, to allow this Second Appeal setting aside the judgment and decree dated 25.01.2017 made in A.S.No.68 of 2013 on the file of the Subordinate Court (Camp Court, Tirumangalam), confirming the judgment and decree dated 12.06.2013 made in O.S.No.114 of 2004 on the file of the District Munsif Court, Tirumangalam.

For Appellants : Mr.R.G.Sankar Ganesh
For Respondents : Mr.V.Ramakrishnan



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JUDGMENT

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This Second Appeal is preferred against the judgment and decree, dated 25.01.2017 made in A.S.No.68 of 2013 on the file of the Sub Court, Tirumanglam (Camp Court), confirming the judgment and decree, dated 12.06.2013 passed in O.S.No.114 of 2004 on the file of the District Munsif Court, Tirumangalam.

2. The appellant herein is the plaintiff and the respondents are the defendants in O.S.No.114 of 2004 on the file of the District Munsif Court, Tirumangalam. The appellant/plaintiff filed the suit for bare permanent injunction.

3. For the sake of convenience, the parties are referred as plaintiff and defendants as arrayed in O.S.No.114 of 2004 on the file of District Munsif Court, Tirumangalam.

4. Case of the plaintiff:

The suit property is consisting two thakku measuring 1,144 sq.ft and 3 feet common pathway situate on the south, in R.S.No.6/1, Kochadai



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Village, Madurai District. The suit property originally belonged to one Kundu, from whom the plaintiff vendor Muniyandi purchased. From Muniyandi, the plaintiff purchased the suit property by virtue of registered sale deed, dated 08.06.1995, from the date of purchase the plaintiff has been in possession and enjoyment of the suit property. After purchase, the plaintiff constructed building leaving 2 ½ feet on the south and 3 feet on the west. Further, there is 3 feet common pathway on the south. The defendants are owners of the house situated on further west of the suit property. The defendants have right to use 3 feet common pathway to reach 20 feet road on the east from their house. All of a sudden, the defendants claimed absolute right over 3 feet common pathway and also 2 ½ feet on south & 3 feet on west left by the plaintiff. On application, the municipal authorities measured the property and prepared a sketch. Even then, the defendants tried to interfere with the possession of the plaintiff. Hence, the plaintiff has filed the suit for permanent injunction restraining the defendants from interfering with the plaintiff's possession of the 3 feet on west and 2 ½ feet on south left by the plaintiff and also 3 feet common pathway.



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5. Case of the Defendant:

The plaintiff never purchased the total extent of 1144 sq.ft and she never left 3 feet and 2 ½ feet at the time of construction as stated by her. The suit east west common pathway is 6 feet width and the same is not 3 feet. The defendants' house is situated immediately west of the plaintiff's building. On the east of the defendants' house, there is 6 feet common pathway and the plaintiff's house. The 6 feet common pathway has been in existence even at the time of the predecessor in title of the plaintiff and the first defendant. The defendants' house property and 6 feet common pathway were purchased by the defendants' vendor Subbaiah Thevar through Court sale certificate in E.P.No.208 of 1991 in O.S.No.717 of 1986 on the file of the District Munsif Court, Tirumangalam and enjoyed the same as such. After purchase, the first defendant has been enjoying the house along with 6 feet common pathway. The plaintiff and her predecessor in title have no absolute right over the western portion of the plaintiff's house. The suit is liable to be dismissed.



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6. During trial, on the plaintiff's side, P.W.1 & P.W.2 were examined and 13 exhibits were marked as Ex.A.1 to Ex.A.13. On the defendants' side, D.W.1 was examined and Ex.B.1 to Ex.B.20 were marked.

7. Before the trial Court/District Munsif Court, Tirumangalam the following issues were framed:-

- "(1) Whether the plaintiff is entitled for permanent injunction?*
- (2) Whether the description of property is correct?*
- (3) To what other relief?"*

8. After hearing both sides, the learned District Munsif, Tirumangalam concluded that the plaintiff has not proved her case and dismissed the suit by passing judgment and decree, dated 12.06.2013.

9. Aggrieved by the judgment and decree in O.S.No.114 of 2004, the plaintiff preferred the Civil Appeal in A.S.No.68 of 2013 before the Subordinate Court, Tirumangalam (Camp Court). Pending appeal, the plaintiff filed a petition in I.A.No.90 of 2016 for appointment of advocate/commissioner; I.A.No.136 of 2016 & I.A.No. 277 of 2016 for



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amendment of suit property to show the 3 feet common pathway as 2nd schedule. The first Appellate Court after hearing both and after perusing material records of the case, dismissed the appeal in A.S.No.68 of 2013 and also dismissed the petitions in I.A.Nos.90 of 2016, 136 of 2016 and 277 of 2016 by passing judgment, dated 25.01.2017 and confirmed the judgment and decree, dated 12.06.2013 passed in O.S.No.114 of 2004.

10. Challenging the judgment and decree of the First Appellate Court, the plaintiff has preferred this Second Appeal and the same has been admitted on 19.04.2018 by framing the following substantial questions of law:-

"1. Whether it is necessary to seek for the relief of declaration when there is no cloud in respect of the title?

2. Whether in a suit for bare injunction it is necessary or not file any application for appointment of advocate/commissioner?

3. Whether it is barred under any law in filing an application for appointment of advocate/commissioner or an application for amendment of the suit property in the first appeal?"



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11. The learned counsel for the appellant/plaintiff has submitted that the plaintiff purchased the suit property from its vendor and after purchase, she constructed the building leaving 2 ½ feet on the south, 3 feet on the west and there is a common 3 feet pathway on the south. On the further west, the defendants' house is situated. But, the defendants claimed absolute right over 3 feet and claimed common pathway 6 feet. So, the plaintiff made an application for measuring the property and upon application, the municipal survey authority measured the property after giving notice to the defendants and gave Ex.A.11 - Survey Sketch, wherein it is clear that the defendant encroached the property. The defendants did not participate while the surveyor measured the property. The trial Court erred in observing that the plaintiff failed to file an application for appointment of Commissioner when Ex.A.11 is marked. The trial Court observed that southern 3 feet is a common pathway and hence, there is no cloud in respect of title and the defendants also admitted the common pathway, hence there is no need to seek relief of declaration. Further, Ex.A.11 clearly shows existence of the common pathway. The trial Court erred in not considering the title document of the plaintiff and approved plan which are marked as Ex.A.2 and Ex.A.3 and failed to infer the existence of a common pathway on the southern side.



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The first appeal is the continuation of the suit, but the first Appellate Court failed to consider the interlocutory applications for appointment of Commissioner and amendment filed by the plaintiff. The plaintiff has not introduced any fresh fact but sought only for correction in the description of property. The first Appellate Court has not given any opportunity to the plaintiff to establish her case that she left 2 ½ feet on the south besides there is 3 feet common pathway as per title deed.

12. The learned counsel for the appellant/plaintiff further submitted that the Courts below held that in the absence of declaration of title, the plaintiff cannot seek injunction. While the plaintiff sought injunction of 3 feet common pathway and the defendant claims 6 feet, the plaintiff sought amendment in mentioning the description of suit property. The plaintiff sought only injunction restraining the defendant from claiming exclusive rights over the common pathway. The Courts below erred in appreciation of oral and documentary evidences adduced on both sides. The plaintiff proved her possession over the suit property, which is suffice for granting injunction. Hence, the plaintiff's counsel prays that the Second Appeal may be allowed. In support of his argument, the learned counsel for the plaintiff relied on the



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judgment in the case of **Ananthula Sudhakar vs. P.Buchi Reddy (Dead)** by **LRs. & Ors. in Appeal (Civil) No.6191 of 2001, dated 25.03.2008 passed by the Hon'ble Supreme Court.**

13. Per contra, the learned counsel for the defendants vehemently argued that the plaintiff has stated that the breath of common pathway is only 3 feet whereas the defendants stated that there is six feet common pathway, so there is a rival claim between the parties. The suit is filed for permanent injunction only. When there is a serious dispute between the plaintiff and the defendants, the plaintiff ought to have sought the relief of declaration. In the absence declaration, the suit for permanent injunction is not maintainable. The Commissioner/advocate's report can be disclosed only details of the suit property and could not mention anything about the disputed common pathway. After adduced evidence on both sides and during the pendency of appeal, the plaintiff sought amendment in the schedule of property, which is also not entertainable. So, the first Appellate Court correctly dismissed the appeal as well as interlocutory applications for amendment and appointment of Commissioner. Further, the plaintiff's failure to seek the relief of declaration of title when serious dispute is raised, the suit for bare injunction



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is not entertainable. The plaintiff herself admitted that the suit property was encroached by the defendant according to Ex.A.11. When the defendants dispute title over the common pathway, the only remedy for the plaintiff is to file a suit for declaration of title. So, the relief of declaration is must. The Hon'ble Supreme Court issued guidelines in **Anathula Sudharkar's** case (relied on by the plaintiff) as to when a mere suit for permanent injunction will lie and as to when it is necessary to file a suit for declaration, possession and for injunction as a consequential relief. The said citation relied on by the plaintiff is also helpful to the defendants' case. Further, the plaintiff has filed subsequent suit in O.S.No.306 of 2018 before the Sub Court, Tirumangalam seeking for declaration and injunction in respect of very same suit property of this case. The Courts below correctly appreciated the evidences adduced on both sides and correctly dismissed the suit. The finding of the Courts below is a concurrent one. Therefore, this Second Appeal may be dismissed. In support of his argument, the learned counsel for the defendants relied on the following citations:

- "i) (2013) 4 MLJ 414 (N.Raman /v/ P.Sivalingam & Others)
- ii) 2014 (5) CTC 801 (N.Kaliamoorthy and Ors. /v/ Variravan Chettiar)



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**iii) 2018 0 Supreme (Mad) 1665 (Kuppan
& Ors. /v/ Rajendran)**

**iv) 2020 (2) CTC 690 (Sivasankaran /v/
S.B.Raman)"**

14. Heard both sides arguments and perused the material records of the case.

15. It is an admitted fact that the dispute revolved around a pathway. The defendants' house is situated on the western side of the suit property. There is no dispute that the defendants could reach the main street through the common pathway. The plaintiff has shown a larger extent of 1144 sq.ft and common pathway as a single schedule of property. The plaintiff pleads that she purchased 1144 sq.ft from his vendor and at the time of construction, she left 2½ feet on the south and the 3 feet common pathway is situated further south. The defendants state that the width of the common pathway is 6 feet. The defendants contended that the first defendant purchased the property from his vendor, who purchased the same through Court auction. On perusal of evidences, the plaintiff filed Ex.A.11 - Sketch prepared by the revenue officials marking the common pathway upon her application. It is stated by the plaintiff that despite the notice issued to the defendants they did



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not participate while measuring the suit property by the surveyor. Through Ex.A.11, the plaintiff states that the defendants encroached the common pathway. Whiles, the defendants' argument is that when there is a serious dispute regarding 2 ½ feet in the 6 feet pathway which is claimed by the plaintiff as of her own, then the plaintiff should seek the relief of declaration, and a suit for bare injunction will not lie is acceptable one in view of the citations relied on both sides.

16. Admittedly, after disposal of the suit by the trial Court, the plaintiff filed interlocutory applications for appointment of a Commissioner and also the amendment of the suit property, i.e., to mention the common pathway separately as 2nd schedule of property, which are not entertainable as per guidelines of the **Hon'ble Supreme Court** in the case of "**Life Insurance Corporation /v/ Sanjeev Buildings**) reported in **2022 AIR SC 4256**" when subsequent amendment is barred by limitation and also introduced new cause of action. Therefore, as rightly argued by the defendants, when there is a serious title dispute over the common pathway, the suit for bare injunction is not maintainable without prayer for declaration in view of the citations relied on by the defendants' side. It is now admitted that the plaintiff has filed yet



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another suit in O.S.No.306 of 2018 before the Sub Court, Tirumangalam seeking for declaration of her title and permanent injunction in respect of the suit property herein. The plaintiff does not raise objection for the same.

17. It is general proposition of law that after giving concurrent findings by the courts below, this Court can interfere only in certain circumstances as held by the Hon'ble Supreme Court in the case of **Nazir Mohamed v. J.Kamala** reported in **(2020) 19 SCC 57**, held as follows:

“37.4. The general rule is, that the High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well recognized exceptions are where: (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.”



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But in this case, the concurrent findings of the Court below do not fall in the above criteria. Both the Courts below correctly appreciated the evidences adduced on both sides and correctly came to the conclusion that the plaintiff failed to establish her case for injunction over the common pathway against the defendants.

18. It is also a proposition of law that injunction cannot be granted against a common owner and possession cannot be proved by commissioner's report. Moreover, the lacuna in the pleadings and the latches on the part of the plaintiff gave some impeachable rights to the defendants. When the suit itself failed by a defect, it cannot be allowed to set it right by filing amendment application in the appeal just to take away the accrued rights of the defendants.

19. From the above facts and circumstances, the Courts below recorded concurrent findings based on evidences adduced in the case. The questions of law could not be decided in favour of the appellant/plaintiff as the suit was factually decided by the Courts below. The said findings need not be interfered by this Court by way of Second Appeal. Hence, the



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questions of law framed in this Second Appeal are answered against the appellant/plaintiff. Thus, this Second Appeal fails.

20. In the result, the Second Appeal is dismissed. The judgment and decree, dated 25.01.2017 made in A.S.No.68 of 2013 on the file of the Sub Court (Camp Court), Tirumanglam, confirming the judgment and decree, dated 12.06.2013 passed in O.S.No.114 of 2004 on the file of District Munsif Court, Tirumangalam is confirmed. No costs.

06.09.2024

NCC : Yes / No
Internet : Yes / No
Index : Yes / No

VSD



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To

1. The Subordinate Court (Camp Court),
Tirumangalam.
2. The District Munsif Court,
Tirumangalam.
3. The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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P.VADAMALAI, J.

VSD

Pre-Delivery Judgment made in
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