



S.A(MD)No.170 of 2018

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.07.2024

Pronounced on : 12.09.2024

CORAM

THE HONOURABLE MR.JUSTICE P.VADAMALAI

S.A(MD)No.170 of 2018

and

C.M.P(MD)No.4499 of 2018

1.Pappai @ Raja
2.Pothumani
3.Ayyavu
4.Ithak @ Murugan
5.Murugan

... Appellants/Respondents/
Defendants

Vs.

Alagar (Died)
Rajan

... Respondent/2nd Appellant/
2nd Plaintiff

PRAYER :-

This Second Appeal is filed under Section 100 of the Civil Procedure Code, to allow this Second Appeal and set aside the judgment and decree dated 28.07.2017 made in A.S.No.19 of 2016 on the file of the Sub Court, Periyakulam, reversing the judgment and decree dated 24.08.2016 made in O.S.No.47 of 2012 on the file of the District Munsif Court, Periyakulam and dismissed the suit.



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For Appellants : M/s.Ajmal Associates

For Respondent : Mr.R.Suriya Narayanan

JUDGMENT

This Second Appeal is preferred against the judgment and decree dated 28.07.2017 passed in A.S.No.19 of 2016 on the file of the Sub Court, Periyakulam reversing the judgment and decree, dated 24.08.2016 passed in O.S.No.47 of 2012 on the file of the District Munsif Court, Periyakulam.

2. The appellants are defendants and the respondents are the plaintiffs in O.S.No.47 of 2012 on the file of the District Munsif Court, Periyakulam. The respondents/plaintiffs filed the suit for permanent injunction restraining the defendants from interfering with the enjoyment of the plaintiffs over ABCD pathway and for mandatory injunction to remove the encroachments made in the pathway.

3. For the sake of convenience, the parties referred as plaintiffs and defendants as arrayed in O.S.No.47 of 2012 on the file of the District Munsif Court, Periyakulam.



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4. Case of the plaintiffs:

The 1st plaintiff's father PeriyaMatran Madhari purchased the house along with 4 ½ feet width pathway from Murugandi Madhari by virtue of sale deed dated 05.11.1945 for Rs.10/-. The first plaintiff's father had been enjoying the property by constructing the house and after his death, the 1st plaintiff is residing along with his family. The plaintiffs' house is situated on the western side. There is east-west separate pathway from the house of the plaintiffs to reach the main cement street. The defendants' house is situated at southern side of the 4 ½ feet pathway, i.e., the pathway is the northern boundary of the defendants' house. The pathway is shown as ABCD in the rough sketch, which is the suit property. The plaintiffs have been enjoying the suit pathway for more than 66 years as their own separate pathway. The defendants put up 3' x 3' x 1 ½' cement tank and kept stones, fire sticks and pillar stones along the plaintiff's suit pathway and thereby, obstructing the plaintiffs' enjoyment from 01.01.2012. Hence, the plaintiffs laid the suit.



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5. Case of the Defendants:

Without mentioning any survey number of the property, the plaintiffs claim right over the defendants' property based on an unregistered sale deed. The suit property's survey number is 2114 and in that survey number the Government granted house sites to the defendants and their neighbours under 'Thoraya Patta'. The defendants' property was subdivided in S.No.2114/2W and the defendants constructed a house and have been enjoying by paying property tax and by getting electricity service connection without any interruption. The plaintiffs' house is situated in S.No.2114/2V. The plaintiffs' house is situated at western side of the defendants' house. On western side of the plaintiffs' house, there is 20 feet panchayat cement street and the plaintiffs are utilizing the said street. The plaintiffs falsely mentioned ABCD pathway by creating four boundaries for the purpose of the suit and tried to grab the property of the defendants. The plaintiffs have no right or title over the suit pathway at any point of time. The plaintiffs filed the suit without mentioning the survey number of the suit property and approached the Court with unclean hands and hence, the suit is liable to be dismissed.



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6. The Trial Court framed the following issues:-

- "(1) Whether the plaintiff is entitled for permanent injunction as prayed for?*
- (2) Whether the plaintiff is entitled for mandatory injunction as prayed for?*
- (3) To what other relief the plaintiff is entitled to?"*

7. During trial, on the plaintiffs' side P.W.1 and P.W.2 were examined and marked 7 exhibits as Ex.A.1 to Ex.A.7. On the defendants' side, D.W.1 and D.W.2 were examined and Ex.B.1 to Ex.B.4 were marked.

8. After hearing both sides, the learned District Munsif, Periyakulam concluded that the plaintiffs did not prove their case and dismissed the suit by passing judgment and decree, dated 24.08.2016.

9. Aggrieved by the judgment and decree in O.S.No.47 of 2012 on the file of the District Munsif Court, Periyakulam, the plaintiffs preferred the Civil Appeal in A.S.No.19 of 2016 before the Subordinate Court, Periyakulam. The first Appellate Court after hearing both sides and after perusing the records held that the plaintiffs have proved their right over the



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suit ABCD pathway and the plaintiffs are entitled to the reliefs sought for in the plaint and thereby set aside the judgment and decree of the trial Court and decreed the suit and passed judgment, dated 28.07.2017.

10. Challenging the judgment and decree of the First Appellate Court, the defendants preferred this Second Appeal and the same has been admitted on 08.06.2018 by framing the following substantial questions of law:-

"(1) Whether the first Appellate Court is right in relying on the contents of Ex.A.2 in the absence of any evidence on the side of the plaintiff to prove the contents, not considering the well established legal principles that mere marking of documents does not amount to proof of its contents?

(2) Whether the failure of the first Appellate Court in not considering the vital contradictions between the boundaries mentioned in the plaint schedule and in Ex.A.2 and whether in circumstances the first Appellate Court can pass a decree without an independent commissioner's report and plan which alone can show the lie and location of the property on ground?



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(3) When the defendants are in unlawful possession or enjoyment of part of the plaintiff's property, whether the mere suit for mandatory injunction is maintainable?"

11. Heard both sides and perused the material records in this Second Appeal.

12. The learned counsel for the appellants/defendants has submitted that the plaintiffs and the defendants are adjacent owners. The plaintiffs house is situated on the western side and the defendants house is situated on the eastern side. The plaintiffs have not properly described the dispute lane which is the suit property. The plaintiffs have not stated the survey number of the property. There are several discrepancies regarding the area, measurements and extent of property between Ex.A.1 - sketch and the plaint schedule property. The plaintiffs claim pathway in the defendants' property. The plaintiffs solely relied on an unregistered Ex.A.2 - Sale Deed, as property value mentioned below Rs.100/-, but it has to be seen whether Ex.A.2 is a true valid document and its contents were proved. Mere marking of 30 years old document will not prove its contents. As per Section 90 of



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the Evidence Act Court may presume only the execution of the document and it can not presume the contents were automatically proved. The plaintiffs have to prove the contents of the document. The plaintiffs being purchasers of the property under Ex.A.2, did not know anything about the contents, including measurement, width and the right and title of the vendors. As per Sections 101 to 104, the person relied on the document has to prove the same. For the pathway, no boundary is stated in the document. The plaintiffs admitted that the boundary stated in the plaint has been subsequently amended by filing amendment petition. The plaintiffs are not definite about the boundaries of the disputed lane in view of the earlier description of the plaint schedule and the subsequent amended description of the plaint schedule. In such circumstances, to prove the physical features of the suit property appointment of an advocate/commissioner is necessary. The plaintiffs have not taken any steps for getting advocate/commissioner's report as rightly observed by the trial Court. The plaintiffs admitted Ex.B.4 the sketch filed by the defendants. The plaintiffs have not filed any FMB sketch, revenue record. The plaintiffs' property is in S.No.2214/2V and the defendants property is in S.No.2214/2W and this has been admitted by the plaintiffs' side. The plaintiff's case is their own pathway, but they have



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not proved through acceptable evidence. The first plaintiff as PW1 clearly admitted that the suit is filed for grabbing the defendants' property and on the western side of the plaintiff's house there is 20 feet cement street. Even for the sake of argument, if the plaintiffs' case is admitted that the defendant is in unlawful possession of the property, then the plaintiff has to file a suit for declaration and recovery of possession and mere suit for mandatory injunction does not lie. The trial Court correctly appreciated the evidence of both sides and correctly dismissed the suit, whereas the first Appellate Court misconstrued the evidences and reversed the finding of the trial Court. Therefore, the Second Appeal may be allowed and the judgment of the first Appellate Court may be set aside and the trial Court judgment may be restored.

13. Per contra, the learned counsel for the respondents/plaintiffs contended that the suit property is only a pathway to reach the cement street. The first plaintiff's father purchased the suit pathway under Ex.A.2 - Sale Deed, which is of the year 1945 i.e., 30 years old document and hence, as per Section 61 of the Evidence Act, the contents of the document were also proved. The plaintiffs' case is only based on



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Ex.A.2 - Sale Deed, which itself spoke that 4 ½ feet pathway was conveyed along with the house site therein. There is no survey number during the year 1945. The plaintiffs' exhibits Ex.A.1 and Ex.A.2 were tallied with each other. Further, Ex.A.6 and Ex.A.7 - Photos proved the existence of suit property and obstructions made by the defendants and thus advocate/commissioner is not necessary. The suit is filed only for an injunction in respect of the suit property which may either be private or common pathway and hence the suit is maintainable. The first Appellate Court being the last facts findings Court has correctly appreciated the evidences adduced by the plaintiffs and correctly decreed the suit. Therefore, the Second Appeal may be dismissed.

14. On hearing both and on perusal of records, it is clear that the plaintiffs have amended the description of the property after filing of the suit and there is no mentioning of survey number of the suit pathway. The plaintiffs have only relied on Ex.A.2 - Sale Deed. On perusal of Ex.A2, it is clear that there is no survey number and there is no measurement mentioned for the suit property/pathway and that the plaintiffs have not established the exact extent and measurements of their house constructed as



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rightly observed by the trial Court. The plaintiffs have also admitted that there are some contradiction between Ex.A.1 - Rough Sketch and boundaries in the schedule property regarding pathway. Ex.A.2 may be of the year 1945, however, in that deed, there is no survey number mentioned and also no specific measurement given for the pathway. If the pathway is exclusively belonged to the plaintiffs then there is no acceptable oral evidence to substantiate the same let in by the plaintiffs side. The first plaintiff as P.W.1 has clearly admitted the sketch marked as Ex.B.4 by the defendants side. If the plaintiffs admits Ex.B.4 - Sketch, then it clearly proved the existence of another public cement pathway on the western side of the plaintiff's house. And it also proved the case of the defendants that the plaintiffs have their access to the public cement street.

15. When there is a dispute arose regarding the pathway that too without any survey number and specific measurements, then it has to be brought before the Court by appointing an advocate/commissioner. This was not done by the plaintiffs as rightly observed by the trial Court. Moreover, there is no FMB sketch or any revenue records marked or produced by the plaintiffs' side to show the existence of suit property as a pathway. Further,



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PW1, clearly admitted as follows:-

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“பிரதிவாதிகள் இவ்வழக்கில் தாக்கல் செய்யும் தோராய வரைபடத்தில் அமைந்துள்ளபடிதான் தாவா சொத்து அமைந்திருக்கிறது என்றால் சரிதான். பிரதிவாதிகளின் வீட்டிற்கு மேற்கு பக்கம் நடைபாதை இல்லை என்றால் சரிதான். பிரதிவாதி ச.எண்.2114/20பிள்யு வீடு கட்டி குடியிருந்து வருகிறார் என்றால் நாங்கள் அதை அனுபவிக்க வேண்டும் என்ற எண்ணத்தில் இவ்வழக்கை தாக்கல் செய்திருக்கிறோம் என்றால் சரிதான்.....”

From the above evidence, the first plaintiff has clearly admitted the defendants' side sketch and he tried to grab the defendants' property. In such facts and circumstances, the first Appellate Court has not considered the evidence of P.W.2 conjoined with Ex.A.1., Ex.A.2 and Ex.B.4 and committed factual error in reversing the findings of the trial Court, which warrants the interference.

16. Next, it is contended by the plaintiffs that the defendants encroached the pathway by erecting some pillar stones and other things. The plaintiffs further case is that the defendant is in unlawful possession of the property. If being so, then the plaintiffs necessarily have to file a suit for declaration and recovery of possession and mere suit for mandatory



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injunction does not lie as rightly argued by the defendants' side. There is no pleadings and proof to show the measurements and extent encroached by the defendant. The plaintiffs have not taken any steps for appointment of advocate/commissioner to establish their case. Mere Ex.P.6 and Ex.P.7 - Photos will not suffice to establish that the defendants encroached pathway and put up standing stone until the plaintiffs proves his title over the pathway. In this case, there is no material or evidence to show that the plaintiff has title over the pathway. As already stated supra, there are contradictions between the suit property and Ex.A.1 - Sketch and also Ex.B.4 - Sketch.

17. From the above facts and circumstances conjoined with evidences oral and documentary adduced in this case, the trial Court correctly passed the judgment and came to the correct findings and the same was interfered by the first Appellate Court by misconstrued the evidences adduced on both sides. Hence, the judgment of the first Appellate Court needs interference by this Court. The questions of law framed in this Second Appeal are answered in favour of the appellants/defendants and against the respondents/plaintiffs. Thus, this Second Appeal succeeds.



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18. In the result, the Second Appeal is allowed. The judgment and decree, dated 28.07.2017 made in A.S.No.19 of 2016 on the file of the Sub Court, Periyakulam, reversing the judgment and decree, dated 24.08.2016 in O.S.No.47 of 2012 on the file of the District Munsif Court, Periyakulam is set aside. The judgment and decree of the trial Court, dated 24.08.2016 passed in O.S.No.47 of 2012 is restored. The suit in O.S.No.47 of 2012 on the file of the District Munsif Court, Periyakulam is dismissed. No costs. Consequently connected Miscellaneous Petition is closed.

12.09.2024

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

To

- 1.The Sub Court,
Periyakulam.
- 2.The District Munsif Court,
Periyakulam.
- 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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