

(2003) 08 MAD CK 0016
In the Madras High Court
Case No : S.A. No. 891 of 1993

V. Palani Gounder and P. Ganapathy Gounder	APPELLANT
Vs	
K. Rangasamy Gounder	RESPONDENT

Date of Decision : 08-08-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2003) 08 MAD CK 0016

Hon'ble Judges : M. Thanikachalam, J

Bench : Single Bench

Advocate : S. Kadarkarai, for the Appellant; R. Mohan, for the Respondent

Final Decision : Dismissed

Judgement

M. Thanikachalam, J.—The defendants having resisted the suit, filed by the plaintiff for mandatory injunction, successfully before the trial

Court, failed before the first appellate Court and the result is the second appeal.

2. The plaintiff/respondent has filed a suit before the District Munsif, Kallakurichi, for mandatory injunction viz., for the removal of thatched shed,

as indicated in the plaint plan, contending that he had purchased the property described in the plaint, under a registered sale deed dated 14.3.60,

for which there was a pathway, that when there was an attempt to prevent the pathway by the defendants, he had filed a suit in O.S.No. 741/71,

on the file of the District Munsif Court, Kallakurichi, where a decree for permanent injunction was granted, that when the defendants disobeyed the

injunction order, contempt petition was filed, which was closed on the undertaking given by the defendants, that they will not disturb the possession

of the plaintiff, that despite the undertaking, they have encroached upon a portion and put up a thatched shed, which should be removed by an

order of mandatory injunction.

3. The appellants/defendants, who are the father and son, have opposed the suit for mandatory injunction, admitting that there is a pattai, in the

north and south direction, which is used by the plaintiff and the defendants as common, that they are in possession and enjoyment of their property

purchased under a registered sale deed dated 17.10.1959, constructing thatched cattle shed in the year 1960, which was renovated in June 1982,

denying other allegations, praying for the dismissal of the suit.

4. The learned District Munsif after full-fledged trial, came to the conclusion that the pathway is not in existence as claimed by the plaintiff, whereas

it comes in some other route, that the ex parte decree obtained by the plaintiff in O.S.No. 741/71, may not have any telling effect, that the plaintiff

having prepared a false sketch, filed the suit, failed to prove his right and in this view, he dismissed the suit on 13.8.1989.

5. The plaintiff questioned the dismissal of the suit before the Sub Court, Vridhachalam in A.S.No. 12/90 contending; that the trial Court has failed

to understand the previous suit, which cannot be questioned by the defendants, failed to appreciate the law as enunciated u/s 11 C.P.C., failed to

appreciate the evidence as well as the Commissioner Report in the previous suit, which are not seriously challenged, and in this view, since the trial

Court has rendered an erroneous finding against the evidence, as well as the law, the same is to be set aside and the suit is to be decreed.

Accepting the above case of the plaintiff, the learned Subordinate Judge allowed the appeal, decreed the suit, on 2.4.1993, which is impugned in

this second appeal.

6. This Court while admitting the second appeal formulated the following substantial questions of law for decision.

1. Whether the lower appellate court is correct in invoking the principle of res judicata without appreciating the facts of the present case as well as

the facts in the earlier case, namely, O.S.No. 741 of 1971?

2. Whether the suit without a prayer for declaration regarding the title to the property in question is maintainable in law?

7. Heard the learned the counsel for the appellants, Mr. S. Kadarakarai and the learned counsel for the respondent, Mr. Mohan, who have

elaborately argued about their case, with reference to the pleadings as well as

the evidence.

8. The plaintiff/respondent is the owner of an extent of 2 acres 51 "" cents, in Survey No. 242, out of an extent of 5 acre 3 cents, not disputed,

which is evidenced by Ex.A1 and spoken by P.W.1, not challenged. On the eastern side of this 2 acres 51 "" cents, the defendants are owning

property in the same survey number. According to the plaintiff, in order to reach the above said properties from Chinna Salem Kachrapalayam

Road, there is a pathway on the southern side of the defendants' property, which runs east-west, then turns towards north, in order to reach

Survey No. 223 also, where both the parties are owning lands. In the pathway claimed by the plaintiff, which is described as "RJKL" in the plaint

plan, it seems the defendants have put up a shed extending the existence shed or otherwise, which is also described in the plaint plan as "AB"

giving measurements. Because of this obstacle, it seems, the plaintiff is not having the channalised pathway to go to his property in Survey No. 223.

Therefore, he has filed this suit for mandatory injunction, for the removal of "AB" shed.

9. In the written statement, the appellants have admitted that there is a patta in the north-south direction and this patta must be "RJKL". They

have also admitted that the patta is common to both the plaintiff and defendants. It is not the case of the defendants, that this patta or common

pathway does not lead to Survey No. 223 on the north, whereas it ends on the south of shed. It is the further contention of the defendants, that

they have constructed a thatched cattle shed in the year 1960, probably, in the property purchased by them, under Ex.B1. Therefore, if the

thatched shed is within the property of Ex.B1 or in other words, it is outside the admitted common pathway i.e. on the east, then the plaintiff may

not have a case. On the other hand, if it is established that "AB" shed is in the common pathway, claimed by the plaintiff, admitted by the

defendants, then the defendants have no business to obstruct the pathway and in this view the plaintiff may be entitled to an order of mandatory

injunction.

10. In this suit, a Commissioner was appointed, who has inspected the premises, filed the sketch and report, which are exhibited as Exs.C2 and

C1 respectively. He has noted the pathway as "A, H, E, D" in Ex.C2, regarding

the disputed portion alone. He has also indicated that there is some other pathway, diverting from the admitted pathway probably to go to Survey No. 223. This pathway available on field, must be because of the fact that the defendants had put up thatched shed in the admitted common pathway. That would not automatically deprive the right of the plaintiff, if he had acquired and established or otherwise it is not extinguished. In the previous suit between the same parties, a Commissioner was appointed and he has also filed a report, and its certified copy is exhibited as Ex.C3. In Ex.A3 also, the disputed pathway in that suit is described as "GHRJKL". At that time, it seems there was no shed in the disputed pathway. Therefore, it should be presumed that only after the visit of the Commissioner, in O.S.No. 741/71, if at all, the defendants should have put up the thatched shed, as pleaded in this plaint and as indicated in the sketch as "AB".

11. The defendants in their written statement admitted the correctness of Ex.A3, which reads ""the defendants do admit the truth, validity and correctness of the report of the Commissioner and the measurements in O.S.No. 741/71"". Therefore, the contention of the learned counsel for the appellants, that up to "AH" alone (C2), there is common pathway and thereafter, there is no pathway leading to Survey No. 223, is an after thought, against the admitted facts as well against the evidence. Therefore, the contention, that the plaintiff has no right beyond "AH" towards north should be negated as did by the first appellate Court. The fact that there is another pathway because of the obstruction put up by the defendants, will not nullify the effect of the previous suit.

12. The first appellate Court has given a finding, that the finding in O.S.No. 741/71 operates as res judicata in this suit and therefore, the defendants are not entitled to question the pathway, which is the subject matter of the previous suit. But the learned counsel for the appellants would contend, that the present disputed portion in this suit, was not the subject matter in O.S.No. 741/71 and therefore, the question of extending the principles of res judicata would not arise for consideration, whereas the first appellate Court has committed an error.

13. The learned counsel for the respondent/plaintiff would contend, that the disputed portion in this suit also, was the subject matter of the previous

suit and the decree and judgment in that suit, though it is an ex-parte one, should operate against the defendants and in this view the findings

rendered by the first appellate Court, is perfectly valid under law. In this context, we have to see what was the subject matter of O.S.No. 741/71

and the parties there under.

14. The plaintiff in this suit filed a suit against the first appellant herein, and two others for declaration of his right to the suit pathway and for

permanent injunction in O.S.No. 741/71, giving the course of the pathway also, which is identified by the Commissioner, in that case, as seen from

Ex.A3. Palani Gounder is the father of Ganapathi Gounder and therefore, the finding rendered in that suit should be binding, on both the

defendants/appellants, in this case. As seen from the description of the property in that suit (vide Ex.A2), the subject matter was a pathway

measuring 12 ft. breadth about 400 ft. length, which was serving as access not only for Survey No. 240, but also for Survey No. 223. The said

property was identified by the Commissioner, as seen from Ex.A3, which is on the southern side of the defendants' admitted property, to certain

extent, then goes towards north in order to reach Survey No. 223, on the north.

15. As said above, in the written statement, the defendants have admitted the truth, validity and correctness of the report of the Commissioner and

the measurements. This admission as quoted supra, is not questioned as mistake of fact before me. Now, in our present suit, the disputed portion is

the pathway running north-south alone, which was the portion of the disputed property in O.S.No. 741/71. Hence, I find no difficulty in

concluding, that the same subject matter was the subject matter in O.S.No. 741/71. The said suit was decreed, whether exparte or otherwise, and

as on this date, not set aside or cancelled under the process known to law. Therefore, it should act against the defendants, and it is unfortunate that

the trial Court has not properly understood the scope of the decree and its effect.

16. It seems, the defendants have not obeyed the injunction order in O.S.No. 741/71, thereby compelling the decree holder to file execution

petition for its enforcement or punishment. In that execution petition, as seen from Ex.A4, accepting the correctness of the decree, the defendants,

including the first appellant, have given an undertaking that they will not disturb the possession of the plaintiff. In pursuance of the undertaking, that

E.P. was closed, thereby making it clear that the defendants knew the previous suit, its effect etc. Thus, having given an undertaking, that they will

not disturb the possession of the plaintiff, it seems they have extended the shed, under the guise of repair, blocking the pathway, which leads to

Survey No. 223 which they are not entitled to.

17. The first appellate Court, considering the principles of res judicata and how the previous decree operated against the appellants, have come to

an unerring conclusion in decreeing the suit, modifying the trial Court's verdict, which is based on not, only an acceptable evidence and correct

position of law.

18. It is not the case of the plaintiff that the right claimed by him, came to be recognized only in pursuance of the decree in O.S.No. 174/71, but it

is the case of the plaintiff, that this right was recognized at the time of the sales by the predecessors in title, including the plaintiff and the defendants.

Ex.A1 sale deed, under which the plaintiff had purchased the properties, clearly says that the plaintiff is entitled to Mamool pathway, which is also

reiterated to some extent in Ex.B1. Only on the basis of the document of title, when the suit was filed by the plaintiff previously, a decree was

granted and it seems the defendants also failed to contest the said case, because of their weakness. Thus, the appellants having allowed the

plaintiff, to get a decree for the common pathway, as said supra, are not entitled to prevent the same, by putting up a shed. Considering these facts

and the supportive evidence, as well as the law, the first appellate Court has granted a justifiable decree, which does warrant confirmation and not

disturbance.

19. The learned counsel for the appellants would contend, that proper issues were not framed and opportunities were not given to the parties, to

agitate their case properly, which should vitiate the findings of the first appellate Court. I am unable to persuade myself to accept the said

contention. On going through the pleadings, it is found, that the plaintiff has specifically stated about the previous suit, O.S.741/71 and the rights

declared therein. It is also further contended, that at the time of filing of E.P., an undertaking was given not to disturb the pathway. For these

pleadings, as seen from the written statement, there is no answer. It is not the case of the defendants, that the said finding in O.S.No. 741/71 is not

binding upon them or it will not operate against them. On the other hand, admitting the correctness of the previous suit and the correctness of the

Commissioner's Report, the written statement reads that the plaintiff is put to strict proof of the same, and nothing more. Therefore, the question of

framing issues, whether the defendants are estopped by the principles of res judicata had not arisen. However, an issue was framed whether the

decree in O.S.No. 741/71 will be binding upon the defendants.

20. Though the trial Court has failed to give a finding on the basis of the law, the appellate Court has given a finding, that the decision therein,

would operate as res judicata. Further, the parties were fully aware of their case and counter case and they went on trial for and against, adducing

evidence. Under these circumstances, the question of non-framing of issue, when finding is given understanding the facts, would not arise for

consideration, vitiating the judgment of the first appellate Court. The parties were not taken by surprise and they were fully aware of the previous

suit. In this view of the matter, the contention of the learned counsel for the appellants, that non framing of proper issues, should vitiate the

judgment of the first appellate Court, is unacceptable.

21. The adverse possession pleaded in the written statement and the construction of the shed from 1960 and its enjoyment, are all against the

reality, since the previous commissioner has not noted any shed in the disputed pathway. Because of the non existence of the shed over the

disputed pathway, an injunction was granted and when enforced, an undertaking was given. If really there was a shed, at least at the time of

execution proceedings, the defendants ought to have agitated the same stating, suppressing the existence of the shed, an order of injunction was

obtained, which could not be enforced. But it seems, as seen from Ex.A4, no such case was projected and candidly the defendants have admitted

the genuineness of the decree, giving an undertaking that they will not disturb, for the reasons best known to them, they have violated the

undertaking.

22. The plaintiff/respondent instead of moving the same court, filed the present suit for mandatory injunction and I am unable to find any

irregularity. It is also not mandatory, always that the suit should be filed for declaration followed by mandatory injunction. When the right is already

declared, no second declaration is necessary. The suit for bare mandatory injunction without a decree for declaration is also well maintainable. The

first appellate Court is correct, in invoking the principles of res judicata and the suit for mandatory injunction without prayer for declaration is well

maintainable. The first appellate Court, elaborately considering the facts and law, as well as the evidence, placing reliance on the reported decision

also, has come to an unerring conclusion while reversing the judgment and decree of the trial Court and I do not find any reason, much less valid

reason to disturb the said finding, since it is neither perverse nor against law. Hence, these points are answered accordingly.

In the result, the appeal is dismissed with costs.