

**Palanisamy Vs. Palanisamy**

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**SooperKanoon Citation :** [sooperkanoon.com/965407](http://sooperkanoon.com/965407)

**Court :** Chennai

**Decided On :** Mar-28-2013

**Judge :** G.Rajasuria

**Appellant :** Palanisamy

**Respondent :** Palanisamy

**Judgement :**

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

28. 03.2013 Coram: THE HONOURABLE MR.JUSTICE G. RAJASURIA  
S.A.No.258 of 2013 Palanisamy .. Appellant vs.

1. Palanisamy 2. Ammaiappan .. Respondents This second Appeal is focussed as against the judgment and decree dated 24.03.2010 passed by the learned Subordinate Judge, Namakkal in A.S.No.7 of 2005 in confirming the judgment and decree dated 29.11.2004 passed by the learned Principal District Munsif, Namakkal in O.S.No.365 of 2002. For appellant : Mr.C.Jagadish JUDGMENT This second appeal is focussed by D1, animadverting upon the judgment and decree dated 24.03.2010 passed by the learned Subordinate Judge, Namakkal in A.S.No.7 of 2005 in confirming the judgment and decree dated 29.11.2004 passed by the learned Principal District Munsif, Namakkal in O.S.No.365 of 2002.

2. The parties are referred to here under according to their litigative status and ranking before the trial Court.

3. A resume of facts, absolutely necessary and germane for the disposal of this Second Appeal would run thus: (a) The plaintiff filed the suit seeking the following reliefs: VERNACULAR (TAMIL) PORTION DELETED (extracted as such) on the main ground that the suit property described in the schedule of the plaint belongs to the plaintiff and that the defendants without any manner or right, high-handedly raised some construction and that should also be removed and that the right of the plaintiff has to be declared. (b) Per contra, D1 by way of challenging and impugning the averments/allegations in the plaint, filed the written statement, which was adopted by D2, a thumb nail sketch of the same would run thus: The suit property could only be used as a pathway by the plaintiff as per the sale deed Ex.A2 dated 01.10.1956 and he cannot claim absolute ownership over it. There was no encroachment in the suit property and there was no construction also raised in the said suit pathway and accordingly, they prayed for the dismissal of the suit. (c) The trial Court framed the relevant issues. (d) Up went the trial, during which the plaintiff examined himself as P.W.1 along with P.W2 and marked Exs.A1 to A3; and on the defendants' side D.1 and D-2 examined themselves as DW1 and DW2 along with DW3 and Exs.B1 to B6 were marked. The Advocate commissioner was examined as CW1 and Exs.C1 to C4 were marked.

4. Ultimately the trial Court decreed the suit partly to the effect that the plaintiff is having only the right of pathway over the suit property and that the constructions put up by the defendants' on that pathway should be removed.

5. Challenging and impugning the judgment and decree of the trial court, the defendants' preferred the appeal for nothing but to be dismissed by the first appellate court confirming the judgment and decree of the trial court.

6. Being aggrieved by and dissatisfied with the judgments and decrees of both the fora below, this second appeal has been filed by D1 on various grounds, suggesting the following substantial questions of law: (i) Whether the courts below are right in law in decreeing the suit, without properly appreciating the material evidences in this case viz., DW1, DW2 and DW3? (ii) Whether the courts below are right in law in giving the finding that there was an encroachment in the suit pathway solely based upon the report of the Advocate Commissioner, whose

report and plan is incomplete, who has not inspected the property with the assistance of the surveyor? (iii) Whether the courts below have rightly cast the burden of proof? (iv) Whether the courts below are right in granting the decree for mandatory injunction when the plaintiff has not produced any material evidence to show that there was encroachment in the suit pathway, particularly, when the defendants have categorically stated that there was no encroachment in the suit pathway? (extracted as such) 7. Heard the learned counsel for the appellant.

8. At the outset, I would like to fumigate my mind with the recent decision of the Hon'ble Court reported in 2012 (8) SCC 14.[Union of India v. Ibrahim Uddin and another]; an excerpt from it would run thus: "59. Section 100 CPC provides for a second appeal only on the substantial question of law. Generally, a second appeal does not lie on question of facts or of law. In SBI v. S.N.Goyal (2008) 8 SCC 92.this Court explained the terms "substantial question of law" and observed as under: (SCC p.103, para

13) "13.....The word "substantial" prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties .....any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law.....There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case." (emphasis added) 9. As such I would like to see as to whether any question of law or substantial question of law is involved in the matter.

10. The learned counsel for the appellant/ D-1 would submit that even though the trial court held that the plaintiff is having only the right of pathway, over the suit property and negated the claim of the plaintiff for the absolute ownership over the suit property yet the court unduly passed order to the effect that the wall

constructed has to be demolished ignoring that it was built as a security and safety measure. In fact, there was no encroachment also in the suit property.

11. A mere running of the eye over the judgment of the trial court would convey and portray, display and demonstrate that the trial court appointed an Advocate Commissioner to visit the suit property and measure it and note down the physical features and also to submit his plan. Even though, both sides filed objection to the Commissioner's report, yet DW1 during trial candidly and categorically accepted the correctness of the commissioner's report and the plan.

12. Accordingly, if viewed it is clear that as found by the trial court in the suit property to some extent, a wall was constructed. Whatever might be the purpose of the defendant in raising such construction, it should not be there in the admitted common pathway. Hence, the trial court correctly and appropriately ordered removal of it.

13. The trial court also adverted to the fact that based on the commissioner's report, which is an undeniable one that a compound wall was raised thereon just before the filing of the suit. As such, the court correctly ordered its removal.

14. Ubi jus ibi remedium - Where there is a right, there is a remedy and accordingly, if viewed, the defendants can have the right of their claim, if at all there is any right in their favour, but no such evidence has been produced. The plaintiff also made a tall claim in view of the encroachment made by the defendants' in the common pathway as though the plaintiff is the absolute owner of the suit pathway. The trial court, appropriately and appositely, correctly and legally au fait with law and au courant with facts held that the plaintiff is entitled to the right of pathway alone and no ownership could be claimed over that disputed area. The trial court also gave a finding that there were encroachments in that common pathway and ordered them to be removed. The first appellate court also confirmed the judgment and decree of the trial court, warranting no interference in this second appeal.

15. Hence, in these circumstances, I am of the considered view that no substantial question of law is involved in this matter for consideration and accordingly, this

second appeal is dismissed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed. vj2 To 1. The Subordinate Judge Namakkal 2. The Principal District Munsif Namakkal

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