



S.A.No.760 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.10.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.760 of 2023
and
C.M.P.No.24008 of 2023

R.Muthusamy

... Appellant

Vs.

R.Periyasamy

... Respondent

PRAYER: Second Appeal filed under Section 100 of C.P.C. to set aside the judgment and decree dated 19.11.2020 in A.S.No.61 of 2019 on the file of the Principal Subordinate Court, Namakkal confirming the judgment and decree dated 09.08.2019 in O.S.No.458 of 2014 on the file of the Additional District Munsif Court, Namakkal.

For appellant

: Mr.D.Shivakumaran

For respondent

: No appearance



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JUDGMENT

The unsuccessful defendant before the Courts below has filed this second appeal challenging the judgment and decree dated 19.11.2020 passed by the learned Principal Subordinate Judge, Namakkal in A.S.No.61 of 2019 in and by which the learned Judge has confirmed the judgment and decree dated 09.08.2019 passed by the learned Additional District Munsif in O.S.No.458 of 2014.

2. The facts which has given rise to the second appeal set out hereinbelow and the parties are referred to in the same ranking as before the Trial Court.

FACTS OF THE CASE:

3. The plaintiff has filed a suit in O.S.No.458 of 2014 for a declaration, permanent injunction and mandatory injunction. It is the case of the plaintiff that the property measuring an extent of 2.97 acres comprised in Survey No.78/2 of Thokkampalayam, Vallipuram Village, Namakkal Taluk belongs to him. The property was initially



an ancestral property of one Veerappa Gounder, son of Mankani alias Sellappa Gounder.

3.1. On 14.07.1972, the said Veerappa Gounder, his son Sellappan and grandson Arunachalam had entered into a registered partition deed, in and by which, the 'A' schedule property was allotted to Veerappa Gounder and the 'B' schedule property was allotted to Sellappan and his son Arunachalam. The property in Survey No.78/2, fell to the share of Veerappa Gounder. On 04.11.1992, the plaintiff had purchased the suit property from Veerappa Gounder, his wife and daughter Kanthimathi. Since the date of purchase, he has been in continuous possession and enjoyment of the said land. The revenue records have also been mutated in his name.

3.2. The defendant owns the land north to the plaintiff's land. The plaintiff would submit that they are in enjoyment of pathway described as X1 and X2 in the plan, lying adjacent to the western



boundary of the defendant's land. This pathway is used to reach the Y1 and Y2 pathway and from there to reach the Vallipuram to Thokkapalayam main road that was running north-south.

3.3. The plaintiff would contend that pathway X1 and X2 was in existence for over 69 years and the plaintiff and his predecessors were enjoying the same openly, continuously and uninterruptedly. The defendant and his predecessors are well aware of such use and the plaintiff's right of easement of the same. This pathway is 12 feet in width and 300 feet in length. The existence of this pathway is clearly mentioned in the partition deed entered into between Veerappa Gounder and his family.

3.4. Overlooking this right of the plaintiff, in the month of July 2013, the defendant and his family members had obliterated X1 and X2 pathway as a result of which, the plaintiff had no access to Y1 and Y2 pathway. Despite the request of the plaintiff to re-lay the pathway,



the defendant has not laid the pathway. On the contrary, the defendant's wife, on 15.06.2013, has filed a false complaint against the plaintiff and got registered an FIR. The plaintiff attempted to negotiate with the defedant, however, relaying of the pathway remained unsuccessful and therefore, the plaintiff has come forward with the suit in question.

3.5. The defendant, in response to this suit, has filed a written statement *inter alia* denying the allegations made by the plaintiff. He had denied the existence of the pathway and would submit that the cause of action pleaded is absolutely false. The defendant would submit that since the pathway was not in existence, there is no necessity to him to destroy it.

3.6. It is also the contention of the defendant, that the plaintiff and defendant are not in cordial terms and therefore, the question of plaintiff demanding restoration of cart track does not arise. Further, it



is also his contention that the suit was filed with a delay of 16 months after the incident in the month of July 2013.

TRIAL COURT:

4. The trial court has framed the following issues.

(a) Whether the plaintiff is entitled for declaration as prayed for?

(b) Whether the plaintiff is entitled for mandatory injunction as prayed for?

(c) Whether the plaintiff is entitled for permanent injunction?

(d) To what other relief the plaintiff is entitled?

5. The plaintiff had examined two witnesses and marked Exs.A1 to A6. Similarly, the defendant had examined two witnesses but had marked no documents. The Advocate Commissioner's report



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and plan had been marked as Exs.C1 and C2.

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6. The learned Judge, after considering the pleadings and the evidence on record, had proceeded to decree the suit as prayed for.

LOWER APPELLATE COURT:

7. Challenging the same, the defendant had filed an appeal in A.S.No. 61 of 2019 on the file of the Principal Subordinate Court, Namakkal. The learned Judge, by his judgment and decree dated 19.11.2020 was pleased to dismiss the appeal, aggrieved by which, the defendant is before this Court.

DISCUSSION:

8. The primary ground of challenge which has been raised in the grounds of appeal and during the argument of the learned counsel for the appellant is that both the Courts below have relied on the Exs.A1 and A2 and have come to the conclusion that there is a



pathway on the western boundary of the property, overlooking the fact that the defendant is not a party to this deed.

9. The learned counsel further submitted that the plaintiff has not been able to establish the fact that he was in enjoyment and possession of the pathway measuring 12 feet width and 300 feet in length. He would further submit that the plaintiff has not been able to establish the fact that the pathway has been obliterated.

10. Heard the learned counsel for the appellant.

11. A perusal of the judgments of the Courts below would show that Ex.A1- partition deed is executed as early as in the year 1972. The first item of the property in Ex.A1 is described as 'A' schedule which is the suit property. In Ex.A1, there is a reference to the pathway which reads as follows:

“மேற்படி சொத்துக்கு பாகக்கறாரில் கண்ட மாழில் தடநடை



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முதலானதும் மற்றும் சக்குபந்தியில் கண்டுள்ள படி

கொளந்தாகவுண்டரிடமிருந்து கிரையம் பெற்ற மேற்படி முத்துசாமி

கவுண்டர் நிறத்தின் மேல்புறம் மாமூலாய் உள்ள தென்வடல்

தடத்திலும் ஆட்கள் கால்நடைகள் வண்டி வாகனங்கள் போக வர

தடநடை பாத்தியம் உண்டு”.

12. It is this property that is conveyed to the plaintiff under Ex.A2. Further, in the complaint lodged by the defendant before Nallipalayam Police Station, it is stated by him that the plaintiff and other family members were attempting to widen the pathway running in the western boundary with the help of a JCB machine. This complaint would clinchingly prove the existence of the pathway to the east of the defendant's land.

13. Further, P.W.2, in his chief examination, admitted the existence of the pathway. However, the defendant has not cross-examined him and ultimately, on 03.02.2019, P.W.2 died without



being cross examined. P.W.2, in his chief examination, has deposed that there was a north-south pathway with the breadth of 12 feet in his land which has been used by the plaintiff and his predecessors to reach the Y1 and Y2 pathway. Therefore, these documents would prove the existence of the pathway described as X1 and X2 in the plaint plan and this, coupled with the defence that there is no pathway in existence, only goes to prove the fact that the defendant was keen on preventing the plaintiff from using the pathway.

14. From the year 1972, the plaintiff has been in enjoyment of the said property and the dispute has arisen only now, 20 years after the partition deed. The plaintiff had purchased the property in the year 1972 and even this document has reference to the pathway. Therefore, even the plaintiff has been using the pathway for over two decades and two years prior to the filing of this suit.

15. Further, the Advocate Commissioner's report clearly



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shows that during his second visit, soil has been dumped on the pathway, thereby, making it higher than the plaintiff's land. The report also mentions that Vathanarayan tree and Vathanarayan plants are found there. The Commissioner has clearly described the tree as live fence on the pathway.

16. Therefore, the Courts below have rightly decreed the suit and I see no reason to interfere with this concurrent judgment and decree. That apart, the plaintiff has not made out any question of law which requires the attention of this Court.

Accordingly, this second appeal is dismissed. Consequently, connected C.M.P. stands closed. Further, there shall be no order as to costs.

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Index : Yes/No
Speaking order/non-speaking order
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11/13



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To

1. The Principal Subordinate Judge,
Namakkal.

2. The Additional District Munsif,
Namakkal.

3. The Section Officer, V.R. Section, High Court, Madras.

P.T.ASHA, J.,

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