

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.01.2015

CORAM :

THE HON'BLE MS. JUSTICE K.B.K.VASUKI

Second Appeal No.1500 of 1998

Utharayanammal .. Appellant/Plaintiff

Vs

1.Sevatha Gounder
2.Pachaiammal
3.Manickammal

... Respondent/Defendants

Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 23.07.1998 made in A.S.No.61 of 1996 on the file of the Additional District Judge, Tiruvannamalai confirming the Judgment and Decree dated 21.08.1996 made in O.S.No.1191 of 1981 on the file of the Principal District Munsif, Thiruvannamalai.

For Appellant : M/s.V.Raghavachari.

For Respondents : M/s.N.Maninarayanan for R1 and R2
M/s.K.Balachandran for R3.

J U D G M E N T

The unsuccessful plaintiff is the appellant herein.

2.The plaintiff filed the suit for declaring her right to use the suit passage to reach Mariamman Koil Street on the north of the plaintiff's house described as DEFG in the suit schedule and in Ex.A2 Plaintiff plan measuring east west three feet, north south 100feet bounded by the road on the north, the house of the plaintiff and the defendants on the west, the house of the plaintiff and Muthugounder on the East and the plaintiff's house on the south. The plaintiff claims the right to use the disputed portion as passage on the strength of Ex.A1 sale deed executed by the defendants 1 & 2/husband and wife, in respect of the property in S.No.104/5 measuring East West and north south 36 feet each totally measuring 3 cents along with vacant site and right of pathway in 3x100feet passage situated on the East of the property belonging to the vendors.

3.The plaintiff's claim for easementary right over the suit passage and for permanent injunction restraining the defendants and their men from interfering with her right of using the same was seriously denied on the side of the contesting defendants

mainly by denying the right of pathway in the passage measuring 3x100feet, on the east of the defendants property. It is the case of the defendants that the disputed portion described as passage in the suit schedule is the vacant site forming part of the defendants property and the same is at no point of time conveyed to the plaintiff either under the document dated 09.01.1975 or after 09.01.1975.

4.Both the plaintiff and the defendants have in support of their respective contentions adduced oral and documentary evidence. The plaintiff examined herself as PW1 and the defendants examined themselves and their witnesses as DW1 to DW8 and Exs.A1 to A5 and Exs.B2 to B5 documents were marked on both sides and Ex.C1 and Ex.C2 were marked as Advocate Commissioner's Report and Advocate Commissioner Plan.

5.The trial Court on the basis of the available evidence admitted the claim of the plaintiff that one such right was mentioned in the sale deed dated 09.01.1975. However, the trial Court on the basis of the evidence of DW1, arrived at further conclusion that the same was included in the sale deed without the knowledge of the defendants who are illiterate and without reading out the relevant portion to the defendants. The trial Court further found that the plaintiff out of east west 100feet length of the passage converted 35feet for her personal use by putting up "mLg;g[& bey;bjhl;;o". The trial Court on the basis of the physical features available therein found that the plaintiff property was situated in such a manner that she has no necessity to use the suit passage as pathway and is hence disentitled to get any relief against the defendants. Aggrieved against the same, the plaintiff preferred AS.No.61 of 1996 and the lower Appellate Court also dismissed the suit on the ground that easementary right claimed by the plaintiff is only by way of necessity and the plaintiff having failed to establish the fact that she could not enjoy the property without the property of other, she is disentitled to claim the relief sought for therein. The lower appellate Court has found that the plaintiff having owned property on the east of the suit passage and on the south of the defendants 1 & 2 has access to reach Mariamman koil street and rice mill street on the south of the property belonging to the plaintiff and the plaintiff hence need not use the suit passage shown as DEFG and the claim for easmentary right of necessity is hence legally unsustainable. Hence, the second appeal by the plaintiff before this Court.

6.The Second Appeal is admitted on the following Substantial question of law :

(1)Whether the Courts below misread the evidence and failed to consider the materials on record to negative the relief of declaration of easmentary right and consequential relief of

permanent injunction as prayed for in para 9(1) of the plaint?

7. Heard the rival submissions made on both sides and perused the records.

8. The learned counsel for the plaintiff would argue before this court that, the easmentary right claimed is one by way of grant and not by way of necessity. The plaintiff has categorically claimed the relief as the person who purchased the passage under the sale deed and according to him the defendants having sold the land along with the right of pathway are estopped from objecting to the same as they are bound by the recitals of the sale deed. The reading of Ex.A1 sale deed would support such claim of the plaintiff that the property was purchased along with the right of pathway in the suit passage. Though the first defendant/vendor would deny the sale of right of pathway over the suit passage under Ex.A1 sale deed dated 09.01.1975 by saying that the recitals to that effect are included in the sale deed fraudulently without their consent and without reading it out to the defendants at the time of executing the sale deed, the same is not substantiated in the present case. The witnesses examined on the side of the defendants is only the attesting witness who having attested the signature of the parties to the document may not be the competent witness to speak about the actual recitals of the documents. The defendants failed to examine the document writer of the document in question, who is more competent to speak about the recitals contained in the same, both the courts below have erred in accepting the plea raised on the side of the defendants mainly on the basis of his own statement and such course adopted by the Courts below is hence legally unsustainable.

9. In my considered view, both the Courts below ought to have decided the issue relating to the sale of right of pathway over the suit passage in the light of the recitals to the document and also in the light of available oral evidence. Further, the cursory look at Ex.C1 report and Ex.C2 rough plan filed by the learned Advocate Commissioner would reveal that the right of pathway over the suit passage is available to the plaintiff to reach Mariamman koil street on the north of the plaintiff's property. The Advocate Commissioner has clearly stated in page 2 of his Ex.C1 report that the plaintiff uses the door way No.3 to reach Mariamman koil street through this passage. As rightly argued herein the finding of the courts below that the plaintiff has converted 35 feet out of 100 feet suit passage for her own use is not the case of the defendants. It is neither pleaded nor spoken by any of defence side witnesses in the witness box. Whereas the Courts below introduced a new case and by doing so, have gone out of the scope of the issue involved in the suit.

10.Be that as it may, as the easmentary right claimed by the plaintiff is one by way of grant, the courts below ought to have upheld the same on the strength of Ex.A1 sale deed and the findings of the Courts below to negative such right contrary to the recitals in the sale deed and the right conveyed under the same. In my considered view, is perverse and hence factually and legally unsustainable and the substantial question of law is accordingly answered in favour of the plaintiff. As a result, the judgment and decree of the Courts below warrants interference by this court to that effect.

11.In the result, the Second Appeal is allowed by setting aside the judgment and the decree of the courts below and by deciding the suit reliefs in respect of the suit DEFG passage as per Exs.C1 and C2 Advocate Commissioner report and plan. The Exs.C1 and C2 Advocate Commissioner report and plan shall form part of this decree. No costs.

Sd/-
Assistant Registrar (CCC)

True Copy

Sub Assistant Registrar

To

1. The Additional District Judge,
Tiruvannamalai.

2. The Principal District Munsif,
Tiruvannamalai.

+1cc to Mr.V.Raghavachari, Advocate sr.3467
+1cc to Mr.N.ManiNarayanan, Advocate sr.3335

Judgment in
S.A.No.1500 of 1998

sv[co]
srg 18/12/2015

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