

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.03.2015

Coram:

THE HONOURABLE Ms. JUSTICE K.B.K.VASUKI

S.A.No.1271 of 2009
and MP.No.1 of 2009
and
MP.NO.1 OF 2009

Swami Nithyanandham .. Appellant/1st
Respondent/1st defendant

vs.

1.Sadhanandam rep. by his
power agent Tamizharasan

2.Manuneechi Chozhan

3.Ramalingam

4.Sundarrajan .. Respondents/Appellants
& R2/ Plaintiff and
D3, D4, D2

Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 18.11.2009 made in A.S.No.36 of 2009 on the file of the Sub Court, Chidambaram reversing the judgment and decree dated 7.9.2009 made in O.S.No.87 of 2006 on the file of the Principal District Munsif court, Chidambaram.

For Appellant : Mr.N.Ramesh

For Respondents : Mr.S.Elambharathi for Mr.K.J.Rebello
-R1 and R3

Notice served, no representation-R2 & R4

JUDGMENT

The first defendant is the appellant herein. The present second appeal is filed against the judgment and decree of the lower appellate court reversing the judgment and decree of the trial court.

2.The suit was filed by the first respondent herein for declaring the suit pathway as common pathway for the use of the plaintiff and other owners of the properties situated in RS.No.77/1 to RS.No.77/5 and for consequential permanent injunction restraining the defendants 1 and 2 from in any manner interfering with the plaintiff's right of enjoyment of the suit pathway as common pathway by putting up any construction or fence in the suit common pathway. According to the plaintiff, the lands comprised in R.S.Nos.77/1 to 77/5 at Sethiathope village, Chidambaram Taluk, originally belonged to one Krishnasamy Raja and the original owner sold specific extent of land in R.S.Nos.77/1 to 77/4 and in R.S.Nos.77/4 and 77/5 and in R.S.Nos.77/1 to 77/3 to the defendants 2 to 4 respectively under three different sale deeds executed on the same date i.e., on 26.2.1986. The properties purchased by the defendants 2 to 4 are adjoining properties from west to east and the western boundary of these items is North South Road. The defendants in order to have access to their lands from North South Road, agreed to provide a common pathway in their respective lands and entered into an agreement on 5.3.1986, and agreed to set apart specific portion in their lands to form a pathway and to use it as common pathway by all the three land owners without any interference and without any right of alienation of the portion set apart as common pathway. While so, the defendants 3 and 4 sold their properties to different persons and the plaintiff was the latest purchaser of the property under the sale deed dated 24.7.2001. All the sale deeds executed by the defendants 3 and 4 refer to about the existence of pathway and the right to use it as common pathway. It is the further case of the plaintiff that the first defendant purchased the property from the second defendant and after his purchase, the first defendant started denying the right of the plaintiff to use it as common pathway and the first defendant is also likely to put up construction or fence in the portion of the common pathway, so as to deny access to the plaintiff and other purchasers.

3.The plaintiff's case was supported by the defendants 3 and 4 in their written statement. Whereas, the execution of the agreement and existence of common pathway and usage of the same and the defendants' right to continue to use the same as common pathway are seriously denied by the defendants 1 and 2 in their common written statement. According to the defendants 1 and 2, the agreement dated 5.3.1986 entered into between the parties for the purpose of common pathway is an unregistered one and the second defendant did not sign any such document and the so called agreement is a forged one and there was no necessity for the second defendant to have any common pathway as he had direct access to his land from the main road and the same is so far the 4th Defendant whose land is also abutting North South Road and the lands belonging to the defendants 3 and 4 have also alternative pathway. It is the further case of the defendants 1 and 2 that the plaintiff cannot claim any easementary right and no reference is also made about the common pathway in the sale deed

executed by the second defendant, as such, the sale deed executed by the defendants 3 and 4 is not binding on the 1st Defendant and no claim for easementary right is maintainable. It is the definite case of the defendants 1 and 2 that the 2nd defendant had been in possession and enjoyment of the entire property and the same was sold to the first defendant under registered sale deed for valuable consideration and it is now the first defendant, who has been in possession and enjoyment of the entire property sold to him.

4. During the pendency of the suit, the Advocate Commissioner was appointed to note down the physical features of the suit properties and the Advocate Commissioner filed his report along with plan and photos with negatives of the suit properties. The parties have, in support of their respective contentions, adduced oral and documentary evidence. The trial court, after duly analysing the entire evidence, arrived at the conclusion that the plaintiff failed to prove either the formation or existence of common pathway and enjoyment of the same by him and other owners as the only access to reach their lands and continuous enjoyment of the same for more than the statutory period as easementary right and accordingly dismissed the suit. Aggrieved against the same, the plaintiff and the defendants 3 and 4 filed AS.36/2009 before the Sub Court, Chidambaram. The lower appellate court reversed the findings of the trial court by holding that the existence of common pathway was duly proved through Ex.B9 agreement and Exs.C1 to C3 Advocate Commissioner's report, Plan and photographs and Exs.C4 to C7 additional documents received at the appellate stage would prove that the plaintiff has recently caused obstruction for enjoyment of common pathway by others and there is no alternative pathway to go to the lands belonging to the defendants 3 and 4 and the examination of the second defendant as DW7 without any permission under Order 18 Rule 3A CPC was not proper and no steps were taken on the defendants' side to disprove the signature found in Exs.B9 and B10 documents and the signature of the second defendant found in Exs.B9 and B10 documents and that of his signature found in his vakalat and in his deposition as DW7 and in Ex.B7 sale deed appear to be the same and the first defendant had no factual knowledge about the actual state of affairs on land in question prior to his purchase during 2005 and the plaintiff and the defendants 3 and 4 are hence entitled to use the suit pathway as common pathway. Aggrieved against the same, the first defendant is now before this court by way of present second appeal.

5. The second appeal is admitted on the following substantial questions of law:

1. Whether the lower appellate court is right in law in simply comparing the signatures of Exs.B9 and B10 with that of the vakalat and deposition without any scientific assistance which practice has been deprecated by various precedents of this Hon'ble Court and Apex Court and whether this has vitiated the judgment of the first Appellate court

reversing the well considered judgment of trial court?

2. Whether the lower appellate court has properly appreciated the law that no appeal or cross appeal could be filed against a finding when the ultimate result is in favour of the person who has succeeded in the suit?

3. Whether the lower appellate court is right in law, in allowing the plaintiff to plead a case of common pathway and easement right which are mutually contradictory and self-destructive not permissible in law?

4. Whether the lower appellate court has not even considered the fact that the best evidence has not been placed before the court by the plaintiff examining himself, because in this case, the plaintiff who has come to court with false case at the instigation of the defendants 3 and 4 has not chosen to enter into the witness box?

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

7. The parties are referred to in this appeal as per their rank in the suit.

8. The suit relief sought for is in respect of the common pathway which is according to the plaintiff situated in RS.Nos.77/1 to 77/5. It is not in dispute that the lands in R.S.Nos.77/1 to 77/5 originally belonged to one Krishnasamy Raja. The defendants 2 to 4 were the purchasers of the properties under three registered sale deeds dated 26.2.1986. The lands purchased by the second defendant are (i) 0.09 cents in RS.No.77/1 (ii) 0.14 cents in RS.No.77/2 (iii) 0.11 cents in RS.No.77/3 and (iv) 0.14 cents in R.S.No.77/4 totally 0.48 cents. The lands purchased by the third defendant are (i) 0.30 cents in R.S.No.77/4 (ii) 0.33 cents in R.S.No.77/5 totally 0.63 cents. The lands purchased by the fourth defendant are (i) 0.12 cents in R.S.No.77/1 (ii) 0.14 cents in R.S.No.77/2 and (iii) 0.13 cents in R.S.No.77/3 totally 0.39 cents. The suit common pathway according to the plaintiff, has been in existence in the lands purchased by the defendants 2 to 4 more fully described in the suit schedule and marked as A to C portions respectively in the plan attached to the plaint. The extent of the land in A to C portions, which is the subject matter of the suit relief is north-south 20 feet x east-west 240 feet in A portion belonging to the second defendant, north-south 20 feet x east-west 140 feet in B portion belonging to the third defendant and North-south 100 feet x east-west 20 feet in C portion belonging to the fourth defendant.

9. As per the plaint plan, the property shown as 'A' portion belonging to the second defendant is situated on the east of and abutting north south road; the property shown as 'C' portion belonging to the fourth defendant is also abutting and on the east of north south road and on the south of 'A' portion. The property shown as 'B' portion belonging to the third defendant is situated on the

further east of 'C' portion. It is pertinent to mention at this juncture that the defendants 3 and 4 are the brothers-in-law by relationship and the major part of the so called ABCD and EFGH common pathway is shown to be running through the property belonging to the second defendant. As already stated, the very execution of Ex.B9 agreement dated 5.3.1986 and the formation of and existence of common pathway are stoutly denied by the second defendant. The second defendant also stoutly denied his signature in Ex.B9. Whereas, the plaintiff and the defendants 3 and 4, who are the parties to the so called agreement, except examining themselves and examining the person, who was cited as witness of the disputed document, have not taken any steps to prove the signature of the second defendant scientifically through hand writing expert. Out of two documents Exs.B9 and B10, which are, according to the plaintiff and the defendants 3 and 4, relating to suit common pathway, no reference was made about Ex.B10 document either in the plaint or in the written statement filed by the defendants 3 and 4 and it is for the first time introduced through the evidence of DW6 Pandurangan purported to be the scribe of the document. In the absence of any pleading regarding the availability of one such document such as Ex.B10 document and regarding the circumstances under which the document came into existence on 6.10.1990 ie., 4 years after the execution of Ex.B9 document, no reliance can be placed on the same.

10.As far as Ex.B9 document is concerned, the trial court disbelieved the same on the basis of the defence raised in the written statement and on the failure of the plaintiff to take steps to prove the same scientifically. Whereas, the lower appellate court has believed the document by comparing the disputed signature in the same with that of the signature of the second defendant in the vakalat and in his deposition and also by reason of the failure of the second defendant to disprove the same. Such course adopted by the lower appellate court is in the following judgments of our High court held to be not correct procedure: (i)1999 (III) CTC 156 (Somasundaram v. Palani) (ii)2006 (2) CTC 201 (Pattabirama Reddiar and another v. Navaneetha Sundaram) and (iii)2008 (2) CTC 550 (M.Govindaraj v. Dr.V.Nallasivan). In all the cases above referred to, the learned brother judges of our High court by following the decisions of the Apex Court in (i)1979 (2) SCC 158 (State Delhi Administration v. Pali Ram) (ii)1992 (3) SCC 700 (State of Maharashtra v. Sukhdev Singh) and (iii)1996 (2) SCC 704 (O.Bharathan v. K.Sudhakaran and another) have categorically held that even though the court may have the power to compare the signature, such comparison is to be made with some admitted signatures of the defendant and the court cannot act as an expert and the comparison with the signature affixed in vakalath and written statement, which had come into existence after the dispute arose, was not in accordance with law. The Apex Court has in the judgments above cited, was of the clear view that it is not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two

agree with each other and the prudent course is to obtain the opinion and assistance of an expert. Applying the view of the Hon'ble Apex Court and our High Court, the procedure adopted by the lower appellate court and the findings rendered on the basis of the same regarding the genuineness of the signature found in the disputed document and execution of Ex.B9 document by the second defendant is legally and factually unsustainable.

11. Even assuming it to be true that Ex.B9 was truly executed, the same is only in the form of agreement for the purpose of formation of common pathway in the manner as agreed between the parties. However, no evidence was adduced on the side of the contesting parties to prove the formation of and existence of the common pathway and width, breadth and length of the same and the natural course of the same etc. Except saying that the same was situated in the specific extent shown in A to C portions in the plaint schedule, the course of the same is not satisfactorily established. The Advocate Commissioner's report and plan also do not tally with the suit schedule and plan appended to the plaint.

12. As a matter of fact, the plaintiff did not come into witness box to speak about his case and the person examined as PW1 is the one claiming himself to be the power agent of the plaintiff. Both the plaintiff who is the subsequent purchaser and his power agent cannot have any direct knowledge as to what transpired between the parties during 1986, as such, no reliance can be placed on the evidence of PW1. As far as the evidence of the defendants 3 and 4 as DW2 and DW3 are concerned, their evidence is not helpful to prove the events following the execution of Ex.B9 disputed document.

13. Further, the plaintiff and the defendants 3 and 4, who claimed their right to enjoy the common pathway on the strength of agreement between the parties, shifted their stand during trial and attempted to raise a plea of easementary right, which is mutually contradictory and inconsistent with the plaint averments. Even the claim for easementary right is also not maintainable by reason of existence of alternate pathway and the admission made by the defendants regarding discontinuance of enjoyment of the right of common pathway. PW1 has in the course of his cross examination clearly admitted that the residents in the house put up in the 'B' portion do not use the suit pathway as common pathway. The third defendant as DW3 has further admitted that the dispute regarding right to enjoy the suit pathway as common pathway arose 10 years back and if that is so, no easementary right is acquired by grant or prescription as per Section 15 of the Indian Easementary Act.

14. It is also to be noted at this juncture that no easementary right by way of necessity can be claimed, having regard to the location of the properties abutting the main road. As already stated, the lands belonging to the defendants 2 and 4 immediately abutting

north south road, have direct access and neither the second defendant nor the fourth defendant had any necessity to enter into agreement for using the disputed portion as common pathway. As far as the property belonging to the third defendant is concerned, there is alternate pathway and the third defendant being closely related to the fourth defendant, could have access through the land belonging to the fourth defendant and there is no necessity for the second defendant/vendor to enter into any agreement to have common pathway to give access to the property belonging to third party. Viewing from any angle, the claim of the plaintiff and the defendants 3 and 4 appears to be untenable. When the trial court after duly discussing all the aspects, rightly rejected the claim, the lower appellate court, on misconception of facts and law and on erroneous approach, reversed the same and the same warrants interference by this Court and the substantial questions of law are accordingly answered in favour of the appellant/first defendant.

15. In the result, the second appeal is allowed by setting aside the judgment and decree of the lower appellate court and by restoring the judgment and decree of the trial court. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

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To

1.The Subordinate Judge, Chidambaram.

2.The Principal District Munsif, Chidambaram.

3.The Section Officer, VR Section,
High Court, Madras

+1 cc to Mr.N.Ramesh Advocate sr.16134

+1 cc to Ms.K.J.Rebello Advocate sr.16112

SA.No.1271 of 2009

aa26/08/2015