

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.09.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.461 of 2008

1.Rajaraman
2.Devaki

... Appellants/Defendant

-Vs-

Subramaniyan

... Respondent/Plaintiff

Second Appeal filed under section 100 of C.P.C against the judgment and decree of the Subordinate Judges' Court at Chidambaram dated 25.09.2007 in A.S.No.47 of 2004 confirming the judgment and decree of the Additional District Munsif Court, Chidambaram dated 16.06.2004 in O.S.No.248 of 1999.

For Appellants : Mr.P.Valliappan

For Respondent : Mr.S.Baskaran

JUDGMENT

The defendants in the original suit are the appellants in the second appeal. Subramaniyan, the respondent herein filed O.S.No.248 of 1999 on the file of the Court of Additional District Munsif Court, Chidambaram, for a bare injunction against the appellants herein (defendants) restraining them from putting up any construction in the plaint 'B' schedule property and thereby obstructing the right of way claimed by the respondent herein/plaintiff to the plaint 'A' schedule property from the main road.

2. The learned trial Judge (Additional District Munsif, Chidambaram), accepted the case of the respondent herein/plaintiff and granted the relief as prayed for by a judgment and decree dated 16.06.2004. Aggrieved by and challenging the decree of the trial Court, the appellants herein

(defendants) preferred an appeal before the learned Sub-Judge, Chidambaram in A.S.No.47 of 2004. The learned lower appellate Judge, after hearing, concurred with the findings of the trial Court and dismissed the appeal by a judgment and decree dated 25.09.2007. It is as against the said decree of the lower appellate Court dated 25.09.2007 made in A.S.No.47 of 2004, the present second appeal came to be filed.

3. The second appeal was admitted on 03.12.2008 and the following questions were formulated as substantial questions of law involved in the second appeal:

a) When admittedly the respondent had neither produced any documentary evidence nor independent oral evidence to prove the alleged right over the 'B' Schedule property, whether the Courts below are correct in law in granting decree for permanent injunction?

b) Whether the Lower Appellate Court is justified in law in granting decree for permanent injunction in respect of the alleged easementary right claimed by the respondent by holding that the appellants had not claimed any exclusive right over the alleged road, especially when the appellants had claimed title over the suit property, which is not a road?

4. The arguments advanced by Mr.P.Valliappan, learned counsel for the appellants and by Mr.S.Baskaran, learned counsel for the respondent are heard. The judgments of the Courts below and the materials available on record sent for from the Courts below are also perused and taken into consideration.

5. There is no controversy over the fact that the property described in plaint 'A' Schedule, namely an extent of 0.02.5 Hectares comprised in R.S.No.79/10A in Keerapalayam Village, Bhuvanagiri Sub-Registration District, Chidambaram Registration District belongs to the respondent herein/plaintiff. It is also a fact not in dispute that the above said property of the respondent herein/plaintiff and the property of the appellants/defendants are facing the same direction, namely north. However, it is also an admitted fact that both the properties are not adjacent to each other and there are properties of other persons in-between. The area over which the respondent/plaintiff claims easementary right is stated to have been described in plaint 'B' schedule. Besides contending that the forefathers of the respondent herein/plaintiff were using 'B' schedule property to reach the main road from 'A' Schedule property, the respondent/plaintiff has also averred in the plaint that except 'B' schedule property, there is no way to have ingress and egress to 'A'

schedule property from the main road. A proper consideration of the above pleading will make it clear that the respondent herein / plaintiff not only claimed easementary right by way of prescription, but also claimed easement by way of necessity.

6. The suit was resisted by the appellants herein/defendants contending that an extent of 9 cents of land comprised in R.S.No.79/10 originally belonged to three brothers by names, Koothan, Anjapuli and Murugan and in a division, each one got three cents; that the plaintiff being one of the descendants of Koothan (grandson), was in enjoyment of the western three cents, whereas Anjapuli's descendant Murugesan was in enjoyment of the middle 3 cents and the descendants of the last brother Murugan, who were enjoying the eastern 3 cents, handed over possession of the same to Murugesan and that thus Murugesan became entitled to 6 cents, which formed the eastern 2/3rd portion, whereas the plaintiff was entitled to 3 cents which formed the western portion. It was contended further that in the neighbouring survey field, namely R.S.No.79/9, one Panneerselvam, brother of the first defendant was in possession of 6 cents and the 3 cents on the west of the said portion enjoyed by Panneerselvam was in the possession of the first appellant / first defendant; that beyond R.S.No.79/9, yet another land comprised in R.S.No.79/8 is there, which belonged to and was jointly enjoyed by Ranganayagi @ Dhanam Ammal, Rajarani and Gopalakrishnan; that the first defendant purchased the said property under a sale deed dated 16.06.1981 and that he removed the hut which existed therein and put up a RCC building with a portico portion in the frontage. It is the further contention of the appellants/defendants that the plaintiff's predecessors owned properties further east as well as north of their property described in plaint 'A' schedule and they had been using those properties to reach the main road, which lies on the north. It is their further contention that at no point of time, the respondent / plaintiff and his predecessors-in-title were using the portion, in which the defendants have put up the pillars for providing a portico, as an access to reach the main road. Based on the said pleadings, they pleaded for dismissal of the suit.

7. After issues were framed, the parties went for trial in which the plaintiff figured as the sole witness (PW1) on his side and produced Exs.A1 to A6. The first defendant Rajaraman figured as the sole witness (DW1) on the side of the appellants herein/defendants and they produced Exs.B1 to B5.

8. The learned trial Judge, after considering the evidence, relying on Ex.A5, xerox copy of the building plan allegedly obtained by the appellants herein/defendants and also making an observation that the appellants / defendants had not produced sufficient documentary evidence in respect of the 'B'

schedule property, arrived at the conclusion that the respondent/plaintiff was entitled to the relief in respect of the plaint 'B' schedule property. In the appeal filed before the lower appellate Court, additional documents were produced on both sides and they were marked as Exs.A7 to A9 and Exs.B6 and B7. The learned lower appellate Judge, relying on Ex.A8, the plan for R.S.No.79, in which the northern portions of S.Nos.79/8, 79/9 and 79/10 have been subdivided into 79/8A, 9A and 10A1 held that the portions thus sub-divided and assigned the sub-division numbers 8A, 9A and 10A of S.No.79 formed the road providing as an access for the respondent/plaintiff to reach the north-south road on the west which connects the east-west road running on the north. Since admittedly a portion of the property designated with the above said sub-division in S.No.79/8 was claimed to be part of the property of the appellants /defendants and pillars were put up to provide a portico in the southern part of S.No.79/8A, the learned lower appellate Judge chose to hold that the appellants/defendants did not have the right to do so, which would have the effect of depriving the respondent/plaintiff of his right of easement to reach the North-South road which connects the East - West Road running on the north. The learned lower appellate Judge also relied on Ex.A5 to arrive at such a conclusion.

9. However, Mr.P.Valliappan, the learned counsel for the appellants/defendants would contend that the sub-divisions shown in Ex.A8 came to be made without notice to the appellants and that no reliance could be made on Ex.A8 as the sub-division made was nullified in a suit in O.S.No.1208 of 2009 filed before the very same trial Court. However, copies of the judgment and decree made in the said suit have not been produced. But it is not disputed by the respondent/plaintiff that the sub-division was nullified by the Court in such a suit. Further contention raised by Mr.P.Valliappan, learned counsel for the appellant is that the Courts below have not properly appreciated Ex.A5 and the same led to a perverse finding that the road on the north of the properties of the parties in entirety comes within S.No.79 itself, whereas according to the appellants/defendants, the owners of the properties lying on the south and the owners of the properties lying on the north have left 8 links each making a total breadth of the street to be 16 links for the common use of the owners of the lands lying on both sides. It is the further contention of the learned counsel for the appellants that the said road occupies equal portions of sub-division numbers 8, 9, 10 on the South, and 2, 3 and 4 on the north. It is the further contention of the appellants that leaving the 8 links on the north to form half portion of the road, the appellants put up the pillars on the south of such road to provide a portico to their house and that the respondent/plaintiff, erroneously claiming easementary right entirely over the defendants' land leaving the portion left out

by the owners of the northern lands approached the Court with pleas of ambiguity.

10. Neither the respondent / plaintiff nor the appellants / defendants moved any application before the trial Court for appointment of a commissioner to note the physical features of the suit properties to find out whether there is any alternate access as claimed by the defendants or whether the 8 links forming the northern parts of sub-division Nos.8,9 and 10 and 8 links forming the southern parts of the sub-division Nos.2, 3 and 4 lies on the north of the pillars put up by the appellants/defendants. The exercise undertaken by the Courts below seems to have been an exercise of searching for a black cat in a dark room. The courts below have also failed to notice the fact that the sub-division effected was nullified in a suit filed by the appellants/defendants. Perhaps due to the failure on the part of the appellants/defendants to produce the documents relating to the said suit, the respondent/plaintiff has come forward with unclear pleadings regarding the portion in which he claims easement. In fact, plaint 'B' schedule property has been described as follows:

"Chidambaram RD: Bhuvanagiri SRD in Keerapalayam Village, R.S.No.79/8A, 79/9A1, 79/9B1 and 79/10A1 road measuring 0.30 cents with the following boundaries: To the west of Rice Mill Compound Wall; To the East of North-South Road; To the south of Arumugam, Muthaiyan, Dhanaopal huts; and to the North of Murugesan, Plaintiff Panneer, Rajagopal and Defendant's houses."

11. The description shows that the 'B' schedule property is bounded on the south not only by the defendants house, but also the houses of Murugesan, Panneer and one Rajagopal. When the respondent/plaintiff claims easementary right over the entire stretch of land, he ought to have made them parties or else he ought to have examined them as witnesses on his side to show that they did have no objection for using the portions corresponding to their property, as road. Under the said circumstances, the plaintiff has failed to make all the owners of the serveant tenements, over which he claims easementary right, as parties to the suit. Again, the contention raised by the appellants / defendants is that the total extent of S.No.79/10 is 9 cents, total extent of S.No.79/9 is 9 cents and the total extent of S.No.79/8 is 9 cents and that all the three subdivisions put together account for a total extent of 27 cents only. However, the respondent/plaintiff provided a description of 'B' schedule as forming part of the above said sub-divisions, but with a larger extent, namely 30 cents. The respondent/plaintiff has not provided proper description of the property, which is claimed to be the road through which he claims easementary right. Under the said circumstances, the

Courts below ought not to have decreed the suit as prayed for without the description of plaint 'B' schedule property being amended to show the exact portion over which the easement was claimed. It shall also be not in the interest of justice to grant the relief in favour of the plaintiff when the description is not proper, especially when the appellants/defendants claim that the road created over the portions left by the southern plot owners and the northern plot owners lies on the north of the pillars put up by the appellants / defendants. The defects have not been rectified by the respondent / plaintiff. Somehow or other, either without realizing the mistakes or showing adamancy in sticking on to the stand, the respondent/plaintiff seems to have proceeded with the case not only before the trial Court, but also before the lower appellate Court and in this Court.

12. Referring to Order VII Rule 7 CPC, the learned counsel for the respondent argued that though the plaintiff might have committed mistakes in seeking the reliefs, this Court can grant the relief using discretion. In support of his contention learned counsel cited the following judgments:

1. (2002) 1 Supreme Court Cases 90 [Rajendra Tiwary Vs. Basudeo Prasad and Another]
2. (2013) 9 Supreme Court Cases 1 [Darshan Gupta Vs. Radhika Gupta]
3. AIR 1962 Supreme Court 527 (1) [Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal]
4. AIR 1937 Privy Council 276 [Kunwar Rajendra Bahadur Singh Vs. Rai Rajeshwar Bali and Others]
5. AIR 1974 Rajasthan 73 [Kusum Chand and another Vs. Kanhaiyalal and another]

13. This Court paid its considerations to the views expressed in the said cases.

14. In Rajendra Tiwary's case, the Supreme Court held that the assistance of Order VII Rule 7 CPC cannot be sought for to go into the question of title of the parties in a suit for eviction under the Rent Control enactment and that the grant of lesser relief than the relief originally prayed for relying on Order VII Rule 7 CPC, will not get attracted to such a situation.

15. In Darshan Gupta Vs. Radhika Gupta, the Supreme Court relying on the special power given to it under Article 142 of the Constitution of India granted the relief on the grounds other than the grounds on which divorce was sought for. Hence, both the judgments are not relevant to the case on hand and in fact, they are not in support of the case of the respondent.

16. In Manohar Lal Chopra's case, the scope of the discretion to grant temporary injunction was discussed and hence, the same is not relevant to the case on hand.

17. The judgment of the Privy Council in Kunwar Rajendra Bahadur's case is also not relevant to the case on hand as it deals with the question whether there was any gross negligence in valuing the appeal and what shall be the effect of a mistaken advice given by a legal practitioners in the given facts and circumstances of a case to attract Section 5 of the Limitation Act. The same is also irrelevant for the purpose of deciding the case on hand. Similar is the nature of the decision made in Kusum Chand's case.

18. The contention of the learned counsel for the respondent is that though the respondent/plaintiff claimed easementary right over 30 cents of land, the Court can fix the course of the easement and grant the relief in respect of a lesser portion. Order VII Rule 7 reads as follows:

"7. Relief to be specifically stated

Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

What Order VII Rule 7 CPC states is that every plaint shall state specifically the relief claimed by the plaintiff either simply or in the alternative and that it shall not be necessary to ask for general relief which the Court may deem fit and proper under the facts and circumstances of the case. In fact, such a general relief has been sought for by the respondent/plaintiff in the plaint as Prayer No.(c). A person claiming easementary right cannot simply rely on the said part of Order VII Rule 7 and contend that though no prayer based on easement is claimed or though the course of easement over the other man's property is not clearly defined, he shall be entitled to such a relief relying on Order VII Rule 7 CPC.

19. A person claiming easement should precisely plead the property over which he claims easement. As the plaintiff has not done it, the plaintiff's case deserves to be rejected. The above said discussions will go to show that both the courts below wrongly cast the burden of proof on the appellants herein/defendants and basing on the weakness of the defence case, the suit came to be decreed, without even noticing the major flaw in the plaintiff's pleading regarding the portion over which the respondent/plaintiff claims easementary right.

Hence, both the substantial questions of law are bound to be answered in favour of the appellants, with the result that the second appeal shall succeed.

20. In the result, the second appeal is allowed. The judgment and decree of the trial Court, which shall stand confirmed by the lower appellate Court deserves to be set aside and the suit shall stand dismissed. However, there shall be no order as to costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

gpa
To

1. The Subordinate Court
Chidambaram

2. The Additional District Munsif Court
Chidambaram

copy to: The Section Officer,
VR Section High Court, Madras

+1 cc to Mr.P.Valliappan, Advocate sr.52505

+1 cc to Mr.S.Baskaran Advocate sr.52227

S.A.No.461 of 2008

aa27/10/2015

WEB COPY