

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED : 22.01.2015

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

SA.No.540 of 2008

and

MP.No.1 of 2008

Kavundiyanannan

.. appellant/1st Plaintiff

V.

- 1.Muthaiyee
- 2.Mottachi @ Elayammal
- 3.Karuppannagounder (deceased)
- 4.K.Shanmugam
- 5.Kavundiyanannagounder
- 6.Marppan
- 7.Nallammal
- 8.Marappan
- 9.Natesan
- 10.Jothi

.. Respondents 1 to 10/Respondents
2,4 to 12 & 13

- 11.Elayappan
- 12.Pavayee
- 13.Marayee
- 14.Muthulakshmi
- 15.Shanmugam

RR12 to 15 brought on record as LRs of the deceased R3

vide order of Court dated 05.11.2014 made in

MP.No.3 of 2014 in SA.No.540 of 2008.

.. respondents

Prayer : Second Appeal is filed under Section 100 CPC against the decree and judgment dated 16.11.2007 made in AS.No.340 of 2003 on the file of the Additional District Court/Fast Track Court, Namakkal, confirming the judgment and decree dated 31.10.2003 made in OS.No.12 of 1999 on the file of the District Munsif cum Judicial Magistrate, Paramathi (transferred as OS.No.1396 of 1986 District Munsif Court, Namakkal).

For appellant : Mr.N.Manokaran

For respondents : Mr.P.Mathivanan for R1, 2, 3, 4, 7
10 & 12 to 15

JUDGMENT

The unsuccessful plaintiff is the appellant herein.

2.The suit in OS.No.12 of 1999 arising out of which is the present second appeal is filed by the appellant/first plaintiff herein and the 11th respondent/second plaintiff for declaring the plaintiffs easementary right to enjoy 12feet width A B C suit passage running through the lands belonging to the defendants for taking men, materials and cattle and vehicles, such as, lorry and tractor to the lands belonging to the plaintiffs and for permanent injunction restraining the defendants from in any manner interfering with the enjoyment of such right by the plaintiffs.

3.It is the specific case of the plaintiffs that 12feet wide suit passage has been in existence for more than 60 years and the same is also shown in the village field map and the plaintiffs have been using the same to reach their property and to carry cattle and heavy vehicles i.e, lorry and tractor to their lands and they have been using the same openly and continuously without any interruption for more than the statutory period and as there is no other alternative passage, the right acquired by them is thus by way of necessity and by way of prescription.

4.The suit claim is seriously denied by the contesting defendants. The contesting defendants though admitted the existence of passage, denied the width, course and nature of use of the same and the right of the plaintiffs to use the same as access to their lands and to carry vehicles through the same. It is their specific case that the suit east west itteri is running through S.Nos.100/1 and 99/1, 100/2, 100/3 and 98/1 and only the defendants have the right of enjoyment of the passage and the same has been used only to carry cattle and width of the same, is not sufficient enough to take heavy vehicles like lorry and tractor and the same can be issued only upto S.No.100/3 and no cart track can be used thereafter.

5.The parties have in support of their respective contentions adduced oral and documentary evidence as PW1 to PW4 and DW1 witnesses and Exs.A1 to A8 and Exs.B1 to B4 documents. The trial court appointed an Advocate Commissioner to inspect the suit property and the Advocate Commissioner's report, plan and sketch were marked as Exs.C1 to C3 documents.

6.The trial court on the basis of the available evidence found that 8feet width cart track is in existence and that the same can be used only to carry men and cattle and not vehicles and the plaintiffs having no alternative pathway have been using the same for more than the statutory period, and acquired such right by way of easement of necessity and by way of prescription and the defendants have no right to interfere with the same. The trial court accordingly restricted the suit relief and decreed the suit. Aggrieved against the same,

the first plaintiff preferred AS.No.340 of 2003 and no appeal was preferred by the defendants against the restricted relief granted by the trial court, regarding the right of the plaintiffs to use the suit passage for carrying men, materials and cattle. The lower appellate court on the basis of the available records, agreed with the findings of the trial Court and confirmed the same and dismissed the appeal filed by the first plaintiff. Hence, this second appeal by the first plaintiff before this Court.

7.The second plaintiff did not join with the first plaintiff both before the first appellate Court and before this court and was hence arrayed as one of the respondents.

8.The Second Appeal is admitted on the following substantial questions of law :

(i)Whether the Courts below are correct in law in restricting the plaintiff's right to take only cattle and cart over the suit property after having recognised his right of easement by prescription, more so the present agricultural senario requires usage of mechanical implements for smooth and convenient enjoyment of the agricultural fields?

(ii)Whether the first appellate court has properly appreciated and applied the principles to find out as to whether the plaintiff has established his right over the suit property for seeking the relief of declaration and injunction especially when the defendant has not challenged the decree granted by the trial Court, and thereby he is estopped from defending the appeal on the ground of constructive resjudciata?

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

10.The relief sought for in the suit is in respect of the right to use the suit passage, which according to the plaintiffs is 12feet width cart track. Having regard to the width of the passage, the plaintiffs contend that they have been using the same to carry men, materials, cattle and heavy vehicles such as lorry and tractor for their agricultural purpose. It is not in dispute that no documentary evidence was produced on the side of the plaintiffs to prove the width, breath and length and course of the suit passage. It is only spoken by the witnesses examined on the side of the parties in the witness box. In order to ascertain the actual state of affairs of the suit property, the trial court appointed an Advocate Commissioner whose report along with two rough plans were received as Exs.C1 to C3 documents and no objection was filed for Exs.C1 to C3 by either of the parties. The trial Court having placed much reliance on Exs.C1 to C3 Advocate Commissioner's report and plan, found the passage to be 8feet width and sufficient enough only to carry men, materials, cattle and not heavy vehicles.

11. Such factual findings rendered by the trial court as confirmed by the lower appellate court in the light of the oral and documentary evidence and with supportive reasoning, cannot be found fault with. Though the plaintiff is bound to prove the material particulars regarding the passage in question, he having failed to adduce any satisfactory evidence, cannot be permitted to raise any grievance against the findings rendered by the courts below on the basis of the available materials. In my considered view, the plaintiff has in this appeal not made out any ground much less valid ground to interfere with the findings of the courts below and the substantial questions of law are hence answered against the plaintiff.

12. In the result, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed. Consequently, connected MP is closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

vsg/tsh

To

- 1.The Additional District Judge/Fast Track Court, Namakkal.
- 2.The District Munsif cum Judicial Magistrate, Paramathi.
- 3.The District Munsif, Namakkal.

+1 cc to M/s.N.Manokaran, Advocate, sr.3457

+1 cc to M/s.P.Mathinavanan, Advocate, sr.3334

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