

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 05.02.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.156 of 2013

Lizie Raj

.. Appellant/Plaintiff

-Vs-

1. Delilah Louis
2. Victoria

... Respondents/Defendants

SECOND APPEAL filed under Section 100 of Code of Civil Procedure against the judgment and decree dated 12.12.2011 in A.S.No.18 of 2011 on the file of the Subordinate Judge, The Nilgiris at Uthagamandalam, partly confirming the judgment and decree dated 28.4.2010 in O.S.No.50 of 2006 on the file of the District Munsif, Kothagiri.

For Appellant : Ms.AL.Gandhimathi

For 1st Respondent : Mr.V.Rajesh

For 2nd respondent : Mr.R.Subramanian
for Mr.C.Prakasam

J U D G M E N T

The plaintiff in O.S.No.50 of 2006 on the file of the learned District Munsif, Kothagiri is the appellant herein. The respondents are the defendants in the said suit. The plaintiff had filed the suit in respect of three schedules of properties, namely, 'A', 'B' and 'C' schedules. So far as the 'C' schedule property is concerned, the plaintiff had prayed for a decree to direct the defendants to remove the fence put up in the 'C' schedule property in front of 'A' and 'B' schedule properties and in respect of 'A' and 'B' schedule properties, the plaintiff had prayed for permanent injunction to restrain the defendants from in any manner interfering with her peaceful possession and enjoyment of the same. By decree and judgment dated 28.04.2010, the trial court dismissed the suit. As against the same, the appellant filed an appeal in A.S.No.18 of 2011 on the file of the learned Subordinate Judge, The Nilgiris at Uthagamandalam. The lower appellate court by decree and judgment dated 12.12.2011 reversed the decree and judgment of the lower appellate court in part, inasmuch as the lower appellate court granted decree for permanent injunction in respect of 'A' Schedule property alone and confirmed the decree and judgment of the trial

court in dismissing the suit in respect of 'B' and 'C' schedule properties. As against the said decree and judgment of the lower appellate court denying permanent injunction in respect of 'B' and 'C' schedule properties, the plaintiff is before this Court with this Second Appeal.

2. This Second Appeal, after repeated adjournments taken by the parties, has come up before me for admission. I have heard the learned Counsel for the appellant and the learned Counsel for the respondents. I have also perused the records carefully.

3. The case of the plaintiff is that the 'A' and 'B' schedule properties are her ancestral properties. So far as 'C' Schedule property is concerned, it is a common lane used by the plaintiff and other co-habitants of the said village for about 100 years and thus, so far as the 'C' schedule property is concerned, according to the plaintiff, she has got easementary right to use.

4. In the written statement, the 2nd defendant denied the title of the plaintiff in respect of 'A' and 'B' schedule properties and the 2nd defendant further pleaded that the 'C' schedule property absolutely belongs to her and her family members over which the plaintiff has got no right whatsoever.

5. Based on the same, the trial court framed appropriate issues. On the side of the plaintiff, 3 witnesses were examined and 10 documents were exhibited and on the side of the defendants, 1 witness was examined and 1 document was exhibited. The Advocate Commissioner's Warrant was marked as Ex.C.1 and his report and sketch were also marked as Ex.C.2 and Ex.C.3. Having considered the above pleadings and the evidence, the trial court dismissed the suit in its entirety. The lower appellate court found that so far as 'A' Schedule property is concerned, the 2nd defendant, who has been examined as D.W.2 has admitted in her cross-examination that the plaintiff is in possession of the said property. Accordingly, the lower appellate court has granted a decree for permanent injunction in respect of 'A' schedule property. So far as the 'B' Schedule property is concerned, the lower appellate court has found that none of the documents except Ex.A.10 mentions about the 'B' schedule property. Ex.A.10 is a family arrangement made on 26.07.1990 which does not bind the defendants. The lower appellate court, on appreciating these evidences on facts, found that the plaintiff is not in possession of 'B' Schedule property. So far as 'C' schedule property is concerned, absolutely, there is no document to show that the said property is a common pathway which is used by the plaintiff also.

6. In this appeal, the learned Counsel for the appellant would submit that so far as 'B' schedule property is concerned, the lower

appellate court ought to have relied on Ex.A.10 and on the admission made by D.W.1.

7. In my considered opinion, the lower appellate court was right in rejecting the said contention for the simple reason that Ex.A1 to Ex.A.9 do not relate to the 'B' schedule property at all. Ex.A.10 is a very recent document executed among the family members of the plaintiff which does not bind the defendants. Further, in support of the said document, there is no other document executed previously has been produced. Neither the patta nor any other document has been produced to show that the 'B' schedule property belongs to the plaintiff. Thus, the lower appellate court has rightly come to a conclusion that the plaintiff has failed to prove her possession over the 'B' schedule property. This is essentially a finding on facts. In this, there is no substantial question of law.

8. Now coming to the 'C' schedule property, it is brought to my notice that earlier the plaintiff filed a suit in O.S.No.30 of 2006 against the 1st defendant herein in respect of 'C' schedule property for the relief of declaration of her right to use the same as a pathway and for permanent injunction to restrain the 1st defendant herein from in any manner interfering with her right to use the same. That suit, after full trial, was dismissed by the trial court on 28.4.2010. On appeal against the same, the appeal in A.S.No.21 of 2010 was also dismissed. Thus, the prayer for declaration has been once for all denied in the said suit and therefore, in the present suit, so far as 'C' schedule property is concerned, the plaintiff cannot have the relief of injunction. This finding of the lower appellate court, in my considered opinion, is absolutely correct and therefore, I do not find any reason to interfere with the decree and judgment of the lower appellate court in respect of 'C' schedule property as well.

9. The learned Counsel for the appellant would, however, submit that as against the decree and judgment of the lower appellate court in A.S.No.21 of 2010, a review has been filed.

10. The learned Counsel for the respondents would submit that the review is only in respect of the court fee and not in respect of the merits of the decree and judgment in the appeal.

11. In my considered opinion, if the review is only in respect of the court fee, there cannot be any scope for the lower appellate court to go into the decree and judgment passed in A.S.No.21 of 2010. If the review is in respect of the merits of the decree and judgment in the appeal, then, the plaintiff will be at liberty to establish her right and get a decree for injunction. I only say that for the said review being disposed of, this judgment will not be a res judicata. Except making this clarification, this Court cannot grant any relief to the appellant. To repeat, I have to hold that there is

no substantial question of law involved in this Second Appeal warranting admission.

12. In the result, the Second Appeal fails and the same is accordingly dismissed. No costs.

Sd/-
Assistant Registrar
Dated:19.2.15

True Copy

Sub Assistant Registrar

To

- 1.The Subordinate Judge, The Nilgiris at Uthagamandalam
- 2.The District Munsif, Kothagiri.

+1 cc to Mrs.Al.Gandhimathi, Advocate,SR.6398

+1 cc to Mr.C.Prakasam, Advocate,SR.6295.

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krd 20/2

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