

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 18.12.2015

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.1069 of 2015 and
M.P.No.1 of 2015

1.Marudhayee
2.Perumal
3.Pappathi
4.Periyannan
5.Sumathi

.. Appellants

vs.

1.Kaliammal
2.Ramasamy
son of Mr.Periyasamy Gounder
3.Kalaimani
4.Pappayee(deceased)
5.Ramasamy
son of Karupannan(Impleaded as Lr of the
deceased R4 as per order dated 25/11/2015
in MP.No.2/11 in SA.SR.29369/09)

6.Periyannan

.. Respondents

Prayer:- This Second Appeal has been filed under Section 100 C.P.C., against the judgment and decree of the learned Subordinate Judge, Namakkal dated 27.06.2008 in A.S.No.27 of 2004 Confirming the decree & Judgment in O.S.No.218 of 1997 dated 02.04.2004 on the file of the learned Additional District Munsif, Namakkal.

For Appellants : Mr.Mukund

For RR1 to 3 : Mr.D.Shivakumaaran

For R.5 : Mr.Neethi Perumal

JUDGMENT

The appellants are the defendants 2 to 6 in the suit in O.S.No.218 of 1997 on the file of the learned Additional District Munsif, Namakkal. The respondents 1 to 3 herein are the plaintiffs in the suit and the other respondents are the other defendants in the suit. The plaintiffs filed the said suit for declaration that the plaintiffs have got right to enjoy the pathway in the property shown as ABCDEF in the rough plan

appended to the plaint and for consequential relief of injunction to restrain the defendants from in any manner interfering with the right of the plaintiffs to use the suit pathway. By decree and judgment dated 02.04.2004, the trial Court decreed the suit as prayed for. As against the same, the appellants filed an appeal in A.S.No.27 of 2004 on the file of the learned Subordinate Judge, Namakkal. By decree and judgment dated 27.06.2008, the First Appellate Court dismissed the appeal thereby confirming the decree and judgment of the trial Court. Challenging the same, the appellants/defendants 2 to 6 are before this Court with this second appeal.

2.This second appeal has come up today for admission. The respondents 1 to 3 have appeared through their learned counsel Mr.D.Shivakumaran and the fifth respondent has appeared through his learned counsel Mr.R.Neethi Perumal.

3.I have heard the learned counsel for the appellants; the learned counsel for the respondents 1 to 3 and the learned counsel for the fifth respondent and I have also perused the records carefully.

4.The case of the plaintiffs is as follows:-

The first plaintiff is the wife and the second plaintiff is the son and the third plaintiff is the daughter in law of one Mr.Periyasamy Gounder. According to the plaintiffs, the property comprised in S.No.156/1 measuring 1 acre 22 cents at Thathaiyangarpatti Village, Namakkal District, absolutely belongs to them. According to them, there is a pathway running South towards North mentioned as ABCDEF in the rough plan appended to the plaint. The breadth of the pathway is 12 feet. According to the plaint allegations, the said pathway lies between the properties belonging to the defendants and the property belonging to the plaintiffs comprised in S.No.156/1. It is the further case of the plaintiffs that they have got right to use the said pathway to reach their land comprised in S.No.156/1 and the said right is an easementary right by necessity and also by description. Since, the defendants attempted to prevent the plaintiffs from using the suit pathway, they filed the present suit.

5.In the written statement, the defendants disputed the existence of the pathway. According to them, there is no such pathway, as it is described in the plaint and the plaintiffs have got no right whatsoever to use the non-existent pathway.

6.Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiffs, three witnesses were examined and 10 documents were exhibited. On the side of the defendants, two witnesses were examined and one

document was exhibited. During trial, an Advocate Commissioner was appointed by the Court and whose report was marked as Ex.C.1 and his plan was marked as Ex.C.2.

7. Having considered all the above, the trial Court decreed the suit which was confirmed by the First Appellate Court. That is how the appellants are before this Court with this second appeal.

8. In this second appeal, the learned counsel for the appellants would submit that the Courts below were not right in granting the decree as prayed for when the existence of the pathway has not been proved at all by the plaintiffs. He would further submit that, absolutely, there is no evidence that there is any such pathway as mentioned as ABCDEF in between the property of the plaintiff and the defendants. He would further submit that even in the Commissioner's report, it is not in fact, mentioned that any pathway leading to the land of the plaintiffs.

9. From the above submissions, I find the following substantial questions of law involved in this second appeal:-

"(i) Whether the Courts below were right in granting the decree as prayed for though there is neither pleading nor evidence as to where lies exactly the alleged pathway mentioned as ABCDEF ?

(ii) Whether the Courts below were right in granting the decree accepting the plea of easementary right when there is no admission in the pleading by the plaintiffs that the defendants are the owners of the land over which the pathway allegedly lies ?

(iii) Whether the Courts below were right in granting the decree when the plaintiffs have not proved that they have either prescribed easementary right or they have a right of easement by necessity on the property mentioned as ABCDEF ?

(iv) Whether the Courts below were right in the matter of drafting the decree which is un-workable and in-executable for want of proper description of the property ?"

10. The learned counsel for the respondents 1 to 3 would submit that though, it is true that the decree has not been drafted by identifying the suit pathway with reference to the

survey number and other identifying features, on that ground, the well considered decree passed by the trial Court and confirmed by the First Appellate Court need not be interfered with.

11.The learned counsel for the respondents 1 to 3 would further submit that the existence of pathway has been mentioned even in the earlier documents under Exs.A.1 and A.2. The learned counsel would submit that there is no question of law at all involved in this matter and the Courts below have considered all the materials such as pleadings, evidence both oral as well as documentary evidence and have come to the conclusion that the plaintiffs have got easementary right over the suit property and therefore, according to the learned counsel, the second appeal deserves to be dismissed.

12.I have considered the above submissions.

13.At the outset, I wish to state that I am not satisfied with the way in which the pleadings have been made by either party before the trial Court. Based on the above pleadings, the Courts below ought not to have granted the decree as prayed for. First of all, in the plaint, there is no mention as to where does the suit pathway lie. There is no survey number of the suit pathway given. According to the plaint averments, the suit pathway namely ABCDEF lies between the properties of the plaintiffs comprised in S.No.156/1 and the and the properties of the defendants. It is not mentioned as to what are the properties which belonged to the defendants with reference to the survey numbers.

14.As per the plain reading of the plaint allegations, the suit pathway does not lie on the property of the defendants at all. The averment made in the plaint is that the suit pathway lies between the property of the plaintiffs and the properties of the defendants. If that is the way in which the pleading is to be understood, then, it is not explained to the Court as to who is the owner of the suit pathway. If it is the case of the plaintiffs that the suit pathway forms part of the property of the defendants, in the absence of any mention as to where does the suit pathway lie and what is the survey number, it is not understandable as to how a decree could be granted in favour of the plaintiffs.

15.The learned counsel for the respondents much relies on the Commissioner's report and the rough sketch. The Commissioner's report indicates that there is a pathway in Survey Nos.156/2, 157/8 and 157/9. In the Commissioner's report, the plaintiffs property has been shown as though, it lies in S.No.156/1E and the properties of the defendants lie in S.No.156/1F, 157/6, 157/9, 139/2A and 139/2B2. But, the pathway shown in red colour does not lead to the property of the

plaintiffs comprised in S.No.156/1F at all. Thus, in my considered view, going by the pleading, I should say that the pleading is highly insufficient to indicate the case of the plaintiffs. The description of the property made in the plaint is also not in accordance with the requirements of Order VII Rule 3 C.P.C. The decree of the trial Court and confirmed by the First Appellate Court states that the suit property is shown as ABCDEF in the rough plan. But, the said rough plan has not been appended to the decree at all. It is not explained to the Court as to how the rough plan can form part of the decree also. As a result, the decree of the trial Court is in-executable as the suit pathway cannot be identified on the ground at all. In view of the above factual position, I have to answer necessarily all the substantial questions of law against the respondents/plaintiffs.

16.The learned counsel for the respondents would submit that for the mistake committed while drafting the plaint, considering the fact that the plaintiffs are illiterates, they cannot be denied justice as they need to be given substantial justice. In other words, the learned counsel for the respondents would pray for remanding the matter to the trial court. So that, the plaintiffs can amend the plaint properly and proceed with the same further. I find every justification in the said submission.

17.I should say that drafting of pleading in a civil case is an art which requires minimum skill; which emanates from the legal knowledge of the learned counsel concerned. Here, in this case, unfortunately, the skill of the learned counsel is not reflected in the way in which the plaint has been drafted. Similarly, the written statement also has not been drafted properly so as to have an effective contest. For these mistakes committed, I don't want to deprive the parties of their rights to have an effective contest. In such view of the matter, I am inclined to remand the matter to the trial Court so that the plaintiffs could amend the plaint and the defendants could file additional written statement and then, the trial Court can proceed further to dispose of the suit afresh.

18.In the result, the second appeal is allowed and the decree and judgment of the trial Court and confirmed by the First Appellate Court is set aside and the suit in O.S.No.218 of 1997 is remanded back to the file of the learned Additional District Munsif, Namakkal, who shall permit the plaintiffs to amend the plaint and also permit the defendants to file additional written statement, if any, and also allow the parties to let in additional evidence both oral as well as documentary, if any, and then, dispose of the suit, in accordance with law. Based on the amendments made, the trial Court may frame

additional issues, if need be. At any rate, the above exercise shall be completed by the trial Court, within a period of six months from the date of receipt of a copy of this order. The parties are directed to co-operate with the trial Court for the disposal of the suit within the time as prescribed by this Court. There shall be no order as to cost. Consequently, connected miscellaneous petition is closed.

-s/d-

Assistant Registrar(CSIII)

True Copy

Sub-Assistant Registrar

jbm
To

1.The Subordinate Judge,
Namakkal.

2.The Additional District Munsif,
Namakkal.

copy to: The Section Officer,
V.R.Section, High Court, Madras

+1 cc to Mr.D.Shivakumaran, Advocate sr.68901

+1 cc to M/S.Sarvabhauman Associates sr.68354

S.A.No.1069 of 2015

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