

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23 - 06 - 2015

CORAM:

THE HON'BLE SMT. JUSTICE PUSHPA SATHYANARAYANA

S.A. No. 1560 of 2011

and

M.P. Nos. 1 of 2011 and 1 of 2014

Periyasamy ... Appellant/Defendant

Vs.

Ramasamy ... Respondent/Plaintiff

Appeal under Section 100 of the Civil Procedure Code, against the judgment and decree dated 29.06.2011 passed by the Subordinate Judge, Perambalur, in A.S. No. 34 of 2010 confirming the judgment and decree passed by the District Munsif, Perambalur, in O.S. No. 403 of 2004 on 30.01.2010.

For Appellant : Mr. C. Prabakaran

For Respondent : Mr. R. Selvakumar

JUDGMENT

Defendant, who suffered a decree in a suit for permanent injunction has projected the instant Appeal against the judgment and decree dated 29.06.2011 passed by the learned Subordinate Judge, Perambalur, in A.S. No. 34 of 2010 confirming the judgment and decree dated 30.01.2010 passed by the learned District Munsif, Perambalur, in O.S. No. 403 of 2004.

2. The plaintiff is the joint owner of the property along with one Ramasamy Nainar by virtue of sale deed dated 27.3.1975. Later in a partition dated 06.5.1999, the suit property in S.F. No. 240 was allotted to the share of plaintiff. According to the plaintiff, mutation in the revenue records has not been effected so far but the chitta for the suit property stands in his name and he has been paying kist. The case of the plaintiff is that the suit property is the only access to the plaintiff for his landed properties and if he is deprived of the usage of the same, he could not reach his lands and ultimately, he will be put to great loss. It is his further case that after the classification, the suit property became a grant and no one has any right to prevent him from using the same as an

access to his lands. The main averment of the plaintiff is that the defendant, who has no right in the suit property excepting to use the same as a common pathway, attempts to interfere with his peaceful possession and enjoyment of the suit property. Hence, the plaintiff filed the suit for permanent injunction.

3. Resisting the suit, the defendant filed written statement denying the allegations made by the plaintiff. He has stated that the appeal filed against the order of the Tahsilar, Kunnam, is pending before the Revenue Divisional Officer and sought for dismissal of the suit.

4. Before the trial Court, the plaintiff examined himself as P.W. 1 besides examining one Ramakkannu as P.W.2 and marked Exs. A.1 and A.11. To nullify the case of the plaintiff, the defendant examined himself as D.W.1 besides examining three more witnesses as D.W.2 to D.W.4 and marked documents Exs. B.1 and B.2. Commissioner's report and sketch were marked as Exs. C.1 and C.2. Ex. X.1 was marked as witness document.

5. The trial Court, on consideration of the evidence adduced by the parties and the submissions made by the learned counsels, by judgment dated 30.01.2010, having found that the plaintiff has established right over the suit property, decreed the suit for permanent injunction. Aggrieved by the same, the defendant preferred appeal in A.S. No. 34 of 2010 before the First Appellate Court / Subordinate Judge, Perambalur, and the same was dismissed confirming the judgment and decree of the trial Court. Feeling aggrieved, the defendant is before this Court with the present Second Appeal.

6. The point that arises for consideration in this Second Appeal is whether on the facts, the plaintiff ought to have filed a suit for declaration of title and injunction?

7. Heard the learned counsel appearing for the appellant and perused the records.

8. The suit property is a common pathway through which the plaintiff reaches his lands. In support of the same, the plaintiff had produced Ex. A.5 dated 31.03.2003 which is the proceedings before the Tahsildar, Kunnam, by which the suit property was classified as "Pothu Pathai". According to the plaintiff, the suit property is an easement by grant.

9. However, assailing the contention of the plaintiff, learned counsel appearing for the appellant / defendant contended that the proceedings of the Tahsildar are vitiated as the same has been obtained by fraud and in support of his contention, he produced Exs. B.1 and B.2. Ex. B.1 is the proceedings of the District Revenue Officer which is subsequent to the suit and the same cannot be considered.

10. It is significant to mention that the defendant / appellant has not pleaded in the written statement about his ownership over the suit property. The appellant contended further that the respondent / plaintiff had alienated pathway to reach his property through the water channel and that the plaintiff is taking advantage of the suit property to have easy access to his lands.

11. The defendant had claimed that the suit property was purchased by him for Rs.100/-. However, there is no registered document produced by him to prove the same. It is also not the case of the defendant that he got the suit land by way of assignment. Therefore, admittedly, the defendant / appellant is not the owner of the suit property and he has no right or title over the same. Curiously, during the course of examination, D.W.1 had admitted that east and west of the suit property belonged to him and if the suit property is attached to it, it would become a single plot.

12. The respondent / plaintiff has placed his reliance on Ex. A.8 which is a sale deed in the name of the wife of the defendant. In the boundary description of the said document, it is specifically mentioned that the suit property is a vacant natham property used as a pathway.

13. The Lower Appellate Court, being the final fact finding court, had considered the document Ex. X.1, resolution passed by the panchayat. The evidence of D.W.4 Deputy Tahsildar, who was examined at the instance of the defendant, also had deposed that the suit property was sub-divided as common pathway as per Ex. A.6. Therefore, when there is a common pathway available, the appellant / defendant cannot compel the respondent / plaintiff to use the alternate pathway contending that it is an easement of necessity. Therefore, it can be easily said that there is an implied grant of easement over the suit property for the plaintiff. The absence of express grant for an easement does not negative an implied grant. The implied grant has to be inferred from the attendant circumstances and other documentary evidence.

14. In the instant case, it is already seen that the disputed string of land is described as pathway in the documents and the evidence shows that the said strip of land was set apart by the revenue authorities as common passage for the usage of all including the respondent / plaintiff. The contention of the appellant / defendant that he has been using the suit property as a cattle shed will not take away the right of the plaintiff. Considering all these aspects, the trial Court has granted the decree in favour of the plaintiff and the same was confirmed by the First Appellate Court. I do not find any reason to differ from the concurrent finding rendered by the Courts below. The point is answered accordingly.

In fine, the Second Appeal fails and the same is dismissed confirming the concurrent finding of the Courts below. However, in the circumstances of the case, there shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

gri

s/d-

Assistant Registrar(CO)

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Sub-Assistant Registrar

To

1. The District Munsif
Perambalur
2. The Subordinate Judge
Perambalur
3. The Record Keeper
V.R. Section
High Court, Madras

+ 1 cc to Mr.R.Selvakumar, Advocate SR 31212

+ 1 cc to Mr.C.Prabakaran, Advocate SR 30623

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