

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 04.11.2016****PRONOUNCED ON : 11.11.2016****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN****S. A.No.216 of 2011**

1.Pachiammal

2.Vasantha

...

Appellants

Vs.

1.Madheswaran

2.Mageswari

...

Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 27.08.2010 made in A.S.No.10 of 2010 on the file of the Subordinate Judge, at Rasipuram, reversing the judgment and decree dated 26.11.2009 made in O.S.No.56 of 2007 on the file of the District Munsif Court, at Rasipuram.

For Appellants : Mr.R.Murali

For Respondent : Mr.P.Mathivanan

JUDGMENT

Challenge in this second appeal is made by the plaintiffs against the judgement and decree dated 27.08.2010 made in A.S.No.10/2010 on the file of the Subordinate Court, Rasipuram, reversing the judgment and decree dated 26.11.2009 made in O.S.No.56/2007 on the file of the District Munsif Court, Rasipuram.

2. The suit has been laid for permanent injunction.

3. The case of the plaintiffs in brief is as follows:

The suit property is a Village Natham land and it was purchased by one Sengoda Achari on 27.09.1941. The first plaintiff is the wife and the second plaintiff is the daughter of S.Kandasamy and S.Kandasamy is the son of Sengoda Achari and as such, after the demise of Sengoda Achari and S.Kandasamy, the suit property was inherited by the plaintiffs and patta was also granted to the plaintiffs in respect of the suit property and the plaintiffs are in possession and enjoyment of the suit property by paying necessary taxes, electricity charges, etc. As depicted in the plaint plan, there is a 16' pathway running south to North, on the east of the suit property and the plaintiffs and their predecessor in interest have been enjoying the above said common pathway to reach the suit property and the existence of common pathway is also shown in the title deeds. The common pathway is used by the plaintiffs and others to reach their respective properties. While so, the defendants unlawfully attempted to encroach into the common pathway and annex with their properties and also, obstructed the use of the common pathway by the plaintiffs and others. Hence, the plaintiffs have been necessitated to lay the suit for permanent injunction.

4. The case of the defendants in brief is as follows:

The suit is not maintainable either in law or on facts. It is false to state that the suit property belonged to the plaintiffs and their predecessor in interest Sengoda Achari under the sale deed dated 27.09.1941 and thereafter, the plaintiffs have been in possession and enjoyment of the suit property by receiving patta and paying house tax and electricity charges etc., The plaint plan is not correct. It is false to state that the plaintiffs and their predecessor in interest have been using the 16' pathway to reach their properties and for taking Cart, Vehicle, etc., from time immemorial. There is no such pathway existing on land. It is false to state that there is a common pathway of 16' that too to the east of the plaintiffs' property. The boundary recitals mentioned in the title deed of the plaintiffs is false. There is no mention of the pathway in the patta given to the plaintiffs. The property owned by the second defendant under the sale deed dated 03.02.2006 was allotted to Palanisamy Gounder under the partition deed dated 11.12.1972 and in that partition deed, it has been correctly mentioned that the properties allotted to Palanisamy Gounder are situated to the East of Appavu's house. The above said properties were purchased by Manickam under two sale deeds dated 13.03.2003 and in the said sale deeds, the first plaintiff's house and one Dhanam's house have been shown as the western boundary. The property situated to the west of the second defendant and to the

South of the plaintiffs, was originally owned by Dhanalakshi and her son Sivakumar under the exchange deed dated 27.09.1995 and the said property was sold to Manickam by them on 11.06.2003 and in the said sale deed also, it has been recited as situated to the West of lands owned by Palanisamy Gounder. Therefore, from the above said documents of title, it is evident that there is no pathway running to a width of 16' on the Eastern side of the suit property as alleged by the plaintiffs. The defendants have put up compound wall with hollow Bricks in between their properties and the plaintiffs' property to a height of 4' and the same has been in existence for more than 40 years. The plaintiffs, suppressing the true facts, have instituted the suit with false particulars, as if the pathway is in existence and that, it is a common pathway, hence, the suit is liable to be dismissed.

5. In support of the plaintiffs' case, PWs 1 and 2 were examined and Exs.A1 to 5 were marked. On the side of the Defendants' DWs1 and 2 were examined and Exs.B1 to B10 were marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to decree the suit as prayed for. Aggrieved over the same, the defendants preferred the first appeal and in the first appellate Court, an Advocate commissioner was appointed and he has filed his report

and plan and the same have been marked as Exs.C1 and C2. The first appellate Court, on a reappraisal of the evidence adduced by the respective parties and also based upon the report and Plan of the Commissioner, namely, Exs.C1 and C2, was pleased to set aside the judgment and decree of the trial Court and dismissed the suit laid by the plaintiffs. Challenging the same, the plaintiffs have come forward with the present second appeal.

7. The plaintiffs claim that there is a common pathway to the East of their property and only through that pathway, according to the plaintiffs, they and others are having access to their respective properties and inasmuch as the defendants, without any authority, attempted to interfere with the possession and enjoyment of the plaintiffs over the pathway, they have been necessitated to lay the suit. With reference to the claim of the pathway, the plaintiffs mainly rely upon the sale deed dated 27.09.1941. The sale deed is said to have been taken in the name of Sengoda Achari and thereafter, Kandasamy, who is the son Sengoda Achari and it is stated that the first plaintiff is the wife of Kandasamy and the Second plaintiff is the daughter of Kandasamy and therefore, according to the plaintiffs, after the death of Sengoda Achari and Kandasamy, the plaintiffs have inherited the suit property purchased under Ex.A1 and are using the common pathway situated to the East of the suit property.

8. It is not the case of the plaintiffs that they have purchased the suit property under Ex.A1. On the other hand, it appears that the plaintiffs have laid a claim over the alleged pathway, based upon the boundary recitals found in Ex.A1. In the sale deed marked as Ex.A1, while describing the property comprised therein, it is stated that it is situated to the West of North-South pathway. Based upon the boundary recitals, it appears that the plaintiffs claim usage in the pathway for reaching their property and it is stated to be a common pathway.

9. Per contra, according to the defendants, there is no pathway as alleged by the plaintiffs and the revenue records also does not indicate that any pathway is available on ground and according to the defendants, the property inclusive of the pathway portion belonged to the defendants and their predecessor in interest under various title deeds and therefore, according to the defendants, the plaintiffs, without any cause of action, have laid the suit.

10. As found earlier, the plaintiffs claim right over the alleged pathway, based upon the boundary recitals found in Ex.A1. However, the boundary recitals, as such, would not confer any title to the same on the plaintiffs. According to the plaintiffs, they have also been

granted patta in respect of the suit property. The defendants as such are not disputing the title of the plaintiffs in respect of the suit property. According to the defendants, there is no common pathway as pleaded by the plaintiffs to the East of their property purchased under Ex.A1. On the other hand, the alleged pathway portion absolutely belonged to the defendants.

11. To sustain the case of the plaintiffs, the plaintiffs have examined the Village Administrative Officer as PW2. The property purchased by the plaintiffs under Ex.A1 is stated to be situated in Survey No.50-3/42. Now, according to the evidence adduced by the respective parties, it could be seen that the pathway alleged to have been situated to the East of the plaintiffs' property is admitted to be situated in Survey No.50-3/43 and this could be seen from the Adangal copy, which has been marked as Ex.A5. As per the same, the land in survey No.50-3/43 belonged to one Palanisamy and in the said Adangal, the said land in the above said survey number is not stated to be a common pathway. Therefore, it could be seen that in the revenue records, the alleged pathway has not been shown as a common pathway and the same has also been admitted by the Village Administrative Officer examined as PW2. In this connection, PW2, in his evidence, has admitted that there is no pathway in Survey No.50-3/43 to reach the plaintiffs' house and as per the revenue plan, there

is no pathway to reach the plaintiffs' house and there is no pathway to the East of Survey No.50-3/42, the survey No.50-3/43 belonged to one Palanaisamy, prior to the second defendant Maheswari and Palanisamy was granted UDR patta and the person, who is awarded patta, is entitled to enjoy the same and only the patta holders are entitled to enjoy the property.

12. In this connection, even the trial Court has given a finding that the alleged pathway is situated only in Survey No.50-3/43 and that, the same is Grama Natham lands and only the patta holders are entitled to enjoy the Grama Natham properties. Therefore, it could be seen that as per the evidence of PW2, VAO and the Adangal marked as Ex.A5, as regards the portion comprised in survey No.50-3/43, it is only the second defendant, who is the patta holder and prior to the second defendant, one Palanisamy is the patta holder. It is therefore obvious, as seen from the evidence of PW2 and also the revenue records, boundary recitals in Ex.A1 have not been correctly given. When there is no pathway as such to the East of the plaintiffs' property in survey No.50-3/42, the case of the plaintiffs that the pathway is situated in survey No.50-3/43 and the same is situated to the East of their property comprised in Survey No.50-3/42 cannot be accepted in any manner.

13. On the other hand, it could be seen from the evidence, both oral and documentary, adduced by the defendants and as rightly found by the first appellate Court, particularly, based on Ex.B4, the property purchased by the second defendant under Ex.B4 is situated to the East of the plaintiffs' and Pachaiaammal's house and there is no North-South common pathway as pleaded by the plaintiffs and if the common pathway had been in existence, necessary recitals to that effect would have been incorporated in the boundary recitals of Ex.B4. The property purchased by the second defendant was originally owned by Palanisamy Gounder, who got the same under the partition deed dated 11.12.1972 marked as Ex.B1 and even in the said partition deed, there is no reference of the common pathway running South to North and the property situated to the West of survey No.50-3/43, is the house of one Appavu. Palanisamy Gounder had sold his property to Manickam under Ex.B3 and the patta issued in favour of Palanisamy has been marked as Ex.B6 and the patta transfer order in favour of the second defendant has been marked as Ex.B8 and a perusal of the above said documents also do not indicate about the existence of any common pathway. Therefore, the first appellate court, on an analysis of the evidence adduced by the parties concerned, has rightly found that there is no pathway in existence in Survey No.50-3/43 to the East of the plaintiffs' house and has rightly

found that the trial Court has erred in holding that such a pathway is in existence merely on the basis of the boundary recitals found in Ex.A1.

14. That apart, even as found by the first appellate court, the commissioner's report and plan marked as Exs.C1 and C2 also do not indicate that any pathway is situated in Survey No.50-3/43. On the other hand, it could be seen that in the said survey number, the defendants have put up a shed for cooking purpose on the Northern portion and that the same is in possession and enjoyment of the defendants.

15. In the light of the above discussion, it could be seen that when the plaintiffs have failed to establish that there is a common pathway to the East of their property purchased under Ex.A1 and when the Adangal extract Ex.A5 and the evidence adduced through PW2 viz., VAO, do not indicate that a common pathway is in existence in the Survey No.50-3/43 and on the other hand, when it is found that it is only the defendants and their predecessor in interest have been enjoying the property comprised in survey No.50-3/43 by claiming title through various deeds, as adverted to earlier, as rightly found by the first appellate court, the plaintiffs have laid the suit on an imaginary cause of action without any existence of pathway to the

East of their property as pleaded by them.

16. That apart, when the plaintiffs' case of usage of common pathway and the enjoyment of the same has been vehemently opposed by the defendants and when a cloud over the title of the plaintiffs claim has been pointed out by the defendants, it could be seen that the plaintiffs' suit simpliciter for injunction would not be proper. If really, the pathway has been in common usage of the plaintiffs and others as pleaded by the plaintiffs and if really, the defendants have no right or title to the same, as rightly argued by the defendants, the plaintiffs should have laid the suit for declaratory relief and incidental relief thereto. On the other hand, the plaintiffs have laid the suit simpliciter for injunction, which would not be sufficient, particularly, when there is cloud over the title of the plaintiffs in respect of the alleged pathway. In this connection, the defendants' counsel placed reliance upon the decision reported in **(2008) 4 Supreme Court Cases 594 (Anathula Sudhakar Vs. P.Buchi Reddy (Dead) by LRS. And others).**

In view of the afore stated reasons, I do not find any substantial question of law is involved in this second appeal. Accordingly, the second appeal is devoid of merits and the same is dismissed. No costs.

11.11.2016

Index : Yes/No

Internet : Yes/No
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To

1. The Subordinate Judge,
Rasipuram.
2. The District Munsif Court,
Rasipuram.

T.RAVINDRAN,J.

sms

Pre-delivery order in
S. A.No.216 of 2011

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