

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.11.2016

PRONOUNCED ON : 21.11.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.222 of 2011

&

M.P.No.1 of 2011

1.Kannammal
2.Chinnasamy Gounder
3.C.Subbarayan
4.C.Karthikeyan

... Appellants/Defendants 2 to 5

Vs.

1.P.Viswanathan
2.Tamilmani
3.Dhanalakshmi

... Respondents/Plaintiff/ 1st
Defendant

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 09.03.2010 passed in A.S.No.21 of 2006 on the file of the Principal Subordinate Court, Tharapuram, confirming the judgment and decree dated 20.09.2005 passed in O.S.No.252 of 2004 on the file of the District Munsiff Court, Kangeyam.

For Appellants : Mr.T.Murugamanickam
For Respondents : Mr.N.S.Sivakumar

J U D G M E N T

The defendants 2 to 5 have impugned the judgment and decree dated 09.03.2010 made in A.S.No.21 of 2006 on the file of the Subordinate Court, Tharapuram confirming the judgment and decree dated 20.09.2005 passed in O.S.No.252 of 2004 on the file of the District Munsiff Court, Kangeyam.

2.Suit for declaration and permanent injunction.

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

The suit track and the adjoining properties situated in Muthu Village Old S.No.773-C and resurvey No.416/4, originally belonged to one Angathal and Angathal sold the suit property and the property situated to the east of the same to the first

defendant under the Sale Deed dated 06.10.1980 and in the sale deed, it is recited that in the east-west track situated in Angathal properties southern boundary and in the north-south track situated to the west of the property. The first defendant is thus having right of access. Subsequently, the first defendant sold 6774 $\frac{1}{4}$ square feet vacant land purchased from Angathal situated on the western side of the property of the first defendant under the Sale Deed dated 13.07.1998 to the plaintiffs and after the purchase, the plaintiffs are enjoying the suit track, which is recited as usual track (mamool). The above mentioned sale deed and the suit cart track is shown as ABC in the plaint. Angathal had also sold on 06.10.1980 to the second defendant. The second defendant purchased the properties north and south of the property purchased by the plaintiffs and the second defendant is also enjoying the suit track to reach her lands. On 15.07.1998, the plaintiffs purchased the eastern portion of the portion from the first defendant and after the said purchase, the plaintiffs built houses within separate compound and enjoying the same. While the plaintiffs measured the western side of their property to put up construction, according to them, the defendants objected to the plaintiffs usage of the suit track and on perusal of the sale deeds, the plaintiffs came to know that the first defendant had also included some other track to the north of the plaintiffs land in their sale deeds, to which the first defendant herself did not have any right. Hence, the plaintiffs requested the first defendant to execute a suitable rectification document. However, the first defendant is dragging on the matter and now the defendants colluded together and causing interference to the usage of suit track by the plaintiffs. The plaintiffs have easementary right over the suit 'ABC' track as per the Sale Deed dated 13.07.1998. Hence, the suit.

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

The plaint plan is incorrect. In the sale deed of the plaintiffs, the suit track right of the plaintiffs is clearly spelled out and as per the same, the track runs towards west from Vellakovil-Muthur Main Road with 20 feet breadth which turns towards south and runs north-south with 15 feet breadth upto the plaintiffs northern boundary alone and the plaintiffs have fixed 15 feet breadth iron gate in their northern wall and prior to the filing of the suit the plaintiffs also blocked that track and now claiming right over the 20 feet breadth 'AB' cart track which was actually formed by the defendants 2 to 5 on the southern side of their properties for their own enjoyment. There is no BC track to the east of the fifth defendant's land. The plaintiffs have no right over the suit property. Under the Sale Deed dated 15.07.1998, the plaintiffs have been given a track right directly towards west of from Vellakovil-Muthur Main Road to reach 1955 $\frac{1}{4}$ square feet of land and the plaintiffs have also laid a concrete flooring in the northern side of their properties from east to

west to reach from western portion of vacant land and further facing Vellakovil-Muthur Main Road, the plaintiffs have fixed a 9 feet breadth iron gate and taking advantage of the words usual track(mamool track) averments in the sale deeds falsely claiming right over the suit cart track. Further, taking advantage of ex-parte orders of ad-interim injunction and also appointment of Advocate Commissioner, the plaintiffs' broke their western compound wall and fixed a gate to have access to the lands of the defendants and created a track like appearance. The plaintiffs have no right over the suit property and there is no 'BC' track on the field. The plaintiffs are not entitled to seek any easementary right as prayed for and hence the suit is liable to be dismissed.

5.In support of the plaintiffs case, PW1 & 2 were examined. Exs.A1 to 5 were marked. On the side of the defendants, DW1 to 3 were examined. Ex.B1 has been marked. Further, Ex.X1 to 3 and Ex.C1 and 2 were also marked. 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.

6.The defendants 2 to 5, preferred the first Appeal. However, the first Appellate Court also confirmed the judgment and decree of the trial Court. Challenging the same, the present Second Appeal has been laid.

7.The Second Appeal was admitted and the following substantial question of law is formulated for consideration in the Second Appeal.

(i)Whether the judgment of the Courts below are vitiated in that they have not qualified the right of the plaintiffs regarding the uses of the suit pathway, in the light of the fact, that their vendor has conveyed a larger right that what she obtained?

8.The plaintiffs claim easementary right by way of grant to the suit pathway. The plaintiffs have annexed a plan alongwith the plaint and a perusal of the plan would go to show that the plaintiffs are seeking the relief sought for in the plaint in respect of 'ABC' pathway depicted in the plaint plan. As regards the case of the plaintiffs with reference to the purchase of the properties from the first defendant under Ex.A3 and A4, the parties are not at issue. That the second defendant had purchased her property from Angathal under the Sale Deed marked as Ex.A5 is also not in dispute.

9.The original owner Angathal of all the lands in the area had conveyed the property to the first defendant under the Sale Deed marked as Ex.A2 and the same is also not in issue. The plaintiffs claim easementary right over the suit

pathway under the Sale Deeds marked as Ex.A3 & A4, particularly, under Ex.A3. A perusal of Ex.A3 would go to disclose the existence of the suit pathway as depicted in the plaint plan i.e., 'ABC' and it could therefore be seen that the plaintiffs have been given right over the suit 'ABC' pathway by their vendor under Ex.A3. That the plaintiffs vendor namely, the first defendant had acquired right over the suit 'ABC' pathway could also be gathered from the recitals found in Ex.A2, Sale Deed. Similarly, the right over the suit pathway being given to the second defendant could also be seen from the recitals found in Ex.A5. Thus according to the plaintiffs, they are claiming the right over the suit 'ABC' pathway by way of grant in particular under Ex.A3, Sale Deed.

10. During the course of arguments, the learned counsel for the defendants fairly conceded that as regards the pathway shown as 'AB' in the plaint plan, there is no dispute. It could therefore be seen that the existence of 'AB' pathway is not at issue. The only issue as regards the parties is with reference to 'BC' pathway. Now according to the defendants, 'BC' pathway is not in existence as claimed by the plaintiffs and the same has been created by the plaintiffs, after getting an exparte ad-interim injunction order and also order for the appointment of Advocate Commissioner and making use of the same, according to them, the plaintiffs have put up iron gates and also created a new pathway and thus it is alleged that the plaintiffs are not entitled to the 'BC' pathway as depicted in the plaint plan and further in as much as the 'BC' pathway is not in existence, the plaintiffs case should fail.

11. However, the Courts below have after analysing the evidence adduced by the parties and also the recitals found in their respective sale deeds with reference to the suit pathway over which the right had been conferred upon them, have come to the conclusion that the 'BC' pathway is in existence on the field.

12. As regards the above findings of the Courts below nothing has been pointed out by the learned counsel for the defendants to warrant any interference.

13. Therefore, the findings of the Courts below as to the existence of 'BC' pathway is found to be correct and to arrive at the said conclusion, it could be seen that the Courts below have analysed the evidence of the respective parties in the right perspective and come to the correct conclusion. As mentioned supra, the plaintiffs claim easementary right by way of grant to the suit 'ABC' pathway under Ex.A3.

14. Therefore, as seen earlier, though the plaintiffs' vendor, Dhanalakshmi had included the recitals about some

other pathway on the northern side in Ex.A3, in as much as according to the plaintiffs, they have not claimed right over the suit 'ABC' pathway as easement of necessity the existence or non existence of any other pathway for the plaintiffs, particularly, the other pathway mentioned as Ex.A3 does not require any consideration. The only focus that has to be given is whether the plaintiffs have right over the suit pathway to which they claim easementary right by way of grant under Ex.A3. The recitals found in Ex.A3 would clearly indicate that the plaintiffs have the right over the suit 'ABC' pathway and it has been mentioned that the plaintiffs are having track right over the 20 feet breadth east-west track, which runs towards south of Kannammal's land which is the usual track through which the plaintiffs shall take their vehicles and further the plaintiffs have also been given the right over the extended pathway to width of 15 feet on the western side of 6774 1/4th square feet running south-north up to the northern end being the usual track would clearly point out that as found by the Courts below, the plaintiffs have been given easementary right over the suit 'ABC' pathway under Ex.A3. Angathal had given the right to the plaintiffs predecessor, the first defendant namely Dhanalakshmi, under Ex.A2 and also given the right of usage of normal pathway to the second defendant under Ex.A5. Therefore, to say that plaintiffs cannot use the suit 'AB' pathway or to say that 'BC' pathway is not in existence and the same had been created by the plaintiffs' cannot be accepted.

15.It is also argued that under Ex.B1, the second defendant had been given the right over the property conveyed therein inclusive of 'BC' suit pathway and such being the position, the plaintiffs cannot have any easementary right over 'BC' pathway and the same gets extinguished by not using the same for a long period of over more than 20 years and accordingly, the plaintiffs should be non suited. However, when Angathal had already conveyed the pathway right to the first defendant under Ex.A2 and the second defendant under Ex.A5 and when the first defendant had subsequently conveyed the right over the pathway to the plaintiffs under Ex.A3, as rightly found by the Courts below, Angathal would not have any right to convey the 'BC' portion of the suit pathway absolutely under Ex.B1. Therefore, the contention that under Ex.B1, the property had been purchased inclusive of the 'BC' pathway has been rightly negated by the Courts below.

16.As regards the case of extinguishment, the Courts below have found that the plaintiffs have established that the pathway has been in existence and been put in use and in this connection PW2 has also deposed that while putting up electrical installations in the house of the plaintiffs he had egress and ingress to the plaintiffs property only through the suit pathway and when the document Ex.A3 denotes the existence and usage of the suit pathway, the contention of the

defendants that the pathway right claimed by the plaintiffs got extinguished under Ex.B1, as such cannot be readily accepted. Furthermore, the defendants in their written statement have not taken a plea that the easementary right of the plaintiffs got extinguished.

17.The only point that is finally urged by the defendants in this Second Appeal is that the plaintiffs under the guise of pathway right obtained by them under Ex.A3, would not be entitled to throw additional burden imposed on the owner of the servient tenement and in this connection, the decision reported in 2001 (4) CTC 193(K. Kolandaisami Gounder (died) and Another Vs. Manickam) was relied upon.

18.The plaintiffs as seen earlier claim easementary right by way of grant in respect of the suit pathway under Ex.A3. The plaintiffs have established their right. No evidence has been adduced to prove that the plaintiffs are making use of the suit 'ABC' pathway in a manner prejudicial to the interest of others or throwing additional burden by extending the width of the suit 'ABC' pathway or putting it to other use not granted to them under Ex.A3, Sale Deed.

19.In such circumstances, in the absence of any evidence pointing to the fact that the plaintiffs have thrown additional burden on the suit 'ABC' pathway either by altering the same or by making use of in any other manner other than what has been conferred to them under Ex.A3, it could be seen as rightly found by the lower Appellate Court, that the above decision would not be applicable to the facts and circumstances of the case on hand.

20.Apart from the above factors nothing has been pointed out to dislodge the findings of the Courts below with reference to the plaintiffs right and enjoyment of the suit 'ABC' pathway. It could be seen that the Courts below have in the right perspective, on analysing the evidence, held that the plaintiffs have established their right and usage of the suit pathway and accordingly granted the reliefs sought for by the plaintiffs.

21.At the end, the learned counsel for the defendants has failed to establish that substantial question of law is involved in this Second Appeal. The substantial question of law as put forth by him, has failed and is answered against the defendants and in favour of the plaintiffs. Resultantly, the Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Asst.Registrar (CO)

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To

1.The Sub Judge,
Tharapuram

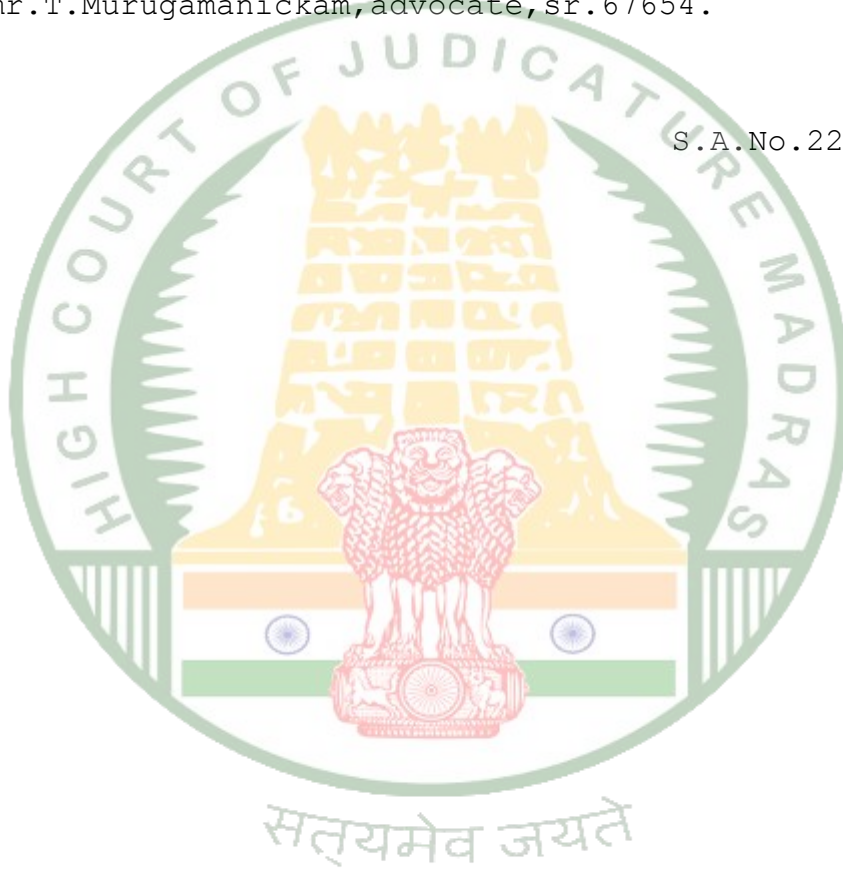
2.The District Munsif Court,
Kangeyam

+1 cc to mr.N.S.Sivakumar,advocate,sr.67233

+1 cc to mr.T.Murugamanickam,advocate,sr.67654.

rj (c0)
krd 3/1

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