

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.12.2016

PRONOUNCED ON : 08.12.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.437 of 2011

and

M.P.No.1 of 2011

Natesan ...Appellant / Respondent/ Plaintiff

Vs.

1. Arumugham

2. Unnamalai @ Kalaiselvi

3. Senthil ...Respondents/ Appellants/ Defendants

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 19.07.2010 made in A.S.No.17 of 2010 on the file of the I Additional Sub Court, Salem, reversing the judgment and decree dated 03.12.2008 made in O.S.No.977 of 2008 on the file of the II Additional District Munsif Court, Salem.

For Appellant : Mr.T.Murugamanickam

For Respondents : Mr. S.Parthasarathy
Senior Counsel
for Mr.J.Ramakrishnan

JUDGMENT

The plaintiff in this second appeal has challenged the judgment and decree dated 19.07.2010 made in A.S.No.17 of 2010 on the file of the First Additional Subordinate Court, Salem, reversing the judgment and decree dated 03.12.2008 made in O.S.No.977 of 2008 on the file of the Second Additional District Munsif Court, Salem.

2. The suit has been laid by the plaintiff for permanent injunction.

3. The second appeal has been admitted and the following substantial questions of law are formulated for consideration in this second appeal.

(a) Whether the judgment of the lower Appellate Court is vitiated in that it has given a finding about the right of access to the appellant's property, which was not in issue before the trial Court?

(b) Whether the lower Appellate Court has misinterpreted to hold, that the third respondent has a right of way over the suit property because it has been mentioned in Ex.B4, whereas no anterior documents of title to prove how such access was provided, have been filed?

4. The plaintiff's case is that the defendants, without authority of law, had interfered in his possession and enjoyment of the lane situated to the west of his property and the east of the defendants' property. Now, according to the plaintiff, he has purchased his property under the registered sale deed dated 15.03.1961 and the same has been marked as Ex.A1. A perusal of Ex.A1 would go to show that there is nothing contained therein to hold that the lane situated on the western side had also been conveyed to the plaintiff by his vendors. On the other hand, it could be seen that the vendors had retained the usage of the lane to themselves and the other sharers for having access to their respective properties. Therefore, it could be seen that the case of the plaintiff that he had acquired the right to use the suit lane under Ex.A1 as such cannot be accepted in any manner.

5. That apart, the plaintiff has not pleaded in the plaint as to what right, he has claimed over the suit lane, whether he is claiming right by way of easement by grant or easement of necessity or easement by prescription. All that he would state that is that the defendants should not prevent his enjoyment of the suit lane and therefore, he is entitled to seek the relief of permanent injunction sought for.

6. As rightly argued by the counsel for the respondents, the plaintiff has also not established that his predecessor in interest had right over the suit lane for the enjoyment of the property covered under Ex.A1. The parent documents to Ex.A1 have not been filed. On the other hand, as adverted to earlier, the vendors in Ex.A1 had retained the usage of the suit lane to themselves and the other sharers for having access to reach their respective properties. Therefore, the case of the

plaintiff that he had been conveyed right to use the suit lane under Ex.A1 cannot be accepted in any manner.

7. The defendants in the written statement have specifically pleaded that the plaintiff has no right whatsoever over the suit lane. According to the defendants, the suit lane is intended and meant only for the usage of the owners of the properties situated in survey Nos.79/13, 79/14A, B, C, D and 79/15. Now, according to the defendants, they had purchased their properties situated in survey Nos.79/14B and 79/14D under the sale deed dated 28.04.2005 along with the easementary right over the suit lane. Further, according to them, they had purchased the property in Survey Nos.79/13 and 79/15 under document Nos.1271/89 and 1168/90 respectively. In other words, according to the defendants, the suit lane is reserved exclusively for their use and not to the use of the plaintiff and therefore, the plaintiff is not entitled to claim any right whatsoever over the suit lane.

8. In this connection, a perusal of Ex.B4, the sale deed dated 28.04.2005, it could be seen that the defendants have also acquired the right over the suit lane for the purpose of having access to reach their respective properties. That such a right has also been acquired by their predecessor in interest under Ex.B3 could be seen from the recitals contained therein. Therefore, it could be seen that when no right as such had been conveyed to the plaintiff under Ex.A1 over the suit lane, it does not stand to reason as to on what basis the plaintiff is claiming right over the suit lane.

9. That apart, it is admitted that the suit lane is situated in survey No.79 where as Ex.A1 the title deed of the plaintiff pertains only to the property situated in survey No.70/16 and as found earlier, the right over the suit lane has not been conveyed to the plaintiff by his vendors under Ex.A1. Therefore, the case of the plaintiff is that he is entitled to have access through the suit lane to enjoy his property under Ex.A1 falls to the ground. On the other hand, it could be seen that without any legal entitlement, the plaintiff has also included survey No.79 in the description of the suit property. Therefore, as rightly argued by the respondents counsel, the description of suit property itself is incorrect and misleading. The parties coming to the court seeking for the necessary relief has to clearly describe the suit property to which, he seeks the suitable relief. On the other hand, when it is found that the plaintiff has not properly described the suit property as such, it could be seen that the description of the suit property, as rightly argued by the respondents counsel, is not only incorrect but also misleading.

10. Further, as rightly found by the first appellate court, the plaintiff examined as PW1 in his evidence has clearly admitted that he is having access to reach his property both on the northern side and on the southern side and therefore, it could be seen that the first appellate Court has also noted that the plaintiff had no necessity to use the suit lane for having access to reach his property. Similarly, from the evidence of PW3 also, it could be seen that the plaintiff is having access to reach his property through other ways. In such view of the matter, the plaintiff's contention that the suit lane is the only access for reaching his property and therefore, his right is not to be interfered by the defendants cannot be countenanced in any manner.

11. At the foremost, the plaintiff has to establish that he is having a legal right to claim right over the suit lane. When that fact itself has not been established, it could be seen that the plaintiff would not be entitled to seek any relief as regards the suit lane in question.

12. It is not the case of the plaintiff that the defendants are not having any right over the suit lane. It has been admitted that the defendants are having right over the suit lane as provided under the title deeds for having access to reach their respective properties. In such circumstances, when it is found that the plaintiff as such is not entitled to lay any legal claim or right over the suit lane and when it is found that the defendants are having right over the suit lane, as rightly argued by the respondents counsel, the trial court has erred in granting the relief sought for by the plaintiff as a charity without the plaintiff making any basis or foundation for seeking such a right over the suit lane. As found earlier, the defendants have vehemently denied the plaintiff's right or title over the suit lane whatsoever in their written statement. Despite the above stand of the defendants, the plaintiff has not come forward to seek the relief of declaration in respect of the suit lane and no proper explanation has been adduced for the same by the plaintiff. Therefore, it could be seen that as rightly argued by the respondents counsel, the plaintiff's suit simpliciter for permanent injunction without seeking the relief of declaration as such is not maintainable.

13. It is argued by the plaintiff's counsel that the lower appellate court has erred in holding that the plaintiff has no right of access over the suit lane, inasmuch as the plaintiff has laid only the suit for permanent injunction. On the other hand, as rightly argued by the respondents counsel, inasmuch as the plaintiff has pleaded the right of enjoyment of the suit lane on the basis of Ex.A1, incidentally, the lower appellate court also went into the question as to whether, at all, the

plaintiff has any right over the suit lane. Therefore, it could be seen that the approach of the lower appellate court in giving a finding as to whether at all the plaintiff is having a right of access to use the suit lane is not against the law.

14. It is also contended by the plaintiff's counsel that the defendants have not established their right over the suit lane other than marking Ex.B4 and therefore, the defendants' case should have been rejected by the lower appellate court and on the other hand, the lower appellate court should have confirmed the judgment of the trial court. The plaintiff has come forward with the suit seeking specific relief. Therefore, it could be seen that the burden of proof is upon the plaintiff to establish that he has a right to use the suit lane as pleaded in the plaint. When that has not been established in any manner and on the other hand, when it has been found that the defendants have right over the suit lane, it could be seen that merely because the defendants have not filed prior documents of title as such they would not be entitled to seek any right over the suit lane cannot be accepted.

15. The plaintiff has to fall or stand on the strength of his own case. He cannot be allowed to pick holes in the weakness of the defendants' case and thereby try to succeed in his case without making any foundation to uphold a legal right over the suit lane as claimed.

16. According to the plaintiff, the defendants and their men attempted to interfere with his possession and enjoyment of the suit lane on 01.09.2008 and therefore, he has been necessitated to lay the suit for permanent injunction. On the other hand, it could be seen that as the plaintiff had without any authority encroached into the suit lane and put up a compound wall, it could be seen that at that point of time, the defendants have moved the Revenue authorities for demarcating their properties and accordingly, it could be seen that the revenue authorities have also issued a notice to the plaintiff before surveying the properties in question and also found that the plaintiff has encroached into the suit lane without any entitlement. Further, the revenue authorities have also sought the assistance of police for carrying out their assignment during the survey. These could be seen from the Exhibits marked as Ex.B6 to 8. Further, as rightly found by the lower appellate court, the advocate commissioner also has noted that the plaintiff had encroached into the suit lane and put up a compound wall. Therefore, the plea of the plaintiff that the defendants are attempting to interfere with his usage of the suit lane and therefore, he had a cause of action to lay the suit as such cannot be accepted in any manner.

17. The plaintiff's counsel relied upon the decision reported in 2001 (3) CTC 641 (Sirajudeen (Died) and 7 others V. Sethu Chettiar and 6 others), the defendants' counsel relied upon the decision reported in 2012 (1) CTC 542 (Arulmigu Kothandaramasamy Koil Thirupuvanam, rep.by its Managing Trustee Jayaprakash Vs. Vairam and Ors.) and also, the decision of the High Court Madras dated 22.07.2015 rendered in second appeal No.2007 of 2003 (R.Appadurai Vs. T.K.Samikkannu). The Principles of Law enunciated in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

In conclusion, the substantial questions of law formulated for consideration in this second appeal are answered against the plaintiff/appellant and in favour of the defendants/respondents. Resultantly, the second appeal fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

sms

To

1. The I Additional Subordinate Judge
Salem.
2. The II Additional District Munsif
Salem.

1 cc to Mr.T. Murugamanickam, Advocate, sr. 72335

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