

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 18.11.2016****PRONOUNCED ON : 23.11.2016****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN****S. A.No.91 of 2011****and****M.P.No.1 of 2011**

S.Karimunnisha	...	Appellant
	Vs.	
C.Uthayakumar	...	Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 30.09.2010 in A.S.No.72 of 2010 on the file of the Sub-Court, Poonamallee, reversing the judgement and decree dated 14.07.2010 in O.S.No.12 of 2008 on the file of the Additional District Munsif Court, Poonamallee.

For Appellants : Mr.D.Bharath Chakravarthy
For M/s.Sai, Bharath & Ilan

For Respondent : No appearance

JUDGMENT

The defendant has, in this second appeal, impugned the judgment and decree dated 30.09.2010 passed in A.S.No.72 of 2010 on the file of the Sub Court, Poonamallee, reversing the judgment and the decree dated 14.07.2010 passed in O.S.No.12 of 2008 on the file of the Additional District Munsif Court, Poonamallee.

2. The Suit has been laid for permanent Injunction.

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

The suit property originally was owned and possessed by G.Parasurama Naicker under the sale deed dated 07.02.1962. The said G.Parasurama Naicker, after purchase, has plotted out the area and sold to various purchasers and the plaintiff has purchased the plot No.3 to an extent of 0.3 acres (2992 sq.ft) under the registered sale deed dated 15.04.1987 and pursuant to the same, the plaintiff has been in possession and enjoyment of the suit property. The plaintiff has also applied for the building plan approval from the CMDA for construction of a pucca building and obtained necessary approval. The suit property has been assessed to the taxes by Municipal authorities and that, the plaintiff has paid tax and electricity charges. Thus the plaintiff is in possession and enjoyment of the suit property. The defendant is residing nearer to the suit property and she does not have any right, title or interest over the suit property. The defendant, without any authority, has been obstructing the plaintiff from using the 20' public road as an easementary right of way, which was duly approved by CMDA and Avadi Municipality and as the defendant's attempts persisted and the plaintiff, in order to use the pathway peacefully, has been necessitated to lay the suit for permanent injunction against the defendant.

4. The case of the defendant, in brief, is as follows;

The suit is not maintainable either in law or on facts. The defendant is also one of the purchasers in the layout bearing plot No.6A. There is no such 20' road used by the plaintiff as pleaded in the plaint. It is false to state that the defendant is obstructing the usage of 20' road by the plaintiff as an easementary pathway. The plaintiff, with the help of his henchmen, attempted to create a pathway to reach his house through the defendant plot, which was resisted by the defendant. Hence, there is no cause of action to lay the suit and the suit is liable to be dismissed.

5. In support of the plaintiff's case, PWs 1 and 2 were examined and Exs.A1 to A13 were marked. On the side of the defendant's, DWs1 to 5 were examined and Exs.B1 to 3 were marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to dismiss the suit. The plaintiff preferred the first appeal and the first appellate court, on a reappraisal of the evidence, was pleased to allow the appeal and decreed the suit as prayed for. Challenging the same, the defendant has preferred the second appeal.

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

1. Whether or not first appellate court erred in decreeing suit in the absence of any proof and merely on the basis of presumptions unsupported by any material on record? And

2. Whether the lower appellate Court can substitute its own opinion as against the considered judgment of the Trial Court and reverse the findings and judgment in the absence of any material?

8. The plaintiff has purchased his property under the sale deed dated 15.04.1987 and the same is not in dispute. The plaintiff is claiming right over the 20' road stated to be situated on the north of the property purchased by him under Ex.A2. The original owner of the plots is G.Parasurama Naicker and the same is also not in dispute. The copy of the sale deed in favour of G.Parasurama Naicker has been marked as Ex.A1. A reading of Ex.A2 would go to show that the plaintiff property is bounded on the north by the 20' road situated in

survey 263/1. In this connection, the plaintiff examined as PW1 has admitted that survey No.263/2A has been divided into 6 plots and there is no plan with reference to the division of the area in survey No.263/2A into 6 plots and it is correct to state that the boundary recitals of the property purchased by him under Ex.A2 and that given in the plaint are different and he has not filed any FMB or any other records to show that the B Schedule pathway is an existence and he does not know, in which survey number, B schedule property is situated and he does not know, the survey number and the extent of the property purchased by the defendant. Therefore, from the above evidence of PW1, the plaintiff, it could be seen that the property description has not been correctly given in the plaint, in particular, the property described as " B " Schedule property. Now, the plaintiff claims pathway right described in the "B" schedule property. To show that the pathway described under the "B" schedule property, as such is in existence, it has been admitted that there is no FMB Sketch or other records.

9. Now, according to the plaintiff, to substantiate that the pathway described in "B" schedule property is in existence, he relies on Ex.A13 sale deed and Ex.A4 building plan approval given by CMDA and Avadi Municipality. Ex.A13 is a copy of the sale deed executed in favour of the one Shanthi Gamesam, with reference to plot No.1 of the

suit survey number. The purchaser of Ex.A13 has not been examined. It has not been explained by the plaintiff as to how 20' northern public road has been mentioned in Ex.A13. It is not the case of the plaintiff that he has contributed any portion of the property purchased by him under Ex.A2 for the formation of the pathway described in the "B" schedule property.

10. The trial Court has, on an analysis of the evidence of the Town Planning Inspector of Avadi Municipality, examined as DW2 and the Town surveyor of Avadi Municipality, examined as DW3 found that they are unable to substantiate the existence of "B" Schedule property, the suit pathway as pleaded by the plaintiff. In this connection, it is found that DW3, in his evidence has admitted that Ex.A2 shows that the properties comprised therein are surrounded on all four sides by other survey numbers and on pointing to the same, when it was questioned, DW2 only stated that in such circumstances, the officials would inspect the properties and show the pathway in the documents. Therefore, as rightly found by the trial Court, DW2, in particular, is unable to explain as to how the road could have been formed in the survey numbers of other property owners as depicted in Ex.A4 plan. Similarly, DW3 also, in his evidence has admitted that in Ex.A2 there is no reference about the pathway on the northern side of the property, but in the plan Ex.A4, there is reference about the

pathway on the northern side of the property. However, admitted that in the official plan, there is no reference about the pathway. Therefore, it could be seen that DW3 is also unable to say as to how come the pathway has been depicted in Ex.A4 plan. DW4 is the licensed surveyor, who, in his evidence, has also admitted that he cannot say as to how the municipality had approved the plan Ex.A4. When there is no reference about the pathway in the property purchased by the plaintiff under Ex.A2, therefore, as rightly found by the trial court, the officials of Avadi Municipality are unable to substantiate as to how under Ex.A4 plan the pathway has come to be depicted or shown. Other than Ex.A4, there is no other document to establish that the suit pathway is in existence and has been in use by the plaintiff to have access to his property purchased under Ex.A2.

11. As rightly found by the trial Court, when it has not been explained or established by the plaintiff that the purchasers of the plots in suit survey number had contributed any land for the formation of the common passage to have access to their respective plots and when Ex.A2, the title deed of the plaintiff does not indicate any right over the suit pathway to the plaintiff and when the plaintiff's property is shown to be surrounded by other survey numbers on all the sides, it does not stand to reason as to how come the suit pathway has been shown to be in existence or depicted in Ex.A4 building plan. As found

earlier, the plaintiff has not examined the title holder of Ex.A13 to show as to how come the pathway has been described in the said sale deed.

12. The lower appellate court, as rightly argued by the appellant's counsel, has based its findings merely on assumptions and surmises. A reading of the lower appellate court's judgement would go to show that it had assumed that while forming layout, it is usual to earmark certain space for passage and accordingly, held that the suit pathway described in the "B" schedule property would have been created and earmarked for the usage of the respective plot holders and so reasoning, it has decreed the suit filed by the plaintiff. However, when the plaintiff has not established the existence of the suit pathway as such on the north side of his property and when the title deed does not depict such a pathway on the north side of the property and when Exs.A4 and 13 on which reliance has been placed by the plaintiff have also not been established as reflecting the true state of affairs, when the officials of Avadi Municipality are unable to give a clear picture as to how come the pathway came to be depicted in the building plan marked as Ex.A4, it could be seen that the lower appellate court's judgement cannot be sustained in any manner.

13. As rightly argued by the appellant counsel, the lower appellate Court has reversed the well considered judgment of the trial Court based upon surmises and assumptions and on its own opinion, without any material to support the same.

14. In conclusion, it could be seen that the substantial questions of law formulated in this second appeal are answered in favour of the appellant and against the respondent.

At the end, the judgment and decree dated 30.09.2010 passed in A.S.No.72 of 2010 on the file of the Sub Court, Poonamallee are set aside and the Judgment and decree dated 14.07.2010 passed in O.S.No.12 of 2008 on the file of the Additional District Munsif Court are confirmed and accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

23.11.2016

Index : Yes/No
Internet: Yes/No
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To

1. The Sub-Court, Poonamallee.

2. The Additional District Munsif Court, Poonamallee.

T.RAVINDRAN,J.

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Pre-delivery order in
S. A.No.91 of 2011
and
M.P.No.1 of 2011

23.11.2016

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