

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.03.2017

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

Second Appeal No.177 of 2017 and
C.M.P.No.3679 of 2017

Gunasekaran ...APPELLANT/PLAINTIFF

vs.

1. A.Ahisanullah

2. Mumtaj

... RESPONDENTS/DEFENDANTS

Appeal filed under Section 100 C.P.C., against the judgment and decree of the Subordinate Judge and Appellate Authority of The Nilgiris at Udhagamandalam, dated 09.02.2012 in A.S.No.39 of 2011 confirming the Judgment and Decree of the District Munsif of Udhagamandalam dated 31.01.2011 in O.S.No.134 of 2003.

For Appellant : Mr.V.Nicholas

JUDGMENT

The plaintiff, who lost before the Courts below is the appellant.

2. The appellant/plaintiff filed O.S.No. 134 of 2003 on the file of the District Munsif, Udhagamandalam against the defendants praying for originally for permanent injunction restraining the defendants from interfering with the use of common pathway measuring 6 feet running from North to South on the Eastern side of the defendants' property and more particularly delineated and marked in the rough sketch in blue colour and subsequently, amended the prayer for mandatory injunction directing the defendants to remove and put up across the common foot path and also for a consequential permanent injunction, restraining the defendants, their men, agents, servants or anybody from blocking or interfering in any manner with the free usage of the common foot path more fully described in the schedule to the plaint and also for the costs of the suit.

3. The plaintiff would aver among other things that the plaintiffs' grand father, namely, Ramaswamy has purchased the land admeasuring to the extent of 14 cents in suit survey number

vide registration sale deed dated 14.3.1992 (Ex.A.1) and he died intestate leaving behind the plaintiff's father, namely, R.Sundaram. The father of the plaintiff during his life time sold land admeasuring 0.03 13/16 acres together with buildings thereon bearing D.Nos.580 and 581 in R.S.No.3677 to the defendants under a registered sale deed dated 05.11.1981 (Ex.A.2) and at the time of executing sale deed, the father of the plaintiff had reserved his right of pathway through north-south and east-west pathway which situates within the defendants' property and the same is described as blue in colour in plaint plan. The father of the plaintiff died intestate leaving behind the plaintiff and his brother and they are in occupation of the suit property and leased out Door Nos. 66 to 68 to other tenants and they are in occupation of D.Nos.69 and 70 and they were using the suit property pathway as ingress and egress to their premises bearing D.Nos. 69 and 70. While so, the defendants tried to block the suit property pathway. Therefore, the plaintiff filed suit for relief of permanent injunction and in the interregnum, as the defendants had put up wall and thereby had blocked the right of pathway also prayed for amending the plaint including the relief for mandatory injunction and prayed for decree.

4. The first defendant filed written statement and it was adopted by the second defendant and they would contend that the father of the plaintiff, namely, Sundaram at the time of execution of sale deed (Ex.A.2) never reserved the right of pathway and the plaintiff and his brothers and sisters and their tenants have got direct access from Seagur main road which is abutting the northern side of suit property and as such, there is no necessity for entering into defendants' property and prayed for dismissal of the suit.

5. The trial Court based on the pleadings framed necessary issues. During the course of trial, the plaintiff examined himself as P.W.1 and marked Exs.A.1 to A.4. On the side of the defendants, the first defendant examined himself as D.W.1 and marked Exs.B.1 to B4. During the pendency of the suit, an Advocate Commissioner was also appointed and his report was marked as Ex.C.1 and xerox copy of the surveyor's sketch was marked as Ex.C2 and the Advocate Commissioner was examined as C.W.2. The Trial Court on consideration of the pleadings, oral and documentary evidence and also after framing necessary issues, dismissed the suit vide Judgment dated 31.01.2011 and aggrieved by the same, the plaintiff preferred an appeal in A.S.No.39 of 2011 and also filed I.A.No. 108 of 2011 under Order 41 Rule 22 of CPC to mark additional documents.

6. The lower Appellate Court after formulating necessary points for consideration and upon perusal of the materials placed before it has dismissed the said appeal vide Judgment and

Decree dated 09.02.2012. The plaintiff challenging the legality of the same, has come forward to file this second appeal.

7. In the memorandum of grounds of appeal, the following substantial questions of law are raised :

a) When the report of the commissioner clearly reveals that there is no right of way at present for door Nos.66 to 68 since the compound wall has been put up by the defendants across the right of way and thereby blocked the same and that there is no access to the suit door Nos.66, 67 and 68 excepting the disputed right of way whether the courts below are correct in not granting the relief to the plaintiff which is contrary to the evidence on record?

b) When the report of the commissioner states that door No.69 and 70 which are facing on the northern side towards the Seagore Road are having the access and whereas door Nos.66 to 68 which are facing on the eastern side of the suit pathway are not having any access except the disputed pathway whether the courts below are correct in dismissing the suit of the plaintiff?

8. The learned counsel for the appellant/plaintiff would contend that the report of the Commissioner has been misconstrued by the courts below and except the suit pathway, there is no other pathway available to use the property of the appellant/plaintiff and as such the findings rendered by the court below are per se unsustainable and prays for interference.

9. This Court has carefully considered the submission of the learned counsel appearing for the appellant also perused the typed set of documents.

10. Admittedly, the father of the appellant/plaintiff, namely, Sundaram during his life time, had conveyed the land and building in D.Nos.580 and 581 in R.S.No.3677 in favour of the defendants under Ex.A.2/registered sale deed dated 05.11.1981. The Courts below on going through the recitals as well as the schedule of property annexed to the said document had recorded the concurrent findings that the father of the plaintiff did not reserve any right to usage of pathway through north-south and east- west which is situate within the defendants' property. The plaintiff having found that the defendants had put up an offending construction in the form of wall also prayed for amendment of prayer and it was ordered and therefore, as such the prayer for mandatory injunction was also made.

11. It is pertinent to point out at this juncture that technically, the appellant/plaintiff pleads easement of necessity. Admittedly, no pleadings to that effect have been made and there is no declaration that the plaintiff is entitled to use the said pathway by way of easement of necessity.

12. The appellant/plaintiff has placed reliance upon the report and sketch of the Commissioner marked as Ex.C1 and Ex.C.2 respectively. It is well settled position of law that the report of Commissioner is a piece of evidence and it is always open to the Court to consider and apprise the said document like any other evidence.

13. In the absence of any recital reserving the right to use the suit pathway, under Ex.A2/registered sale deed dated 05.11.1981 and that the appellant/plaintiff did not file any suit for declaration, for declaration of the easmentary right and that further findings recorded by the courts below that the plaintiff is also having an alternative pathway to reach their property in question, this Court is of the view that the Judgment and findings recorded by the courts below do not warrant interference. The courts below had considered the pleadings and analysed the oral and documentary evidences in a proper perspective and in the light of the concurrent findings reached, this Court is of the considered view that no questions of law, leave alone the substantial questions of law arise for consideration in the second appeal.

14. Therefore, the second appeal is dismissed at the admission stage itself. Consequently, connected miscellaneous petition is closed. However, there shall be no order as to costs.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

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To

1.The District Munsif,
Udhagamandalam

2.The Subordinate Judge and Appellate Authority,
The Nilgiris, Udhagamandalam

+lcc to Mr.V.Nicholas,Advocate sr.14510

Second Appeal No.177 of 2017

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ss(6/4/2017)