

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.02.2017

PRONOUNCED ON : 21.02.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.712 of 2011 and M.P.No.1 of 2011
and
S.A.No.713 of 2011

S. A.No.712 of 2011

Nachimuthu	...	Appellant
	Vs.	
1.Rengasamy		
2.Balasubramani	...	Respondents

S. A.No.713 of 2011

Nachimuthu	...	Appellant
	Vs.	
1.Rengasamy		
2.Sellammal		
3.Ramesh		
4.Perumal	...	Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 19.02.2010 in A.S.No.113 of 2005 & A.S.No.112 of 2005 on the file of the Sub Court, Namakkal, reversing the judgment and decree dated 18.04.2005 in O.S.No.289 of 2003 & 263 of 2003 on the file of the Principal District Munsif Court, Namakkal.

For Appellant in : Mr.S.Kalyanaraman
both S.As.

For Respondent Nos.1 &2 : Mr.T.Dhanyakumar
in S.A.No.712/2011
& Respondent No.1
in S.A.No.713/2011

COMMON JUDGMENT

S. A.No.712 of 2011

Challenge, in this second appeal is made by the plaintiff against the judgment and decree dated 19.02.2010 passed in A.S.No.113 of 2005 on the file of the Sub Court, Namakkal, reversing the judgment and decree dated 18.04.2005 passed in O.S.No.289 of 2003 on the file of the Principal District Munsif Court, Namakkal.

S. A.No.713 of 2011

Challenge, in this second appeal is made by the 1st defendant/plaintiff in O.S.No.289 of 2003 against the judgment and decree dated 19.02.2010 passed in A.S.No.112 of 2005 on the file of the Sub Court, Namakkal, reversing the judgment and decree dated 18.04.2005 passed in O.S.No.263 of 2003 on the file of the Principal District Munsif Court, Namakkal.

2. The second appeals have been admitted and the following substantial question of law is formulated for consideration in the second appeals:-

“ Whether the judgments and decrees of the first appellate court in dismissing the suit laid by the plaintiff and decreeing the suit laid by the first defendant are based upon the perverse findings and misdirected against the evidence on record?”

3. For the sake of convenience, the parties are referred to as per their ranking in the trial Court in O.S.No.289 of 2003.

4. As regards the right and title of the plaintiff in respect of the property purchased under Ex.A1, the first defendant has not raised any dispute. Similarly, as regards the right and title of the property acquired by the first defendant under the partition deed marked as Ex.B1, the plaintiff has not raised any dispute. The only dispute between the parties is with reference to the suit pathway, pertaining to which, the plaintiff has laid the suit, claiming the reliefs of declaration and permanent injunction. According to the plaintiff, he has been granted the pathway right in the property belonging to the

first defendant situated in Survey No.11/1B under Ex.A1 and he and his predecessor in interest have been using the suit pathway for more than the prescribed period without any interruption whatsoever and thus, according to the plaintiff, he has acquired prescriptive easementary right over the suit pathway and inasmuch as the defendants attempted to interfere with his possession and enjoyment over the same, he has been necessitated to lay the suit against the defendants.

5. Per contra, the first defendant has denied the existence of the suit pathway as put forth by the plaintiff and according to him, no such pathway is in existence and has not been in use either by the plaintiff or the others and according to the first defendant, inasmuch as the plaintiff and others, without any authority, made attempts to interfere with his possession and enjoyment of the property acquired by him under Ex.B1 partition suit, he has been necessitated to lay the suit for permanent injunction.

6. As seen from the pleadings and also the evidence adduced in the matters, it is found that the plaintiff is claiming the suit pathway right (easementary) over the property belonging to the first defendant situated in Survey No.11/1B. Now, according to the

plaintiff, the said pathway measures to a width of 5', the plaintiff claims easementary right over the suit pathway under Ex.A1. A perusal of Ex.A1 would go to show that as rightly put forth by the first defendant's counsel, there is no reference about the width of the suit pathway. However, under the said document, it is found that the plaintiff has been given the pathway right over the property situated in Survey No.11/1B on the western side and admittedly, survey No.11/1B belongs to the first defendant. Therefore, it is found that the plaintiff claims easementary right over the suit pathway by prescription, which runs, only through the land belonging to the first defendant. It is also found that the plaintiff is not claiming any absolute right over the suit pathway.

7. The confusion seems to have arisen, inasmuch as the first defendant alleging that there is no pathway in his property as contended by the plaintiff and on the other hand, according to him, the property acquired by him under Ex.B1 is in his absolute possession and enjoyment without any pathway right to the plaintiff and also on that footing, has sought the relief of permanent injunction against the plaintiff in the suit filed by him, it is found that the plaintiff has adduced evidence that the first defendant has no right over the suit pathway and that, it is only the plaintiff and

another person namely Rengasamy, who have right over the suit pathway. The above said evidence of the plaintiff, as rightly put forth by the counsel for the plaintiff, has been misconstrued by the first appellate Court, as if, the plaintiff is claiming absolute right or title over the suit pathway or over the property, where, the suit pathway lies and in such view of the matter, holding that the plaintiff has taken inconsistent pleas i.e. claiming easementary right as well as title over the area, where, the suit pathway lies, disbelieved his case and thereby, negatived the reliefs sought for by him. Further, the first appellate Court has also held that the plaintiff has failed to establish that he has been using the suit pathway for more than the prescribed period as per law. Another factor, by which, the first appellate Court rejected the plaintiff's case is that as the suit pathway on ground is not found to be measuring 5' width and on the other hand, it is found to be measuring only 2'/3' width as seen by the advocate commissioner and noted in his report and plan Exs.C1 & 2.

8. Per contra, based upon the advocate commissioner's report and plan and also finding that the suit pathway is in existence though not of width of 5' but of width of 2'/3' as noted by the advocate commissioner in Exs.C1 & C2 and also finding that the

plaintiff has established the usage of the suit pathway for more than the prescribed period as postulated under law, the trial court has accordingly granted the reliefs sought for by the plaintiff.

9. As seen from the evidence adduced in the matters, admittedly, the existence of pathway is found as on date as noted by the advocate commissioner in his report and plan. Inasmuch as the suit pathway had been in existence even prior to 1981 the date of Ex.A1 sale deed and been in usage by the plaintiff's predecessor in interest and the plaintiff, after Ex.A1, it could be seen that while conveying the property under Ex.A1, the plaintiff's predecessor in interest had also conveyed the easementary right over the suit pathway in Survey No.11/1B. As adverted to earlier, the width of the suit pathway has not been mentioned in Ex.A1. However, the plaintiff has laid the suit claiming that the suit pathway measures to a width of 5'. However, on ground, as seen from Exs.C1 & 2, the suit pathway is found to be only a width of 2'²/₃'. Therefore, the resultant position is that the plea of the first defendant that no pathway, as such, exists is not true. On the other hand, it is found that the pathway is in existence in Survey No.11/1B, however, not to a width of 5' as claimed by the plaintiff, but to a width of 2' in certain points and 3' in certain points. Therefore, the contention of the first

defendant that no pathway, as such, exists in his property situated in S.No.11/1B cannot be countenanced.

10. It is the specific case of the plaintiff that the suit pathway runs only in the property belonging to the first defendant and that is why he is claiming only right to have access through the same to reach his property. Therefore, a reading of the plaint averments cumulatively would only go to show that the plaintiff, as such, has not claimed any absolute title over the portion, where, the suit pathway runs. On the other hand, he claims only easementary right over the suit pathway as mentioned supra. Inasmuch as the first defendant has denied the existence of the suit pathway in his property and also claimed to be in possession and enjoyment of the suit property and also pleaded that the plaintiff is not entitled to use any portion thereof as a pathway, on that defence, it appears that the plaintiff, during the course of his evidence, has stated that he is having right over the suit pathway and the first defendant is not having right over the suit pathway. On the other hand, if the evidence of the plaintiff adduced both during the chief examination and cross examination is observed wholly, it could be seen that the plaintiff is only claiming easementary right over the suit pathway and not absolute right. In such view of the matter, the first appellate

Court has misconstrued the evidence adduced by the plaintiff in a wrong perspective and thereby, proceeded to disbelieve the plaintiff's case of the easementary right over the suit pathway. If the plaintiff had claimed any absolute title over the property, where, the suit pathway runs, he would not have instituted the suit for the relief pertaining to the easementary right, as regards the suit pathway. Therefore, the evidence adduced by the plaintiff examined as PW1 and also PWs2 & 3 wholly would only go to show that the plaintiff has claimed only easementary right over the suit pathway by prescription and not any absolute right.

11. No doubt, as adverted to earlier, the pathway is found to be not of 5' width, on ground as claimed by the plaintiff. It is found to be only of a width of 2' at certain points and 3' at certain points as noted in Exs.C1 & 2. No objection seems to have been preferred to the commissioner's report and plan by the first defendant. It is therefore obvious and also made clear that the suit pathway of width 2'/3' exists, on ground, as depicted in Exs.C1 & C2. Accordingly, the trial Court found that the usage right of the suit pathway had been given to the plaintiff under Ex.A1 and even prior to the same, the same had been in the enjoyment of the predecessor in interest of the plaintiff and further holding that the plaintiff and his predecessor in

interest had been enjoying the suit pathway for more than prescribed period, upheld the plaintiff's case of the easmentary right by prescription over the suit pathway, however to a width of 2'²/₃' as noted in Exs.C1 & 2. On the other hand, the first appellate Court finding that the plaintiff has failed to establish the existence of a pathway of a width of 5' on ground rejected the plaintiff's case. It is found that the first appellate Court has erred in rejecting the plaintiff's case altogether when it is found that there is a pathway in existence of width 2'²/₃' on ground and in such position, as rightly put forth by the plaintiff's counsel, should have proceeded to mould the reliefs sought for by the plaintiff's accordingly and granted the appropriate remedies. But, the first appellate court has proceeded to dispose of the matters on a wrong appreciation of the facts and law.

12. As regards the suit laid by the first defendant for the relief of permanent injunction, it is found that the plaintiff is not disputing the property acquired by the first defendant under Ex.B1 as such. Equally, the plaintiff has also not been disputing the right of the first defendant over the suit property, where, the suit pathway lies as of today. The only dispute is with reference to the usage of the suit pathway by the plaintiff. In such view of the matter, the plea of the first defendant that the plaintiff is attempting to interfere with his

possession and enjoyment of the property acquired by him under Ex.B1 as such cannot be countenanced. Therefore, it is found that the trial court has rightly disbelieved his version and rejected his case. However, as seen above, the first appellate Court, on a misconception of the evidence both on facts as well as law, has accepted the case of the first defendant and disbelieved the plaintiff's version.

13. In the light of the above discussions, it is found that as determined by the trial Court, the plaintiff is entitled to the relief sought for as regards the suit pathway. Therefore, it is found that the first appellate court has, based upon the perverse findings and conclusions and also misdirected itself against the evidence on record, erred in dismissing the suit laid by the plaintiff and decreeing the suit laid by the first defendant. Therefore, in such view of the matter, the judgments and decrees of the first appellate Court cannot be sustained. The substantial question of law formulated for consideration in the second appeals is accordingly answered in favour of the plaintiff and against the first defendant.

In conclusion, the judgment and decree dated 19.02.2010 in A.S.Nos.113 of 2005 & A.S.No.112 of 2005 on the file of the Sub

Court, Namakkal are set aside and the judgment and decree dated 18.04.2005 in O.S.Nos.289 of 2003 & 263 of 2003 on the file of the Principal District Munsif Court, Namakkal are confirmed. Accordingly, the second appeals are allowed. Consequently, connected miscellaneous petition is closed. No costs.

Index : Yes/No
Internet: Yes/No
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21.02.2017

To

1. The Sub Court, Namakkal.
2. The Principal District Munsif Court, Namakkal.

T.RAVINDRAN,J.

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Pre-delivery Judgment in
S. A.No.712 of 2011
and M.P.No.1 of 2011
and
S.A.No.713 of 2011

21.02.2017