



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.08.2017

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) No.230 of 2014

and

M.P.(MD).No.2 of 2014

Murugan

... Appellant /Appellant/ Plaintiff

Vs.

1.Karuppusamy

2.Bhooma

... Respondents /Respondents / Defendants

PRAYER: Appeal filed under Section 100 of C.P.C., against the judgment and decree, dated 27.03.2013, made in A.S.No.175 of 2010 by the learned Subordinate Judge, Tuticorin, confirming the judgment and decree, dated 15.07.2010, made in O.S.No.15 of 2009 by the learned Additional District Munsif, Tiruchendur.

For appellant

... Mr.M.P.Senthil

For respondents

.... Mr.M.Saravanan

JUDGMENT

The plaintiff, who has been non-suited by both the Courts below, has preferred the above appeal. The suit is filed for declaration of plaintiff's title, permanent injunction and mandatory injunction directing the defendants to remove the iron gate fixed by them in the suit property.

2.The case of the plaintiff is that the southern portion of the suit property measuring south-north 12 Carpentry Cubit (C.C.) (தேச முழம்) and east-west 2-1/2 C.C. originally owned by one Ponnappa Pillai. The said Ponnappa Pillai had sold the same on 09.06.1909 to one Subbaiah Pillai. The said Subbaiah Pillai had also purchased northern side of the suit property. After the death of Subbaiah Pillai, the said properties were in the occupation of his son Ponnaiya Pillai. The plaintiff is the son of the said Ponnaiya Pillai. Thus, the plaintiff claimed that he is entitled to entire suit property measuring south-north 65 C.C and east-west 2-1/2 C.C. The defendants seems to have purchased the eastern side of the suit property from one Sudalai, who has got no right to deal with the suit property. The defendants had made two openings in the north-south common wall and put up an iron gate and a wooden door. Despite repeated request made by the plaintiff, it is stated that



the defendants refused to remove the gate and door. Hence, the suit was filed by the plaintiff.

3. The suit was resisted by the defendants stating that the suit property originally belonged to one Agnimuthu Pillai Vagayara, the plaintiff's father and one Esakkiya Pillai. The second defendant had purchased the property from the daughter of Esakkiya Pillai. In fact, there was a partition deed, dated 29.01.1968, in which the plaintiff's father Ponnaiya Pillai and the first defendant had divided the properties showing the suit property as a common pathway. The plaintiff and his father were aware of the same. In the parent document of the defendants, dated 19.10.1906, the suit property is shown only as a common pathway. The plaintiff cannot claim exclusive right over the suit property. Hence, they prayed for dismissal of the suit.

4. Before the trial Court, on the side of the plaintiff, the plaintiff himself was examined as PW1 and Exs.A1 to A4 were marked and on the side of the defendants, the first defendant himself was examined as DW1 and Exs.B1 to B8 were marked. The Courts below have concurrently dismissed the suit. Aggrieved by the same, the above second appeal has been filed by the plaintiff.

5. At the time of admission, the following question of law was framed for consideration:

"Whether the Courts below have rendered a perverse finding that the disputed stretch of land is a common passage belonging to the appellant and the respondents, based on the attestation of the partition deed relied on by the respondents marked as Ex.B2?"

6. Heard the learned counsel for the appellant and the learned counsel for the respondents.

7. It is pointed out that PW1, in his cross examination, has specifically admitted more than once that the suit property is in common enjoyment of the plaintiff and the defendants. It is also admitted by him that the said pathway has been used by Agnimuthu Pillai Vagayara to reach the Anaintha Perumal Temple. Further, He has admitted that his house is situated on the west of the said pathway having the main entrance on the eastern side and the defendants' house is having main entrance on the western side facing the pathway. It is also admitted by the plaintiff that the suit pathway is situated in Survey No.1462/45 and the said pathway is also used for taking water connection and power supply by the defendants. The plaintiff also had pleaded ignorance as to when the defendants had put up their house and how long it has been in existence. It is openly admitted by the plaintiff that the defendants and some other persons have been using the suit pathway to reach the temple and that the suit property was never in the exclusive possession of the plaintiff. Thus, the question of declaration of title of the suit property in favour of the plaintiff

was rightly rejected by the Courts below.

8. Insofar as the question of possession is concerned, the plaintiff has not even pleaded as to when the defendants had interfered with his peaceful possession or even usage of the passage. When, admittedly, the suit passage has been used only as a common pathway, the question of obtaining permission from the plaintiff or the plaintiff giving permission to others to use the pathway does not arise. Though it is stated that the defendants had constructed their house to suit their convenience by putting up the entrance of the house in the common pathway, the plaintiff has specifically not stated as to when the defendant had fixed the iron gate or the wooden door. The report of the Commissioner is also silent about the same. Therefore, it is to be inferred that the alleged iron gate and the wooden door fixed by the defendants for entering into the pathway has been there in existence for long and the plaintiff has failed to prove as to when the same was fixed and how that is hindering the smooth usage of the pathway. In fact, the trial Court has found that the said iron gate and the door have been fixed long before the suit. Even presuming that the same were fixed recently, it cannot be called as an encroachment, as the plaintiff has failed to prove his exclusive right over the suit property. There is also no evidence produced by the plaintiff to show that it is a right of easement. The Courts below have rightly dismissed the suit for want of evidence. The concurrent findings of the Courts below are based only on the facts. Thus, the question of law is answered against the plaintiff.

9. In the result, this second appeal fails and the same is, accordingly, dismissed, confirming the judgment and decree passed by the Courts below. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar

To

1. The Subordinate Judge, Tuticorin.

2. The Additional District Munsif, Tiruchendur.

3. The Record Keeper, V.R Section,

Madurai Bench of Madras High Court, Madurai.

+1cc to Mr. M.P. SENTHIL Advocate in SR. No. 75004

+1cc to Mr. M. SARAVANAN Advocate in SR. No. 74829

GCG

JS/MR.KKR/SAR.4/18.09.2017/3P-6C

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