



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 27.07.2017
CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

WEB COPY

SECOND APPEAL (MD) No.61 of 2014
and
M.P. (MD).No.1 of 2014

Annammal

... Appellant /
Appellant/ Plaintiff

Vs.

1.Maria Arockiam

2.Prabhu

... Respondents /
Respondents / Defendants

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree, dated 30.09.2013, made in A.S.No.30 of 2013 on the file of the II-Additional Sub Judge, Nagercoil, confirming the judgment and decree, dated 19.01.2012, made in O.S.No.444 of 2009 on the file of the II-Additional District Munsif, Nagercoil.

For appellant

... Mr.N.Dharmar
for Mr.N.Dilipkumar

For 1st respondent

.... No appearance

For 2nd respondent

.... Mr.M.P.Senthil

JUDGMENT

The plaintiff is the appellant, who is seeking decree for declaration of her right to use the plaint "B" schedule property as pathway to reach "A" schedule property on the basis of easement of necessity and prescription and for a consequential injunction.

2.It is the case of the plaintiff that she had purchased the right of usage of plaint "B" schedule property from the first defendant and his wife by way of a consent deed, dated 23.12.1998, by paying a sum of Rs.11,000/-. The plaintiff also has pleaded that she has prescribed her title by way of easement by prescription and by necessity with respect to "B" schedule property. A Commissioner was also appointed in the suit who has submitted a report. The plaintiff has examined herself as PW1, ~~being a deponent in the suit~~ and two other witnesses. The plaintiff has based her claim on ownership as well as easement which are mutual exclusive rights.



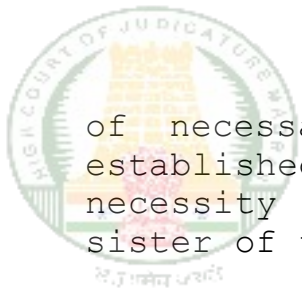
3. Denying the facts supporting the cause of action in the plaint, the defendant had resisted the suit contending that a settlement deed - Ex.B1 was executed by the father of the first defendant in favour of his grandchildren viz., the second defendant and his sister by name Brindha. At the time of execution of Ex.B1, the settlees were minors and their mother was appointed as a guardian. The Settlement Deed - Ex.B1 is dated 12.01.1993, whereas the alleged consent deed obtained by the plaintiff from the first defendant and his wife is dated 23.12.1998. Therefore, the mother could not have consented for conveying the exclusive right given to the second respondent and her sister by way of settlement deed.

4. Before the trial Court, on the side of the plaintiff, PWs.1 to 3 were examined and Exs.A1 to A8 were marked and on the side of the defendants, the second defendant was examined as DW1 and Exs.B1 to B8 were marked. Both the Courts below have concurrently rejected the claim of the plaintiff.

5. Heard the learned counsel for the appellant and the learned counsel appearing for the second respondent and perused the records carefully.

6. The plaintiff has got her title to "A" schedule property under Ex.A1, dated 03.02.1996, having purchased the same from one Amirtharaj. The said sale is for a specific extent of 8-1/2 cents with specific boundaries. The plaintiff also has filed Exs.A2 to A7 in respect of her title. The dispute is only with respect to "B" schedule which is a pathway. The plaintiff, excepting examining herself and her two sons, has not examined any other independent witnesses to speak about the uninterrupted usage of her from the date of execution of Ex.A1 - Sale Deed. Having pleaded easement by necessity, the plaintiff should have established her uninterrupted usage over the "B" schedule property for more than 20 years. However, the plaintiff, excepting her evidence as PW1, has not produced any other document or oral evidence to establish her long usage as easement by prescription over the suit property. As stated earlier, the plaintiff/appellant, having admitted that she obtained consent from the first defendant and his wife by paying a sum of Rs.11,000/- for transferring the right of usage over the pathway, is deterred from making the claim of easementary right. Therefore, it can be easily stated that the plaintiff has miserably failed to establish her right of easement over the "B" schedule property.

7. One another objection raised by the defendants is that the second defendant, who became co-owner under Ex.B1 - Settlement Deed, has not been impleaded by the plaintiff to claim easementary right and hence, the suit is also bad for non-joinder



of necessary parties. As the plaintiff has absolutely not established her right over the suit property by easement by necessity or easement by prescription, the non impleadment of the sister of the second defendant is not necessary.

8. As stated earlier, the plaintiff has raised inconsistent pleas claiming both the easement and ownership which are mutually exclusive concepts. Unless the plaintiff admits the title of the second defendant over the suit property, she cannot make a claim of easement. If she claims ownership over the property as per the consent deed, then her claim of easement would automatically fail. In such a situation, where the plaintiff claims ownership, she has to give up the plea of easementary right. If she admits the ownership of the second defendant, then the burden is on the plaintiff to prove the long usage and the existence of easement right for her. Having failed to prove the ownership, it is not open to the plaintiff to revive the plea of easement. In the light of the above discussions, there is no question of law arising for determination.

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

Sd/-

Assistant Registrar(CSII)

/True Copy/

Sub-Assistant Registrar

To

1.The II-Additional Sub Judge, Nagercoil.

2.The II-Additional District Munsif, Nagercoil.

3.The Record Keeper, VR Section,
Madurai Bench of Madras High Court,
Madurai.

+One cc to Mr.N.Dilipkumar, Advocate, SR.No.68170

+One cc to Mr.M.P.Senthil, Advocate, SR.No.68069

gcg

RL/6C/3P/KP/SAR1/11/8/2017

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