

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 15.02.2018
CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.571 of 1999

D. Vellingiri

... Appellant/Defendant

Vs.

1.K.Thirumoorthy(died)

2.K.Jagadambal

3.Sivabakkiam

4.Madhivanan

5.Arunvanan

... Respondents/Plaintiff

(Respondents 3 to 5 are brought on record as LRs of the deceased 1st respondent vide order of the court dt 01.08.2005 made in CMP.No.6183/2005)

Prayer: Second Appeal filed under Section 100 of C.P.C. against the Judgment and decree of the learned Second Additional Appellate Authority and Second Additional District Judge of Coimbatore dated 21.12.1998 in A.S.No.95/1998 confirming the Judgment and Decree of the learned Third Additional District Munsif, Coimbatore dated 07.04.1998 in O.S.No.1254 of 1992.

For Appellant :Mr.N.E.A.Dinesh

For Respondents:Mr.Dhalapathi Vignesh Kumar
for Mr.M.Sriram

J U D G M E N T

The defendant is the appellant, who lost the case before the courts below filed this present second appeal.

2. The averments contained in the plaint, in brief, are as follows:

One Kuppusamy @ Kuppa Pannadi is the absolute owner of 'A' schedule property. The first plaintiff is the only son of Kuppa Pannadi. He had three daughters viz., Ponnuthaiammal, Sampooram and the second plaintiff. The two items of the suit property are the ancestral property of the plaintiff. The "RSOF" is the portion purchased by the plaintiff's father vide sale deed dated 20.01.1935. On 22.08.1938, Kuppa Pannadi sold away one portion of the property to one Arumugha Pannadi. Thereafter on 19.09.1951, the mother of the plaintiffs 1 and 2, purchased the said property from the said Arumugha Pannadi. Both Kuppa Pannadi and his wife died leaving behind their legal representatives to succeed to the estate. The plaintiffs had filed a sketch in order to show that the two properties mentioned as "ABXY" and "AGRT" belongs to the plaintiffs. There is a common pathway between "ABXY" and "AGRT" and the common

pathway is marked as "ABCD" portion and opposite to it, there is a open space in the northern side of "AEFG" portion. The defendant taking advantage of the plaintiffs' absence had altered the structure and encroached the pathway and further he had also extended the construction up to 'CD' and also put up a wall of 'AD' completely closing the access from the plaintiffs' ancestral property to other portions. The common enjoyment of the vacant sites were acquired and altered by putting up the wall in between 'A' and 'B' and tried to close the access completely from Northern side main road. Thereafter, the defendant unlawfully encroached from 'E' to 'D' and put up a house. Though the plaintiffs are entitled to seek relief of mandatory injunction to remove the encroachment from point 'E' to 'D', in order to avoid unnecessary litigation, the plaintiffs filed a suit for declaration declaring the 'ABCD' portion as a common pathway and permanent injunction against the defendant as well as for a mandatory injunction directing the defendant to remove the encroachment made in the 'ABCD' portion.

3. The averments contained in the written statement filed by the defendant, in brief, are as follows:

The plaintiffs have no right over the property. Admittedly, 'ABCD' portion belonged to the defendant and he denied the various allegations made in the plaint. The plaint plan is totally misleading and on the admissions made by the plaintiffs, the property shown as 'ABXY' is a vacant land and it has direct access on the west and on the south. There is no need to come along the passage shown as 'ABCD' to reach this property. The property shown as 'AGFED' in the plaint averments does not belong to him and it is not ancestral property with access from the west. Admittedly, there is a public road on the south of the plaintiffs' property abutting the 'EOFRST' portion of the plaintiffs' property. The other portion of the property is also a vacant site abutting to the plaintiffs' property. Therefore, the plaintiffs' cannot claim any access through 'ABCD' portion to reach the properties. The plaintiffs can use the front wall which is used as a public road in order to reach portion of the properties. Admittedly, the plaintiffs' properties are vacant site and there are no sketches for these properties. Therefore, the claim of the plaintiffs that there is a access along 'ABCD' to reach these vacant lands cannot at all be true. The plaint plan describing that there is a drainage lane on the south of the plaintiffs' property is not correct. The so called lane is more than 4-1/2 feet width and there are houses of third parties on the south of this road. Hence, the plaintiffs attempted to mislead by filing a plaint plan.

4. The defendant denied the allegations made in the averments that the defendant extended his construction up to 'CD' and also by putting up a wall along 'AB' closing the

access. The plaintiffs have purposely omitted to mention that at the time of admission of Second Appeal, the defendants had a bath room and toilet which has been used by the defendant for several years. Therefore, the allegations with regard to construction along 'ABCD' is false. The defendant encroached any of the portion particularly 'E' to 'D' portion and put up a house is also false. The defendant is a retired Court Amin and he has remodelled his house with his retirement benefits.

5. In order to deny the rights of the defendant, the plaintiffs have filed a vexatious suit against the defendant and the defendant has denied that 'ABCD' is a pathway and is intended for use of the plaintiff along with the defendant.

6. On the other hand, it is a front vasal of the defendant which was northern entrance and the portion shown as 'ABCD' belongs to him and no one else. Hence, the plaintiffs cannot have any right over 'ABCD' passage belonging to the defendant. The plaintiffs have never used this 'ABCD' passage as his access to reach his properties on the south and north. The so called Devendra Street on the west of the property is 60 feet in width and not a 30 feet Road as shown in the plaint plain. Therefore, the entire claim of the plaintiffs to the alleged passage in 'ABCD' and for the alleged removal of the wall of 'AB' are not at all sustainable. The plaintiffs are not entitled to any declaration or permanent injunction and mandatory injunction. The suit claim lacks in bonafide and merits.

7. After elaborate trial and after framing the issues, the lower court decreed the suit in favour of the plaintiffs. Aggrieved by the same, the appellant/defendant has preferred an appeal before the lower appellate court and the lower appellate court has also confirmed the decree granted by the lower court. Aggrieved by the same, the appellant is before this court by way of the present second appeal.

8. At the time of entertaining the second appeal, this court has framed the following substantial questions of law:

i) When the plaintiffs are having alternative way even if it is not convenient for their use, whether the courts below are correct in granting the relief on the basis of easement of necessity?

ii) When it is admitted by the plaintiffs that they are keeping the property purchased from the father of the plaintiffs as vacant site and that they are residing away from the said properties for more than 40 years and such cannot claim the right of easement whether the courts below are correct in granting the decree?

9. Learned counsel appearing for the appellant would submit that admittedly 'ABCD' portion is in front of the defendant's house. The defendant is the retired court staff and after retirement, he constructed a small portion. In order to defeat the defendant's right, the respondents/plaintiffs have filed a vexatious suit against the appellant/defendant. Infact, the 'ABCD' portion belong to the defendant and the same was not used by the plaintiffs. There is an alternative pathway called 'Devendra Road' available to the plaintiffs to reach his property and public lane. Hence, both the courts concurrently had committed an error by granting a decree in favour of the plaintiffs. In order to prove the rights of the defendants, the defendants marked the suit property title and the same has been marked as Ex.A4 and it relates to the sale deed purchased from one Arumugha Pannadi. Ex.A4 document shows that the property belongs to the defendant.

10. Learned counsel appearing for the respondents/plaintiffs would submit that both the suit properties belongs to the plaintiffs. Admittedly, 'ABCD' is a common pathway and the plaintiffs and defendant are entitled to use 'ABCD' portion as a common passage. However, taking advantage of the defendant's official position as court staff, he encroached the 'ABCD' portion by putting up a wall and bathroom and rest room and thereby encroached the common passage, aggrieved against which, the plaintiffs have filed a suit for declaration and mandatory injunction.

11. After perusal of the entire documents as well as the Advocate Commissioner's Report, the lower court decreed the suit in favour of the plaintiffs and the lower appellate court has also confirmed the decree of the lower court. As against the concurrent findings, the appellant is before this court by way of the present second appeal.

12. Heard learned counsel for the appellant and respondents.

13. On perusal of the available materials and records, it is seen that the plaintiffs owned a property on the south as well as north corners, the defendant's house property is abutting to the eastern side of the plaintiffs' property and other portion of the plaintiffs' property is lying to the immediate north of the defendant's property. Admittedly, 'ABCD' portion is shown between the defendant and the plaintiffs' property. Though the defendant filed a settlement deed which is marked as Ex.B3, the 'ABCD' portion is not included in the said document. In order to find out the physical features of the property, the lower court has appointed an Advocate Commissioner. After inspection, the Advocate Commissioner has filed a report stating that the portion marked as Exs.B1, 2, 3 & 4 appears to be a newly

constructed bath rooms and he has also found that the compound wall is between B6 and D5 on the northern side of the defendant's property. Both the bath rooms and the house referred to above appears to be a newly white washed. Immediately on the southern side of the plaintiffs and defendant's house property, there is 4 feet land on the south of A2 - D1. The plan is further proceeded to east.

14. The Advocate Commissioner has also recorded the roofing projection of the third parties which is on the northern side of A1 & A2 wall. The Advocate Commissioner's report further proceeded that the house of the defendant is facing north. To the east west side, immediately situated north south of the Municipal land. The defendant's properties hired in the ground Municipal land. Further, the Advocate Commissioner had admitted that there is a municipal land in the south side of vacant site of the plaintiffs' property. However, through the Municipal land, the plaintiffs cannot reach his other property.

15. On perusal of the entire records, it is seen that the 'ABCD' portion was used as a common passage by the plaintiffs as well as the defendant. However, the defendant encroached the common passage which was consequently established by the Advocate Commissioner's Report as well as in his oral evidence.

16. In view of the above, the defendant did not produce any document or any scrap of evidence to show that 'ABCD' portion belongs to him. In the absence of any material, I do not find any error in the Judgement and Decree granted by the courts below and there is no ground to interfere with the concurrent findings of the courts below. The well considered decisions of the courts below need not be interfered with without any valuable material. Accordingly, substantial questions of law are answered against the appellant.

In the result, the second appeal is dismissed and the Judgment and decree of the II Additional Appellate Authority and II Additional District Judge, Coimbatore, dated 21.12.1998 in A.S.No.95/1998 confirming the Judgment and Decree of the III Additional District Munsif, Coimbatore, dated 07.04.1998 in O.S.No.1254/1992, is confirmed. No costs. Consequently, connected miscellaneous petition, if any, is closed.
gv

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1.The II Additional Appellate Authority and
II Additional District Judge,
Coimbatore.

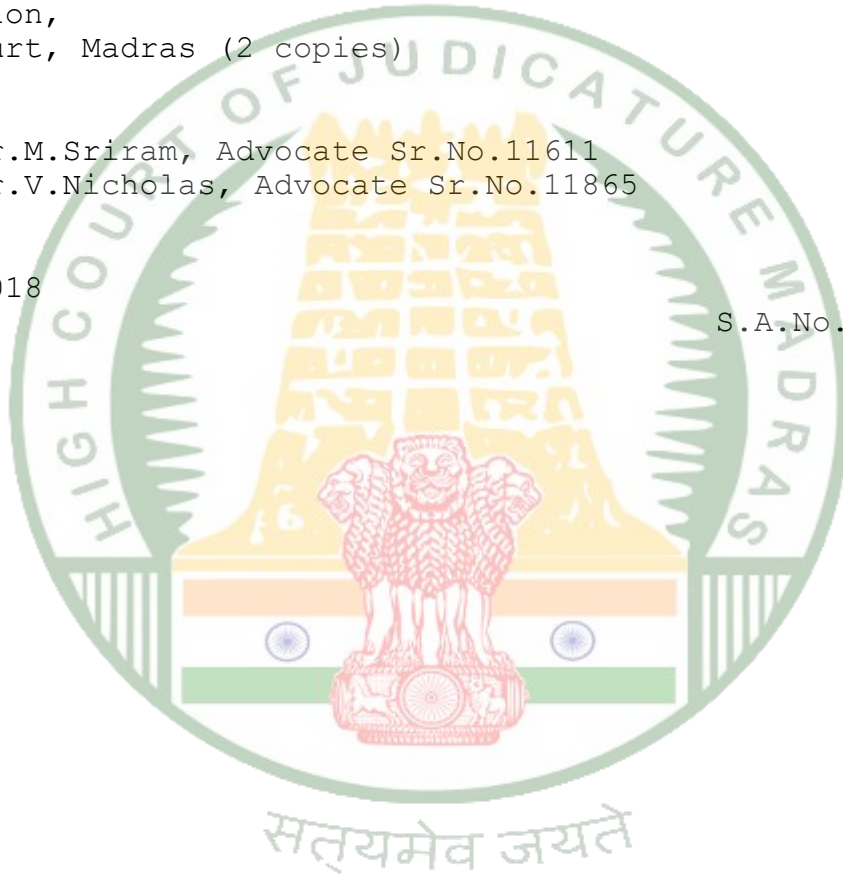
2.The III Additional District Munsif,
Coimbatore.

3.The Section Officer,
VR Section,
High Court, Madras (2 copies)

+1cc to Mr.M.Sriram, Advocate Sr.No.11611
+1cc to Mr.V.Nicholas, Advocate Sr.No.11865

NMI (CO)
sm:22.3.2018

S.A.No.571 of 1999



WEB COPY