

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 17.01.2018
CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1955 of 2000
And
C.M.P.No.19137 of 2000

Rajagantham

... Appellant/Respondent

Vs.

Tamilselvan

... Respondent/Appellant

Prayer:

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 25.08.2000 made in A.S.No.33 of 2000 on the file of the Additional District Judge, Pondicherry confirming the judgment and decree made in O.S.No.36 of 1999 dated 28.10.1999 on the file of the Principal District Munsif, Pondicherry.

For Appellant : Mr.R.Venkatesalu
for Ms.M.Nagalakshmi

For Respondent : No Appearance

J U D G M E N T

The plaintiff who succeeded the case before the lower Court and lost the case before the lower Appellate Court has filed the second appeal before this Court.

2.The case of the plaintiff is as follows: The plaintiff purchased 'A' Schedule property through a notarial sale deed dated 05.07.1961 during the French Government and is living there after constructing a house therein. Even after the death of her husband, the plaintiff continuously enjoyed the suit property with her children. The defendant's property is adjacent to the plaintiff's house and North of the Vinayagar Koil Street. The plaintiff and the defendant's house are having the entrance facing the West. The plaintiff and the defendant have to enter their respective house through a common pathway through West of the property leading from the Vinayagar Koil Street i.e., Mannadipet Road running through West to East. The pathway is the disputed 'B' Schedule property and it is running through South to North.

3.The 'B' Schedule property was managed by the plaintiff as well as by the defendant's vendor for more than 37 years. The plaintiff has acquired easementary right over the 'B' Schedule property. As a matter of fact, the plaintiff's electricity meter board is fixed on the wall of the defendant's house and water pipeline to the plaintiff property leading from the main road also passes through the 'B' Schedule property i.e., North to South. The defendant is the recent purchaser of the property. After his purchase, the defendant is disturbing the plaintiff by objecting the plaintiff's usage of the 'B' Schedule property. The defendant has attempted to close the 'B' Schedule property to deny access to the plaintiff to reach her property.

4.Since the 'B' Schedule property is the only access to the plaintiff's house from the Vinayagar Koil Street, the plaintiff lodged a police complaint to the Station House Officer, Thirukannur Police Station on 16.09.1998 regarding the high handed acts of the defendant. Since the Law Enforcing Agency has not taken any appropriate steps, the plaintiff has filed the suit for declaration and permanent injunction declaring that the 'B' Schedule property is common pathway and not to disturb the peaceful possession and enjoyment of the property.

5.The sum and substance of the written statement filed by the defendant is as follows: The defendant purchased the property situated to the South of the plaintiff's property comprised in 1152 sq.ft. being bound on the South by the road leading to Mannadipet (Vinayagar Koil Street), on the North by the plot of the plaintiff Rajakantham, on the West by the plot of Singaram and on the East of Govindasamy Gounder.

6.The defendant purchased the said property through a sale deed dated 02.12.1991 from one Kuppammal. Even at the time of purchase of the said property by the defendant there existed a dilapidated hut and after his purchase the plaintiff renovated the said hut by constructing a new thatched hut and is possessing the same. The claim of the plaintiff that there is an easementary right of passage on the Western side of 'A' Schedule property to an extent of 2 ft. x 100 ft. as detailed in the 'B' Schedule property is not correct.

7.Infact, the plaintiff's father and one Singaram who were cousin were owning the property on the Western side of 'A' Schedule property. To the further West of the property of the said Singaram, there is a common public passage running North to South to a width of 3 ft. 3 inches leading from the main road and this passage is being used by the plaintiff's vendor as well as the plaintiff to have access to her house. There is no passage situate to the West of 'A' Schedule as described in the 'B' Schedule property as claimed by the plaintiff. To the further West of the available common passage is the house of one

Kannan who is running a Tea Stall who is none other than the cousin of the plaintiff and the said Kannan encroached the common passage situate to the West of the house of Singaram.

8. In view of the encroachment made by the said Kannan, there were frequent quarrel between the children of Singaram and Kannan regarding the use of such passage. This was the passage that was being used by the plaintiff to have access to her house. While such being the position, the plaintiff colluded with the said Kannan and attempted to grab the property described as 'B' Schedule property to have an encroachment into the defendant's property and such attempt was resisted by the defendant.

9. In fact, 'B' Schedule property is not a part of the 'A' Schedule property. 'B' Schedule property as described in the plaint is the absolute property of the defendant by virtue of the sale deed dated 02.12.1991 in favour of the defendant. The plaintiff never enjoyed the imaginary pathway described in the 'B' Schedule property and her claim to have enjoyed the same for over 37 years is not correct. The defendant and his vendors in title were enjoying the property right over the 'B' Schedule property for over 30 years. The encroachment of the common pathway by Kannan cannot give rise to the plaintiff to seek easementary right in respect of the 'B' Schedule property.

10. The lower Court after framing the issues, decreed the suit based on the Commissioner Report Ex.Z4 as well as Ex.X2 filed by the Revenue Authorities. However, the defendant filed appeal before the lower Appellate Court. The lower Appellate Court dismissed the suit and allowed the appeal in favour of the defendant. Aggrieved by the same, the plaintiff has filed the present appeal before this Court.

11. When the matter came up for admission, this Court has framed the following substantial questions of law:

"(I) Whether the construction of the lower appellate Court placed on Ex.A1 and Ex.B1 is patently erroneous?

(II) Whether the inference of the lower appellate Court that owing to non-mentioning of right of pathway in Ex.A1 and owing to the alleged existence of a separate pathway, the subject easementary right is unenforceable is not perverse?"

12. The learned counsel appearing for the appellant would submit that the plaintiff purchased the property on 05.07.1961 through Ex.A1 and the translated copy of the same is marked as Ex.A2. After the purchase, the plaintiff constructed a house by

using the common passage which was available in between the Singaram's house and the defendant's house and in order to prove her usage of common passage, the electricity meter board was fixed on the defendants property wall and the water pipeline to the plaintiff property leading from the main road also passes through the 'B' Schedule property i.e., North to South. These are admitted facts. The defendant himself admitted the same in his deposition.

13.The learned counsel appearing for the appellant further submitted that based on the clear cut deposition and after perusing the Commissioner's report, the lower Court passed a well considered order and granted decree in favour of the appellant/ plaintiff. However, the lower Appellate Court arrived at a conclusion based on Ex.X2 which was marked by the Revenue Officials through D.W.2. D.W2 in his deposition deposed that there was an existing common passage which led to the plaintiff's house and Ex.X2 did not disclose whether it is a private pathway or common pathway as stated by the plaintiff. Only on that ground, the suit was dismissed and the appeal was allowed. However, the same issue was discussed by the lower Court. Accordingly, he prayed for allowing the appeal by decreeing the suit.

14.No one appeared on behalf of the defendant/ respondent. However, based on the available records, this Court decides to proceed the matter.

15.The un-disputed facts are that originally both the plaintiff and defendant's property belonged to one Krishna Gounder. The said Krishna Gounder sold the property to the plaintiff in the year 1961. Subsequently, the defendant's vendor one Kuppammal purchased the very same property after 25 days. Thereafter in the year 1991, this defendant purchased the property from the said Kuppammal. Perusal of the translated copy of the documents which was marked as Ex.A2 and Ex.B3 sale deeds executed by the Krishna Gounder discloses that the boundaries are one and the same. The description of the property is one and the same and Ex.A2 does not disclose the private pathway leading from South to North.

16.Even on perusal of Commissioner report, the Commissioner categorically held that the width as stated in the plaint is not available and the 'B' Schedule property is not a demarcated property. The width of 3 ft. as stated in the 'B' Schedule pathway is apparently a straight pathway from one point to another point. Even on perusal of the rough sketch marked along with the Commissioner Report, the e, f, g, l, m, h, is the common passage mentioned in the 'B' Schedule property. Even on perusal of the e, f, g, l, m, h, in the beginning the point is less than two feet and the common point is one feet. It is not

possible to use the common passage which is less than two feet or one foot by the plaintiff.

17.However, on perusal of Ex.X2 filed by the Revenue Authorities which was marked by examining D.W2, there is a common passage leading from Vinayagar Koil Street and end with the plaintiff's property. When there is a common passage available, without using the common passage claiming the private pathway from the defendant without any document to substantiate the same is not sustainable. Even on perusal of Ex.A2 and Ex.B3 the original vendor has not mentioned the pathway inbetween the plaintiff and the defendant's property. Merely because the electricity metre box was fixed on the wall of the defendant's house and the water pipeline is running through the 'B' Schedule property, it does not give any right to the plaintiff to file a suit claiming the common pathway. Though it was made available with the consent of the earlier party, it does not bind on the defendant who purchased the property in the year 1991, in the absence of any specific averments in the sale deed.

18.Accordingly, the substantial questions of law raised before this Court with regard to the sale deed executed by the Krishna Gounder in favour of the plaintiff and the defendant's vendor did not mention about the common pathway and in the absence of any documentary proof, claiming the separate pathway from the defendant by way of easementary right is not proved by the plaintiff/ appellant. Accordingly, the substantial questions of law are answered against the plaintiff.

19.In view of the above, the second appeal is dismissed. The judgment and decree dated 25.08.2000 made in A.S.No.33 of 2000 on the file of the Additional District Judge, Pondicherry reversing the judgment and decree made in O.S.No.36 of 1999 dated 28.10.1999 on the file of the Principal District Munsif, Pondicherry, is confirmed. No costs. Consequently, the connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To

1.The Additional District Judge, Pondicherry.

2.The Principal District Munsif, Pondicherry.

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

RV(CO)
sm:16.2.2018

S.A.No.1955 of 2000
And
C.M.P.No.19137 of 2000



WEB COPY