

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.09.2018

PRONOUNCED ON : 25.10.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.201 of 2015

Vasanth Lakshmanan ...Appellant/Plaintiff

Vs.

1. Natarajan
2. Devaki Natarajan ...Respondents/Defendant

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 05.11.2014 passed in A.S.No.116 of 2012 on the file of the IV Additional Judge, City Civil Court, Chennai confirming the judgment and decree dated 17.08.2011 passed in O.S.No.6816 of 2007 on the file of the XIV Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.V.Raghavachari
for M/s. P.Krishnan

For Respondents: Mr.K.Chandrasekaran

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 05.11.2014 passed in A.S.No.116 of 2012 on the file of the IV Additional Judge, City Civil Court, confirming the judgment and decree dated 17.08.2011 passed in O.S.No.6816 of 2007 on the file of the XIV Assistant Judge, City Civil Court, Chennai.

2. The Parties are referred to as per their rankings in the trial Court.

3. Suit for Permanent Injunction.

4. The case of the plaintiff, in brief, is that she is the owner of the plaint schedule property inclusive of the common passage, which is the subject matter of dispute by virtue of a

sale deed dated 18.11.2004 and the plaintiff has been using the suit property inclusive of the common passage and the common passage has been under the common enjoyment of the plaintiff and the defendants and accordingly the plaintiff is entitled to 50% share in the common passage and the other 50% belong to the defendants. The service connection, viz., water supply, drainage connection, etc., are drawn through the common passage of her portion of the property and even the plaintiff's vendor S.Kuppusamy also owned and possessed the right to the common passage by virtue of the sale deed dated 19.06.1992 and the common passage had been used for entry to the property of the plaintiff and for drawing other service line for the said property. The original owner Mrs.Violet Rani got the suit property by virtue of a settlement deed dated 19.12.1974 inclusive of the right of way in the common passage and accordingly, the plaintiff and her predecessors in interest have been using the common passage over a long period of time and as the defendants without any authority attempting to interfere with the right of usage and enjoyment of the common passage by the plaintiff, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts. After denying the plaintiff's allegations in toto, put forth that the documents of title projected by the plaintiff and the sale deed of the property acquired by the defendants would go to show that no common passage belong to the plaintiff's vendor Kuppusamy and further Kuppusamy, had himself attested the sale deed dated 18.01.2002 executed by K.Chandira to the first defendant and the abovesaid sale deed does not show any common passage as alleged by the plaintiff to the length of north to south 35 feet and a width of 4½ feet east to west from Chidambaranar street to SSV temple land. On the other hand, the passage of 14 feet in length north to south and 4 feet in width east to west on the southern portion of the defendants' land had been shown for the defendants to have access to the Chidambaranar street from their property and the abovesaid access of passage is made exclusively for the defendants and their family alone and nobody including the plaintiff has got any right over the said passage. If the plaintiff's case is accepted as true, there should have been a common passage with a length of 69½ feet (36½ + 33), which is not so and therefore the common passage pleaded by the plaintiff is a mere fabrication and an after thought to appropriate the right of way over the defendants' property and further the plaintiff has got a right of access through SSV Koil street to her land and a gate was also in existence for her use and access hitherto and therefore the plaintiff cannot use the defendants' land for right of way and taking advantage of the absence of the first

defendant, the plaintiff is attempting to gain the right of way through the defendants property and the case of the plaintiff that the service line had been drawn through the passage to her property is false. It is false to state that the original owner Violet Rani had also the right over the common passage by virtue of the settlement deed dated 19.12.1974 and even the settlement deed executed by Violet Rani dated 19.10.1974 in favour of her husband S.A.Asirvatham clearly stated that the settlee would have a passage of 14 feet in length north to south and 4 feet in width east to west for access and also the measurement was stated as east to west 33 feet and north to south 36½ feet, totalling to 1204 sq. ft. or thereabouts and Asirvatham in turn sold the property to one Chandra under the sale deed dated 19.06.1992 and there is no mentioning of any common passage in the said document and therefore the common passage alleged by the plaintiff is a mere myth. The plaintiff has not acquired any right of way by way of grant or prescription in respect of the suit property belonging to the defendants and the plaintiff has no cause of action to institute the suit and the plaintiff has access only through SSV Koil street available on the norther side of the plaintiff's property and hence the suit is liable to dismissed.

6. In support of the Plaintiff's case, Pws1 and 2 were examined and Exs.A1 to A7 were marked. On the side of the defendant Dw1 was examined and EXs.B1 to 13 were marked. Exs.C1 was also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the courts below were pleased to dismiss the plaintiff's suit. Impugning the same, the present second appeal has been laid.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

- "a) Whether the courts below were right in ignoring the recitals of Ex.A2 which says that there is a common pathway?
- b. Whether the courts below were right in holding that Ex.A2 does not prove the existence of the common pathway? and
- c. Whether the courts below were right in ignoring the report of the Advocate Commissioner where the Advocate commissioner has mentioned about the existence of the pathway?

9. During the course of hearing of the second appeal, as per the order dated 12.09.2018 in CMP No.16166 of 2018, this court had permitted the defendants to produce the original settlement deed dated 19.10.1974 as an additional document

considering that the certified copy of the settlement deed dated 19.10.1974 had already been marked as Ex.B2 and accordingly the abovesaid document, namely, the original settlement deed dated 19.10.1974 has come to be marked as Ex.B14 in the second appeal.

10. The dispute between the parties is, with reference to the alleged common passage running in the property measuring north to south from Chidambaranar street 35 feet and east to west 4½ feet and it is stated that the plaintiff is entitled to 50% share in the abovesaid common passage and the defendants are entitled to the remaining 50% share with reference to the same. Now, according to the plaintiff, she has acquired the property described in the plaint schedule by way of a sale deed dated 18.11.2004, the certified copy of the same has been marked as Ex.A3 and it is seen that the abovesaid sale deed had been executed in favour of the plaintiff by Kuppusamy, examined as PW2. Kuppusamy in turn acquired the right from S.Violet Rani and others in respect of the property by virtue of a sale deed dated 19.06.1992, the certified copy of which has been marked as Ex.A2. Violet Rani in turn, is found to have acquired the right in the said property by virtue of a settlement deed dated 19.12.1974, the certified copy of which has been marked as Ex.B1. Therefore it is seen that the plaintiff traces his title to the alleged common passage through Exs.B1, A2 and A3.

11. Now, according to the defendants, there is no common passage as put forth by the plaintiff and it is stated that the alleged passage projected by the plaintiff and as described in the plaint, had not been conveyed in the title deed of the plaintiff's predecessors in interest marked as Ex.B1 and not validly conveyed under Ex.A2 and therefore it is stated that the plaintiff's vendor Kuppusamy (PW2) is not entitled to convey any right of common passage in favour of the plaintiff by way of Ex.A3 sale deed and it is further stated that by way of Ex.A3 sale deed, the plaintiff is attempting to create the right of way over the property belonging to the defendants, which the plaintiff is not entitled to legally and it is also further stated that even in the defendants documents of title deed marked as Exs.B3, B4 and B2 respectively, there is no reference about the common passage as sought to be made out by the plaintiff and accordingly it is stated that when in none of the documents above pointed out, there is any reference about the common passage as such for gaining access to the plaintiff's property and on the other hand, the plaintiff had been having access only from SSV Koil street situated on the northern side of her property and suppressing the same, the plaintiff cannot be allowed to seek any right of way over the defendants property alleging that the same is the common passage belonging to the plaintiff and the defendants and hence it is contended that the plaintiff has no cause of action to institute the suit.

12. It has been admitted and also as it could be seen from the description of the plaint schedule property, the plaintiff's property is bounded on the north by SSV temple and vacant land of the temple. On a perusal of the anterior title deed of the plaintiff marked as Ex.B1, i.e, the settlement deed executed in favour of Violet Rani by Asirvatham, it is seen that, while describing the property, there is only a mention of the lane running north to south from SSV Koil second street and measuring 35 feet north to south and 4½ feet east to west situated in between SSV temple ground and Samuels house site. On the other hand, the title deed of the plaintiff marked as Ex.A3, describes the alleged common passage running north to south measuring 35 feet from Chidambaranar street and east to west 4½ feet upto SSV temple land. It is thus found that when Chidambaranar street is found to be located on the southern side of the defendants' property and the property belonging to another as could be seen from the settlement deed marked as Ex.B3/B14 and when the plaintiff property is found to be lying to the north of the defendants property and SSV Koil property is found to be the northern boundary of the plaintiff's property and when as per Ex.B1, the anterior title deed of the plaintiff, a lane is found to be commencing from SSV koil street in between SSV temple ground and Samuels house site, it does not stand to reason as to how in Ex.A3, the alleged common passage has been described to be running from Chidambaranar street upto SSV temple land and by way of the abovesaid description of the alleged common passage in Ex.A3 sale deed it is seen that as rightly put forth by the defendants counsel, the plaintiff is seeking to gain right of way through the defendants' property, on the other hand, when in Ex.B1 settlement deed, the alleged lane is shown to be running only between SSV temple ground and Samuel's house site and not found to be running through the defendants' property upto Chidambaranar street, as rightly argued, the plaintiff's vendor, without any entitlement, had conveyed the alleged right over the non existing common passage to the plaintiff by way of Ex.A3 sale deed. Similarly, even in the sale deed executed in favour of the plaintiff's vendor by Violet Rani and others marked as Ex.A2, the common passage is shown to be running from Chidambaranar street upto SSV temple's land, on the other hand, when Violet Rani had been conferred the property by way of Ex.B1 settlement deed, the same is shown as the lane running from SSV Koil street upto Samuel's house site and there is no grant of any access of way to Violet Rani through the defendants' property. It is thus found that the plaintiff or his vendor would not be entitled to have any access of way in the alleged common passage said to be running from Chidambaranar street to SSV koil property. The said position has been clearly admitted by the plaintiff's vendor examined as PW2 and PW2 during the course of cross examination has admitted that he had purchased the property from Violet Rani during the

year 1992 and the sold the same to the plaintiff and further admitted that in 1974 settlement deed, while describing the property, the said property was shown to be having access only through SSV koil street and also admitted that he had entrusted the settlement deed to the plaintiff and acquired the property only as described in the settlement deed, i.e., Ex.B1 and further admitted that SSV koil vacant land is shown as the northern boundary of the suit property and also admitted that Chandra sold the property to the defendants during 2002 and that he had attested the said document and further admitted clearly that while Violet Rani alienated the property to him, there had been access or way to the property only through SSV Koil street and accordingly the said way or passage had been in existence for more than 10 years and he had not obtained any permission for using the common passage and further admitted once more that the northern boundary is shown as SSV koil and vacant land site and such being the evidence of the plaintiff's vendor, it is seen that when Violet Rani had not been granted any access of way through the defendants property running from Chidambaranar street as set out in the plaint schedule and on the other hand, the access to the property belonging to Violet Rani has been only from the northern side i.e., through SSV Koil street and the said access or way had been in existence for several years and accordingly the same also been so described in Ex.B1 settlement deed, when such being the position, it does not stand to reason as to how Violet Rani would be entitled to convey the right over the alleged common passage in favour of PW2 as if the same is running through the defendants' property of the measurement as set out in the plaint schedule and accordingly it is found that as rightly put forth by the defendants' counsel, if the plaintiff had endeavoured to produce the original settlement deed Ex.B1 along with the plan attached to the same, the true picture would have been disclosed as to the nature of the right of access / way to the property settled upon Violet Rani under the said settlement deed. Though PW2 would admit that he had entrusted the settlement deed to the plaintiff, the plaintiff, for the reasons best known to her has not cared to produce the said settlement deed and on the other hand it is seen that the certified copy of the same has been marked only by the defendants. If the plaintiff had endeavored to produce the original settlement deed along with the plan attached to the same and when PW2 had admitted that Violet Rani had entrusted the plan along with the sale deed and furthermore PW2 during the course of chief examination would also admit that as per the said plan, the plaintiff is having access only through SSV koil street, the plaintiff having not established her alleged right over the common passage as set out in the plaint schedule, particularly, through the defendants' property, should have endeavoured to produce the original settlement deed Ex.B1 with the plan attached to the same and if the same has been

projected, the court would have been in a position to understand as to the nature of the right of way which had been conferred upon Violet Rani to have access to the property settled upon her. But, conveniently, the plaintiff had suppressed the original settlement deed Ex.B1 along with the plan.

13. If really any common passage or way had been running through the defendants' property as put forth by the plaintiff, the same would have been disclosed in the title deeds of the defendants. On a perusal of the title deeds of the defendants, commencing from Exs.B3, B4 and B2, it is seen that there is no reference at all about the common passage from Chidambaranar koil street upto SSV Koil land and on the other hand, the defendants had been given the right only over the lane portion measuring north to south 14 feet and east to west 4 feet for gaining access to their property from Chidambaranar street and the said lane is found to be located on the south eastern corner of the property, i.e. to the east of Viswanathan plot and to the south east of the defendants property. There is no reference about the continuation of the said lane or any common passage from Chidambaranar street running through the defendants' property and the same is conspicuously found not depicted in the abovesaid title deeds, i.e, Exs.B3, B4 and B2 and when it is noted that the plaintiff's vendor PW2 had attested the sale deed executed by Chandra marked as Ex.B2 dated 10.01.2002 and even in the said document, there is no reference about any common passage running through the defendants' property, in such view of the matter, the plaintiff cannot be allowed to gain any right of way through the defendants' property by depicting the alleged common passage in the description of the property comprised in Exs.A2 and A3.

14. The plaintiff is attempting to gain the right of way through the defendants' property in the guise of the description of the property comprised in Exs.A2 and A3. However, when the original title holder of the plaintiff's property has not been granted any such right by way of Ex.B1 settlement deed and when the plaintiff's vendor has clearly admitted about the right of access only through SSV koil street for several years, the plaintiff cannot be allowed to gain access through the defendants' property by incorporating the recitals of common passage in her sale deed or by taking advantage of such recitals in the sale deed of his vendor and thereby seek the right of way through the defendants' property without any legal entitlement.

15. It is contended by the plaintiff's counsel that the commissioner's report and plan marked in the matter does not go to show that any provision is available for the plaintiff to have access to her property through SSV koil street. No doubt, the commissioner in his report would state that on visiting the

said premises, he noticed a compound wall which contained a closed entrance and adjacent to the northern compound wall there is a Vinayagar temple situated and the temple has its compound wall and a gate is found locked and accordingly reported that there is no entrance from Somasundara Vinayagar Street to the plaintiff's property. On that score, it is contended that there could not have been any way or access to the plaintiff's property through SSV koil land. However, when the earlier title deed of the plaintiff's predecessors in interest EX.B1 goes to show that right of access had been only made available through SSV koil land and the same had been clearly admitted by PW2, the plaintiff's vendor and also the existence of the said way for several years has also been admitted by PW2, merely from Commissioner's report and plan, it cannot be held that the plaintiff is not having access from SSV koil property located on the northern side. As rightly determined by the courts below from the report of Advocate Commissioner seen in entirety in consonance with the documents of title of the plaintiff and documents of title of the defendants, it is seen that the plaintiff had been having access only through SSV koil land and not from Chidambaranar street through the alleged common passage and accordingly when from Ex.C1 coupled with the admission of PW2, the plaintiff's vendor, it could be inferred that there had been a way from SSV koil street in the earlier period, however, subsequent to the closure of the same for one reason or the other, it is found that the plaintiff has come forward claiming the right over the defendants property as if she has common right over the same as set out in the plaint schedule. On the other hand, when as it could be seen from the description of the defendants' property, right from the inception, the defendants had been granted the access from Chidambaranar street to their property over a lane of 14 feet north to south and 4 feet east to west and the lane is found to be not running through the defendants property upto the plaintiff's property, it is seen that resultantly for gaining access to the plaintiff's property, there should have been a way only from SSV koil street on the northern side and accordingly, the same had been depicted in EX.B1 settlement deed. In order to suppress the same, it is seen that the plaintiff had not endeavored to produce the original settlement deed Ex.B1 and the plan attached to the same and if the same had been produced, the truth would have been disclosed that the right of way to the plaintiff's property from the inception had been only through SSV koil street on the northern side and not through the defendants' property. If the right of way to the plaintiff's property had been only through the defendants' property as now put forth, as to why there is no such description of the common passage in the defendants' documents has not been explained by the plaintiff. In such view of the matter, it is seen that the plaintiff is attempting to take advantage of Commissioner's report and plan to contend that

there is no way to her property from northern side through SSV koil street.

16. As above pointed out, the plaintiff has miserably failed to establish the existence of any common passage running through the defendants' property and the plaintiff's anterior title deed Ex.B1, does not point out to the abovesaid passage and when the plaintiff has deliberately suppressed the production of the original settlement deed with the plan attached to the same, thereby indirectly the plaintiff is attempting to claim the right of way through the defendants' property, in such view of the matter, when the plaintiff's predecessors in interest had not been granted any such right under EX.B1 settlement deed, it is seen that she would not have been competent to convey the non-existent right in favour of the plaintiff's vendor and in turn the plaintiff's vendor also would not be entitled to convey the alleged right in favour of the plaintiff and in such view of the matter, it is found that the courts below are justified in non-suiting the plaintiff as the plaintiff has failed to establish any valid claim of right over the alleged passage as set out in the plaint schedule.

17. Furthermore, when the defendants have, from the inception, been disputing the claim of the title of the plaintiff to the alleged common passage and when according to the defendants no such common passage exists in their property, in such view of the matter, the plaintiff should have sought for the declaration of nature of the right she seeks to enforce in respect of the alleged common passage as to whether she is seeking absolute right over the same or easementary right in respect of the same and accordingly should have come forward with necessary relief of declaration pertaining to the same. On the other hand, the suit had been laid by the plaintiff simplicitor for the relief of permanent injunction. Accordingly, it is seen that, as rightly argued, the plaintiff's suit without seeking the relief of declaration as to her alleged right in the alleged common passage and more particularly when the plaintiff has failed to establish that the common passage exists on ground running through the defendants' property, it is seen that on the above score also, the plaintiff suit is found to be not maintainable.

18. The defendants' counsel in support of his contentions, placed reliance upon the decisions reported in (2017)12 Supreme Court cases 27 (Kamakshi builders v. Ambedkar Educational society and others) and CDJ 2018 MHC 4842 (Family Manager Rajamanickam v. Wakf Committee, rep. by Muthavalli, Janab Abdul Jabbar & others). The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at the hand.

19. In the light of the above discussions, the plaintiff cannot take advantage of the recitals contained in Exs.A2 and A3, in claiming the right over the alleged common pathway particularly having failed to establish that her predecessor in interest, namely, Violet Rani had been conferred any such right over the alleged common pathway by way of Ex.B1 settlement deed and accordingly when it is found that Violet Rani is incompetent to confer or convey any such right to the plaintiff's vendor and in turn the plaintiff's vendor is also incompetent to convey any such right to the plaintiff and in such view of the matter, the plaintiff cannot be allowed to take advantage of the commissioner's report for sustaining her claim of right over the alleged common pathway as the report and plan of the commissioner cannot be the basis or a substitute for enabling the plaintiff to claim any right over the non existent passage in the defendants' property as above discussed. The substantial questions of law formulated in this second appeal are accordingly answered against the plaintiff and in favour of the defendant.

20. In conclusion, the second appeal fails and is accordingly dismissed with cost. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

bga

To

1. IV Additional Judge, City Civil Court, Chennai
2. XIV Assistant Judge, City Civil Court, Chennai.

+1cc to M/s.P.Krishnan, Advocate, S.R.No.73709

+1cc to Mr.K.Chandrasekaran, Advocate, S.R.No.73854

A.No.201 of 2015

GJII (Co)
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