

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 14.12.2017

Pronounced On : 27.03.2018

CORAM

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

S.A. No.1744 of 2000

K.Narayanan ...Appellant/Appellant/Plaintiff

-Vs-

1.Lakshmi

2.Samiappan

...Respondents/Respondents/
Defendants

Prayer: The Second Appeal is filed under Section 100 C.P.C. against the judgment and decree dated 24.09.1999 made in A.S.No.142 of 1997, on the file of the Sub Court, Gobichettipalayam which confirmed the Judgement and Decree dated 30.09.1997 made in O.S.No.246 of 1995, on the file of the District Munsif Court, Sathyamangalam.

For Appellant : Mr.R.Babu
for B.Kumarasamy

For Respondents : No representation

JUDGMENT

This second appeal has been filed by the plaintiff against the judgment and decree dated 24.09.1999 passed in A.S.No.142 of 1997, on the file of the Sub Court, Gobichettipalayam, which confirmed the judgment and decree dated 30.09.1997, made in O.S.No.246 of 1995 on the file of the District Munsif Court, Sathyamangalam.

2.The appellant herein has filed a suit in O.S.No.246 of 1995 on the file of the District Munsif Court, Sathyamangalam, for permanent injunction restraining the respondents herein from interfering with his peaceful possession and enjoyment of suit 'A' schedule property, to declare his easementary right to use the suit 'B' schedule property as cart track and consequently to grant permanent injunction restraining the respondents herein from obliterating the cart track, which is running in the suit 'B' schedule property. The learned District Munsif by his judgment dated 30.09.1997 decreed the suit and granted permanent injunction in respect of the suit 'A' schedule property, but he dismissed the suit in respect of the suit 'B' scheduled property.

3. Aggrieved by the aforesaid judgment and decree, the plaintiff has filed an appeal in A.S.No.142 of 1997 and the defendants have filed an appeal in A.S.No.26 of 1999 on the file of the Sub-Court, Gobichettipalayam. The learned Sub-Judge by his common judgment dated 24.09.1999 has dismissed both the appeals confirming the judgment and decree of the trial Court. As against the same, the plaintiff has filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial Court.

4. The averments made in the plaint are in brief as follows:-

The plaintiff has purchased the suit 'A' schedule property through a registered sale deed dated 04.05.1994. He dug a bore well and cultivating the said land. The defendants are husband and wife. The first defendant owns a land on the north of the suit 'A' schedule property. The plaintiff also owns a land on the north of the first defendant's land and in that land the plaintiff's garden shed is there. Hence, the first defendant, at the request of the plaintiff, orally granted the right of way, in the month of May 1994 itself, through the suit 'B' schedule property which is shown as 'AB' portion in plaint plan. Since then the plaintiff has been using the suit 'B' schedule property to reach the suit 'A' schedule property from the property situated on the north of the first defendant's property. Since, there is no other cart track for the plaintiff to reach the suit 'A' schedule property from his garden shed, the right of way over the suit 'B' schedule property was granted as of necessity. Further the plaintiff has laid an underground pipeline through the 'B' schedule property to irrigate his northern lands. That being so, the defendants, on 14.07.1995, tried to encroach the northern portion of the suit 'A' schedule property and also tried to obliterate the cart track which is shown as suit 'B' schedule property. Hence the suit.

5. The averments made in the written statement filed by the second defendant and adopted by the first defendant are in brief as follows:-

The first defendant has purchased her property vide sale deed dated 28.12.1987 from one Abdul Bazeer and from that date onwards, the defendants are enjoying the same. On 04.05.1994 the plaintiff has purchased the suit 'A' schedule property. Thereafter, the plaintiff represented that he will dig a bore well on his northern land within 12 months and till that time he requested to permit him to take water from the suit 'A' schedule property to his northern land through the first defendant's land. Considering the said request, he was temporarily permitted to take water through the first defendant's land. Hence the plaintiff has laid an underground pipeline through the first defendant's land and took water to his northern land. The said oral permission expired in the year 1995 and thereafter, the plaintiff has no right to use the first defendant's land. The averment that the suit 'B'

schedule property was used by the plaintiff as a cart track is false. He was never permitted to use the suit 'B' schedule property as cart track. The alleged oral grant is absolutely false. The plaintiff cannot claim any cart track right over the first defendant's property. Therefore, the defendants prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as P.W.1 and marked Exs.A1 and A2 as exhibits. On the side of the defendants, one witness was examined as DW.1 and one exhibit was marked as Ex.B1. The Advocate Commissioner's report and plan were marked as Exs.C1 and C2 respectively.

7. The learned District Munsif, after considering the materials placed before him, decreed the suit in respect of the suit 'A' schedule property and dismissed the suit in respect of the suit 'B' schedule property. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.142 of 1997 and the defendants filed an appeal in A.S.No.26 of 1999 on the file of the Sub-Court, Gobichettipalyam. The learned Sub Judge has dismissed both the appeals confirming the trial Court's judgment and decree. As against the same, the plaintiff has filed the present second appeal.

8. At the time of admitting the second appeal, this court has formulated the following substantial question of law:-

"Whether the findings of the Court below are correct in law in holding that the right of way is not mentioned in Ex.A1 which would not affect the case of the plaintiff since, the right of way was already conferred on the plaintiff under oral grant?"

9. Since batta was not paid for sending notice to the second respondent, the second appeal was dismissed for default against him as per the order passed by this Court, dated 15.12.2009. So far as, the first respondent is concerned, she has received notice, but she did not appear either in person or through counsel and hence, she was set-exparte on 14.12.2017. After hearing the arguments of the learned counsel for the appellant and perusing the records, judgment is being passed.

10. The learned counsel for the appellant contended that the commissioner's report would show the existence of the cart track and the same would prove that there was an oral grant of an easement over the suit 'B' schedule property. He further contended that the first defendant, who granted the right of easement, did not file written statement. He further contended that in fact, the defendants not at all entered into

the witness box to prove the averments made in the written statement and hence an adverse inference has to be drawn against them. The case of the plaintiff with regard to the easement by oral grant was not at all disputed by the defendants by adducing evidence. He further contended that it is clear from the recitals in Ex.A1 that the plaintiff is entitled to use 'mamool' cart track to reach his property. He further contended that the Courts below failed to consider the oral and documentary evidence adduced by the plaintiff in a proper perspective and hence, he prayed to allow this second appeal and decree the plaintiff's suit as prayed for.

11. Admittedly, the second defendant is the husband of the first defendant. There is no dispute that both of them are living together. So, the second respondent, who is being the husband would know the facts of the case and hence nothing wrong in filing written statement by him.

12. The plaintiff has filed the suit for declaration claiming easementary right. So, the burden is upon him to establish his case, by adducing oral and documentary evidence. He cannot pick up wholes in the case of the defendants. Merely because, the Commissioner has stated in his report that there is a cart track in first defendant's property, it cannot be presumed that the first defendant granted easementary right to use her land for cart track to go from the plaintiff's southern land to his northern land.

13. Admittedly, in the year 1994, the plaintiff has laid an underground pipeline for taking water from his southern land (suit 'A' schedule property) to his northern land through the first defendant's land. According to the defendants, in the year 1994, the plaintiff represented that he will dig a bore well on his northern land within 12 months and till that time he requested to permit him to take water by laying pipeline from his southern land to the northern land through the first defendant's land and accordingly they gave permission temporarily to take water through the first defendant's land and the said oral permission also expired in the year 1995. Their further case is that they did not orally grant any easementary right for using the first defendant's land as cart track.

14. The plaintiff while examining himself as P.W.1, during cross examination, has categorically admitted that he has removed the pipe line. According to the plaintiff, both the pipeline as well as the cart track were running in the suit 'B' schedule property and the same has been shown as 'AB' in the plaint plan. He has not stated any reason for removal of the pipe line. The removal of the pipeline itself would show that the defendants' case is true. It has to be presumed that since the licence period was over, the plaintiff has removed the pipeline. So, automatically the licence to use cart track also should go.

15.It is pertinent to note that the plaintiff has not claimed easementary right of pathway for the suit 'A' schedule property. On the contrary, he claimed the right of pathway from his northern land to his southern land through the first defendant's property. If he claims pathway for enjoying the suit 'A' schedule property it can be said that there is a justification. But he cannot claim pathway from his old property to the newly purchased property through the stranger's land. It is not the case of the plaintiff that originally the plaintiff's northern land and southern land and first defendant's land were belonged to a common ancestor and they were enjoyed as a single unit. The plaintiff failed to prove the alleged oral grant of an easementary right over the first defendant's property. So, the plaintiff cannot claim right of cart track over the first defendant's property.

16.The trial Court and the first appellate Court after considering all the materials available on record found that the alleged oral grant of easement for cart track over the first defendant's land has not been proved. In the said factual and concurrent findings, this Court cannot interfere. Accordingly, the substantial question of law is answered against the appellant. Hence, this second appeal is liable to be dismissed.

17.In the result, this Second Appeal is dismissed confirming the judgments and decrees passed by the Courts below. No Costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

cp/vs

To

1. The Sub Court, Gobichettipalayam

2.The District Munsif Court, Sathyamangalam.

RJI (CO)

sm:24.4.2018

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