

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.07.2018

PRONOUNCED ON : 09.08.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1759 of 2004

1. A.Doraisamy (Deceased)
2. Chandragandhi
3. Uma Maheswari
4. Senthil KumarAppellant/Lrs of Plaintiff

(Appellants 2 to 4 brought on record as LRs of the deceased sole appellant vide order of court dated 04.07.2018 made in CMP.No.10910 to 10912/2018 in S.A.No.1759 of 2004)

Vs.

Avanashiappan Respondents/Defendant

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 27.02.2004 passed in A.S.No.48 of 2003 on the file of the Subordinate Court, Tiruppur, confirming the Judgment and Decree dated 17.07.2003 passed in O.S.No.102 of 1995 on the file of the District Munsif Court, Avinashi.

For Appellants : Mr.K.Goviganesan

For Respondent : Mr.R.Saseetharan

JUDGMENT

In this second appeal, challenge is made to the Judgement and Decree dated 27.02.2004 passed in A.S.No.48 of 2003 on the file of the Subordinate Court, Tiruppur, confirming the Judgment and Decree dated 17.07.2003 passed in O.S.No.102 of 1995 on the file of the District Munsif Court, Avinashi.

2. The second appeal has been admitted on the following substantial questions of law:

" (1). Whether the Courts below have committed an error of law in over looking the well settled principle of law that the enjoyment of the right of easement by prescription within two years does not mean actual user of the right claimed but only such constructive user is consistent with the continuance of enjoyment and prevents the inference of its discontinuance especially when the right claimed by the plaintiff is only to carry out white washing and repairs of the walls and when the existence of the drainage in the suit pathway is not denied by the defendant?

(2). Whether the lower appellate court has committed an error of law in not considering the oral evidence on record for recording a finding as to whether the plaintiff was using the suit pathway within two years next to the filing of the suit?"

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. Suffice to state that the plaintiff/appellant has laid the suit against the defendant/respondent for the reliefs of declaration that he is entitled to enjoy the suit pathway and also for the consequential relief of permanent injunction restraining the defendant from interfering with his enjoyment of the suit pathway.

5. On a perusal of the plaint averments, it is found that the case of the plaintiff, as regards the suit pathway, is that he and his predecessors in interest had been enjoying the suit pathway, continuously, openly and without any interruption whatsoever and thereby, prescribed title to the suit pathway by way of prescription and accordingly, inasmuch as the defendant, on account of hostile attitude, interfered with his possession and enjoyment of the suit pathway and with reference to the same, on 30.01.1990, the defendant made an attempt illegally to prevent the plaintiff from enjoying the suit pathway by putting up a temporary construction, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

6. The defendant has contested the claim of the plaintiff contending that the suit pathway is not in the enjoyment of the plaintiff as put forth in the plaint and accordingly, stated that the pathway has been only in the exclusive possession and enjoyment of the defendant and thereby, sought for the dismissal of the plaintiff's suit.

7. On the basis of the materials placed on record, both oral and documentary, by the respective parties, the trial Court was pleased to dismiss the suit laid by the plaintiff. Aggrieved over the same, the plaintiff preferred the first appeal. The first appellate Court, considering the pleas put forth by the respective parties as regards the suit pathway, formulated the points as to whether the plaintiff and his predecessors in interest have prescribed their easementary right over the suit pathway as claimed in the plaint and also whether the abovesaid right, if exists, been enjoyed by the plaintiff and his predecessors in interest continuously as put forth by the plaintiff or whether the said right got extinguished and accordingly, on an analysis of the materials placed on record, as regards the first point formulated for consideration as abovestated, determined that the plaintiff and his predecessor in interest had been enjoying the suit pathway and accordingly, held that the plaintiff and his predecessors in interest have prescribed their easementary right over the suit pathway as put forth in the plaint. Further, as regards the second point formulated for consideration held that the abovesaid right enjoyed by the plaintiff and his predecessors in interest, particularly, for maintaining the wall of the plaintiff's Ginning Factory and for the drainage purposes has not been extinguished by non user as projected by the defendant. As against the abovesaid determination of the plaintiff's right over the suit pathway and the non-establishment of the said right as sought to be projected by the defendant, the defendant has not preferred any independent appeal or cross objection in the present appeal preferred by the plaintiff. Accordingly, it is found that when the first appellate Court has formulated the points for determination as regards the entitlement of the plaintiff to the suit pathway as claimed in the plaint and accordingly, determined the abovesaid points in favour of the plaintiff, as rightly put forth by the plaintiff's counsel, the first appellate Court should have, accordingly, set aside the judgment and decree of the trial Court and upheld the plaintiff's case. On the other hand, it is found that the first appellate Court, despite holding the abovesaid main points for determination in favour of the plaintiff, still proceeded to confirm the judgment and decree of the trial Court by holding that the plaintiff has not established the use of the suit pathway for two years prior to the institution of the suit and on that footing, refused to entertain the appeal preferred by

the plaintiff and thereby, confirmed the judgment and decree of the trial Court and for arriving at the abovesaid conclusion, it is found that the first appellate Court has solely placed reliance upon the commissioner's report and plan projected in the matter.

8. As rightly put forth by the plaintiff's counsel in the present appeal, it is found that the commissioner had been appointed to note down the physical feature as to the existence of the suit pathway and accordingly, the commissioner had also filed his report and plan and from the same, it could be seen that the suit pathway has been in existence. Even the defendant has not disputed the existence of the suit pathway, as such, and all that, the defendant would claim is that the suit pathway has been in the exclusive possession and enjoyment of the defendant and it is stated that the defendant has put up a fence and also a gate and accordingly, the key of the lock put up in the gate is in the custody of the defendant. On that footing the first appellate Court had held that the plaintiff has failed to establish the usage of the suit pathway for two years prior to the institution of the suit and thereby, declined the reliefs sought for by him.

9. On a perusal of the pleadings, it is found that the specific case of the plaintiff is that the defendant illegally attempted to prevent his enjoyment of the suit pathway only on 30.01.1990 by attempting to put up a temporary construction and the abovesaid averment made in the plaint had not been specifically disputed in the written statement. Even, as regards the above plea put forth in the plaint, the plaintiff examined as PW1 would state that the defendant obstructed his enjoyment of the suit pathway just one week prior to the filing of the suit and the abovesaid evidence of PW1 has not been suggested to be a false one by the defendant during the course of the cross examination of PW1. In addition to that, the evidence has also adduced on the side of the plaintiff through the mouth of PW2 that the fence and the gate put up in the suit pathway has been jointly raised by the plaintiff and the defendant and accordingly, he has stated that both the plaintiff and the defendant are having one key each for the lock fitted in the gate and as rightly argued, no suggestion whatsoever has been put to PW2 refuting his abovesaid evidence on the abovesaid aspects. Thus, it is found that the defendant as such having failed to establish that he has been in the exclusive possession and enjoyment of the suit pathway for two years prior to the institution of the suit and on the other hand, as pointed out above, when according to the plaintiff, as the enjoyment of the suit pathway had been attempted to be obstructed by the defendant just one week prior to the institution of the suit and

when the same has not been specifically controverted by the defendant either by way of the written statement or during the course of the cross examination of the plaintiff's witnesses and when it is found, from the materials placed on record, that the suit pathway has been in the possession and enjoyment of the plaintiff, considering the fact that drainage is also running in the suit pathway portion and also the commissioner's report and plan would go to show that the plaintiff had also put up a doorway facing the suit pathway for the purpose of having access to the same for reaching rear portion of the suit pathway and when the same is not established to have been put up by the plaintiff recently for the purpose of the case and further, the usage of the suit pathway is also found to be needed for cleaning and maintaining the wall of the plaintiff's Ginning Factory by having access through the same, accordingly, it is seen that the first appellate Court, on coming to the conclusion that the plaintiff and his predecessor in interest have prescribed title to the suit pathway by prescription and their abovesaid right has not been established to have been extinguished by the defendant and considering the abovesaid aspects of the matter, in the preponderance of probabilities, the plaintiff's usage and enjoyment of the suit pathway has not been hindered or obstructed two years prior to the institution of the suit as determined by the first appellate Court and on the other hand, the same had been attempted to be interfered by the defendant just one week prior to the institution of the suit and accordingly, the plaintiff having been necessitated to institute the suit for appropriate reliefs, it is thus seen that the first appellate Court had negatived the plaintiff's lis erroneously on the basis that the plaintiff has failed to establish the usage of the suit pathway two years prior to the institution of the suit mainly based upon the commissioner's report and plan. When the physical features as noted by the advocate commissioner and as above discussed would also go to establish the usage of the suit pathway by the plaintiff also and accordingly, it is found that the plaintiff has been using the suit pathway by exercising easementary right over the same and he has not been shown to be in the non enjoyment of the same two years prior to the institution of the suit as sought to be made out by the defendant particularly for the purpose of cleaning the wall of his factory and also for effecting the repairs of the same and also, when it is noted that the suit pathway has also used as the drainage by the parties concerned, in such view of the matter, it is found that the first appellate Court, despite holding the main points for determination in favour of the plaintiff, erroneously declined the reliefs sought for by the plaintiff on the footing that the plaintiff has failed to establish the usage of the same two years prior to the institution of the suit. When the materials placed on record prove otherwise, it is thus found that the determination of the

first appellate Court as regards the non user of the suit pathway for two years prior to the institution of the suit by the plaintiff being based upon only the commissioner's report and plan and however, when the commissioner's report and plan do not support the said version as above discussed and when the materials had been placed by the plaintiff to show that he has also been using the suit pathway continuously from the days of his predecessors in interest and as the right has not been extinguished in any manner other an attempt made by the defendant just one week prior to the institution of the suit by putting up a temporary construction, accordingly, it is seen that the first appellate Court should have upheld the plaintiff's case by setting aside the judgment and decree of the trial Court.

10. Considering the principles as to how the continuous easement or discontinuous easement could be extinguished as outlined in Section 47 of the Easementary Act, 1882 and when the ingredients contained therein having not been shown to be applicable to the present case, for the reasons aforestated and on the other hand, the plaintiff having been held to be enjoying the easementary right from the days of his predecessors in interest and thereby, prescribed the easementary right with reference to the same and also his right has not been found to be extinguished by the first appellate Court as sought to be made out by the defendant, it is seen that the first appellate Court has erroneously determined, without any proper appreciation of the materials placed on record, that the plaintiff has failed to establish the usage of the suit pathway two years prior to the institution of the suit. Accordingly, the substantial questions of law formulated in the second appeal are answered in favour of the plaintiff and against the defendant.

For the reasons aforestated, the Judgement and Decree dated 27.02.2004 passed in A.S.No.48 of 2003 on the file of the Subordinate Court, Tiruppur, confirming the Judgment and Decree dated 17.07.2003 passed in O.S.No.102 of 1995 on the file of the District Munsif Court, Avinashi are set aside and resultantly, the suit in O.S.No.102 of 1995 laid by the plaintiff is decreed as prayed for with costs and accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To

1. The Subordinate Court, Tiruppur.

2. The District Munsif Court, Avinashi.

+1cc to Mr.K.Govi Ganesan, Advocate, S.R.No.54834

+1cc to Mr.R.Saseetharan, Advocate, S.R.No.54708

S.A.No.1759 of 2004

TM(CO)
GSP(04/10/2018)



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