

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.03.2018

PRONOUNCED ON : 06.04.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.570 of 2004

Rajammal ... Appellant/Plaintiff

Vs.

Manonmani ... Respondent/Defendant

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Additional District Judge (Fast Track Court No.V, Coimbatore) at Tirupur dated 03.03.2003 in A.S.No.33/2002 reversing the judgment and decree of the District Munsif cum Judicial Magistrate Court at Palladam dated 16.08.2001 in O.S. No.622/1995.

For Appellant : Mrs. Mythili Suresh
for M/s. Sarvabhauman Associates

For Respondent : Mr.Kinston Jerold

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 03.03.2003, passed in A.S.No.33/2002, on the file of the Additional District Judge (Fast Track Court No.V, Coimbatore) at Tirupur, reversing the judgment and decree dated 16.08.2001, passed in O.S. No.622/1995, on the file of the District Munsif cum Judicial Magistrate Court at Palladam.

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

3. Suit for declaration and permanent injunction.

4. The case of the plaintiff, in brief, is that she is the owner of the house bearing door no.6/111 and the vacant space around it in the suit village and the plaintiff got the property

by virtue of the patta granted by the Government and the plaintiff constructed the house in the year 1969 and residing therein for the past 25 years and the defendant is the adjacent neighbour having her property on the north and the west of the plaintiff's property and the defendant had also got her property by way of patta from the Government and there is a north south pathway on the northern side of the plaintiff's property and in between the defendant's property and the said pathway is in existence for the past about 30 years for the plaintiff to reach the east west Tiruppur Othakalmandapam main road and the said pathway is the suit property and the same is shown as ABCD in the plaint plan and the width is 3 feet and the length is 65 feet and the pathway has been in the use of the plaintiff for reaching the main road for the past 30 years openly, continuously and to the knowledge of the defendant and others. The plaintiff has also the easement of necessity and easement by way of prescription to the suit pathway and the defendant by using his influence encroached the major portion of the pathway and left only 3 feet pathway to the plaintiff and recently, the defendant with an intention to occupy the suit pathway attempted to put padals on the north and south of the pathway and in this connection, the plaintiff presented a petition before the Revenue Divisional Officer, Tiruppur and the Revenue Divisional Officer had granted a stay in favour of the plaintiff and ordered the defendant not to make any obstruction in the suit pathway by way of an order dated 24.01.1984 and despite the said order, the defendant has tried to interfere with the plaintiff's enjoyment of the suit pathway by putting up obstruction and hence, according to the plaintiff, she had been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit is not maintainable either in law or on facts. It is false to state that the plaintiff has right to the alleged suit pathway both by way of prescription and by way of necessity as an easementary right and the right of way by easement of necessity and by prescription do not co-exist and they are mutually contradictory and there is a road branching off from the Tiruppur road and proceeding southwards east of the Valliammal's house and the plaintiff reaches her house by proceeding through this mud road and turning westwards in the road that leads to her house and it is true that through this road the plaintiff is taking carts and when there is a well laid road to reach her house, the plaintiff cannot claim any right of way over the defendant's property as an easement by way of necessity. The defendant is entitled to put her property to any kind of use and the plaintiff has no entitlement to question the same and hence, the suit laid by the plaintiff without any cause of action is liable to be dismissed.

6. In support of the plaintiff's claim PWs 1 and 2 were examined, Exs.A1 to A6 were marked. On the side of the defendant DW1 was examined, Exs.B1 to B3 were marked. Exs.C1 and C2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to decree the suit as prayed for. On appeal, the first appellate court, on an appreciation of the materials placed on record, was pleased to set-aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the defendant, dismissed the suit laid by the plaintiff. Aggrieved over 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:

(i) When the appellant had established the right of easement by necessity and acquisition by prescription as required under Sections 13 and 15 of the Indian Easements Act, 1882 by producing Exs.A1 to A6 material documents coupled with oral evidence of PWs 1 and 2, whether the lower appellate Court is correct in law in non-suiting the appellant?

(ii) When the suit pathway is the only access for the appellant and it has been used by the appellant for over thirty years, whether the lower appellate court is correct in law in holding on the basis of Exs.C1 and C2 Commissioner's report and plan that the appellant has got an alternative access, which is a circuitous one, never used by the appellant?

(iii) Whether the lower appellate Court is correct in law in taking a unduly critical view of the judgment the trial court by eschewing the evidence of PWs1 and 2?

9. The plaintiff has filed a plan along with the plaint. The suit pathway is shown as ABCD, which is stated to be situated to the north of the plaintiff's property and in between the properties of the defendant bearing Door Nos.6/109 and 6/110. The plaintiff claims easementary right over the said property both by way of prescription as well as by way of necessity.

10. According to the defendant, there is no pathway as putforth in the plaint and further according to the defendant, the property over which the suit pathway is alleged to have been

existing is the property belonging to the defendant absolutely and hence the plaintiff cannot lay any claim of right to use the same as pathway to have access to the main road and further according to the defendant the plaintiff is having another access to reach her house from the main road and hence the suit laid by the plaintiff is liable to be dismissed.

11. In this matter, the Advocate Commissioner has inspected the properties of the parties concerned and filed his report and plan marked as Exs.C1 and C2. As rightly determined by the first appellate Court as well as the admission of the plaintiff's husband, examined as PW1, during the course of his evidence, it is found that there is an access to the plaintiff's house from the main road and this has been clearly elucidated by the Advocate Commissioner in his report and plan and it is found that unable to resist the same, PW1 has also admitted the existence of the said access to reach the house and it is found that the said access is passing through the Government property and further, according to PW1, the plaintiff could have access to her house from the main road through the pathway running on the southern side of Palanisamy naicker's house. However, according to PW1, the plaintiff's husband, though the said way had been used as an access, if the same is used, he has to pass through about 500 feet and on the other hand, if the suit pathway is used, the distance would be shorter and hence, as rightly determined by the first appellate Court, when the materials placed on record would go to show clearly that there is an access to the main road from the plaintiff's house, it is found that the case of the plaintiff that she has easementary right by way of necessity to the alleged suit pathway shown as ABCD in the plan is found to be not justified. Accordingly, it is noted that the first appellate Court after taking into consideration the various authorities cited before it finding that the easementary right by way of necessity would come into play only in the case of the absolute necessity and accordingly noting that easement any right by way of necessity could not be granted purely on the ground of convenience and advantage, accordingly rightly rejected the claim of the plaintiff for seeking right to the alleged suit pathway as easementary right by way of necessity.

12. It is found that both the plaintiff as well as the defendant had acquired patta in respect of the properties belonging to them. The defendant has filed the patta marked as Ex.B1. On a perusal of Ex.B1, as rightly found, it does not indicate the existence of the pathway in the property assigned therein. The plaintiff has not cared to place her patta for the consideration of the Court for the reasons best known to her. If really, the plaintiff had been granted any easementary right of the pathway over the properties assigned to the defendant, definitely there would have been reference to the same in the defendant's patta or as the case may be, in the plaintiff's

patta. However, there is no indication thereto found in the defendant's patta, marked as Ex.B2. Conveniently, the plaintiff has suppressed her patta and not cared to place the same to evidence as to whether she had been granted any pathway right in the defendant's property for having access to her assigned property. It is thus found that the claim of the plaintiff that the pathway had been in existence shown as ABCD in the plaint plan for several years and thereby, there she has prescribed easementary right by way of prescription to the same as such cannot be countenanced. Similarly, the evidence of PW2 testifying that he has taken the materials through the said pathway also is found to be unbelievable. As rightly determined, when it is found that the defendant's house construction had been done at a later stage, the claim of PW2 that he had taken the materials through the pathway existing between the defendant's house properties for the construction of the plaintiff's house prior in time is found to be unacceptable and it is rightly found by the first appellate Court that the evidence of PW2 seems to be artificial and also unreliable, particularly, when there is no material placed in support of the same. It is thus found that the plaintiff has failed to place acceptable materials to hold that the suit pathway had been earmarked in the defendant's property for the plaintiff to have access from the main road and in such view of the matter, the claim of the plaintiff to the suit pathway by way of prescription as such cannot be countenanced.

13. However, the plaintiff would contend that the Revenue Divisional Officer, Tiruppur, has restrained the defendant from causing obstruction to the plaintiff through the suit pathway by way of Ex.A4 proceedings. However, as rightly determined by the first appellate Court, the revenue officials is not the authority to determine the title and therefore, it is found that the proceedings of the Revenue Divisional Officer, Tiruppur, marked as Ex.A4, by itself would not confer any right over the alleged suit pathway in favour of the plaintiff. The plaintiff having come to the Civil Court for establishing her claim of easementary right over the alleged suit pathway and when it is found that there is no material placed in support of the plaintiff's claim, the proceedings of the revenue department by itself would not be sufficient to uphold the plaintiff's claim of title to the suit pathway, particularly, when there is no material placed on record to show the existence of the suit pathway as such and further, it is found that the plaintiff is having access to her property through another way as pointed by the Advocate Commissioner as well as the admission by the plaintiff's husband PW1.

14. As rightly determined by the first appellate Court, the claim of easementary right in respect of the suit pathway both

by way of prescription as well as necessity are found to be contradictory. In this connection, reliance is placed upon the decision reported in I.L.R. (1997) 3 MADRAS 1425 (Nanjammal and others Vs. Marappa Gounder and another) by the defendant's counsel. However, the plaintiff's counsel would rely upon the decision reported in 1999-1-L.W.422 (R.Sengoda Gounder and 5 others Vs. Sengoda Gounder and 5 others) for contending that the abovesaid pleas are not inconsistent and can be made by a party for establishing her right. No doubt, there is an observation in the said decision that the party could not be deprived of claiming both the easementary right. However, in so far as the case covered in the said decision, it is found that though both the easementary right by way of prescription as well as necessity had been claimed, the right has been restricted only to the easementary right by way of prescription and accordingly, on that basis, the case covered in the said decision had come to be rendered. Such being the position, it is found that as rightly contended by the defendant's counsel, the abovesaid observation of the learned Judge cannot be held to be authoritatively holding that the party is entitled legally to take up the easementary right both by way of prescription as well as necessity. On the other hand, when it is found that such divergent rights could not be taken, as they being mutually contradictory and destructive, it is seen that on the above ground also, the plaintiff's suit has to fail. That apart, in so far as this case is concerned, the plaintiff having miserably failed to establish her claim of easementary right both by way of prescription as well as by way of necessity, as above discussed, it is seen that the first appellate Court is justified in non suiting the plaintiff on the basis of proper appreciation of the materials placed on record in the right perspective both factually and legally and in such view of the matter, it is seen that the judgment and decree of the first appellate Court do not warrant any interference. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendant.

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

Sd/-

Assistant Registrar(CS V)

//True copy//

Sub Assistant Registrar

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To

1. The Additional District Judge,
(Fast Track Court No.V, Coimbatore),
Tirupur.
2. The District Munsif cum Judicial Magistrate Court,
Palladam.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.Sarvabhauman Associates, Advocate SR.No.25373
+1cc to Mr.S.K.Ragunathan, Advocate SR.No.25354

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GN(24/04/2018)



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