

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.12.2017
PRONOUNCED ON : 09.01.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.861 of 2002

1. Perumal Servai

2. Manickammal Appellants/Appellants/Plaintiffs

Vs.

1. R.Subramani

2. R.Jagathesan

3. R.Sathiyamoorthy

4. R.Venkatesan Respondents/Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 26.11.2001 in A.S.No.7 of 2000 on the file of the Subordinate Judge's Court, Mettur confirming the judgment and decree dated 28.4.2000 in O.S. No.289 of 1996 on the file of the District Munsif cum Judicial Magistrate's Court, Omalur.

For Appellants : Mr.R.Subramanian

For Respondents : Mr.S.Saravanakumar
for M/s. V. Jaikumar

JUDGMENT

This second appeal is directed against the judgment and decree dated 26.11.2001 passed in A.S.No.7 of 2000, on the file of the Subordinate Court, Mettur confirming the judgment and decree dated 28.4.2000 passed in O.S. No.289 of 1996 on the file of the District Munsif cum Judicial Magistrate Court, Omalur.

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 plaintiffs, in brief, is that the suit property originally belonged to the father of the first plaintiff. The second plaintiff is the wife of the first plaintiff and the suit property consists of a tiled house bearing door nos.27,28 and 28-A and a thatched house bearing door no.29 and a vacant space. The suit property was partitioned by the first plaintiff and his elder brother Angappa servai amongst themselves with the consent of their father, by a registered partition deed, dated 10.12.1965 and since then, the first plaintiff is in possession and enjoyment of the share allotted to him and after the death of Angappa servai in 1971, his legal heirs sold his allotted share in the suit property, in favour of the second plaintiff, by way of a registered sale deed dated 14.12.72 and accordingly, the plaintiffs 1 and 2 are the absolute owners of the entire suit property and enjoying the same by obtaining electricity connection etc., The defendants 1 to 4 have their ancestral property in the west adjoining to the suit property and their house was facing north and there is no common pathway adjoining to the house of the defendants in the eastern side and the pathway situated to the east of the defendants house absolutely belongs to the plaintiffs and the defendants attempted to use the said pathway and encroach the portion of the same along with their property, but, it was prevented and hence, after the exchanges of notices between the parties, according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts. It is true that the door nos. 27, 28 and 28-A and door no.29, as stated in the plaint, belonged to the plaintiffs. However, it is false to state that the plaintiffs are the owners of the vacant space as claimed in the plaint. It is false to state that the first plaintiff and Angappa servai divided the suit property amongst themselves by a partition deed dated 10.12.1965 and accordingly, enjoying their shares respectively and the defendants do not admit that the legal heirs of the deceased Angappa servai sold his share to the second plaintiff on 14.12.72 and it is false to state that since then, the plaintiffs 1 and 2 were enjoying the entire suit property as claimed in the plaint. It is true to state that the defendants ancestral suit property is situated to the west of the plaintiffs' house and the house situated to the west of the plaintiffs' house was purchased by the defendants' father, Raju, on 30.08.1940 and enjoying the same and it is false to state that there is no common pathway to the east of the defendants' property and it is false to state that the said pathway exclusively belongs to the plaintiffs. The pathway situated to the east of the defendants house is common to the defendants, plaintiffs and others and the plaintiffs cannot claim any exclusive right to the same. The case of the

plaintiffs that the defendants attempted to interfere with the possession and enjoyment of the pathway is not correct. The defendants' father had purchased the properties on 30.08.1940, measuring east west 37 feet and north south 50 feet and enjoying the tiled house bearing no.32 and thatched house bearing no.31 and to the east of the said property, there is a common pathway measuring 6 feet breadth and 38 feet length and since 1940 onwards, the defendants' father had been in enjoyment of the said common pathway and it is located in poramboke property and other than the said pathway, there is no pathway for the defendants to have access to the main road and hence, the suit laid by the plaintiffs is liable to be dismissed.

6. In the additional written statement the defendants have also taken a plea that they have got easementary right of the way for reaching their house and excepting the common pathway, there is no other way to reach the main road. The defendants have also perfected easementary right in the suit property by continuous and uninterrupted use of the same, for more than 50 years from the days of the predecessors in title and hence, the suit is liable to be dismissed.

7. In support of the plaintiffs' case PWs 1 and 2 examined, Exs.A1 to 21 were marked. On the side of the defendants DWs 1 and 2 were examined, Exs.B1 to 19 were marked. Exs. C1 to C3 were also marked. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to reject the plaintiffs case. Assailing the same, the present second appeal has been laid.

8. At the time of admission of the second appeal, the following substantial question of law was formulated for consideration:

Whether in law are not the decree and judgment of the lower appellate Court vitiated in that after finding that the suit property is a common lane, the relief should have been moulded instead of dismissal of suit in toto?

9. The plaintiffs claim title to the suit property on the basis of the partition deed dated 10.12.1965, marked as Ex.A1 and the sale deed dated 14.12.72, marked as Ex.A2. From the pleadings set out by the respective parties and the materials placed, it is found that the dispute between the parties lies only with reference to the common pathway situated to the east of the defendants property bearing door nos. 32 and 31, which is a tiled house and a thatched house. It is found that the thatched house had since become destroyed, the property belonging to the defendants had been acquired by them, by way of the sale deed dated 30.08.1940, marked as Ex.B1. As such there

is no dispute between the parties as regards the title deeds through which they claim title to their respective properties. The plaintiffs claim exclusive right to the pathway situated to the east of the defendants property. On the other hand, according to the defendants, the said pathway is a common pathway to them as well as to the plaintiffs and others for having access to the main road situated on the northern side. The plaintiffs having traced their title to the disputed pathway both under Exs.A1 and A2, it has to be seen whether the plaintiffs are entitled to claim exclusive right to the disputed pathway. Ex.A1 is the partition deed executed between the first plaintiff and his brother Angappa servai. As per the said deed, it is found that the A schedule property described therein had been allotted to Angappa servai and the B schedule property described therein had been allotted to the first plaintiff. According to the plaintiffs, the share allotted to Angappa servai under Ex.A1 had been sold by his legal heirs to the second plaintiff by way of Ex.A2, sale deed. A perusal of the property described in the A schedule, under Ex.A1, would go to show that the said property has been described as three units and it is found that Angappa servai had been allotted the property consisting of the ground situated to the south of Krishnan's land and the common pathway to the east of Marakkal's house and Papathiammal's vacant space to the north of V.Subbaraya chettiar's house and to the west of the B schedule share described therein and the above said first unit has been stated to be measuring eastwest 17½ feet and northsouth 24 feet and the said unit also consists of two houses facing north located within the above said boundaries and the second unit is described as the land situated within the above mentioned boundaries measuring east west 13 ½ feet and north south 15 feet and the thatched hut located therein and the third unit is described as the common pathway situated to the north of the first unit above stated to the east of Marakkal's house to the west of the B schedule property described therein and to the south of the common pathway and Krishnan's land measuring east west 17 ½ feet, north south 6 feet and in the above said common pathway described in the third unit, it is seen that Angappa servai had been allotted common half share and apart from the above said three units described in the A schedule property, it is also found that Angappa servai had also been given common right of using the common pathway measuring 6 feet width running north to south from the common pathway described in the third unit to reach the union road and also given right in the service connection and the electrical fittings and the common share in the wall described in the A schedule property. In toto, it is found that as rightly determined by the Courts below, only in the third unit of the A schedule property, as stated above, Angappa servai had been given a right of share over the common pathway belonging to their family and the other half right had been given to his brother, the first plaintiff and as regards

the common pathway measuring 6 feet width running north south for having access to the union road, it is seen that he has been given only the right of way and not absolute right towards his share. Therefore, as rightly found by the Courts below, the disputed pathway measuring 6 feet width situated to the north of the third unit of A schedule property above stated, has not been allotted to either Angappa servai or the first plaintiff under Ex.A1. On the other hand, they have given only the right of using the said pathway under the said document. Similarly, in the B schedule property described in Ex.A1, the first plaintiff had been allotted the property consisting of the ground measuring East west 20 feet and north south 30 feet, situated to the north and west of Kuppusamy gounder's house to the east of the A schedule property and to the south of the lands of Krishnan and others and the said property also consists of two houses and further, the first plaintiff had also been granted half right in the common pathway belonging to the brothers described in the third unit of the A schedule property and further, it is also noted that the first plaintiff has also been given the right of using the disputed common pathway measuring 6 feet width running north to south for reaching the union road as given to Angappa servai in the A schedule and in addition to that, the first plaintiff has also been given the right over the common Wall etc.

10. Therefore, a cumulative reading of the shares allotted to Angappa servai and the first plaintiff under Ex.A1 would only go to show that though they had been given absolute right of pathway conferring equal share as regards the third unit above stated measuring east west 17 ½ feet and north south 6 feet, as far as, with reference to the common pathway situated to the north of the same measuring 6 feet width, it is found that they had been given only the right to use the said common pathway for reaching the union road and not absolute right. Such being the position, it does not stand to reason, as to how the first plaintiff could claim absolute right over the disputed common pathway situated to the north of the pathway, the third unit of A schedule under Ex.A1 and when it is the specific case of the plaintiffs that the legal heirs of Angappa servai had only sold the A schedule property described in Ex.A1 to the second plaintiff, under Ex.A2, it is found that both the plaintiffs had been only granted the right of using the pathway in so far as the disputed common pathway is concerned, which is found to be not allotted to the exclusive right of the brothers as in the case of the pathway allotted to the brothers under Ex.A1 as described in the third unit of A schedule above stated. Such being the position, the plaintiffs cannot claim any exclusive right over the disputed common pathway situated to the east of the defendants property described under Ex.A1, on the footing that the same had been acquired by them under Exs.A1 and A2.

11. The Courts below have correctly identified that the title deeds under which the plaintiffs claim absolute title to the disputed common pathway do not confer them such a right and on the other hand, had granted only the right of using the common pathway and that they have been given absolute right only in the common pathway situated to the south of the disputed pathway under the above said title deeds. It is thus found that the plaintiffs cannot seek the relief of declaration in respect of the suit property which admittedly includes the disputed common pathway.

12. However, it is argued by the plaintiffs' counsel that under Ex.B1, the defendants father had purchased the property situated to the west of the house and lane belonging to Venkatappa servai, namely, the first plaintiff's father and according to him, if the above said lane had been a common lane, the same would have been described as the common lane and on the other hand, it had been only be described as belonging to Venkatappa servai and therefore, based on the recitals under Ex.B1, the Courts below should have held that it exclusively belongs to the plaintiffs. However, as rightly putforth by the defendants' counsel, considering the shares allotted to the two brothers under Ex.A1, it is found that as far as the disputed common pathway is concerned, they had not been conferred absolute right and granted only the right of using the common pathway. The common lane shown as belonging to Venkatappa servai in Ex.B1 located on the eastern side would only refer to the third unit of the common lane absolutely and equally allotted to Angappa servai and the first plaintiff under Ex.A1 and by no stretch of imagination, it could be held that it relates to the disputed common pathway in respect of which, Angappa servai and first plaintiff had been granted only the right to use the same and not been conferred any absolute right. If such be the case, as rightly argued by the defendants' counsel, when Venkatappa servai is said to have acquired right over the property by way of the document which has come to be marked as Ex.B16, it is found that there is no reference at all that he had also purchased absolute right over the disputed common pathway and when the plaintiffs are unable to show that Venkatappa servai had acquired absolute right in respect of the disputed common pathway also under Ex.B16, it is seen that the plaintiffs cannot be granted the relief of declaration as regards the disputed common path way.

13. That apart, the plaintiffs' counsel also contended that the defendants in their additional written statement have claimed easementary right in respect of the disputed pathway and such being the defence projected by the defendants, according to him, the defendants thereby have impliedly accepted the right of the plaintiffs over the disputed common pathway and on that basis, according to him, the Courts below should have granted the relief of declaration as prayed for. However, the above

contention does not merit acceptance. No doubt, the defendants have also pleaded easementary right for using the disputed common pathway for accessing the main road. By way of the above said defence, it cannot be held that the defendants have conceded that the plaintiffs have absolute title over the disputed pathway. It is found that the defendants are consistent in their pleadings that the disputed common pathway is common to all, for accessing to the main road, which is situated on the north side. The plaintiffs having come forward with the specific case that they had been allotted absolute right over the disputed common pathway under Exs.A1 and A2 and on the other hand, on a perusal of Exs.A1 and A2, when it is found that the plaintiffs had been allotted only the right of using the disputed common pathway and not conferred any absolute right over the same and when it is found that they had been given the absolute right in the common pathway only situated to the south of the disputed common pathway, it is found that by way of the above said easementary plea projected by the defendants, we cannot uphold the plaintiffs title to the disputed common pathway. As rightly argued by the defendants' counsel, the defendants are entitled to take inconsistent pleas and accordingly, on that footing, it cannot be held that they have accepted the plaintiffs title to the disputed common pathway. At the most, it can only be understood that the defendants by way of the above said easementary claim, is seeking the said claim against the true owner of the disputed common pathway. However, when the true owner of the disputed common pathway is not arrayed as a party to the lis, it is seen that the claim of the easementary right putforth by the defendants, has to be negatived.

14. The Courts below having found that the plaintiffs have not been granted any absolute right over the disputed common pathway and the plaintiffs having not clearly demarcated the disputed common pathway either in the plaint schedule or in the plaint plan and when the plaintiffs have described the suit property as being located to the south of the Panchayat road, Krishnan house and Marakkal's house and Marakkal demolished house and on the other hand, when it is found that the plaintiffs had been granted only the right to use the disputed common pathway situated to the south of the panchayat road and when the disputed common pathway has not been clearly identified by the plaintiffs by giving clear linear measurements and also the survey number in which it is located, it is seen that excluding the same, the plaintiffs cannot be granted the relief of declaration as regards the other portions of the suit property, since the suit property has been described as one unit in the plaint, although, as found earlier, excepting the disputed common pathway, the defendants had not raised any issue with the title of the plaintiffs in respect of the other portion of the suit property inclusive of the door numbers mentioned in the plaint schedule.

15. Further, though the plaintiffs had come forward with the suit claiming title to the suit property as claimed in the plaint, on the basis of Exs.A1 and A2, however, during the course of evidence, when the first plaintiff had been confronted with the nature of the property that had been actually allotted under Ex.A1, it is seen that the first plaintiff examined as PW1, during the course of cross examination, has been forced to accept that there is no document to show that the disputed common pathway belongs to him and no such document is also available in the name of his father and according to him, after the institution of the suit, he has obtained patta in respect of the disputed common pathway and accordingly, it is seen that the plaintiffs have projected the patta as Ex.A15. However, when it is found that Ex.A15 has come to into existence after the institution of the suit and when according to the plaintiffs, they seek title to the suit property only under Ex.A1 and A2 and further, when there is no clear reference found in Ex.A15 that even inclusive of the disputed common pathway, the plaintiffs had been granted the said patta and when it is further noted that the plaintiffs have not established that the said patta had been granted to them after giving notice to all the parties concerned, including the defendants, no safe credence could be attached to Ex.A15, for upholding the plaintiffs claim of title to the disputed common pathway, they same being only a revenue document.

16. In the light of the above position, the substantial question of law formulated in this second appeal as to whether the plaintiffs would be entitled to obtain the relief of declaration as regards the other portions of the suit property excluding the disputed common pathway, as such, cannot also be acceded to, since, as above discussed, the plaintiffs have not clearly demarcated the disputed common pathway from the rest of the suit property and such being the position, the Courts below are found to have rightly rejected the reliefs sought for by the plaintiffs. Accordingly, the substantial question of law formulated in the second appeal is answered against the plaintiffs.

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

s/d-

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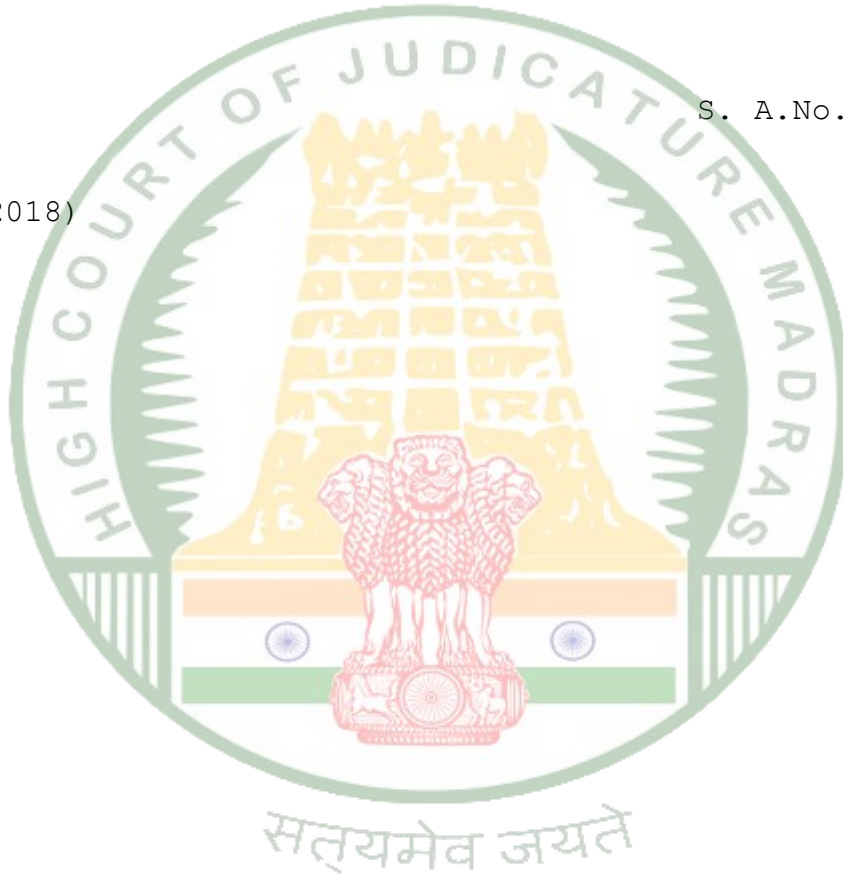
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