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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.01.2018

CORAM :

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

Second Appeal (MD) No.13 of 2018

and

CMP(MD)No.358 of 2018

Chinniah : Appellant/Appellant/Plaintiff

-Vs-

Muthu : Respondent/Respondent/Defendant

Prayer: Second Appeal filed under Section 100 of the Code of the Civil Procedure, against the judgment and decree dated 01.02.2016 made in A.S.No.70 of 2013 on the file of the Sub Court, Pudukottai, confirming the judgment and decree dated 25.04.2013 made in O.S.No.169 of 2008 on the file of the District Munsif cum Judicial Magistrate Court, Thirumayam.

For Appellant :Ms.K.Hemakarthikeyan

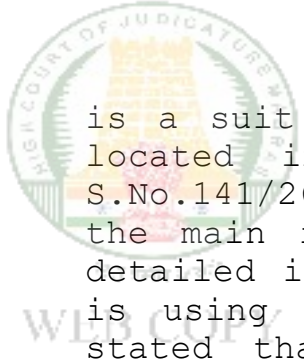
For Respondents :Ms.A.L.Gandhimathi

JUDGMENT

This Second Appeal has been filed against the judgment and decree dated 01.02.2016 made in A.S.No.70 of 2013 on the file of the Sub Court, Pudukottai, confirming the judgment and decree dated 25.04.2013 made in O.S.No.169 of 2008 on the file of the District Munsif cum Judicial Magistrate Court, Thirumayam.

2.The appellant / plaintiff has filed a suit in O.S.No.169 of 2008 on the file of the District Munsif-cum-Judicial Magistrate Court, Thirumayam, for declaration that the plaintiff is entitled to easmentry right over the suit 'B' schedule property to have access from his property in suit 'A' schedule property to the east-west street on the south and for consequential injunction restraining the defendant from interfering with his right or obstructing the pathway by putting up any construction.

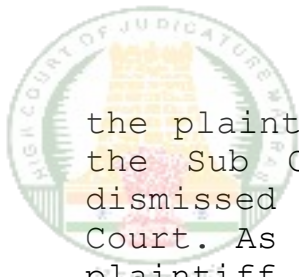
2.1.The case of the plaintiff is that the suit 'A' schedule property belongs to the plaintiff and that he is in enjoyment of the same by getting rough patta ("Thoraya patta") from the Special Tahsildhar for Natham settlement. The suit "B" schedule property



is a suit pathway measuring 10 feet width and 100 feet length, located in the southern side of the plaintiff's house in S.No.141/26 and 141/27. The plaintiff has no other access to reach the main road from his house. Though, the said pathway is not detailed in the revenue records, it is stated that the plaintiff is using the same from time immemorial. The plaintiff further stated that the defendant has made an attempt to put up a construction and thereby, obstructing the pathway in the suit "B" schedule property on 09.12.2008. The plaintiff claimed right of easement for beneficial enjoyment of his property and he is also pleaded easement of necessity under Section 13 of the Indian Easement Act, 1882. It is stated by the plaintiff that apart from the plaintiff, the suit pathway is being enjoyed by others and the defendant have no right to obstruct the pathway. Though the defendants are given patta for the suit 'B' schedule property, it is contented that the defendant can exercise the right, subject to the easement right of the plaintiff.

3.The suit was contested by the defendant mainly on the ground that the suit 'B' schedule property is not in existence on ground. The defendant specifically denied the allegations that the suit 'B' schedule property is used as a pathway for the beneficial enjoyment of the plaintiff's property namely the property described as suit 'A' schedule property. It is further contended that the suit 'A' schedule property itself is not being enjoyed by the plaintiff for more than 25 years, as the plaintiff himself is residing in a house, which is located about 1 km away from the suit 'A' schedule property. It is further stated that the plaintiff is using the pathway running towards north from the suit 'A' schedule property and reaches the main road by running towards eastern direction. The defendant also pleaded that the plaintiff was never using the suit 'B' schedule property as a pathway at any point of time and that the suit has been laid by the plaintiff without having any right of easement. The defendant has also pleaded by attributing motive for filing the suit and described the suit as a vexatious litigation.

4.The plaintiff has examined P.W.1 to P.W.5, apart from marking the documents under Ex.A1 to Ex.A6. The defendant has examined D.W.1 and D.W.2 and marked documents under Ex.B1 to Ex.B4. Before the trial Court, an Advocate Commissioner was appointed and he has submitted a report under Ex.C1 and Ex.C2. The trial Court after considering the evidences, dismissed the suit holding that the suit 'B' schedule property is not required for the plaintiff to use the same to have access from his property in the suit 'A' schedule property to reach the main road. It is also found by the trial Court that the plaintiff have not proved that he is in enjoyment of such easmentry right for more than 20 years. Since it is admitted that the plaintiff have no documents, the trial Court after holding that the plaintiff is not entitled to any right of easement, dismissed the suit. Aggrieved by the same,



the plaintiff has preferred an appeal in A.S.No.70 of 2013 before the Sub Court, Pudukottai and the lower appellate Court also dismissed the appeal and confirmed the findings of the trial Court. As against the concurrent findings of the Courts below, the plaintiff has preferred this second appeal.

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5.The learned counsel for the appellant fairly submitted that the plaintiff's claim is only for easement of necessity, as he is in need of this property to have access to reach the main road. It is to be noted that the Courts below after referring to the Commissioner's report and plan, have specifically found that that there is an alternative pathway, that is available for the plaintiff to have access from suit 'A' schedule property to the main road. Hence, the contention of learned Counsel for appellant on the question of plaintiff's right of easement of necessity has been rightly rejected by the Courts below. The learned Counsel for the appellant has mainly relied upon Order 41 Rule 31 of CPC, stating that the lower appellate Court has not framed these points for determining in the appeal.

6.Going by the judgment of the appellate Court, it is seen that the appellate Court has specifically framed the points for determination as whether the plaintiff is entitled to the right of easement and for declaration as prayed for. Having regard to the nature of pleadings, it is seen that the issue framed by the appellate Court is proper. Further, the appellate Court has considered all the points and issues raised by the appellant before the lower appellate Court. In these circumstances, the judgment of the appellate Court cannot be assailed by referring to Order 41 Rule 31 of CPC.

7.Having regard to the specific findings of the Courts below, this Court sitting in second appeal, has no power to re-appreciate the entire evidence. This Court is able to see that the Courts below, have come to the conclusion based on the admitted facts and evidence. The judgment of the Court below is also supported by the Advocate Commissioner's report. Since findings of the Courts below are based on materials and the learned Counsel for the appellant has not pointed any irregularity or illegality in the judgment of the appellate Court, while confirming the findings of the trial Court on all issues. In such circumstances, this Court is not inclined to entertain this second appeal as no substantial question of law is involved in this appeal and hence, this second appeal is dismissed. However, no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CSII)

Sub Assistant Registrar



1.The Subordinate Judge,
Pudukottai.

2.The District Munsif-cum-Judicial Magistrate,
Thirumayam.

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The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai

+1 CC TO Ms.K.Hemakarthiskeyan, Advocate, Sr.No. 44267

JAM/15/03/2018/ CVC / SAR 3/ 4p-5c

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