



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.06.2018

CORAM :

WEB COPY

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

Second Appeal (MD) No.18 of 2018
and

C.M.P.(MD)No.436 of 2018

Chinna Gurusamy Thevar (Died)

2.Arumuguvel

3.Muneeswaran

: Appellant / Appellant/

Plaintiff

(Appellants 2 and 3 are brought on record as legal heirs of deceased sole appellant vide order dated 07.03.2018)

-Vs-

1.Pitchaiammal

2.Senthilkumar

3.Kanagaraj

4.Selvarani

5.Arujuna Raja

6.Gnanammal

: Respondents / Respondents/

Defendants

Prayer: Second Appeal filed under Section 100 of the Code of the Civil Procedure, against the judgment and decree passed by the learned Subordinate Judge, Srivilliputhur, dated 22.06.2016 in A.S.No.37 of 2011 confirming the judgment and decree of learned Principal District Munsif, Srivilliputhur, dated 22.10.2010 in O.S.No.177 of 2003.

For Appellant

:Mr.N.Dilip Kumar

For R1 to R4 and R6

:Mr.M.Thirunavukkarasu

For R5

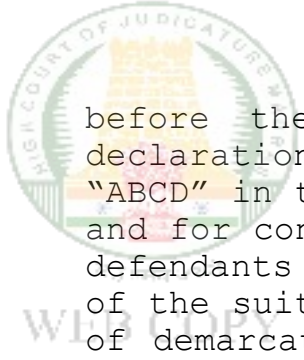
:No Appearance

JUDGMENT

The plaintiff in the suit in O.S.No.177 of 2003 on the file of the Principal District Munsif Court, Srivilliputhur, is the appellant in this appeal.

<https://hcservices.ecourts.gov.in/hcservices/>

2.The appellant herein filed the suit in O.S.No.177 of 2003



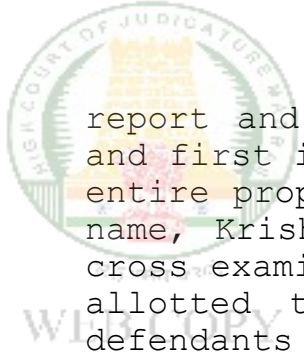
before the Principal District Munsif Court, Srivilliputhur for declaration that the suit first schedule property described as "ABCD" in the plaint plan is the exclusive property of the plaintiff and for consequential relief of permanent injunction restraining the defendants from interfering with the plaintiff's peaceful enjoyment of the suit first schedule property. The suit is also for the relief of demarcation of the suit property and consequently directing the defendant to hand over possession of the encroached area.

3.The case of the appellant in the plaint is that the suit property described as first schedule belongs to the plaintiff. Though it is admitted that the suit property and other properties originally belonged to the ancestors of the plaintiff and the defendant by name, Alaguthevar, it is stated that the said Alaguthevar died about 60 years back leaving behind his 8 sons to inherit the property and to enjoy the suit property in common. It is the specific case of the plaintiff that the suit second schedule property is allotted to the father of the second defendant and the suit first and third schedule properties were allotted to the predecessor-in-interest of the plaintiff. The plaintiff specifically stated that the co-owners entered into an oral partition and later the property allotted to the father of plaintiff was inherited by the plaintiff and his father, who in turn, had divided the property by way of oral partition and it is stated that in the oral partition, the plaintiff was allotted with third schedule property measuring an extent of 26 cent and the first schedule property.

4.The suit was contested by the defendants disputing the averments in the plaint with regard to the oral partition. Though it is admitted that the suit property originally belonged to Alaguthevar, the allotment pleaded by the plaintiff was specifically denied. The defendants also claimed ownership over the suit first schedule property as legal heirs of Krishnathevar, one of the sons of Alaguthevar. It is the specific case of the defendants that the suit first and second schedule properties were allotted to Krishnathevar in the oral partition among the sons of Alaguthevar.

5.The plaintiff produced Ex-A1 to Ex-A3 and examined himself as PW-1. The second defendant produced Ex-B1 to Ex-B11. The second defendant examined himself as DW-1 and examined one Shanmugavelayutham as DW-2. After framing necessary issues, the trial Court held that the plaintiff has failed to prove his title in respect of an extent of 26 cents described in item No.I. The trial Court also relied upon the admission of DW-1 stating that the suit first schedule property was allotted to the father of defendants 2 to 4. Since no document or oral evidence is produced by the plaintiff to prove his title, the trial Court rejected the case and ultimately dismissed the suit. Aggrieved by the judgment and decree of the trial Court, the plaintiff preferred an appeal in A.S.No.37 of 2011 before the Subordinate Court, Srivilliputhur.

6.The appellate Court after relying upon the Commissioner's



report and oral evidence of DW-1, found that the suit second item and first item lies as a single unit without any ridges and that the entire property was allotted to the father of defendants 2 to 4, by name, Krishnathevar. As a matter of fact, the plaintiff during his cross examination admitted that the suit first schedule property was allotted to the share of Krishnathevar, namely, the father of defendants 2 to 4. Though the plaintiff produced documents Ex-A1, which is the sale deed executed in favour of Patchiammal by the brothers of plaintiff, the Appellate Court found that there is no mentioning in respect of any portion of the suit property or the right of the plaintiff over the suit first item. Since the Commissioner has given his report and plan in Ex-C1 and Ex-C2, after perusal of the same, the lower appellate Court further held that the suit third item belongs to the plaintiff and the suit first and second item are the exclusive properties of the defendants. Inasmuch as the plaintiff failed to prove that there exist a pathway in the suit first item property, the lower appellate Court further held that the plaintiff has failed to prove his case.

7.The lower appellate Court also found that the plaintiff has come forward with the suit claiming title over the suit first item. Since the plaintiff has also pleaded easement of necessity, the appellate Court further observed that the person, who claims title to the property cannot raise a plea claiming easementary right. It is a settled position of law that the person can claim easementary right only if he admit the title of another, whose land is used for the enjoyment of his own property. Since the plea of title and plea of easementary is mutually distinctive, the lower Appellate Court held that the plaintiff is not entitled to the relief of easmentary right. Aggrieved by the concurrent findings of the trial Court as well as the appellate Court, the plaintiff has preferred the above second appeal.

8.The plaintiff / appellant has raised the following substantial questions of law in the memorandum of grounds:

"(a)Whether the plaintiff is entitled to the limited relief of permanent injunction on the basis of "Easement of Necessity", when he had proved his enjoyment of 3rd schedule property as a pathway to access his plaint first schedule property and when it is substantiated that 3rd schedule is land locked and the plaintiff and the defendants 1 to 4 had inherited from a single common ancestor?

(b)Whether the defendant had proved the availability of an existing alternative pathway for the usage of plaintiff against relief claimed on the existing pathway and its enjoyment by the plaintiff on the basis of Easement right by Necessity, will entitle the plaintiff to the decree prayed for?



(c) Whether the plaintiff is entitled to use the first schedule property as a pathway on the ground of easement of necessity, since he cannot enjoy the third schedule property without the same?

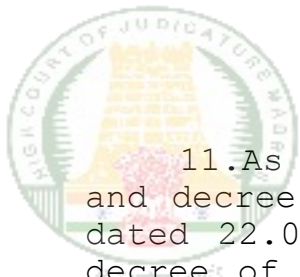
(d) Whether the first appellate court was right in assuming that there is no provision for granting pathway in agricultural land and only ridges can be used to reach the portion of land and thus proceedings to dismiss the suit?

(e) Whether the plea of adverse possession raised on the side of the defendant can be taken to hold that the title of the plaintiff is admitted and proved?

(f) Whether the plea of adverse possession taken by the defendants along with the plea of ownership which are mutually contradictory can be taken up and whether the defendants have substantiated adverse possession, are they entitled for prescriptive title?"

9. As pointed out by the lower appellate Court, the plaintiff has not specifically pleaded a right of easement in respect of suit first schedule. However, the easement of necessity can be granted only if the property is derived by various persons from a common ancestor. Even if a right of passage is referred to in documents, it can be established that the person is entitled to easement of necessity only by showing that he has no alternative way to have access to the public way or road or street from his own property. In this case, the Advocate Commissioner appointed by the trial Court has inspected the property and filed Ex-C1 and Ex-C2. The plan and report of the Advocate Commissioner indicate that on the western side of the suit property, there is a pathway, referred as "EFGKM". The appellate Court based on the admission of the plaintiff that the suit property belonged to the father of defendants 2 to 4 and evidence of defendants along with the Advocate Commissioner's report and plan, has considered all the issues in the light of the pleadings and rejected the case of plaintiff. Merely because, the properties were inherited from a common ancestor, it cannot be said that the co-sharers, who have divided the property, are entitled to a common passage.

10. In a case, where, it is not established that any specific property has been left as a common pathway for the convenient enjoyment of all sharers, the easement of necessity cannot be presumed. In this case, ultimately, pathway suggested by the defendant, as acknowledged by the Commissioner's report, cannot be ignored. Having regard to the concurrent findings of the Courts below regarding the title and easementary right claimed by the plaintiff, this Court do not find any reason to interfere with the findings of the lower appellate Court. Further, this Court do not find any substance in any of the substantial questions of law, particularly having regard to the findings of Courts below on facts.



11.As a result, this second appeal is dismissed. The judgment and decree passed by the learned Subordinate Judge, Srivilliputhur, dated 22.06.2016 in A.S.No.37 of 2011 confirming the judgment and decree of learned Principal District Munsif, Srivilliputhur, dated 22.10.2010 in O.S.No.177 of 2003 is confirmed. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar

To

- 1.The Subordinate Judge,
Srivilliputhur.
- 2.The Principal District Munsif,
Srivilliputhur.
- 3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.(2 Copies)

+1CC to Mr.Thirunavukkarasu Advocate in SR.No.68757.

+1CC to Mr.N.Dilipkumar Advocate in SR.No.68984.

CMR

DS/SV/SAR-1:16.07.2018: 5P/7C

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