

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 11.12.2019
CORAM:

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

SA.NO.1262 OF 1995

1.R.Angammal
2.E.Angammal
3.E.Ramesh Kumar
4.E.Balaji

... Appellants

vs.

1.K.Dharmalingam
2.M.Ramasamy
3.T.P.Periasamy (Died)
4.R.Muthusamy (Died)
5.S.Muthusamy (Died)
6.Kannan
7.Sivagami
8.Muthammal
9.M.Dhanabakkiyam
10.M.Suresh Kumar
11.P.Mani
12.P.Suresh
13.Kala

... Respondents

- Cause title accepted and 2nd Appellant appointed as guardian of the Minor 4th Appellant vide order this court in CMP.No.7868 & 7869 of 1995, dated 07.07.1995.

- 4th Appellant declared as major, his mother and guardian 2nd Appellant E.Angammal discharged from the guardianship vide order of this court dated 10.06.2019 made in CMP.No.12009 and 12012 of 2019.

- RR6 to 8 brought on record as LRs of the deceased 4th Respondent viz. R.Muthusamy vide court order dated 07.02.2017 made in CMP.No.2408 of 2007 (CMP.Nos.2405 to 2408 of 2017) and CMP.Nos.10804 to 10806 of 2006 in S.A.No.1262 of 1995 and CMP.Nos.1862 to 1864 of 2010 in S.A.No.1262 of 1995.

- RR9 & 10 brought on record as LRs of the deceased 5th Respondent viz. S.Muthusamy, vide order of this court dated 07.02.2017 made in CMP.No.2407 of 2007 (CMP.Nos.2405 to 2408 of 2007) in S.A.No.1262 of 1995.

- RR11 to 13 brought on record as LRs of the deceased R3 viz T.P.Periyasamy, vide order of this court dated 16.04.2019 made in CMP.No.7725, 7728 and 7735 of 2019 in S.A.No.1262 of 1995.

PRAYER:

Second Appeal filed under Section 100 of Civil Procedure Code against the decree and Judgment dated 11.02.1993 in AS.No.80 of 1992 on the file of the Sub Court, Namakkal preferred against the decree and Judgment dated 11.10.1991 in OS.No.114 of 1985 on the file of the Additional District Munsif, Namakkal.

Appellants	: Mr.T.M.Hariharan
R3	: Mr.S.S.Anna Durai
R1, R2, RR7, 9 to 13	: Mr.J.Hariharan
R6 to R8	: No appearance

JUDGMENT

The appellants are the legal heirs of the defendant (since deceased) in O.S.No.114 of 1985 on the file of the Additional District Munsif, Namakkal. The respondents 1 to 5/ plaintiffs filed the suit for declaration of their right over 25 feet wide passage on the northern side of Survey Numbers 275/4 and 275/3 of Thammankurichi village, Namakkal Taluk, Namakkal District and for a permanent injunction restraining the defendant from interfering with their peaceful possession and enjoyment of the suit passage.

2. The parties are referred to as per their ranking in the trial court and at appropriate places, their ranks in the present appeal would also be indicated, if necessary.

3. The brief facts of the case of the plaintiffs is as follows:

The plaintiffs purchased a land in Survey Number 275/2 measuring 1.20 acres, adjacent to the land of the defendant at Thammankurichi village, Namakkal Taluk, Namakkal District from one Kuppayee (since died) through a sale deed dated 05.02.1985 (Ex.P1) and they are in peaceful possession and enjoyment of the property. The property purchased by the plaintiffs and the property belonging to the defendant (since deceased) originally belonged to one Sengodan. The vendor of the plaintiffs conveyed right over 25 feet wide passage on the northern side of the Survey Numbers 275/3 and 275/4, belonging to the defendant and ever since the date of purchase of their property, they have been using the suit passage. According to the plaintiffs, since the defendant attempted to interfere with their peaceful usage of the said passage, they are constrained to file the present suit for declaration of their right over the suit passage and for a permanent injunction restraining the defendant from interfering with their peaceful possession and employment of their right over the same.

4. The defendant (deceased) resisted the suit on the following grounds:

- I. There is no passage on the northern side of the defendant's property.
- II. The plaintiffs do not have any easementary right over the 25 feet passage as alleged by them.
- III. The suit filed by the plaintiffs is misconceived.

5. The plaintiffs in order to establish their right over the suit passage examined five witnesses and also marked Ex.A1 to Ex.A9. The defendant examined himself and one another witness and marked Ex.B1 to Ex.B7. An Advocate Commissioner was appointed by the learned Additional District Munsif, Namakkal and he filed his reports which were marked as Ex.C1 and Ex.C2. After full contest, the learned Additional District Munsif, Namakkal decreed the suit, with costs, in favour of the plaintiffs vide his decree and Judgment dated 11.10.1992.

6. Aggrieved over the same, the defendant filed an appeal before the learned Subordinate Judge, Namakkal in A.S.No.80 of 1992. The learned Subordinate Judge, Namakkal after analysing the evidence on record, upheld the decree and judgment passed by the learned Additional District Munsif, Namakkal.

7. Subsequently, the defendant died and his legal heirs have filed the present second appeal. The second appeal was admitted on the following substantial question of law:

"Whether the plaintiff has established easementary right over a 25 feet wide track as claimed by him?"

8. It is an admitted fact that the property purchased by the plaintiffs and the property purchased by the defendant (since deceased) were originally owned by one Sengodan. The defendant purchased the property in S.No.275/4 and S.No.275/3 prior to the purchase made by the plaintiffs. The said property is situated on the eastern side of the plaintiffs' property. After the sale made to the plaintiffs and the defendant, the survey number has been sub divided into S.Nos.275/3, 275/2 and 275/4. The main contention of the plaintiffs is that there is a 25 feet wide passage on the northern corner of Survey Numbers 275/4 and 275/3 and the said passage is being used by the plaintiffs and their predecessors-in-title for more than 50 years. Ex.A1 is the sale deed dated 05.02.1985, executed by one Kuppayee (since deceased) in favour of the plaintiffs. Through Ex.A1, the right over the 25 feet wide passage in Survey Numbers 275/3 and 275/4 was conveyed to the plaintiffs. The plaintiffs contend that except the suit passage they do not have any other pathway to reach their land. They have also claimed easementary right by way of

necessity and by way of prescription. The Advocate Commissioner appointed by the learned Additional District Munsif, Namakkal, has found the existence of 25 feet wide passage on the northern side of the land in Survey Numbers 275/4 and 275/3. He had also observed in his report that there are tyre marks of the lorries in the suit passage.

9. Apart from this, the evidence adduced on the side of the plaintiffs is also clear on the aspect of the usage of the suit passage for reaching their land. Both the Courts below have concurrently held that the plaintiffs have easementary right of necessity and by grant over 25 feet suit passage and it is based on evidence and facts. It is to be noted that as per section 100 of the Code of Civil Procedure, 1908, a Second Appeal lies only on substantial question of law and not on finding errors of facts. It is settled law that High Court cannot set aside the finding of facts by the first appellate court. In the instant case, the existence of pathway is proved by the plaintiffs by adducing sufficient oral and documentary evidence and the findings of both the courts below cannot also be said to be perverse. In fact, no substantial question of law arises in the present appeal. Therefore, the Second Appeal is dismissed. No costs.

Sd/-

Assistant Registrar(CS III-MDU)

//True Copy//

Sub Assistant Registrar

mtl

To

1. The Subordinate Judge, Namakkal.
2. The Additional District Munsif, Namakkal.

Copy To

The Section Officer,
VR Section, High Court,
Madras-104.

+lcc to Mr.T.M.Hariharan, Advocate, S.R.No.103236
+lcc to M/S.K.V.Law Firm, Advocate, S.R.No.103271

SA.No.1262 of 1995

RSK(CO)
CS/03/08/2020