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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.12.2019
Date of Verdict : 17.12.2019

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1652 of 1998

Karupathal

...Appellant/Defendant

Vs.

Palani Naicker alias K.Palaniappan(died)
2.Saraswathi
3.Pechiammal

...Respondents/Plaintiff

(R2 and R3 brought on record as LR's of the deceased R1 Viz., Palani Naicker alias K.Palaniappan vide court order dated 30.01.2019 made in CMP.No.316 to 318 of 2015 in SA.No.1652 of 1998(CVKJ)

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree of the learned Subordinate Judge of Udumalpet dated 01.12.1995, in A.S.No.55 of 1995 reversing the judgment and decree of the learned District Munsif of Udumalpet dated 23.12.1994 in O.S.No.587 of 1989.

For Appellant : Mr.J.Hariharan
For Mr.V.Nicholas

For Respondents
For R2 and R3 : Notice served
: R1 - died

JUDGMENT

This second appeal is directed as against the judgment and decree dated 01.12.1995, passed in A.S.No.55 of 1995 on the file of the learned Subordinate Judge, Udumalpet, reversing the judgment and decree dated 23.12.1994 in O.S.No.587 of 1989 on the file of the learned District Munsif, Udumalpet.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The case of the plaintiff in brief is as follows :-



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3.1 The plaintiff filed the suit for permanent injunction. The property described in the 'A' schedule along with other adjacent portions were originally purchased by the father of the plaintiff by virtue of sale deed dated 19.10.1942. After purchase of the vacant land, he put up superstructure. He had three sons and during his life time, the family arrangement was made. Accordingly, the western portion of the property was allotted to the plaintiff and patta was also issued in his favour in respect of 'A' schedule property. Thereafter all the revenue documents mutated in his name and all the dues were paid in his name. On the western side of his property, a pacca north south common lane is in existence, which is mentioned as 'B' schedule property. The plaintiff also produced the rough plan to show the line of plaintiff and defendant house and north to south common lane. Though the plaintiff's house is situated immediately on the south of metal road which runs between Vadugapalayam and Gudimangalam, since the plaintiff's house is facing south, the plaintiff and his predecessors used all these years the north south common lane to reach the metal road. There is no other way except the north south common lane to come out from the plaintiff's house. Apart from that, the plaintiff is also having right in the lane to white wash his western compound wall. While being so, due to misunderstanding between the plaintiff and the defendant, the defendant tried to obstruct the use of lane by the plaintiff. The defendant also tried to put up stones and live fence in the lane and thereby attempted to close the lane. Hence, the plaintiff filed a suit for permanent injunction.

4. The defendant resisted the plaintiff's case that a common pathway said to be in between the properties of the plaintiff and the defendants is imaginary one. The certificate issued by the Tahsildar is not related to the pathway mentioned by the plaintiff. There is no lane as mentioned in the plaintiff's 'B' schedule and the property belongs to the family of the defendant. The property belonging to the plaintiff family is on the eastern side and the property belonging to the defendant is on the western side. There is no north south common lane between the two properties. For the past several years, the plaintiff has been making efforts to grab the suit 'B' schedule property which is on the western side of the defendant's property. Neither the plaintiff nor his family members had a pathway on the western side of their property at any point of time. The shed and the compound wall have been recently constructed on the property of the defendant. The only way which the plaintiff is entitled to go to the east from his property and turn to the north and reach the east west pathway. In fact, there was no partition between the legal heirs of the plaintiff family and as such the suit itself is not maintainable.



for the only reason that the plaintiff did not implead the other legal heirs as party to the suit. When the plaintiff himself is not having full right over the suit property, the suit filed for injunction without even seeking for any declaration prayer is not legally maintainable. In fact, the plaintiff encroached some extent of the land belonging to the defendant and in order to escape from this, the suit has been filed with false allegations. Therefore, the plaintiff is not entitled to seek any relief as prayed for and sought for dismissal of the suit.

5. In support of the plaintiff's case, P.W.1 and P.W.2 were examined and 10 documents were marked as Ex.A.1 to Ex.A.10. On the side of the defendant D.W.1 and D.W.2 were examined and Ex.B.1 to Ex.B.11 were marked. The Advocate Commissioner's report and rough sketch were marked as Ex.C.1 and Ex.C.2. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court dismissed the suit. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred an appeal suit in AS.No.55 of 1995 before the learned Subordinate Judge, Udumalpet. The first appellate Court on appreciating the materials placed on records, allowed the appeal by reversing the judgement and decree passed by the trial Court. Challenging the same, the defendant has come forward with the present second appeal.

6. At the time of admission of the second appeal, the following substantial questions of law were framed :-

- a) When the appellant / defendant disputed the title of the respondent / plaintiff in respect of the suit property, whether the suit for the relief of bare permanent injunction without seeking the relief of declaration is maintainable under law?
- b) Whether the first appellate court misread the evidence and failed to consider the materials on record in granting the relief of permanent injunction?
- c) Whether the respondent / plaintiff is entitled to the relief of bare permanent injunction as prayed for in the plaint?

7. Mr.J.Hariharan, the learned counsel for the appellant submitted that in Ex.A.1 sale deed marked by the plaintiff, there is no mentioning of pathway as claimed by the plaintiff on the western side of his property. Except the said document nothing was produced by the plaintiff to show that the plaintiff is also using the common pathway situated in between the plaintiff's house and the defendant's house. In the patta marked



as Ex.A.2 issued in the name of the plaintiff more extent has been shown than the portion allotted to the plaintiff by the family arrangement. In this regard, the defendant repeatedly sent representations to the revenue authorities concerned to find out the correct extent. But the revenue authorities did not take any step to survey the property since the Ex.A.10, the sketch shows no mention of lane as claimed by the plaintiff. When there is no document to prove that the plaintiff is under 'B' schedule property or nothing mentioned as common pathway in the sale deed dated 19.10.1942 marked as Ex.A.1, the suit itself is not maintainable without the prayer of declaration. Therefore, he prayed for allowing the second appeal.

8.Heard Mr.J.Hariharan, learned counsel appearing for the appellant. Though notice was served, no one appeared on behalf of the respondents 2 & 3.

9.Originally, the suit schedule property along with the other properties belonged to the father of the plaintiff. He purchased the said property by registered sale deed dated 19.10.1942. He had three sons and during his life time, a family arrangement was made. Accordingly, the other properties went to the share of his elder son and after his demise, his share is enjoyed by his only son. The other properties purchased in the year 1942 were divided into two portions by east west and western portion was allotted to the plaintiff and the eastern portion was allotted to his brother. The plaintiff marked the sale deed stands in the name of his father as Ex.A.1 dated 19.10.1942. The said property was divided into two portions, in which western side portion was allotted to the plaintiff. On perusal of the Ex.A.1, there is no recital mentioning the pathway as claimed by the plaintiff on the western side of his property. Except the Ex.A.1, no other documents were produced by the plaintiff to show that the plaintiff is also using the common pathway situated in between the plaintiff's house and the defendant's house. The Advocate Commissioner was appointed and according to his report, the 'B' schedule property was not used by any body and it was filled up with garbage and stones. Therefore, no one is using the pathway, including the plaintiff and the defendant.

9.1.Further, the Ex.A.10 marked by the plaintiff, the sketch shows that it was created under the Natham Land Survey Scheme, in which there is no mention about the existence of 'B' schedule property, namely the lane. The Ex.A.2 patta issued in the name of the plaintiff and shown more extent than in the portion allotted to the plaintiff by the family arrangement between the brothers. In this regard, the defendant repeatedly had sent representations to the revenue authorities concerned to find out whether the extent mentioned in the patta is correct or not. The revenue authorities did not take any step to survey



the property since the Ex.A.10, the sketch shows no mention of lane as claimed by the plaintiff. In fact, the Ex.A.1 clearly shows that the plaintiff's father purchased the property on the eastern side of the north south pathway from one Nallava Nayakkan, who is none other than the father in law of the defendant and he derived the said property from his father in law. In Ex.A.1, the sale deed has not mentioned any vacant place or common pathway between the property of the said Nallava Nayakkan. Though the Ex.C.1 and C.2, the Commissioner's report and plan shows the vacant land between the plaintiff and defendant property, there is no other revenue documents produced to prove the said land is classified as pathway or lane.

9.2.The first appellate court only on the basis of the Commissioner's report and rough sketch, concluded that there is a common pathway between the house of the plaintiff and the defendant and assumed that it is used by both. The first appellate court also misconstrued the fact that the Ex.A.1, sale deed was executed in favour of the plaintiff proved the fact that the said property is on the western side and there is a pathway and the property belongs to the said Nallava Nayakkan. Admittedly, there is a road between Vadugapalayam and Gudimangalam and the sale deed, Ex.A.1 shows the property of the defendant as well as the mud road between Vadugapalayam and Gudimangalam. It does not mean that there is a pathway between the plaintiff and the defendant house. Further when there is no document to show that 'B' schedule property is Natham land, the first appellate court concluded that 'B' schedule property is Natham land and used for common pathway. Further no action was taken by the revenue officials to survey the property and no one is added as party in the suit proceedings to examine that the 'B' schedule property is classified as Natham land.

9.3.The plaintiff filed the suit for permanent injunction in respect of the 'B' schedule property. When there is no document to prove that the plaintiff is entitled under 'B' schedule property or mentioned as common pathway in the sale deed dated 19.10.1942 marked as Ex.A.1, the suit itself is not maintainable without the prayer of declaration. When there is a cloud over the suit property, the plaintiff ought to have asked for relief of declaration and injunction. Without considering the above facts, the first appellate court misconstrued the entire evidence and decreed the suit in favour of the plaintiff.

10.Therefore, this Court is of the considered opinion that the reasons assigned by the first appellate court do not hold good, and the same are liable to be interfered with the substantial questions of law. Accordingly substantial questions of law are answered in favour of the appellant and the findings of the first appellate court are set aside. In fine, this second appeal is allowed. Accordingly, the judgment and decree



passed by the first appellate court, viz., the Subordinate Court, Udumalpet in A.S.No.55 of 1995 is set aside and the judgment and decree passed by the trial court, viz., the District Munsif Court, Udumalpet in O.S.No.587 of 1989 is restored. No order as to costs.

s/d-
Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

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To

1. The learned Subordinate Judge,
Udumalpet
2. The learned District Munsif,
Udumalpet.

Copy to

The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

+1 CC to Mr.V.Nicholas, Advocate sr 105215.

S.A.No.1652 of 1998

SAI(CO)
SP(15/07/2020)