

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:18.01.2019

Coram:

The Hon'ble Mr.Justice N.SATHISH KUMAR

S.A.No.365 of 2012

C. Swaminathan ... Appellant/Respondent/Plaintiff

Versus

M. Kandasamy ... Respondent/Appellant/3rd Defendant

Second Appeal filed under Section 100 C.P.C. to set aside the Judgment and Decree dated 22.07.2011 made in A.S.No.11 of 2009 on the file of the Additional Sub Judge, Thiruppur, reversing the Judgment and Decree dated 30.06.2008 made in O.S.No.1067 of 2004 on the file of District Munsif, Thiruppur.

For Appellant .. Mr.S. Mukunth
for M/s. Sarvabhauman Associates

For Respondent .. Mr.S. Parthasarathy
Senior Counsel for
Mr.R. Baskaran

JUDGMENT

Aggrieved over the Judgment of the First Appellate Court in allowing the Appeal filed by the Third Defendant as against the judgment of the trial Court dismissing the Counter Claim in respect of the use of path way, the present appeal came to be filed by the Plaintiff.

2. The suit has been filed by the Plaintiff for Permanent Injunction restraining the Defendant, their men, assigns, agents hirelings, servants, from interfering with the Plaintiff's right of taking water from S.F.No.141/1-B PAP Channel by opening the madai and to use the water to irrigate the Plaintiff's lands S.F.No.141/1-C in Nachipalayam Village, Tiruppur Taluk as per the terms and conditions of the Registration Certificate No.65/2000, issued by the Government of Tamil Nadu. The Plaintiff is the owner of the agricultural land in S.F.No.141/1-C and 141/4-C by virtue of the Partition Deed dated 4.6.1986. The Defendants 1 and 2 are the adjacent land owners of the

Plaintiff's land in S.F.No.141/1-B and 4-B. There is a PAP Channel Madai in the Defendants land in S.F.No.141/1-B. The Plaintiff erected a pipeline from the madai and the same reaches Plaintiff's land in S.F.No.141/1-C. This right of taking water through the above said lands are authorised by the Government by Registration Certificate No.65/2000. However, the Defendants have made an attempt to prevent the Plaintiff from erecting pipeline and taking water.

3. Denying the allegations of the Plaintiff, it is the contention of the Defendants that the pipeline has not laid by the Plaintiff; only PAP authorities have laid the pipelines. The Plaintiff is not irrigating his lands and he has not raised any crops. He attempted to obstruct the Defendants in enjoying the east west cart track in his portion in S.F.No.141/1-C without any reason. Hence the Defendants filed counter claim seeking relief against the Plaintiff not to prevent the use of cart track.

4. Before the trial Court on the side of the Plaintiff, 3 witnesses were examined and 14 exhibits were marked. On the side of the Defendants 2 witnesses were examined and 6 exhibits were marked. 4 other documents were marked as Court Exhibits. The trial Court dismissed the suit filed by the Plaintiff as well as Counter Claim filed by the Defendants. It is to be noted that the trial Court has taken into consideration of the finding of the Commissioner's Report and found that the pathway claimed by the Defendants is not put into use and hence dismissed the Counter Claim. Aggrieved over the findings of the trial Court the Third Defendant filed first appeal. The First Appellate Court considered the materials and documents particularly Exs.A.1 to A3, A10 and A11 and found that the pathway claimed by the Defendant is in existence in the property and come to the conclusion merely because some bushes and shrubs are noted by the Commissioner it cannot be concluded that the pathway is not in existence and accordingly allowed the Appeal filed by the Third Defendant, against which the present Second Appeal came to be filed by the Plaintiff.

5. At the time of admitting the appeal the following Substantial questions of law have been framed :

"1. Whether the lower Appellate Court is right in decreeing the Defendant's Counter Claim when the Defendant/Respondent did not prove the use of the Cart track?

2. Is not the decree of the lower Appellate Court erroneous in as much as the learned Judge has failed to appreciate that under Ex.B.1 there are two cart track, of which the one in S.No.141/1

is no longer being used and only the one in S.No.141/4 is available?

3. Whether the lower Appellate Court is correct in law in decreeing Defendant/Respondent Counter Claim, without appreciating the evidence adduced from the correct perspective having misinterpreted Exs.B1, C1, C2, C3 and C4?

4. Whether the lower Appellate Court is correct in law in allowing the appeal, especially when the same is barred by limitation?"

6. Learned counsel for the Appellant Mr.S. Mukunth submitted that the Commissioner's Report would clearly show that the pathway though is in existence, it is not put into use. The Report of the Commissioner clearly shows the easementary right is in existence. Hence the First Appellate in court granting relief in favour of the Defendant is not in accordance with law.

7. Mr.S. Parthasarathy, learned Senior Counsel appearing for the Respondent submitted that the trial court has rightly took note of the documents and arrived at a conclusion which does not require any interference.

8. I have perused the materials and documents. The main crux of the issue between the Plaintiff and Defendants is pathway. The Plaintiff filed suit and the Defendant filed counter claim. The trial court mainly negatived the counter claim on the basis of the Commissioner's Report. The Commissioner has found that the pathway surrounded by shrubs and bushes, therefore it is not in use for many years. Only on that observation, the trial Court come to the conclusion that the pathway is not in existence and negatived the relief. Whereas the First Appellate Court analysed the rights of the parties to the pathway through the documents particularly Exs.A1 to A3, A7, A10, A11 and Ex.B1 and found that the right of pathway has been granted from the year 1952 itself and continued subsequently, and come to the conclusion that merely because the Commissioner noted down some shrubs and bushes over the pathway it cannot be took away the easement right of the Defendant. It is to be noted that to extinguish the right of easement there must be some evidence to show that the pathway has not been used continuously for more than 20 years. But no evidence or materials available on records even to show that the pathway is never used continuously for more than 20 years. In the absence of any material or evidence to show that the pathway is never in use continuously for more than 20 years, it cannot be presumed that the right granted under the documents has been extinguished. Therefore, this Court does not find any infirmity

in the order passed by the First Appellate Court. The Substantial Questions of Law are answered as above. The appeal is liable to be dismissed.

9. Accordingly, the Second Appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

ggs.

To

1. The Additional Sub Judge,
Thiruppur.
2. The District Munsif,
Thiruppur.
3. The Section Officer,
V.R. Section, High Court,
Madras.

+1cc to Mr.Sarvabhauman Associates, Advocate, S.R.No. 4471

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VSN II (CO)
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