

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.08.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.303 of 2013

&

M.P.No.1 of 2013

R.Krishnan

... Appellant/Plaintiff

Vs

1.Singamuthu @ Gunamathi

2.Ashok Kumar @ Padmanaban

... Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree dated 31.08.2012, passed in A.S.No.42 of 2010 on the file of the learned Subordinate Judge, Gudiyatham, Vellore District reversing the Judgement and Decree dated 03.09.2010 passed in O.S.No.37 of 2005 on the file of the learned District Munsif Court, Gudiyatham.

For Appellant : Mr.A.Palaniappan for
M/s.S.N.Ravichandran

For Respondents: Mr.V.M.G.Ramakkannan

JUDGMENT

The above Second Appeal is filed challenging the Judgement in A.S.No.42 of 2010 of the Subordinate Judge, Gudiyatham, reversing the

Judgement and Decree in O.S.No.37 of 2005. The facts necessary for the disposing of the above Second Appeal is narrated herein below and the parties are referred to in the same litigative status as in the suit.

2.Plaintiff's case:

2.1. The suit has been filed originally for bare injunction restraining the defendants from causing any obstruction to the plaintiff's use of the B-Schedule property which is a pathway. The B-Schedule property has been described as follows:

"Vellore District, Gudiyattam Sub-District, Gudiyattam Circle, No.59, Mungapattu Village, dry S.No.66/3 extent 0.14 acres Kist Rs.1.36 (in this ½ share in) common battai with all the rights to take bullock cart and lorry to the 'A' schedule property the passage is situated from the Southern side of village main road and Eastern side of the M.A.Muriyappa lands (now the lands purchased by the defendants)"

2.2. The case of the plaintiff was that the property was belonged to one M.A.Rudrappa and his family. A compromise deed was entered into between the said Rudrappa and his brother in a partition suit in O.S.No.

178 of 1971. The suit A-Schedule property and a common passage in the suit B-Schedule property was allotted to the share of Rudrappa under a deed of compromise dated 08.07.1974. The final decree has also been passed in the lines of the compromise.

2.3. The plaintiff had purchased the property from the said Rudrappa under a registered sale deed dated 24.01.2001. The said B-Schedule property was being used to take lorries and other vehicles to the A-Schedule property. The brother of Rudrappa, namely, Muriyappa had sold his lands to the defendants two months prior to the filing of the suit and in the sale deed a half share in a common pathway was also sold.

2.4. The plaintiff would submit that on 23.01.2005 the defendants attempted to obstruct the pathway by putting a fencing stones in the middle of the passage, with great difficulty the same was thwarted by the plaintiff. Since they were continuing with their obstruction, the plaintiff was constrained to file the suit.

2.5. Pending the suit the defendants have, according to the plaintiff, annexed the western half share of the B-Schedule property and the annexed portion has been described as C-Schedule property. The plaintiff therefore took out an application for amending the plaint to include the relief of mandatory injunction in respect of the C-Schedule property and to restore the same back to its original position.

3. Defendant's case:

3.1. The 2nd defendant had filed a written statement which was also adopted by the 1st defendant in which the defense was as follows:

- a) The suit property was not allotted to the share of the plaintiff's vendor.

b) The suit is bad for non-joinder of necessary parties (however how this is bad for non-joinder of necessary parties has not been detailed)

c) The B-Schedule property which the plaintiff described i.e., 22 feet East-West and 290 feet North-South was not in existence and what was in existence is an extent of 88.2 meters North-South and 4 meters East-West for several decades and the description therefore in the suit schedule is wrong. The defendants denied that they have attempted to

install fencing stones in the B-Schedule property. Therefore they sought for the dismissal of the suit.

3.2. In the additional written statement, which came to be filed pursuant to the amended plaint being filed, the defendants would add the following defenses:

a) The pathway of 3.4 meters East-West and 88.2 meters North-South is only in existence (in the original written statement the East-West extent was shown as 4 meters).

b) The relief of bare injunction without the relief of declaration is not maintainable.

c) There is no cause of action for filing the suit.

4. Advocate Commissioner's report:

Pending the suit an Advocate Commissioner had been appointed, who had visited the property and submitted a report. In the said report he had stated that though he had been asked to inspect the B-Schedule property the defendants had only permitted him to measure the western 7 cents in the B-Schedule property. He has stated that on the western

side the lands have been levelled and the lands in the eastern side were not levelled. He also stated that newly planted coconut saplings were found in the defendants' place.

5. Trial Court:

5.1. The learned District Munsif, Gudiyatham had framed the following issues:

"1. Whether the 'B' Schedule property is to be used as a passage?

2. Whether the defendants are to be restrained by means of permanent injunction?

3. To what other relief?"

5.2. He had also drafted additional issues which are as

follows:

"1.Whether the defendant annexed the western half of 'B' schedule in 2005?

2.Whether common battai is in existence as on date and there is no need for restoration?

3.Whether plaintiff is entitled to seek for restoration of common battai?"

5.3. The plaintiff had examined as himself as P.W.1 and marked Ex.A.1 to Ex.A.5. The 1st defendant had himself examined as D.W.1 and the Taluk Surveyor as D.W.2. Ex.B.1 to Ex.B.3 were marked on the side of the defendants. The Advocate Commissioner's report has been marked as Ex.C.1 and Ex.C.2.

5.4. The learned District Munsif, Gudiyatham, on a perusal of the documents available on record and the evidence let in, both documentary as well as oral, had come to the conclusion that the common passage measured an extent of 14 cents and the defendants had destroyed a portion of the said common pathway and annexed the same to their lands. The learned District Munsif, Gudiyatham has categorically arrived at a finding that the defendants had annexed the C-Schedule into their property and therefore ultimately decreed the suit as prayed for.

6. Appellate Court:

Challenging the said Judgement and Decree the defendants had filed A.S.No.42 of 2010 on the file of the Subordinate Judge, Gudiyatham. The learned Judge proceeded to allow the appeal and challenging the said Judgement and Decree the plaintiff is before this Court.

7. Second Appeal:

When the appeal was admitted the following Substantial Question of law were framed:

"1.Whether the first Appellate Court misdirected itself in not taking into consideration of the Exhibits A2, A3 and A4 in arriving at erroneous finding?"

2.Whether the Lower Appellate Court right in applying the provisions of Sections 4 and 12 of Easement Act in the absence of pleading and evidence on the side of the defendant?

3.Whether the Lower Appellate Court right in holding that the limitation for filing the suit

commenced from the proceedings of UDR in 1987 and barred by limitation without advertng to the fact that

the suit for declaration is not filed and the question of limitation is not arise?

4. Whether the said common path way morefully described in 'B' Schedule is way of necessity to the plaintiff claiming to Rudrappa under Ex.A2 is only way of necessity to have access to Village main road, lying on the northern side of the 'A' Schedule property and also the properties of Defendants 1&2 purchased under Ex.A3 and A4?."

8. Submissions:

8.1. Mr.A.Palaniappan, learned counsel for Mr.S.N.Ravichandran for the appellant would argue that the suit A and B - Schedule had been allotted to the share of his vendor under Ex.A.1, the final decree in O.S.No.178 of 1971. He would draw the attention of this Court to item no.19 which is allotted to the vendor of the plaintiff and item no.25 of the property allotted to the vendor of the defendants namely, Muniyappa. Both these schedules according to him, would describe the common pathway as measuring 14 cents.

8.2. He would also argue that annexation of the C-Schedule to the lands belonging to the defendants had taken place pending of the suit in the month of June 2005. Therefore, immediately an application for amending the plaint has been taken and the relief of mandatory injunction has also been introduced. The findings of the Appellate Court that the defendants have an exclusive right to the 7 cents based only on the UDR patta without reference to the document of title under which they have purchased is totally erroneous.

8.3. The learned counsel would argue that the sale deed in favour of the plaintiff would clearly describe the B-Schedule as 14 cents and not 7 cents as pleaded by the defendants.

8.4. Mr.V.M.G.Ramakkannan, learned counsel appearing on behalf of the respondents/defendants would contend that the final decree has not been acted upon and there is no proof whatsoever to show that the plaintiff and the defendants have been using the 14 cents allotted as pathway. He would further argue that the suit filed without including the prayer for declaration is not maintainable.

8.5. He would also argue that there is non joinder of

parties in as much as vendor of the defendants and plaintiff has not been impleaded in the suit. He would also contend that the plaintiff has no easementary right to the said property. The counsel would seek to interpret the schedule given in item no.19 and item no.25 in the compromise decree by contending that only 7 cents has been allotted to both the plaintiff as well as the defendants.

8.6. He would further argue that the Appellate Court has, after appreciating the evidence rendered a clear finding and that the plaintiff has not been able to demonstrate and prove that he was in continuous possession and enjoyment of the pathway for over 20 years. That apart, the UDR patta had been granted as early as in the year 1987 and the suit has come to be filed in the year 2005 and therefore the learned District Munsif, Gudiyatham has erred in decreeing the suit.

9. Discussion:

9.1. Heard the counsels on either side and perused the documents filed. Admittedly the plaintiff as well as defendants would derive title to

the 14 cents described as a common pattai (path way) only on the basis of Ex.A.1, which is the final decree that has been given in O.S.No.178 of 1971. A reading of the schedules given therein both in favour of the vendors of the plaintiff as well as the defendants would clearly describe the pathway to an extent of 14 cents and the respective parties have been given an undivided half share in the said pathway. This fact is further reiterated in the respective sale deeds which have been marked as Ex.A.2 (sale deed in favour of the plaintiff) and Ex.A.3 (sale deed in favour of the 1st defendant) and Ex.A.4 (sale deed in favour of the 2nd defendant). In the schedule to these sale deeds the pathway has been categorically described as an extent of 14 cents. Considering the fact that the document clearly shows the extent of the land it does not call for any further interpretation by the Court.

9.2. A reading of the Judgement of the Appellate Court would demonstrate that the Appellate Judge has proceeded beyond the pleadings made by either parties. It is nobody's case that Ex.A.1 was not acted upon or that the plaintiff is claiming a easementary right over the A-Schedule property. The plaintiff's case is that they derive title to the

B-Schedule property only under Ex.A.1 final decree. The Appellate Court had further placed much reliance upon the Chitta and Adangal which has been given to the plaintiff's vendor which shows 7 cents belonging to Rudrappa in S.No.66/3. However, a reading of Ex.A.1 clearly shows that each of the parties namely

the plaintiff therein (Rudrappa) and the defendant therein (Muriyappa) were each entitled to equal share in the 14 cents described as common pattai. Therefore each would be entitled to 7 cents in the common passage and that is what described in Ex.B.1 and Ex.B.2. The defendants have deliberately kept away the chitta and adangal that was issued to their vendors.

9.3. The Appellate Court has also held that the suit was bad for non-joinder of necessary parties. A perusal of the Written statement shows that the defendants have not pleaded as to who are the necessary parties, who are required to be made parties for passing the Judgement and Decree.

9.4. The plaintiff had not pleaded that the Ex.A.1 was not acted upon and nor have they pleaded any easementary right. The learned Subordinate Judge has looked beyond the issue on hand. The Trial Court had rightly considered the document in question particularly Ex.A.1 to Ex.A.4 to come to the conclusion that both parties are entitled to an undivided 7 cents each in a total extent of 14 cents which has been ear marked as common pathway.

9.5. Ultimately this common pathway has been annexed very recently as it is evident from the report of the Advocate Commissioner who had visited the property on 29.10.2006 where he finds that in the annexed portion (the newly levelled land and dug out land) coconut saplings have been planted very recently. The defendants have trespassed into the common passage and converted it to the present state in June 2005. It is clear that the pathway has been obliterated by the defendants pending the suit. None of these factors have been considered by the learned Subordinate Judge. The learned Subordinate Judge has neither considered Ex.A.1 to Ex.A.4 nor has he considered Ex.B.1 and Ex.B.2 from the correct perspective and this erroneous approach has resulted in the Judgement of the Trial Court being reversed.

9.6. The Substantial Questions of law 1 and 2 are answered in favour of the appellant. As regards Substantial Question of law no.3, as already submitted the defendants have only produced the chitta and adangal which has been issued in favour of the defendants. Further, the obliteration of the pathway has been made pending the suit and the amendment has been immediately sought for and therefore, the suit is not barred by limitation. Further, the suit is also for an injunction, which is a continuing cause of action.

9.7. As regards Substantial Question of law no.4, the suit proceeds on the basis that the plaintiff and the defendants derive title to the B-Schedule property under Ex.A.1 and a

reading of the said schedule would show that the B-Schedule property is the only access to the respective properties therefore the Substantial Question of law no.4 is also answered in favour of the appellant.

10. In the result, the Second Appeal stands allowed and the Judgement and Decree in A.S.No.42 of 2010 on the file of the learned Subordinate Judge, Gudiyatham stands reversed. No costs. Consequently connected Miscellaneous Petition is also closed.

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Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

To

1.The Subordinate Judge, Gudiyatham.

2.The District Munsif, Gudiyatham.

Copy TO

The Section Officer,
V.R. Section, High Court,
Madras.(2 copies)

+1cc to Mr.V.M.G.Ramakkannan, Advocate, S.R.No. 72214
+1cc to Mr.S.N.Ravichandran, Advocate, S.R.No. 72276

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