

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.08.2019
PRONOUNCED ON : 23.09.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.Nos.260 and 261 of 2016
and
C.M.P. Nos.5011 and 5012 of 2016

Duraisamy ...Appellant/Appellant/Defendant
in both appeals
... Appellant/Appellant/Plaintiffs

Vs.

1.Saravanan
2. Roobini ...Respondents/Respondents/Plaintiffs
in both appeals

Prayer:

Second Appeals filed under Section 100 of Civil Procedure Code, against the judgment and decree made in A.S.Nos.4 and 5 of 2013 on the file of Sub Court, Rasipuram, dated 04.12.2013 confirming the judgment and decree made in O.S.Nos.230 and 231 of 2010 on the file of District Munsif Court, Rasipuram dated 10.08.2012.

For Appellant : Mr. S.Sounthar in both appeals.

For Respondents: Mr. P. Muthusamy in both appeals.

COMMON JUDGMENT

Second Appeal Nos.260 and 261 of 2016 are directed against the common judgment and decree dated 04.12.2013 passed in A.S.Nos.4 and 5 of 2013 on the file of Subordinate Court, Rasipuram, confirming the judgment and decree dated 10.08.2012 passed in O.S.Nos.230 and 231 of 2010 on the file of the District Munsif Court, Rasipuram.

2. Both the second appeals have been admitted on the following substantial questions of law.

i. Whether the judgments of the courts below are vitiated for misreading of pleadings in stating that the appellant has not pleaded availability of alternative pathway and hence, evidence regarding the same is

inadmissible?

- ii. Whether the judgments of courts below are vitiated for ignoring material evidence on record?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

5. The suit in O.S. No.230 of 2010 has been laid by the plaintiffs against the defendant for the relief of permanent injunction restraining him from in any way interfering or obstructing the enjoyment and usage of the pathway mentioned as ABC in the rough sketch filed along with their plaint. Whereas the suit in O.S.No.231 of 2010 has been laid by the defendant against the plaintiffs for the relief of permanent injunction restraining them from in any manner preventing or obstructing the defendant from putting up the fence on the western side of his property by erecting stones.

6. The dispute between the parties is only in respect of the pathway running north south branching from east west Rasipuram-Aathur main road and running towards south on the western side of the defendants' property. Now according to the plaintiffs, the abovesaid pathway is the only access to their property for reaching the Rasipuram-Aathur main road and as could be seen from the materials placed on record, it is found that the plaintiffs' property is situated immediately south of the defendant's property and the defendant's property is situated immediately south of Rasipuram-Aathur main road. From the pleas set out by the respective parties as well as the materials placed on record, it is found that both the parties claim their origin of title to their respective properties by way of a partition deed dated 17.11.1950, the copy of which deed has been marked as Ex.A6/B1. It is found that the property belonging to the defendant is comprised in survey No.196/4B1 of the suit village and the plaintiff's property is comprised in survey No.196/4A of the suit village and as could be seen from the available materials as well as commissioner's report and plan exhibited in the matter, the house is situated partly in survey No. 196/4B1 and partly in survey No.196/4A and the defendant examined as D.W.1 has admitted that the northern half portion of the said house belongs to him and the southern half portion of the said house belongs to the plaintiffs and also would admit that he is using the pathway in dispute shown as ABC in the rough sketch to have ingress and egress to his house portion. Therefore, as rightly found and determined by the courts below, even though the defendant would claim the absence of any pathway on

the western side of the properties belonging to the respective parties, as above stated, the defendant has admitted the use of the pathway for reaching his house portion and therefore, as held by the courts below, the defendant has projected a false case as if no pathway at all has been in existence on the western side of the properties belonging to the respective parties.

7. As above pointed out, both the parties relied upon the partition deed dated 17.11.1950 for sustaining their respective case marked as Ex.A6/B1. On a perusal of the abovesaid partition deed as held by the courts below, there is a clear reference about the existence of the pathway commencing from the north western corner of Sundara Gounder's property i.e. the defendant's property and ending at south western corner of Palaniappa Gounder's property i.e. the property of the plaintiffs' predecessors in title. Therefore, from the abovesaid partition deed, when we could gather the existence of a pathway measuring a width of 9 feet and has been in usage and enjoyment of the predecessors in title of both the plaintiffs and the defendant and in such view of the matter, the claim of the defendant that no pathway had been in usage on the western side of the properties belonging to the respective parties and therefore, his contention that though reference about the pathway has been mentioned in Ex.A6/B1 partition deed, the same had not been put in usage at any point of time and therefore, the plaintiffs cannot claim any right of pathway over the same, as such, cannot be accepted. On the other hand, as could be seen from the commissioner's report and plan marked in the proceedings, it is found that the existence of the pathway is available on ground and therefore, to say that the pathway referred to in Ex.A6/B1 has not been put in usage by anyone and therefore, the same is not in existence, as such, cannot be believed and accepted and the abovesaid case of the defendant has been rightly disbelieved by the courts below. As held by the courts below, other than putting forth objection to the commissioner's report and plan, no further steps had been taken by the defendant to show that no pathway has been in existence as sought to be made out by him.

8. On a perusal of the averments contained in the plaint, it is found that the plaintiffs claim right over the pathway in question from their anterior documents i.e. the partition deed Ex.A6/B1. When as above pointed out, Ex.A6/B1 points out to the existence of the pathway and the usage of the same by the predecessors in title of the respective parties and the existence of the pathway has also been buttressed by the commissioner's report and plan exhibited in the matter, in such view of the matter, the arguments put forth by the defendant that the plaintiffs have no right of pathway by way of grant i.e. on the strength of Ex.A6/B1, as such, cannot be countenanced. When, as about pointed out, the plaintiffs trace their right over the suit pathway from their parental title deed and when the parental title deed i.e. Ex.A6/B1 confers existence of the pathway and usage of the same, in

such view of the matter, as held and determined by the courts below, the plaintiffs, as a matter of right, are entitled to claim right over the pathway by way of grant and therefore, the defence put forth by the defendant that the plaintiffs cannot be allowed to rely upon the abovesaid partition deed for deriving title to the suit pathway cannot be accepted in any manner.

9. The plaintiffs have established their right and entitlement to use the pathway on the strength of Ex.A6/B1 partition deed. When the abovesaid right had been granted to the plaintiffs by way of the grant under the abovesaid document, there is no need for the plaintiffs to sustain their claim and their right over the same on the footing that the said pathway is the only access to reach their property from Rasipuram-Aathur Main road. However, the plaintiffs have also pleaded that the suit pathway is the only access to reach their property from Rasipuram-Aathur main road and there is no other access to their property. However, the abovesaid case of the plaintiff has been challenged by the defendant and though the defendant would claim that the plaintiffs have other mode of access to reach their property, particularly, by way of the pathway said to be comprised in survey No.196/2F, however, on ground, the defendant has failed to establish that the said pathway is available to the plaintiffs for gaining access to their property and on the other hand, when it is found that the abovesaid pathway running in survey No.196/2F has been laid for the lay out formed on the western side of the properties belonging to both the parties and when the plaintiffs have clearly established their right and usage over the suit pathway without any doubt by way of Ex.A6/B1 partition deed, and when the abovesaid right has been granted to the plaintiffs by way of the grant and in such view of the matter, even assuming for the sake of arguments that the plaintiffs have other access to reach their property, the right conferred on them by way of Ex.A6/B1 partition deed would not be defeated or extinguished in any manner and still the plaintiffs would be entitled to exercise their right of pathway over ABC pathway as described in the rough plan and in such view of the matter, if the defendant is allowed to put up fencing on the western side of his property, definitely, there would be hindrance to the plaintiffs in gaining access to their property from Rasipuram-Aathur main road and therefore, the courts below are found to be justified in not granting the relief prayed for by the defendant and on the other hand, found to be justified in granting the relief as prayed for the plaintiffs.

10. Both the courts below have appreciated the oral and documentary evidence adduced by the respective parties in the right perspective and found that the plaintiffs are entitled to use the pathway shown as ABC in the plaint plan and also justified in holding that the said right had been acquired by the plaintiffs by way of the grant and also by way necessity

and therefore, the judgment and decree of the courts below upholding the plaintiffs' case and dismissing the defendant's case, in my considered opinion, do not warrant any interference and the reasonings and conclusions of the courts below being sound and acceptable in all aspects and not suffering from any perversity or infirmity, in all, it is found that, in my considered opinion, no substantial question of law is found to be involved in the second appeal. Be that as it may, the substantial questions of law formulated in the second appeals are accordingly answered against the defendant and in favour of the plaintiffs.

11. The plaintiffs' counsel, in support of his contentions placed reliance upon the decision of this court dated 15.02.2017 passed in the Second Appeal in S.A.No.733 of 2011 (Chinnusamy and another vs. Sundaram). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at hand.

12. In conclusion, both the second appeals fail and are accordingly dismissed with costs. Consequently, connected miscellaneous petitions are also closed.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

bga

Copy to

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

+1cc to Mr.S.Sounthar, Advocate, S.R.No.81971

S.A.Nos.260 and 261 of 2016

GMR (CO)
GN (26/06/2020)