

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.12.2019

Date of Verdict : 03.01.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1391 of 2001
and C.M.P.No.14972 of 2002

Raja

S/o.Maya Gounder

...Appellant/Appellant/2nd Plaintiff

Vs.

1. Vedi Raj (Died)
2. Rajavelu
3. Vallikannu Ammal
4. Periannan
5. Murugan

(5th respondent declared as major and his Court Guardian Advocate Ghandhimathi discharged from the Guardianship vide order of Court dated 14.08.2018 made in S.A.No.1391 of 2001)

6. Minor Saravanan
7. Minor Saridha
(Minors rep. by Court guardian Advocate Gandhimathi)

8. Manjula
9. Dharmalingam
10. Ramajayam
11. Kalai Selvi

(RR9 to 11 declared as majors and their mother & Guardian Manjula discharged from the Guardianship vide order of Court dated 14.08.2018 made in S.A.No.1391 of 2001)

Respondents 1 to 11/Respondents 1 to 11/ Defendants 1, 2, 4 to 12

12. Sengutuvan
13. Sekar
14. Palani
15. Suthakar

16. Ilango

17. Anbu

(R12 to 17 are brought on record as legal heirs of the deceased first respondent viz., Vedi Raj vide order of this Court dated 13.09.2019 made in C.M.P.No.189 of 2019 in S.A.No.1391 of 2001)

...Respondents

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 20.03.2000 made in A.S.No.116 of 1998 on the file of the Additional District Court, Thiruvannamalai, confirming the judgment and decree dated 17.08.1998 made in O.S.No.755 of 1985 on the file of the Principal District Munsif Court, Thiruvannamalai.

For Appellant : Mr.K.Krishnan
For Mr.A.Sivaji

For Respondents
R1 : Died

R2 to R11 : Dispencc with

For R12 to R17 : Mr.S.T.Bharath Gowtham
For Ms.P.Veena Suresh

JUDGMENT

This second appeal has been preferred as against the judgment and decree dated 20.03.2000 made in A.S.No.116 of 1998 on the file of the Additional District Court, Thiruvannamalai, confirming the judgment and decree dated 17.08.1998 made in O.S.No.755 of 1985 on the file of the Principal District Munsif Court, Tiruvannamalai.

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 :-

3.1. The suit is filed for easementary right of the plaintiff for the suit property and also for permanent injunction. The suit schedule property ad measuring 1 acre 26 cents comprised in Survey No. 452/9, is belonged to the first defendant and his brother Povathi Gounder and each of the them entitled to half of the share. The said Povathai Gounder had a son viz., Karunanithi @ Mannu and one Muniammal is the wife of

the said Karunanithi. The said Povathai Gounder and Karunanithi died long back as such the said Muniammal succeeded the suit property. The plaintiff purchased the property ad measuring 63 cents comprised in Survey No.452/9 from Muniammal under the registered sale deed dated 27.08.1972 and he was put in possession and enjoyment of the property. One Venkatesan, proprietor of Subbaiya Gounder, Coimbatore, had obtained decree as against the defendants in O.S.No.74 of 1965 on the file of the District Munsif Court, Thiruvannamalai and he brought entire extend of land ad measuring 1 acre and 26 cents in survey No.452/9 for sale through Court auction and the said acution took place on 13.07.1972, in which the plaintiff is the successful bidder and he purchased the entire extend of property in Survey No.452/9, thereby he become the absolute owner of the entire extend of property ad measuring 1 acre 26 cents in survey No.452/9. The sale certificate also issued in his favour.

3.2. The defendants are the owners of the land situated in the west and south of the land comprised in Survey No. 452/9 and to the south of the defendant's land there is a road. From the road, the plaintiff passes through the land comprised in Survey No.471/6A, belonging to the defendants to reach his property comprised in Survey No. 452/9. In fact, even before the sale the first defendant and his brother Povathai Gounder were going through the property comprised in Survey No.471/6A to reach the property comprised in Survey No. 452/9. Except this passage, no other way to reach the land. The passage has been used from time immemorial. The right of passage is an absolute necessity.

3.3. Though the plaintiff and his predecessors had an easement title over the suit property and the plaintiff had the easement right over the suit property and he had also prescribed such as easement of way over the suit property. In fact, the land in survey No. 452/9 is entitled to draw water from the well comprised in Survey No. 471/6A. There is a channel to draw water to the property comprised in Survey No. 452/9. The rough plan enclosed along with the plaint to show the existence of the path way in the land comprised in Survey No.471/6A, which is marked as A & B in the plan annexed with the plaint.

3.4. While being so, the sons of the defendants are attempted to dispute the plaintiff's title to the land ad measuring 1.26 acres through an advocate notice dated 09.02.1979 and it was replied by the plaintiff on 15.02.1979. Due to misunderstanding between the plaintiff and the defendants, the defendants obstructing the plaintiff to reach the land by passing through the suit schedule property. Hence the suit.

4. Resisting the same the first defendant filed written statement stating that the entire case of the plaintiff is false

and there is a cart track on the eastern side of the property comprised in Survey No. 471/6A and that cart way was given in survey No. 471/6B. The said road leads to the land belongs to the plaintiff. The plaintiff never used the land belonging to the defendants as pathway to reach his land. The plaintiff has no right over the property belonging to the defendants particularly the land comprised in Survey No. 471/6A, to reach the land of the plaintiff. The sale deed does not contain the easementary right and the plaintiff does not prescribe any easementary right. Further the plaintiff has not entitled to draw water from the well comprised in Survey No.471/6A to the land comprised in Survey No. 452/9. Therefore, he prayer for dismissal of the suit property.

5. On the side of the plaintiff examined P.W.1 to P.W.3 and were marked Ex.A.1 to Ex.A.7. On the side of the defendants examined D.W.1 & D.W.2 and no document were marked. The Advocate Commissioner's report and his plan were marked as Ex.C.1 and Ex.C.2. Base on the material placed on record, both the oral and documentary evidences of the respective parties and the submissions made, the trial Court found that the plaintiff has other way to reach his land, as such he is not entitled for the relief of easementary right and dismissed the suit filed by the plaintiff. Aggrieved by the same, the plaintiff filed an appeal suit in A.S.No.116 of 1998 before the Additional District Court, Thiruvannamalai, and the same was also dismissed. Aggrieved over the judgment and decree passed by the Courts below, the present second appeal has been preferred by the plaintiff.

6. At the time of admission of this second appeal on 30.09.2019, the following substantial question of law were formulated for consideration:-

"1. Have not the Courts below committed error in law in dismissing the suit for declaration of right over the suit pathway merely on the ground of the existence of alleged alternative cart tract?

2. Is not the judgment and the decree of the lower appellate Court vitiated due to the non-framing of the relevant and proper points for consideration as is required under Order XXXI Rule 31 CPC?

3. Are the Courts below right in law in dismissing the suit for suit pathway when such right has been granted to the plaintiff under Ex.A.1 sale deed to which the first defendant has signed as a witness?

4. Is not the first defendant estopped from denying the right, title and interest of the plaintiff to use the suit pathway when the said first defendant has signed the

sale deed under Ex.A.1 in favour of the first plaintiff as a witness to the said sale deed?

5. Have not the Courts below misdirected themselves in dismissing the suit for pathway merely on the ground of the existence of an alleged cart track which in law is not suitable as pathway to reach the plaintiff's land?"

7. The learned counsel appearing for the appellant/plaintiff and the respondents/defendants are reiterated the averments set out in the plaint as well as the written statement.

8. Heard Mr.K.Krishnan, learned counsel appearing for the appellant/plaintiff and Mr.S.T.Barath Gowtham, learned counsel appearing for the respondents 12 to 17/legal heir of the first defendant.

9. The plaintiff filed the suit for declaration of easementary right over the suit property and for permanent injunction on the strength of the sale deed dated 27.08.1972 in respect of the suit property ad measuring 63 cents, which was marked as Ex.A.1. Further under Ex.A.2 dated 01.11.1972, the sale certificate also issued to confirm the purchase of the plaintiff on the auction in O.S.No.74 of 1965 on the file of the District Munsif Court, Thiruvannamalai, in respect of the entire extend of land ad measuring 1.26 acres comprised in Survey No.452/9 by the plaintiff. The delivery of possession is also confirmed by the Ex.A.3. The plan annexed in the plaint is marked as Ex.A.4.

10. Since the plaintiff claimed easementary right over the suit property, he has to prove the enjoyment of the property i.e., he is using the pathway to reach his land comprise in Survey No. 452/9 only through the pathway comprised in survey No.471/6A. In fact, in the present suit, an Advocate Commissioner was appointed to note down the physical features of the suit property and he filed his report and plan, which were marked as Ex.C.1 and Ex.C.2.

11. The learned counsel appearing for the defendants submitted that if any person claimed easementary right by way of prescription, they must prove that they are using and enjoying the right for more than 20+2 years before filing of the suit. Whereas the plaintiff purchased the property under Ex.A.1 and Ex.A.2 and took possession only from 19.02.1973. The plaintiff filed this suit only in the year 1985. Therefore, the plaintiff cannot claim easementary right by way of prescription, since he

is in possession and enjoyment of the suit only from 19.02.1973 and the suit was filed on 20.09.1985, without even completing 20+2 years. Though the plaintiff claimed easementary right by necessity, the plaintiff did not prove that the way as claimed in the plaint is the only way to reach his property. Ex.C.1 and Ex.C.2 and also Ex.A.4 the rough plan annexed along with the plaint revealed that there was a cart track in Survey No.471/6B, which leads to the plaintiff's land comprised in Survey No. 452/9.

12. According to the plaintiff, he claimed easementary right pursuant to the schedule property mentioning in the plaint purchased by the plaintiff from Muniammal. Ex.A.1 reveals that the property ad measuring 63 cents out of 1 acres 26 cents comprised in Survey No. 452/9 along with the easementary right of drawing water from common well comprised in Survey No. 471/6A and the post of a picotta, the bucket (ftiy?ePhpiwf;Fk; fUtp) and water channel to draw water and to reach the land comprised in Survey No. 452/9. But the plaintiff filed the suit for easementary right of pathway under Ex.A.1. It is found that in the Ex.A.1 as above stated, no easementary right granted to the plaintiff as claimed by the plaintiff.

13. In fact, in the commissioner report A & B was marked as ridge and it was not mentioned as pathway and it is situated in the land belonging to the defendants. In Survey No. 471/6B on the eastern side of the defendants land, there was a pathway, which was starting from the Thiruvannamalai to Mangalam main Road and it reaches the plaintiff's land comprised in Survey No. 452/9. Therefore, the plaintiff cannot claim easementary right on the strength of the rough sketch Ex.A.4. The easementary of necessity is not to be granted on the ground of convenience and consistence but solely on the ground of easementary of necessity. When there are other way to ingress and egress, the easement of necessity cannot be claimed merely on the ground that other ways are inconvenient. Further the right of way as easement of necessity implies that there is no other means of access, however, inconvenient. When the dominant tenement cannot be enjoyed without imposing a burden on the servient tenement, then the question of easementary does not arise.

14. It is revealed very clearly from Ex.C.1 and Ex.C.2 that there was an alternative pathway to reach the land belongs to the plaintiff comprised in Survey No.452/9. As such, the plaintiff is not entitled for easementary right over the property as claimed by him. Therefore this Court does not find any reason to interfere with the findings rendered by the Courts below. Therefore, this Court is of the considered opinion that no substantial question of law involved in this appeal. Be that as it may. All the substantial questions of law, formulated by this Court in this Second Appeal, are answered in favour of the defendants and as against the plaintiff.

15. In the light of the above discussion, this Court finds that the Courts below have analyzed the evidences both the documentary and oral in detail, adduced by the parties and by giving cogent reasons, concluded rightly and dismissed the suit filed by the plaintiff. Accordingly, this Second Appeal stands dismissed by confirming the judgment and decree of the Courts below. Consequently, connected miscellaneous petition is closed. No order as to costs.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

Rts

To

1. The Additional District Judge,
Thiruvannamalai,
2. The Principal District Munsif,
Thiruvannamalai.
3. The Section Officer,
V.R.Section,
Madras High Court,
Chennai.

+lcc to Mr.A.Sivaji, Advocate, S.R.No. 1278

+lcc to Mr.P.Veena Suresh, Advocate, S.R.No. 593

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S.A.No.1391 of 2001
and C.M.P.No.14972 of 2002

RJI (CO)
GN(16/09/2020)

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