

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 13.02.2020

PRONOUNCED ON: 26.02.2020

CORAM :

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

S.A.NO.569 OF 2007

&

MP.NO.1 OF 2007

1.Shanmugam
2.Jagatha

.. Defendants/Respondents/
Appellants

Vs.

Kanagaraji

.. Plaintiff/Appellant/
Respondent

Prayer:-

This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 19.01.2007 passed in A.S.No.40 of 2006 on the file of the Sub Court, Tirupattur reversing the judgment and decree dated 24.03.2006 made in O.S.No.125 of 2003 on the file of learned Principal District Munsif, Ambur.

For Appellants : Mr.T.R.Rajagopalan, SC for
Ms.P.R.Supraja

For Respondent : Mr.V.Raghavachari

JUDGMENT

This Second Appeal has been filed against the Judgment and decree dated 19.01.2007 passed in A.S.No.40 of 2006 on the file of the Sub Court, Tirupattur reversing the judgment and decree dated 24.03.2006 made in O.S.No.125 of 2003 on the file of learned District Munsif, Ambur.

2. The facts, which gave raise to the filing of the present Second Appeal are stated hereunder:

The appellants were the defendants and the respondent is the plaintiff before the trial Court. The parties are described as per their litigative status before the trial Court.

3. The plaintiff has approached the trial Court in O.S.No.125 of 2003 for declaration of title and interest to the suit property and for permanent injunction, restraining the defendant from interfering with the peaceful possession and enjoyment and further permanent injunction restraining the defendants from obstructing the plaintiff in putting up new construction in the suit property.

4. According to the plaintiff, the suit schedule property originally belonged to Kannappa Mudaliar, Krishnasamy Mudali and Sadasiva Mudali and they were in possession and enjoyment of the same. According to the plaintiff, a patta was issued in favour of the above three persons. After the demise of these persons, the plaintiff, one Shanthi, and Rajendiran have come into possession and enjoyment of the same. In the Natham survey, in updating Register, a patta was issued in favour of the said Shanthi, plaintiff and Rejendiran jointly. Subsequently, the patta was sub-divided vide proceedings of the Tahsildar dated 13.11.2000 and after sub-division, the schedule property was allotted to the plaintiff and the plaintiff has been in possession of the same. The plaintiff and his father have been living in the said property. The local Panchayat has also levied property tax to the suit property in favour of the plaintiff's father and now in favour of the plaintiff. The patta and other tax receipts in support of the plaintiff's plea, have also been filed in the suit proceedings. According to the plaintiff, that the defendants are trying to create a pathway right into the suit property and obstructing the plaintiff from putting up any construction. According to him, the defendants have no right whatsoever or interest in the suit property. In view of the attempts to encroach upon the suit property belonging to the plaintiff, the suit came to be filed.

5. The suit was resisted by the defendants by filing a detailed written statement. The defendants denied the claim of the plaintiff that the plaintiff has title over the suit property as according to them, merely because patta was granted in updating scheme, the plaintiff cannot claim absolute right over the suit property. The patta alone cannot be a document of title. The defendants have also stated in the written statement that the boundaries of the suit property were not mentioned in the schedule to the plaint. The further case of the defendants was that the plaintiff did not disclose as to how the property had come into his possession. According to the defendants, in between the lands belonging to them and the plaintiff, there is a pathway/cart road with 6' feet breadth running from west to east in the suit property and the defendants were using the same for ingress and egress to their property in S.No.181/2 and therefore, the claim of the plaintiff for declaration of title to the suit property was unsustainable. The trial Court which

went into the issues, has partially allowed the suit in favour of the plaintiff stating that except 6' feet width road as claimed by the defendants lying between the properties of the plaintiff and the defendants, the plaintiff was entitled to the declaration and other injunction reliefs. The trial Court has come to such conclusion on the basis of the fact that many of the documents which came up for consideration indicate that there was an existence of cart track of 6' feet width in the suit schedule property. According to the trial Court, even the evidence let in on behalf of the plaintiff was indicative of that particular fact. Therefore, the trial Court has decreed the suit though in favour of the plaintiff, yet as far as 6' feet width road used by the defendants, the trial Court ultimately protected the defendants' interest for using the said road. As against the judgment and decree of the trial Court dated 24.03.2006 in O.S.No.125 of 2003, the plaintiff preferred an appeal in A.S.No.40 of 2006 on the file of Sub Court, Tirupathur.

6. The lower Appellate Court which dealt with the appeal, has found that there was no evidence to show that the existence of cart track as claimed by the defendants in the suit schedule property. In fact, the lower appellate Court has referred to the evidence let in on behalf of the defendants in extenso and found that it was not established that the defendants were using the passage in question. The lower appellate Court has referred to the evidence of Devakumar and Jagada. Jagada being the second defendant, wherein they did not categorically depose about the existence of passage. In fact, the lower appellate Court has referred to the exact evidence saying that the place which is in dispute between the plaintiff and the defendants was actually, there was a drainage and over the drainage there could not be a passage. In fact, the lower appellate Court has also referred to the evidence of second defendant, where she had admitted the existence of the drainage in the disputed place and also existence of a broad passage Ooni on the southern side of the property, which is available to be used by the defendants. The evidence further established the fact that the Ooni is located adjacent to the land belonging to the first defendant. More over, it was also emerged from the evidence that the defendants were actually using the Ooni in order to reach their cattle shed and their land located adjacent to the plaintiff's property. In the said circumstances, the lower appellate Court has reversed the findings of the trial Court and set aside the judgment and decree by allowing the appeal in full. As against that, the present Second Appeal has been filed by the defendants.

7. At the time of admitting the Second Appeal, the following substantial questions of law have been framed:-

(i) When it is settled in law that the plaintiff can succeed or fail on the strength of his own case is the Sub Judge right in presuming title on the ground that the defendant failed to establish easement of necessity?

(ii) When the plaintiff having not produced any document of title with reference to the disputed portion of the property, still is the Sub Judge right in granting a decree?

(iii) When admittedly the disputed lane is shown in all the antecedent documents including one in the year of 1905 coupled with the fact the resurvey effected in the year of 2000 has not been done following the prescribed procedure is the Sub Judge right in granting a decree only on the basis of a patta which is not a document of title?

(iv) Is the sub Judge right in casting the onus of proof wrongly on the defendant when the plaintiff has to prove title to the suit property?

8. Mr. T. R. Rajagopalan, learned Senior counsel appearing for the appellants/defendants would submit that in a suit like this for declaration, no indication in the plaint as to when the suit property came to the plaintiff, no boundaries were given in the plaint. In the absence of boundaries in the suit schedule property, the plaintiff was not entitled to succeed in his claim for grant of title. More over, in the absence of any averment regarding how the plaintiff came into possession of the property, the grant of declaration of title both by the trial Court and the lower appellate Court are erroneous and liable to be interfered with.

9. The learned Senior counsel would also submit that the title to the property must be independently established and not through patta alone. According to the learned Senior counsel, the plaintiff has not filed any title documents, in order to establish his claim for title. The learned Senior counsel would take this Court through the evidence of PW4, who was a Surveyor. According to him, on 13.11.2000, the survey number in S.No.181/1 was subdivided which is reflected in Exs.A2 and A3. However, he would submit that he has not brought the drawing/sketch to the Court as the same is in the office. PW4 would also depose that in S.No.181/1D, the existence of street is found. He would also depose that the sub-division can be done only by the competent authority viz., Tahsildar and the sub-division which had taken place in the year 2000 was not authorized. He would further depose that when a joint patta was issued originally to

Kannappa Mudaliar, Krishnasamy Mudali and Sadasiva Mudali unless that property underwent in partition or subjected to any sale or possession for a long period of time, the question of sub-division in the same did not arise. He would also admit that Ex.B2 document filed on behalf of the defendant would show the existence of pathway.

10. The learned Senior Counsel would also refer to the judgment of the appellate Court in order to demonstrate that as to how the lower appellate Court has erred in reversing the judgment and decree of the trial Court. The learned Senior counsel would also rely on the decision reported in "(2014) 2 SCC 269 (Union of India and others) versus Vasavi Cooperative Housing Society Limited and others)", in order to emphasize the legal point that the burden is always on the plaintiff to establish his case irrespective of whether the defendant proves his case or not. He would also rely on a decision reported in "2017 (1) CTC 37 (Arulmigu Marundeeswarar Thirukoil, rep. by its Executive Officer versus The Chief Engineer, The Highways Department, Govt. of Tamil Nadu)". In this case, the learned Judge has held that when a cloud is created by the defendants in title, the person claiming title should prove with cogent evidence and title to the property. Mere production of 'A' register is not sufficient. Further, the learned Judge of this Court has held that patta granted by the revenue authorities not a seal of approval of title of a party and the patta issued by the revenue authorities is not always binding on the Civil Court. He would further draw the attention of this Court to a decision reported in "2017 (1) CTC 67 (M.Karupppiah Thevar and others versus John Victor)", wherein, this Court has held that patta granted by the Revenue authority is not a seal of approval of title of the party and the patta is also not binding on the civil Courts. He would therefore, submit that in the absence of other evidence, the plaintiff cannot succeed to his claim for title to the suit schedule property.

11. Per contra, the learned counsel, Mr.V.Raghavachari appearing for the respondent/plaintiff has submitted that the plaintiff has filed as many as 10 documents in support of his claim. Ex.A1 was a patta issued jointly to Kannappa Mudaliar, Krishnasamy Mudali and Sadasiva Mudali. Ex.A2 patta was issued on 06.11.2000 in favour of the plaintiff. Ex.A3 was the order sub-dividing the property dated 13.11.2000. Ex.A4 was a joint patta issued to the predecessor in title of the plaintiff. Exs.A5 to A8 were the Tax receipts. According to him, all these documents would clearly show that the plaintiff has interest of title over the suit property. According to the learned Counsel, it is not the case of the defendant that they are claiming the title over the suit schedule property, their claim is only to use of the pathway of 6' feet width in a portion of the suit

property and the defendants failed to establish the existence of the pathway by marking any public document. The defendants have simply claimed existence of pathway on the basis of certain private transactions which cannot be a valid piece of evidence to accept the case of the defendants as against the plaintiff.

12. Mr.V.Raghavachari, learned counsel would also submit that the claim of the defendants of easementary right by necessity to have ingress and egress to their property, cannot be claimed in the facts and circumstances of the present case in view of the existence of alternative pathway Ooni as borne out by the records. In fact, the lower appellate Court has correctly appreciated the existence of the pathway (Ooni) and also relied upon the evidence let in the defendant side particularly, the evidence of the 2nd defendant in regard to the factum of the first defendant using the said Ooni to approach his property. The legal principle is well settled that once an alternative pathway is available, the question of claiming of easementary right of necessity does not arise at all.

13. The learned counsel would also submit that as regards the submission of patta alone is not a document of title, he would submit that in the absence of any contra documents filed on behalf of the defendants upsetting the claim of the plaintiff, the Civil Courts can rely on the patta, Ex.A2 dated 06.11.2000 and grant the relief to the plaintiff. Moreover, the trial Court has granted the relief after due appreciation of all the evidence except carving out 6' feet width pathway from the purview of declaration. However, rightly the learned appellate Court has set aside the judgment and decree of the trial Court on the ground that the defendants have not established their case that there exist a pathway in the survey number belonging to the plaintiff. In the said circumstances, the learned counsel would pray for dismissal of the Second Appeal.

14. Considered submissions put forth by the learned Senior counsel, Mr.T.R.Rajagopalan for the appellants /defendants and Mr.V.Raghavachari, learned counsel for the respondent/plaintiff and perused the materials and the pleadings placed on record.

15. The Courts below, in fact have found substance in the claim of the plaintiff for grant of declaration on the basis of the materials made available for consideration. In fact, the trial Court itself has granted the relief of declaration except 6' feet width pathway after accepting the case of the plaintiff. However, the trial Court has erred while granting the relief to the plaintiff by excluding 6' feet width road as pathway to be used by the defendants by accepting case of the defendants in regard to the pathway. The trial Court has erred in relying on

the evidence which did not clearly establish the existence of cart track as claimed by the defendants. In fact, as rightly contended by the learned counsel for the respondent/plaintiff that the defendants did not spare any efforts to mark any public documents in order to prove their counter claim. The documents pertaining to private transaction, cannot be a valid piece of evidence to show existence of public pathway and it cannot certainly be an effective substitute to a public document. Moreover, this Court finds that the location of 6' feet width road in the rough sketch enclosed cuts right into property belonging to the plaintiff. It is quite unbelievable that such road could have existed at all to be enjoyed by the defendants. The lower appellate Court has rightly appreciated this fact and held in favour of the plaintiff in toto. In fact, the decision relied upon by the learned Senior counsel for appellant, i.e. 2017 (1) CTC 67 (cited supra), actually supports the case of the plaintiffs. Learned Judge of this Court has held that patta assumes significance when no contra document was filed by the parties. In the case on hand, no documents were filed on behalf of the defendants to take away the evidentiary value of the patta issued to the plaintiff which was the basis of his title claim.

16. Moreover, the evidence let in on behalf of the defendant particularly by witnesses, namely Jagadha and Devakumar (DW4 and DW5) wherein, it was admitted that the first defendant was using Ooni to reach his land, cattle shed and his property. In such circumstances, the question of claiming for alternative relief like easementary right of necessity, did not arise at all and also not maintainable. Once the right to use the passage is not found to be acceptable, it is no more open to the defendants to question the declaration of title granted to the plaintiff. When the trial Court has granted the relief of declaration except 6' feet width road, the defendants have not chosen to file an appeal against that judgment. Therefore, the arguments advanced by the learned Senior counsel for the appellants about the non indication of boundaries in the plaint, cannot be countenanced, as both the Courts below have understood the claim of the plaintiff and granted the reliefs.

17. Further, the dispute by the defendants is only regarding the pathway, therefore their objection as to the non-indication in the plaint about how the plaintiff came into possession of the property need not be addressed at all. It is not the case of the defendants that they were claiming title over the suit property. Therefore, the absence of any averments regarding as to how the plaintiff has come into possession of the property is not fatal to the case of the plaintiff.

18. Moreover, this Court finds that the lower appellate Court findings vis-a-vis the findings of the trial Court are well founded. More over the lower appellate Court has also found that in order to claim easementary right, the defendants ought not to have denied the title to the suit property. In this case, the lower appellate Court has rightly found that the defendants openly denied the title of the plaintiff over the suit property and therefore, they are barred from seeking the relief under the easementary laws. On the whole, this Court finds that the lower appellate Court's judgment is well considered one and this Court does not find any infirmity in the judgment and decree passed by the lower appellate Court in favour of the plaintiff. Accordingly, the substantial questions of law framed, are answered against the appellants/defendants.

19. In view of the above, the Second Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(MDU)

//True Copy//

Sub Assistant Registrar

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To

1. The Sub Court,
Tirupattur.
2. The Principal District Munsif,
Ambur.
3. The Section Officer,
VR Section, High Court,
Madras-104.

+1cc to Mr.T.R.Rajaraman, Advocate, S.R.No.16669
+1cc to Mr.V.Raghavachari, Advocate, S.R.No.16497

S.A.No.569 of 2007

PVS (CO)
CS/18/11/2020