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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.01.2021

CORAM

THE HONOURABLE MR. JUSTICE T. RAVINDRAN

S.A.No. 1343 of 2008

and

M.P. No.1 of 2008

Jayaraj

S/o. Chinamanaicker

... Appellant / Plaintiff

Vs.

1. Pulliappan

S/o. Kalinaicker

2. Kaliappan

S/o. Pulliappan

3. Pulliappan

S/o. Kondamanaicker

4. Bomman

S/o.Kondamanicker

... Respondents / Defendants

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against judgment and decree dated 14.09.2005 made in A.S. No.175 of 2001 on the file of the Sub Court Namakkal, reversing the judgment and decree dated 27.07.2001 made in O.S. No.73 of 1999 on the file of the District Munsif Court, Rasipuram.

For Appellant : Mr. N. Manokaran

For Respondents : Mr. S. Senthilnathan

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 14.09.2005 passed in A.S. No.175 of 2001 on the file of the Subordinate Court, Namakkal, reversing the judgment and decree dated 27.07.2001 passed in O.S. No.73 of 1999 on the file of the District Munsif Court, Rasipuram.



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

3. The plaintiff in O.S. No.73 of 1999 is the appellant in the second appeal.

4. The plaintiff has laid the suit for permanent injunction. Seeking the relief of cart track said to be measuring 10 feet in width lying in survey No.15/8, according to the plaintiff, he has been enjoying the suit cart track as described in the rough plan for cultivating his land comprised in survey No.15/4 measuring an extent of 48.1/2 cents and other than the suit cart track, he has no other access to reach his land and by way of continuous usage and enjoyment of the suit cart track, he has acquired the right to the suit cart track and inasmuch as the defendants attempted to interfere with the possession and enjoyment of the suit cart track by putting up the stone structures in the same, according to the plaintiff, he has been necessitated to lay the suit for the relief of permanent injunction.

5. The defendants resisted the plaintiff's suit contending that the suit cart track said to be lying in the Survey No.15/8-25 and 15/8-27 belongs to the defendants ancestrally and the defendants have obtained the patta and enjoying the suit property and no cart track is in existence in the abovesaid survey numbers and the defendants, with a view to demarcate their land, have put up the stone structure on the eastern side of the survey No.15/8-25 and 15/8-27 and furthermore, to the north of the plaintiff and the defendants' properties, stone structures have been put about 4 feet in height running east to west on northern side and about 2 feet in height running south to north on eastern side and the plaintiff has got every access to reach his property and therefore, according to the defendants, the plaintiff has no cause of action and the suit is liable to be dismissed.

6. In support of the plaintiff's case, P.Ws.1 to 3 were examined, Exs.A1 and A3 were marked. On the side of the defendants D.Ws. 1 to 3 were examined and Exs. B1 and B2 were marked. Exs. X1 and X2 and Exs. C1 and C2 were also marked.

7. On a consideration of the oral and documentary



11. Despite the abovesaid factors, when the plaintiff's claim of right and usage over the alleged suit cart track has been totally put in challenge by the defendants, the plaintiff has to come forward with the suit for the relief of declaration as to the nature of right he seeks over the cart track. In the decision rendered by the Apex Court reported in 2008 17 SCC 491 (Bachhaj Nahar v. Nilima Mandal and another), the Apex Court has held that the facts to be pleaded and proved for establishing the title are different from the facts that ought to be pleaded and proved for making out the easementary right and also explained as to what are the necessary pleas to be put forth in the plaint seeking for the various kinds of easementary rights and the same are extracted below.

"18. A perusal of the plaint clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the schedule property. The facts to be pleaded and proved for establishing title are different from the facts that are to be pleaded and proved for making out an easementary right. A suit for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an easementary right relates to a right possessed by a dominant owner/occupier over a property not his own, having the effect of restricting the natural right of the owner/occupier of such property.

19. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a watercourse, etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have to plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner



of disturbance or obstruction to the easementary right.

20. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and the defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to watercourse. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence.

21. A right or easement can be declared only when the servient owner is a party to the suit....."

Considering the abovesaid principles of law outlined by the Apex Court and applying the same to the case at hand, when the plaintiff has failed to come out as to on what basis and under what circumstances and from which date and over which period he is claiming the right of easement by way of necessity and the right of easement by way of prescription, it is seen that on that score alone, the plaintiff suit is liable to be thrown out.

12. Furthermore, as rightly held by the first appellate



court, there is no clear recital in Ex.A1 that the plaintiff has been granted the right to use the suit cart track as described in the plaint. The plaintiff has also not come forward clearly as to where the suit cart track lies and the owners of the survey numbers over which the alleged suit cart track lies. Very vaguely the plaintiff would claim that the suit cart track running in Survey No.15/8 measuring an extent of 10 feet in width. The plaintiff has not come forward as to who are the owners of survey number 15/8 and whether the plaintiff has been exercising the right over the suit cart track running in Survey No.15/8 to the knowledge of the owners thereof and the plaintiff has also not come forward as to the length of the suit cart track. But very vaguely would state that he has no other access to reach his land other than the suit cart track and he has been enjoying the suit cart track over a long period of time. More particularly, the plaintiff has also not come forward in the plaint that the suit cart track has been described in the settlement deed Ex.A1.

13. As rightly held by the court below, on a reading of the averments contained in Ex.A1 settlement Deed, particularly, the lie of the property comprised therein and on a comparison of the same with the cart track as depicted in the rough plan marked as Ex.A2, the first appellate court has rightly held that various discrepancies are noted with reference to the lie of the cart track as projected by the plaintiff in the rough plan. The lie of the mammol pathway described in Ex.A1 settlement deed does not concur with the lie of the cart track as depicted in the rough plan marked as Ex.A2.

14. The plaintiff would claim that he has been enjoying the suit cart track over a long period of time and thereby impliedly would claim that he has acquired the right by way of prescription. The plaintiff would admit that he is in the possession of the title deed by way of which his mother had acquired the title to the property described in the plaint schedule including the suit cart track. Despite the position being above, the plaintiff has not endeavored to mark his parent title deed to evidence that his mother and his ancestors had been enjoying the cart track as described in the plaint to reach the land comprised in R.S. No.15/4. Therefore, a serious suspicion arises in the case of the plaintiff as to whether at all he would have enjoyed the suit cart track over a long period of time as



projected by the plaintiff. No plausible explanation has been put forth by the plaintiff for the non production of the parent title deed.

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15. The plaintiff would mainly rely upon the commissioner's report to sustain the claim of relief of permanent injunction over the suit cart track marked as Exs.C1 and C2. The plaintiff would describe the width of the suit cart track as 10 feet, whereas during the course of evidence, mentioned the width of the cart track as 11 feet. The plaintiff has not endeavoured to measure the width of the suit cart track when the property was inspected by the Advocate Commissioner. Furthermore, as above noted, the plaintiff has not mentioned the length of the suit cart track. Only in the course of evidence, he would state that the suit cart track measures a length of 150 feet. Even the Advocate Commissioner in his report has not mentioned the length of the suit cart track. From the lie of the properties belonging to the parties concerned, it is seen that the plaintiff's property is lying to the east of the properties belonging to the defendants. Now according to the plaintiff, the suit cart track lies in between the properties belonging to him and the defendants. However, considering the lie of the property belonging to the parties and the commissioner's report and the plaint in toto, it is not clear as to whether the cart track is in existence as projected by the plaintiff. Particularly when the description of the property comprised in Ex. A1 settlement deed is considered, as rightly held by the first appellate court, the access described in the settlement deed does not indicate the lie of the cart track as sought to be projected by the plaintiff. On the other hand, the access to the property comprised in Ex.A1 settlement deed would only go to show the existence of mammol pathway and not the cart track as described in the plaint.

16. From the materials placed on record, the survey no.15/8 over which the suit cart track is alleged to be in existence, it is noted that the abovesaid survey number has been subsequently sub divided as survey nos.15/1 to 72. From the evidence of P.W.3 and Ex.X1, the plaintiff would project the case that the suit cart track is available on ground and described in Ex.A1. However, considering the evidence of P.W.3 and Ex.X1, it is found that in Exs.X1 and X2 marked through P.W.3, survey No.15/69 is described as pathway and 15/70 is described as



street. According to the plaintiff the pathway described in survey No.15/69 is the cart track. However, P.W.3 would state that survey No.15/69 is described only as pathway and furthermore, would admit that he does not know whether the said pathway lies and equally would also state that he does not know whether the road situated in survey No.15/70 lie and when there is no material projected on the part of the plaintiff as to whether the pathway described in Survey No.15/69 belongs to anyone or the same is the public pathway and when P.W.3 is unable to throw any clear picture with reference to the existence and usage of the said pathway and when the plaintiff has also not placed any material to correlate that the pathway described in survey No.15/69 is only the cart track over which he claims the right, the first appellate court is justified in disbelieving the plaintiff's case. Whereas the trial court, without any basis or material, proceeded to hold that the pathway described in Survey No.15/69 is the cart track which has been pleaded by the plaintiff.

17. In the light of the abovesaid factors, when the plaintiff has not endeavoured to establish the existence of the suit cart track on ground as put forth by him and when the settlement deed projected by him does not portray or depict the existence of the suit cart track as claimed by the plaintiff and Exs.X1 and X2 also do not reflect the existence of the cart track on ground as above discussed and the evidence of P.W.3 with reference to the same is found to be totally unreliable and not convincing and the plaintiff having not filed his parent title deed to establish the existence of the suit cart track and usage of the same from the days of his ancestors, in such view of the matter, and as above seen, despite the challenge put forth by the defendants over the plaintiff's claim of right over the cart track, the plaintiff having not claimed the relief of declaration of the nature of right he seeks to enforce in respect of the cart track, all put together, it is noted that the first appellate court, for the reasons assigned by it, has rightly rejected the plaintiff's case by setting aside the judgment and decree of the trial court. The reasons assigned by the first appellate court for setting aside the judgment and decree are found to be based on the proper appreciation of the materials placed on record, both factually as well as legally. Therefore, the judgment and decree of the first appellate court do not warrant any interference.



18. In the light of the abovesaid discussions, no substantial question of law is found to be involved in the second appeal. Resultantly, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

bga

To

1.The Sub Court, Namakkal

2.The District Munsif Court, Rasipuram.

Copy To

The Section Officer,
VR Section, High Court, Madras

+1cc to M/s.N.Manokaran, Advocate, S.R.No.1554

S.A.No.1343 of 2008

CNR(CO)
SB(17/09/2021)