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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.11.2021
PRONOUNCED ON : 24.11.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.5 of 2010
& M.P.No.1 of 2010

K.Thangavel ... Appellant/Defendant
Vs.

A.Manickam ... Respondent/Plaintiff

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 29.06.2009 passed in A.S.No.147 of 2008 on the file of the Subordinate Court, Tiruchengode, reversing the judgment and decree dated 29.01.2008 passed in O.S.No.290 of 2002 on the file of the District Munsif Court, Tiruchengode.

For Appellant : Mr.R.Darshan
for Mr.N.Manokaran

For Respondent : No appearance

J U D G M E N T

The present Second Appeal is directed against the judgment and decree dated 29.06.2009 passed in A.S.No.147 of 2008 on the file of the

Subordinate Court, Thiruchengode, reversing the judgment and decree dated 29.01.2008 passed in O.S.No.290 of 2002 on the file of the District Munsif Court, Tiruchengode.

2. The respondent/plaintiff has filed a suit before the learned District Munsif, Tiruchengode in O.S.No.290 of 2002, seeking the relief of permanent injunction restraining defendant and their supporters from any way preventing or disturbing the plaintiff from laying the pipeline in the suit schedule property.

3. The learned District Munsif, Tiruchengode, by judgment



and decree dated 29.01.2008 dismissed the suit, against which, the plaintiff/respondent preferred an appeal in A.S.No.147 of 2008 on the file of the Sub Court, Tiruchencode, praying to set aside the judgment and decree dated 29.01.2008, passed by the learned District Munsif, Tiruchengode in O.S.No.290 of 2002.

4. By judgment and decree dated 29.06.2009, the learned Subordinate Judge, Tiruchencode, allowed the appeal filed in A.S.No.147 of 2008 and granted the decree in favour of the plaintiff. Feeling aggrieved over the same, the defendant is before this Court with the present Second Appeal.

5. For the sake of convenience, hereinafter, the appellant is called as 'defendant' and the respondent is called as 'plaintiff'.

6. The laconic averments made in the plaint, are as follows:

(i) The plaintiff by virtue of a registered sale deed dated 31.08.2000 becomes the absolute owner of the lands in S.F.No.1/2 to an extent of 2.47.5 acres in A.Erayamangalam village, Tiruchengode Taluk. Likewise, by way of inheritance, the plaintiff is the absolute owner to the lands in S.No.131/2 to an extent of 1.36.0 hectares of Chickanaikkanpalayam Village, Tiruchengode Taluk,. Except the plaintiff, no one is having right or title over the said property.

(ii) The plaintiff is having a well in S.No.1/2 wherein he installed a 10 HP electric motor pumpset vide S.C.No.795. From the said well he proposed to take water to the land comprised in S.No.131/2 by putting a underground pipeline in the pathway, which is situated in S.No.1/2 of Chikkanaikkanpalayam Panchayat and through another one pathway situated in S.No.137.

(iii) The plaintiff have acquired a easement right of pathway and right to lay underground pipeline in S.No.137 by virtue of a registered document dated 31.08.2000. The defendant is having land in S.No.1/2 on the southern side of the plaintiff's field. There is a common pathway to the width of 10 feet running on the eastern side of the plaintiff's land as well as in the defendant's lands. The said 10 feet width common pathway is running upto Chikkanaikkanpalayam Panchayat Road. The laying of pipeline by the plaintiff is no way giving disturbance or trouble to the defendant.

(iv) On 03.11.2002, the defendant and his supporters tried to disturb the plaintiff from laying the pipeline and the



same was managed by him with great difficulty. Now the defendant is proclaiming as if he will not allow the plaintiff to lay the pipeline or enjoy the suit pipeline peacefully in future. Therefore, it is necessary to grant an order of injunction as prayed for by the plaintiff. Hence, the suit.

7. The case of the defendants, is as follows:

(i) It is true that the plaintiff is the owner of the land to an extent of 2.47.5 acres in S.F.No.1/2 of A.Erayamangalam Village, Tiruchencode Taluk. Originally the defendant had sold the suit property to one Rajavel and retained the remaining properties with him. The plaintiff purchased the suit property from the said Rajavel. Before purchasing the abovesaid land, the vendor of the plaintiff viz., Rajavel, the defendant and others formed a 10feet cart-track to reach the house of the defendant which is situated in the south-western corner of S.No.1/2. The said cart-track absolutely belongs to the defendant and the plaintiff is having only a easementary right for ingress and egress.

(ii) The defendant is not having any objection to use the said pathway for reaching the Chikkanaickanpalayam Panchayat Road by the plaintiff. The plaintiff has no right over the land, in which the cart-track is formed. The cart-track and its land are not common for the plaintiff and the defendant. The easement right to use the pathway for ingress and egress to his field alone is granted to the vendor of the plaintiff by the defendant and therefore, the plaintiff is not entitled to lay the pipeline underneath the cart-track.

(iii) The relief claimed in the suit is mandatory in nature. If the relief of permanent injunction is granted, the plaintiff will lay pipe-line in the private cart-track which absolutely belongs to the defendant. Laying of pipeline after obtaining a decree of permanent injunction is mandatory in nature and the same cannot be executed in EP and hence, the suit for mere injunction is not maintainable. The suit is not properly valued. Therefore, the suit filed by the plaintiff is liable for dismissal.

8. Based on the above pleadings, the learned District Munsif, Tiruchencode, framed necessary issues and tried the suit. On the side of the plaintiff, the plaintiff himself examined as PW1 and marked five documents, as Ex.A1 to A5. On the side of the defendant, the defendant himself examined as DW1. Further, on his side, two more witnesses were examined as DW2 and DW3 and marked one document as Ex.B1. Apart from those documents, the report and the plan filed by the learned Advocate



Commissioner, are marked as Ex.C1 to Ex.C4.

9. Having considered the materials placed before him, the learned District Munsif, Tiruchengode, vide judgment and decree dated 29.01.2008, dismissed the suit filed by the plaintiff.

10. In the appeal preferred by the plaintiff in AS No.147 of 2008, the learned Subordinate Judge, Tiruchengode, by judgment and decree dated 29.06.2009, set aside the findings arrived at by the learned District Munsif, Tiruchengode and allowed the suit with entirety. Accordingly, suit was decreed in favour of the plaintiff.

11. Aggrieved over the said findings of the first appellate Court, the defendant is before this Court with the present Second Appeal. When the Second Appeal came up for admission, this Court formulated the following substantial questions of law.

"a) Whether the first appellate Court is right in law in decreeing the suit for bare injunction to lay underground pipeline in the suit cart track in the absence of any documentary evidence to confer such right over the suit cart track particularly when the plaintiff and his vendor (DW3) have been granted only the right of easement to use the cart track?

b) Whether the first appellate Court has committed an error in granting the prayer to lay pipeline underneath the suit property especially when there is no prayer for mandatory injunction more so, the vendor of the plaintiff was granted the right of easement to use the suit property as an access to reach his land?

c) Whether the first appellate Court is right in law in holding that the suit cart track is a "common property" for both the parties herein even though there is no legal evidence to arrive such finding?

d) Whether the first appellate court is right in fixing the burden of proof on the defendant particularly when the plaintiff has not discharged his initial burden of proof under Section 101 to 103 of the Indian Evidence Act?"

12. In the instant case, admittedly the vendor of the plaintiff had purchased the suit land from the defendant vide Ex.B1 dated 16.09.1998. For ingress and egress of the said land, the defendant gave right to the plaintiff's vendor as the



purchaser has to use southwest hiteri (,1;nlhp) in the width of 12 feet situated on the east of S.No.1/2 which leads to Perumampalayam to Chickenayakapalayam road. Therefore, the defendant gave right to use the cart-track only for ingress and egress of the suit land. Thereafter, vide Ex.A1, dated 31.08.2000, the plaintiff has purchased the property from the said Rajavel with the same rights, already provided to the Rajavel. Therefore, the right given to the vendors of the plaintiff and the plaintiff is only a right of easement to take cart and for ingress and egress of the suit land.

13. Mr.R.Darshan, learned counsel appearing for the appellant submitted that the first appellate Court after ignoring the provisions under Section 28 of the Indian Easements Act, committed an illegality in applying the doctrine of acquiescence.

14. The learned counsel also submitted that first appellate Court clearly erred in overlooking the legal principles that the respondent/plaintiff being the owner of a dominant tenement in respect of the pathway only, had no right whatsoever to throw additional burden on the servient tenement without prescribing a right to lay the pipeline as against the appellant.

15. It was also the submission of the learned counsel that the first appellate Court had clearly overlooked the well-settled principles of law that the owner of the servient tenement was entitled to obstruct the dominant tenement from illegally attempting to claim new rights until they ripened into an easement as envisaged under the provisions of the Indian Easements Act.

16. Now on considering the said submissions with relevant records, Section 28 of the Indian Easements Act runs as follows:

“With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect: An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed. The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the rights were imposed or acquired. In the absence of evidence as to such



intention and purpose (a) A right of way of any one kind does not include a right of way of any other kind."

17. No doubt, the Section does say that a right of way of any one kind does not include a right of way of any other kind and would mean that a person entitled to a dominant right to use a pathway for ingress and egress cannot claim any other mode for using the pathway.

18. Here it is a case, the claim of the plaintiff is that as he was provided with the right to use the disputed pathway for reaching his land and accordingly, he is also having the right to lay the pipeline. Infact the said claim is against Section 28 of the Indian Easements Act. If we go by the Section, it is possible to hold that the respondent/plaintiff in the instant case would not be entitled to take the water line, drainage line and over-head electric line over the suit pathway.

19. Now the real problem between the plaintiff and the defendant is that the defendant had not permitted the plaintiff to lay the pipeline. In otherwise, he had not raised any objection to use the said cart track for ingress and egress of the suit land. Since the defendant has raised an objection before laying the pipeline, it is not a case to decide whether laying of the pipeline is necessary or not and accordingly, the question of mandatory injunction does not arise.

20. Therefore, in the absence of any material to show that the plaintiff is having the right to install the pipeline in the suit pathway, the relief of injunction cannot be granted.

21. Accordingly, in the light of the discussion stated supra, the Second Appeal is allowed. The Judgment and decree dated 29.06.2009 passed in A.S.No.147 of 2008 on the file of the Subordinate Court, Tiruchengode, is set aside and in view of the above, the suit filed in O.S.No.290 of 2002 on the file of the District Munsif Court, Tiruchengode, is dismissed. No Costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1.The Subordinate Judge,
Tiruchengode.

2.The District Munsif,
Tiruchengode.

Copy To

The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.N.Manokaran, Advocate SR.No.60945

S.A.No.5 of 2010

RGN(CO)
GN(28/03/2022)