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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.10.2021

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

S.A.NO.604 OF 2013

AND

C.M.P.NOS.17016, 17017 AND 17019 OF 2021

Jothiammal

...Defendant / Appellant /
Appellant

Vs.

Murugan @ Iyyaswamy

...Plaintiff / Respondent /
Respondent

PRAYER : The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgement and decree dated 01.03.2012 made in A.S.No.264 of 2010 on the file of the VI Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 05.01.2010 made in O.S.No.3818 of 2009 on the file of the VII Assistant Judge, City Civil Court, Chennai.

For Appellant	:	Mr.C.Subramanian
For Respondent	:	Ms.Swetha for M/s.Srinath Sridevan

J U D G M E N T

The unsuccessful defendant is the appellant before this Court. The plaintiff filed a suit for permanent injunction restraining the defendant and her men and agent from parking any vehicle in the pathway provided for ingress and egress of the house property.

2. The plaintiff sold a piece of land to the defendant. The defendant has constructed a house in the land. The entire construction in 810 sq.ft of land without leaving any space for parking as well as pathway and used the common passage for parking causing lot of inconvenience and therefore, he filed a suit for permanent injunction.

3. In the written statement, it is stated that the defendant and her family members own five two wheelers and were parking it without causing any inconvenience to any person during night. The plaintiff has acquiesced to the parking of vehicles for a



long time and she cannot take an objection at this distance of time. Since it is a common pathway, it can be used by everybody without causing hindrance to any one. On this score, she sought for dismissal of the suit.

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4. The trial Court framed appropriate issues and relying on the evidence of D.W.2, son of the defendant in cross examination that the passage was used for parking the vehicles, even during day time apart from night hours, granted injunction in favour of the plaintiff. On appeal, the First Appellate Court found that the common passage is measuring east to west only 5 ½ feet and right is only for ingress and egress and it cannot be used for parking the vehicles.

5. The contention of the defendant that it is used for a long period is not sustainable as it does not exceed 12 years. Therefore, the defendant cannot claim easementary right by prescription by herself as she is also one of the owners of the property. Therefore, for peaceful enjoyment of both the sides and that the claim of the defendant in respect of the easementary right without completing 20 years is not sustainable, the Lower Appellate Court confirmed the judgment and decree of the trial Court. Aggrieved over the same, the defendant has preferred the above Second Appeal.

6. The learned counsel appearing for both parties have agreed to argue the Second Appeal on the question of law framed on the Memorandum of grounds, which reads as under:-

1) Whether the Lower Appellate Court is correct in law to confirm the judgment of the Trial Court without appreciating Section 25(1) and (2) of the Limitation Act, 1963?

2) Whether the Lower Appellate Court is correct in law to confirm the judgment of the Trial Court without appreciating Section 41 (f) and (g) of the Specific Relief Act, 1963?

3) Whether the Lower Appellate Court is correct in law to confirm the judgment of the Trial Court on the ground that the defendant had not stated as to when she had started the user of the suit property for parking of vehicles without appreciating the pleadings at Para 4 of the written statement?

4) Whether the Lower Appellate Court is correct in law to confirm the judgment of the Trial Court without appreciating the provisions of Order III Rule 1 & 2 Civil Procedure Code, 1908 and the proposition of law laid down in the judgment reported in AIR 2005 SC 439?

5) Whether the Lower Appellate Court is correct in law to confirm the judgment of the Trial Court on the ground that the suit as framed is maintainable in law.



7. The learned counsel for the appellant would vehemently contend that the vehicles are parked without hindrance to the users in common pathway. The Courts below without appreciating Section 25 (1) and (2) of the Limitation Act, 1963, decreed the suit and the decree and judgment are contrary to Section 41 (f) and (g) of the Specific Relief Act, 1963. According to him, the defendant completed the construction in the year 1987 and the suit came to be filed in the year 2009. Therefore, they have been using the property for over 20 years. Hence, the easementary right prescribed on them to use the way and this point was not considered by the trial Court and as per Section 41 (f) and (g), when it is not reasonably clear that it will be a nuisance, the plaintiff is not entitled to the relief of injunction.

8. Insofar as the above contention is concerned, the plaintiff and the defendant are having equal right over the property for using the common pathway. The plaintiff sold the rear portion of the property to the defendant, and permitted access to the house of the defendant. The width of the passage is only 5 ½ feet. Even assuming that the defendant had been using the property for access of way for over 20 years, it will not entitle her to claim easementary right to park the vehicle. She can utmost claim easementary right to access the property.

9. Secondly, while D.W.2 on his own admission, made clear that he owns five two wheelers and parked it day and night. The contention of the plaintiff is that there are seven vehicles parked. Even assuming five two wheelers are in the parking, the passage is having 5 ½ feet width and it will definitely cause nuisance and hindrance to the users particularly, the plaintiff, who is a Senior Citizen. In times of medical emergency, it will be very difficult to have access to go out of the place. Other than this, there will be lot of other hindrance in day-to-day activities by users of common pathway. For that purpose, the finding of the trial Court that it will cause inconvenience cannot be said to be without any reasons and visualization. If at all, the party wants to park the vehicles for safety purpose, it should be based on mutual understanding and it cannot be that anybody will have a right of parking the vehicle in the passage meant for access.

10. Therefore, the finding that right to access, causing nuisance and prescription of the easementary right will not arise in this case. Hence, the grant of permanent injunction is justified. From the question of law raised by the appellant, I do not find any legal issues to be decided in the matter. By admission of the defendant in cross examination, it is categorically proved that the plaintiff is not entitled to raise the issue on the admitted fact.



11. Therefore, I do not find any merit for consideration and the Second Appeal does not deserve admission. Accordingly, the Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

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Sd/-
Assistant Registrar (CS-V)

// True Copy //

Sub Assistant Registrar

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To

1.The VI Additional Judge,
City Civil Court,
Chennai.

2.The VII Assistant Judge,
City Civil Court,
Chennai.

+1cc to M/s.Srinath Sridevan, Advocate Sr.No.55518

S.A.No.604 of 2013 and
C.M.P.Nos.17016, 17017 and 17019 of 2021

JP-II (CO)
RVM(08/06/2022)