



WEB COPY



S.A.No.1130 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.10.2022

CORAM:

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

Second Appeal No.1130 of 2007

1.Kumaran
2.Savithiri
3.Valarmathi
4.Chitra
5.Rama

... Appellants

Versus

Rajmohan

...Respondent

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 30.11.2006 made in A.S.No.123 of 2004 on the file of the Principal Sub-Ordinate Judge, Mayiladuthurai in confirming the judgment and decree dated 08.04.2004 made in O.S.No.615 of 1996 on the file of the Principal District Munsif, Mayiladuthurai.

For Appellants : Mr.A.Muthukumar

For Respondent : No Appearance



S.A.No.1130 of 2007

JUDGMENT

This Second Appeal has been filed against the judgment and decree dated 30.11.2006 made in A.S. No.123 of 2004 on the file of the Principal Sub-Ordinate Judge, Mayiladuthurai, confirming the judgment and decree dated 08.04.2004 made in O.S. No.615 of 1996 on the file of the Principal District Munsif, Mayiladuthurai.

2. The defendants 2 to 6 in O.S. No. 615 of 1996 on the file of the Principal District Munsif, Mayiladuthurai have come up with the present Second Appeal.

3. The suit in O.S.No.615 of 1996 was filed by the respondent/plaintiff as against the defendants 1 to 6. Pending suit the 1st defendant Velayutham died and therefore, the defendants 2 to 6 contested the suit.

4. The respondent has filed the suit praying to grant a decree for permanent injunction restraining the defendants 2 to 6 their men, agents or



S.A.No.1130 of 2007

anyone from interfering with the peaceful and continuous use of the suit property, a pathway leading to his fields, in any manner and in anyway or trespass upon the suit property by putting up any gate or barrier.

5. According to the respondent/plaintiff, the lands comprised in R.S.No.205, 206 & 207 measuring 5.3 1/2 acres at Sitharkadu Village, Mayiladuthurai Taluk belongs to Sri Venkatesa Perumal Koil and Karuboyiram Konda Iyanar Temple, which temple is administered by the family trust of Duraisamy Pathar and his family. There was a big bund lying in the land situated in R.S.252, 254, 256 & 257 over which a common "Kalam" (path) situated in the land in S.N.253 and it leads from Maraiyur to Mayiladuthurai Road to the temple property. According to the plaintiff, this land is used as a Cart track and pathway leading to the fields. This is the land over which Bullock Carts with loads of the manure and harvest will be ferried. The pathway is having the length of 300 meters and breath of 3 meters. The trustees of the temple and their tenants used the pathway atleast for the past 50 years prior to the institution of the suit. Thus, the use



S.A.No.1130 of 2007

of the pathway by the plaintiff and others is a right of easement and such right is perfected by prescription and long usage. According to the plaintiff, he became a tenant in the year 1997 and his name was duly recorded as a cultivating tenant in respect of the aforesaid 5.3 1/2 acres of nanja lands by the Record Officer, Mayiladuthurai on 01.08.1978. The plaintiff as also his predecessor in title have been using this land as a pathway to the fields. It is through this pathway, the plaintiff and other agricultural tenants carried their agricultural produce to their respective lands. While so, on 10.06.1996, the defendants threatened the plaintiff that he should not use the pathway and put up a gate across the pathway in the western end. The peaceful enjoyment of the plaintiff, in using the suit property as a pathway has been sought to be prevented by the defendants. Therefore, the suit has been filed.

6. Repudiating the averments in the plaint, a written statement was filed by the defendants contending that the plaintiff is one of the cultivating tenants of the lands belonging to the temple. However, the allegation that



S.A.No.1130 of 2007

there was a big bund (pathway) lying in the nanja lands in R.S.252, 254, 256 & 257 is not correct. It was admitted by the defendants that there is a common "Kalam" (pathway) in R.S.253. But, it was not used as a Cart Track or pathway leading to the temple lands at any time. The harvested paddy will not be used to be taken through the suit property as alleged by the plaintiff. According to the defendants, they are the owners of the land in R.S.No.259/4, 259/7 & 245. The defendants are also the owners of the lands in R.S.257, 252, 256, 254, 203, 204, 208, 209 and 188-A. Since the defendants have raised sugar cane in their fields, with a view to safeguard their agriculture produce, they have fenced the land in R.S.No.259 & 245 and put up a gate. In R.S.259 & 257 the defendants have formed a private pathway by filling up the earth on their own. For this purpose, it is claimed that the defendants have spent money and also paid for the labour. In fact, the plaintiff has filed an application before the Revenue Authorities questioning the right of the defendants to lay a private road in the pathway and after conducting an enquiry the claim of the plaintiff was negatived. It is also stated that an Advocate Commissioner was appointed in the suit. But, he has inspected the property without giving an opportunity to the defendants. Therefore, the



S.A.No.1130 of 2007

report of the Commissioner and the sketch filed by him cannot be relied on by this Court. It is further stated that the plaintiff has got no manner of right, title or interest over the suit property and he never used the suit property as pathway, as alleged. Therefore, the question of infringement of easementary right as claimed by the plaintiff will not be arise and prayed for dismissal of the suit.

7. With the above averments, the plaintiff as well as the defendants 2 to 6 went for trial. During the course of trial, both the plaintiff as well as the defendants did not let in any oral or documentary evidence. However, only the report of the Advocate Commissioner and the sketch filed by him have been marked as Exs.C1 to C4.

8. The trial Court on appreciation of the aforesaid Exs.C1 to C4 has concluded that the plaintiff has been using the suit pathway for a long time even before purchasing the lands in question in the year 1997. By referring to



S.A.No.1130 of 2007

Exs.C1 and C2, the trial Court concluded that the property in question was used as a pathway and there is no other land available to the tenants of the temple to reach their fields, except the suit pathway. Accordingly, the trial Court decreed the suit.

9. Aggrieved by the decree and judgment of the trial Court first appeal was filed in A.S. No. 123 of 2004 by the defendants 2 to 6. The appellate Court concluded that the land in question was used as a pathway by the plaintiff and other cultivating tenants of the temple. The appellate Court also concluded that by virtue of long and continued usage of the pathway in question, the plaintiff has perfected his easementary right. Even though the defendants claimed that they are the exclusive owner of the land in question, they did not prefer any independent suit seeking declaration of their exclusive right over the suit property. Accordingly, the appellate Court dismissed the appeal preferred by the defendants. Aggrieved by the same, the present appeal has been filed.



S.A.No.1130 of 2007

10. The following questions have been raised for consideration of this Court, as questions of law, and they are:

1. When the foundation of the suit is only on the basis of the alleged easementary rights, whether the suit for bare injunction is maintainable in law without a prayer for declaration of the easementary rights?
2. When the plaintiff's case is that he became a tenant for the lands in the year 1977, whether the suit filed on 12.06.1996 on the alleged easementary rights is maintainable in law?
3. When the plaintiff had not pleaded that he has no other access to his lands or common kalam, whether the Courts below erred in law in holding that the defendants failed to prove that there is an alternative access for him?
4. Whether the easement of necessity arises for consideration when there is no pleading and evidence and the lands never belonged to any common owner?
5. Whether the plaintiff can claim any right over the pathway laid by the defendants in their lands?
6. Whether the Courts below misconstrued and misappreciated the pleadings and evidence on record?



S.A.No.1130 of 2007

WEB COPY 11. In spite of notice, there is no representation for the sole respondent/plaintiff and this Court heard the argument of the learned counsel for the appellants.

12. The learned counsel for the appellants submitted that the plaintiff, who came forward with the suit, has failed to prove his right and interest over the pathway by letting in oral and documentary evidence. In effect, the plaintiff has admitted in the plaint that the defendants have put up a gate on the western side of the suit property. While so, without seeking for a relief of declaration to declare the right over his land, he has filed the instant suit only for bare injunction. The plaintiff has not chose to examine himself as a witness before the trial Court. However, the trial Court by merely referring to Exs.C1 to C4 decreed the suit filed by the plaintiff. It is also submitted that both the trial Court as well as the first appellate Court have erroneously shifted the burden of proof on the defendants. When the suit was filed by the respondent/plaintiff, it is for him to prove his case based on the pleadings and documentary evidence. In the present case, the pleadings of the plaintiff is not



S.A.No.1130 of 2007

supported by any documentary evidence. While so, both the Courts below fell in error in granting a decree of permanent injunction restraining the defendants. Therefore prayed to frame additional substantial questions of law as suggested in the grounds of appeal.

13. At the outset, it must be stated that the substantial questions of law raised in the present appeal are not sustainable under Section 100 of CPC. On a careful perusal of the same, it could be inferred that they are purely questions of fact. Notwithstanding the same this Court finds that both the plaintiff as well as the defendants 2 to 6 did not examine themselves as witnesses before the trial court or filed any documentary evidence in support of their respective plea. The trial Court appointed an Advocate Commissioner taking note of the fact that the dispute in this case is a pathway which is said to be used as a Cart Track for carrying the agricultural produce. The Advocate Commissioner in his report has categorically pointed out that the suit property is being used as a Cart Track and except the suit property there is no other common pathway available to carry these agricultural produce in



S.A.No.1130 of 2007

the locality to reach their land. This amply makes it clear that the plaintiff and other cultivating tenants are using the suit property as a common pathway for their ingress and egress, *inter alia* to carry the agricultural produce, manure as well as the harvest. In such view of the matter both the Courts below are right in holding that the suit property is being used as a common pathway by the plaintiff as well as the defendants.

14. Yet another ground raised by the learned counsel for the appellants/ defendants 2 to 6 is that both the Court below erroneously shifted the burden of proof on the defendants and it is legally not sustainable. This submission of the learned counsel for the appellants cannot be accepted for the simple reason that in the written statement filed by the defendants have not merely denied the plaint averment but have stated that they have laid a private road by filling the earth, besides, they have erected a gate to safeguard the sugarcane produce in their lands. If it is so, the defendants are expected to lead evidence and to prove this to the satisfaction of the Court. However, the



S.A.No.1130 of 2007

defendants have not chosen to examine any witness nor produced any documents to prove what they have asserted in the written statement. In such circumstances, the Courts below are wholly justified in holding that the defendants, who have come forward with the theory of laying a private road in the land in question, have not proved it in the manner known to law.

15. On a cumulative reading of the entire records, this Court is of the view that the report of the Advocate Commissioner fully supports the claim of the plaintiff. Even though it is stated that the Advocate Commissioner has inspected the property without affording opportunity to the defendants, it is not known as to what prevented the defendants from submitting their objection to the report of the Advocate Commissioner. On perusal of the records, it is seen that no such objection was ever raised by the defendants before the trial Court. Therefore, there is no substance in the submissions of the learned counsel for the appellants.

16. Further, this Court does not find any substantial questions of law



S.A.No.1130 of 2007

arises for consideration in this appeal. All the questions as suggested in the memorandum of grounds of appeal, on a careful reading, only indicates that they are questions of fact, which, this Court, need not deal with, in exercise of powers under Section 100 of CPC. In the absence of any substantial question of law having been raised by the appellants, this Court can only confirm the concurrent findings rendered by the Court below.

17. In the result, the judgment and decree dated 30.11.2006 made in A.S.No.123 of 2004 on the file of the Principal Sub-Ordinate Judge, Mayiladuthurai in confirming the judgment and decree dated 08.04.2004 made in O.S.No.615 of 1996 on the file of the Principal District Munsif, Mayiladuthurai stands confirmed. The Second Appeal stands dismissed devoid of merits. No Costs.

26.10.2022

Index : Yes/No
Internet : Yes/No
gbi



S.A.No.1130 of 2007

To
WEB COPY

1. The Principal Sub-Ordinate Judge,
Mayiladuthurai.
2. The Principal District Munsif,
Mayiladuthurai.



WEB COPY



S.A.No.1130 of 2007

KRISHNAN RAMASAMY, J.,

gbi

S.A.No.1130 of 2007

26.10.2022