



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED ON : 08.03.2022

JUDGMENT PRONOUNDED ON : 11.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A. (MD) .No.234 of 2019

WEB COPY

1.Sekar

2.Jayakumar

3.Stanley Jones

...Appellants/Appellants/Defendants

Vs

1.Murugan

2.Gandhi

3.Poongani

...Respondents/Respondents /Plaintiffs

PRAYER : Second Appeal is filed under Section 100 of C.P.C, to set aside the judgment and decree dated 06.07.2018 passed in A.S.No.65 of 2015 on the file of the I Additional Sub Court, Nagercoil confirming the judgment and decree dated 29.10.2014 passed in O.S.No.106 of 2012 on the file of the I Additional District Munsif Court, Nagercoil.

For Appellants : Mr.M.P.Senthil

For Respondents : Mr.Niranjan S.Kumar

JUDGMENT

The defendants are the appellants.

2.The plaintiffs filed O.S.No.106 of 2012 before the I Additional District Munsif Court, Nagercoil, Kanyakumari District for declaration that the plaint 'D' schedule property is part and parcel of plaint 'C' schedule 15 feet common pathway. The plaintiffs further prayed for a declaration that the sale deed dated 02.12.2011 executed by the second defendant through the third defendant in favour of the first defendant with regard to 'D' schedule property is invalid and void and will not bind the plaintiffs. The plaintiffs further prayed for permanent injunction restraining the defendants from interfering with the plaintiffs common right of pathway over the plaint 'C' schedule property by constructing any building or obstructing the 15 feet common pathway in 'C' schedule property including the 'D' schedule property. The suit was decreed by the trial Court. The defendants filed A.S.No.65 of 2015 before the I Additional Sub Court, Nagercoil. The learned Subordinate Judge was



pleased to dismiss the appeal. As against the same, the defendants have filed the above second appeal.

3.The plaintiffs had contended that the parents of the first plaintiff purchased 'A' schedule property from the second defendant under Exhibit A2 on 06.11.2002. Thereafter, the parents of the first plaintiff have executed a registered settlement deed in favour of the first plaintiff with regard to 'A' schedule property under Exhibit A3 on 27.04.2010. Hence, the first plaintiff is the absolute owner of 'A' schedule property.

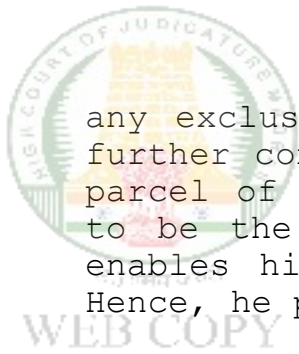
4.The plaintiffs had further contended that the second defendant has executed a registered sale deed jointly in the name of the plaintiffs 2 and 3 with regard to 'B' schedule property on 04.02.2004 under Exhibit A4. According to the plaintiffs, 'A' schedule is lying on the eastern side and 'B' schedule property is lying on the western side. In between 'A' and 'B' schedule properties, a 15 feet width common pathway is located which is used by the plaintiffs for ingress and egress to their respective properties. The said pathway is shown as 'C' schedule property.

5.The plaintiffs had further contended that the northern most portion of 'C' schedule property was alienated by the second defendant in favour of the first defendant under Exhibit A5 on 02.12.2011. Once the second defendant has sold away 'A' and 'B' schedule properties showing 'C' schedule property as a common pathway, the portion of the said common pathway cannot be alienated by the second defendant. After earmarking 'C' schedule property as a common pathway for 'A' and 'B' schedule properties, the second defendant cannot retain any portion after sale so as to confer a right on him to alienate a portion of 'C' schedule property.

6.The plaintiffs had further contended that the stair case of the residential house of the plaintiffs 2 and 3 is lying towards west, facing the 'D' schedule property. The alienation of 'D' schedule property in favour of the first defendant would specially obstruct the access of the plaintiffs 2 and 3 to the 'C' schedule pathway. Hence, the plaintiffs prayed for declaration that 'D' schedule property is part of 'C' schedule property. They had further prayed for declaration that the sale deed executed by the second defendant in favour of the first defendant is null and void and further prayer for injunction not to disturb the usage of 'C' schedule pathway by the plaintiffs.

7.The defendants filed a written statement contending that only up to a particular point in 'C' schedule property was surrendered to the Panchayat for public necessity and therefore, the plaintiffs are entitled to the pathway only up to the electric post. According to the defendants, the second plaintiff has got no right on 15 feet which lies on the eastern side of the schedule property.

<https://hccourtservices.in> The defendants further contended that the plaintiffs were not given



any exclusive right over the said 15 feet pathway. The defendants further contended that 'D' schedule property does not form part and parcel of 'C' schedule property and the second defendant continues to be the exclusive owner of the 'D' schedule property which enables him to convey the same in favour of the first defendant. Hence, he prayed for dismissal of the suit.

8.The trial Court after careful consideration of the oral and documentary evidence, arrived at a conclusion that Exhibits A2 and A4 sale deeds standing in the name of the plaintiffs will clearly disclose that their eastern and western boundaries are shown as 'C' schedule pathway. Though north-south measurement of 'C' schedule property has not been mentioned, no portion of pathway has been retained by the vendor namely the second defendant. The trial Court also relied upon Exhibit A12 a lay-out plan to arrive at a finding that 'C' schedule is shown as a pathway in the said lay-out plan. The said lay-out plan also forms part of Exhibits A2 and A4 sale deeds. Once a lay-out is created, earmarking a particular property as a pathway, thereafter, the vendor will not have any right over the same.

9.The trial Court also found that under Exhibit A2, there is no reference about the retention of any property by the second defendant in 'C' schedule property. However, while executing Exhibit A4, the second defendant has chosen to contend that as if some portions in the 'C' schedule property has been retained by him. Exhibit A2 is anterior in point of time and hence, any recital under Exhibit A4 will not confer any right upon the second defendant. The trial Court also relied upon the commissioner's report which clearly stated that 'C' schedule property is a pathway having 15 feet width. The defendants have not chosen to file any objection to the said commissioner's report. Hence, the trial Court arrived at a finding that 'D' schedule property is forming part of 'C' schedule property. Based upon the said findings, the trial Court held that since 'D' schedule property is forming part of 'C' schedule pathway, the second defendant will not be entitled to alienate the same under Exhibit A5 in favour of the first defendant. The trial Court decreed the suit as prayed for.

10.The First Appellate Court after independent consideration and analysis of oral and documentary evidence, arrived at a finding that the entire 'C' schedule property is a common pathway. That apart, 'D' schedule property forms part of 'C' schedule property. The First Appellate Court also relied upon the commissioner's report to arrive at a finding that the entire 'C' schedule property is a common pathway. The First Appellate Court further held that once the second defendant has alienated 'A' and 'B' schedule properties in favour of the plaintiffs showing 'C' schedule property as a pathway, thereafter he will not have any title to alienate the portion of 'C' schedule property in favour of the third defendant. Based upon the

<https://services.courtsofmadras.org/> the First Appellate Court confirmed the judgment and



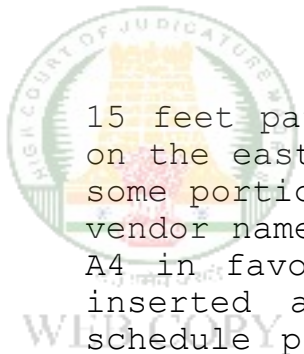
decree of the trial Court. As against the concurrent findings, the present second appeal has been filed by the defendants.

11.The learned counsel for the appellants contended that the second defendant has specifically mentioned in the schedule of Exhibit A4 sale deed that he has retained some portions of 'C' schedule property. Hence, he contended that when the second defendant has retained a portion of 'C' schedule property, he is entitled to alienate the same under Exhibit A5 in favour of the first defendant. He further contended that Exhibit A4 sale deed has not been properly interpreted by the Courts below. According to the learned counsel for the appellants, there is a reference about 'D' schedule property in Exhibit A4 by reciting that some portion is being retained by the second defendant in the 'C' schedule property. The learned counsel further contended that when the defendants have taken a specific stand that there is no pathway, the Courts below erroneously shifted the burden upon the defendants. The Courts below have relied upon the Advocate Commissioner's report for granting a declaration that the sale deed in favour of the third defendant is null and void. According to the learned counsel for the appellants, even as per the Commissioner's report, 'D' schedule property does not form part of 'C' schedule property. The learned counsel further contended that Exhibit A12 is a xerox copy of an unapproved lay-out plan. Without any seal or approval, the said document ought not to have been relied upon by the Courts below to arrive at a finding that 'C' schedule property is a common pathway. Hence, he prayed for allowing the second appeal.

12.Per contra, the learned counsel for the respondents contended that the rough sketch and the commissioner's plan are tallying with each other. According to the learned counsel for the respondents, the second defendant at the time of alienation of the plots under Exhibits A2 and A4 has shown the 15 feet pathway as a boundary to the plaintiffs. After showing 'C' schedule property as a pathway, the second defendant does not have any right whatsoever to alienate the portion of the said pathway in favour of the third defendant. The retention of some portions of 'C' schedule property as found in the schedule of property of Exhibit A4 is only by way of interpolation so as to create a title for the second defendant in 'D' schedule property. Hence, he contended that even dehors of Exhibit A12 lay-out plan, the decree of the Courts below could be confirmed. Hence, he prayed for dismissal of the second appeal.

13.I have considered the submissions on either side.

14.There is no dispute that the first plaintiff has purchased 'A' schedule property under Exhibit A2 dated 06.11.2002 from the second defendant. The schedule of property under Exhibit A2 will clearly show that the properties have been sold mentioning the plot numbers and not the survey numbers. As per schedule of property



15 feet pathway on the eastern side means the pathway is available on the eastern side from north to south. There is no indication that some portions of the pathway in the northern side is retained by the vendor namely the second defendant. However, while executing Exhibit A4 in favour of the plaintiffs 2 and 3, the second defendant has inserted a recital that he has retained some portions in 'C' schedule property. Once the property is shown as a pathway under Exhibit A2 for the entire north-south direction, the second defendant has lost his title for 15 feet width pathway for the entire north-south extent. Thereafter, the second defendant has no right whatsoever to contend that he has got title over the northern most portion of the pathway. Hence, the boundary recital in Exhibit A4 will not come to the rescue of the second defendant.

15.The second defendant has alienated the 'D' schedule property in favour of the first defendant under Exhibit A5. A perusal of the schedule of property in Exhibit A5 will clearly indicate that the northern most portion of 15 feet pathway is shown as a schedule of property. Hence, it is evident that the second defendant has alienated only a portion of pathway and he did not have other properties in the northern most portion of 'C' schedule property.

16.Once a property is alienated showing the adjacent property as a pathway, thereafter, the vendor will not have any right over the said pathway. The vendor cannot be heard to contend that he has retained the said pathway or a portion of the said pathway so as to alienate the same to some third parties. The pathway becomes an appurtenant to the properties sold. The vendor cannot retain any portion of the appurtenant separately and alienate it to his whims and fancies to the third parties, thereby affecting the right of the parties who have already purchased the property with the appurtenance.

17.In view of the above said discussion, I do not find any illegality or perversity in the judgment and decree of the Courts below. There is no question of law much less a substantial question of law that arises for consideration in the present Second Appeal. The Second Appeal stands dismissed at the admission stage itself. No costs.

Sd/-

Assistant Registrar (CS-II)

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/ /2022

Sub Assistant Registrar(CS)



To

1.The I Additional Subordinate Judge, Nagercoil

2.The I Additional District Munsif, Nagercoil.

3.The Section Officer

V.R.Section

Madurai Bench of Madras High Court

Madurai (2 copies)

+1 CC to M/s.NIRANJAN S KUMAR, Advocate (SR-11641[F] dated 11/03/2022)

+1 CC to M/s.M.P.SENTHIL, Advocate (SR-11889[F] dated 14/03/2022)

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