



S.A.No.1388 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 22.09.2023

Delivered on: 24.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.B.BALAJI

S.A.No.1388 of 2008

&

M.P.No.1 of 2008

Subban

... Appellant

Vs.

1.Muthusamy (died)

2.Palaniammal

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C against the judgment and decree dated 30.06.2008 made in A.S.No.68 of 2004 by the learned Sub-Ordinate Judge, Namakkal confirming the judgment and decree dated 30.06.2004 made in O.S.No.7 of 2003 on the file of Principal District Munsif, Namakkal.

For Appellant : Mr.T.Dhanyakumar

For Respondents : Mr.C.Jagadish for R2



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JUDGMENT

The unsuccessful plaintiff who lost before the Trial Court as well as the First Appellate Court is the appellant herein.

2. The plaintiff sought for a relief of declaration that he was entitled to a pathway and also for a consequential injunction to restrain the defendants from obstructing his usage from the said pathway and also for further reliefs of mandatory injunction to restore the pathway and to declare that a portion in S.No.284/2B belongs to the plaintiff and for delivery of possession of the said encroached portion.

3. The case of the plaintiff was that the plaintiff owned 74 cents in S.No.284/2B, having purchased the same on 06.11.2002 from one, Lakshmi. According to the plaintiff the defendants are mother and son owning lands in S.No.284/1 and 284/2A. According to the plaintiff, there was a pathway about 5' wide to enable the plaintiff to reach the Suit schedule land and that



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the pathway right has been mentioned in the sale deed in favour of the plaintiff as well. It is the case of the plaintiff that the defendants sowed chilli in a portion of the pathway and thereby obliterated the right of the plaintiff. The plaintiff caused a lawyer's notice alleging encroachment. However, as the defendants were not forth coming to comply with the demands made by the plaintiff, the plaintiff laid the Suit on the ground that he is entitled to easement by prescription and consequently sought for the various reliefs which have been already setout herein above.

4. The 1st defendant filed a written statement denying the very existence of the pathway over which the plaintiff sought for easement by prescription. The defendants also denied any encroachment by them into the Suit pathway and sought for dismissal of the Suit.

5. Before the Trial Court, the plaintiff examined himself as P.W.1 and one Mr.Muthusamy as P.W.2 and marked Exs.A1 to A9. On the side of the defendants, the 1st defendant was examined as D.W.1. However, no



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documents were exhibited on their side. The Advocate Commissioner appointed by the Court inspected the property and filed his report. The report and two sketches enclosed along with the report were marked as Court Exs.C1 to C3. The Trial Court, after discussing the oral and documentary evidence adduced by the parties held that the plaintiff failed to prove the existence of the Suit pathway, much less his right over the same. The Trial Court specifically found that the plaintiff did not establish even the measurements of the said pathway and as to where it commenced and ended and held that the plaintiff had failed to discharge the burden of proof not only regarding the existence of the alleged pathway, but also the plaintiff's right over the same. However, the Trial Court placing reliance on the Advocate Commissioner's report and sketch held that the defendants had encroached 1 cent of land belonging to the plaintiff and decreed the suit partly, in so far as relief of declaration of 1 cent comprised in S.No.284/2B and handing over possession of the said encroached 1 cent to the plaintiff.

6. Aggrieved by the findings of the Trial Court, plaintiff filed



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A.S.No.68 of 2004. Cross objection was also filed by the defendants in so far as the suit being partly decreed granting the relief of declaration with regard to 1 cent and consequently directing the defendants to handover vacant possession of 1 cent to the plaintiffs.

7. The First Appellate Court dismissed the Appeal filed by the plaintiff and allowed the Cross Objection filed by the defendants. As against the said findings of the First Appellate Court, the present Second Appeal has been filed challenging the concurrent findings rendered by the Courts below in dismissing the Suit filed by the plaintiff.

8. The Second Appeal has not been admitted and only notice has been ordered. Pursuant to which the respondents have entered appearance.

9. I heard Mr.T.Dhanyakumar, learned counsel for the appellant and Mr.C.Jagadish, learned counsel for the 2nd respondent.



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10. At the outset, I am able to see that in so far as the Cross Objection being allowed, the plaintiff has not chosen to prefer any Appeal and the present Second Appeal is only directed against the concurrent findings in the Suit in O.S.No.7 of 2003 and confirmed in A.S.No.68 of 2004.

11. The appellant has suggested the following substantial questions of law:

a) Whether the plaintiff is entitled to the relief 'C' on the basis of Exs.A2,C1 and C2;

b) Whether the plaintiff is entitled to pathway right along ABC portion on the ground of easement by prescription and also on the ground that ABC pathway was owned by one family and later, on division comes to different parties.

12. On considering the rival submissions advanced by the learned counsel for the parties and on also on going through the records produced before me, I proceed to decide the Second Appeal.



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13. First and foremost, in so far as both the suggested substantial questions of law are concerned, I am unfortunately unable to frame the said two questions as substantial questions of law as they primarily revolve around the factual position in the Suit and cannot be termed as substantial questions of law.

14. In any event the Second Appeal having stood over for consideration right from 2008, I intend to discuss the findings of the Courts below to see whether there is any illegality or perversity in the concurrent findings rendered by the Courts, warranting interference in Second Appeal, under Section 100 of the Code of Civil Procedure, 1908.

15. The ownership of the properties by the plaintiff as well as the defendants are not in dispute. According to the plaintiff, a 5' pathway was existing in the Suit schedule land belonging to him and that his sale deed also mentions about the same. It is seen from the sketch filed by the Advocate Commissioner that the properties belonging to the plaintiff and defendants



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are adjacent to each other and originally forming part of a larger track of land, sold in smaller bits to different persons under whom the plaintiff and defendants claim title.

16. The Commissioner's report as well as sketch also do not in anyway support the case of the plaintiff that there was a pathway of a width of 5' to enable the plaintiff to reach the Suit schedule property. Further, the Courts below have also discussed the oral and documentary evidence and categorically found that there was nothing to show the existence of such a pathway as alleged by the plaintiff. The Courts have also found that the sale deed in favour of the plaintiff also did not speak about any such 5' pathway in S.No.284/1. The Courts have also discussed the parent title deeds viz., Exs. A4, A5 and A6 and found that no specific right of use of pathway was spelt out in any of those documents and that after sub-division of the properties as S.Nos.284/2B and 284/1 there was no documentary evidence to show the existence or provision of any pathway on the northern side. The Courts have also rightly rejected the contentions put forth by the plaintiff with regard to



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the existence of the pathway in between S.Nos. 284/1A and S.No.284/2A, though the same has been shown in the rough sketch filed along with the plaint. The First Appellate Court has also specifically found that the said rough sketch filed along with the plaint has not been proved or explained by the plaintiff and also placing reliance on the Advocate Commissioner's report, the Lower Appellate Court disbelieved the version of the plaintiff. Even in so far as the claim in respect of easement by prescription, the Courts have found that plaintiff has miserably failed to establish the same and that no steps were taken to examine the vendors of all the predecessors in title. In so far as the Cross Objections also, the First Appellate Court held that the actions of the Commissioner measuring S.No.284/2B and the findings of the Trial Court with regard to encroachment of 1 cent could not be sustained and held that merely because there was a deficit in the plaintiff's land it cannot be presumed that the defendants alone have encroached and occupied the same.

17. Thus, I am unable to see any grounds whatsoever, much less substantial questions of law, warranting interference with the concurrent



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findings of the Courts below with regard to declining reliefs prayed for by the plaintiff. As already discussed, the suggested substantial questions of law to be decided U/s.100 of C.P.C, are not substantial questions of law. I am unable to see any other substantial question of law arising from the concurrent findings rendered by the Courts below. The Cross Objection being allowed by the First Appellate Court has also not been challenged by the plaintiff and the Second Appeal has been filed only against the dismissal of the Suit and thus there are no absolutely no grounds to entertain the present Second Appeal.

18. In fine, the Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

24.11.2023.

Internet:Yes
Index:Yes/No
Neutral Citation:Yes/No
Speaking/Non-speaking order
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To

- 1.The Sub-Ordinate Judge,
Namakkal.

2. The Principal District Munsif,
Namakkal.



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P.B.BALAJI, J.,

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Pre-delivery Judgment in
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