



S.A.No.485 of 2007
and M.P.Nos.1 & 2 of 2007

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.03.2023

CORAM

THE HONOURABLE MRS. JUSTICE **R.HEMALATHA**

S.A.No.485 of 2007

and

M.P.Nos.1 & 2 of 2007

1.B.Jayakumar

2.Jayashree

...Appellants

Vs.

Karnan

... Respondent

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 25.01.2007 passed in A.S. No.54 of 2006, on the file of the Sub Court, Nilgiris, upholding the decree and judgment dated 28.04.2006 passed in O.S. No.431 of 2004, on the file of the District Munsif Court, Uthagamandalam.

For Appellants : Mr.R.Krishna Prasad
for M/s.Sarvabhauman Associates

For Respondent : No appearance



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JUDGMENT

The defendants in O.S. No.431 of 2004, on the file of the District Munsif Court, Uthagamandalam are the appellants in the present appeal. The suit was filed by the respondent/plaintiff for a bare injunction restraining the present appellants/defendants from interfering with their peaceful possession and enjoyment of the suit property which is morefully described in the plaint schedule as a land in Old S.No.3816/2A and sub divided as R.S.No.3816/7 of Nilgiris District measuring 0.03 acres of land together with a common right of way shown in the plaint plan.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present appeal would also be indicated.

3.The case of the respondent/plaintiff is that he purchased the suit property through a registered sale deed dated 24.04.1991 (Ex.A1)



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from one Rajammal and eight others along with the right over the common passage. According to him, he was in possession and enjoyment of the suit property along with the right of way through the common passage and the neighbouring owners were also using the said common passage. It is the contention of the plaintiff that the defendants/appellants, who had no exclusive right over the common passage, are interfering with plaintiff's peaceful enjoyment over the same and hence, he filed the suit.

4.The suit was resisted by the defendants on the following grounds :

- i. The defendants' property is about 12 to 15 feet above the plaintiff's property and the plaintiff, by putting up a stair case commencing from his property and ending with the property of the defendants, is claiming right over the alleged passage which exclusively belongs to the defendants.
- ii. The plaintiff can approach his property through a different passage and he is attempting to make a shortcut from his terrace.



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- iii. The illegal attempt made by the plaintiff has been exposed during the inspection of the Advocate Commissioner appointed by the trial Court.
- iv. The plaintiff also suppressed the existence of the other pathway to his property and therefore, the plaintiff cannot claim any right of way through a passage which exclusively belongs to the defendants.
- v. Therefore, they prayed for dismissal of the suit.

5. On the basis of the above pleadings, the trial Court framed the following issues :

- i. "Whether the suit as framed is maintainable?
- ii. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?
- iii. To what relief the plaintiff is entitled ?"

6. In the trial Court, the plaintiff examined himself and marked Ex.A1 to Ex.A6. The first defendant examined himself and marked



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Ex.B1 to Ex.B9. An Advocate Commissioner was appointed by the trial Court and his report and plan were marked as Ex.C1 & Ex.C2, respectively.

7. The learned trial Judge after analysing the oral and documentary evidence adduced on both sides decreed the suit filed by the plaintiff vide his decree and judgment dated 28.04.2006 on the following grounds:

- i. The sale deed Ex.A1 executed in favour of the plaintiff clearly shows the right of the plaintiff over the common passage.
- ii. The plaintiff has also adduced sufficient documentary evidence to show that he has been using the common passage for several years.
- iii. The Advocate Commissioner in his report & plan (Ex.C1 and Ex.C2) had shown the existence of common pathway.
- iv. The case of the plaintiff is not for an easementary right based on necessity but for easementary of right by way of grant vide his sale deed Ex.A1.
- v. The first defendant also during the course of cross examination



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admitted the existence of the common passage and he has not established that the said pathway exclusively belonged to him.

- vi. Though the defendants had contended that the plaintiff's property is situate 12-15 feet below the property of the defendants, the commissioner's report Ex.C2 states that the difference in the elevation is around 6 feet. Therefore, merely because the property of the defendants is lying in a lower level and the plaintiff is trying to put up a stair case the defendants cannot prevent the plaintiff from using the pathway.

8. Aggrieved over the same, the defendants filed an appeal in A.S.No.54 of 2006 before the Sub Court, Nilgiris. The learned Subordinate Judge, Nilgiris, after analysing the oral and documentary evidence adduced on both sides upheld the decree and judgment passed by the trial court, vide his decree and judgment dated 25.01.2007.

9. Now the present Second Appeal is filed by the defendants. Notice of motion was ordered to the respondent and after several



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adjournments, the case was posted for hearing today. In the Memorandum of grounds, the appellant has raised the following substantial questions of law.

- i. Whether in the absence of any proof of possession and enjoyment, the Courts below were right in law in decreeing the suit for injunction?
- ii. Whether considering the topography of the land (terraced land) the Courts below were correct in law in declaring the respondent's right to the passage that too in a suit for injunction?
- iii. Whether the Courts below are correct in law in decreeing the suit for a mandatory injunction without there being a prayer for the same?

10. Heard Mr.R.Krishna Prasad for M/s.Sarvabhauman Associates learned counsel for the appellant. As already observed, there is no appearance on behalf of the respondent.



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11. Mr.R.Krishna Prasad, learned counsel for the appellants contended that when the defendants have denied the right of the plaintiff over the suit passage, he should have suitably amended the plaint seeking for a declaratory relief and since this has not been done the suit filed by the plaintiff for bare injunction is not maintainable. He would further contend that even as per the Advocate Commissioner's report, the plaintiff's property is 12-15 feet below the property of the defendants and the plaintiff is attempting to encroach upon the property of the defendants by putting up a stair case from his terrace. He would further contend that both the Courts below had committed an error in decreeing the suit filed by the plaintiff as the existence of the common passage has not even been indicated in the plaint schedule and on that ground itself the suit is liable to be dismissed.

12. At the outset it may be observed that this is a concurrent finding rendered by both the Courts below based on the evidence adduced on both sides. The plaintiff has filed the suit for a bare injunction restraining the defendant from interfering with his peaceful possession and enjoyment over the common passage. According to him,



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he purchased 0.03 acres of land in R.S.No.3816/2 through a registered sale deed Ex.A1 dated 24.04.1991. According to him, in the sale deed itself the right of passage has been indicated. Thus, it is clear the plaintiff is claiming right over the passage by way of grant.

13. A perusal of the sale deed Ex.A1 shows that one Rajammal and eight others had sold the suit property in favour of the plaintiff and the recitals of the said documents has been extracted by the trial Court in Para 13 of its judgment and the same is extracted hereunder :

"13. On the basis of the evidence, if we peruse the material documents produced by the plaintiff, Ex.A1 which was a sale deed executed by one Rajammal and 8 others in favour of the plaintiff for the suit property S.No.3816/2 wherein it has been mentioned as follows :

SCHEDULE OF PROPERTY

Registration District : The Nilgiris

Registration Sub District : Uthagamandalam

Locality : Kandai

The property is situated within the Uthagamandalam Municipal Limits.

R.S.No. (before Sub-Division) 3816

R.S.No (after Sub Division) 3816/2



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Total Extent 1.10 Acres

Extent conveyed : 0.03 acres of land which is delineated in RED colour with common right of way coloured as yellow in the plan appended hereto.

Boundaries

North : Land belonging to Selvakumar,

South : Common right of way

East : Land belonging to Selvakumar,

West : Land belonging to Selvakumar,

14. A careful observation of Ex.A1 wherein it has been clearly mentioned that a common right of way was conveyed to the plaintiff in the suit property. The only point for consideration in this appeal was whether the plaintiff was having the right over the suit property as a common pathway or not. On the basis of which if we peruse the evidence of D.W.1 at the time of cross examination who would say as follows. (Relevant Portion)".

The Advocate Commissioner in his report and plan (Ex.C1 & Ex.C2) had shown the existence of pathway. Moreover, the first defendant had also during the course of cross examination admitted the existence of 10 feet common pathway between his house and the plaintiff's house.



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14. The contention of the appellant's counsel is that since the plaintiff's property is 15 feet lower than the defendant's property there is a gap between the plaintiff's and defendants' property and therefore, the said gap cannot be construed as a common pathway. The Advocate Commissioner, in fact, had examined these aspects and observed in his report that there is an elevation of 6 feet between the property of the plaintiff and the defendants. However, he has shown a common pathway between the property of the plaintiff and the defendants. In the circumstances, both the Courts below had observed that the plaintiff has got right of way through the common passage. The contention of the counsel for the appellant that when the right of the plaintiff over the common passage is questioned by the defendants, the plaintiff should have amended the plaint seeking for the relief of declaration of his right over the common passage cannot be accepted for the simple reason that such a right was granted by way of sale deed Ex.A1 in favour of the plaintiff. As already observed, the defendants had admitted the existence of common passage. In such circumstances, this Court finds no reason to interfere with the observation made by both the Courts below, *moreso*,



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while exercising the power under Section 100 of the Code of Civil Procedure. The questions of law shown in the memorandum of grounds are only questions of fact.

15. In the result,

i. the Second Appeal is dismissed. No costs.

Consequently, connected Miscellaneous Petitions are closed.

ii. the decree and judgment dated 25.01.2007 passed in A.S. No.54 of 2006, on the file of the Sub Court, Nilgiris and the decree and judgment dated 28.04.2006 passed in O.S. No.431 of 2004, on the file of the District Munsif Court, Uthagamandalam, are upheld.

03.03.2023

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
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R. HEMALATHA, J.
mtl

To

1. The Sub Court, Nilgiris.
2. The District Munsif Court, Uthagamandalam.
3. The Section Officer, VR Section, High Court, Madras.

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