



SA.No.719 of 2006

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.11.2023

CORAM

THE HON'BLE Mr.JUSTICE **C.KUMARAPPAN**

S.A.No.719 of 2006
M.P.No 5117 of 2023

Rangasamy Gounder

... Appellants

- Vs -

Murugan

... Respondent

Second Appeal is filed under Section 100 of the Civil Procedure Code against the Judgment and decree of the Court of the Subordinate Judge, Namakkal in A.S.No.17 of 2002 dated 30.08.2005 confirming the Judgment and decree in the Court of the District Munsif cum Judicial Magistrate Paramathi (Namakkal) in O.S.No.91 of 2000, dated 10.12.2001.

For Appellant : M/s.C.Jagadish
For Respondent : Mr. C.A.Ramanan for Mr. N. Manoharan



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JUDGMENT

The appellants herein are the plaintiff before the Court below and the respondent is the defendant.

2. For the sake of convenience, the parties are referred to herein according to their litigative status as mentioned before the trial Court.

3. Brief facts which give rise to this second appeal is as follows:-

The plaintiff has filed a suit for declaration in respect of a passage existing in the defendant's land in S.F.No. 167/2 to reach the plaintiff's land in S.F.No.167/4. The plaintiff claims his right by way of easement by prescription. The said contention was objected by the defendant and they have stated that there was no passage as stated by the plaintiff, and the alleged passage used to exist only during the period when there was no agricultural operation.

4. Before the Trial Court on behalf of the plaintiff two documents were



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marked as Ex.A1 and A2 and five witness were examined P.W.1 to P.W.5.

On behalf of the defendants three documents were marked as Ex.B1 to B3 and four witness were marked D.W.1 to D.W.4.

5. Ultimately the trial Court disbelieved the case of the plaintiff and dismissed the suit. Against which the plaintiff preferred a first appeal, even the first appellate Court has not agreed with the plaintiff and ultimately dismissed the appeal. Aggrieved with the same, the plaintiff is before this Court in the second appeal.

6. While admitting this second appeal this Court has framed following substantial questions of law:

(i) Whether the Courts below acted illegally in relying upon Exs.C3 and C4 the report and plan of the second commissioner without scrapping the report and plan Exs.C1 and C2 of the first commissioner?

(ii) Whether the finding of the Courts below based upon the Report of the 2nd Commissioner alone regarding the existence of the suit Cart-track is sustainable in law?

(iii) Whether the rejection of the evidence regarding the existence and use of the suit Cart-track by Pws 2 to 5 is



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arbitrary and not based upon any justifiable reason?"

7. The learned counsel for the plaintiff/appellant would vehemently submits that the very procedure adopted by the Court below in relying upon the second commissioner's report, while the first commissioner's report subsists is contrary to the law and further submits that even according to the admissions made by the defendant, there is abundant evidence in respect of the plaintiff's right of easement by prescription. Therefore, would contend that the second appeal is liable to be allowed.

8. In support of the plaintiff's/appellant's case the learned counsel has relied upon the Judgments rendered by this Court in ***S.A. No.1138 of 2006*** on 13.07.2018 and in ***C.R.P.No.3934 of 1984*** on 26.10.1984 in the case of ***Ganesan and others vs Vijayalakshmi and K. Viswanathan Vs. P. Shanmughan and another*** respectively.

9. However, the learned counsel for the defendant/respondent strongly object the contentions made by the learned counsel for the Appellant/plaintiff and would submit that there are no documentary evidence available as to the



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right of easement by prescription and would submit that the submissions made by the learned counsel for the Appellant/plaintiff that there is an admission made by the defendant in respect of the plaintiff's right is disputed.

10. Now the point for consideration is whether the procedure adopted by the Trial Court as well as the First Appellate Court, in respect of relying upon the second commissioner's report is in accordance with law or not to be decided.

11. In this regard the learned counsel for the plaintiff/appellant has relied upon the Judgment rendered in the case of ***K. Viswanathan Vs. P. Shanmughan and another in C.R.P.No.3934 of 1984***. Through which the learned counsel emphasised before this Court that whenever a commissioner was appointed and when his report is available in the record, Subsequently if any commissioner is appointed for the second time then it is contrary to law. No doubt this Court absolutely has no quarrel with the propositions enunciated in the above Judgment. However, the facts of the instant case is some what different from the above precedent.



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12. In the instant case, the earlier commissioner was appointed and he has filed the commissioner's report. But, after filing of the commissioner's report the defendant appears to have filed an objection to the commissioner's report. Wherein he has objected on the ground of bias and other aspects. During such time, the defendant appears to have moved an another application for appointment of Advocate Commissioner in I.A.No. 366 of 2000, wherein the Appellant/Plaintiff has endorsed no objection for appointment of a second advocate commissioner.

13. Therefore, when the plaintiff himself has endorsed no objection for the appointment of a second advocate commissioner, even while the earlier commissioner's report is in record, this Court could not find any infirmity in relying upon the second commissioner's report. Apart from that, when the Appellant/Plaintiff himself agree for the appointment of second commissioner and a report filed before the Court, we have to only assume that the earlier commissioner's report by conduct of the parties would allow to be automatically eclipsed in view of the no objections endorsed for second commissioner. Therefore, the finding of fact recorded by both Court



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below based on the second commissioner's report, could not be found faulted with.

14. Further the learned counsel for the Appellant/Plaintiff would submit that there is an admission by the defendant in respect of the existence of the right of the plaintiff towards right of easementary by prescription. But both the Court below has recorded the finding of fact that there are no material so as to hold the existence of right of easementary by prescription. This Court also could not find any alleged admission made by the defendant witnesses. Therefore, the substantial question of law are answered in favour of the Respondent and this second appeal is liable to be dismissed.

15. In the result, this second appeal is dismissed. No order as to costs. Consequently, the connected miscellaneous petition is closed.

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To

1. The Subordinate Judge, Namakkal
2. The District Munsif cum Judicial Magistrate Paramathi (Namakkal)

C.KUMARAPPAN, J

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