



S.A.No.646 of 2010

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.03.2023

CORAM

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

S.A.No.646 of 2010 &

M.P. No.1 of 2010

1. Nagammal

2. Gopal

3. Madhaiyan

4. Vijaya

5. Malarvizhi

...Appellants

Vs.

Easwari

... Respondent

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 20.11.2009 passed in A.S. No.85 of 2008, on the file of the Subordinate Judge, Dharmapuri, upholding the decree and judgment dated 22.01.2007 passed in O.S. No.156 of 2005, on the file of the District Munsif Court, Dharmapuri.

For Appellant : Mr. D. Baskar

For Respondent : No appearance



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JUDGMENT

The appellants are the defendants in O.S. No.156/2005 on the file of the District Munsif Court, Dharmapuri. The respondent/plaintiff filed the said suit for declaration of her right over the suit pathway and also for a permanent injunction restraining the appellants/defendants from interfering with her peaceful possession and enjoyment of the same and for costs.

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 plaintiff and the defendants is as follows:

3.1. The plaintiff and her predecessor in title were using the 4 feet wide and 70 feet long suit pathway for more than 20 years. According to the plaintiff there is no other pathway for her to reach her land and that the defendants are attempting to interfere with her



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possession and enjoyment of her right over the common pathway. Hence she filed the suit seeking for the relief as stated above.

3.2. The defendants in the written statement have denied the right of the plaintiff over the suit pathway. According to them, the plaintiff never used the pathway as alleged by her and that there is no cause of action for filing the suit.

4. On the basis of the above pleadings, the trial court framed the following issues:

- i. "Whether the plaintiff is entitled for declaration of suit common pathway as alleged in the plaint?
- ii. Whether it is correct that the plaintiff is entitled to claim the right of pathway by easement of necessity?
- iii. Whether the plaintiff is entitled for injunction against the defendants?
- iv. To what relief?"



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5. In the trial court, the plaintiff examined herself and two other witnesses and marked Ex.A1 to Ex.A10. The 2nd defendant examined himself and one another witness and marked Ex.B1.

6. After full contest, the trial court judge decreed the suit in favour of the plaintiff vide her decree and judgment dated 22.01.2007 on the ground that the evidence adduced on both sides shows that the predecessor in title of the plaintiff and the defendants were enjoying the common pathway and that the plaintiff after purchasing the property was using the said pathway to reach her property. The trial court judge further held that the defendants had not established that there is an alternate pathway for the plaintiff.

7. Aggrieved over the decree and judgment passed by the trial court, the defendant filed an appeal in A.S. No.85 of 2008, before the Sub Court, Dharmapuri. The learned Subordinate Judge, after analysing the oral and documentary evidence adduced on both sides, upheld the findings of the trial court and dismissed the appeal vide his decree and



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judgment dated 20.11.2009.

8. Now the Second Appeal is filed by the defendants against the concurrent findings of both the courts below. Notice of motion was issued to the respondent and after several adjournments, the case was posted for hearing today. In the Memorandum of Second Appeal, the appellants have raised the following substantial questions of law.

- a) "Whether the courts below was right in granting declaration of right of easement of way by necessity when the existence alleged right of way came only about 15 years before the filing of suit?
- b) Whether the courts below were right in taking into consideration of Ex.A8, which is Advocate Commissioner's report and plan filed in another suit in O.S. No.165 of 1996 without examining the Advocate Commissioner?
- c) Whether the courts below were right in relying upon Exs.A9 and A10, which is plaint and rough plan in O.S. No.48 of 1993 for deciding the right of way in the present suit?
- d) Is not the courts below committed illegality in decreeing the suit,



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when the plaintiff failed to establish the existence of right of way for the past 20 years and 2 years prior to the suit?

e) Whether the courts below are right in decreeing the suit of the plaintiff in violation of Section 15 of the Easements Act, 1882?"

9. Heard Mr. D. Baskar, learned counsel for the appellants. Even though notice was served to the respondent and her name is printed in the causelist, there is no representation on behalf of the respondent.

10. Mr. D. Baskar, learned counsel for the appellants contended that the plaintiff had never used the pathway as alleged by her and that both the courts below had wrongly decreed the suit in her favour. According to him, the said pathway exclusively belongs to the defendants and that the plaintiff cannot claim any right over the said pathway.

11. The plaintiff along with the plaint filed a plan in which the suit pathway is shown as 'ABCD'. The plaintiff, in order to establish that she has got easementary right over the suit pathway, had relied on the



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sale deed Ex.A1 dated 15.07.1991 executed by her vendors, namely, (1) Perumal and (2) Gowri (P.W.2). In the said sale deed, the southern boundary of the property was described as common pathway. One of the vendors of the plaintiff, namely Gowri (P.W.2), had deposed that she sold the property to the plaintiff along with the right over the pathway and that she, infact, was using the suit pathway to reach her land. P.W.2 is one of the sisters of the defendants and in a partition between the family members, the vendors of the plaintiff, namely, Perumal and Gowri (P.W.2), were allotted the northern portion, which was subsequently sold by them in favour of the plaintiff. It was deposed by P.W.2 that the common pathway is shown in the sale deed Ex.A1. She also admitted the existence of common pathway and the sale of her land to the plaintiff along with the right over the said pathway. The 2nd defendant who examined himself as D.W.1 admitted that there was a partition in his family, in which the property of the plaintiff was allotted to the share of his sister Gowri (P.W.2). Since the appellants/defendants had denied the very existence of the pathway, the plaintiff filed the commissioner's report and plan filed in the earlier suit in O.S. NO.165/96 on the file of

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the District Munsif, Dharmapuri, filed by one Madeshwari against the defendants/appellants and their sisters. In the said Advocate Commissioner's report, the existence of common pathway was shown. The learned counsel for the appellants contended that the Advocate Commissioner's Report filed in some other case cannot be relied upon by the plaintiff in the instant case and both the courts below had mainly based their findings on the Commissioner's report and plan. His further contention is that an easement of prescription is capable of being acquired only if the user during the statutory period has been using with the animus of enjoyment of the easement as such in the land of another and not if the user has been in the consciousness of one's own ownership over the same. According to him, the sale deed Ex.A1 cannot be a conclusive proof to show that the plaintiff has easementary right over the suit pathway. He also relied on the decision in ***Murugesha Moopanar vs. Sivagnana Mudaliar*** reported in ***1997(1) CTC 348*** and contended that in the instant case the plaintiff has not proved that there was no other pathway to reach her land and that she and her predecessor in title were using the suit pathway as alleged by her.



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12. It is pertinent to point out that the property of the plaintiff was sold by one of the sisters of the defendants and the suit pathway was used by all the sharers even after partition. The vendor of the plaintiff, was allotted the northern portion about 18 years prior to the date of sale in favour of the plaintiff. The southern boundary in the sale deed (Ex.A1) is shown as "common pathway". Moreover, the appellants/defendants have not also shown any other pathway other than the one specified in the plaint to reach the land of the plaintiff and further admitted that they were all using the said pathway before and after partition. It is also pertinent to point out that the courts below had rendered a concurrent finding based on the proper appreciation of evidence adduced on both sides and by no stretch of imagination, the findings rendered by both the courts below can be termed as perverse.

13. It is also pertinent to mention that this is a second appeal under Section 100 of the Code of Civil Procedure where the jurisdiction of the High Court is confined to a substantial question of law. A full Bench of the Supreme Court in *Bholaram Vs. Ameerchand* reported in



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AIR 1981 SC 1209 has held that the High Court cannot interfere with the concurrent factual findings of courts below in a second appeal. Moreover, there is no substantial question of law involved in the present Second Appeal.

14. In the result,

- i. The Second Appeal is dismissed. No costs. Consequently connected miscellaneous petition is dismissed.
- ii. the decree and judgment dated 20.11.2009 passed in A.S. No.85 of 2008, on the file of the Subordinate Judge, Dharmapuri, and the decree and judgment dated 22.01.2007 passed in O.S. No.156 of 2005, on the file of the District Munsif Court, Dharmapuri, are upheld.

15.03.2023

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
bga



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- To
1. The Subordinate Judge, Dharmapuri,
 2. The District Munsif, Dharmapuri,
 3. The Section Officer, VR Section, High Court, Madras.



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