



S.A(MD)No.618 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 20.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)No.618 of 2016
and
C.M.P(MD)No.9204 of 2016

Thankaian

... Appellant/Appellant
/Defendant

Vs.

Francis

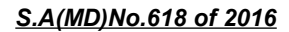
... Respondent/Respondent
/Plaintiff

PRAYER :-

This Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S.No.8 of 2013, dated 23.07.2014 on the file of the Sub-Court, Kuzhithurai, confirming the judgment and decree passed in O.S.No.527 of 2009, dated 18.10.2012 on the file of the Principal District Munsif Court, Kuzhithurai.

For Appellant : Mr.H.Arumugam

For Respondent : Mr.D.Anbarasu



The unsuccessful defendant in the suit is the appellant. The respondent herein filed a suit for declaration of his easementary right over the suit 'C' schedule property, for permanent injunction and also for mandatory injunction to remove the constructions in 'C' schedule property. The suit was decreed by the trial Court and the appeal filed by the appellant was dismissed by the First Appellate Court. Aggrieved by the same, this Second Appeal is filed.

2. According to the respondent/plaintiff, he is the owner of suit 'A' schedule property and he put up a building thereon and the 'B' schedule property lies in the south of 'A' schedule property. On further south of 'B' schedule property, there is a public road namely, Thaiyalumoodu – Alankulam Road. It is the specific case of the respondent that on the eastern side of 'B' schedule property, there is a north-south pathway from the road to 'A' schedule property. The width of the pathway is 5 links. According to the respondent, he and his predecessors have been using the suit pathway for more than 80 years and hence, he sought for easementary right by prescription. It is also pleaded by the respondent that the appellant tried to close the said pathway and hence, he was constrained to file a suit. The



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respondent originally filed a suit for declaration of easementary right over 'C' schedule pathway and for consequential permanent injunction restraining the appellant from interfering with his right of user. Subsequently, he amended the plaint and sought for mandatory injunction directing the appellant to remove the constructions put up by him pending suit.

3.The appellant herein filed written statement, wherein, he admitted that the respondent was the owner of suit 'A' schedule property. However, he denied the very existence of 'C' schedule pathway. It was further the case of the appellant that on the west of 'C' schedule property, there is a pathway having a width of 5 links leading towards north and reach the plaint A-schedule property and the said pathway had been used by the respondent to get an access to their property. Therefore, by claiming that the existence of 'C' schedule property is only a fiction, the appellant sought for dismissal of the suit.

4.Before the trial Court, the respondent was examined as PW1 and yet another witness was examined as PW2. The respondent has filed nine documents and the same were marked as Ex.A1 to Ex.A9. On behalf of



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appellant, he was examined as DW1 and no other documentary evidence was let in by the appellant. The trial Court at the instance of respondent/plaintiff appointed an Advocate Commissioner, he filed a Report and Plan, dated 09.02.2010 and the same were marked as Ex.C1 and Ex.C2. Thereafter, at the instance of respondent, the Advocate Commissioner re-visited the property and filed his second report and plan, dated 08.02.2023 and the same were also marked as Ex.C3 and Ex.C4.

5.The trial Court on appreciation of oral and documentary evidence available on record came to the conclusion that the respondent was entitled to declaration of easementary right over the 'C' schedule pathway and also for permanent injunction and mandatory injunction prayed for. Aggrieved by the same, the appellant filed the First Appeal in A.S.No.8 of 2013 on the file of Sub Court, Kuzhithurai. The First Appellate Court confirmed the findings of the trial Court and aggrieved by the same, the appellant is before this Court.

6.The learned counsel for the appellant assailing the finding of the Court below submitted that the respondent having pleaded easementary right by prescription failed to prove the long user and hence both the Courts below



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ought not to have granted declaration and other reliefs as prayed for. The learned counsel also tried to impress upon this Court by submitting that the Advocate Commissioner appointed by the Courts below found that the existence of a gap on immediate west of suit 'C' schedule property and hence, when an alternative pathway is available to the respondent, he was not entitled to claim easementary right over 'C' schedule property especially when there was no evidence to support the long user of 'C' schedule property to claim prescriptive easementary right.

7.The respondent in his pleadings categorically stated that he and his predecessor in title had been using the 'C' schedule property as only access leading to 'A' schedule property from the road. In order to prove the plea, the respondent examined himself as PW1 and he deposed in support of the averments contented in the plaint. One another independent witness was examined by respondent as PW2 and he deposed in his evidence that the suit 'C' schedule property had been used by the respondent and his predecessor in title right from the days of his childhood. He also deposed that apart from suit 'C' schedule pathway, there was no other access to respondent's property from road. The Advocate Commissioner appointed by the trial Court also found



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that the suit 'C' schedule property was the only access available on ground for reaching the suit 'A' schedule property. He also found that there is a gap on the western side of suit 'B' schedule property and the width of the same is two links. Therefore, a gap with a width of two links cannot be used as a pathway and the physical features noted by the Advocate Commissioner support the case of the respondent that the suit 'C' schedule property with the width of 5 links is the only access leads to 'A' schedule property from the road on the south of 'B' schedule property. The Advocate Commissioner's Reports and Plan coupled with the evidence of independent witness PW2 proved that the suit 'C' schedule property has been used by the respondent as only access to the suit 'A' schedule property for sufficiently long time so as to claim easementary right by prescription. The First Appellate Court, being the last Court of facts, on appreciation of oral evidence of PW1, PW2 and Advocate Commissioner's Report, came to the conclusion that respondent proved his easementary right over the suit 'C' schedule property and this Court finds no reason to interfere with the factual finding recorded by the Courts below.

8. Apart from declaration of easementary right, permanent injunction in respect of suit 'C' schedule property, the respondent also prayed for mandatory



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injunction to remove the offending constructions put up by the appellant in the suit 'C' schedule property, which makes hindrance to his right to access the pathway. It was the case of the respondent that the offending construction were put up by the appellant subsequent to the filing of the suit. The same was fortified by the second Advocate Commissioner's Report and Plan, namely Ex.C3 and Ex.C4. When the Advocate Commissioner visited the suit property for the first time he did not note any offending constructions in the 'C' schedule property. But When he visited the suit property for the second time on 08.02.2021, he noted a compound wall put up by the appellant closing the suit 'C' schedule property. Therefore, it is clear that the offending constructions were put up by the appellant only subsequent to the filing of the suit and hence, it requires to be removed. The Court below rightly came to the conclusion that the respondent is entitled to mandatory injunction as prayed for.

9. In view of the above discussions made earlier,

a) I do not find any substantial question of law in the Second Appeal and consequently the Second Appeal stands dismissed and the judgment and decree passed by the learned Sub Court, Kuzhithurai, dated 23.07.2014 in



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A.S.No.8 of 2013 stands confirmed;

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- b) in the facts and circumstances of the case, there would be no order as to costs; and
- c) consequently, connected Miscellaneous Petition is closed.

20.02.2023

NCC : Yes/No
Index : Yes / No
vsd

To

- 1.The Sub-Court,
Kuzhithurai.
- 2.The Principal District Munsif Court,
Kuzhithurai.
- 3.The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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