



SA.No.1065 of 2009

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.04.2024

CORAM

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

S.A.No.1065 of 2009

Ramasamy Kounder

... Appellant

- Vs -

1. Allimuthu
2. Kannan
3. Malliyammal

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree in A.S.No.12 of 2007 dated 26.09.2008 on the file of the Principal Subordinate Judge, Villupuram confirming the judgment and Decree in O.S.No.386 of 2004 dated 27.07.2005 on the file of the 1st Additional District Munsif, Tirukoilur.

For Appellant : Mr.N.Suresh

For Respondents : Ms.Mahamandra Rajalakshmi for R1
Mr.T.S.Baskaran for R2 and R3



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J U D G M E N T

The appellant herein was the plaintiff before the Trial Court. The respondents herein are the defendants before the Trial Court.

2. For the sake of convenience, the parties will be referred to according to their litigative status before the Trial Court.

3. The brief facts which give rise to the instant Second Appeal is that, according to the plaintiff, “A” schedule property was the ancestral property of the plaintiff through his grandfather Gopal Gounder, and he has put up a thatched hut about 5 years back from the date of filing of the suit. The “B” schedule property was a passage to reach “A” schedule property, and that he has been using the said passage for a period of more than 25 years. Therefore, according to the plaintiff, he has easementary right by prescription over the “B” schedule property. Whereas the defendants put up a construction in the “B” schedule property. Hence, the plaintiff has come forward with a suit for declaration to declare his easementary right over the “B” schedule property and to remove the encroachment made thereon.

4. The said suit was resisted by the defendants by contending that “B” schedule property is a property belongs to the defendants, and that the plaintiff cannot have any easementary right over the same. It was also



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contended by the defendants that the description of the property is defective.

Hence, prayed to dismiss the suit.

5. The defendants 2 and 3 have also filed a separate written statement, whereas they also reiterated the stand taken by the first defendant. Thus, the ultimate contentions of the defendants are that the plaintiff has got no right over the “B” schedule property.

6. Before the Trial Court, the plaintiff was examined himself and two other witnesses examined as PW1 to PW3, and marked two documents as Exs.A1 and A2. On behalf of the defendants, 2 witnesses were examined as DW1 and DW2 and marked 5 documents as Exs.B1 to B5. As a third party document, 2 documents were marked as Exs.X1 and X2, and as a Court document, Commissioners report and plan were marked as Exs.C1 and C2.

7. The Trial Court, after having considered the oral and documentary evidence, has found that the plaintiff has not proved the easementary right over the “B” schedule property, and ultimately dismissed the suit. Aggrieved with the same, when the plaintiff has preferred the First Appeal, the First Appellate Court concurred with the finding of the Trial Court and ultimately, dismissed the First Appeal concurring with a view taken by the Trial Court. Not satisfying with the finding of the First Appellate Court, the plaintiff has



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approached this Court by way of this Second Appeal.

8. The learned counsel for the appellant would vehemently contend that, according to the Commissioner's report, Exs.C1 and C2, there are no other way to reach the A schedule property, which factum was not at all considered by the Trial Court. It is also contended by the learned counsel for the appellant that, through Ex.B2, the predecessor in title of the plaintiff have retained an extent of '60 X 3' feet as a passage, and this passage is nothing but “B” schedule property. Whereas the Trial Court has totally ignored Ex.B2. Apart from that, the learned counsel for the appellant very much relied upon the evidence of DW2, wherein he has admitted the existence of 3 feet passage. This factum was also not relied by the Trial Court. Therefore, contended that the findings rendered by the Trial Court is perverse, which is liable to be interfered by this Court in the Second Appeal.

9. However, the said contention was resisted by the learned counsel for the respondents by contending that DW2 in his evidence though admits about the existence of 3 feet passage, emphasised that the said passage is available only among themselves and has never been stated as if belongs to the plaintiff. It was also contended by the learned counsel for the defendants that they have been in possession and enjoyment of “A” schedule property and



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their title has been confirmed by virtue of a patta, that too which has been granted 5 years prior to filing of the suit. Therefore, contended that the case of the plaintiff that they are in enjoyment of “B” schedule property for more than 25 years cannot be believed. It was also contended by the learned counsel for the respondents that there is also an another alternative passage to reach “B” schedule property and that by using such passage, he put up construction in the A schedule property. Therefore, the contention put forth by the plaintiff that there is no other way to reach A schedule property is contrary to factual position. Hence, prayed to dismiss the Second Appeal.

10. I have given my anxious consideration to either side submissions.

11. While perusing the findings of the Trial Court, the Trial Court has elaborately considered various aspects, wherein the Trial Court relied upon Exs.B1, B2, B3 and B4, which is of the year 1966, 1972, 1993 and 1996. Wherein the Trial Court has found that there is no reference about the existence of the passage. It was the contention of the learned counsel for the respondents that through these documents, the entire property was purchased by the defendants, and that the defendants' predecessor in title has left only 3 feet passage for their exclusive use.

12. On perusal of the evidence of DW2, as extracted in paragraph 16 of



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the Judgment, it is amply clear that the 3 feet passage, which has been harping upon by the learned counsel for the appellant was left only for the defenant's usage. Apart from that while perusing the plaint averment, it is the contention of the plaintiff that they have been enjoying the B schedule property for more than 25 years, but the Trial Court has found that A schedule property was allotted to the plaintiff only by virtue of patta. In this regard, the learned counsel for the appellant would submit that the suit property comes under the classification of Natham and that they have been in possession and enjoyment of the said property for more than 25 years. To substantiate such contention, no document has been filed except Ex.A2 dated 24.03.2001.

13. It is pertinent to mention here that in order to prescribe easementary right, there must have been more than 20 years continuous usage. If we read Ex.A2, it is of the year 2001. But the suit has been filed during 2005 (within a period of 5 years). The learned counsel for the appellant would submit that even if they have no right as pleaded in the plaint, under easement by necessity, they must be granted a relief. While looking at the plaint pleadings, there is no reference that there are no other way to reach the suit property and that this is the only way to reach the suit



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property. Therefore, even otherwise there is no foundation to sustain their claim for easement by necessity. Therefore, this Court is of the firm view that though the learned counsel for the appellant has put forth certain contention to formulate a probable, alternative view, that cannot be a reason to interfere with the well considered finding of the Court below unless there is a perversity in the judgment. While perusing the judgment of the Court below, this Court could not find any perversity and also could not find any substantial question of law.

14. In the result, this second appeal is dismissed. There shall be no order as to costs.

08.04.2024

kmi

Index : yes/no

Speaking/Non Speaking Order

Neutral Citation Case: Yes/No

To

1. The Principal Subordinate Judge,
Villupuram.
2. The 1st Additional District Munsif,
Tirukoilur.

C.KUMARAPPAN, J

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