



S.A.No.1384 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.02.2024

CORAM

THE HONOURABLE Mr. JUSTICE G.ARUL MURUGAN

S.A.No.1384 of 2010

and

M.P.No.1 of 2010

Natarajan

... Appellant

VS.

1.Vaiyapuri

2.Palanimuthu

3.Palaniappan

4.Krishnammal

...Respondents

Prayer:- Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 28.07.2010 passed in A.S.No.98 of 2005 on the file of II Additional Sub-ordinate Judge, Villupuram, confirming the judgment and decree dated 25.02.2005 passed in OS.No.293 of 2002 on the file of II Additional District Munsif, Ulundurpet.

For Appellant : Mr.C.Prakaran

For R1 : No Appearance

For R2 to R4 : Died



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J U D G M E N T

The plaintiff is the appellant before this Court in this second appeal. The second appeal is filed against the judgment and decree dated 28.07.2010 in AS.No.98 of 2005 on the file of II Additional Sub-ordinate Judge, Villupuram, confirming the judgment and decree dated 25.02.2005 in OS.No.293 of 2002 on the file of II Additional District Munsif, Ulundurpettai.

2. For the sake of convenience, the parties are referred to as per their ranking before the Trial Court.

The brief facts, which give rise to the second appeal, are as follows:

3. According to the plaintiff, the 'A' schedule 1st item of the suit property is the ancestral property and the plaintiff, his father and grandfather were in enjoyment of the house, which is now in enjoyment of the plaintiff herein. The 'A' schedule second item of the suit property was purchased by the plaintiff and his brother Palaniappan through sale deed dated 21.06.2000 from one Vimaladevi, wife of Ramamurthy and



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they were in possession and enjoyment of the same. After plaintiff's brother palaniappan died, the plaintiff alone is now in enjoyment of the 'A' schedule second item of the suit property.

4. According to the plaintiff, the suit 'C' schedule property is also the ancestral property of the plaintiff. The suit 'B' schedule property is a pathway. The access to 'A' schedule and 'C' schedule properties can be made only by having an ingress and egress through the 'B' schedule suit property. Through the street on the southern side, he can reach the 'B' schedule pathway and from there, the plaintiff has access to the 'A' schedule and 'C' schedule properties. Since the plaintiff is having right to use the pathway in 'B' schedule, he is able to enjoy the 'A' schedule and 'C' schedule properties.

5. According to the plaintiff, the other land owners in the survey number of the 'A' schedule and the 'C' schedule properties have also been using the pathway in 'B' schedule as a public way of access. The defendant does not have any separate right over the pathway in the 'B' schedule. However, due to a dispute, the defendants prevented the plaintiff from using the pathway in 'B' schedule on 08.07.2002. As such,



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the plaintiff gave a complaint to Ulundurpet Police Station on 12.07.2002 which was received in CSR.No.126 of 2002. As the complaint was not immediately acted upon, the defendant had put up a hut in the 'B' schedule pathway. Therefore, the plaintiff has come up with this suit for declaration and also for mandatory injunction for removal of the hut by the defendants.

6. The defendants had resisted the suit by filing written statement stating that an extent of 23 cents of land in S.F. No.19/16 in the 'B' schedule was purchased by the first defendant through sale deed dated 28.06.1980 in Ex.B.5. Likewise, one Ganapathi Udaiyar and Kandasamy Udaiyar were entitled to an extent of 8 cents by way of inheritance and 6 cents by way of sale deed in S.F.No.19/17. The first defendant is an adopted son of Kandasamy Udaiyar. Therefore, the first defendant being the legal heir of Kandasamy Udaiyar and Ramachandran being the legal heir of Ganapathy Udaiyar they were jointly entitled to 14 cents in SF.No.19/17 which is the 'B' schedule property.



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7. According to the defendants, the father of the second defendant one Thangavel Udaiyar has purchased an extent of 7 ½ cents by sale deed dated 06.02.1950 and further he is entitled to an extent of 15 cents through sale deed and partition and therefore, Thangavel Udaiyar is entitled to an extent of 22 ½ cents. Apart from this, through family arrangement, another 48 cents in S.F.No.16 was allotted to Thangavel Udaiyar. As such, altogether Thangavel Udaiyar was entitled to 70 ½ cents and he is in possession and enjoyment of the same.

8. According to the defendants, the 3rd defendant had purchased an extent of 28 ½ cents in S.F. No.19/15 by sale deed dated 16.05.2000 and Thangavel Udaiyar had settled an extent of 29 cents in SF.No.19/15 to his wife, the fourth defendant Krishnammal, through settlement deed dated 15.11.1946. The fourth defendant, therefore, through settlement, was entitled to an extent of 29 cents and through sale deed was entitled to 14 ½ cents and as such, the fourth defendant altogether is entitled to an extent of 43 cents in S.F.No.19/15. Out of which, the fourth defendant after retaining the extent of 18 ½ cents, has conveyed the remaining extent to the 3rd parties. The defendants further contended that when the



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plaintiff has come up with the suit stating that he is using the pathway in 'B' schedule property to reach his lands in 'A' & 'C' schedule properties, no such pathway is actually available in the ground. Further, the plaintiff is using a lane which is situated on the western side of his house to have ingress and egress. Further, the plaintiff has not made any specific plea as to on what basis he is claiming right over the 'B' schedule property. Further, when the plaintiff himself claims the 'B' schedule property is the public pathway, he had prayed for declaration which is contrary to his own pleadings and sought for dismissal of the suit.

Evidence and Documents:

9. During Trial, the Plaintiff examined himself as PW.1 and examined one Velayutham as PW.2 and Veerasamy as PW.3 and marked Exs.A.1 to A.41. On the side of the defendants, the defendants 1 to 3 were examined as DW.1 to DW.3 and one Sellaperumal was examined as DW.4 and marked Exhibits B1 to B.174. The Commissioner report and plans and the FMB, Adangal, 'A' register have been marked as Exs.C.1 to C.6.



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Findings of the Court below:

10. The Trial Court after analysing the evidence and documents by judgment and decree dated 25.02.2005, dismissed the suit. The Trial Court found that when the plaintiff claims that the 'B' schedule pathway runs in S.F. No.19/16 and 19/17 and he has filed the suit mainly based on Ex.A.1 and A.4, the boundaries in the sale deed does not show that the suit pathway situated on the eastern boundary in the schedule of the sale deed as claimed by the plaintiff. Further, the Trial Court noted that from the Advocate Commissioner Report, it is seen that the suit pathway does not run in S.F.No.19/17. Further, when the plaintiff himself has pleaded that the B schedule suit pathway is a public way of access, it is not made clear as to how the plaintiff has sought for declaration over the 'B' schedule property which is contrary to his own pleadings.

11. Aggrieved by the judgment and decree of the Trial court, the plaintiff filed appeal in AS.No.98 of 2005 on the file of Subordinate Judge, Vellore. The Lower Appellate Court after reappraising the evidence also by judgment and decree dated 28.07.2010, dismissed the appeal. The Lower Appellate Court also found that the plaintiff has not



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clearly pleaded as to what basis he claims a right over the 'B' schedule pathway. The plaintiff has not established the existence of the pathway and also mere existence will not give right to the plaintiff to have ingress and egress. Even if the plaintiff is claiming easementary right, there is no pleading or materials produced by the plaintiff to establish his claim. Aggrieved by the concurrent finding of the fact, the plaintiff is before this Court on appeal.

12. This Court by order dated 02.12.2010, ordered notice of motion.

Submission made by the learned counsel for the appellant:

13. The learned counsel for the appellant argued that even though the plaintiff has claimed declaration of the suit 'B' schedule pathway, in view of the specific pleadings made by the plaintiff that the 'B' schedule property pathway is a public way of access to all land owners who have lands in survey numbers of 'A' schedule and 'B' schedule properties, atleast the plaintiff is entitled for injunction restraining the defendants from preventing the plaintiff from using the 'B' schedule suit pathway.



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14. The learned counsel further argued that the courts below failed to consider that the plaintiff can have access to his 'A' and 'C' schedule properties only by having ingress and egress through the 'B' schedule property. The learned counsel further contended that even though the existence of the 'B' schedule pathway has not been mentioned in Ex.A.1, A4 and A18, that alone will not curtail the right of the plaintiff to have ingress and egress in the 'B' schedule pathway which is his pre-existing right.

15. The learned counsel further contended that the courts below have erroneously come to the conclusion that the plaintiff is having an alternative way of access through the lane and also failed to appreciate the report of the Advocate Commissioner which would establish the existence of the 'B' schedule pathway. The learned counsel further contended that the judgment and decree of the courts below are not based on the materials available on record and therefore sought for allowing of this second appeal.



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16. The respondents have been served and the names are also printed in the cause list. It is reported that the respondents 2 to 4 died, however, the appellants have not taken any steps to substitute the legal heirs. However, the name of the surviving first respondent is printed in the cause list but there is no representation on the side of the first respondent.

Analysis:

17. Admittedly, the plaintiff claims right over the 'A' and 'C' schedule suit properties through Ex.A.1, A4 and A18. It is the case of the plaintiff that he is the absolute owner of the 'A' schedule and 'C' schedule properties and that he has a right of access through the 'B' schedule pathway. According to the plaintiff, the suit schedule pathway runs in S.F.No.19/16, 19/17 and he has come up with the suit for declaration to declare the 'B' schedule pathway in favour of the plaintiff and also for mandatory injunction to remove the hut allegedly put by the defendant. When the plaintiff has sought for declaration claiming ownership over the 'B' schedule pathway, the documents filed by him in Ex.A.1, A4 and A18



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becomes relevant and as rightly noted by the Trial Court, the perusal of these documents reveals that the 'B' schedule suit pathway has not been mentioned as the boundary, more particularly, the eastern boundary in both the sale deeds in Ex.A.1 and A4. If at all the pathway as mentioned in 'B' schedule is available, then naturally the pathway would have been mentioned in the schedule to the sale deed. When the plaintiff claims that he has no other way of access and he can reach his 'A' and 'C' schedule properties only by having an ingress or egress through the 'B' schedule property, the fact remains that no such pathway has been mentioned as boundary to the sale deed relied on by the plaintiff in Ex.A.1 and A.4, or even having any right in 'B' schedule property.

18. Further, the perusal of the plaint shows that the plaintiff has pleaded that all the other land owners in the survey numbers of schedule 'A' and schedule 'C' are entitled to have access through the 'B' schedule pathway as it is a public way of access. When the plaintiff has taken such a stand, contrary to his own plea, he has filed the suit claiming for declaration in respect of the suit 'B' schedule pathway. As rightly observed by the courts below, when it is the admitted case of the plaintiff



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that the pathway in 'B' schedule is a public way of access, then the suit filed by him for declaration of the pathway in his favour cannot be sustained.

19. It is also relevant to note that when the plaintiff claims that he has no other way of access to reach his 'A' schedule and 'C' schedule property and the same can be done only by having ingress or egress through 'B' schedule property, the plaintiff has not taken any steps for appointment of an Advocate Commissioner to establish the existence of the pathway. On the contrary, at the instance of the defendants, the Advocate Commissioner was appointed and the report and the plan has been filed in Ex.C1 and C2. From the perusal of the Advocate Commissioner Report, it reveals that the pathway does not run in S.F. No.19/17. Even though the pathway was available in S.F.No.19/16, in the Adangal extract in Ex.C.4, S.F.No.16-B is recorded in the name of Palanimuthu which is a “Nilavayal pathai”. Further as per the new FMB in Ex.C3, pathway running in S.F.No.19/16-B with S.F.No.19/16-C and does not proceed upto S.F.No.19/15 B which is the plaintiff's property. As such from the Advocate Commissioner's Report, it could be seen that



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there is no pathway in 'B' schedule as claimed by the plaintiff and further the plaintiff has not made clear as to on what basis he is making claim over the 'B' schedule pathway.

20. If the plaintiff is claiming a easmentary right either by easement by grant or easement by prescription or by easement of necessity, the plaintiff is bound to plead and prove his easementary right for obtaining the relief. If at all, the plaintiff claims right over the 'B' schedule pathway based on the easement of necessity, the plaintiff has to establish that the lands were divided from a common owner and the plaintiff has no other access to his property. The plaintiff is bound to prove that without the easmentary right, the dominant property cannot be used.

21. When the plaintiff has come up with the suit claiming a right over the 'B' schedule pathway, he has not established that actually the pathway is in existence in the 'B' schedule as claimed by the plaintiff. The report of the Advocate Commissioner shows that there is no pathway as claimed by the plaintiff and coupled with the fact that even in the title deeds of plaintiff in Ex.A.1, A.4 and A18, no such pathway is shown as



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boundary. The plaintiff has also miserably failed to plead and prove that the plaintiff cannot use 'A' schedule and 'C' schedule properties without having an ingress and egress into the 'B' schedule property. On the contrary, the plaintiff has claimed for declaration as against the defendants and also for mandatory injunction to remove the hut, as against the real owner.

22. Taking note of all these aspects, the Trial Court and the Lower Appellate Court had arrived at a finding of fact which is based on the materials available on record and are not perverse. This Court does not find any substantial question of law involved in this second appeal for the consideration of this Court.

23. In view of the same, this Second Appeal stands dismissed. However, there is no order as to costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes/No
Speaking order/Non-speaking order
drl



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To
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1. The II Additional Sub-ordinate Judge, Villupuram.
2. The Principal District Munsif Court, Cuddalore.
3. The Section Officer, V.R.Section, High Court, Madras.

G.ARUL MURUGAN,J

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