



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2024

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

S.A.No.999 of 2013 and
M.P.No.1 of 2013

Mr.P.Chandran

... Appellant / Plaintiff

Vs.

1.Mr.Susai (deceased)
2.Mrs.Lilly
3.Mr.Jhonson Jolly
4.Mrs.Manju
5.Bheena
6.Sudha
7.Mary
8.Jacintha

(R7 & R8 are brought on record as legal heirs
of the deceased R1 vide order dated 17.04.2024
made in CMP.Nos.5331, 5333 & 5335 of 2024)

... Respondents / Defendants

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 27.02.2012 made in A.S.No.24 of 2010 on the file of the Sub-ordinate Judge and Appellate Authority of the Nilgiris at Uthagamandalam by confirming the decree and judgment dated 22.06.2010 in O.S.No.39 of 2006 on the file of the District Munsif of Kotagiri.



For Appellant : Mr.D.Ashok Kumar

For Respondents : Mr.V.Chinnasamy

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JUDGMENT

This Second Appeal has been filed to set aside the judgment and decree dated 27.02.2012 made in A.S.No.24 of 2010 on the file of the Sub-ordinate Judge and Appellate Authority of the Nilgiris at Uthagamandalam by confirming the decree and judgment dated 22.06.2010 in O.S.No.39 of 2006 on the file of the District Munsif of Kotagiri.

2. Heard Mr.D.Ashok Kumar, learned counsel for the appellant and Mr.V.Chinnasamy, learned counsel for the respondents and perused the materials available on record.

3. The appellant is the plaintiff who has filed a suit for permanent injunction against the defendants. The Trial Court has dismissed the suit and the First Appeal preferred by the plaintiff was also dismissed by confirming the judgment of the Trial Court.

4. In fact, the defendants have raised a counter claim for seeking the relief of declaration that the 'B' schedule property of the counter claim is a



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common pathway and a consequential permanent injunction. The counter claim was also dismissed. The defendants have also filed a cross appeal before the First Appellate Court and the same was dismissed and the judgment of the Trial Court was confirmed.

5. The short facts pleaded in the plaint by the plaintiff are as follows:

The suit property measuring 2 1/2 cents was originally belonged to the plaintiff as it was a self acquired property by virtue of a settlement deed dated 23.04.1999 executed by his wife. The plaintiff is in possession and enjoyment of the same. The property also included a right of pathway. The plaintiff has constructed a house in a portion of 2 1/2 cents and the mutation was also effected in the revenue records in the name of the plaintiff and the remaining part remains in possession of the plaintiff. The defendants are the neighbours and they have their separate right of way for entering into their house and they have no manner of right to occupy the plaintiff's suit property.

5.1. The defendants broke open the fence between the plaintiff and the defendants house during the absence of the plaintiff and started to use



the plaintiff's land as an access to the defendants' house. When the plaintiff came to know about the same, he gave a police complaint. The police enquired the matter and warned the defendants and thereafter, the plaintiff closed the fence and asked the defendants not to interfere with his right over the property. The defendants came to the suit schedule property at 10.00 a.m. on 15.04.2006 with an intention of entering into the suit schedule property. The plaintiff resisted their attempt with great difficulties and thereafter, filed a suit for permanent injunction.

6. The short facts pleaded in the written statement and counter claim are as under:

The claim of the plaintiff that he is in possession of the house existing in the suit property is denied. There is an existing pathway that was assigned and confirmed in favour of the defendants through a registered sale deed dated 06.04.1979. The defendants are entitled to use the said pathway for their beneficial enjoyment of the house. The pathway is being enjoyed by them as an easementary right from 18.12.1981. The plaintiff resisted the defendants to use the pathway and that had caused a quarrel between themselves. In view of that, a Criminal case was registered before the



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Kotagiri Police Station by the defendants. The police warned the plaintiff not to obstruct the pathway and the matter got amicably settled there. As alleged by the plaintiff, they have not put up any fence and closed the pathway. The defendants continued to use the pathway as they do not have any other pathway to access their house.

6.1. The defendants' house property lies on the eastern side of the suit schedule property. The said property was purchased by the second defendant through a registered sale deed dated 18.12.1981 from one Yesumary and it comprised 3 cents in S.No.1168 / 2A. The sale deed of the vendor of the second defendant dated 06.04.1979 would also confirm that the pathway was already in existence. After the purchase, the second defendant had constructed a shed in the said land and subsequently, it was converted into a small house bearing Door No.16/28A. The revenue records have been mutated in the name of the second defendant and she is paying the house tax also. Hence, the plaintiff cannot claim any exclusive right over the pathway by denying the defendants right of enjoyment over the same. The defendants have also filed a counter claim by showing the common pathway as 'B' schedule property and claimed the relief for



declaring the same as a common pathway along with the consequential relief of permanent injunction.

7. The reply statement of the plaintiff reads as under:

The allegations made in the written statement and the counter claim are false. The defendants do not have any right over the alleged pathway. There is no common pathway as alleged by the defendants. The defendants do not have any manner of right over the same much less than the easementary right either by prescription or by necessity. Hence, the counter claim should be dismissed.

8. Based upon the averments made in the pleadings, the Trial Court has framed the following issues:

"1. Whether the plaintiff entitled to the decree for permanent injunction against the defendants from interfering with the plaintiff's proprietary right of way in the plaint schedule property?"

2. Whether the defendants entitled to the decree of declaration of foot path of 'B' schedule property of the counter claim as common one and for permanent injunction



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restraining the plaintiff from obstructing the foot path mentioned in the counter claim schedule property?

3.To what relief to plaintiff and defendants and cost?"

9. During the course of the trial, on the side of the plaintiff, one witness has been examined as P.W.1 and Exs.A1 to A6 were marked. On the side of the defendants, two witnesses were examined as D.W.1 and D.W.2 and Exs.B1 to B6 were marked.

10. At the conclusion of the trial and on considering the materials available on record, the learned Trial Court has dismissed both the suit and the counter claim. The First Appeal and the Cross Appeal preferred by both parties before the First Appellate Court were also dismissed by confirming the judgment of the Trial Court. Aggrieved over the same, the plaintiff has filed this Second Appeal in which he has raised the following substantial questions of law:

"1.Whether both the Courts below were wrong in disregarding the settlement deed dated 23.04.1999 marked as Ex.A1 in the absence of the production of the parent sale deed dated 30.11.1994, more particularly, in a case



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where the plaintiff has sought for the relief of bare injunction?

2. Whether both the Courts below went wrong in completely disregarding the revenue records that were marked as Exs.A2 to A5 while determining the possession of the plaintiff in the suit property? and

3. Whether the findings rendered by both the Courts below can be termed as perverse due to improper appreciation of the oral and documentary evidence available on record?"

11. The learned counsel for the appellant submitted that the settlement deed dated 23.04.1999 though was denied by the defendants, they have pleaded only easementary right by alleging that there is a common pathway is in existence. In that case, the burden would be only upon the defendants to prove the existence of the common pathway. But the defendants did not establish any pathway and claim false right alleging that they have easementary right over the site belonging to the plaintiff. The Lower Court without considering the boundary shown in Ex.A1 and disregarding the records which has been marked as Exs.A2 to A5, to show



the possession and enjoyment over the suit property, has chosen to record a finding adverse to the plaintiff and it is not correct.

12. The learned counsel for the defendants submitted that the respondents / defendants did not have any other pathway except the common pathway which runs on the western side of their site that is being denied by the plaintiff. The title documents would show the existence of the common pathway and hence, the same cannot be denied by the plaintiff. As the Courts below have rightly appreciated the materials available on record, the substantial questions of law as alleged by the plaintiff will not arise.

13. The plaintiff claims that he has acquired the suit property by way of a registered settlement deed dated 23.04.1999 which is marked as Ex.A1. The said settlement deed is said to be executed by the plaintiff's wife in favour of the plaintiff. Even though the defendants in the written statement had denied the title of the plaintiff over the suit property, they filed a counter claim stating that they have an easementary right and the same has been prescribed in view of the long usage of the common pathway alleged to be lying on the eastern side of the suit property and the western side of



the defendants' house site. If the defendants sets up the plea of easementary, then it goes without saying that they admit the title of the plaintiff in the suit property.

14. The plaintiff's settlement deed which is marked as Ex.A1 would show the eastern boundary as the defendants' site, more particularly, it has been mentioned that S.No.1168 / 2A Susai's Baagam (First defendant). However, the defendants claim that there is a pathway running on the western side of their property. The defendants title deeds which have been marked as Exs.B1 & B2 does not have four boundaries. Ex.B1 sale deed would show that on the western side is the land belonging to TRS Lourdsamy and the parent document which has been marked as Ex.B2 would also show that the western boundary is a property belonging to one TRS Lourdsamy. So the above boundary details which have been shown in Exs.B1 and B2 documents do not show any pathway running on the western side. There is a general recital that the pathway would be enjoyed as a common pathway. So the above recital would only refer to the vendors of the above documents and not the defendants.



15. The plaintiff who has filed a suit has got the initial burden to prove that he is entitled to the suit property and that he is in enjoyment of the same. Even according to the defendants' defence that they have an easementary right over the suit property, the plaintiff's title and possession over the suit property has been admitted. So the burden would shift upon the defendants to prove that there is a pathway in existence and it runs on the plaintiff's house site measuring 2 1/2 cents and thus, they have been in enjoyment of the same.

16. Had it been the case the defendants that Exs.B1 and B2 documents would have made a mention about the pathway in its boundaries, the Lower Court would have done the exercise of comparing the boundary details in Ex.A1 to Exs.B1 and B2 to arrive at a conclusion whether there is any pathway or not. It would have been a better case for the plaintiff had he applied for the appointment of Commissioner to note down the physical features and filed a report. It is equally so for the defendants also to make such an application. Unfortunately, both the plaintiff and defendants did not file any petition for appointment of Commissioner.



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17. It is the categorical statement and the counter claim of the defendants that there is an existing pathway. Hence, the burden and the necessity to seek for appointment of Commissioner would be more upon the defendants than on the plaintiff. The Lower Court cannot simply reject the claim of the plaintiff on the ground that the parent document dated 30.11.1994 was not produced and hence, the essential facts about the existence of pathway was suppressed. It was by overlooking the contention of the defendants that there is a pathway and also their burden to prove the same.

18. The Courts cannot expect the plaintiff to prove the negative fact that there was no pathway. It is sufficient for the plaintiff to produce the documents of title and possession to claim that he is the owner of the suit property. Any party claims the contrary by stating that they have got any right either by way of title or by possession or as easement, would take up the burden of proving the said fact. The defendants did not come forward to prove the same. The consistent evidence of P.W.1 before the Court was that the defendants have their pathway on the eastern side of the property and they have been using the same. So the oral evidence was also not helpful to



the defendants to establish the allegation that there was a pathway situated at the western side of their site.

19. In fact, the defendants have given a categorical admission that the plaintiff is in possession of 2 1/2 cents of land. So the admitted facts need not be proved by the plaintiff and hence, even in the absence of proving any documents to show the possession of the plaintiff in the suit property, that will not go adverse to him in deciding the fact whether the plaintiff was in enjoyment of the suit property. As the title documents produced by the plaintiff along with the admission given by D.W.1 during his examination would be sufficient to hold that the plaintiff is the owner of the suit property measuring 2 1/2 cents and that he is in enjoyment of the same. Even if the defendants feel that they have a right of pathway and that could be substantiated by the plaintiff's wife sale deed dated 30.11.1994, the defendants ought to have given notice to the plaintiff and thereby, the plaintiff should have denied the same. In the absence of any such notice, there is no need to take any adverse presumption against the plaintiff.



20. To be noted that the defendants who have filed a counter claim which was dismissed did not choose to prefer any Second Appeal by challenging the dismissal of their counter claim. So the defendants have accepted the decision of the Courts below that they did not have pathway on the western side of his property running on the site of the plaintiff. When the substantial facts have been proved by the plaintiff and the preponderance of probability also very much lying in favour of the plaintiff, it is wrong on the part of the Lower Courts to deny the relief to the plaintiff on the ground that the plaintiff did not produce the parent sale deed dated 30.11.1994. In fact, the Courts below did not weigh the burden that has been placed upon the defendants and the fact that they did not discharge the same. So the substantial question of law No.1 is answered in favour of the appellant / plaintiff that the non-production of the parent sale deed dated 30.11.1994 will not deny the plaintiff's title over 2 1/2 cents which is the subject matter of settlement deed dated 23.04.1999.

21. Even if the revenue records Exs.A2 to A5 were not considered, the Courts below ought to have considered the oral evidence D.W.1 where he admits the possession of the plaintiff over the suit property. Hence, the



substantial question of law No.2 will not arise. In view of the reasons stated above, the findings rendered by both the Courts below are improper and incomplete. The appreciation of the holistic materials available on record would only show the existence of preponderance in favour of the plaintiff which the Courts have omitted to appreciate. Hence, the substantial question of law No.3 is answered in favour of the appellant. Accordingly, the substantial questions of law are answered.

22. In the result, this Second Appeal is allowed and the judgment and decree dated 27.02.2012 made in A.S.No.24 of 2010 on the file of the Subordinate Judge and Appellate Authority of the Nilgiris at Uthagamandalam by confirming the decree and judgment dated 22.06.2010 in O.S.No.39 of 2006 on the file of the District Munsif of Kotagiri is set aside. Accordingly, the suit is decreed in favour of the plaintiff. No costs. Consequently, connected miscellaneous petition is closed.

Speaking order / Non-speaking order

14.11.2024

Index : Yes / No

Neutral Citation : Yes / No

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R.N.MANJULA, J.

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To

- 1.The Sub-ordinate Judge and
Appellate Authority of the Nilgiris,
Uthagamandalam.
2. The District Munsif,
Kotagiri.

S.A.No.999 of 2013

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