



S.A.No.730 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 16.02.2024

Delivered on:23.02.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.B.BALAJI

S.A.No.730 of 2018
and
C.M.P. No.21353 of 2018

Valli W/o. Subramanyan

... Appellant

Vs.

Ramasamy S/o. Kuppusamy

... Respondent

PRAYER: The Second Appeal has been filed under Section 100 of the Civil Procedure Code to set aside the decree and judgment in A.S.No.14 of 2013 passed by the learned Additional Sub Judge, Puducherry dated 13.03.2018 confirming the judgment and decree in O.S.No.1737 of 2007 dated 28.08.2013 on the file of the learned III Additional District Munsif, Puducherry.

For Appellant : Mr. P. Veeraraghavan

For Respondent : Mr. T.R. Rajaraman for Mr. V.V. Sairam



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J U D G M E N T

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1. The plaintiff in a Suit for declaration of easementary right of access over a common pathway and for a consequential mandatory injunction directing the defendant not to resist the plaintiff from demolishing the compound wall to provide access to his property, is the appellant.

2. The material facts that are necessary for deciding the above Second Appeal are hereunder:

The plaintiff claims to be the owner of the property situated in R.S. No.274/40 at New Street (Old Iyyanar Koil Street), Thelarshpet, Puducherry – 9 to an extent of 30 / 60 feet. The plaintiff has constructed a two-storeyed house in the said property and originally the property was belonging to the joint family comprising of three brothers, namely, Thulasingam, Krishnaraj and Lakshmanan, sons of Mr. Narayana Gounder. There was a partition of the property amongst the three brothers and common pathways of 9'90' on the southern side and 9'70' on the western side, were provided to access the properties partitioned to enable access to the respective properties allotted to the three brothers. Further, the case of the plaintiff is that the said three brothers



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had converted their portions into house sites. One of the portions had a direct access to old Iyyanar Koil Street which was sold by Thulasingham, one of the brothers, to the plaintiff on 29.01.1976. According to the plaintiff, the remaining two plots were sold to Chitra and Ramasamy. The defendant's plot was just behind the plaintiff's property. The defendant has purchased his property from Thulasingham on 10.10.1988 and according to the plaintiff, ever since he purchased the property on 29.01.1976, he has provided a side door appurtenant to the southern side common pathway and has been using it ever since the purchase of the property and thereby he has acquired easementary right. As the defendant had purchased the property adjacent to the plaintiff's portion in 1988, subsequently both the plaintiff and defendant were enjoying the common pathway jointly. However, according to the plaintiff, in the 1st week of August 2007, the defendant attempted to block the pathway and prevent the plaintiff from accessing the same. In order to secure the pathway, the plaintiff attempted to break the compound wall, which was resisted by the defendant in the first week of August 2007. The plaintiff has issued a Lawyer's notice on 30.08.2007 to which, the defendant sent a reply on 06.09.2007 refusing the plaintiff's claim. Hence the suit came to be instituted.



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3. The defendant filed a written statement stating that the plaintiff was never in enjoyment of the alleged suit common pathway at any point of time; the plaintiff had direct access from New Street (Old Iyyanar Koil Street); and in the sale deed executed by one of the brothers, Thulasingham in favour of the defendant, it has been specifically stated that pathway running west to east of the Southern side of the plaintiff's property reaching New Street (Old Iyyanar Street) on the Eastern side, belongs only to the other two brothers, Krishnaraj and Lakshmanan and the defendant.

4. According to the defendant, the compound wall has been constructed in 1989 and has been in existence for more than 19 years and at no point of time, the plaintiff sought to exercise his easementary right or any other right alleging that the plaintiff was also entitled to a share and right in the common pathway. The defendant therefore sought for dismissal of the suit.

5. The Trial Court decreed the suit declaring the plaintiff's easementary right over the suit measuring 9 / 90 feet and also granted a mandatory injunction to restrain the defendant from resisting the plaintiff from demolishing the compound wall, in order to gain access to the common pathway



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from the southern side of the plaintiff's property.

6. The defendant preferred an appeal in A.S. No.14 of 2013. In the appeal, an Advocate Commissioner was also appointed and he has filed a report. However, the Advocate Commissioner has stated that since there is an objection to the measurements, the pathway could not be measured and physical features were not noted down. In pursuance of the same, there is nothing available in the records to indicate that there was any revisit by the Advocate Commissioner subsequently.

7. The Appellate Court, after independent assesement of the oral and documentary evidence available on record, held that the plaintiff had pleaded an inconsistent case by claiming the right of easement on one hand and claiming to be the owner of the common pathway on the other hand. It is also held that the suit itself was not maintainable as the plaintiff had set up three diferent versions namely 1) right of easement, 2) ownership and 3) long user of the pathway.

8. Aggrieved by the reversal findings rendered by the First Appellate



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Court, the plaintiff has preferred the present Second Appeal. On 18.12.2023, the Second Appeal was admitted on the following substantial question of law:

“whether the conclusion reached by the 1st Appellate Court that the appellant / plaintiff was not entitled to claim easementary right as well as the ownership over the suit property is vitiated by misleading of the plaintiff.

9. I have heard Mr. P. Veeraraghavan, learned counsel for the appellant and Mr. T.R. Rajaraman for Mr. V.V. Sairam, learned counsel for the respondent. I have gone through the judgment of the Courts below as well as the pleadings, oral and documentary evidence adduced by the parties before the Trial Court.

10. On a reading of the plaint, it is evident that the plaintiff has approached the Court on the ground that the pathway on the southern side of his property has been used by him right from 29.01.1976 and therefore he has acquired a right of easement and the defendant being a purchaser of the adjoining plot, has no exclusive right to hinder or affect the said easementary



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right of the plaintiff, namely access his property through the pathway. The plaintiff has also stated that the access is essential for parking vehicles and also entrance to his house. The plaintiff attempted to open the compound wall which was resisted by the defendant in the first week of August 2007. Per contra, the case of the defendant is that the compound wall was constructed even in the year 1989 and the plaintiff has never been in enjoyment of the common pathway to access his house through the said pathway, at any point of time, much less 1976, as claimed by the plaintiff.

11. The learned counsel for the appellant would take me through the documents exhibited by the plaintiff before the Trial Court and he would point out that in all the sale deeds, namely Ex.A2, Ex.A3 and Ex.A4, one of the boundaries to the schedule, clearly mentioned the existence of the pathway and therefore he stated that the plaintiff's right over the common pathway cannot be denied and he was entitled to the mandatory injunction to remove the compound wall mere to provide access to his property. He would also place relevance on the following two decisions in ***Kuppakal vs. Mathan Chettiar and Ors reported in and K. Govindarajulu Chettiar vs. V.N.***



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Srinivasalu Naidu reported in 1972(1) MLJ 385 .

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He would also invite my attention to Ex.A8 and Ex.A9 which are Rough Sketch showing existence of common pathway and photographs respectively.

12. Per contra, Mr. T.R. Rajaraman, learned counsel appearing for the respondent would state that the plaintiff never got any right under any of the documents exhibited by him. He would also contend that the plaintiff has not established the fact that he has been using the common pathway from 1976. Further he would also refer to the Sketch and photographs and stated that the plaintiff has direct access to his property from New Street (Old Iyyanar Street) and the alleged right of easement has not been established by the plaintiff. The learned counsel would therefore pray for dismissal of the suit.

13. In so far as the substantial question of law is concerned, even though the substantial question of law framed is whether the 1st Appellate court erroneously held that the plaintiff was disentitled to the easementary right, when he was claiming right of ownership over the common pathway, reading of the plaint as a whole, I am able to see that the plaintiff has only claimed the right of



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easement and he has never claimed ownership of the pathway. In fact, even on a careful reading of the schedules, namely the description of the property conveyed under the Ex.A2, Ex.A3 and Ex.A4, it is clear that the common pathway is only spelt out as one of the boundaries of the schedules and the pathway does not find a mention in the body of the schedule, which alone describes the property which is the subject matter of the conveyance. The moment when the property is described by four boundaries in order to define the lay of the property, which is the subject matter of the conveyance, then it is only that part of the property under which right or interest has been transferred or conveyed to the purchaser. The mentioning of the common pathway in the boundaries, therefore, is only a clear indication that the common pathway or any right in the common pathway has not been conveyed to the purchaser under the above mentioned three sale deeds.

14. It is also seen from the schedules that the plaintiff has an access from New Street (Old Iyyanar Street) and however, it is not the case of the plaintiff that he requires the common pathway on the southern side by way of easement of necessity. His only case is that he has been using the common pathway from 1976 and therefore he has prescribed the easementary right and the defendant has attempted to disrupt the said right and therefore, the suit has



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been filed.

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15. On reading of the plaint and also the evidence, it comes out that the plaintiff has nowhere pleaded as to when the compound wall was constructed, which is crucial to decide the entitlement of the plaintiff to seek the relief of not only easementary right, but also mandatory injunction. It is the specific case of the defendant that the wall was constructed wayback in the year 1989, soon after his purchase in the year 1988 and the plaintiff has never been using the said pathway and has been accessing his property only through New Street (Old Iyyanar Street). The photographs in Ex.A9 also evidence the fact that the plaintiff has a direct access to New Street (Old Iyyanar Street) and there is also an iron gate, which has been put up by the plaintiff, as the entrance to his property. The compound wall which is sought to be removed / demolished by the plaintiff is also clearly visible in the photographs, Ex.A.9 series and they clearly appear to be not newly constructed compound walls and even to the naked eye, it is clear that the said compound wall has been constructed several years back. The plaintiff has also not been able to produce any satisfactory oral and documentary evidence to fortify the plaint claims that he has been using the common pathway right from the year 1976, without any disturbance. Merely



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because one of the boundaries mentioned in the sale deed under which the plaintiff purchased the property as a common pathway, it would not entitle him to the relief of declaration of an easementary right or the relief of mandatory injunction to prevent the defendant from resisting the plaintiff's attempts to demolish the compound wall to provide an access to the property on the southern side. The plaintiff, who claims easementary right has to establish that he has been using the said common pathway for over the prescribed period, before entitling himself to a decree.

16. Admittedly, the plaintiff has purchased the property in the year 1976 and the plaintiff is also silent with regard to when the compound wall was constructed. The only allegation in the plaint as to cause of action for the suit is that in the first week of August 2007, the defendant prevented the plaintiff from demolishing the compound wall in order to provide access to his property on the southern side.

17. On the contrary, the defendant has specifically pleaded that the compound wall is constructed even in the year 1989 and photographs in Ex.A9 also clearly suggest that the aid compound wall is not of any recent origin.



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Thus, the plaintiff has miserably failed to prove that he has been enjoying the common pathway over the prescribed period of 20 years, that entitling him to his easementary rights being declared. By stating that the pathway is common, the plaintiff clearly claims right and interest in the said subject pathway and when he does so, he certainly cannot claim the right as an easementary right.

18. It is settled law that in order to claim easement, in a suit for easement, the plaintiff has to admit that the property in respect of which easement is sought for belongs to the adversary party. Even otherwise, the plaintiff is not able to establish his easementary right by continuous enjoyment, over the statutory period. The 1st Appellate Court has rightly found that the plaintiff cannot raise inconsistent pleas, relying the ratio laid down by this Court in ***Krishnamoorthy vs. Nagammal & Another reported in 2015 (1) CTC 477*** and ***Arunachalam Pillai vs. Sorimuthu Pillai reported in 2004 (1) CTC 414.***

19. In so far as of the decision on which, the learned counsel for the appellant has placed reliance upon, in ***Kuppakal vs. Mathan Chettiar and Ors.,***



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it was a case, where the plaintiffs proposed to construct a wall on both sides of the pathway which would restrain the defendant from accessing his property.

This is not the case on hand.

In the decision in ***K. Govindarajulu Chettiar vs. V.N. Srinivasalu Naidu reported in 1972(1) MLJ 385***, the Court found that there is an implied and confirmed grant for enjoying access to a 30 feet road and therefore it was held that usage of road cannot be denied. However the facts of the case in hand are totally different.

20. Admittedly, the plaintiff has direct access to New Street (Old Iyyanar Street and his specific case that he has acquired easement by long usage of road from 1976 is only on paper and has not been proved either by pleading or by evidence.

21. Therefore, I do not find any infirmity, irregularity or perversity in the findings arrived at by the First Appellate Court and consequently, the second appeal is liable to be dismissed.



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22. In fine, the second appeal stands dismissed. There shall be no order as to costs. Connected miscellaneous petition is also closed.

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Internet:Yes

Index:Yes/No

To

1. The Additional Sub Judge, Puducherry
2. The III Additional District Munsif, Puducherry.

P.B.BALAJI,J

mjs

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