



S.A.(MD)No.493 of 2008

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.06.2024

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.(MD)No.493 of 2008

T.S.Govindaraj Chettiar (Died)

2.Padmavathy

... Appellants

(2nd appellant is brought on record as LR's of the deceased sole appellant vide Court order dated 06.02.2023 made in C.M.P.(MD)Nos. 1252 & 1253 /2023 in S.A.(MD)No.493/2008)

Vs

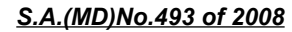
L.Raja Mahendran

... Respondent

PRAYER: Second Appeal filed under Section 100 of C.P.C. against the decree and judgment passed in A.S.No.65/2005 on the file of Principal Subordinate Judge, Thanjavur dated 15.11.2007 reversing the decree and judgment passed in O.S.No.62/2002 on the file of District Munsif Court, Thanjavur dated 06.04.2005.

For Appellants : Mr.V.K.Vijayaragavan

For Respondent : Mr.V.Janakiramulu



WEB COPY

2. According to the respondent/plaintiff he is the owner of property situate in T.S.No.2733, Nanayakkara Chetty Street, Thanjavur, as per the registered sale deed dated 05.02.2001. The suit property is a lane portion situate on the West of the plaintiff's property. The suit property situate in T.S.No.2734 belongs to the defendant. However, the plaintiff has got



S.A.(MD)No.493 of 2008

easementary right of way through the suit property to reach Nanayakkara Chetty Street on the Northern side. It was claimed by the plaintiff that he had no other access to reach the above said street. Therefore, he has got easementary right of necessity over the suit property. It was also claimed by the plaintiff that he and his predecessor in title have been using the suit property as an access to reach Nanayakkara Chetty Street for more than statutory period and hence, acquired easementary right by prescription also. It was also claimed by the plaintiff that the defendant constructed a wall on the Northern side of his property blocking the entrance and access to the suit property and hence, he was constrained to file the above suit for declaration and other reliefs.

3. The appellant / defendant filed a written statement and resisted the suit on the ground that the plaintiff has got access to Nanayakkara Chetty Street on the Northern side of his property in T.S.No.2733 and after purchase, he converted the Northern portion as a shop and filed a suit vexatiously as he has got easementary right. It was also claimed by the defendant that his ancestors allowed the plaintiff's vendor to construct a door on the eastern side to have free access between the two houses, as both of them were relatives. Defendant also claimed that the



S.A.(MD)No.493 of 2008

plaintiff and his vendor never used the suit property as an access and hence, the plaintiff was not entitled to any kind of easementary right. It was also claimed that at the time of raising of wall by the defendant, there was no objection by the plaintiff, but he moved the police officials to have right of access. As their attempt before the police people failed, the plaintiff filed the vexatious suit without having any manner of right. Therefore, the defendant sought for dismissal of the suit.

4. The plaintiff was examined as P.W.1 and his vendor was examined as P.W.2. The Advocate Commissioner appointed by the Court was examined as P.W.3. On behalf of the plaintiff, 15 documents were marked as Ex.A1 to Ex.A15. The defendant examined as D.W.1. Yet another witness, who is a neighbour was examined as D.W.2. On behalf of the defendant, two documents were marked as Ex.B1 and Ex.B2. The Report and plan of the Advocate Commissioner was marked as Ex.C1 and Ex.C2.

5. The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the plaintiff was not entitled to any relief and dismissed the suit. Aggrieved by the



S.A.(MD)No.493 of 2008

same, he filed an appeal in A.S.No.65 of 2005 on the file of the Principal Sub Court, Thanjavur. The first appellate Court, on re-appreciation of evidence available on record, came to the conclusion that the plaintiff proved his prescriptive right of easement and granted a decree as prayed for. Aggrieved by the same, the defendant has come before this Court.

6. At the time of admission, this Court formulated the following substantial questions of law by an order dated 03.04.2008:

“i) Whether the judgment and decree of the Court below is perverse on account of its failure to consider the fact that there is an alternative way for the respondent to enter into his property and he has also provided a separate way for the tenant under him?”

7. The learned counsel for the appellant contended that the property of plaintiff is situated on the Southern side of Nanayakkara Chetty Street abutting the same and the northern side of plaintiff's property abutting the road was converted into a shop for commercial use by the plaintiff and the plaintiff is not entitled to create easementary right of necessity by blocking his access to street by his own act. The learned counsel submitted that the first appellate Court failed to take into consideration the Advocate Commissioner's report and plan in this



S.A.(MD)No.493 of 2008

regard. The learned counsel further submitted that in the sale deed of the plaintiff, which was marked as Ex.A1, the suit property was shown as a lane portion of defendant Govindaraj and it was not described as a common lane available for both the plaintiff and defendant. Therefore, the case put forth by the plaintiff as if the suit property has been used by him as an access to reach Nanayakkara Chetty Street is falsified by the recital found in his own document and the same is binding on the plaintiff.

8. Based on the argument made by the learned counsel for the appellants, the following additional substantial question of law is arising for consideration:

Whether the finding of the appellate Court that the plaintiff has proved his plea of easement by prescription is vitiated by misreading of Ex.A1 and Ex.A2?

9. The learned counsel for the respondent is heard on the additional question of law also.



S.A.(MD)No.493 of 2008

10. The learned counsel for the respondent vehemently contended that a perusal of Advocate Commissioner's report and plan would suggest that there is an entrance in the plaintiff's property towards the East facing the suit property and the said fact probabalize the plea of the plaintiff that he and his predecessor in title had been using the suit property as an access to reach Nanayakkara Chetty on the Northern side. He further submitted that the admission made by D.W.1 that his predecessor permitted the plaintiff's vendor to open an entrance on the Eastern side supports the case of the plaintiff that he and his predecessor has been using the suit property as an access for more than statutory period. He further submitted that failure to mention the suit property as a common lane in Ex.A1 and Ex.A2 will not affect plaintiff's right of easement which is otherwise available to him.

11. The plaintiff sought for declaration of easementary right and other consequential relief by raising a plea of easement by necessity and easement by prescription. As far as easement by necessity is concerned, a perusal of Ex.C1 and Ex.C2, report and plan of the Advocate Commissioner would suggest that the plaintiff's property situated on the Southern side of Nanayakkara Chetty Street. Therefore, the plaintiff has



S.A.(MD)No.493 of 2008

got access to Nanayakkara Chetty Street from every inch of his property.

However, he converted the Northern portion of his property as a shop and exploits it commercially. It is also seen that the frontage of the plaintiff's property opening at Nanayakkara Street is 12 feet and the plaintiff has put up a shop in the Northern portion to the breadth of 10 feet. Therefore, remaining 2 feet alone is available for him to have access to Nanayakkara Street. Merely because, the plaintiff developed his property on the Northern side and blocked his frontage by putting up a shop, he cannot claim an easement of necessity to have access to Nanayakkara Street through the suit property which lies on the Eastern side of his property. In order to claim easement of necessity, there must be a splitting of dominant and servient tenements. In the case on hand, the property of the plaintiff lies on the Southern side of Nanayakkara Chetty Street abutting the street and due to own act of the plaintiff, his access to Nanayakkara Chetty Street, through the frontage got impaired. In such circumstances, he is not entitled to any easement of necessity. A perusal of the Advocate Commissioner's report and plan would further suggest that the plaintiff is also having right of way to enter the shop on the Northern side from his house and then reached the road from the shop. Therefore, the plea raised by the plaintiff claiming easement by



S.A.(MD)No.493 of 2008

necessity is not acceptable to this Court. In fact, the first appellate Court has not considered the plea of easement by necessity raised by the plaintiff.

12. The point for determination framed by the first appellate Court is only with regard to the easement of prescription pleaded by the plaintiff. While considering the question whether the plaintiff and his predecessor in interest have been using the suit property as a way for more than statutory period, with necessary animus, the boundary description in the plaintiff's title document Ex.A1 assumes significance. In the boundary description, while describing the eastern boundary, it was mentioned “ரெத்ன செட்டியார் வீட்டு வழிநடை சந்துக்கு மேற்கு”. The plaintiff is a party to Ex.A1. While describing the suit property, it was not described as a common lane belonged to the plaintiff's vendor and the defendant's predecessor Rathina Chettiyar. It was clearly mentioned in Ex.A1 that the suit property is the pathway of the defendant's predecessor Rathina Chettiyar. Therefore, the boundary description in the plaintiff's own title document by necessary implications negatives the right of the way to the plaintiff or his vendor. When the exercise of right of way over the suit property is not mentioned



S.A.(MD)No.493 of 2008

in the plaintiff's own document, the plea raised by the plaintiff as if he and his predecessor has been enjoying the suit property as an access for more than statutory period is not acceptable to this Court.

13. The learned counsel for the respondent by taking this Court to the evidence of plaintiff's vendor, who was examined as P.W.2, submitted that he clearly deposed about the use of suit property as an access for quite long time. Though P.W.2, vendor of the plaintiff in his evidence deposed about the exercise of right of way over the suit property, he is unable to explain the reason for his failure to mention the same in the sale deed executed by him in favour of the plaintiff. Further in the document executed by him in favour of the plaintiff, he described the suit property as a pathway for Rathina Chettiyar property and he does not mention it as a common pathway for Rathina Chettiyar property and also his property. In such circumstances, the evidence of P.W.2 cannot be given any weightage. Further from the cross examination of P.W.2, it is clear that prior to sale in favour of plaintiff, there was an agreement to sell the property to defendant's son and for some reason or the other, the same was dropped. Therefore, it appears that there is no smooth relationship between the family of the plaintiff's vendor and the



S.A.(MD)No.493 of 2008

defendant, immediately before execution of sale deed in favour of the plaintiff. In such circumstances, based on the evidence of plaintiff's vendor alone, we cannot come to the conclusion that the plaintiff proved his easement right by prescription. The plaintiff, for the reasons well known to him, failed to examine any other independent witnesses viz., neighbours, to prove his long user of suit property as a pathway. Therefore, the findings rendered by the first appellate Court as if the plaintiff proved his plea of easement by prescription is vitiated by non-consideration of materials available on record viz., Ex.A1 and Ex.A2. Therefore, the additional question of law framed is answered in favour of the appellant and against the respondent.

14. This Court already decided that the plaintiff failed to prove his plea of easement by necessity and in this regard, the Courts below failed to take into consideration the Advocate Commissioner's report and plan in proper perspective. Therefore, the first question of law is also answered in favour of the appellant.

15. In view of the answer to both the questions of law, the Second Appeal stands allowed by setting aside the judgment and decree passed by the first appellate Court. The judgment and decree passed by the trial



S.A.(MD)No.493 of 2008

Court stands restored. There shall be no order as to costs.

WEB COPY

21.06.2024

NCC : Yes

Index : Yes

vsm

To

1.The Principal Subordinate Judge, Thanjavur.

2.The District Munsif, Thanjavur.

3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



S.A.(MD)No.493 of 2008

S.SOUNTHAR, J.

vsm

S.A.(MD)No.493 of 2008

21.06.2024