



S.A.(MD)No.860 of 2008

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 06.062024

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THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.(MD)No.860 of 2008

Thiru A.R.Saminathan

... Appellant

Vs

1.Balan @ Balasubramanian
2.Ramuthay
3.Thanthoni Perumal
4.Suganthi

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C. against the judgment and decree passed in A.S.No.424 of 2004 on the file of the Principal Subordinate Judge, Dindigul dated 20.09.2006 confirming the decree and judgment passed in O.S.No.539 of 1999 on the file of the 2nd Additional District Munsif, Dindigul dated 05.03.2001.

For Appellant : Mr.H.Lakshmi Shankar

For Respondents : Mr.Babu Rajendran



S.A.(MD)No.860 of 2008

JUDGMENT

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The defendant in the suit is the appellant. The suit is for declaration that the plaintiffs were entitled to easementary rights to use the suit property as a pathway for ingress and egress and also to take horses and to take water from the water sources available with the defendant's property. The plaintiffs also sought for injunction restraining the defendant from interfering with the right of the plaintiffs to use the suit property as a pathway and to take water from the water source available with the defendant's property. The suit was decreed by the trial Court and the findings of the trial Court were affirmed by the first appellate Court. Aggrieved by the concurrent findings, the defendant has come by way of this Second Appeal.

2. According to the plaintiffs, the suit property originally belonged to first plaintiff's grandfather Kondaiyan Chettiyar. In the year 1953, there was a partition between Kondaiyan Chettiyar and his sons viz., Perumal, Govindan, Thanthoni Perumal and Azhagarsamy. The suit property was allotted to Govindan's share as 'B' schedule in the partition deed. The plaintiffs are claiming right under the said Govindan. It was



S.A.(MD)No.860 of 2008

claimed by the plaintiffs that the pathway in the suit property is the only access available to the plaintiffs to reach their lands for the purpose of agricultural operation and they have been using the same for so many years by taking cattle like Sheep and Horses for the purpose of agricultural operation. It was also claimed by the plaintiffs that the plaintiffs have been taking water from the water source available in the land of Jeyabalan and Ravi from time immemorial. The defendant purchased the property allotted to the share of Thanthoni Perumal and he also purchased the properties of Jeyabalan and Ravi, in which the water source is situated. After purchase, the defendant attempted to interfere with the plaintiffs' right of pathway and also the right to take water and hence, the plaintiffs were constrained to file a suit for above said reliefs.

3. The defendant filed a written statement and resisted the suit by claiming that the plaintiffs had right to use the suit property only as a pathway and they had no right to take cattle through the suit pathway. He also claimed that the plaintiffs have no right to fetch water as per the plaint averments.

4. Before the trial Court, the first plaintiff was examined as P.W.1



S.A.(MD)No.860 of 2008

and 5 other witnesses were examined as P.W.2 to P.W.6. Five documents were marked on the side of the plaintiffs as Ex.A1 to Ex.A5. The defendant was examined as D.W.1 and no documentary evidence was let in by the defendant. The report and plan of the Advocate Commissioner were 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 plaintiffs established their right to use the suit property as a pathway along with the right to carry cattle and also to take water from the water source available in the property purchased by the defendant from Jeyabalan and Ravi. Consequently, the trial Court granted decree as prayed for. Aggrieved by the same, the defendant preferred an appeal in A.S.No.424 of 2004 on the file of the Principal Sub Court, Dindigul. The first appellate Court concurred with the findings of the trial Court. Aggrieved by the same, the defendant has come by way of this second appeal.

6. At the time of admission, this Court formulated the following substantial questions of law, by an order dated 04.06.2024:

“Whether the Courts below are justified in granting a declaration regarding the right to fetch water in the pond



S.A.(MD)No.860 of 2008

situated in the separate property of the defendant, when there is no recitals in the documents relied on by the plaintiffs with regard to the right to fetch water.”

7. The plaintiffs claimed that the pathway available in the suit property is the only access to reach their lands for the purpose of agricultural operation. Ex.A1 is the partition deed between the plaintiffs' predecessor in interest Govindan and his sharers. A perusal of the same would suggest that the plaintiff's predecessor in interest Govindan was given right to use suit pathway with Mamulright. When the plaintiffs' predecessor is given right to use usual pathway right, it includes right to carry the cattle along with them. Unless the right to carry the cattle is allowed, it may not be possible for the parties to use the pathway as access to reach their agricultural land and carry out the agricultural operations. Therefore, the conclusion reached by the Courts below that the plaintiffs are entitled to carry horses through the suit pathway is based on proper appreciation of evidence available on record and the same requires no interference from this Court.

8. The learned counsel for the appellant vehemently contented that the plaintiffs also seek right to fetch water in a water source situated in the separate property of the defendant. When there is no documentary



S.A.(MD)No.860 of 2008

evidence in support of the right to carry water from another's property, the plaintiffs are not entitled to seek declaration of such a right.

9. Though the plaintiffs in the prayer portion of the plaint sought for declaration of right to take water as an easementary right, in the body of the plaint the plaintiffs claimed right to fetch water as a customary right. The right to fetch water from the third party land can only be claimed as a customary right and it cannot be treated as an easementary right. In order to prove the customary right, the plaintiffs must produce cogent evidence to establish that they have been enjoying such a right from time immemorial. In the case on hand, in the documents filed by the plaintiffs, there is no reference about their right to fetch water from the land of Jeyabalan and Ravi. The oral evidence let in by the plaintiffs with regard to the right to fetch water is not sufficient to come to the conclusion that the plaintiffs have been exercising the said right from time immemorial without any interruption. In Ex.A1-partition deed relied on by the plaintiffs also there is no reference about their right to fetch water from the land of Jeyabalan and Ravi.

10. The learned counsel for the respondent submitted that the



S.A.(MD)No.860 of 2008

vendor of the defendant Jeyabalan was examined as P.W.3 and he deposed that the plaintiffs have got right to fetch water from his land.

Therefore, the learned counsel submitted that the conclusion reached by the Courts below with regard to the right to fetch water from Jeyabalan's land need not be interfered with. A close scrutiny of P.W.3's evidence would suggest that he categorically admitted that he purchased the property in the year 1967 and in his sale deed, there was no reference about the right to fetch water. He further admitted that in the year 1986, he and his brother got the property partitioned and in the partition deed also there was no reference about right to fetch water available to the other parties.

11. In such circumstances, the oral evidence of P.W.1 with regard to the right of the plaintiffs to fetch water cannot be accepted when even according to his admission, in his parent document, there was no reference about the right of the plaintiffs to fetch water. When there is no acceptable evidence available on record to suggest enjoyment of right to fetch water for quite long time so as to claim customary right, the Courts below ought not to have granted a decree in its entirety in favour of the plaintiffs as prayed for. Therefore, this Court is inclined to interfere with



S.A.(MD)No.860 of 2008

the decree granted by the Courts below with regard to the right of the plaintiffs to fetch water from the land of Jeyabalan and Ravi now purchased by the defendant, as plaintiffs failed to establish the customary right pleaded by him. Accordingly, the questions of law framed at the time of admission is answered in favour of the appellant and the second appeal shall stand allowed partly by setting aside the judgment and decree passed by the Courts below with regard to the right of the plaintiffs to take water from the water source available in the land of Jeyabalan and Ravi purchased by the defendant. In other respects, the judgment and decree passed by the Courts below stands confirmed. There shall be no order as to costs.

06.062024

Neutral Citation : Yes/No

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S.A.(MD)No.860 of 2008

To

- 1.The Principal Subordinate Judge, Dindigul.
- 2.The 2nd Additional District Munsif, Dindigul.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.A.(MD)No.860 of 2008

S.SOUNTHAR, J.

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S.A.(MD)No.860 of 2008



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S.A.(MD)No.860 of 2008

06.062024