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S.A.No.1437 of 20



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 13.09.2024

CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A.No.1437 of 2003

Ponpass Mary,
W/o.Joseph,
Muthappu Udayanpatti,
Kannudayampatti Majra,
Manapparai Taluk,
by her POA Joseph.

... Appellant/Appellant/Plaintiff

Vs.

1.Savaraimuthu
2.Soosai Ammal
3.Anthony
4.Irundayam

... Respondents/Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 27.09.2002 passed in A.S.No.106 of 2002, on the file of the Principal District Court, Tiruchi, confirming the judgment and decree dated 27.03.2002 passed in O.S.No.7 of 1997 on the file of the District Munsif Court, Manapparai.

For Appellant

: Mr.C.Mahadevan
for Mr.V.Rajakittu

For RR 2 to 4

: Mr.J.Anand Kumar

: Mr.R.Ragavendran
Government Advocate
(Amicus Curiae)



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JUDGMENT

The Judgments and decrees passed in O.S.No.7 of 1997 on the file of the District Munsif Court, Manaparai and in A.S.No.106 of 2002, on the file of the Principal District Court, Tiruchi, are being challenged in the present Second Appeal.

2.The appellant herein as plaintiff instituted a suit in O.S.No.7 of 1997 on the file of the trial Court against the respondents seeking a declaration that she was entitled to exercise passage right over the suit 'B' schedule property and the consequential relief of injunction restraining the defendants from interfering with the peaceful exercise of right over the suit 'B' schedule property and also for mandatory injunction directing the defendants to dismantle and remove the offending structures shown as 'C' schedule property.

3.For the sake of convenience, the parties are referred to as, as described before the trial Court.



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4. According to the plaintiff, she is the exclusive and absolute owner of the property in 'A' schedule and purchased the same from one Arulanandam under a registered sale deed, dated 16.02.1987. In the suit 'B' schedule property, there existed a cart track in Boosthithi and the plaintiff and her predecessor-in-title have been passing through the suit 'B' schedule property to reach suit 'A' schedule property. She does not have any alternate access to reach the 'A' schedule property from the east-west main street on the south. Further, the plaintiff and her predecessor-in-title have prescribed easementary rights over the suit 'B' schedule property. On 23.12.1996, the defendants put up offending constructions described as 'C' schedule property in the suit 'B' schedule property. Hence, the plaintiff has filed the said suit for the abovestated relief.

5. The defendants had filed a written statement stating that the suit 'B' schedule property is not in bootsthithi and the plaintiff has acquired the right to the suit 'B' schedule property is not admitted. The plaintiff, who has no connection with the suit 'B' schedule property which is being used by the defendants and others, cannot claim any



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relief with respect thereto and the plaintiff has no right over the suit 'C' schedule property also and prayed for dismissal of the suit.

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6.Before the trial Court, on the side of the plaintiff, one Joseph was examined as P.W.1 and Anthonyammal was examined as P.W.2 and Ex.A.1 to Ex.A.4 were marked. On the side of the defendants, one Soosaiammal was examined as D.W.1 and no documents were marked. On the side of the court, Ex.C.1 to Ex.C.3 were marked.

7.On the basis of the rival pleadings made on either side, the trial Court, after framing necessary issues and after evaluating both the oral and documentary evidence, has dismissed the suit.

8.Aggrieved by the Judgment and decree passed by the trial Court, the plaintiff herein as appellant, had filed an Appeal Suit in A.S.No.106 of 2002 on the file of the first Appellate Court.



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9.The first Appellate Court, after hearing both sides and upon reappraising the evidence available on record, has dismissed the appeal and confirmed the Judgment and decree passed by the trial Court.

10.Challenging the said Judgments and decrees passed by the Courts below, the present Second Appeal has been preferred at the instance of the plaintiff as appellant.

11.At the time of admitting the present second appeal, this Court had framed the following substantial question of law for consideration:

'Whether the judgments and decrees of the Courts below are sustainable in law as they have not considered the entire evidence available on record and the relevant provisions of law applicable to the facts of the present case?'



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12.The learned counsel appearing for the appellant/plaintiff would submit that the appellate Court erred in holding that the suit 'B' schedule property as a common pathway would not bind the plaintiff with the easementary right and the predecessor of the plaintiff should have omitted to exercise the right of cart track over the suit 'B' schedule property and has misled the report of the Advocate Commissioner-Ex.C.2. The appellate Court has erroneously held into the question of abandonment in the absence of any plea and the plaintiff has not established long user for over 20 years inspite of specific recitals in Ex.A.2 and abandoning the right by recitals in Ex.A.1 and prayed for allowing the Second Appeal.

13.The learned counsel appearing for the respondents/defendants reiterated the averments made in the plaint and the appeal and submitted that the Courts below had rightly dismissed the suit.



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14.Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents and also perused the records carefully.

15.According to the plaintiff, she is the exclusive and absolute owner of the property in 'A' schedule and purchased the same from one Arulanandam under a registered sale deed, dated 16.02.1987. In the suit 'B' schedule property, there existed a cart track in Boosthithi and the plaintiff and her predecessor-in-title have been passing through the suit 'B' schedule property to reach suit 'A' schedule property. She does not have any alternate access to reach the 'A' schedule property from the east-west main street on the south. Further, the plaintiff and her predecessor-in-title have prescribed easementary rights over the suit 'B' schedule property. On 23.12.1996, the defendants put up offending constructions described as 'C' schedule property in the suit 'B' schedule property.

16.According to the defendants, the suit 'B' schedule property is not in bootsthithi and the plaintiff has acquired right the suit 'B' schedule property is not admitted. The plaintiff, who has no



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connection with the suit 'B' schedule property which is being used by the defendants and others, cannot claim any relief with respect thereto and the plaintiff has no right over the suit 'C' schedule property also and prayed for dismissal of the suit.

17.The trial Court was of the view that the plaintiff miserably failed to establish either the easement of necessity or prescriptive easement as pleaded by her and the common pathway on the east of the 'A' schedule property in the sale deed-Ex.A.2 does not *ipso facto* confer any right on the plaintiff and based on Ex.C.1, the trial Court has come to the conclusion that there is no pathway in boosthithi.

18.The Appellate Court was of the view that the plaintiff has to establish the enjoyment of 'B' schedule property for an unbroken period of 20 years to acquire the right of easement by prescription. The offending structure described as 'C' schedule property in the 'B' schedule property and Ex.C.1 would show that the enjoyment by the predecessor-in-title of the plaintiff got extinguished on account of the non-enjoyment of the suit 'B' schedule property for twenty long



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years. Therefore, the claim for prescriptive easement also does not stand for scrutiny and the Appellate court held that the plaintiff has failed to establish her claim for easement of necessity or easement by prescription.

19. When the matter came up for hearing on 14.08.2024, this Court directed the learned Government Advocate, who was appointed as an amicus curiae, to measure the suit schedule property and file a report.

20. Pursuant to the said order, dated 14.08.2024, the learned Government Advocate filed a report along with sketch, wherein the property named as 'B' schedule property has been in possession and enjoyment of one Thomas Udayar in Survey No.216/1D and in that property there exists a small lane which is a five feet breadth and the same has been enjoyed by the said Thomas Udayar and he has not been made as a party to the proceedings and Arockiammal, who is the wife of the first defendant-Savarimuthu, is the owner in Survey No.216/1E and claimed right over the place of Arockiammal. It is found that only Thomas Udayar is in possession and enjoyment of Survey



No.216/1D and in that area, there is no such easementary right or prescriptive right in continuous enjoyment of the plaintiff has been proved. It is seen that the plaintiff was not using the said pathway and the plaintiff has acquired the property in Survey No.216/1B and the same is in 'L' shape and the said plaintiff has acquired a right of way in her own land to reach east-west street on the south side.

21.On perusal of the materials available on record, it is seen that the plaintiff has stated that as per Ex.A.2-sale deed having in the name of Arulanandham, the predecessor-in-title of the plaintiff would establish that the plaintiff has acquired 'A' schedule property alone from one Arulanandam. With regard to 'B' schedule property and the alleged offending construction detailed as 'C' schedule property are not there in the sale deed filed by her and the pathway in dispute described as 'B' schedule property was referred to as a common pathway, but there is no evidence except the interested testimony of P.W.2 that the pathway has been enjoyed by the plaintiff also after the purchase of 'A' schedule property in the year 1987.



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22.The Advocate Commissioner's report Ex.C.1 shows that there was no pathway in existence as such in boosthithi and the said alleged offending construction was made about 9 years ago. It is also seen that the parent document Ex.A.2 stands in the name of Arulanandham and the said Arulanandham purchased the 'A' schedule property with the boundary of the common pathway on the east. Whether the common pathway has been used by the vendor of the said Arulanandham for the purpose of reaching the property in 'A' schedule property was not clearly referred to in the sale deed-Ex.A.2 and the plaintiff purchased the property describing the eastern boundary as only a pathway. The word 'common' employed in the description under Ex.A.2 was completely taken away in the description found in Ex.A.1.

23.That being the case, the common pathway as stated in 'A' schedule property was put to use by her family for taking carts to reach 'A' schedule property is not proved, as the Commissioner has stated that 'B' schedule property was not there and not in the usage of the parties concerned. It is also stated that the offending structure noted down by him had been constructed about nine years ago and



with the existence of the offending structure detailed as 'C' schedule property, it is clear that the plaintiff could not have used 'B' schedule property as a pathway to take the cart. It is also further seen that in 'B' schedule property, the plaintiff has got no right and mere description in the sale deeds would not give any right of using the said pathway and if at all there was any pathway meant for taking carts for quite a long time, as alleged by the plaintiff, the survey department would have definitely marked such a pathway in the F.M.B sketch. No F.M.B. sketch is forthcoming to establish the existence of the pathway as on date. It is an admitted version of P.W.1, the power of attorney holder of the plaintiff, that there is direct access from the street which is located on the south of 'A' schedule property. There is no question of giving an easement of right of necessity arises for the plaintiff and it is also found that even if it is a common pathway, the same has not been used as long many years and it is also further seen that the enjoyment of 'B' schedule property for a period of twenty years has not been proved by the plaintiff and the same is negated against the plaintiff.



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24.It is also seen that the said claim made by the plaintiff against Arockiammal has been proved to be false, as the property in which she is in possession has been occupied by one Thomas Udayar and he has also been issued with appropriate patta by the revenue authorities and the said Arockiammal in Survey No.216/1E has got nothing to do with the said pathway and the defendants have been unnecessarily dragged into this proceeding for so long many years and there is no merit in the case of the plaintiff and the same has to be rejected and with the help of the Government Advocate, the said area was measured and accordingly, it is found that the plaintiff is not having any right over 'B' schedule property and the prayer of declaration and consequential injunction are also negatived by the courts below are confirmed.

25.As the learned counsel appearing for the plaintiff sought liberty to file a fresh suit against Thomas Udayar, who is not a party before this Court, this Court is not inclined to accept the same, but it is left open to the party to work out her remedy in the manner known to law.



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26.From the above, this Court is of the view that the Judgments and Decrees of the Courts below are accompanied with sufficient reasons, in which, this Court does not want to make any interference. Accordingly, the substantial question of law framed is ordered as against the plaintiff and in favour of the defendants.

27.Since the learned Government Advocate has assisted this Court, he is entitled to a fee for appearing in this case.

28.In the result, the Second Appeal stands dismissed. No costs.

13.09.2024

Index : Yes/No
Internet : Yes/No
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To

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1.The Principal District Court,
Tiruchi.

2.The District Munsif Court,
Manaparai.

3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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V.BHAVANI SUBBAROYAN, J.

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Judgment made in
S.A.No.1437 of 2003

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