

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.02.2011

Coram:

THE HONOURABLE MR.JUSTICE G. RAJASURIA

S.A.No.486 of 2008 &
M.P.No.1 of 2008

1. P.Dhanakodi
2. P.Perumal Gounder
3. P.Ammayee ... Appellants (Defendants)

vs.

Alamelu .. Respondent (Plaintiff)

This Second Appeal is focussed as against the judgment and decree passed in A.S.No.16 of 2007 dated 26.09.2007 on the file of Sub Court, Mettur, Salem District reversing the judgment and decree passed in O.S.No.656 of 1996 on the file of District Munsif Court-cum-Judicial Magistrate, Omalur, Salem District dated 31.01.2007.

For appellants : Mr.A.Sundaravadhanan

For respondent : Mr.V.Sekar

JUDGMENT

This Second appeal is focussed by the original defendants animadverting upon the judgment and decree dated 26.09.2007 passed in A.S.No.16 of 2007 by the Sub Court, Mettur, Salem District, reversing the judgment and decree of the District Munsif Court-cum-Judicial Magistrate, Omalur, Salem District in O.S.No.656 of 1996. The parties are referred to hereunder according to their litigative status and ranking before the trial Court.

2. A 'resume' and recapitulation of the relevant facts absolutely necessary and germane for the disposal of this Second Appeal would run thus:

(a) The plaintiff filed the suit seeking the following reliefs:

"(i) To pass a decree of permanent injunction restraining the defendants and their men from in any way obliterating or disturbing the cart track on the western side of S.No.76/7B, iteri and road (suit properties) from the enjoyment of the plaintiff.

(ii) For costs" (extracted as such)

(b) The defendants filed the written statement resisting the suit.

(c) Whereupon issues were framed by the trial Court.

(d) The plaintiff-Alamelu examined herself as P.W.1 along with P.Ws.2 to 5 and Exs.A1 to A6 were marked. On the side of the defendants Ex.B1 was marked. Exs.C1 to C3 were marked as Court documents.

3. Ultimately the trial Court dismissed the suit as against which the plaintiff preferred appeal. Whereupon, the appellate Court reversed the judgment and decree of the trial Court.

4. Being aggrieved by and dissatisfied with the judgment and decree of the first appellate Court, this Second Appeal has been filed on various grounds inter alia to the effect that the first appellate Court was not justified in reversing the reasoned judgment of dismissal of the suit of the plaintiff; the trial Court clearly and categorically pointed out that to the east of the plaintiff's and the defendants' properties there is an 'itteri', so to say pathway and that could be used by both to have ingress and egress to their respective lands and in such a case, the plaintiff is unjustifiably claiming another right of pathway over the defendants' land. The suit was also bad for want of a prayer of declaration of title. Over and above that there should have been a prayer for mandatory injunction when the facts as per plaintiff were to the effect that the defendants demolished the cart track.

5. Accordingly, suggesting the following substantial questions of law the defendants filed this Second Appeal :

"(a) Has not the Lower Appellate Court committed an error of law to the fact and circumstances of the case, in not dismissing the Appeal, in view of the fact that the suit is not maintainable without a prayer for declaration and mandatory injunction when the suit cart track is admittedly not in existence.

(b) Has not the Lower Appellate Court committed an error of law to the fact and circumstances of the case, in not dismissing the suit, in view of the admission made by the appty is the best form of evidence.

(c) Has not the Lower Appellate Court committed an error of law to the fact and circumstances of the case, in allowing the Appeal on the basis of the reasons which have not been raised by the Respondents and pleaded either in pleading or in her evidence.

(d) Has not the Lower Appellate Court committed an error of law to the fact and circumstances of the case, in reversing the well merited Judgment and Decree of the Trial Court without reversing the findings and reasoning.

(e) Has not the Lower Appellate Court committed an error of law to the fact and circumstances of the case, in reversing the Judgment and Decree of the Trial Court on issues which have not been framed and raised before the Trial Court.

(extracted as such)

6. My learned Predecessor framed the following substantial questions of law:

(1) Has not the Lower Appellate Court committed an error of law to the fact and circumstances of the case, in not dismissing the Appeal, in view of the fact that the suit is not maintainable without a prayer for declaration and mandatory injunction when the suit cart track is admittedly not in existence.

(2) Has not the Lower Appellate Court committed an error of law to the fact and circumstances of the case, in allowing the Appeal on the basis of the reasons which have not been raised by the Respondents and pleaded either in pleading or in her evidence ."

7. Heard both sides.

8. Both the substantial questions of law are taken together for discussion as they inter linked and inter woven with each other.

9. The gist and kernel of the argument of the learned counsel for the appellants/defendants would run thus:

(a) The first appellate Court should have taken into consideration the fact that there is an "itteri" i.e. pathway existing to the east of the lands of both the plaintiff and the defendants.

(b) The purpose of pathway is to have ingress and egress to the lands concerned. Once the itteri is found existing to the east of the plaintiff's and the defendants' lands, the question of the plaintiff once again claiming another right of pathway over the defendants' land by no stretch of imagination or by phantasmagorical thoughts would not arise and that was why the trial Court adhering to the principles of justice appropriately and appositely decided the lis and dismissed the suit. However, the first appellate Court took a hyper technical view as though in the sale deed executed by the defendants in favour of the plaintiff, right to pathway was granted as claimed by the plaintiff and whereupon alone unjustifiably and wrongly the first appellate Court decided the lis warranting interference in the Second Appeal.

Accordingly, the learned counsel for the appellants/defendants would pray for setting aside the judgment and decree of the first appellate Court.

10. Piloting the arguments on the side of the respondent/plaintiff and in a bid to torpedo and pulverise the arguments as put forth and set forth on the side of the appellants/defendants, the learned counsel for the respondent/plaintiff would submit thus:

(a) Ex.A1 is the sale deed dated 20.04.1994 wherein a pathway is found specified and it is anterior in point of time to the sale deed Ex.B1 executed by the same vendor of the plaintiff. As such priority is attached to Ex.A1.

(b) The common vendor before parting with his right over the remaining part of land bearing Survey No.76/7B in favour of the defendants, while selling the property situated in S.No.76/7A and part of S.No.76/7B, granted the right of easement in favour of the plaintiff as per Ex.A1, the sale deed dated 20.04.1994, whereby such easement right got vested absolutely.

(c) The Commissioner's report also refers to 4-1/2 feet pathway situated on the western side of the defendants' property and in such a case, absolutely there is no rhyme or reason on the part of the defendants in finding fault with the judgment and decree of the first appellate Court.

(d) He would also incidentally submit that when the sale deed is clear, he was not duty bound to pray for his easementary right and for that matter the question of praying for mandatory injunction would not arise for the reason that only the right of ingress and egress through the pathway alone is contemplated.

Accordingly, the learned counsel for the respondent/plaintiff would pray for the dismissal of the Second Appeal.

11. I fumigate my mind with the following decisions of the Hon'ble Apex Court:

(i) (2006) 5 Supreme Court Cases 545 - HERO VINOTH (MINOR) VS. SESHAMMAL.

(ii) 2008(4) SCALE 300 - KASHMIR SINGH VS. HARNAM SINGH AND ANOTHER.

(iii) 2009-1-L.W.1 - STATE BANK OF INDIA & OTHERS vs. S.N.GOYAL

(iv) (2011) 1 SCC 673 [VIJAY KUMAR TALWAR vs. COMMISSIONER OF INCOME TAX, DELHI]

A plain poring over and perusal of those decisions would highlight and spotlight the fact that the Second Appeal cannot be entertained by the High Court as per Section 100 of CPC unless there is any substantial question of law is made out from the available materials on record.

12. Indubitably and indisputably, and at any rate undeniably, the facts would run thus:

One and the same common vendor executed Ex.A1 and Ex.B1. Ex.B1 dated 02.05.1994 is latter in point of time. The vendor while executing Ex.A1, in the schedule of property set out thus:

"சேலம்ரிடி தாரமங்கலம்சப்ரிடி ஒமலுர் தாலுக்கா எலவம்பட்டி
கிராமத்தில் எங்களில் 1 லக்கமிட்டவருக்கு கிரயமுலமாயம்
மற்றவர்களுக்கு பிதுராஜிதமாய் பாத்தியப்பட்டு சுவாதீன
அனுபவத்தில் இருந்துவரும் கவர்மெண்ட் சர்வே 76/7ஏ ப.உறக்டர்

0.71.0க்கு தீ.நீ.3.95 இதற்கு ஏக்கர் 1.75 சென்ட் நிலம் பூராவிலும், சர்வே 76/7பி ப.உெற.0.76.0க்கு தீ.நீ.4.27 இதற்கு ஏக்கர் 1.88 ஆகிய இரண்டு நெம்பர்களிலும் மொத்தம் ஏக்கர் 3.63 சென்ட் நிலத்தில் இதில் பொதுவில் பேர் பாதி வடபுறம் 1.81-1/2 சென்ட் நிலம் பூராவக்கும் சக்குபந்தி .

கிருஷ்ணன் பாகத்திற்கு ... வடக்கு

இட்டோரிக்கும் பொது தடத்திற்கும் ... மேற்கு

ஜோதிமணி சின்னதம்பி இவர்கள் நிலத்திற்கும் ... தெற்கு

நாதியான் நிலத்திற்கு ... கிழக்கு

இதன் மத்தியில் டை 1.81-1/2 சென்ட் நிலம் பூராவும் டை கிரய நிலத்திற்கு சர்வே 76/7பி நெம்பரில் மேற்குபுறமாக கால்நடைகள் வண்டி வாகனாதிகள் போகவர மாழில் வழிநடைபாத்தியமும் மற்றும் சகலவித பாத்தியமும் இந்த கிரயத்திற்குச் சம்மந்தப்பட்டது. இந்த சொத்து எலவம்பட்டி கிராம பஞ்சாயத்து எல்லைக்குட்பட்டது."

It is therefore pellucidly and palpably, obviously and axiomatically clear that the owner of the property bearing S.No.76/7B gave by grant in the form of sale deed Ex.A1 the right of ingress and egress to the property bearing S.No.76/7A which was sold as per Ex.A1 by him in favour of the plaintiff. In such a case, it cannot be stated that the plaintiff is having no right of easement by grant as per the deed Ex.A1 over the western portion of the defendants' property. Since in the sale deed itself unambiguously and unequivocally the common vendor set out the relevant facts that the plaintiff shall have the right of easement over the said property referred to supra, the question of prayer for declaration of title would not arise. Furthermore, the defendants have not disputed the versions in the said Ex.A1 and there was no counter claim also praying for declaring that the said incorporation of the version in Ex.A1 was against law or void etc. Hence, I am of the view that this suit cannot be treated as bad for want of prayer for declaration.

13. The question of prayer for mandatory injunction would not arise because no Tar road on any other road is contemplated. What is contemplated in Ex.A1, is only a right of ingress and egress to the plaintiff's property under Ex.A1 through the said cart track and nothing more is contemplated. In such a case the defendants should allow ingress and egress through that cart track to the

plaintiff's land and nothing more is required. The question of ushering in the concept of mandatory injunction in my opinion is totally untenable. The first appellate Court giving importance to Ex.A1 and the genuineness of the averments found therein recorded its detailed finding reversing the finding of the trial Court which is obviously wrong. The trial Court even went to the extent of misconstruing as though the suit property is the property of the plaintiff. In stricto sensu here, the disputed property, namely the suit property, is only the cart track which is situated to the western portion of the defendants' land and misconstruing as though the itteri, so to say the pathway situated to east of the defendants' land also was in the contemplation of the subject matter of the suit, the trial Court decided the lis. Once the parties in the cold light of the day agreed to have certain arrangements, then the Court has to enforce their contractual obligations if they are not illegal or perverse or void ab initio. There is no question of the Court incorporating its own view in rendering the judgment in a case based on the contractual rights and liabilities. The trial Court virtually was very much carried away by the fact that the itteri is admittedly situated to the east of the plaintiff and defendants' land and the first appellate Court being the last Court of fact after correctly appreciating the facts reversed the said finding warranting no interference in the Second Appeal.

14. Accordingly, the substantial question of law No.1 is decided to that effect that the Lower Appellate Court was justified in not dismissing the Appeal, in view of the fact that the suit is not maintainable without a prayer for declaration and mandatory injunction.

15. The substantial question of law No.2 is decided to the effect that the Lower Appellate Court was justified in allowing the Appeal on the basis of the evidence available before it.

16. In the result, the Second Appeal is dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

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Sd/-

Asst.Registrar.

/true copy/

Sub Asst.Registrar.

gms

To

1. The Sub Court, Mettur, Salem District

2. The District Munsif Court-cum-Judicial Magistrate,
Omalur, Salem District

1 cc to Mr.d. Shivakumaran, Advocate, Sr. 13913

1 cc to MR.a. Sundaravadhanam, Advocate, Sr. 14328

S.A.No.486 of 2008

SV (CO)
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