



S.A.No.81 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.02.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No. 81 of 2021
&
C.M.P. No. 1762 of 2021

Natarajan

...Appellant

Vs.

1.Gurusamy Gounder

2.Thangavel

...Respondents

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 31.01.2020 made in A.S.No.27 of 2017 on the file of the Subordinate Judge, Gopichettypalayam confirming the Judgement and Decree dated 24.10.2017 and made in O.S.No.74 of 2009 on the file of the District Munsif, Gopichettypalayam.



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For Appellant : Mr. N.Ishtiaq Ahmed

For Respondents : Mr. P.R.Bala Subramanian.

J U D G M E N T

The plaintiff who has unsuccessfully contested a suit for declaring that the plaintiff is entitled to a suit pathway and for an injunction restraining defendants from interfering with the peaceful possession and enjoyment of this common pathway is the appellant before this Court. The facts which have ultimately culminated in the filing of this Second Appeal is herein below set out and the parties are referred to in the same ranking as before the Trial Court.

2. The plaintiff had filed the suit O.S.No.74 of 2009 on the file of the District Munsif, Gobichettipalayam for the relief that has been set out herein above. It is the plaintiff's case that the property measuring an extent of 1.28 cents comprised in new S.No.265/1, old S.No.12, Arakkankottai Village, belongs to the plaintiff under a registered sale



deed dated 31.03.1968. South of this property, the plaintiff is entitled to the property comprised in S.No.265/3, which is the plaintiff's ancestral property. South of these lands, a portion has been sold as a house site leaving behind an extent of 60 cents.

3. The plaintiff would submit that he is enjoying this remaining extent of 60 cents together with agricultural lands in S.No.265/1. The plaintiff has dug a well and has put up residential house in S.No.265/1. The suit property comprised in S.No.265/1 together with the well belonged to the son of Nanjappa Gounder, namely, Ramana Gounder and his children. The 1st plaintiff had purchased the western portion of S.No.265/1 under a sale deed dated 31.03.1968. On the very same day the said Ramana Gounder and his family had sold the eastern portion of S.No.265/1 to one Kaliyanna Gounder and his family. The possession of both these portions were taken over by the respective purchasers.

4. It is the contention of the plaintiff that to reach these lands access was through North South Pathway which is coloured green in



the suit plan, which proceeds north south and then turns west and hits the boundary of the 1st plaintiff's land. The portion described as ABCD in the plaint plan and coloured red was being enjoyed by the plaintiff, his predecessors and the defendants for the last 40 years as a pathway for taking carts, tractors, lorries etc. The pathway proceeds near the defendants land in S.No.263 and also lands of a third party, one Suppanna Gounder, in S.No.266. This land was being used by all of them from time immemorial.

5. While so, the defendants have annexed the ABCD pathway along with their lands and they had put up Iron fencing at the points CD and a gate at points BC. They had also stored stone pillars, barbed wires etc., inside this property. While the suit was pending, the 1st plaintiff had passed away on 28.03.2012 and the 2nd plaintiff being his only son inherited the same. The 1st plaintiff had also executed a registered will in favour of the 2nd plaintiff.



6. The plaintiff would submit that the defendants have no right to deny access to the plaintiff to the pathway right upto his house. The plaintiff would state that on 17.03.2009, the defendants had attempted to clandestinely put up the fencing which was successfully prevented by the plaintiff. Therefore, the plaintiff has come forward with the suit in question.

7. The 1st defendant had filed a written statement at the outset denying the existence of the disputed pathway. The defendants had denied that the plaintiff had an access to use the portion coloured red in the plaint plan which is shown as pathway connecting S.No.265/2 & S.No.263. Infact the defendant has denied the very pathway which is coloured red in the plaint plan.

8. The defendant would submit that this pathway which is described as ABCD belongs to the defendants exclusively. Neither the plaintiff nor any other third party have a right over the same. The pathway which runs to the eastern boundary in S.No.265/2 belongs



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exclusively to the defendants. To reach the plaintiff's property from Sathi - Athani main road access was through North bound pathway which proceeds through the lands in S.No.265/2, 265/1 at the Southern tip, north of the lands comprised in S.No.265/3. The pathway proceeds westwards towards the plaintiff's house upto the well. This is the only pathway that was in existence.

9. The defendant would submit that the old survey number of these lands was S.No.12. The defendant would refer to the parent document, namely, sale deed and would submit that he and his predecessors in title have been enjoying the suit pathway without any third party interference. His father, Chinna Marappa Gounder, had under a sale deed dated 02.06.1943 purchased the properties along with the right of pathway. Therefore, the defendants sought for the dismissal of the suit in question.



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10. The learned District Munsif, Gobichettipalayam had framed the following issues:

“1.வாதிகள் கூறவதுபோல் தாவா வண்டிப்பாதையை வாதிகள் அமைதியான முறையில் அனுபவம் செய்து வந்துள்ளார்களா?

2.வாதிகள் கோரும் நிரந்தர உறுத்துக்கட்டளை பரிகாரம் வாதிகளுக்கு கிடைக்கத்தக்கதா?

3.வாதிகளுக்கு கிடைக்கக்கூடிய இதர பரிகாரங்கள் என்ன?

Additional Issue:

வழக்கு அவசிய தரப்பினரே சேர்க்காததால் பாதிக்கப்பட்டுள்ளதா?

11. The plaintiff had examined himself as P.W.1 and four other witnesses. Ex.A1 to Ex.A.17 were marked on the side of the plaintiff. The 1st defendant had examined himself as D.W.1 and one Pazhanisamy as D.W.2 and marked Ex.B.1 and Ex.B.2. The Advocate



Commissioner's report and plan have been marked as Ex.C.1 and Ex.C.2.

12. The Trial Court on considering the evidence both oral and documentary had dismissed the suit.

13. Challenging the said dismissal, the plaintiff had filed A.S.No.27 of 2017 on the file of the Sub Court, Gobichettipalayam. The Lower Appellate Court also confirmed the Judgement and Decree of the Trial Court and dismissed the appeal. Against the said dismissal, the plaintiff is before this Court.

14. Mr. N.Ishtiaq Ahmed, learned counsel appearing on behalf of the plaintiff would submit that both the Courts below have totally ignored the admission of the defendant. In his written statement, the defendant would state as follows:

“சிவப்பு வண்ணமிட்ட வண்டித்தடத்தில்
கிழமேல் வண்டித்தடம் வரைபடத்தில் காட்டியுள்ளது



போல் புதிய க.ச.265/1 மற்றும் 265/2 ஆகிய
பூமிகளின் வடகோட்டிலும், முிரதிவாதிகள் பூமியாகிய
புதிய க.ச.263 மற்றும் பு.க.ச.266ல் ஆகிய இரு
காலைகளிலும் சேர்ந்து தென்புறம் கடைசி
பகுதியிலும் தொன்றுதொட்டு இருந்து வருகிறது
என்பது சரியே. பு.க.ச.266 காலையில் இந்த
பிரதிவதிக்கும் பங்கு பாத்தியம் உள்ளது.

15. The learned counsel would submit that in the light of this admission, the Trial Court ought to have decreed the suit. He would further draw the attention of the Court to the fact that a mere perusal of the plaint plan would clearly show that the pathway is a contiguous one and the portion coloured red was part of the common pathway coloured green. Therefore, he would submit that these factors have been totally ignored by the Courts below.



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16. Per contra, Mr.P.R.Bala Subramanian, learned counsel appearing on behalf of the defendants would submit that nowhere has the defendant accepted that there is a pathway which is shown in the plaint plan and coloured red. He would further submit that Ex.A.1, the sale deed under which the plaintiff purchased the property does not refer to this pathway. On the contrary, it only refers to North South pathway and the recitals are not found in any of the other documents filed on the side of the plaintiff and it is only in the mortgage deed Ex.A.5 that there is some reference to this pathway. However, the same has been executed after the suit has been filed and therefore is a self serving document. The Courts below have clearly held that the plaintiff has failed to prove the existence of this pathway and his right to the same.

17. The above Second Appeal was admitted on the following Substantial Questions of Law:

“1.Whether the Courts below have not erred in law by shifting the burden of proof on the appellant when the



defendant/respondent has categorically admitted about the existence of the common cart track in paragraph 5 of the written statement and chief examination of DW1 coupled with admission of DW2?

2. Whether the Courts below have not erred in law in not considering Exs.A8 and A16 which are Government records and which clearly speaks about the existence of common passage?

18. Heard the learned counsels and perused the records.

19. As rightly pointed out by the learned counsel for the defendants, the contention of the learned counsel for the plaintiff that the defendant has admitted the existence of this suit pathway is totally misconceived. A reading of the entire paragraph would indicate that the defendant has in clear and categorical terms denied the existence of this common pathway and the fact that it has been used by the plaintiff and his predecessors in title for over 40 years. On the contrary the



contention of the defendant is that the pathway that is existing is not a common pathway.

20. The plaintiff has come to the Court stating that he has a right to the suit pathway under her sale deed. The document filed by them, namely, Ex.A.1 would describe subject property as follows:

“அரக்கன்கோட்டை கிராமத்தில் க.ச.12 நெ.பு.ஏ.5.17 இதில் வடபுறத்தில் மேற்புறம் அதாவது 11 நெ. காலைக்கும் (கி), 54 நெ. காலைக்கும் (தெ) இதே காலையில் நாளது தேதி நாங்கள் காளியண்ண கவுண்டர் வகையறாவுக்கு கிரையத்துக்கு கொடுத்த பங்குக்கும் (மே), இதே காலையில் தங்களுடைய பங்குக்கும், குருசாமி கவுண்டர் பங்குக்கும் (வ) இதன் மத்தியில் பு.ஏ.1.22 1/2 உள்ள சாகுபடி பூமியும், இதே காலையில் கிணற்றுக்கு கிழபுறம் கிழமேலாகவும், காளியண்ண கவுண்டர் வகையறாவுக்கு கிரையம் செய்த சாகுபடி பூமிக்கு கிழபுறம் தென்வடலாகவும் உள்ள வண்டிபாதையின் விஸ்தீரணம் ஏ 0.11. இதில் இந்த கிரையத்துக்கு சம்பந்தப்பட்டது. பொதுவில் பாதி ஏ.0.5 1/2 ஆக மொத்தம் பு.ஏ.1.28 உள்ள பூமியும், மேற்படி காலை து. கிணற்றில் வடபுறம் பாதியில்



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பொதுவில் பாதியும், வடபுறமுள்ள கிழக்குப் பார்த்த ஒரு துலையும், மேற்படி கிணற்றில் வைத்துள்ள மின்சார மோட்டர் பம்பு செட்டில் பொதுவில் 1/4 பங்கும், மாவடை, மரவடை சகிதம்.

This pathway is the one that is shown in the plaint plan in green colour proceeding westwards through S.No.265/3 and 265/2 then turning North upto the point CB.

21. Therefore, both the Courts below on considering documents have come to the conclusion that the plaintiff has failed to prove his case. I see no reason to interfere with the same. Consequently, the substantial question of law no.1 is answered against the plaintiff. No arguments were advanced with regard to substantial question of law no.2. However, since the specific case of the plaintiff is that the pathway right has been granted to them under their sale deed, Ex.A.1 and this Court has held against the plaintiff, the Government records Ex.A.8 and Ex.A.16 will not give them a better right. This question of law is also answered against the plaintiff.



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22. In the result, the Second Appeal is dismissed. Consequently,
the connected Civil Miscellaneous Petition is closed. No costs.

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Index : Yes/No
Internet : Yes/No
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To

1.The Subordinate Judge,
Gopichettypalayam.

2.The District Munsif,
Gopichettypalayam.



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