

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:23.09.2015

CORAM:

THE HON'BLE TMT.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.140 of 2009

and

M.P.No.1 of 2009

Janaki ...Appellant/Plaintiff

-vs-

1. Banda Munisami Naidu (Deceased)

2. M.Venkatesan

3. M.Murugan

(R2 and R3 recorded as LRs
of the deceased R1 vide order
of Court dated 09.09.2015 made
in memo dated 31.08.2015)

4. Subramani

5. Kubendran

...Respondents/Defendants

Appeal under section 100 of Civil Procedure Code against the judgment and decree dated 23.09.2008 made in A.S.No.53 of 2004 on the file of the Principal Sub Court, Krishnagiri, confirming the judgment and decree dated 22.03.2004 made in O.S.No.64 of 2001 on the file of the District Munsif Court, Krishnagiri.

For Appellant : Mr.P.Mani

For Respondents 1 to 3 : Mr.S.N.J.Hariharan
for Mr.V.Nicholas

JUDGMENT

The plaintiff who had lost before the Courts below, has filed this Second Appeal, challenging the decree, refusing to grant the relief of declaration of title and permanent injunction.

2. The dispute revolves around the right of way in a form of cart-track with the width of 15 links over the lands of the defendants to reach 'A' schedule lands. 'A' schedule lands were purchased by the plaintiff for a valuable

consideration. The said 'A' schedule lands and the adjacent lands lying on the North of the same, belonged to one Pachamuthu and his wife and mother. The said land owners sold the lands forming part of 'A' schedule, under a registered sale deed dated 12.01.1960 in favour of the first defendant's mother. However, the right of way in the form of cart-track over the lands sold in favour of the first defendant's mother Pappammal, was retained by the vendors. In the said sale deed dated 12.01.1960, it is clearly mentioned that the vendors, Pachamuthu and others retained 'B' schedule cart-track for their enjoyment of the lands. Thereafter, the said Pachamuthu's wife, Kuttiammal sold 'A' schedule lands with the right of way over the cart-track in favour of one Seenappa Naidu, under two sale deeds in the year 1973. The said Seenappa Naidu, in turn, sold 'A' schedule lands along with the right of way, in favour of the plaintiff on 25.01.1999. Thus, the plaintiff claimed right of way over 'B' schedule property, namely, cart-track to reach 'A' schedule property.

3. The suit was contested by the defendants. According to the defendants, 'A' schedule properties were not covered under the sale deed dated 18.06.1973. The plaintiff had fraudulently obtained the sale deed under Ex.A1 by including the excess lands. Ex.B1 is the sale deed executed by Pachamuthu and others, in favour of Seenappa Naidu for an extent of 1.36 acres, which is forming part of Survey No.723/2. In the said sale deed, there is no right of pathway as alleged by the plaintiff in 'B' schedule property. It is contended further that even as per the sale deed in the year 1960, which is in favour of the plaintiff's mother, the same had clearly restricted their right to alienate the impugned pathway. According to the defendants, there is no pathway at all, as claimed by the plaintiff. The first defendant got his right in the suit properties, after the death of his mother, namely, Pappammal, who had purchased the property in the year 1960. The first defendant also had dug a Well in the said land and built a house therein. The plaintiff has got no manner of right or title in the suit property. Hence, the defendants prayed for dismissal of the suit.

4. The Courts below had concurrently held that the plaintiff has not established her right or title over the suit property.

5. When the Second Appeal was listed for admission on 16.02.2009, only notice was ordered and no question of law was framed.

6. The contention of the learned counsel for the appellant is that the cart-track reserved in Ex.A2 sale deed is for the beneficial enjoyment of the lands and that the land owners have been enjoying the said right and the plaintiff is also entitled to use the cart-track. It is the contention of the learned counsel for the appellant that the plaintiff's vendor's vendor and the plaintiff's vendor as well as the plaintiff exercised their right to cart-track in the suit properties and the said right of cart-track runs with the lands enjoyed by them.

7. The question now that has to be decided in this Second Appeal is as to whether the plaintiff has got right over the suit cart-track.

8. The suit schedule properties originally belonged to Pachamuthu and others, lying North of 'A' schedule properties, which were sold under Ex.A.2 on 12.01.1960. At the time of sale, the vendors had retained 'A' schedule suit lands and the right of way in the form of cart-track with the width of 15 links over the suit lands. In the said sale deed dated 12.01.1960, it is categorically mentioned that the vendors have the right of way over 'B' schedule cart-track. Subsequently, the said Pachamuthu's wife sold away 'A' schedule properties with the right of way over the cart-track in favour of Seenappa Naidu, under two sale deeds, one, executed in the year 1992 and the other document was executed in the year 1973. The said Seenappa Naidu is the vendor of the plaintiff. He had sold 'A' schedule properties on 25.01.1999 along with the right of cart-track. The contention of the respondents/defendants is that in the year 1999, after Ex.A1 sale deed, the plaintiff had surreptitiously included an excess extent of lands as if they had a right of cart-track. In Ex.B1 sale deed, which was executed by Pachamuthu and others in favour of the plaintiff's vendor, in respect of an extent of 1.36 acres, no right of pathway was given as alleged by the plaintiff. The plaintiff also deliberately had not produced the said sale deeds. The reason for suppressing the production of the said sale deeds by the plaintiff was that even as per Ex.A2, the vendors, Pachamuthu and others had restricted their right to alienate the impugned pathway.

9. A perusal of the document under the title flown to the plaintiff shows that the vendor of the plaintiff, Seenappa Naidu purchased 'A' schedule properties, as per Ex.A3 from Pachamuthu and others. Under Ex.B.1, another document, by which, the said Seenappa Naidu purchased the property from Pachamuthu and others in which the said cart-track is not

included. As per the above said sale deeds, no right was given to the pathway of 'B' schedule property. However, the appellant/plaintiff claims the right of way through cart-track mentioned as 'B' schedule property under a registered sale deed dated 25.01.1999, which was marked as Ex.A1. 'B' schedule property was not given under Ex.B1.

10. As stated earlier, the plaintiff had not marked the particular document before the Court for the simple reason that no right was given to the plaintiff's vendor under Ex.B1. If any right over the suit cart-track was given to the plaintiff's vendor in Ex.B.1, the same would have found place in Ex.A1, under which, the plaintiff claims title. In fact, 'B' schedule property was shown as Western boundary of the property conveyed. In Ex.A1, under which the plaintiff claims right, there is no specific recital about the right over 'B' schedule property. Therefore, neither the plaintiff nor his vendor had any right or interest in 'B' schedule property.

11. On the other hand, the defendants have got right over the property from the first defendant's mother, who had purchased the same in the year 1960 under Ex.A2 from the original owner Pachamuthu and others. When the plaintiff claims easementary right over the suit property, the title has to be with the servient owner. But, in this case, the plaintiff claims to have right over the pathway for himself and therefore is estopped from claiming the right as easementary right. When the plaintiff claims right over 'B' schedule property as that of his own, the burden is on her to establish the ownership of the same. Even in Ex.A2, the right of ownership was restricted and in the plaintiff's documents, the right of cart-track was not at all mentioned.

12. Before the trial Court, an Advocate Commissioner was appointed and he filed his plan and report in Exs.C1 and C2, which also do not mention about the existence of the cart-track. The plaintiff also has not established the existence of the cart-track and her right over the same by any other evidence. The plaintiff has based her claim on Exs.A1 and A2 and Ex.B1 is the document of the plaintiff's vendor. In the said document, no pathway was given and it is also not in dispute. The first defendant purchased approximately 48-½ cents in Survey No.723 within specific boundaries.

13. The learned counsel for the appellant further contended that mere non-mention of the right of way in the sale deed of her vendor in Ex.A.1, cannot deprive the appellant from acquiring the right of way as the lands

purchased by her, can be put to use only with the right of cart-track. But the said contention cannot be accepted as the plaintiff has to establish her case, when she specifically contended that she is the owner of the properties. The plaintiff who has come to this Court, claiming the usage of right over the suit cart-track, has to either establish the ownership over the same or for claiming a right of easement. But, in this case, the plaintiff has claimed both ownership as well as the easementary right, which are mutually exclusive. The plaintiff cannot take such inconsistent plea. Since she has not proved her title over the cart-track, the Courts below have rightly dismissed the claim of the plaintiff. The right of easement also had to be pleaded and proved. The plaintiff having failed to prove the right of easement, either by necessity or by prescription or by grant, cannot have any relief from this Court. Accordingly, the claim of the plaintiff over the suit cart-track was rightly declined by the Courts below. Nevertheless, the plaintiff should have access to reach 'A' schedule property through 'B' schedule property. The lower appellate Court has also granted a right of foot pathway to the plaintiff to have access to 'B' schedule property. In the absence of specific evidence from the plaintiff to establish the right of usage of cart-track, the plaintiff may be entitled to only for a foot pathway as granted by the lower appellate Court. The right claimed by the plaintiff is only an accessory right and it should not be detrimental or inconvenient or injurious to other owners. As the respondents/defendants have not filed any appeal against the relief of grant of use of the foot pathway to the plaintiff, the plaintiff is allowed to use the same as foot pathway only. The question is answered accordingly. Though the lower appellate Court has granted the relief, the same had not been drafted in the decree thereby the relief granted is made ineffective. Therefore, the lower appellate Court is directed redraft the decree in accordance with its judgment dated 23.09.2008.

14. In view of the above findings, the Second Appeal is dismissed, confirming the judgment of the lower appellate Court with the above direction. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

srn

To

1. The Principal Sub Judge,
Krishnagiri.
(With direction to re-draft the decree)

2. The District Munsif Judge,
Krishnagiri.

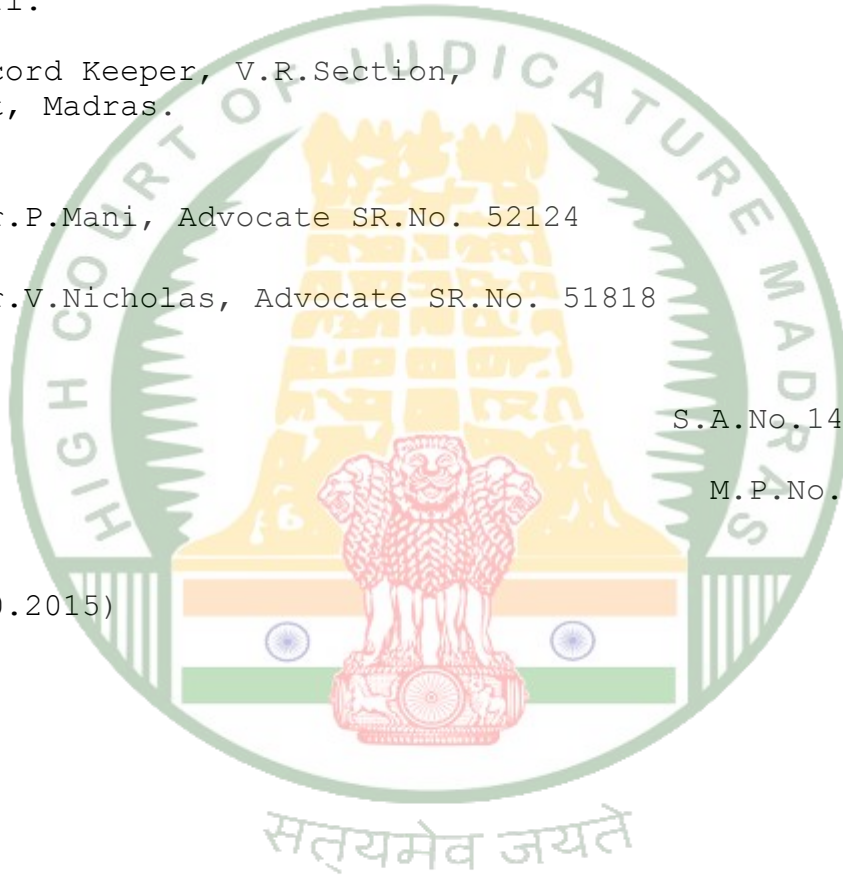
3. The Record Keeper, V.R.Section,
High Court, Madras.

1 CC to Mr.P.Mani, Advocate SR.No. 52124

1 CC to Mr.V.Nicholas, Advocate SR.No. 51818

S.A.No.140 of 2009
and
M.P.No.1 of 2009

KGK (CO)
PSI (15.10.2015)



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