

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18 - 08 - 2015

Coram

The Hon'ble TMT. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 379 of 2009

and

M.P. No. 1 of 2009

N. Ravikumar ... Appellant/Plaintiff

vs.

1. Duraisamy
2. Dhanalakshmi
3. Raja ... Respondents/Defendant

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 26.09.2008 in A.S. No.116 of 2005 on the file of the Court of Subordinate Judge, Namakkal, confirming the judgment and decree dated 25.04.2005 made in O.S. No.627 of 2002 on the file of the Principal District Munsif, Namakkal.

For Appellant : Mr. C. Jagadish

For Respondents : Mr. Mukundan
for M/s Sarvabhauman Associates

JUDGMENT

The unsuccessful plaintiff in the suit O.S. No. 627 of 2002 for the relief of declaration that he is entitled to take cattle, cart and vehicles from P3 land in S. No. 31/7C1 across XY pathway to his lands marked as P.1 and P.2 situate in S. No. 31/7A1 and 31/7B1 and for consequential injunction, has filed this Second Appeal under Section 100 of the Code of Civil Procedure challenging the judgment and decree dated 26.09.2008 passed by the Subordinate Judge, Namakkal, in A.S. No. 116 of 2005 wherein and by which the judgment and decree dated 25.04.2005 recorded in O.S. No. 627 of 2002 on the file of the District Munsif, Namakkal, were confirmed dismissing the suit.

2. While confirming the finding of the trial Court, the Lower Appellate Court modified the decree holding that the plaintiff was entitled to use XY pathway only as a pathway and not entitled to take

cart, cattle or vehicles through P.3 land to P.1 and P.2 lands across XY pathway from National Highways.

3. Admittedly, the lands are agricultural lands. The contention of the learned counsel for the appellant is that the cattle and tractors to plough the lands for raising crop can be taken from National Highways to P.1 and P.2 lands only through P.3 land by crossing XY pathway. To decide the right of the plaintiff, the burden is on the plaintiff to establish the same.

4. The question, therefore, that arises for consideration is, whether the Courts below are right in law refusing to grant relief of declaration and permanent injunction particularly when the suit pathway is admittedly a common pathway.

5. Ex. A.2 dated 27.6.2001 is the deed under which the plaintiff derives his right and title to the suit property. Ex. A.4 dated 23.11.2000 is the plaintiff's vendor's document. Ex. A.5 dated 5.9.1995 is the document under which the plaintiff's vendor had purchased the suit properties from defendants 1 and 2. The defendants get their title under Ex. B.1 settlement deed dated 04.9.1980.

6. From a perusal of Ex. A.5, it is clear that the defendants 1 and 2 had sold the lands to one Varadaraj on 05.9.1995 showing XY North South passage as common pathway. The portion P.1 and P.2 are on the west of the said common pathway which is purchased by the plaintiff under Ex. A.2.

7. Learned counsel appearing for the appellant contended that admittedly, the 'XY' passage was common pathway between Varadaraj family and Eswara Gounder family. While so, the purchases from Varadaraj are deemed to have the same right to use the pathway in common. The Lower Appellate Court also had correctly found that the plaintiff is entitled to use the 'XY' pathway. However, the defendants are refusing the rights of the plaintiff to use the said 'XY' pathway to take cattle and other vehicles.

8. For this purpose, the report of the Commissioner marked as Ex. C.1 was relied on by the learned counsel. Though the report of the Commissioner mentioned that P.1 and P.2 lands are highly elevated and that there is no cart-track in existence, the properties being agricultural ones, the plaintiff should be allowed to use it for taking cattle and vehicles. The conspectus of the facts makes it clear that the plaintiff is entitled to the common pathway as admitted by the defendants.

9. Whether the said right is limited only to use as a pathway or to take cattle, cart and tractor also?

10. In this regard, learned counsel for the appellant placed reliance on the decision of the Hon'ble Supreme Court in Ayyaswami Gounder vs. Munnuswamy Gounder [(1984) 4 SCC 376] and more particularly, referred to paragraphs 10 and 11, which read as follows:-

Para 10 : "We find considerable force in this contention. In the absence of any specific pleading regarding prejudice or detriment to the defendants-respondents the plaintiffs have every right to use the common land and the common channel. The plaintiffs-appellants were claiming their right on the basis of admitted co-ownership rights which includes unrestricted user, unlimited in point of disposition, and the High Court was not justified in holding that the plaintiffs' right to take water was not acquired by any grant from the defendants-respondents or from any other sale deed. The right of co-ownership presupposes a bundle of rights which has been lost sight of by the High Court.

Para 11: The only restriction put by law on the common user of land by a co-owner is that it should not be so used as to prejudicially affect or put the other co-owner to a detriment."

11. When XY is a common pathway, in the absence of any specific pleading regarding prejudice or detriment to the defendants, the plaintiff cannot be prevented from using such common pathway to reach P.1 and P.2 lands.

12. The defendant also had not claimed that the usage of the pathway by the plaintiff for taking cart and tractor throw an increased burden on the common pathway. By taking a tractor from P.3 to P.1 and P.2 lands, the plaintiff is not going to alter or add the physical features. The right claimed by the plaintiff is only an accessory right and it should not be detrimental to the other users. The levelling of P.1 and P.2 lands to P.3 land to enable vehicular movement, may not be said to be detrimental to the common pathway or be inconvenient or injurious to the other owners of the pathway. As the claim of the plaintiff is only reasonable and proper, the plaintiff is entitled to the full enjoyment of the same.

13. Moreover, when the plaintiff has purchased P.3 portion itself to reach the lands in P.1 and P.2 from National Highways, restricting his rights only for pathway and not to use other vehicles through the same, would restrict his agricultural operations. Hence, this Court is inclined to permit the plaintiff to use the 'XY' North South pathway even for the purpose of taking cattle, cart and tractor. However, the plaintiff is allowed to reach P.1 and P.2 lands from P.3 land through 'XY' common pathway only to a defined

width that may be required to take a cart or tractor and not to use every point on 'XY' pathway. The plaintiff is, in other words, permitted to take tractor and cart from P.3 land in 31/7C -1 straight to P.2 land situate in 31/7B-1 only for agricultural activities.

In the result, the Second Appeal stands allowed in part modifying the judgment and decree of the Lower Appellate Court to the extent indicated above. Consequently, the suit is decreed with the above observations. But in the circumstances of the case, the parties are directed to bear their own costs. As a sequel thereto, connected Miscellaneous Petition is closed.

-s/d-

Assistant Registrar

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Sub-Assistant Registrar

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To

1. Subordinate Judge
Namakkal
2. The District Munsif
Namakkal
3. The Section Officer
V.R. Section
High Court
Madras

+1 cc to M/s.Sarvabhauman Associates sr.43516
+1 cc to M/S.C.Jagadish Advocate sr.43751

S.A. No. 379 of 2009

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