

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.07.2015

CORAM

THE HON'BLE MS. JUSTICE R. MALA

S.A.No.1266 of 2003

Date of Reserving the Judgment 23.06.2015	Date of Pronouncing the Judgment 01.07.2015
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S.Kandasamy ...Appellant/Respondent/Plaintiff

-Vs-

Kandasamy Gounder ...Respondent/Appellant/Defendant

Prayer:

Second appeal filed under Section 100 of CPC against the judgment and decree of the Additional District Court (Fast Track Court), Namakkal in A.S.No.70 of 2002, dated 11.10.2002 reversing the judgment and decree of the Principal District Munsif Court, Namakkal in O.S.No.667 of 1992, dated 30.03.1995.

For Appellant : Mr.T.Dhanyakumar

For Respondent : Mrs.Mythili Suresh,
for M/s.Sarvabhauman Associates

J U D G M E N T

The second appeal arises out of the judgment and decree dated 11.10.2002 made in A.S.No.70 of 2002 on the file of the Additional District Court (Fast Track Court), Namakkal, reversing the judgment and decree dated 30.03.1995 passed in O.S.No.667 of 1992 on the file of the Principal District Munsif Court, Namakkal.

2. The averments made in the plaint are as follows:-

(a) The plaintiff and the defendant are neighboring land owners.

The plaintiff has purchased the suit property under a registered sale deed dated 25.05.1989 from one Marayee and others for a valuable consideration. The defendant had purchased the western adjacent land about 13 years ago. The plaintiff land is situated in S.No.100/1 and the defendant land is situated in S.No.100/2. Both the lands formed part of single S.No.100 measuring an extent of 4 acre 21 cents owned by Peria Gounder under Sale Deed, dated 08.11.1917. The said Periya Gounder had three sons viz., Nallianna Gounder, Chinna Gounder and Marappa Gounder. The plaintiff purchased the property from the legal heirs of Nallianna Gounder and the defendant is the owner of the remaining share in S.No.100, which is now brought under S.No.100/2. The pathway for S.No.100 is specifically shown along BCE for reaching the Panchayat Road on the East proceeding along S.Nos.93 and 94. The pathway along AB is for the plaintiff who owns S.No.100/1 on the basis of easement of necessity as the plaintiff has no other path to reach the Panchayat road and having a right along BCE (S.Nos.93 and 94). BCE pathway is a right by grant.

(b) There was a litigation between the defendant and on Kolanda Gounder regarding BCE pathway right for S.No.100 and it stands affirmed in the suit in O.S.No.60 of 1987. In the said suit, since the plaintiff's paternal uncle supported the case of Kolanda Gounder, the defendant with some bad intention is obstructing the plaintiff from going along AB course to reach the BC path. Hence, the plaintiff was forced to file the suit for declaration and injunction.

3. The gist and essence of the written statement filed by the defendant is as follows:

The suit property was purchased by the plaintiff under a registered sale deed dated 25.05.1989 and the defendant had purchased the property in S.No.100/2. But the plaint plan enclosed along with the plaint is not correct. Originally the suit property belong to one Periya Gounder who had three sons viz., Nallianna Gounder, Chinna Gounder and Marappa Gounder. The entire suit property was sold to Marappa Gounder on 04.04.1967. After purchase, Marappa Gounder was in possession and enjoyment of the property and it was re-surveyed as S.No.100/2 and he was paying the kist. The defendant purchased the property from Marappa Gounder on 16.03.1979 and he is in enjoyment of the property for more than 12 years. The plaintiff and his predecessor-in-title was in enjoyment of the pathway in the western side of the property and they are not having any right of pathway in S.No.100/2. Further, there is no pathway in S.No.100/2. So, the plaintiff is not entitled to easement by necessity or grant. There was also a suit in O.S.No.60 of 1987 between the defendant and the Kolantha Gounder in respect of the pathway. In the said suit, the pathway in S.Nos.93 and 94 has been decided and the same was also

confirmed by the appellate Court. The plaintiff has not impleaded himself as party to the proceeding. If really, the plaintiff has got a right in the pathway, he could have very well impleaded himself as party to the proceeding. Thus, the defendant prayed for dismissal of the suit.

4. The gist and essence of the additional written statement filed by the defendant is as follows:

There is no pathway in S.No.100/2. Neither the plaintiff nor his predecessor-in-title is enjoying the same. So, they are not entitled to the relief of mandatory injunction. Hence, he prayed for dismissal of the suit with compensatory costs.

5. The Learned Trial Judge after considering the averments made in the plaint, written statement and additional written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidences viz., P.W.1, P.W.2, D.W.1, D.W.2 and Exs.A.1 to A.3, Exs.B.1 to B.12 and Exs.C.1 and C.2, decreed the suit. Aggrieved against the judgment and decree passed by the trial court, the defendant preferred an appeal in A.S.No.70 of 2002 on the file of the Additional District Court (Fast Track Court), Namakkal.

6. The learned First Appellate Court has considered the arguments advanced on either side and framed necessary point for consideration and reversed the Judgment and Decree passed by the Trial Court and allowed the appeal. Against the Decree and Judgment passed by the first Appellate Court, the present second appeal has been preferred by the defendant/appellant.

7. At the time of the admission, the following question of law has been framed.

"Whether the lower appellate court has failed to consider the entitlement of the plaintiff for the relief of easement of necessity in proper perspective as stipulated under Sections 13 and 14 of the Indian Easement Act."

8. The learned counsel appearing for the appellant would submit that the suit properties in Survey No.100 originally belong to one Periya Gounder who has purchased the same under Ex.A.2/Sale Deed, dated 08.11.1917. The said Periya Gounder had three sons viz., Nallianna Gounder, Chinna Gounder and Marappa Gounder and so, each are entitled to 1/3rd share in the suit property. The appellant/plaintiff had purchased 1/3rd share belonging to Nallianna Gounder under Ex.A.1/Sale Deed, dated 25.05.1989 from the legal heirs of Nallianna Gounder. On the other hand, Chinna Gounder had sold his

1/3rd share of the property to his brother Marappa Gounder under Ex.B.1/Sale Deed, dated 04.04.1967. The said Marappa Gounder in turn sold his 1/3rd share of the property along with the property purchased from his brother to the respondent/defendant under Ex.B.2/Sale Deed, dated 16.03.1979. Thereafter, the property in Survey No.100 had been subdivided into S.No.100/1 and 100/2. The learned counsel would further submit that out of the total extent of 4 acre 21 cents, the respondent/defendant is entitled to 2 acre 81 cents and the appellant/plaintiff is entitled to 1 acre 40.5 cents. At the time of purchase, the plaintiff had access to his property through the property of this defendant. So, the plaintiff is entitled for pathway right to a width of 10 feet marked as ABCE in the plaint plan and for permanent injunction restraining the defendant and his men from interfering in any manner with the plaintiff and his men in the usage of the said ABCE path for himself, his men, cattle, carts and vehicles. The learned counsel would further submit that as per the document, he was given the right to use the pathway. The Trial court rightly considered the said factum and decreed the suit. Whereas the first appellate Court had dismissed the suit stating that the appellant/plaintiff had an alternative way to reach the suit property. The first appellate Court without considering the report of the Advocate Commissioner as well as the Ex.A.1/Sale Deed, dated 25.05.1989 wherein it was specifically mentioned that the appellant/plaintiff had got pathway right, had dismissed the suit. Hence, the learned counsel for the appellant prayed for setting aside the judgment and decree of the first appellate Court.

9. Resisting the same, the learned counsel for the respondent would submit that the respondent/defendant had purchased 2/3rd share in the suit property under Ex.B.2/Sale Deed, dated 16.03.1979. Patta had also been issued in the name of the respondent. The learned counsel further submitted that one Kolantha Gounder who is the owner of the property in Survey No.93 had objected for using the pathway. Hence, the respondent herein filed a suit in O.S.No.60 of 1987 on the file of the learned District Munsif, Namakkal for declaration and permanent injunction. In the said suit, an Advocate Commissioner was appointed and he filed the report in Exs.P.8 and P.9. Subsequent to the file of the report, the Commissioner again inspected the property and filed a report in Exs.P.10 and P.11. In the said report it was specifically mentioned that there was pathway in Survey Nos.93, 94 and 95. In pursuant of the same, the suit was decreed. Since the appellant herein is a relative of the said Kolantha Gounder, at his instigation, he has filed the present suit. The first appellate Court has considered the deposition of P.W.1/Kandasamy and came to the correct conclusion that he has got an alternative pathway to reach his property. Since there is an alternative way, he is not

entitled to easement of necessity. Furthermore, the properties were owned by common ancestor and it was divided between three brothers. The plaintiff/appellant herein had purchased the property under Ex.A.1/Sale Deed, dated 25.05.1989 from one of the sharer's legal heir and the suit has been filed in the year 1992. So, the plaintiff/appellant has not prescribed easement right by prescription, as he is not enjoying the property for more than 20 years. Further, the Advocate Commissioner appointed by the court had filed his report wherein it was specifically mentioned that there is no pathway in Survey No.100/2. So, the first appellate Court has rightly allowed the appeal and dismissed the suit. Thus, the learned counsel for the respondent prayed for dismissal of the appeal.

10. Considered the rival submissions made by both sides and perused the material records, oral and documentary evidences.

11. It is an admitted fact that the suit properties in Survey No.100 originally belongs to one Periya Gounder who has purchased the same under Ex.A.2/Sale Deed, dated 08.11.1917. The said Periya Gounder had three sons viz., Nallianna Gounder, Chinna Gounder and Marappa Gounder. The appellant/plaintiff had purchased 1/3rd share belonging to Nallianna Gounder under Ex.A.1/Sale Deed, dated 25.05.1989 from the legal heirs of Nallianna Gounder. On the other hand, Chinna Gounder had sold his 1/3rd share of the property to his brother Marappa Gounder under Ex.B.1/Sale Deed, dated 04.04.1967. The said Marappa Gounder in turn sold his 1/3rd share of the property along with the property purchased from his brother to the respondent/defendant under Ex.B.2/Sale Deed, dated 16.03.1979. Thereafter, the property in Survey No.100 had been subdivided into S.No.100/1 and 100/2. Thus out of the total extent of 4 acre 21 cents, the respondent/defendant is entitled to 2 acre 81 cents and the appellant/plaintiff is entitled to 1 acre 40.5 cents.

12. Now this Court has to decide whether there is any easement by grant?

On perusal of the Ex.A.1/Sale Deed, dated 25.05.1989, there is specific mentioning about the right of pathway in Survey Nos.93 and 94. It is appropriate to incorporate the relevant portion of the said document.

“மேற்கண்ட நிலங்களில் தென்புறம் ஓரமாய் போடப்பட்டிருக்கும் பாதை வழியாக ஆட்கள் கால்நடைகள் வண்டிவாகனங்கள் போகவர உள்ள வழிதடநடை பாததியுமும் மற்றும் நிலத்திற்கு சம்மந்தப்பட்ட சகல ஈஸ்மென் டிபாத்தியங்கள் பூராவும் கிரயத்துக்குபாத்தியப்பட்டது கிரய சொத்து அரசு நத்தம் கிராம பஞ்சாயத்துக்கும் மோகனூர் பஞ்சாயத்து யூனியன் எல்லைக்கும் உட்பட்டது”

13. The above extracted portion of the document would reveal that the appellant/plaintiff is entitled to pathway on the southern side of Survey Nos.93 and 94. However, it was not stated that he is having right in Survey No.100/2. It is also pertinent to note that the Advocate Commissioner who was appointed at the instance of the defendant had filed Exs.C.1 and C.2/reports. In the said reports also, it was specifically mentioned that there is no pathway in Survey No.100/2, since no right has been given under Ex.A.1. In such circumstances, the appellant is not entitled to easement right by grant under Ex.A.1.

14. Now this Court has to consider whether the appellant is entitled to easement right by prescription?

Admittedly, the suit property has been purchased on 25.05.1989 and the suit came to be filed in the year 1992, well within 3 years. So, there is no easement right by prescription because he is not enjoying the property for more than 20 years.

15. Now this Court has to decide whether there is easement of necessity?

The Advocate Commissioner appointed in this case has filed his report under Exs.C.1 and C.2. The Advocate Commissioner was examined as D.W.2. He was also appointed as Commissioner in the earlier proceeding in O.S.No.60 of 1987 and the said report is marked as Exs.B.8 to B.12, wherein it was specifically mentioned that there is pathway in Survey Nos.93 and 94. As per the report in Exs.C.1 and C.2, it was specifically stated that there is no pathway in Survey No.100/2. It is pertinent to note that Marayee, the vendor of the appellant/plaintiff who was examined as P.W.2 had not deposed that there was easement pathway in Survey No.100/2. Furthermore, since her cross-examination has been contrary to the chief-examination, no relevance can be placed on her evidence.

16. Per contra, the respondent who was examined as D.W.1 had deposed that there was a pathway in the western side of Survey Nos.101 and 102 and Nallianna Gounder was in enjoyment of the property. He denied the suggestion that there is no pathway in S.Nos.101 and 102 to reach his land. Further, in his cross-examination he has fairly conceded that it was not mentioned that there was a pathway in Survey No.100/2. On perusal on Ex.B.8/Commissioner Report, there was a pathway on the western side of S.Nos.101 and 102. So, the first appellate Court has rightly held that there is an alternative pathway.

17. Furthermore, in paragraph 3 of the Commissioner's Report, it was specifically stated that there was a pathway in C to D and there

is no pathway in B to A in S.No.100/2 and that groundnut and maize had been cultivated in the said survey number. It was further submitted that the place mentioned in AB is rock. In such circumstances, the appellant herein has miserably failed to prove that there was a pathway in S.No.100/2. He has also failed to prove that the right of using the pathway in S.No.100/2 has been given to him as per Ex.A.1/Sale Deed, dated 25.05.1989. So, the first appellate Court has rightly considered the same and came to the correct conclusion that there is no pathway in S.No.100/2. But he is having pathway to reach his property in S.No.100/1, through the western side of S.No.101 and 102. So, the appellant/plaintiff is not entitled to relief of easement of necessity. Thus, the substantial question of law is answered accordingly.

18. In view of the answer given to the substantial question of law, the first appellate Court has considered all the relevant documents and came to the correct conclusion that there is no pathway in S.No.100/2. Hence, the judgment and decree passed by the first appellate Court is a well-reasoned one and the same does not warrant interference by this Court.

19. In fine,

- (a) The Second Appeal is dismissed. No costs.
- (b) The judgment and decree passed by the first appellate Court is hereby confirmed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

1.The Additional District Court
(Fast Track Court),
Namakkal

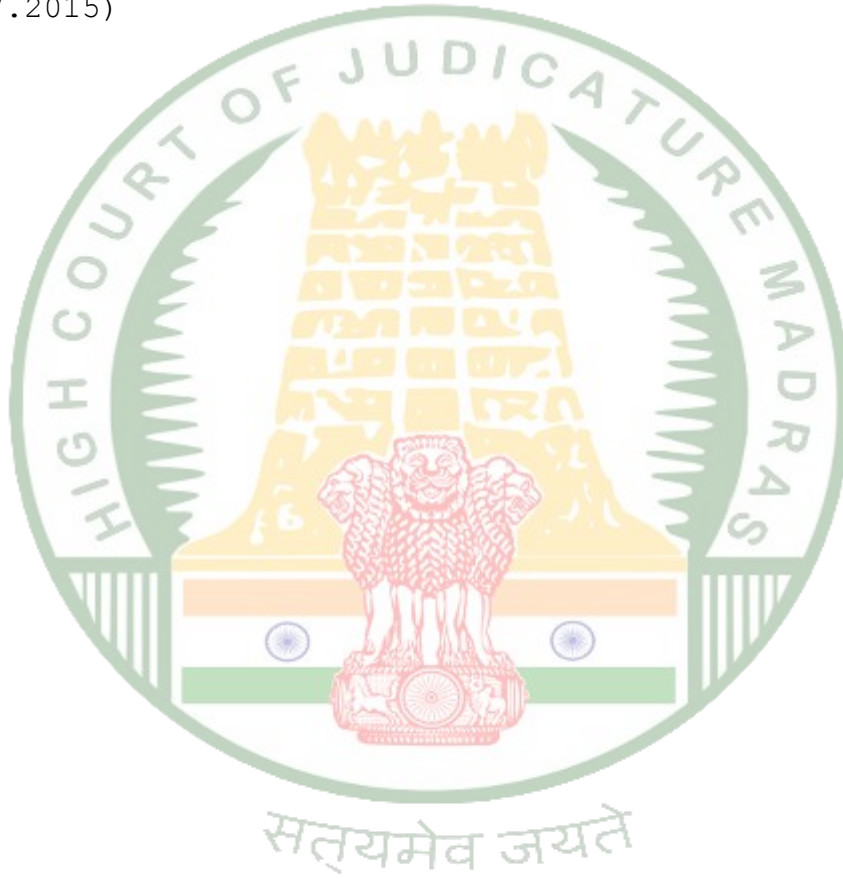
2.The Principal District Munsif Court,
Namakkal

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

1 CC to Mr.T.Dhanyakumar, Advocate SR.No. 32885

S.A.No.1266 of 2003

NM (CO)
PSI (21.07.2015)



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