

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.04.2015

CORAM

THE HONOURABLE MS. JUSTICE R.MALA

S.A.No.2042 of 2001

Judgment reserved on 27.04.2015	Judgment pronounced on 30.04.2015
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1.Eswaramoorthy
2.Hemachari
3.Varadappa Achari ... Appellants/Respondents/Plaintiffs

(Appellants 1 to 3 are representing
Viswa Brahmana Community people of Purisai Village)

Vs

Arumuga Udayar ... Respondent/Appellant/Defendant

Prayer: Second appeal filed under Section 100 of CPC against the Judgment and Decree dated 16.08.2001 in A.S.No.29 of 1999 on the file of the Sub Court, Cheyyar, reversing the Judgment and Decree dated 27.10.1998 in O.S.No.720 of 1996 on the file of the Additional District Munsif Court, Arni.

For Appellants : Mr.P.Mani

For Respondents : Mr.V.Venkadasalam

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 16.08.2001 in A.S.No.29 of 1999 on the file of the Sub Court, Cheyyar, reversing the Judgment and Decree dated 27.10.1998 in O.S.No.720 of 1996 on the file of the Additional District Munsif Court, Arni.

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

The plaintiffs represent the Viswa Brahmana Community and they are having separate burial ground in S.No.510 in Purisai Village and they reach the burial ground through S.No.509 for more than 70 years and that has been mentioned in 1917 village field map. The defendant purchased the property in S.No.509 ten years back. Since the plaintiffs are using S.No.509 to reach the burial ground in S.No.510 they prescribed easementary right by prescription and neither the defendant nor his predecessor in title has objected them. Now the defendant is estopped from obstructing the passage. On 27.12.1984 during the re-survey the property has been sub-divided and in that sub division, 0.08 cents has been mentioned as Pattai (footpath). During the partition between the defendant and his brother Vadivelu Udayar 0.08 cents has been excluded and remaining extent alone has been divided between them. So, they are estopped from obstructing the plaintiffs from using the pathway to reach the burial ground in S.No.510 and the plaintiffs Community are not having any other way to reach the burial ground in S.No.510. Now, the defendant attempted to object for taking the dead bodies through S.No.509. Hence, the plaintiff filed a suit for easementary right by prescription and also by necessity and also injunction.

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

The defendant has stated that they are using S.No,509 as a pathway for taking dead bodies to burial ground in S.No.510 is false. The defendant's father Subburaya Udayar purchased an extent of 0.23 cents in S.No.509/3 on 09.01.1942 from Srinivasa Chariar and from that date onwards they are in possession and enjoyment and the defendant's father purchased S.No.509 through a sale deed dated 27.11.1959 from sons and daughters of Srinivasa Chariar. So, from the date of purchase, he was in possession and enjoyment without any interruption. In the sale deed pathway has not been mentioned. Now the plaintiffs have attempted to encroach upon the property. Since the plaintiffs have destroyed the crops raised in the property, he gave a complaint stating that he is enjoying the property for more than 40 years and hence, he prescribed titled by adverse possession and the plaintiffs neither prescribed easementary right by prescription nor by necessity. They never used S.No.509 for taking the dead bodies to the burial ground in S.No.510 and an alternative way is available to reach S.No.510 and patta has been issued in his name. Hence, he prayed for dismissal of the suit.

4.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side has

framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1 to P.W.6, D.W.1, D.W.2, C.W.1 and Exs.A1 to A9, Exs.B1 to B64 and Exs.C1 to C3, decreed the suit. Aggrieved against the judgment and decree of the trial court, the defendant preferred an appeal in A.S.No.29 of 1999 on the file of the Sub Court, Cheyyar.

5.The learned First Appellate Court has considered the argument 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 of the first Appellate Court, the present second appeal has been preferred by the plaintiff.

6.At the time of admission of the above second appeal, the following substantial questions of law were framed for consideration.

"1.Whether in law the plaintiffs community people are entitled to use the pathway in S.No.509/1A belong to the defendant as easementary right to reach the burial ground in S.No.510 when the plaintiffs community people have been using the said pathway for the purpose of taking dead bodies of their community people to the burial ground in s.No.510 for more than 75 years without any objection whatsoever and when there is no alternative way to reach the said burial ground?

2.Whether the lower appellate court erred in law in refusing to consider Exhibit A2 and A3 Village Maps on the ground that the same were not proved by examining the concerned officials when the said maps are public documents made under the authority of the Government and its accuracy could be presumed under Section 83 The Evidence Act?"

7.Challenging the judgment and decree of the First Appellate Court, the learned counsel for the appellants/plaintiffs would submit that the Trial Court after considering the oral and documentary evidence has granted declaration of easementary right and injunction, but whereas the First Appellate Court has set aside the same stating that Ex.A2 and Ex.A3 were not proved. Even though it is a public document, Ex.A2 came into effect in the year 1917 and in that itself, it was shown that S.No.510 is Thattankuttai and it was stated that there is a burial ground and to denote that (+) symbol has been mentioned and pathway has also been mentioned. To prove the same, P.W.5/Village Administrative Officer, P.W.6/Village Assistant, P.W.1/the first plaintiff, P.W.2/the second plaintiff, elderly people in the Village, P.W.3 and P.W.4 were examined and their evidence clearly prove that the appellants' Community having separate burial

ground and to reach the same, they are using S.No.509. The learned counsel appearing for the appellants further submit that Commissioner has been appointed and he was examined as C.W.1 and Exs.C1 to C3 were marked through him and in that also, pathway and also the Samadhi has been mentioned. He further submitted that the First Appellate Court without assigning any reason has set aside the same. Hence, he prayed for allowing the appeal and to restore the judgment and decree of the Trial Court.

8.Refuting the same, the learned counsel appearing for the respondent would submit that there is no evidence to show that S.No.510 is a burial ground and in S.No.509, sub division was made only in the year 1984 and mentioned as Pattai (pathway) and without giving notice to the respondent, the sub-division has been made. He culled out the evidence of P.W.2 and P.W.5 and submit that S.No.509/1A has not been used as a pathway for reaching the burial ground in S.No.510. He further submitted that there is an alternative way available and so, they are not entitled for easementary right by necessity. Hence, he prayed for dismissal of the appeal. To substantiate his argument, the learned counsel appearing for the respondent relied upon the decision reported in 1998 (1) MLJ 151 (Nanjammal and others vs. Marappa Gounder and another).

9.Considered the rival submissions made on both sides and also perused the typed set of papers. It is also appropriate to incorporate Sections 13 and 15 of the Indian Easements Act, 1882, which reads as follows:

"13.Easements of necessity and quasi easements:-

Where one person transfers or bequeaths immovable property to another-

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,-

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement; or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless the different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (a), (c) and (e) are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

15.Acquisition by prescription:- Where the access and use of light or air and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support, or other easement, shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I:- Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is

apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II:- Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Explanation III:- Suspensions of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV:- In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to government, this section shall be read as if, for the words "twenty years" the words "thirty years" were substituted."

10. Now, this Court has to decide whether the First Appellate Court is right in holding that Ex.A2 and Ex.A3 are not reliable? It is pertinent to note that Ex.A2 and Ex.A3 are public document and it was prepared in the year 1917 and it was admitted by both sides. In such circumstances even the Trial Court has considered the same, the First Appellate Court has committed an error in not considering the same. Ex.A2 and Ex.A3, Village Field Maps are public documents and hence reliable. In Ex.A2 and Ex.A3, it was specifically mentioned (+) symbol in S.No.510 and that symbol denotes burial ground. On perusal of S.No.510, even though it was mentioned as Thattankuttai, (+) symbol has been mentioned. It is also admitted that S.No.646 which is also burial ground and in that also, (+) symbol has been mentioned. For reaching Thattankuttai there is a pathway which was indicated by dots in S.No.509. The Trial Court has considered the same in proper perspective and came to the correct conclusion but whereas without assigning any reason, the First Appellate Court has disbelieved Ex.A2 and Ex.A3. It is true that as per the evidence of P.W.1, he has stated that in the year 1985 his son died and he was also taken through S.No.509 and buried at S.No.510. It is appropriate to incorporate the relevant portion of evidence of P.W.1, wherein he has stated as "1985ல் இறந்த என்னுடைய மகனையம் அந்த வழியாகத்தான் கொண்டு சென்று அடக்கம் செய்தோம்.". P.W.2 in his chief

examination has stated that except S.No.509 no other way is available to reach the burial ground in S.No.510. Before filing the suit the respondent has objected them and so, complaint has been given, panchayat has been conducted and in that it was stated to permit the appellants to use this pathway. A perusal of Ex.A2 and Ex.A3 shows that from the year 1917 onwards, they are enjoying the property i.e. they are taking the dead bodies through S.No.509 to reach S.No.510 where the burial ground is situated. P.W.2 in his evidence has accepted that there is an alternative way to reach S.No.510 through S.Nos.512 and 511 but whereas in S.No.511 it was stated as Kasakulam. So, I am of the view that the appellants prescribed easementary right by prescription.

11.P.W.4, who is an independent witness in his chief examination has stated that at the time of deposition he was 84 years old and from 24 years of his age, they are using the pathway. P.W.5, Village Administrative Officer who is a competent person, in his cross examination, he has stated that no document has been filed to show that (+) symbol indicates burial ground even though Ex.A3 has been marked. As per the record, it was stated that in S.Nos.646 and 388, there is a burial ground mentioned as (+) symbol and as per the records there is no other burial ground. Further he has stated that for the last three months S.No.510 has not been used as burial ground. P.W.6, Village Assistant also confirmed the same. Commissioner, who was examined as C.W.1 has gone to the place and given a report has mentioned that Samadhi has been find place in S.No.510. In such circumstances, I am of the view that the First Appellate Court without considering Ex.A2 and Ex.A3 has allowed the appeal. But whereas the document Ex.A2 and Ex.A3 are the public document and it is not in dispute in which it was specifically stated that S.No.510, Thattankuttai is a burial ground and reference has been made and pathway also mentioned through S.No.509 which was used by the appellant community for more than 75 years from the year 1917 which was corroborated by oral evidence. Hence, I am of the view that the appellants have easementary right by prescription for using the pathway in S.No.509/1A to reach the Thattankuttai into burial ground which is meant for Viswa Brahmana Community.

12.At this juncture, it is appropriate to consider the decision relied upon by the learned counsel appearing for the respondent reported in 1998 (1) MLJ 151 (Nanjammal and others vs. Marappa Gounder and another) wherein it was held that if there is any alternative way, they are not entitled for easementary right by necessity. It is appropriate to incorporate the relevant portion in paragraph No.12, wherein it was held as follows:

"12..... The right of way as easement of necessity

implies that there is no other means of access, however, inconvenient. When the dominant tenement cannot be enjoy without imposing burden on the servient tenement, then the question of easement of necessity arises. If an alternative way exists no question of necessity arises."

Whatever may be the difficulty, if there is a way that will be sufficient to decline the relief sought for by the appellants. The lower appellate Court has considered the evidence in that regard also, and has rightly come to the conclusion that the plaintiffs are not entitled to any relief."

There is no quarrel over the proposition. But here even though as per the plan there was an alternative way to reach S.No.510 through S.No.511, Kasakulam but the appellants are entitled for easementary right by prescription by using the suit property as a way to reach the burial ground in S.No.510 much prior to 1917.

13.For the foregoing reasons, I am of the view that the First Appellate Court without considering Ex.A2 and Ex.A3, public documents has erroneously set aside the judgment and decree of the Trial Court. Hence, the judgment and decree of the First Appellate Court is unsustainable and it is hereby set aside and the judgment and decree of the Trial Court is a well reasoned one and the same is hereby restored. Consequently, the second appeal is hereby allowed.

14.In fine,

- The Second Appeal is allowed with cost.
- The decree and judgment passed by the First Appellate Court/the learned Subordinate Judge at Cheyyar in A.S.No.29 of 1999 dated 16.08.2001 is hereby set aside and the decree and judgment passed by the Trial Court/the learned Additional District Munsif, Arni in O.S.No.720 of 1996 dated 27.10.1998 is hereby restored.

Sd/-

Assistant Registrar(CS III)

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Sub Assistant Registrar

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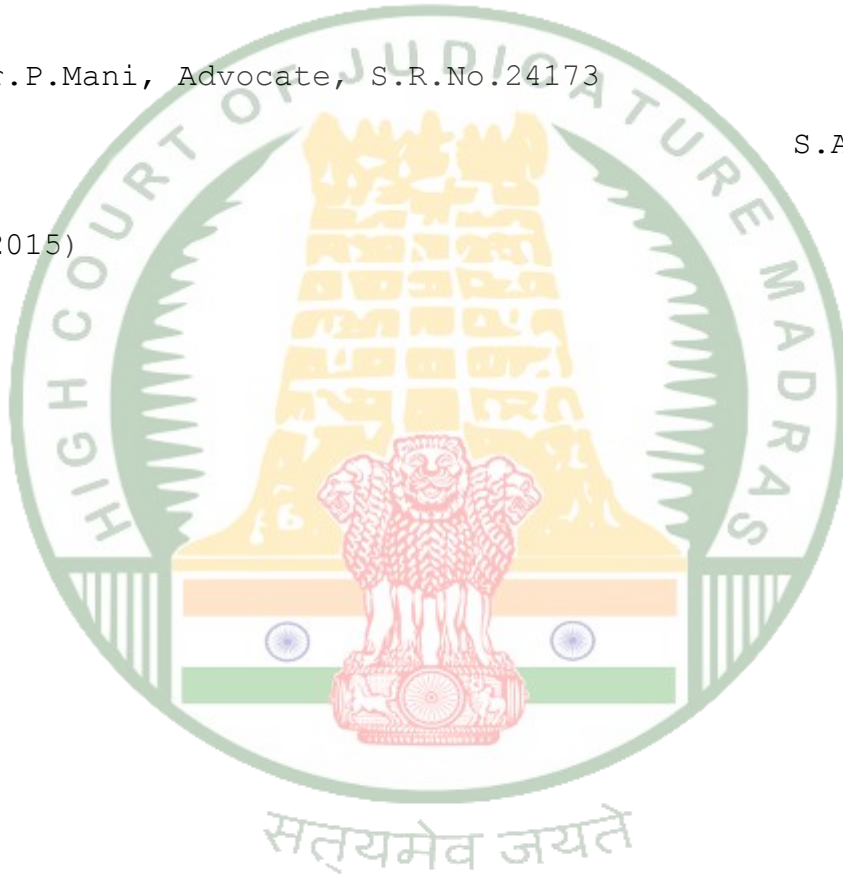
To

1. The Sub Court,
Cheyyar.
2. The Additional District Munsif Court,
Arni.
3. The Record Keeper,
V.R.Section,
High Court, Chennai.

+1cc to Mr.P.Mani, Advocate, S.R.No.24173

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