



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: **25.11.2016**

C O R A M

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THE HONOURABLE MR. JUSTICE S.S.SUNDAR**Second Appeal (MD) No.94 of 2015**

Aranthangi Co-operative Town Bank Ltd.,
No.4060, rep.by its General Manager,
No.127, Pudukkottai Road,
Aranthangi Town and Munsif. : Appellant/Respondent/Plaintiff

Vs.

1. Mohammed Beevi
2. Badurinisha Begum : Respondents/Appellants/Defendants

Prayer: - Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908, against the Judgment dated 22.10.2013 in A.S.No.12 of 2013 on the file of the Principal District Judge, Pudukkottai, reversing the judgment and decree in O.S.No.18 of 1999 dated 12.02.2010 on the file of the District Munsif Court, Aranthangi.

For Appellant : Mr.K.Balasundharam
For Respondents : Mr.N.Balakrishnan

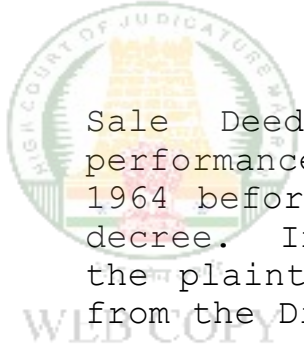
J U D G M E N T

The Plaintiff in the suit in O.S.No.18 of 1999 on the file of the District Munsif Court, Aranthangi, is the appellant in this Second Appeal.

2. The appellant filed a suit in O.S.No.18 of 1999 for declaration that the plaintiff Bank has a common right of way over the suit property for the free ingress and egress and for consequential innunction, restraining the respondents herein in any manner interfering with the right of way.

3. The case of the appellant as has been read from the plaint, are as follows:

3.1. The suit property has been classified as Zari Natham in the Government records and it belongs to one Murugaiah Pillai. The said Murugaiah Pillai purchased the property under registered Sale Deed dated 30.01.1943. Subsequently, the said Murugaiah Pillai entered into a sale agreement with the plaintiff's bank in respect of 8 cents of vacant land with a common right of way from its west. Since the said Murugaiah Pillai failed to execute the



Sale Deed, the plaintiff Bank filed a suit for specific performance against the said Murugaiah Pillai, in O.S.No.253 of 1964 before the District Munsif Court, Thanjavur, and obtained a decree. In execution of the said decree for specific performance, the plaintiff bank also obtained the sale deed dated 02.09.1969 from the District Munsif Court, Thanjavur.

3.2. As per the Sale Deed executed by the Court, the plaintiff was given right not only in respect of 8 cents of land, but also to the pathway which was specifically referred to in the Sale Deed as second item of the Sale Deed. The plaintiff is in enjoyment of the common pathway which is in existence as a pathway measuring 120 links East-West and 12 links North-South.

3.3. Since the defendants who have no right to prevent the plaintiff from enjoying the pathway right, made an attempt to obstruct the plaintiff's enjoyment over the suit pathway, it was contended by the plaintiff that the plaintiff was constrained to file the suit.

3.4. The suit was contested by the defendants by denying the averments in the plaint. According to the defendants, they are in enjoyment of the suit property. The defendants who are residing on the western side of the suit property, claimed title to the suit property as an absolute owner. The trial Court decreed the suit mainly on the ground that the right of easement is proved by the plaintiff by virtue of the Sale Deed executed by the Court in favour of the plaintiff. Since the plaintiff relied upon the decree in the suit for specific performance and the subsequent Sale Deed obtained from the judgment-debtor in the previous suit, the trial Court has not considered the documents produced by the defendants to prove their exclusive title in the various proceedings in relation to the suit property as to its existence and enjoyment by defendants.

3.5. Aggrieved by the judgment and decree, the defendants preferred an appeal in A.S.No.12 of 2013.

3.6. The lower appellate Court considered each and every document produced by the defendants and after analysing the documents in the light of the pleadings and oral evidence reversed the findings of the trial Court and dismissed the suit. The lower appellate Court found that without any parental documents, the Sale Deed, executed under Ex.A1 cannot be accepted. Since the plaintiff relied upon Ex.A1 which is only indicative of a wrongful title, is not entitled to any right of easement. The lower appellate Court also considered the factual and legal issues and came to the conclusion that the plaintiff has not established the existence of pathway and that there is no right of easement for the plaintiff.

<https://hcservices.ecourts.gov.in/hcservices/>

3.7. Aggrieved against the judgment of the appellate Court, the appellant/plaintiff preferred this Second Appeal before this



Court by raising the following questions of law:

" a) Whether any prior document is necessary to prove the right of easement within the meaning of Easements Act, 1882?

b) Whether the recitals in a document of 30 years of old raises the presumption of genuineness or not within the meaning of Section 90 of the Indian Evidence Act, 1872?

c) Whether the physical features mentioned in a Commissioner's report can be taken as an evidence to prove the possession of a person or not within the meaning of Section 38 of the Specific Relief Act, 1963?

d) Whether non denial of a fact by the defendant amounts to admission or not, within the meaning of Section 58 of Indian Evidence Act, 1872?

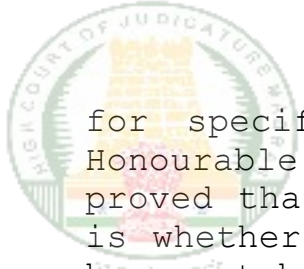
e) Whether admission of DW.1 in cross as to existence of pathway amounts to admission or not within the meaning of Section 19 of the Indian Evidence Act, 1872?"

4. The learned Counsel for the appellant relied upon the judgment of the Honourable Supreme Court in **Sree Swayam Prakash Ashramam and Another -Vs- G.Anandavally Amma and Others** reported in (2010) 2 MLJ 191 (SC). In the said judgment, it has been held that an easement of grant can either by express terms or even by necessary implication. In paragraph 25 of the above said judgment is relevant and extracted as follows:

"25. In our view, therefore, the High Court was also fully justified in holding that there was implied grant of 'B' Schedule property as pathway, which can be inferred from the circumstances for the reason that no other pathway was provided for access to 'A' schedule property of the plaintiff and there was no objection also to the use of 'B' schedule property of the plaintiff as pathway by the original plaintiff (since deceased) at least up to 1982, when alone the cause of action for the suit arose."

In the above said judgment of the Honourable Supreme Court, it has been held that when the easement claimed is by way of grant, it has been held by the Honourable Supreme Court that such easement can either by express terms in the deed or by necessary implication.

5. In the present case, though the plaintiff claimed that the plaintiff is entitled to use the suit property by virtue of a sale deed obtained from the original owner in execution of the decree



for specific performance, the law that was laid down by the Honourable Supreme Court may not help the plaintiff, unless it is proved that their vendor had such right of easement. The question is whether the plaintiff in the present case has proved that they have established their easement either by prescription or by grant or by necessity. It is a fact that the suit property was not the subject matter of the agreement between the plaintiff and their vendor. It has been held by the lower appellate Court that the defendants in the suit for specific performance namely the original owner had no title to the suit pathway. It appears that the suit for specific performance originally was only in respect of 8 cents of land. It is only by way of subsequent amendment the suit pathway itself became the subject matter of earlier suit for specific performance.

6. In such circumstances, as held by the lower appellate Court, in the absence of any material to show that the plaintiff's predecessor in interest namely the said Murugaiah Pillai was having any right or interest over the suit property, the plaintiff cannot succeed in the present suit, to get a declaration or consequential injunction. The appellate Court has considered the issue in a proper perspective and based on material evidence both oral and documentary, came to the conclusion to deny the right to plaintiff.

7. I find that the judgment of the lower appellate Court is a well-considered one and the conclusions are supported by the reasons. In such circumstances, I do not find any reason to interfere with the findings of the lower appellate Court and the question of law which are raised in the memorandum of grounds are answered in the following manner:

7.1. For claiming right of easement, the plaintiff has to establish his case. The easement right has to be specified. A person can succeed in establishing the right of easement only if he is able to prove that he is entitled to such easementary right either by prescription or by grant or by way of necessity.

7.2. In the present case, it is the specific case of the appellant that he is entitled to easement by way of grant as the plaintiff had acquired right under the sale deed which was executed by the Court in execution of decree for specific performance. The answer to the first question as to whether the plaintiff has proved the right of his vendor, is negatived by the appellate Court after considering the various circumstances. Merely because the plaintiff has obtained a sale deed with reference to the pathway, it cannot be presumed that he became the owner, especially when the right of plaintiff's vendor is disputed. The plaintiff has not claimed easement by prescription or by grant or by way of necessity. Hence, the first question of law has not merits.



7.3. With regard to the second question of law, it is to be seen that it is not appropriate in the present case. First of all, Section 90 of the Indian Evidence Act, 1872 is to draw presumption regarding the signature of the persons executed or attesting the document when the document is proved to be 30 years old. In the present case, the execution of the Sale Deed by the Court in execution of decree for specific performance is not in dispute. However that does not absolve the plaintiff from proving the vendor's right.

7.4. The third question of law is on the basis of Commissioner's report. The physical features found in the Commissioner's report clearly indicates that the plaintiff is not actually using the pathway and that physical possession is only with the defendants and in such circumstances, the lower appellate Court is justified in not entertaining the plea of plaintiff.

7.5. The fourth question of law raised by the appellant, relying on Section 58 of Indian Evidence Act, has no relevance to the present case.

7.6. The fifth and the last question of law is on the assumption that the first defendant has admitted the case of the plaintiff regarding the existence of pathway. In this case, the defendants did not admit the existence of suit pathway and hence, there is no merit in the fifth question of law.

8. Having regard to the fact that the lower appellate Court has applied its mind and arrived at conclusion based on evidence both oral and documentary, this Court finds that no interference is warranted and hence this Second Appeal is dismissed. No costs.

Sd/-

Assistant Registrar (AS)

/True copy/

Sub Assistant Registrar

To

- 1.The Principal District Judge, Pudukottai.
- 2.The District Munsif Court, Aranthangi.

Copy to:

The Section Officer, V.R.Section,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.K.BALASUNDHARAM, Advocate, SR No.73807

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