

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.Nos.891 and 892 of 1997

Kandasamy Gounder (died)

K.Muthusamy

(L.R of the deceased sole appellant) ...Appellant in both S.As.

...Vs...

1.Muthusamy Gounder

2.Subramani

... Respondents in S.A.No.891 of 1997

1.Muthusamy Gounder

2.Kandasamy

... Respondents in S.A.No.892 of 1997

Prayer in S.A.No.891 of 1997:

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 15.12.1992 and made in A.S.No.14 of 1991 on the file of the Sub-Court, Namakkal, confirming the Judgment and decree dated 31.10.1990 and made in O.S.No.1083 of 1981, on the file of the Principal District Munsif, Namakkal.

Prayer in S.A.No.892 of 1997:

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 15.12.1992 and made in A.S.No.15 of 1991 on the file of the Sub-Court, Namakkal, confirming the Judgment and decree dated 31.10.1990 and made in O.S.No.1085 of 1981, on the file of the Principal District Munsif, Namakkal.

For Appellant : Mr.T.Dhanyakumar in both S.As

For Respondents : Mr.K.Kuppuswamy in both S.As

COMMON JUDGMENT

The unsuccessful defendant in O.S.No.1083 of 1981 and plaintiff in O.S.No.1085 of 1981 has filed these Second Appeals before this Court.

2. The plaintiff in O.S.No.1083 of 1981 filed the suit for declaration declaring that the suit pathway is used by the plaintiff as common pathway and for permanent injunction and ii) the plaintiff in O.S.No.1085 of 1981 filed the suit for declaration, declaring that the defendants have no right over the pathway and for permanent injunction.

3. Both the suits were clubbed together and common decree was passed. The lower Court decreed the suit in O.S.No.1083 of 1981 and dismissed the suit in O.S.No.1085 of 1981.

4. The defendant in O.S.No.1083 of 1981 and plaintiff in O.S.No.1085 of 1981 is the appellant herein and the plaintiff in O.S.No.1083 of 1981 and defendant in O.S.No.1085 of 1981 are the respondents herein.

5. The brief averments made in the plaint in O.S.No.1083 of 1981 are as follows:-

The suit schedule properties belonged to the plaintiff's family. Since the father of the plaintiff become very old and was not able to conduct the case as kartha of the family, the plaintiff has filed the present suit.

6. Originally, the suit properties are common properties of the plaintiff and the defendant. Thereafter, a portion of the properties was purchased by the defendant. The plaintiff and the defendant and other third parties used the pathway situated in Survey Number 136. The pathway is 10 feet and the same is described as C.D pathway. That C.D pathway start from S.No.136 and lead to Survey Number 137 and the said pathway is used by the plaintiff as well as the defendant and other third parties for over 60 years. Accordingly, they possess the C.D pathway and has prescribed easementary rights and easement by necessity. Due to misunderstanding in between the plaintiff and defendant, the defendant converted the said pathway as agriculture land. The same was questioned by the plaintiff. However, the defendant did not yield to the request made by the plaintiff. Accordingly, the plaintiff filed a suit for declaration, declaring that the suit, C D pathway used by the plaintiff is a common pathway and consequential injunction not to interfere with the usage of the pathway by the plaintiff.

7. The defendant denied the entire averments made in the plaint. There is no pathway available in the said Survey Number. The land claimed by the plaintiff as the pathway is the agriculture land used by the defendant and it is cultivated by the defendant and hence claiming the usage of pathway by prescribing easement rights and the easement of necessity is denied. Infact there is no pathway available in Survey numbers

136 and 137. The plaintiff used the land as a pathway by car, truck and other vehicles in order to reach their land is hereby denied and there is no pathway at all. In fact the plaintiff and the other third parties used the northern side of property, one of the pathway leading to Muthusamy kovil as the pathway, that Muthusamy kovil pathway is the real pathway used by the plaintiff and other third parties.

8. The defendant also filed suit in O.S.No.1085 of 1981 for declaration declaring the suit C.D pathway used by the plaintiff as a common pathway and for consequential injunction not to interfere with the usage of the pathway by the plaintiff. Accordingly, he prayed for dismissal of the suit.

9. The sum and substance of the averments made in the plaint in O.S.No.1085 of 1981 are as follows:-

The suit property is in S.No.136 and the total extent of land in S.No.136 is 4.06 acres. The said land belongs to the plaintiff's family. The plaintiff purchased the property from his father on 30.01.43 for a valuable consideration. After the purchase, it is the plaintiff's property. Except the plaintiff, the defendant or any other person have to right over the property. The defendant's property is in Survey number 137/1 and it is situated in northern side of the plaintiff's property. The said pathway is used by the plaintiff and other person from time immemorial. Thereafter, the defendant constructed a house in S.No.132, after construction of the said house the defendant made a request to permit the defendant to use the suit property as pathway in order to reach his house. The plaintiff refused to accept the said request, again on 19.07.1981 the defendant formed a pathway in the suit property, thereby the plaintiff filed the suit for declaration declaring that the defendants have no right over the pathway and for Permanent Injunction.

10. Both the suits were clubbed together and common witnesses were examined and documents were also marked in the respective suits. Finally, after framing the issues, the lower Court decreed the suit filed by the respondent herein and dismissed the suit filed by the appellant herein.

11. Initially the lower court on 12.12.1983 dismissed the suit in O.S.No.1083 of 1981 and decreed the suit in O.S.No.1085 of 1981, aggrieved by the same, the plaintiff in O.S.No.1083 of 1981 has filed appeal before the lower appellate court. The lower appellate court assailed A.S.No.105 of 1985 and 86 of 1985. After elaborate discussion the lower appellate court allowed the respondent/plaintiff in O.S.No.1083 of 1981 to mark additional document, the same was marked as Ex.A12 and remanded the matter before the lower court. In trial the plaintiff in O.S.No.1083 of 1981 examined five witnesses on his side and

marked Ex.A1 to Ex.A13. On the side of the defendant two witnesses were examined and marked Ex.D1 and Ex.D2. Apart from the above the Advocate Commissioner was examined as court witness and Commissioner's Report is marked as court document Ex.C1 to Ex.C4. The lower Court after framing the issues, considering the evidence and other documents and after elaborate discussion on 25.09.1986, decreed the suit in O.S.No.1083 of 1981 and dismissed the suit in O.S.No.1085 of 1981.

12. Aggrieved by the same, the appellant herein filed appeal before the lower Appellate Court in A.S.No.14 of 1991 and A.S.No.15 of 1991. The lower appellate Court also after elaborate discussions confirmed the judgment of the lower Court. As against the concurrent findings, the present Second Appeals have been filed.

13. At the time of admission, this Court has framed the following common substantial questions of law:-

i) Whether in law and on facts the plea of easement of necessity has been made out and whether the existence of a private path way on patta land of the third party could be a ground to reject the claim of easement of necessity?

ii) Whether the findings of the Courts below are vitiated for non compliance of the provisions of Order 28 Rule 3-A of C.P.C?

iii) Whether the lower Appellate Court erred in law in permitting the respondent to adduce additional evidence in violation of Order 41 Rule 27 of C.P.C at the belated stage and to the detriment of the appellant?

14. The learned counsel for the appellant would submit that the contention raised by the respondent before the Lower Court that the respondent acquiring the prescriptive easementary rights in the suit pathway and out of easement of necessity is claiming the pathway is unsustainable. The learned counsel for the appellant further submitted that initially the suit is decreed as against which they preferred appeal filed in A.S.No.15 of 1991. However, the lower Appellate Court remanded the matter for prescription of easementary right to the lower Court for the examination of witnesses in O.S.No.1083 of 1981. However, based on the joint memo, the parties were examined jointly and the said plaintiff was examined on 05.03.1983 as first witness and P.W.2 examined on 07.12.1983.

15. Accordingly, the plaintiff in O.S.No.1083 of 1981 was examined as a party in the said proceedings. The defendant in O.S.No.1085 of 1981 was examined as other parties and marked the documents.

16. The learned counsel for the appellant would further submit that, the appellant is the owner in Survey Number 136 and the respondents claim the pathway in Survey Number 136. However, the respondents did not establish the pathway in the above said Survey Number and without analysing the deposition of appellant's side, the lower Appellate Court dismissed the appeal filed by the appellant and decreed the suit filed by the respondent which is unsustainable one and the respondent did not establish prescriptive easementary rights for usage of the pathway. In the absence of any document or independent witness, the lower Court decision which was confirmed by the appellate Court is not sustainable. Accordingly, the appellant is entitled to succeed the Second Appeal.

17. The learned counsel for the respondent would submit that initially the entire property in Survey number 136 and 133 belongs to Kandasamy Chellammal vagayara, Palaniyandi Sembukan and Karuppannan vagayara. They enjoyed the entire property as one family property and they use the said pathway as common pathway of the entire family. The appellant has purchased the property from Kandasamy Chellammal Vagayara and used the common pathway. Thereafter, the plaintiff and the defendant purchased the property through different sale deeds and also all those documents were marked before the lower Court. The lower Court has arrived at a conclusion that the property was enjoyed by the original owner, subsequent owner, the plaintiff and the defendant and other third parties as pathway. Hence, the respondent established his case before the lower Court and prescriptive easementary rights of the suit property and after perusal, the lower Court granted the decree in favour of the respondent. Hence, the well considered concurrent findings of the Courts below need not be interfered in the Second Appeal and accordingly, he prayed for dismissal of the Second Appeal.

18. On a perusal of the judgments of the Courts below and on perusal of all the exhibits filed by the parties, the entire property in Survey numbers 136 and 133 belonged to the families of Kandasamy Chellammal Vagayarra and Palaniyandi Karupannan Sembukan Vagayara. All the properties were enjoyed by the said families and was not enjoyed by the appellant alone. Even appellant purchased the property from his father, based on the above sale deed. The appellant filed the suit for declaration, declaring that the respondent is not entitled to use the pathway. Initially the entire property belonged to Kandasamy

Chellammal Vagayara and there was a partition. The pathway is allotted and the said pathway was used by the plaintiff in O.S. No. 1083 of 1981 / defendants in O.S. No.1085 of 1981 and other third parties.

19.Perusal of Ex.B1 Sale Deed dated 30.01.1943 clearly shows that there was a pathway in S.No.136. Even the respondents disproved the case of the appellant as the pathway on Northern side of the property was not established before the Court and the same is exposed in the Commissioner Report which was marked as Ex.C3. The Commissioner Report Ex.C3 revealed that there was no pathway in the Northern side of the property. Apart from the above, perusal of Ex.A4 Compromise decree as well as the decree attached with the documents, reveals that there was a pathway in the Southern side to an extent of 3.5 acres of the property situated in S.No.137/2 and 136 which was allotted in favour of the respondents herein.

20. In view of the above discussions and on perusal of the records, the lower Court as well as the lower Appellate Court arrived at the conclusion that there was a pathway and the same was enjoyed by the plaintiff and the defendant. In the absence of any other material, this Court is not in a position to interfere with the findings of the Courts below. In view of the above, the common substantial questions of law are answered against the appellant.

21. In the result,
i) these Second Appeals are dismissed
ii) the Judgment and decree dated 15.12.1992 in A.S.Nos.14 of 1991 and 15 of 1991, on the file of the Sub-Court, Namakkal is confirmed. No costs.

Sd/-
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

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To

1. The Sub-Court, Namakkal.
2. The Principal District Munsif, Namakkal.
3. The Section Officer, V.R. Section,
High Court, Madras.(2 copies)

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CP(CO)
TR(09/07/2018)