



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.09.2018

PRONOUNCED ON : 23.10.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.507 of 2015

N.Raja ... Appellant/Defendant

Vs.

Saroja ...Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 21.12.2012 passed in A.S.No.97 of 2012 on the file of Principal sub court, Salem, confirming the judgment and decree dated 13.10.2011 passed in O.S.No.995 of 2010 on the file of the Principal District Munsif Court, Salem.

For Appellant : Mr.R.Neelakandan

For Respondent : Mr.S.Jayakumar

#### JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 21.12.2012 passed in A.S.No.97 of 2012 on the file of Principal subordinate court, Salem, confirming the judgment and decree dated 13.10.2011 passed in O.S.No.995 of 2010 on the file of the Principal District Munsif Court, Salem.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for mandatory injunction.

4. The case of the plaintiff, in brief, is that she had purchased the property in survey No.83/2B with an extent of 55 cents shown as 'A' in the rough plan from one Kuppusamy by way of the registered sale deed dated 10.02.1999 and enjoying the said property since the date of the abovesaid sale transaction



and also stated that she has purchased another part of the property from one Nachiappa Gounder and others by way of the registered sale deed dated 16.04.2009 in survey No.83/1, 1A, 83/2 and 2A with an extent of 1.50 acres of land shown as 'B' in the rough plan and enjoying the same since the date of the sale and the plaintiff is using the pathway shown in the rough plan in yellow colour to reach her lands and the defendant is the adjacent land owner of the plaintiff's property and the defendant's property is shown in green colour in the rough plan and the pathway shown in yellow colour in the rough plan was used by the plaintiff and the defendant jointly in common to reach their lands from Harur main road. While so, the defendant requested the plaintiff to sell the property belonging to her, which the plaintiff refused and aggrieved over the same, according to the plaintiff, the defendant has been obstructing her from using the pathway shown in yellow colour in the rough plan and also illegally put up a fence in the common pathway so as to prevent the plaintiff from reaching her lands and accordingly it is stated by the plaintiff, she has been necessitated to lay the suit for the appropriate relief.

5. The case of the defendant, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts and after disputing the plaintiff's allegations, it is stated by the defendant that he had purchased an extent of 1 acre of land in survey No.83/2B by way of the sale deed dated 31.05.2002 from one Raja Gounder, son of Karuppa Gounder and the partition had been effected between the defendant and the plaintiff's husband and their family members by way of the registered partition deed dated 24.04.1998 and under the said partition deed, the 'B' schedule property described thereunder had been allotted to the defendant and the same had been enjoyed by the defendant till date and as per the recitals contained in the partition deed, the pathway laid in the properties should be enjoyed only by the sons of Nallaiya Gounder for reaching the lands described in the partition deed and the parties are not entitled to use the abovesaid pathway for reaching the lands of third parties and accordingly there is no connection whatsoever for the lands in survey No.83/2A lying on the northern side of the pathway and the plaintiff cannot seek any right to use the pathway for reaching the land lying in Survey No.83/2A and therefore, the claim of the plaintiff that she is entitled to use the pathway to reach the land in survey No. 83/2A by way of the purchase of the same is not sustainable. The plaintiff, at the most, would be entitled to use the pathway only for reaching the lands located on the southern side of the pathway lying in survey No. 83/2B and therefore, the claim of the plaintiff that she is entitled to use the suit pathway for reaching the lands located on the northern side lying in survey No. 83/2A is unacceptable and liable to be rejected. It is



false to state that the plaintiff has been using the pathway shown in yellow colour in the rough plan for gaining access to her lands and it is further false to state that on account of the refusal of the plaintiff to sell her land to the defendant, the defendant has obstructed her in the usage of the pathway and thereby the defendant had put up the fence in the pathway. On the other hand, inasmuch as the plaintiff attempted to use the pathway for gaining access to the land lying in survey No.83/2A and in this connection, the defendant has laid a civil suit in O.S.No.98 of 2006 on the file of the first additional district munsif court, Salem, against Pavaiammal, wife of Nachiappan, the plaintiff and the plaintiff's husband Chinnaamy for the relief of permanent injunction and inasmuch as the abovesaid parties failed to contest the abovesaid civil suit, the same ended in a decree in favour of the defendant and suppressing the same, the plaintiff has laid the present suit and the fence had been put up by the defendant only to protect his property even prior to 2006 and the plaintiff is not entitled to seek the removal of the same and having failed to contest the suit laid by the defendant in O.S.No.98/2006, the plaintiff has no cause of action to lay the suit and hence the suit is liable to be dismissed.

6. In support of the Plaintiff's case, Pw1 was examined and Exs.A1 to A5 were marked. On the side of the defendant DW1 was examined and EXs.B1 to B5 were marked. Exs.C1 and C2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the courts below were pleased to accept the plaintiff's case. Challenging the same, the present second appeal has been laid.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

"a) Whether the courts below were right in decreeing the suit for mandatory injunction alone in the absence of prayer for declaration; when the right of the plaintiff over the suit property viz., the alleged common pathway, which has been confirmed by the 1<sup>st</sup> appellate court?

b. Whether the courts below erred in holding that the exparte decree passed in a suit filed by the defendant / appellant herein against the respondent herein also relating to the same property would not bind stating it was only an exparte decree, not a decree on



merits?

9. The subject matter of the suit is the pathway and fence. As per the case of the plaintiff, she claims that she is entitled to use the pathway shown in yellow colour in the plaint plan for gaining access to the lands acquired by her by way of the sale deed dated 16.04.2009 lying in survey No.83/1, 1A, 83/2 and 2A and accordingly putting forth the case that the pathway shown in yellow colour in the plaint plan has been jointly used by the plaintiff and the defendant, and on account of enmity, inasmuch as the defendant had put up the fence shown in red colour in the plaint plan and thereby obstructed the plaintiff's usage of the pathway for gaining access to her lands, according to the plaintiff, she has been necessitated to lay the suit for the necessary relief.

10. The defendant had resisted the plaintiff's suit mainly contending that there had been partition effected between the defendant and the plaintiff's husband and the other family members by way of the partition deed 24.04.1998, whereunder the properties had been allotted to various parties and it is stated that the pathway described in the abovesaid partition deed is intended to be used only for having access to the lands forming part of the subject matter of the abovesaid partition deed and not to the lands belonging to third parties and in such view of the matter, the plaintiff cannot be allowed to use the pathway in question for gaining access to the lands purchased from third parties as above stated, which has no link, whatsoever, with the pathway in question and accordingly prayed for the dismissal of the plaintiff's suit.

11. The partition deed dated 24.04.1998 admitted by both the parties has been marked as Ex.A4/B1. Thus it is noted that by way of Ex.A4/B1, the defendant, the plaintiff's husband and others had been allotted various properties as described in the partition deed and it is further stated that the pathway had been ear-marked in the said partition deed for enabling the parties to have access to their respective shares as described in the partition deed and therefore, on a close reading of the recitals contained in Ex.A4/B1 partition deed, it is found that the parties thereto, or the successors in interest, would be entitled to use the pathway described in the partition deed only for gaining access to the subject matter of the partition deed and not for the other lands. Accordingly, it is noted that the defendant has taken the plea that the plaintiff is entitled to use the pathway only for gaining access to the land belonging to the plaintiff in survey No.83/2B lying on the southern side and not entitled to use the pathway for gaining access to the lands lying in survey No.83/2A located on the northern side and accordingly contended that the plaintiff is not entitled to seek



WEB

the removal of the fence put up by the defendant in the pathway. Further, according to the defendant, the fence had been put up in the pathway to protect his properties and furthermore also to prevent the plaintiff from utilising the pathway for gaining access to her other lands not being the subject matter of Ex.A4/B1 partition deed.

12. Materials placed on record go to show that inasmuch as the plaintiff, her husband and one Pavaiammal, wife of Nachiappan had interfered with the defendant's enjoyment of the suit pathway and the fence put up by the defendant thereon, seeking the relief of permanent injunction against them, it is seen that the defendant has laid a suit in O.S.No.98/2006 against the abovesaid parties and the said suit ended in favour of the defendant. The decree passed in the abovesaid suit has been marked as Ex.B5. On a perusal of Ex.B5, it is seen that inasmuch as the abovesaid parties had failed to contest the defendant's case, accordingly, the suit ended in an exparte decree in favour of the defendant. It is seen that till date, the abovesaid exparte decree has not been set aside by the plaintiff and others. Therefore, as rightly put forth by the defendant, when he had already obtained the relief against the plaintiff and others as regards the fencing put up by him in the pathway, though the same is an exparte decree, still, until the same is overturned in the manner known to law, it is found that the said decree would be binding upon the plaintiff and the others involved in the suit. In such view of the matter, the reasoning of the courts below that inasmuch as the decree passed in O.S. No.98/2006 is only an exparte decree, the same is not binding upon the plaintiff, as such, cannot be accepted in any manner. When it is noted that the plaintiff is also aware of the institution of the abovesaid suit and the decree passed against her therein, the plaintiff without initiating the necessary action to set aside the same in the manner known to law and furthermore suppressing the same and having laid the suit against the defendant as regards the same subject matter is found to be not legally sustainable. In such view of the matter, the reasoning of the courts below that the decree obtained by the defendant in O.S.No.98/2006 is not binding upon the plaintiff on the footing that it is only an exparte decree, as such, cannot be legally sustained.

13. In this connection, the plaintiff's counsel contended that considering the nature of the decree passed in O.S.No.98/2006, it could not be construed as a decree formulated on a judgment pronounced as contemplated under law and therefore the said decree obtained by the defendant is not binding upon the plaintiff. However, as rightly put forth by the defendant's counsel, even though the abovesaid decree had been passed on account of the failure of the plaintiff and



others to contest the suit laid by the defendant, but the same having been passed, after accepting the merits of the claim of the defendant proved to the satisfaction of the court concerned, it is seen that the decree passed in the abovesaid suit in favour of the defendant would be legally binding upon the plaintiff and the others and in such view of the matter, the argument put forth by the plaintiff's counsel that the court, which had passed the decree in O.S. No.98/2006 had not applied its mind before granting the relief in favour of the defendant and therefore, the decree passed in the said suit is not binding upon the plaintiff, as such, cannot be countenanced. There is no plausible explanation on the part of the plaintiff as to why she had not endeavored to contest the abovesaid suit laid by the defendant and also challenge the decree passed in favour of the defendant in the said suit in the manner known to law. Insofar as this suit is concerned, the plaintiff has not sought for any relief of declaration that the decree passed in O.S.No.98 of 2006 is null and void and not binding upon her. Even assuming for the sake of arguments that the decree passed in the abovesaid suit in favour of the defendant is not legally sustainable as now sought to be made out, until the same is set aside in the manner known to law, in my considered opinion, the same is binding upon the parties involved therein including the plaintiff and in such view of the matter, the courts below are found to have erroneously and easily brushed aside the abovesaid decree passed by a competent court of law without assigning any proper reason with reference to the same and hence the determination / findings of the courts below with reference to the same are liable to be set aside.

14. As above noted, it is the specific case of the defendant that the plaintiff is not entitled to use the pathway in question for gaining access to her other lands not being the subject matter of the partition deed, marked as Ex.A4/B1. The suit has been laid by the plaintiff only for gaining access to the lands purchased by her located in survey No.83/2A lying on the northern side of the suit pathway. In such view of the matter, if at all the plaintiff is entitled to have access through the suit pathway for reaching her lands lying in survey No.83/2A on the northern side, the plaintiff, should have, at the foremost, explain or put forth, on what basis, she is seeking the said right in respect of the suit pathway, other than barely mentioning that the suit pathway in question has been used by the plaintiff and the defendant jointly to reach their lands from Harur main road and when as per Ex.A4/B1 partition, the suit pathway, as such, could be used only for gaining access to the subject matter of the abovesaid partition deed and not to the other lands and in such view of the matter, without establishing her legal entitlement to use the suit pathway for gaining access to the other lands purchased by her,



the plaintiff cannot be granted the relief prayed for. In such view of the matter, as rightly put forth by the defendant, the plaintiff should, at the first instance sought for the necessary relief of declaration for using the suit pathway for gaining access to the lands purchased by her as projected in the plaint. The plaintiff cannot be allowed to claim the right to use the suit pathway on the strength of Ex.A4/B1 partition deed, as by way of the abovesaid partition deed, the pathway in question is found to be restricted in its use only as regards the subject matter of the partition deed and not to the other lands. Therefore, the plaintiff having come forward to prefer the suit seeking the relief prayed for, should have sought the declaration of the nature of the relief she seeks to exercise in respect of the suit pathway for having access to the lands purchased by her, particularly, lying in survey No.83/2A on the northern side.

15. In this connection, the plaintiff seeks to rely upon the recitals contained in the sale deeds whereunder she had purchased the other lands marked as Exs.A2 and A3. Admittedly, the defendant is not a party to the abovesaid sale transactions. Furthermore, on a perusal of the abovesaid sale deeds, it is seen that there is a reference to use the mamool pathway for the plaintiff to have the access to the lands purchased by her by way of the same. As rightly put forth, when there is no material placed on record to show that the mamool pathway referred to in Exs.A2 and A3 sale deeds pertains to the suit pathway and particularly, when the defendant is not the party to the abovesaid sale transactions and more particularly, when Ex.A4/B1 partition deed restricts the use of the pathway in question only with reference to the subject matter of the abovesaid partition deed, accordingly, it is found that unless and until the plaintiff establishes the nature of the title she seeks to enforce in respect of the pathway in question for gaining access to the land lying in survey No.83/2A on the northern side, the plaintiff would not be entitled to obtain the relief prayed for.

16. In view of the abovesaid position, as rightly put forth by the defendant, the plaintiff having not come forward with the suit seeking the nature of the right, which she seeks to exercise in respect of the suit pathway by claiming the relief of declaration with reference to the same, her present suit laid simplicitor for the relief of mandatory injunction is not maintainable. The abovesaid contention projected by the defendant is found to be acceptable.

17. When the plaintiff has come forward with the civil action seeking the claim of right in respect of the suit pathway for gaining access to the lands purchased by her and when the



WEB COPY

alleged right projected by the plaintiff had been stoutly challenged by the defendant in the written statement, particularly, disputing her entitlement to use the suit pathway for gaining access to the lands lying in survey No.83/2A on the northern side and when the recitals found in Exs.A2 and A3 sale deeds had not whispered the suit pathway in question other than mentioning the mamool pathway and when the pathway in question is found to be restricted in use only as regards the subject matter of the partition deed marked as Ex.A4/B1, in the light of the above factors, as rightly put forth, the plaintiff should have sought for the relief of declaration with reference to the nature of the right she seeks to enforce in respect of the suit pathway, accordingly, if the plaintiff is claiming absolute right or easementary right or any other right in respect of the suit pathway, particularly, for gaining access to the land lying in survey No.83/2A on the northern side, accordingly, the plaintiff should have put forth the necessary recitals with reference to the same in the plaint and endeavored to seek the relief of declaration in the light of the same as regards her entitlement to use the pathway in question. On the other hand, other than barely pleading that the suit pathway has been used by her and the defendant jointly and on the other hand, when there is no material placed on the part of the plaintiff that she is entitled to use the suit pathway for gaining access to the lands purchased by her and not forming the subject matter of Ex.A4/B1 partition deed, in such view of the matter, as rightly put forth, the plaintiff's suit simplicitor laid for the relief of mandatory injunction without seeking the relief of declaration of right in respect of the suit pathway, particularly, as regards her entitlement to use the suit pathway for gaining access to the lands purchased by her, it is seen that the suit laid by the plaintiff is not legally sustainable.

18. Furthermore, as above noted and rightly argued by the defendant with reference to the fencing put up by the defendant in the suit pathway, he had already obtained a decree in the civil action laid against the plaintiff and others and when the same is, till date, not set aside in the manner known to law, it is seen that the abovesaid decree would be binding upon the plaintiff and the others and accordingly when as regards the subject matter, namely, the fencing, the defendant had already been granted the relief of permanent injunction restraining the plaintiff and others from removing the same or/ and thereby interfere with his possession and enjoyment of the suit pathway, the plaintiff having suppressed the same and laying the suit and furthermore, the plaintiff having failed to establish her entitlement to use the suit pathway for gaining access to the lands purchased by her as above discussed, the courts below are found to have erred in upholding the plaintiff's suit without there being any acceptable and reliable material to sustain the



same.

19. In support of his contentions, the plaintiff's counsel relied upon the decisions reported in

1. 2006(4) L.W.942 (Gurdev Kaur & others v. Kaki & others).
2. 2007-2-L.W.445 (A.P.Kuppusamy & others v. P.Kumarapalayam Municipality).
3. 2009-4.L.W.125 (Narayanan Rajendran & another v. Lekshmy Sarojini & others
4. 2011 (3) CTC 168 (Meenakshisundaram Textiles, Bangalore v. Valliammal Textiles Ltd, Tirupur)
5. Judgment in S.A.No.158 of 2011 (Periasamy Gounder and others v. Arasappa Gounder)
6. 2009-2-L.W. 546 (Anathula Sudhakar v. P.Buchi Reddy (dead) Lrs & others)
7. 2018(2) CTC 859 (Mad) (K.Balakrishnan v. S.Dhanasekar)

Similarly, the defendant's counsel, in support of his contentions placed reliance upon the decisions reported in

1. Judgment in S.A.No.406 of 2004 (R.T.Veeraraghavan v. R.Sundaresan & another).
2. (2011) 5 MLJ 413 (T.R.Thangappan v. Chitra).
3. 2012(1) CTC 708 (Arumigu Kothandaramasamy Koil, Thirupuvanam v. Vairam and others).
4. 2012 (3) CTC 48 (P.B. Kasee Sah v. P.T.Hiru Sah).
5. MANU/TN/8242/2007 (V.Ranga Durai & others v. S.Jayalakshmi and another).
6. Judgment in A.S.No.767 of 1990 and M.P.(MD) No.1 of 2007 (Hasina Begum v. Shoukath Ali and others).

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case



at the hand.

20. In the light of the above discussions, the courts below are found to have erred in granting the relief of mandatory injunction in favour of the plaintiff in the absence of the plaintiff failing to establish her claim of right in the suit pathway in question by seeking the necessary relief of declaration with reference to the same and the courts below are found to have erred in upholding the plaintiff's case on the footing that the pathway in question is the common pathway belonging to the plaintiff and the defendant and others ignoring the recitals contained in the partition deed marked as Ex.A4/B1 which restricts the use of the suit pathway to the other lands other than the subject matter of the abovesaid partition deed. Equally, the courts below are found to have erred in determining that the decree obtained by the defendant in O.S.No.98 of 2006 is not binding upon the plaintiff on the footing that it is only an exparte decree forgetting for a moment that the exparte decree would also be equally binding upon the parties to the suit unless and until the same is set aside in the manner known to law and without considering the abovesaid aspects in the right perspective, it is found that the courts below had committed a gross error in acceding to the plaintiff's case. The substantial questions of law formulated in this second appeal are accordingly answered against the plaintiff and in favour of the defendant.

21. For the reasons aforesaid, the judgment and decree dated 21.12.2012 passed in A.S.No.97 of 2012 on the file of Principal subordinate court, Salem, confirming the judgment and decree dated 13.10.2011 passed in O.S.No.995 of 2010 on the file of the Principal District Munsif Court, Salem, are set aside and resultantly the suit laid by the plaintiff in O.S.No.995 of 2010 is dismissed with costs. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-  
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

bga

To

1. The Principal subordinate Judge, Salem



2. The Principal District Munsif, Salem

3. The Section Officer, V.R. Section,  
High Court, Madras.

+1cc to Mr.R.Neelakandan, Advocate SR.No.72350

+2cc to M/s.S.Jayakumar, Advocate SR.No.72240

S.A.No.507 of 2015

EV (CO)

GMV (28/11/2018)