

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.02.2018
PRONOUNCED ON : 27.02.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1045 of 2003

1. Kathavarayan (Deceased)
2. Chinnakulanthai (Deceased)
3. K. Kumar
4. K. Veeraraghavan
5. K. Palani
6. Poopottalam
7. Indirani
8. Saroja
9. Meera
10. Irrusammal
11. E. Velautham
12. Poongavanam
13. Sahadevan
14. Raman
15. Lakshmanan
16. Prema
...Appellants (Plaintiff)
(Appellants 2 to 16 brought on record as Lrs of the Deceased 1st appellant vide order of this Court dated 04.01.2018 made in CMP No.3181/2007)
(Appellants 3 to 16 recorded as LRS of the deceased 1st Appellant vide order of this court dated 04.01.2018 in C.M.A. 1852/2008 in S.A. No. 1045/2003)

Vs.

1. Ramu
2. Arumugam
3. Elumalai
4. Nagappan
5. Kempu
6. Antharan
7. Munuswamy

... Respondents/Defendants

1, 5 & 7 and Defendants 2, 3, 4 & 6.

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 21.12.2000 passed in A.S.No.44/99 on the file of Sub Court, Madurantakam reversing the judgment and decree passed in O.S. No.201/96 dated 24.08.99 on the file of the District Munsif Court, Madurantakam.

For Appellants : Mr.M.S.Subramaniam

For Respondents : Mr.K.Chandrasekaran

JUDGMENT

This second appeal is directed against the judgment and decree dated 21.12.2000, passed in A.S.No.44/99, on the file of Subordinate court, Madurantakam, reversing the judgment and decree passed in O.S. No.201/96, dated 24.08.99, on the file of the District Munsif Court, Madurantakam.

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

3. Suit for permanent injunction.

4. The case of the plaintiff, in brief, is that he is the absolute and exclusive owner of the plaint schedule properties and they are his own patta lands and the plaintiff has filed the original patta and chitta extract to show the ownership of the suit properties and there is no pathway in the plaint schedule properties and however, the defendants with their henchmen attempted to form a road in the plaint schedule properties from the 4th of March 1996 and the same had been resisted by the plaintiff, the defendants are attempting to form the pathway to the burial ground and the Government i.e., the panchayat had already formed a pucca road adjacent to the suit property and there is a thaar road going across the suit survey numbers, which is clearly sub divided and even in the village plan, no pathway has been shown in the plaint schedule properties and on the other hand, inasmuch as the defendants are attempting to form the pathway in the plaint schedule properties and thereby interfere with the possession and enjoyment of the suit properties by the plaintiff, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts and the suit properties are only assignment lands and the plaintiff has not purchased the same and his title is not admitted and there is a battai passing through the suit properties to the burial ground and the cremation ground and under the guise of the ex-parte order of injunction, the plaintiff has tried to close the access and the cremation and burial ground is comprised in survey number 164/2B lying to the south of survey number 157/3 and the

residential colony for the harijans is situated to the north of survey number 157/3 and the cremation and burial ground comprised in survey number 164/2B is made for the harijans and only through survey number 157/3, the dead bodies are being carried to the burial and cremation ground and the survey number 157/3 originally was in the possession and enjoyment of Valluvanainar by name Sivapatham and thereafter Natarajan and thereafter, on the colony getting improved and moved towards south, they had left their houses in survey number 157/3 and thereafter, the plaintiff has been cultivating some lands hither and thither, without causing any inconvenience to the public. However, after obtaining patta, he started putting fence and on being questioned, it is stated by the plaintiff that, to prevent the cattle trespass he had put up the fence and would remove them whenever any dead body is taken to the burial and cremation ground. However, the plaintiff is attempting to close the access of the road reaching the burial and cremation ground and after the convening of the panchayat, he has fully removed the fence and to the knowledge of the plaintiff, the public had been using the pathway to reach the cremation ground from their colony and the plaintiff has suppressed these facts and has laid the suit and at the time of grant of patta in favour of the plaintiff, it was assured by him that he would never object or prevent anybody from using or accessing to the burial or cremation ground and only thereafter, the patta was granted in his favour. Had it been objected by the plaintiff earlier, the public would have also objected for the grant of patta in favour of the plaintiff and there is no cause of action for the suit and the suit has not been framed properly and without the relief of declaration, the plaintiff's suit for permanent injunction is not maintainable and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's claim PWs 1 to 3 were examined, Exs. A1 to A17 were marked. On the side of the defendants DWs 1 to 7 were examined, Exs. B1 and B2 were marked. CW1 was also examined and 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 trial Court was pleased to decree the suit as prayed for. On appeal, the first appellate Court on an appreciation of the materials placed on record and the submissions made, was pleased to set-aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the defendants, dismissed the suit laid by the plaintiff. Aggrieved over the same, the present second appeal has come to be laid.

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

1. When admittedly the suit property is a patta land and fence by the plaintiff, can the defendants claim the pathway across the suit property, when there is no such pathway as per the village plan produced?
2. Is not the suit maintainable against the defendants who attempted to form the road/pathway across the plaintiff's land on the ground that the suit is not filed against the defendants in representative capacity?
3. Whether the judgment of the lower appellate Court is vitiated by not considering the pleadings and evidence?

9. The plaintiff claims title to the suit properties based on the patta granted in his favour. In this connection, to sustain his above plea, the plaintiff has marked the patta pass book as Ex.A1 and patta issued in his favour as Ex.A2. It is further found that the plaintiff has also filed chitta extract issued in his favour as Ex.A14 and the adangal extract in respect of the suit property as Ex.A15. On a conjoint reading of the above said documents produced by the plaintiff, it is evident that the plaintiff has been granted the patta in respect of the suit properties and accordingly, in possession and enjoyment of the same and the possession and enjoyment of the suit properties by the plaintiff could also be evidenced from the kist receipts produced by the plaintiff and marked as Exs.A3 to A12.

10. On a conjoint reading of the averments contained in the written statement, it is found that the defendants have also admitted that the patta in respect of the suit properties had been granted in favour of the plaintiff. What they would contend is that there is a pathway running across the suit properties, particularly, the first item of the suit properties in survey number 157/3 and that is the only access for the people settled in the harijan colony for taking the dead bodies to the cremation and burial ground and according to the defendants, at the time of the grant of patta in respect of the suit properties, the plaintiff had assured that he would not object any one from taking the dead bodies through the pathway running across the suit properties in any manner and

accordingly, it is stated by the defendants that they had also not objected to the grant of patta issued in favour of the plaintiff in respect of the suit properties. Thus, it is found clearly that, the defendants have admitted the title of the plaintiff in respect of the suit properties and as above seen, the plaintiff has produced all the reliable documents to sustain his claim of ownership over the suit properties.

11. According to the plaintiff, he has absolute title, possession and enjoyment of the suit properties pursuant to the grant of patta in his favour and accordingly, enjoying the same and further according to the plaintiff, there is no pathway running across the suit properties at any point of time and the residents of harijans colony or any one had never used the suit properties as an access for taking the dead bodies to the burial and cremation grounds. While so, inasmuch as the defendants attempted to form the pathway across the suit properties for taking the dead bodies to the burial and cremation grounds, it is the case of the plaintiff that he has been necessitated to lay the suit for appropriate reliefs.

12. Per contra, it is the case of the defendants that the pathway has been running across the suit properties from time immemorial and only through the said pathway, the people settled in the harijan colony had been taking the dead bodies to the burial and cremation grounds and therefore, the plaintiff is not entitled to obstruct the use of the pathway running across the suit properties for enabling the residents of the harijan colony, particularly, the defendants from taking the dead bodies to the burial and cremation grounds and hence, the plaintiff is not entitled to obtain the reliefs sought for.

13. As above seen, the trial Court had accepted the plaintiff's case based on the documents produced by the plaintiff, which would clearly go to show that no pathway, as such, exists in the suit properties as an access for taking the dead bodies to the burial and cremation grounds. In this connection, the plaintiff has produced the F.M.Bs in respect of field numbers 164 and 157 of the suit village and also produced the village map marked as Ex.A13 series and on a perusal of the above said documents, it is evident that no pathway is in existence or had been in existence in the suit properties at any point of time. If really any pathway had been in existence across the suit properties as put forth by the defendants, as rightly argued, the existence of the same would have been reflected in the above said documents. The first appellate Court has also noted correctly that the existence of the pathway across the suit properties is not reflected in the above said

documents and however, it is found that the first appellate Court has proceeded to dispose of the appeal only based upon the commissioner's report and plan plus surmises and conjectures.

14. On a perusal of the commissioner's report and plan marked as Exs.C1 and C2 conjointly as well as the evidence of the advocate commissioner examined as CW1, it is found that in the plan marked as Ex.C2, the properties belonging to the plaintiff has been shown in serial numbers 1 to 6 and it is found that across the suit survey numbers there is a thaar road running north to south and it is further found that the houses are located to the north of the suit properties shown in serial numbers 1 to 3 and the same had been shown as ABC in the plan Ex.C2 and to the north of the same, the village road is running. Further, it is also noted that to the south of the suit properties Harichandra temple is located shown in serial number 7 and it is further seen that there is a newly formed road from the main thaar road running towards east, shown in serial numbers 8 and 9 and it is stated that the same is the access for reaching the cremation ground. It is further seen that the burial ground is located to the west of the main thaar road running north to south. Thus, it is seen that even as per the report and plan of the advocate commissioner, there is no pathway in existence in the suit properties as such and on the other hand, separate access is available for reaching the burial and cremation grounds and it is thus seen that the case of the defendants that there is a pathway running across the suit properties for time immemorial for taking the dead bodies to the burial and cremation grounds, as such, cannot be accepted in any manner.

15. The position being above, it is found that the first appellate Court has proceeded on surmises and conjectures, on the premise that inasmuch as the access to the cremation ground shown by the advocate commissioner as serial number 8 and 9 in Ex.C2 are of new origin, according to the first appellate Court, inasmuch as the residents of the harijans colony would have been taking the dead bodies to the burial and cremation grounds from time immemorial, there should have been a pathway in existence for the said purpose and accordingly, proceeded to hold that the said pathway should have been only in the suit properties and accordingly, determined that the pathway is in existence in the suit survey numbers for enabling the residents of the harijans colony for taking the dead bodies to the burial and cremation grounds. This determination of the first appellate Court has also been made on the basis that inasmuch as the suit properties had been once classified as anaadhinam lands and accordingly, as the plaintiff has failed to establish that he or his predecessor in interest had been granted the ryotwari patta after the

abolition of zamindari system and accordingly, on the premise that the suit properties at one point of time, being anaadhinam lands, the residents of harijan colony would have access only through the suit properties for taking the dead bodies to the burial and cremation grounds and on that reasonings, proceeded to hold that there should have been a pathway running across the suit properties and accordingly, held that the plaintiff is not entitled to obstruct the usage of the same by the residents of the harijan colony. However, when there is no material placed on record to show that at any point of time there existed a pathway running across the suit properties as an access for taking the dead bodies to the burial and cremation grounds, it is found that, as rightly argued the first plaintiff's counsel, merely on surmises and conjectures and without any legal basis, the first appellate Court had proceeded to hold that there should have been a pathway only running across the suit properties for enabling the people to take the dead bodies to the burial and cremation grounds. If that be so, as rightly argued, the same would have been reflected in the village map and F.M.Bs pertaining to the suit survey number. However, the village map and F.M.Bs pertaining to the suit survey numbers do not reflect the existence of any pathway at any point of time and also the commissioner's report and plan do not lend support that the pathway is running through the suit properties and on the other hand, when it is found that there is a separate access for reaching the burial and cremation grounds, it is seen that without any material to hold that there had been existing a pathway running across the suit survey numbers at any point of time, the first appellate Court is found to have completely fallen into error in holding that the pathway is in existence across the suit properties for the purpose of taking the dead bodies to the cremation and burial grounds. When it is found that the defendants have not placed any acceptable and reliable materials that any such pathway had been in existence in the suit properties, it is found that as rightly argued by the plaintiff's counsel, the first appellate Court, on a guess work, without any materials on record, proceeded to hold that the pathway should have been in existence from time immemorial only through the suit properties and not elsewhere. The evidence of DWs 1 to 7, particularly, the evidence of DWs 4 and 5, who are the VAO and clerk attached to the Tahsildar office respectively, do not lend support that the pathway had been running across the suit properties for the purpose of taking the dead bodies to the burial and cremation grounds. When it is found that as per the evidence of DWs 4 and 5, the village map and the F.M.Bs do not reflect the existence of any such pathway across the suit properties, and in particular, when it is found that DW4 was in the service pertaining to the suit village just one month prior to his testimony and when DW5 is not a resident of the suit village and speaks only on the basis of the record provided by him as Exs.B1 and B2, it is found that their evidence would be

of no substance to come to the conclusion that the pathway is in existence or had been in existence at any point of time across the suit properties for taking the dead bodies to the burial and cremation grounds.

16. The defendants have not established that the pathway is available in the suit properties as projected by them. On the other hand, the materials placed by the plaintiff would go to show without any ambiguity that no pathway as such had been in existence at any point of time across the suit properties. As rightly put forth by the plaintiff's counsel, the nature of the right over the alleged pathway claimed by the defendants has not been clearly spelt out. The defendants have not pleaded that they claim any easementary right in respect of the alleged pathway running across the suit properties. When it is found that the plaintiff has title to the suit properties and the same has also been admitted by the defendants, it is for the defendants to put forth the case as to under what mode of claim or right they seek to sustain their alleged right in the alleged pathway. When it is found that the defendants are the residents of the harijan colony and having other access to reach the burial and cremation grounds, as reflected in the commissioner's report and plan, it is found that, as rightly argued, the defendants are not entitled to claim any right by way of easement of necessity over the alleged pathway. When the defendants have failed to establish that such a pathway had been in existence across the suit properties at any point of time and also failed to establish that they had been using the same for more than the prescribed period as stipulated by law, it is found that the defendants cannot also lay any claim by way of easement by prescription over the alleged pathway. Further, the defendants have also not pleaded that by way of custom, they had been using the alleged pathway across the suit properties and thereby acquired right to use the same as such. It is thus found when the defendants have failed to establish the existence of the pathway in the suit properties at any point of time and when the materials placed on record would go to show that no such pathway had been in existence at any point of time in the suit properties and on the other hand, when it is noted that other access are available for taking the dead bodies to the burial and cremation grounds and when the defendants failed to establish that they have easementary right either by prescription or by necessity or by customary usage in using such a pathway across the suit properties and in particular, when the existence of the pathway across the suit properties itself is not established at any point of time, it is seen that as rightly argued, the defendants are not entitled to seek any right in the suit properties, even the imaginary pathway right and when it is noted that it is only the plaintiff who has absolute title to the suit properties and also in the possession and enjoyment of

the same and when it is seen that the plaintiff had been using the suit properties by fencing the same, which has been also admitted by the defendants in the written statement and when the defendants have not established that fence had been subsequently removed at the intervention of the panchayat, it is seen that the defendants are not entitled to interfere with the possession and enjoyment of the plaintiff in respect of the suit properties by claiming that the pathway is running across the same for the purpose of taking the dead bodies to the burial and cremation grounds.

17. The plaintiff's counsel in this connection urging that the principles of law with reference to the establishment of the easementary right having not been established by the defendants in any manner, according to him, the defendants should be enjoined from interfering with the plaintiff's possession and enjoyment of the suit properties. In this connection, the plaintiff's counsel placed reliance upon the decision reported in 2000 (1) MLJ 431 (Periyanna Gounder (died) and another Vs. Komarasami) and in the said decision, the principles relating to the easementary right have been elaborately discussed as detailed below.

19. The principles to be borne in mind with regard to the easementary right are well-settled. It is necessary that the plaintiff should establish his case as required by law before he can claim a right of easement over the land. Sec.15 of the Easements act provides that where a right of way has been peacefully and openly enjoyed by any person claiming title thereto as an easement, and as of right without interruption, and for twenty years, the right would be established. It is also necessary for the plaintiff to establish that he openly enjoyed this right and that he did so as of right.

20. The object of the section in requiring that the user should be open is that it must be of a nature from which a presumption would arise that the owner of the land had knowledge that his land was being so used, and that he had acquiesced in it.

21. No doubt, it is true that in one paragraph of the plaint, it is averred claiming easementary right both by prescription and necessity. The very claim by prescription and necessity is itself inconsistent. An easement of necessity means

an easement without which the property cannot be used at all. Mere convenience is not the test of an easement of necessity. A man cannot acquire a right of way as an easement of necessity, if he has got other means of access to his land, however, more inconvenient it may be than by passing over the land of neighbours.

22. An easement of necessity is not to be granted merely on the ground of convenience and advantage, but solely on the ground of absolute necessity. In other words, when there are other ways of ingress and egress, an easement of necessity cannot be claimed merely on the ground that such ways are inconvenient.

23. It is a well established rule that ordinarily a court should find a case and decree the suit only on the basis of the pleadings of the parties. In a case, where the claim is for an easement right, it is all the more necessary that the pleadings should be specific and precise. The right of easement is one which a person claims over a land which is not his own. The qualitative and quantitative requirement for the different kinds of easements are to a great extent mutually exclusive. That is the reason why the Courts have always insisted that whenever a right of easement is claimed, the pleadings should be precise and clear and not vague.

24. These principles have been laid down in the following decisions:

(1) Ramachandra vs. Hari A.I.R. 1929 Bom. 144; (2) Nanjammal v. Marappa Gounder, (1998) 1 M.L.J. 151; (3) Ibrahimkutty Koyakutty v. Abdul Rahumankunju Ibrahimkutty, A.I.R. 1993 Ker.91

Similarly, in the decision reported in AIR 1967 MADRAS 164 (Chidambara Thevar Vs. T.Vedayya Thevar and others) the principles relating to the establishment of the claim of easementary right by custom has been explained in the following manner.

(17) I am also of the opinion that the claim of the defendants has to be negatived as it

does not satisfy the equally important condition of reasonableness. It will be a very unreasonable custom for people to walk through lands in which the owner has raised cultivation as in this case, paddy or tobacco, especially when there is another pathway about a few furlongs further. In a village connecting two places which are of a distance of 2 to 3 miles, for the villagers, a distance of three or four furlongs is certainly not a great thing, and when there is such a pathway it is not reasonable to allow them to have the suit pathway, because the distance is reduced by a few furlongs. On this aspect my attention was drawn to the decision of Umamaheswaram, J, in Venkadu v. Subbaramaih, AIR 1954 Andhra 54 in which the learned Judge has observed that a custom to pass over cultivable lands is certainly unreasonable and cannot be recognised by the Courts. The learned Judge has followed the decision of the Patna High Court in Baldeo Bind v. Abdul Aziz, AIR 1948 Pat 425 in which it was held that a customary right to pass through land bearing valuable crops should fail on the ground that the custom was unreasonable. The Bench decision in AIR 1948 Pat 425 is important in that there also the right of way was claimed more as an easement, as in this case, than as a customary right, and that it is for the party claiming the right to establish that in spite of indications of common sense to the contrary it is reasonable for large body of men to pass through agricultural lands belonging to another and in which the owner at considerable cost, energy and expense has raised valuable crops.

18. Considering the principles of law enumerated on the subject involved, it is found that the defendants having admitted the title of the plaintiff to the suit properties and claiming only right of pathway across the suit properties and when the defendants have failed to plead the nature of the right they seek and also failed to establish that they had been exercising any kind of right, as such, by way of easementary or by custom and further more, when they have failed to establish the existence of any such pathway across the suit properties, it is found that the defendants have miserably failed to establish their version and accordingly, it is seen that as rightly determined by the trial Court, the defendants in the guise of

forming the pathway in the suit properties is attempting to interfere with the possession and enjoyment of the plaintiff in respect of the suit properties.

19. The first appellate Court has also proceeded to reject the plaintiff's case on the footing that the plaintiff has failed to lay the suit in the representative capacity and only laid the suit against the defendant. However, as rightly argued, when according to the plaintiff, he had been obstructed only by the defendants in using the suit properties by claiming the existence of the pathway or attempting to form a pathway in the suit properties against any legal authority, it is found there is no need or necessity on the part of the plaintiff to lay suit against the whole of the villagers in a representative capacity. Inasmuch as only the defendants had illegally interfered with his possession and enjoyment, it is found that, accordingly, the plaintiff has laid the suit against the obstructors i.e., the defendants and in such view of the matter, the reasonings of the first appellate Court that the frame of the suit, as laid by the plaintiff, is incorrect cannot be accepted in any manner. Equally, the determination of the first appellate Court that the plaintiff should have laid the suit only in a representative capacity against the defendants also cannot be accepted when the cause of action for the plaintiff is only against the defendants in particular and therefore, it is found that the plaintiff's lis cannot be thrown out on the ground that the same had not been filed in the representative capacity against the defendants.

20. In the light of the above said reasonings, when it has been clearly established that the suit properties are patta lands and the patta had been admittedly granted only in favour of the plaintiff and accordingly, the plaintiff had been using the suit properties by fencing the same, by paying kist etc., and when the defendants have failed to establish that any pathway has been in existence across the suit properties at any point of time and on the other hand, when the documents placed on record do not disclose the existence of any pathway at any point of time across the suit properties and when it is further found that the plaintiff has laid the suit only as against the obstructors, who had caused interference in his possession and enjoyment and accordingly, when there is no need for the plaintiff to file the suit in a representative capacity against the defendants and when it is seen that the materials placed on record, both oral and documentary, do not reflect the existence of the pathway in the suit properties at any point of time, the first appellate Court is found to have rejected the plaintiff's case only based on the surmises and conjectures and without any legal basis by appreciating the materials placed on record in the wrong perspective and it is thus found that the reasonings and conclusions of the first appellate Court are completely

vitiated, perverse and illogical and in such view of the matter, the judgment and decree of the first appellate Court cannot be allowed to sustain any further and liable to be set aside. The substantial questions of law formulated in this second appeal are answered in favour of the plaintiff and against the defendants.

21. In conclusion, the judgment and decree dated 21.12.2000, passed in A.S.No.44/99, on the file of Sub ordinate court, Madurantakam, are set aside and the judgment and decree passed in O.S. No.201/96, dated 24.08.99, on the file of the District Munsif Court, Madurantakam are confirmed and accordingly the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

s/d-
Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

sli

To

1. The Subordinate court, Madurantakam.
2. The District Munsif Court, Madurantakam.
3. The Section Officer, V.R.Section,
High Court, Madras.

+2 Ccs to Mr.K. Chandrasekaran, Advocate sr 14835 & 14836.

+1 CC to Mr.S. Subramanian, Advocate sr 15021

S. A.No.1045 of 2003

NM(CO)
SP(04/04/2018)

WEB COPY