

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.06.2018
PRONOUNCED ON : 06.07.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1822 of 2004

1. T.Sampath Kumar
2. T.Sekar

...Appellants/Respondents 2 & 3/
Defendants 2 & 3

Vs.

1. K.Pushpalatha ...1st Respondent/Appellant/ Plaintiff
2. T.Savithri ...3rd Respondent/5th Respondent/5th Defendant

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 25.08.2003 passed in A.S.No.89 of 2002 on the file of the Principal District Judge of Coimbatore reversing the judgment and decree dated 22.02.2002 passed in O.S.No.1140 of 1997 on the file of the Third Additional District Munsif of Coimbatore.

For Appellants : Mr.S.Subbiah, Senior Counsel
for M/s. D.Sathya Sri
For Respondent No.1 : Mr.R.Mukundan
for M/s.Sarvabhauman Associates
For Respondent No.2 : Mr.T.L.Thirumalaisamy

JUDGMENT

In this second appeal, challenge is made to the judgment and decree dated 25.08.2003, passed in A.S.No.89 of 2002, on the file of the Principal District Court, Coimbatore, reversing the judgment and decree dated 22.02.2002, passed in O.S.No.1140 of 1997, on the file of the Third Additional District Munsif Court, Coimbatore.

2. The second appeal has been admitted on the following substantial questions of law:

"1. When the plaintiff herself had claimed only a right of taking a pipeline through the disputed property, either under the power of conferment of such a right under the sale deed or as an easementary right, whether the lower appellate Court is justified in granting a relief to the plaintiff by assuming that she is the co-owner along with the appellants?

2. When the plaintiff herself had not claimed a right of co-owners along with the other respondent, whether the Court has power to enlarge such a right as to one that of a co-ownership, without pleading and without any evidence?

3. The interpretation of Tamil word "Sakitham" as done by the lower appellate Court to include rights other than those rights which were not specifically conferred under the law, is proper? and

4. Can the appellate Court enlarge its jurisdiction in conferring a larger right upon the party against the interest of the opponent, even without any pleading, specifically for that purpose?"

3. The defendants 2 and 3 in O.S.No.1140 of 1997 are the appellants in the second appeal. The first defendant Thirumalai naicker had died. The plaintiff is the first respondent in the second appeal. It is found that the plaintiff has laid the suit for permanent injunction originally against the defendants 1 to 3 in respect of the suit property. Pending suit, the first defendant having died, it is found that the defendants 4 and 5 have also been impleaded in the suit as the legal representatives of the deceased first defendant. The relationship between the parties is not in dispute. It is found that as above seen the plaintiff had laid the suit originally only against the defendants 1 to 3. Though it is noted that the plaintiff is the daughter of the deceased first defendant and the sister of the defendants 2 and 3, neither the plaintiff in the plaint nor the defendants in the written statement had disclosed about the abovesaid relationship between the parties. This itself would go to show that the parties are not in good terms and accordingly, it is found that they had not even endeavoured to disclose the relationship amongst them in their pleadings. After the death of the first defendant, his wife and daughter had been impleaded as the defendants 4 and 5. Thus, it is found that the parties are closely related to each other.

4. Considering the scope of the controversy between the parties, in particular, between the plaintiff and the defendants 2 and 3 lying in a narrow compass, it is unnecessary to go into the facts of the matter in detail. Suffice to state that the plaintiff has laid the suit against the defendants seeking the relief of permanent injunction in respect of the suit property. The defendants have disputed the entitlement of the plaintiffs to the said relief. The materials placed on record go to show that as such there is no dispute as regards the purchase of the property by the plaintiff from the defendants 1 to 3, by way of a sale deed dated 01.08.86, which document has come to be marked

as Ex.A1 and from the recitals contained therein, it is found that the plaintiff had purchased the property located in survey No.396, situated to the north and south of the vacant site belonging to the vendors described therein i.e., the defendants 1 to 3, to the east of the A schedule land belonging to Marudhachala naicker and to the west of Gokulam colony 1st street measuring east west 62 feet, north south 35 feet, in toto measuring 2170 square feet equivalent to 5 cents of land along with and inclusive of the mamool pathway rights. Though some contra pleadings had been raised by the parties as to the abovesaid sale deed, the fact remains that the defendants have admitted that the plaintiff had purchased the abovesaid property by way of Ex.A1 sale deed. The suit has been laid by the plaintiff not in respect of the abovesaid property in toto. On the other hand, the suit has been laid by the plaintiff only in respect of the property lying to the east of the plaintiff's house bearing door No.46A and defendants' houses bearing door Nos.42 to 46 in survey No.396, namely, the north south Gokulam colony 1st street extension. It is thus found that the plaintiff by way of this suit has sought for permanent injunction only to injunct the defendants from interfering with her right to enjoy the north south Gokulam colony 1st street extension lying to the east of her house and the house of the defendants and as above mentioned, by way of Ex.A1 sale deed, the plaintiff has been alienated the property in the abovesaid survey number measuring 5 cents of lands within the specific boundaries and the 5 cents of lands is admittedly described as located to the west of Gokulam colony 1st street. Further, as above noted, under Ex.A1, the plaintiff has been granted all the rights inclusive of the mamool pathway rights for the enjoyment of the property acquired by her under Ex.A1.

5. In brief, according to the plaintiff, inasmuch as she is entitled to take water supply service connection from the City Corporation of Coimbatore, by laying a underground pipeline through the suit property and inasmuch as her abovestated right had been restricted or restrained by the defendants without any authority, according to the plaintiff, she has been necessitated to lay the suit for necessary reliefs.

6. Per contra, the defence projected by the defendants 2 and 3, in particular, is that the plaintiff had been granted only the pathway right in respect of the north south Gokulam colony 1st street extension lying to the east of her property and not more than that and therefore, it is contended that the plaintiff is not entitled to lay any underground pipeline for the purpose of securing water connection from the city corporation.

7. Thus, it is found, the short point that arises for consideration in this matter is as to whether by way of Ex.A1 sale deed, the plaintiff would be entitled to take the underground water pipeline to her residence for the purpose of satisfying her water needs.

8. The plaintiff in paragraph No.4 of the plaint has averred that the property comprised under the Will dated 15.09.55 is situated to the north of Gokulam colony and its street No.1 running to south to north which joins with the lands of the defendants in the central portion and the defendants in continuation of the abovesaid road No.1, formed a north south road in the middle of their land for the purpose of developing the same into plots and in the lands situated on the west of the north south road in the southern portion, the defendants have constructed a big residential house containing nine residential units and residing in some units and leased out the others and while controverting the above averments in paragraph No.4, the defendants in paragraph No.3 of the written statement had averred that the averments in para 4 are self-serving, concocted and incorrect and further, they have also stated that the defendants had not laid any road and it was only the Coimbatore City Corporation which has laid the road and thus, from the above plea of the defendants, it is found that the road/street formed to the east of the residential houses belonging to the defendants and the plaintiff had been laid only by the corporation and not by the defendants. As above seen, while alienating by way of Ex.A1 sale deed, the defendants have clearly averred that the property alienated is situated to the west of Gokulam colony 1st street. It is thus found that even as per the boundary recitals contained in Ex.A1 and paragraph No.3 of the written statement, the 1st street, Gokulam colony lying to the east of the residence of the plaintiff and the defendants had been formed only by the corporation as such and accordingly, the defendants have not retained any ownership in respect of the said property i.e., the suit property and accordingly, while describing the property alienated to the plaintiff under Ex.A1, they had described the same to be located to the west of Gokulam colony, 1st street. In such view of the matter, in the light of the clear recitals abovementioned in Ex.A1 sale deed as well as the pleas made in the written statement, the further claim of the defendants that they still retain the ownership of Gokulam colony, 1st street extension as such cannot be accepted in any manner. Accordingly, it is found that the defendants have granted the right to the plaintiff to enjoy the property lying to the west of Gokulam colony 1st street and admitted that it is only a road or street maintained by the corporation and also admittedly the plaintiff had been given the right of way under the said document. It is found that thereafter, the defendants, as the vendors, could not lay any claim of absolute right in respect of the abovesaid Gokulam colony 1st street area for any purpose as their own and also would not be entitled to prevent the plaintiff from enjoying the said Gokulam colony 1st street area to the maximum advantage for enjoying the property acquired by her under Ex.A1. Accordingly, the plaintiff has averred in paragraph No.8 of the plaint that when the defendants have specifically described the property alienated to her as lying to the west of Gokulam colony 1st street and also having given the right of way over the same and

the defendants having not retained any ownership of the said property, thereafter cannot lay any claim of absolute right in the said area and thus, according to the plaintiff, she would be entitled to use the Gokulam colony 1st street area for all purposes including drainage and water supply connection. Accordingly, it is the case of the plaintiff that inasmuch as the defendants interfered with her right to take the water supply service connection to her residence by laying underground pipeline in the said Gokulam colony 1st street area, she had been necessitated to lay the suit for permanent injunction. The plaintiff has also averred that even otherwise she would be entitled to take the underground pipeline through the Gokulam colony 1st street area by way of easement of necessity. As above noted, the defendants have disputed the entitlement of the plaintiff to take the water service connection through that area.

9. Thus, it is made clear that only the Gokulam colony 1st street area is the suit property. It is admittedly lying to the east of the residence of the plaintiff and the defendants. The defendants have not placed any materials as such to hold that they still retain any ownership over the suit property as such. Though some endeavours had been made by the defendants to project that they had been engaged in the agricultural operation in the abovesaid area, with reference to the abovesaid claim of the defendants, there is no acceptable and reliable material and therefore, as rightly contended by the plaintiff's counsel, it is found that the defendants are only attempting to create an impression as if they had been raising crops in that area i.e., the suit property, without establishing their entitlement to the same and also without placing any acceptable and reliable material to sustain the said claim. If the defendants had retained any ownership over the suit property i.e., Gokulam colony 1st street, the defendants, while alienating the property to the plaintiff under Ex.A1, would have described the property alienated as lying to the west of the area belonging to them. On the other hand, the property under Ex.A1 had been described only as lying to the west of Gokulam colony 1st street and when the abovesaid street is found to be laid by the City Corporation and the defendants are not shown to have retained any control over the same as such, it is found that as similar to the defendants, the plaintiff would also be entitled to enjoy the said area of Gokulam colony 1st street or the suit property, as the case may be, to her maximum advantage.

10. It is found that, on the materials placed, the defendants themselves have taken water supply connection to their residence by laying the underground pipeline through the suit property and accordingly, it is found that when the defendants are entitled to take water service connection to their residence by laying a underground pipeline through the suit property, it does not stand to reason as to how the defendants would be entitled, as a matter of right, to prevent the plaintiff from availing the said facility to satisfy her

water needs, particularly, when the defendants have not retained the ownership in respect of the suit property as such under Ex.A1 sale deed and as above seen, thereafter also i.e., after Ex.A1, the defendants have not shown their exclusive entitlement to the suit property so as to deprive the plaintiff from taking the water service connection through the same. Now, according to the defendants, as per Ex.A1 sale deed, the plaintiff at the most would be entitled to use the suit property only as a pathway to reach her residence and nothing more than that. If that be so, it does not stand to reason as to how the plaintiff had been permitted to secure the electricity service connection to her residence by taking the electrical service connection through the suit property. Materials placed on record go to disclose and also admitted by the defendants themselves that the plaintiff had obtained the electricity service connection to her residence through the suit property and the said service connection had been effected in favour of the plaintiff from the electrical post fixed in the suit property and when the electricity service connection had been availed by the plaintiff from the pillar located in the suit property by taking the line underneath the suit property, the case of the defendants that the plaintiff is entitled to use the suit property only as a pathway and for nothing else, as such, cannot be countenanced in any manner. Similarly, as above noted, the defendants themselves have taken the water service connection to their residence by laying the underneath pipeline through the suit property and accordingly, expecting the same basic need to be satisfied, it is found that the plaintiff had also made necessary requisition to the City Corporation for effecting water service connection to her residence by way of underneath pipeline in the suit property. It is found that on the obstruction put forth by the defendants, the plaintiff is not able to secure the water connection and hence, she is before the Court.

11. It has been admitted by the defendants and not even required to be admitted as such, that the plaintiff is entitled to the basic supply of water for her sustenance and accordingly, when it is found that the plaintiff had been granted all the rights in the suit property i.e., Gokulam colony 1st street inclusive of the pathway rights and accordingly, when the suit property had been enjoyed by the defendants for taking their water service connection and equally, the plaintiff had also been permitted to take the electric service connection to her residence through the suit property, particularly, from the pillar erected in the suit property, to say that the plaintiff would be entitled to use the suit property only as a pathway and not for any other purposes as such cannot be accepted in any manner. Accordingly, it is found that the first appellate Court in the right appreciation of the materials placed on record finding that as per Ex.A1 sale deed when the plaintiff had been granted all the rights inclusive of the mamool pathway right to enjoy the property acquired, the said terms should be construed

in a wider sense so as to enable the plaintiff to avail the basic facilities/amenities for her sustenance and thus, it is seen that the first appellate Court in the right appreciation of the materials placed on record finding that the defendants as such had not retained any ownership of the suit property i.e., Gokulam colony 1st street area in any manner and also not established to be exercising exclusive ownership in respect of the said area, accordingly held that the plaintiff is entitled to as a matter of right to enjoy the suit property to the maximum advantage as a co-owner in respect of the suit property which is intended to be used in common by the plaintiff as well as the defendants and on that basis, it is found that the first appellate Court rightly upheld the entitlement of the plaintiff to lay the underground pipeline through the suit property and accordingly noting that the defendants, despite the close relationship of the parties, was hell-bent upon preventing the plaintiff from enjoying the property peacefully even for availing the basic need of water supply, in my considered view, the defendants had been rightly restrained by the first appellate Court in preventing the plaintiff from securing the water service connection to her residence through the suit property.

12. When the plaintiff had been granted all the rights including the right of pathway to use the suit property under Ex.A1 sale deed as such, it is found that as rightly noted by the first appellate Court, considering the nature of the disposition of the interest transferred to the plaintiff under Ex.A1, it is found that the transferors, namely, the defendants had transferred all the rights in the property alienated to the plaintiff under the said document capable of passing by them and accordingly, it is found that by way of the abovesaid document, the plaintiff has acquired all the legal necessities thereto by way of the operation of transfer as provided under section 8 of the Transfer of Property Act and accordingly, the suit property i.e., Gokulam colony 1st street area being left in common to both the parties, i.e., the plaintiff and the defendants and accordingly, both being entitled to use the same to their maximum advantage without causing any disturbance to the enjoyment of the others, with reference to the same and when it is found that the laying of the underground pipeline through the suit property would not in any manner obstruct or prevent the defendants from using the same and as above seen, the defendants themselves had taken the underground pipeline through the suit property to effect water connection and furthermore, when the plaintiff had already been permitted to effect electricity service connection by taking service line through the suit property, that too, from the pillar fixed in the suit property, it is found that the suit property had been all along used as the property in common by both the defendants and the plaintiff as such and in such view of the matter, the first appellate Court is justified in holding that the suit property is a common property to both the defendants and the plaintiff and

accordingly, the defendants are not entitled to restrict or prevent the plaintiff from taking the underground pipeline for the purpose of availing water facility from the City Corporation.

13. A plea had also been taken before the Courts below that the said City Corporation should have been added as a necessary party. However, when it is noted that the City Corporation is ready to comply with the needs of the plaintiff, as could be seen from the evidence of PW2 and only on account of the hindrance caused by the defendants, the same could not be effected, on facts, it is found that as rightly determined by the first appellate Court, the City Corporation, Coimbatore is not required to be impleaded as a party for the adjudication of the issues involved in the matter. Considering the entitlement of the plaintiff to the usage of the suit property as such and she being the co owner of the same along with the defendants and accordingly, entitled to use the same to the maximum advantage, particularly, for satisfying her basic needs like water and electricity supply, in the light of the decision relied upon by the plaintiff's counsel, reported in 1998 - 3 - LW 197 (Basha Reddiar (died) and 4 others Vs. Janarthanam and 5 others) in which, the entitlement of the co-owner to use the common pathway to the maximum advantage had been detailed as follows:

I Co-owners, Injunction - Underground drainage through common pathway - Right of a co-owner to use of land to the maximum benefit - Not an "easement" - Scope.

Held: The finding of the Courts below that the plaintiff is not entitled to have the underground drainage over the common pathway cannot be accepted. As a co-owner, he is entitled to make use of the land to the maximum benefit, subject to only one condition, i.e. his enjoyment should not affect the right of others. To take an underground drainage connection is a right of enjoyment by a co-owner and the other co-owners cannot injunct the plaintiff on the ground that he interferes with their co-ownership rights. If such a relief is granted, it will amount to negating the right of the co-owner to enjoy his co-ownership right. By laying the underground pipeline, there is no interference of the passage or their access to their buildings or their property, except for some minor inconvenience during the time of laying the pipeline. The defendants will not be put to any hardship or injury to their co-ownership rights.

Following the same, it is found that when the laying of the underground pipeline through the common suit property would not

cause any hindrance to the usage of the same by the defendants in any manner as above noted, the defendants would be not entitled to cause interference to the endeavours of the plaintiff in securing the water connection to her property by laying the underground pipeline through the suit property.

14. No doubt, the plaintiff had also asserted her right to the suit property for taking the underground pipeline to effect water service connection also by way of easement of necessity. On a reading of the plaint averments as a whole and considering the entitlement granted to the plaintiff under Ex.A1, it is seen that the plaintiff had asserted her common right to enjoy the suit property along with the defendants and such being the position, the right which the plaintiff seeks in respect of the suit property could only be a common right as such and not the right by way of easement and in such view of the matter, and further, when the defendants have not disputed as such the acquisition of the property by the plaintiff under Ex.A1 and also accepted that the plaintiff had been granted all the rights including the pathway under the said document and the scope of the present suit is only with reference to the nature of the right to which the plaintiff is entitled to in respect of the suit property and in such view of the matter, there is no need for the plaintiff to seek the relief of declaration as such in respect of the suit property and accordingly, it is found that the decisions relied upon with reference to the alleged easementary claim of the plaintiff in respect of the suit property as well as her failure to seek the relief of declaration reported in 2001 (4) CTC 193 (K.Kolandaidsami Gounder (decd.) and another Vs. Manickam), 2017-3-LW.232 (Athappan (deceased) and others Vs. Sengoda Gounder & others), 2013-5-L.W.164 (Govind Singh Vs. A.Khaja Mohiddin), (2014) 1 MLJ 242 (K.Samundi Gounder (Died) & Others Vs. Samaraj & Others), 2013 (2) TLNJ 290 (Civil) (Kulandaivel Padayachi (deceased) and 4 others Vs. Muthuvel Padayachi, K.Sangu) and (2012) 7 MLJ 813 (Natesa Gounder Vs. Raja Gounder & Others), in my considered opinion, would not be applicable to the case at hand.

15. Lastly, it is also seen that the trial Court has opined that the plaintiff is having another mode to effect the water service connection through the property belonging to a third party and accordingly, on that footing, declined the reliefs sought for by the plaintiff. However, when on the reasonings above noted, the plaintiff is seeking only to enforce her common right in the suit property as such and not seeking to enforce her easementary right, as sought to be projected by the defendants and accordingly, when the plaintiff similar to the defendants is entitled to use the suit property to her maximum advantage, particularly, for satisfying her basic needs, accordingly, it is found that the plaintiff would be having the inherent right to take the water service connection through the suit property for quenching her thirst and in such view of the matter, as put forth by the plaintiff's counsel, in equity also,

it is found that the plaintiff's right to take the water service connection through the suit property cannot be obstructed by the defendants without establishing their exclusive claim of right to the suit property, particularly, after conferring all the rights to the plaintiff to use the same for enjoying the property alienated to her by way of Ex.A1. Thus, it is found that the trial Court has misdirected itself in declining the plaintiff's relief by determining the right sought for by the plaintiff as an easementary right and further, by determining that the plaintiff would also be entitled to take the service connection through another man property. As contended by the plaintiff's counsel, when the plaintiff is entitled to take the water service connection in the common property as a matter of right, as above discussed, it is seen that the trial Court had fallen into error by improperly appreciating the materials placed on record and thereby misdirected itself and resultantly found to have erroneously dismissed the plaintiff's suit.

16. In the light of the above discussions, the plaintiff having claimed the right to use the suit property only as the common property as a co-owner and not by way of an easementary right and when the plaintiff had been granted all the rights to use the suit property to the maximum advantage, it is found that the first appellate Court is justified in upholding the plaintiff's claim of right to use the suit property to the maximum advantage inclusive of laying the underground pipeline through the same for effecting the water supply. The substantial questions of law formulated in the second appeal are accordingly answered in favour of the plaintiff and against the defendants.

17. The other decisions relied upon by the plaintiff's counsel reported in 2017 (1) CTC 662 (Mad) (Periasamy Gounder, Kolantha Gounder, Palanichamy Vs. Arassapa Gounder) and 2018 (1) MWN (Civil) 259 (Mad) (Tamil Nadu Police Housing Corporation, Rep. by its Director General of Police Vs. R.Dhanalakshmi) are taken into consideration and followed as applicable to the case at hand.

18. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

To

1. The Principal District Judge,
Coimbatore.
2. The Third Additional District Munsif,
Coimbatore.

+lcc to Mr.P.Raja, Advocate SR.No.44261
+lcc to M/s.SARVABHAUMAN ASSOCIATES SR.No.43819

Pre-delivery Judgment in
S.A.No.1822 of 2004

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