

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.03.2018

PRONOUNCED ON : 26.03.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.2097 of 2003

Subramaniam ... Appellant/ Defendant

Vs.

Maramma Reddiar ... Respondent/ Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 29.11.2002, made in A.S.No.49 of 2002, on the file of the Additional District Sessions Judge cum Chief Judicial Magistrate, Namakkal confirming the judgment and decree dated 23.04.1996 made in O.S. No.567 of 1994, on the file of the Principal District Munsif Court, Namakkal.

For Appellant : Mr.T.Dhanyakumar

For Respondent : Mr.P.Mathivanan

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 29.11.2002, passed in A.S.No.49 of 2002, on the file of the Additional District and Sessions Judge cum Chief Judicial Magistrate Court, Namakkal, confirming the judgment and decree dated 23.04.1996, passed in O.S. No.567 of 1994, on the file of the Principal District Munsif Court, Namakkal.

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

3. Suit for declaration, permanent injunction and mandatory injunction.

4. The case of the plaintiff, in brief, is that the plaintiff and the defendant are brothers. The plaintiff and the defendant owned ancestral properties in survey No.85/B and accordingly, effected division of their ancestral properties orally and thus, the properties sub divided in survey No.85/B1 was allotted to the plaintiff and the property sub divided in survey No.85/B2 was allotted to the defendant and accordingly, the parties are enjoying their respective shares by obtaining patta, paying kist etc., The plaintiff has filed the plaint depicting the topography of the properties belonging to the parties concerned and at the time of effecting the oral partition of the ancestral properties, the pathway measuring ten feet in width has been earmarked on the southern portion of the survey No.85/B2 for gaining access to the plaintiff's property situated in the survey No.85/B1 for taking cattle, cart etc., and the said pathway has been shown as AB in the plaint plan and even prior to the partition, the pathway has been in existence and enjoyed by the parties concerned and except the suit pathway, there is no pathway to access the plaintiff's property and thus, the plaintiff is entitled to easementary right in respect of the suit properties by way of absolute necessity and by way of quasi easementary right and whileso, the defendant requested the plaintiff to sell the plaintiff's properties and on refusal, developing enmity, the defendant attempted to obliterate the suit pathway and thereby, prevent the plaintiff from having access to his property and hence, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit is not maintainable either in law or on facts. It is true that the lands comprised in survey No.85/B belonged to the parties concerned. In addition to that, the properties lying to the east of the share allotted to the plaintiff were also owned by the family and survey No.85/B was sub divided as survey Nos.85/B1 and B2 and survey No.85/B1 was allotted to the plaintiff and survey No.85/B2 was allotted to the defendant and thereby, they are enjoying their respective shares by obtaining patta, paying kist etc., and to the west of the defendant's property, Valayapatti kattuputhur road runs and to the north of the properties lie the eastwest panchayat pathway to the north of the poramboke lands and though in the plaint plan, the survey numbers belonging to the respective parties had been correctly given, the description in the plaint schedule has not been correctly given and it is false to state that there has been a pathway shown as AB in the plaint plan on the southern side of the defendant's land and the same has been used for taking the cattle, cart etc., to the plaintiff's property and there has been no pathway in the AB portion as claimed in the plaint and it is false to state that the plaintiff has acquired easementary

right by way of necessity and quasi easementary right in respect of the said pathway and the plaintiff is having access to his lands only through the eastwest panchayat road lying on the northern side of the poramboke land and further, the plaintiff is also having access from the southern side of his property and it is false to state that the defendant attempted to obliterate the alleged pathway and thereby prevented the plaintiff from having access to his lands and inasmuch as there has been no pathway as shown in the plaint plan, the plaintiff's suit without any cause of action is liable to be dismissed.

6. In support of the plaintiff's case, PWs 1 and 2 were examined, Exs.A1 and A2 were marked. On the side of the defendant DWs 1 to 3 were examined. Ex.B1 was 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 dismiss the suit laid by the plaintiff. Aggrieved over the same, the present second appeal has been laid.

8. At the time of admission of second appeal, the following substantial question of law was formulated for consideration:

"Whether the Courts below have erred in granting the reliefs prayed for by the plaintiff when the plaintiff has not proved his entitlement for the relief of easement of necessity as prescribed under Section 13 of the Indian Easement Act."

9. The suit has been laid in respect of the pathway shown as AB in the plaint plan. According to the plaintiff, the said pathway has been in existence for several years and the same has been the access for the plaintiff to reach his lands for the purpose of taking cattle, cart etc., and thus, it is the case of the plaintiff that he has easementary right over the suit pathway by way of necessity and by way of quasi easementary right. However, the plaintiff has restricted his claim in respect of the suit pathway only with reference to the easementary right by way of necessity.

10. On the materials placed, it is found that the pathway shown as AB in the plaint plan is found to be in existence. The said pathway is situated to the south of the defendant's land in survey No.85/B2. It is found that the properties of the parties belonged to them in common ancestrally and subsequently by effecting oral division, they separated the properties as allotted to the parties. Now, according to the plaintiff, the suit pathway is in existence for several years, even prior to

the partition effected and the same has been used to access his share and further, according to the plaintiff, other than the suit pathway, there is no access for reaching his lands.

11. A commissioner has been appointed in this matter and after the inspection of the properties concerned, he has filed his report and plan and it is found that an endeavour has been made by the defendant to the Advocate commissioner to show that the plaintiff is having access to his lands through the pathway shown as XY in the commissioner's plan. However, as seen from the commissioner's report and plan, the XY pathway ends with the lands of the third parties and therefore, it is seen that the plaintiff, as such, cannot have any access to his lands through XY pathway and accordingly, it is seen that when the lands of the third parties intervene between the said pathway and the plaintiff's land, it is found that the said XY pathway would not be the access for the plaintiff's land and accordingly, the above case of the defendant has been rightly negated by the Courts below. Further, it is seen that according to the defendant, the plaintiff as well as the owners of the lands situated to the east of the plaintiff's land are having access only through the eastwest panchayat pathway lying to the north of the poramboke land and as seen from the commissioner's report and plan, the F access branching from MN pathway ends with the third parties lands and when it is found that there are houses to the north of the plaintiff's land, as rightly determined by the Courts below, the case of the defendant that the plaintiff has access to the lands through the F portion as shown in the plan cannot be countenanced.

12. The extent of the suit pathway is found available as per the commissioner's report and plan and it is thus found that the pathway shown as AB in the plaint plan is in existence and accordingly, it is found that the said pathway is the direct access to the plaintiff's land from Valayapatti kattuputhur road. Though the plaintiff would claim that the defendant had attempted to obliterate the suit pathway as such, it is only noted that the suit pathway is not cultivated and annexed with the other portion of the defendant's property and on the other hand, only stones and rubbish had been heaped on the suit pathway and in such view of the matter, when on the materials placed on record, it is seen that the suit pathway is the only access to reach the plaintiff's lands and the other alleged access projected by the defendant are found to be no access to the plaintiff's land and the said access ends with the third parties lands and does not continue till the lands of the plaintiff, it is found that the contention put forth by the defendant that the plaintiff is having other access to reach his lands had been rightly disbelieved by the Courts below.

13. In this connection, another significant factor has to be taken note of and it is found that the share allotted to the defendant is larger in extent than the share allotted to the plaintiff. Accordingly, it is seen that the pathway had been left earmarked in the defendant's land for enabling the plaintiff to reach his land and the said fact has been rightly noted by the Courts below for accepting the plaintiff's case.

14. As rightly determined by the first appellate Court, the absence of the existence of the pathway in the Government records, by itself would not lead to the conclusion that the pathway is not available on ground. When it is found that the suit pathway is measuring only ten feet, when as per the evidence of the Village Administrative Officer, only when the pathway measuring 20 links or more, would be reflected in the Government revenue field maps, it is found that the mere absence of the suit pathway in the field map by itself would not undermine the plaintiff's case as such.

15. In the light of the above discussions, when it is rightly determined by the Courts below, on the basis of the factual matrix available, the suit pathway is the only access to the plaintiff and no other access is available to reach the plaintiff's land as put forth by the defendant, it is found that the Courts below had rightly upheld the claim of the plaintiff's easementary right, in respect of the same by way of necessity and in such view of the matter, the judgment and decree of the Courts below do not warrant interference in any manner and the substantial question of law is accordingly answered against the defendant and in favour of the plaintiff.

16. The principles of law outlined in the decisions relied upon by the plaintiff's counsel reported in (1969) 1 MLJ 435 (K.S.Vaidyanathan and Ors. Vs. Buhari and Sons (P) Ltd. And Anr.) and the defendant's counsel reported in 1997 (I) CTC 348 (Murugesu Moopanar Vs. Sivagnana Mudaliar) and 1999-2-LW 392 (Samsudeen Vs. Krishnan and others) are taken into consideration and followed as applicable to the case at hand.

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

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

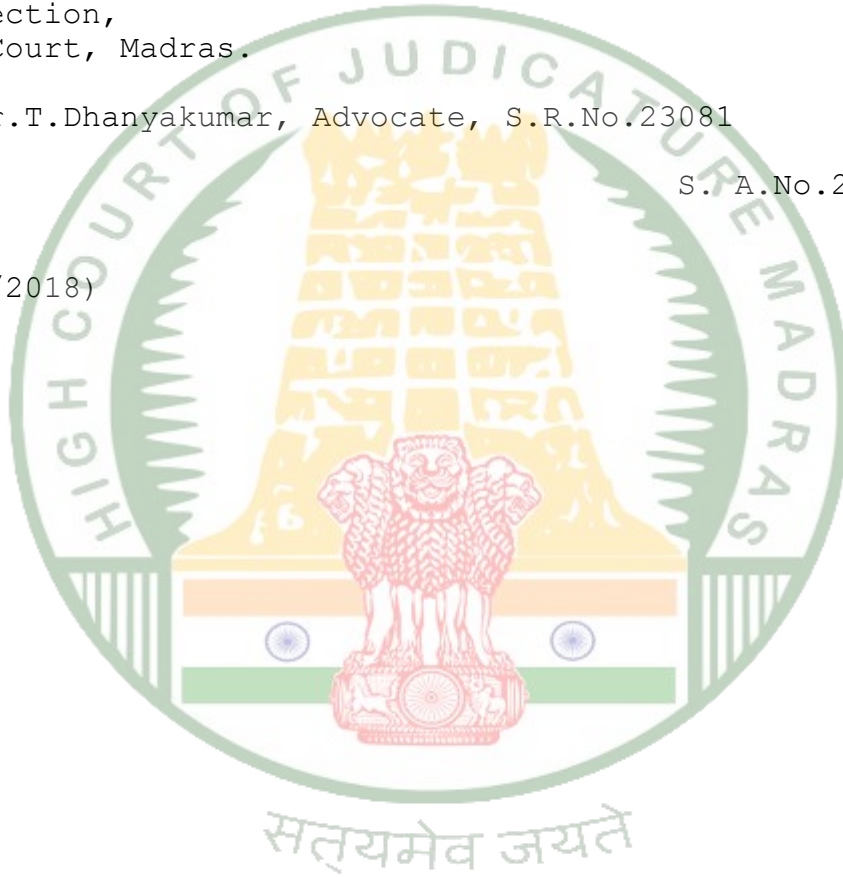
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To

1. The Additional District and Sessions Judge
cum Chief Judicial Magistrate Court,
Namakkal.
2. The Principal District Munsif Court,
Namakkal.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.T.Dhanyakumar, Advocate, S.R.No.23081

S.A.No.2097 of 2003

PVS (CO)
GSP (13/07/2018)



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