

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:26.07.2018	Delivered on: 04.01.2019
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CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.842 of 1994

Kumaraswamy

... appellant

Vs.

1.Govindan(Deceased)

2.Rasu

3.Perumal

... Respondents

(third respondent given up order
of Court dated 13.07.2018 in
S.A.No.842/1994)

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree of the learned Subordinate Judge, Ariyalur Passed in A.S.No.67/88 dated 26.04.1991 confirming the judgment and decree of the learned District Munsif Court, Jeyankondam, passed in O.S.No.308 of 1984 dated 29.07.1987.

For Appellant : Mr.Antony Jesus
For Mr.K.Srinivasan

For Respondents: R2-set exparte
R3-given up

JUDGMENT

This second appeal has been filed by the plaintiff against the judgement and decree passed by the Sub Judge, Ariyalur in A.S.No.67 of 1988 dated 26.04.1991 confirming the judgment and decree passed by the District Munsif, Jeyankondam in O.S.No.308 of 1984 dated 29.07.1987.

2. The appellant/plaintiff had filed a suit in O.S.No.308 of 1984 on the file of the District Munsif, Jeyankondam, to declare that the construction of wall and putting up of the fence in the common pathway which have been mentioned as ABCD and EFGH in the

plaint rough plan as encroachment and to direct the defendants to remove the said encroachment byway of mandatory injunction. The learned District Munsif, Jeyankondam by the judgment dated 29.07.1987, had dismissed the said suit with costs.

3. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.67 of 1988 on the file of the Sub Judge, Ariyalur. The learned Sub Judge, had dismissed the said appeal without costs and confirmed the judgment and decree passed by the trial Court. Feeling aggrieved, the plaintiff has filed the present second appeal. For the sake of convenience, the parties are referred to has described before the trial Court.

4. The averments made in the plaint in brief are as follows:

The plaintiff and the defendants are descendants of a common ancestor. A common pathway width about 9 feet is running towards west from the north-south street as shown in the plaint rough plan. The property of the third defendant is situated on the north of the said 9 feet pathway and the house of the defendants 1 and 2 situated on the south of the aforesaid pathway. The plaintiff's house is situated on the north of the aforesaid pathway. The persons, who are residing on the western side are using the said pathway for taking carts and cattles for several 100 years, without any objection from any one. The portions which are mentioned as MCOP and TMPQRD in the plaint rough plan were purchased by the first defendant's father under a sale deed dated 03.07.1947 from one of the co-sharers namely, Duraisamy Padaiyachi. The aforesaid properties are situated on the south of the aforesaid 9 feet, common pathway. The property of the third defendant is shown as IJFG in the plaint rough plan which is situated on the north of the aforesaid common pathway. That being so, on 20.11.1984, with a view to reduce the width of the aforesaid common pathway, the defendants 1 and 2 had encroached 3 feet width of the aforesaid common pathway on the southern side and constructed a compound wall to the height of 4 feet and length of 52 feet. On the same day, the third defendant had encroached on the northern side of the aforesaid common pathway to a width of 2 feet and put up a fence. The defendants are not entitled to encroach the common pathway. Because of the said encroachment, the width of the common pathway substantially reduced and the plaintiff and other residents not able to take bullock cart etc. Hence, the plaintiff was constrained to file the above suit for the aforesaid relief.

5. The averments made in the written statement filed by the defendants 1 and 3 and adopted by the second defendant are, in brief as follows:-

a) The description of the property given in the plaint schedule is not correct and proper particulars have not been mentioned in the plaint rough plan. In the A-B portion the foundation stones were laid several years ago and a mud wall was constructed and after removing the said mud wall stone wall has been constructed. Likewise, the fence in the EH portion is also present for the past several years. The said stone wall was constructed several months ago and at that time, no one raised any objection and hence, the plaintiff is estopped by acquiescence.

b) It is false to state that the width of the aforesaid pathway is 9 feet. At no point of time, the width of the pathway was 9 feet. The aforesaid pathway was never used as cart track and it has been used only as pathway and even now, the plaintiff can use the said pathway without any difficulty. It is false to state that the defendants 1 and 2 are entitled to 82 feet north south. They are entitled to 86 feet north south. In the sale deed dated 03.06.1947. The defendants have not encroached the common pathway as alleged in the plaint and therefore, prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif, Jeyakondam had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and he also examined one more witness as PW2. He had marked Ex.A1 to Ex.A3 as exhibits. On the side of the defendants, three witnesses were examined as DW1 to DW3. The defendants have not marked any exhibits on their side. The report and plan filed by the Advocate Commissioner have been marked as Ex.C1 and Ex.C2 respectively.

7. The learned District Munsif, Jeyakondam, after considering the materials placed before him, found that the plaintiff failed to establish that what was the original width of the suit pathway. He also found that the commissioner's report and plan also would not support the case of the plaintiff and also found that the plaintiff failed to prove that the defendants have encroached the common pathway. Accordingly, he dismissed the suit with costs. Aggrieved by the same, the plaintiff filed an appeal in A.S.No.67 of 1988 on the file of the Sub-Judge, Ariyalur. The learned Sub-Judge, Ariyalur had dismissed the said appeal confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the plaintiff filed the present second appeal.

8. This Court, at the time of admitting the second appeal has formulated the following substantial question of law:

"Whether the findings of the Courts below are vitiated by its failure to consider the extent of easement right granted under Ex.A1 as provided for under Section 28 of the Indian Easement Act, 1882 especially when the right of passage is admitted?"

9. During the pendency of the second appeal, the first respondent died. As per the Memo filed by the learned counsel for the appellant dated 06.07.2018, the second respondent has been recognized as legal representative of the first respondent and the third respondent is given up.

10. Since the first respondent died and the second respondent remained absent and was set exparte and the third respondent is given up, after hearing the arguments of Mr.Antony Jesus, for Mr.K.Srinivasan the learned counsel for the appellant and perusing the records, judgment is being passed.

11. Substantial question of law:-

The learned counsel for the appellant/plaintiff has submitted that the Courts below erred in holding that the plaintiff did not seek for declaration in respect of the common passage while adverting to the specific allegation regarding the cause of action for the suit. The Courts below having accepted Ex.A1 wherein a reference to the common passage is referred, erred in law, stating that would not amount to the common passage for all purposes. The Courts below having accepted the commissioner's report and plan which refers to an encroachment on the part of the third defendant/third respondent shown beyond the boundary wall of the property of the third respondent, erred in law in not granting a decree as prayed for. He further submitted that the Courts below failed to advert to the admission of the first respondent as DW1 and third defendant as DW3 and that the measurement of the property which they are entitled to and would establish the encroachment in the common passage. He further submitted that the Courts below over looked the Commissioner's report and plan which clearly shows the encroachment made by the respondents in the common passage. The Courts below failed to consider that the entire properties belonged to the common ancestor and in a partition between the sharers a common passage was left out and that right cannot be restricted to only 'foot pathway.' He further submitted that

the Courts below failed to advert to Section 28 of the Indian Easements Act, 1882, the extent of the right of easement and the principles therein and therefore, he prayed to allow the second appeal and to set aside the judgments and decrees passed by the Courts below and decree the suit as prayed for.

12. In support of the aforesaid contentions, the learned counsel for the appellant has relied upon the following decisions:-

1) Madai Lakshmi Alias M.Rajalakshmi Vs. P.M.Partha Kumar, (2000) 9 SCC 524.

2) H.P.State Electricity Board and others Vs. Shiv K.Sharma and others, (2005) 2 SCC 164.

3) Sree Swaym prakash Ashramam Vs. G.Anandavally Amma and others, (2010) 2 SCC 689.

13. The appellant herein has filed the above suit stating that the respondents 1 and 2 had encroached the suit pathway on the southern side adjacent to their property measuring about 3 feet width and constructed a compound wall to the length of 52 feet. He also stated that the third respondent/third defendant had encroached the aforesaid common passage on the northern side to a width of 2 feet adjacent to his land and put up a fence and hence, the defendants should be directed to remove the aforesaid encroachment made on the pathway byway of mandatory injunction. During the pendency of this second appeal, the learned counsel for the appellant/plaintiff has filed a memo on 06.07.2018 stating that the third respondent/third defendant is given up and therefore, the second appeal has been dismissed against the third respondent/third defendant. So, this Court has to see whether the relief which has been asked by the plaintiff against the respondents 1 and 2 /defendants 1 and 2 can be granted.

14. It is an admitted fact that there is a pathway which runs from north-south street, towards west as shown in the plaint rough plan. According to the plaintiff, the original width of the said passage was 9 feet, but on 20.11.1984, the defendants 1 and 2 had encroached 3 feet width in the said passage on the southern side adjacent to their lands. The defendants 1 and 2 denied the said allegation. According to the defendants 1 and 2, the foundation stones were laid several

years ago and on the said foundation stone a mud wall was constructed and recently they have removed the said mud wall and put up the present stone wall and therefore, they have not encroached the said passage as alleged by the plaintiff.

15. The plaintiff claims 9 feet width of common passage based on the recitals found in Ex.A1. Ex.A1 is the registration copy of the sale deed dated 03.07.1947 executed by one Duraisamy Padaiyachi and his son in favour of the first defendant's father namely, Perumal Padaiyachi. In the said sale deed, it is stated that the property which was sold to the said Perumal Padaiyachi situated on the south of common passage, but the width of the said passage is not mentioned in the said document. However, measurements have been given for the property purchased by the said Perumal Padaiyachi under the said document. It is stated that the said property is measuring east west 52 feet north-south 82 feet. Relying on the aforesaid recitals, the plaintiff claimed that the defendants 1 and 2 are entitled for 82 feet north south whereas the commissioner's report would show that they are having 86 feet north-south and that it would show that the defendants 1 and 2 have encroached in the said common passage as shown in the plaint rough plan.

16. The Advocate Commissioner has not stated in his report (Ex.C1) that he measured the properties of the defendants 1 and 2 with reference to Ex.A1 sale deed and revenue records. Further, he has not stated that he measured the properties with the help of a surveyor. Under the said circumstances, the measurements mentioned in the Advocate Commissioner's report and plan cannot be taken as accurate one. However, in the said report, the commissioner has stated that though the stones of the compound wall put by the defendants 1 and 2 above earth level appears to be new ones, the stones laid in the basement appears to be old. It shows that the basement of the aforesaid compound wall is not a new one and it was in existence, even prior to the alleged construction of new compound wall. Further, PW1 and PW2 have admitted in their evidence that the defendants 1 and 2 immediately, after purchase have put up a bamboo grill in the aforesaid common passage and subsequently, they have constructed a compound wall with stones. The trial Court taking into consideration of the fact that the plaintiff has not asked for declaration of his right over the suit pathway and also the fact that he has not produced any material to show that the original width of the said passage was 9 feet and also the admission made by PW1 and PW2 dismissed the suit. The first Appellate Court also confirmed the said findings. In the light of the said factual concurrent findings this Court cannot interfere.

17. In Madai Lakshmi Alias M.Rajalakshmi Vs.P.M.Parth Kumar (supra), the concurrent findings of the trial Court and the lower Appellate Court was that right by prescription had not accrued in favour of the respondent as there had been no uninterrupted user for a period of 20 years. The High Court had upheld the finding that easement of necessity no longer existed on the basis of the finding recorded by the trial Court and the lower Appellate Court. The High Court held that the respondent had perfected his right of quasi-easement under Section 13(f) of the Easements Act. On further appeal, the Hon'ble Supreme Court has held that the respondent having failed to establish his continued and uninterrupted user of the pathway for a period of 20 years, the High Court erred in reversing the concurrent decision of the Courts below. In this case, the Courts below concurrently found that the plaintiff failed to prove that the original width of the suit passage was 9 feet and in the said concurrent factual findings, this Court cannot interfere. Therefore, the aforesaid decision will not help the plaintiff.

18. In H.P. State Electricity Board and others Vs.Shiv K.Sharma and others (supra), the High Court considered the findings of fact recorded by the Additional District Judge and held that the said findings did not call for any interference under Section 100 CPC in the second appeal. The Hon'ble Supreme Court up-held the decision of the High Court and dismissed the appeal. Therefore, the aforesaid decision also will not help the plaintiff.

19. In Sree Swayam Prakash Ashramam Vs.G.Anandavally Amma and others (supra) the Hon'ble Supreme Court has held that mere fact that plaint pathway was not mentioned in the settlement deed concerned was no ground to hold that there was no implied grant of schedule B property as pathway. In this case, in Ex.A1 sale deed, pathway has been mentioned but the width of the pathway has not been mentioned. Further the defendants have not denied the existence of pathway and also the plaintiff's right to use the said pathway. The dispute is only with regard to the width of the pathway. There is no evidence as to what was the original width of the pathway. Therefore, the aforesaid decision also will not help the plaintiff.

20. In this case, the plaintiff failed to prove that the original width of the suit pathway was 9 feet and the defendants 1 and 2 have encroached 3 feet width of the said pathway. The Courts below after considering the materials placed concurrently found that the plaintiff failed to prove the alleged

encroachment. In the said concurrent factual findings this Court cannot interfere. Accordingly, the substantial question of law is answered against the appellant/plaintiff.

21.In the result, the second appeal is dismissed. No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

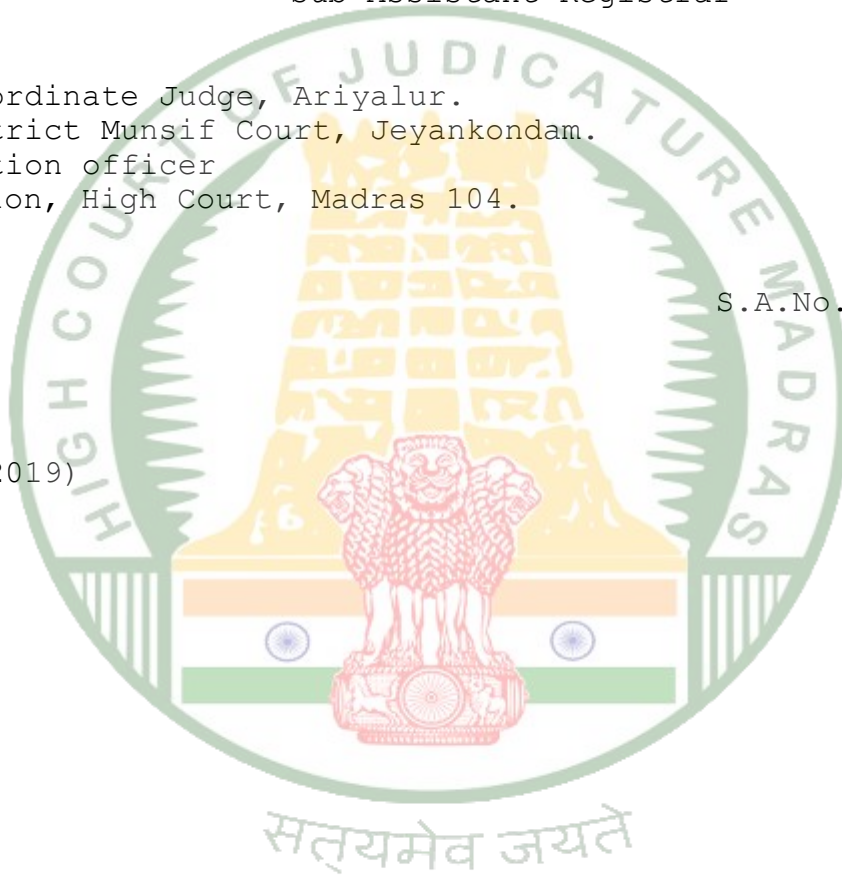
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To

- 1.The Subordinate Judge, Ariyalur.
- 2.The District Munsif Court, Jeyankondam.
- 3.The Section officer
VR Section, High Court, Madras 104.

S.A.No.842 of 1994

KAN(CO)
SP(30/05/2019)



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