

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 18.01.2019

DELIVERED ON: 24.01.2019

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

Second Appeal No.616 of 2009

and M.P.No.1 and 2 of 2019

1. Palaniappan (deceased)
2. Sasikaladevi
3. Minor Navinessh
rep. by his next friend/guardian,
mother, 2nd appellant Sasikaladevi

Appellants 2 and 3 brought on record as legal heirs
of the deceased sole appellant vide order of this
court
dated 07.09.2018 in CMP No.12539 to 12541 of 2018 in
S.A.No.616/2009

.... Appellants (Defendants LRS of Defendant)

Vs.

Shanmugam Respondent (Plaintiff)

PRAYER: Second Appeal filed under Section 100 of
the Code of Civil Procedure against the decree and
judgment dated 12.08.2008 passed in A.S.No.34 of 2008 by
the Subordinate Judge, Tiruchengodu, reversing the decree
and judgment dated 19.07.2004 passed in O.S.No.195 of
1997 by the District Munsif, Tiruchengodu.

For Appellants : Mr. S. Mukunth

for M/s Sarvabhauman Associates

For Respondent : Mr.V.Venkatasamy

JUDGMENT

The appellant is the defendant in O.S.No.195 of
1997 on the file of the District Munsif, Thiruchengode.
The plaintiff in O.S.No.195 of 1997 filed the suit for

(i) Permanent injunction restraining the
defendant and his men from interfering with
the plaintiff's peaceful enjoyment over the
suit property.

(ii) Mandatory injunction for removing
the encroachments made in the suit property
by the defendant.

(iii) Awarding costs of the suit.

The suit property is described as a 20 feet wide pathway marked as ABCD in the plan appended with the plaint.

2. For the sake of convenience, the parties are called as mentioned in the original suit.

3. The brief case of the plaintiff is as follows:

The entire land in S.No.19 of Thiruchengode measuring 10.25 acres originally belonged to the defendant and his family members. They sold an extent of land measuring 0.15 acres with specific boundaries out of 10.25 acres in S.No.19 of Thiruchengode in favour of one Arthanari Padayachi along with a right of way through 20 feet wide pathway on the southern side of the land through a registered sale deed dated 13.02.1964 (Ex.A1). Arthanari Padayachi sold the said property along with the right over the pathway in favour of one A.S.Angammal vide a sale deed dated 11.10.1985 (Ex.A5), who in turn sold the same in favour of the plaintiff through a sale deed dated 09.02.1996 (Ex.A2). The suit pathway starts from Thiruchengode-Sankari Main Road situate on the western side of the property and runs East-West on the defendant's property. The contention of the plaintiff is that the defendant wanted to purchase the property already sold by him during 1964, from the plaintiff and that since the plaintiff did not accept the offer made by the defendant, the defendant started preventing the plaintiff from enjoying the suit pathway and one such attempt was made on 06.05.1994. The defendant during the pendency of the suit put up sheds over the suit property.

4. The defendant resisted the suit by contending that the suit pathway absolutely belonged to him and that a " foot pathway/pedestrian pathway " alone was conveyed through Ex.A1 sale deed dated 13.02.1964 in favour of plaintiff's predecessor in title. It is further contended by him that the plaintiff cannot be permitted to take his vehicles through the said pathway.

5. The learned District Munsif, Thiruchengode dismissed the suit vide her decree and judgment dated 19.07.2004 holding that the 20 feet pathway is not in existence as per the report (Ex.C1) of the advocate commissioner and that the plaintiff can only walk through the pathway since only such a right was conveyed through the sale deeds Ex.A1, Ex.A2 and Ex.A5. It is further observed that the plaintiff cannot take his vehicles or carts through the suit pathway.

6. Aggrieved over the said decree and judgment, the plaintiff filed an appeal before the Subordinate Judge, Thiruchengode in A.S.No.34/2008. The first appellate court decreed the suit filed by the plaintiff by observing that since no specific mention is made in the sale deeds Ex.A1, Ex.A2 and Ex.A5 that the plaintiff and his vendors should not take vehicles or carts through the suit 20 feet wide pathway and that the plaintiff is entitled to take his vehicle through the suit pathway. It is further held that since the advocate commissioner has clearly stated that the defendant had put up sheds over the suit pathway, the same should be removed by the defendant. The first appellate court, decreed the suit filed by the plaintiff.

7. Now the second appeal is filed by the defendant on the following substantial questions of law.

1) Whether the lower appellate court is correct in interpreting the terms of Sale Deed and gave its own opinion while the terms are clear and unambiguous?

2) Whether the grant of mandatory injunction by the lower court is sustainable in the absence of proper cause of action as to the obstructions?

8. During the pendency of this second appeal, the sole appellant/defendant died and his legal heirs were brought on record and impleaded as appellants 2 and 3.

9. Mr.S.Mukunth, learned counsel for the appellants would contend that as per Section 28 of the Indian Easements Act, 1882, the extent of easementary right and mode of its enjoyment other than easement of necessity must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired. He stressed upon that a right of way of any one kind would not include a right of way of any other kind and since in the instant case what was conveyed through Ex.A1 sale deed dated 13.02.1964 was only a "pedestrian pathway", the plaintiff cannot take his vehicles through the suit pathway. He also relied on the following decisions.

(i) dK.Kolandaisami Gounder
(deceased) and another Vs. Manickam
reported in (2001) MLJ (Supp.) 379

(ii) Kanji and others Vs. Udaya and
another reported in AIR 1991 M.P. 354

and contended that when specific right was given to use

the land of the defendant only as a foot pathway/ pedestrian pathway, the defendant cannot be burdened with more obligations.

10. His next contention is that as per Order XX Rule 9 and Order VII Rule 3 of Code of Civil Procedure, where the subject matter of the suit is an immovable property, the same should be described properly for identification and that since the plaintiff has not described the extent of alleged encroachment made by the defendant over the suit pathway, the first appellate court was wrong in granting a mandatory injunction directing the defendant to remove the entire sheds constructed by him in his property. He also placed reliance upon the decision in *Manickammal (deceased) and others Vs. R. Jayaraman (died) and others* reported in 2018-1 L.W. 62 and contended that vague description of suit property should result in rejection of the claim made by the plaintiff.

11. Per contra, Mr.V.Venkatasamy, learned counsel for the respondent/plaintiff would contend that since no specific restriction is made for usage of pathway, the plaintiff is entitled to take his vehicles/carts through the pathway. He would also contend that when the Advocate Commissioner has clearly indicated the encroachments made by the defendant over the pathway those encroachments should be removed and that since the plaintiff has earmarked 20 feet wide road as pathway and has conveyed easementary right by grant through the sale deed Ex.A1, he cannot subsequently encroach upon the said land. He relied on the decision in *Chinnusamy and Rajeswari Vs. Sundaram* reported in 2017 (2) CTC 770 and contended that Easementary right by way of grant is a matter of contract between the parties and the same would not get extinguished by the statutory provision under Section 41 of the Act, which is applicable only to easement of necessity arising under Section 13 of the Act. He also relied on the decision of the Honourable Supreme Court in *Hero Vinoth (Minor) Vs. Seshammal* reported in (2006) 5 Supreme Court Cases 545 and contended that in a easement of grant, the parties are governed by the terms of the grant and not by anything else.

12. A perusal of Ex.A1 sale deed dated 13.02.1964 executed by the defendant in favour of Arthanari Padayachi (plaintiff's predecessor in title) clearly shows that the buyer was given a " foot path/pedestrian pathway" over the 20 feet wide pathway. The same right was conveyed through Ex.A5 in favour of

plaintiff's vendor. However, in the sale deed Ex.A2 dated 09.02.1996 executed in favour of the plaintiff, there is a slight development in vesting the easementary right in favour of the plaintiff and this sale deed (Ex.A2) reads "all rights to use the pathway for ingress and egress".

13. The plaintiff in the instant case claims right of way through 20 feet wide pathway in the land of the defendant as the said right is conveyed through the sale deeds Ex.A1, Ex.A2 and Ex.A5. In fact, he wants to take his vehicles/carts through the said pathway. Though the defendant does not deny the easementary right of way granted in favour of the plaintiff in the suit pathway, however contends that the plaintiff cannot burden him more by taking his vehicles through the pathway as the same would be detrimental to the use of his own land. The specific contention of the defendant is that the plaintiff was given only a "foot path / pedestrian right of way" and he cannot take his vehicles through the pathway.

14. A right of way is a right to pass over the soil of another person uninterruptedly. Rights of way do not fall under the denomination of natural rights and they are discontinuous easement which may be acquired in the same way as the other easements are acquired. A private right of way is vested to the owner of particular tenements and their origin is by grant or prescription. In the instant case, the right of way over the suit property is claimed by the plaintiff through the sale deeds Ex.A1, Ex.A2 and Ex.A5 and the plaintiff contends that his right of way is obstructed by the defendant as the defendant had put up constructions over the suit pathway. This is actually confirmed by the learned advocate commissioner, who has clearly stated in his report and plan (Ex.C1 and Ex.C2) that the pathway at the entrance from the Sankari Main Road is 18 feet and thereafter narrows down to 7 feet and after certain distance, it is 10 feet wide.

15. Though the plaintiff in para 8(a) of his plaint has contended that the defendant "had put up walls, thatched and tiled sheds" over the suit pathway during the pendency of suit, in his deposition as PW1 has categorically admitted that encroachments in the suit pathway existed even before his purchase of the property. He further added that his vendor promised him to get the encroachments removed at the time of execution of sale deed in his favour. There is no such pleading in this regard and on the contrary, the plaintiff in his plaint has contended that the defendant put up construction over

the suit pathway only during the pendency of the suit.

16. The plaintiff's another contention in the plaint is that the defendant requested the plaintiff to sell his property in his favour and that since the said request was turned down by him, the defendant started preventing him (plaintiff) from using the pathway. He has again contradicted his own version in the plaint by deposing that he has never seen the defendant before and that he does not know whether the defendant wanted to purchase his property. The plaintiff as PW1 has also contended that the defendant had encroached upon the pathway by 13 feet at some place and 3 feet at some other place. He has not specifically stated the exact extent of encroachment made by the defendant over the suit pathway.

17. Though any wrongful interference with a right of way constitutes a nuisance, every obstruction of the way would not amount to an unlawful interference, unless there is a substantial interference with the easement granted. In the instant case, as already observed, the plaintiff was granted only a "foot way/ pedestrian pathway" and therefore the obstruction made in the suit pathway may not amount to any substantial interference of plaintiff's usage.

18. The scope of the grant could be determined by the terms of the grant between the parties alone and in the absence of express words in the sale deeds Ex.A1 and Ex.A5 granting permission to the plaintiff to take his vehicles over the suit pathway, the plaintiff cannot claim such a right over the suit pathway.

19. It is also relevant to extract Section 28 of the Indian Easements Act, 1882 to the extent as is necessary for the purpose of this present appeal.

Section 28 Extent of easements. - With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect:-

Easement of necessity. - An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

Other easements. - The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired.

In the absence of evidence as to such intention and purpose -

(a) Right of way. - A right of way of any one kind does not include a right of way of any other kind;

It is therefore clear that a right of any one kind would not include a right of any other kind and the intention of parties must be gathered from the documents viz., the sale deeds Ex.A1 and Ex.A5. If the parties intended the pathway for taking carts/vehicles, that would have been specifically mentioned in the sale deeds and since it is clearly indicated as "foot path/ pedestrian pathway" the plaintiff cannot be permitted to take his vehicle through the pathway. A foot path (also pedestrian way) is a type of thoroughfare that is intended for use only by pedestrians and not other forms of traffic such as motorized vehicles, cycles and horses. A foot path is a right of way that can only be used by pedestrians.

20. More over, as per Section 29 of the Easements Act, 1882, the owner of the dominant tenement cannot throw any burden on the servant tenement by doing any additional usage. Further, the plaintiff's vendor did not seem to object the defendant from putting up any construction over the suit pathway and therefore the plaintiff is estopped from contending that he is entitled to the entire extent of 20 feet pathway without any obstruction, especially when the plaintiff's predecessor in title did not claim such a right.

21. As discussed earlier, the plaintiff has not specifically described the exact extent of encroachment made by the defendant over the suit pathway. When the plaintiff as PW1 states that the width of the pathway is 13 feet at some place and 3 feet at some other place, the learned advocate Commissioner in his report (Ex.C1) states that at the entrance from Sankari Main road, it is 18 feet and thereafter narrows down to 7 feet. The plaintiff has not also given specific measurements of encroachments made by the defendant over the suit pathway. Thus, neither the plaint nor the advocate commissioner's report states the exact extent of encroachment made by the defendant and in the absence of the same, the first appellate court was wrong in granting mandatory injunction to remove the encroachments made by the defendant. If a suit for mandatory injunction is decreed, unless specific extent of encroachment is given, it would become impossible to execute the decree. Thus, judged from any angle, the suit filed by the plaintiff cannot be decreed.

22. In the result,

(i) The second appeal is allowed. No costs. The connected miscellaneous petitions are closed.

(ii) The decree and judgment passed by the Subordinate Judge, Tiruchengode (first appellate court) in A.S.No.34 of 2008 dated 12.08.2008 is set aside,

(iii) The decree and judgment passed by the District Munsif, Tiruchengode in O.S.No.195 of 1997 dated 19.07.2004 is restored.

(iv) The suit in O.S.No.195 of 1997 on the file of the District Munsif, Tiruchengode is dismissed with costs.

Sd/-

Assistant Registrar(CS viii)

//True Copy//

Sub Assistant Registrar

mst
To

1. The Subordinate Judge, Thiruchengode.

2.The District Munsif, Thiruchengode.
Copy to;

The section officer,
VR Section,
High court
Madras

+2ccs to M/s Sarvabhauman Associates , Advocate SR.No. 5789,6241

+1cc to Mr.V.Venkatasamy, Advocate SR.No. 5411

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A.SK(11/04/2019)

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