



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11.06.2019

CORAM: The Hon'ble Mr. Justice N. Seshasayee

S.A.Nos. 2177 and 2178 of 2004

1. Shanmugha ... Sole Appellant in SA.No.2177 of 2004
1st Appellant in SA.No.2178 of 2004
2. Sivathal ... 2nd Appellant in SA.No.2178 of 2004

Vs.

1. Keppakkal ... 1st respondent in both appeals
2. Gurusamy ... 2nd respondent in SA.No.2178 of 2004
3rd respondent in SA.No.2177 of 2004
3. Ramasamy Gounder ... 2nd respondent in SA.No.2177 of 2004

Common Prayer:- Second Appeal filed under Section 100 of Civil Procedure Code against the common Judgment and Decree dt 26.07.2002 made in A.S.Nos.22 and 21 of 2001 on the file of the Court of the IInd Additional Sub Judge, Coimbatore, setting aside the Judgment and Decree dt.14.12.2000 made in O.S.Nos.850 and 915 of 1997 on the file of the Court of the 1st Additional District Munsif, Coimbatore.

For Appellants : Mr.T.P.Manoharan, Senior counsel
Assisted by D.Kamatchi

For Respondents : Mr.P.Srinivas

COMMON JUDGMENT

The dispute in these appeals pertains to existence of a pathway/cart track in the property of the respondents.

2. The substantial facts herein are admitted and they go as follows:

- The property in S.F.No.323 of Pichanoor Village has a total extent of 9.26 acres. The property to its immediate east belongs to the first respondent. The appellant has a property somewhere on the north of this property. The



WEB COPY

dispute is all about whether appellant has a right of way along the western boundary of the respondent's property.

- Claiming that there existed a pathway, over which the appellant and his predecessors in title have enjoyed a right of pathway for over 50 years and alleging that the respondents are afoot to destroy or obliterate the said pathway, the first appellants has filed O.S.No.850 of 1997 for bare injunction.
- The respondents on their part would contend that there never existed any such right of way over their property, that the appellant or his predecessors in title had ever enjoyed and laid a

suit in O.S.No.915 of 1997 for a declaration that no right of pathway, as claimed by the plaintiff, was available to them and for consequential injunction.

- It appears that during the pendency of the Suit, the disputed pathway was destroyed or damaged. Subsequent to which, the appellant had amended his plaint and has now sought a prayer for mandatory injunction to restore the pathway.

2.1 Before the trial Court, the parties have examined themselves, besides examining other witnesses. Both suits were tried jointly and evidences were recorded. In O.S.No.850 of 1997, the Suit filed by the appellant, the appellant had filed his title deed in Ext.A.1 and backed the same with the earlier title deeds which were marked as Exts.A.2 and A.9. The defendants too had filed their title deeds. In both the suits separate Commissioners were appointed, and they filed their plans and reports. The one filed in O.S.No.850 of 1997 were marked as Ex.C.1 and Ex.C.2, and the other filed in O.S.No.915 of 1997 were marked as Ex.C.3 and Ex.C.4. On appreciating the evidence, the trial Court proceeded to decree the appellant's suit and dismissed the respondents suit.

2.2 Aggrieved by the said decree, the respondents herein preferred A.S.Nos.21 and 22 of 2001 respectively against the decrees passed in O.S.No.850 of 1997 and O.S.No.915 of 1997. Both the appeals were heard together and disposed of by a common judgment. The first Appellate Court has reversed the decrees of the trial Court. Felt aggrieved by the reversal in his fortune, the appellant has now approached this Court.

3.1 As indicated in the earlier paragraphs the appellant herein does not dispute the respondent's title to S.F.No.323 of Pichanoor Village. He has claimed his limited right of pathway/cart track along the western extremity of the



WEB

respondent's property. The issue here is whether there at all a right of pathway had ever existed. The trial Court has relied on Ex.A.9, dated 21.11.1945, under which, certain Marathal claimed title to plaintiff's property, then under Ex.A.2, sale deed dated 09.06.1959, by which one Ramasamy Gounder had obtained title to the same property based on Ex.A.9, which was followed by Ex.A.1, the title deed of the appellant. In Ex.A.9, a reference to a right of pathway over respondent's property is indicated. When this property was sold under Ex.A.2 in 1959, the right of pathway gets a reference as right over the cart track. This again gets represented in Ext.A.1, title deed in favour of the appellant as well, with a specific reference to a right of a pathway or a cart track indicating that it was existed even prior to 1945.

3.2 The trial Court then turned to the Commissioner's report filed in both the cases. In Ex.C.1 and EX.C.2, the commissioner finds that about 7 feet along the western boundary of the respondent's property is left to be used as a pathway. Relying on these material evidences before it, the trial Court proceeded to hold that there existed a pathway for the benefit of the appellant and decreed the Suit.

4. While reversing the trial Court's Judgment, the Appellate Court has held that P.W.1, in his evidence has stated that there existed an alternate pathway along an elongated route for him to reach his property and accordingly it concluded that there existed an alternate pathway for him. It has also taken note of the fact that while in Ext.A.9 and Ext.A.2, reference is only to a pathway/nadaipathai but, in Ex.A.1 the same is altered and described as a Cart track.

5. The Second Appeal Nos.2177 and 2178 were admitted for deciding the following substantial questions of law;

1)Whether the finding of the Court below that only a passage is in existence in S.F.No.323 and not a cart track, is sustainable in law?

2)Whether the appellants are not entitled to use the suit cart tract on the ground of easement of necessity?

6. If the Appellate Court's Judgement is properly scrutinized, to start with, it does not delve on the question as to what is the width of the pathway/nadaipathai mentioned in Ex.A.9, or the cart track in Ex.A.2 and Ex.A.1. Secondly, it appears to have confronted a non-existing question on easement of necessity. Had the Suit been laid as one for easement of necessity, the Court should delve over the question as to if there exists an alternative pathway. Here the contention is that the appellant merely goes to assert that the appellant



and his predecessors in title have enjoyed the right of pathway for more than 50 years.

7. Whether the pathway was there all along could be ascertained by going through Ex.A.9 and Ex.A.2. Ex.A.9, which is last of documents filed by both sides and dates back to 1945, and this would indicate that the pathway was in existence well beyond 52 years when the Suit was laid. Whether the right of pathway has emerged as one of prescriptive right of easement or a contractual right granted to appellant's predecessors in title? It cannot be stated with any degree of precision at this distant point of time, and it is suffice to state for the present, based on the available evidence, that there existed a pathway along the western extremity of the respondent's property.

8. The next issue is about the extent to which the appellant now asserts title. Neither Ext.A-9, nor any of the successive documents Exts.A.2 and A.1 indicate anything about the width of the pathway. Therefore, how have the parties understood it therefore gains significance. Here the commissioner's report steps into resolve the issue. Ext.C.1 and Ext.C.2 state that the pathway has a width of 7 feet along the western extremity.

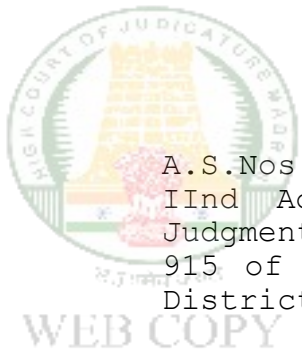
9. In order to alleviate all confusion, this Court now has to not only restore the decree of the trial Court but also limit the extent of right the appellant will have. The nearest evidence as to the width of the pathway is available in Ex.C.1 and Ex.C.2, which indicates that the pathway has a width of 7 feet. Further, it also indicates about the coconut trees etc., along the western boundary of the pathway. Even though the Commissioner's report indicate the width of the pathway as 7 feet, this Court now limits it to 6 feet.

10. In conclusion, this appeal is allowed and the appellants right of way over this foot path along the western boundary of the respondents property is held to be in existence and there shall be an decree for mandatory injunction for his restoration.

11. The learned counsel for the appellant states that to the extent required, the appellant himself can contribute to the restoration of his right of pathway.

12. It is made clear that this pathway can be used for any purpose in which pathway can be reasonably used. It is also made clear that this will not have the effect of disturbing the title of the respondents over the soil in S.F.No.323.

13. In the result, the present second appeals are allowed and the common Judgment and Decree, dated 26.07.2002, made in



A.S.Nos.21 and 22 of 2001, on the file of the Court of the IIInd Additional Sub Judge, Coimbatore, setting aside the Judgment and Decree dated 14.12.2000, made in O.S.Nos.850 and 915 of 1997, on the file of the Court of the 1st Additional District Munsif, Coimbatore is set aside. No costs.

Sd/-
Assistant Registrar

//True Copy//
Sub Assistant Registrar

tsg

To

1. The II Additional Subordinate Judge,
Coimbatore

2.The I Additional District Munsif,
Coimbatore.

3.The Section Officer
VR Section, High Court, Chennai.

+1cc to Mr.P.Srinivas, Advocate SR.47297

+2cc to Mr.K.P.Jotheeswaran, Advocate SR.47341, 47342

S.A.Nos.2177 and 2178 of 2004

SJ(CO)
CB(15/07/2020)