

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.08.2019

CORAM:

THE HON'BLE MR.JUSTICE N.SESHASAYEE

S.A.NO.643 OF 2004

1. The Director,
TamilNadu Khadi & Village Industries Board,
Kuralagam, Chennai.

2. The Deputy Director,
TamilNadu Khadi & Village Industries Board,
Tiruvannamalai.

...Appellants/Defendants 4 & 5

Vs.

1.K.Rajalakshmi
2.K.Rajesakaran
3.K.Rajendran
4.K.Rathinam

... Respondent 1 to 4/Plaintiffs

5.The Collector, Tiruvannamalai.
6.The Thasildar, Chengam.
7.The Executive Officer,
Town Panchayath, Chengam.

...Respondents 5 to 7/
Defendants 1 to 3

Prayer:-

Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree of the learned Principal District Judge, Thiruvannamalai allowing the appeal made in A.S.No.40/2001, dated 28.2.2002 and reversing the Order of Dismissal passed by the District Munsif-cum-Chief Judicial Magistrate, Chengam, dated 10.4.2001 in O.S.No.150 of 2000.

For Appellants : Mr.S.K.Bose

For Respondents : Mr.N.Manikandan,
Government Advocate for R5 & R6
Mr.N.Subbarayalu for R7
RR1 to 4 - No appearance

JUDGMENT

1. The defendants 4 and 5 who had been successful in defending the suit laid for declaration of plaintiff's right of way over a property comprised in S.F.No:418, and for allied relief of injunction, before the trial Court, but lost to the plaintiffs before the first appellate Court, have preferred this appeal. Plaintiffs/respondents 1 to 4 would be referred to by their rank before the trial Court, and defendants 4 and 5 would be referred to as appellants. (This is so because defendants 1 to 3 did not contest the suit, and in this appeal, they are arrayed as respondents 5 to 7)

2.1 The admitted facts on either side are:

- The plaintiffs own a block of agricultural land in various sub-divisions of S.F.No.221. The main lies on far west, and between the main road and the plaintiff's property lies a block of buffer land in S.No:418 and this is a Natham property.
- That the defendants 1 to 3 have allotted a plot measuring 40 ft x 20 ft. in S.F.No:418 to the appellants abutting the afore referred to main road on the west, where the appellants have put up a building.

2.2. The allegation in the plaint is that the plaintiffs and their predecessors-in-title have been using the property in S.F.No:418 for over a century, openly and without any obstruction, and that this alone served as only access-point of their property to the main road. The construction of the building by the appellants had obstructed their right of way and hence have laid a suit for the reliefs already outlined above.

2.3. The defendants 1 to 3 chose not to file their written statement (a disappointing state of affairs that the Court witnesses, as the State not infrequently chooses not to defend the interest of the State. The doctrine of public trust where the Government is considered as a trustee of its citizens, often seen thrown to wind, and the officialdom opts not even to assist the Court with material facts often. In our system instances such as these surely will go unaccounted). The 5th defendant in its written statement has denied the right of way as claimed by the plaintiffs over S.F.No:418 and have alleged that the portion where the appellants have put up their construction was a road margin and that this portion was in the possession of three named encroachers, that after removing the encroachment, on 07-03-1991, the Government, has allotted this portion to the appellants, that this plot allotted to it was assigned S.F.No:418/16, that the agricultural lands of the

plaintiffs lie at least some 7 feet below the level of the suit property, and hence it is inconceivable that they could have used the property allotted to it, for transporting their agricultural produce by bullock carts.

3. When the dispute went to trial, the trial Court dismissed the suit on the ground that the plaintiffs still have access to the main road on the west, However, the first appellate Court did not subscribe to the same view and reversed the judgment of the trial Court and decreed the suit. For arriving its conclusion, the first appellate Court relied on Ext.B11. This is a communication from the Thasildar to the District Collector.

4. Challenging the judgment and decree of the first appellate Court, which reversed the decree of the trial court and decreed the suit, the appellants are before this Court with this second appeal.

5.This appeal is admitted on the following substantial questions of law;

1.When no easementary right was granted under Exs.A-1 and A-2, whether the lower appellate Court has not erred in law in decreeing the suit filed for declaration based on easementary right?

2.When the plaintiff failed to establish enjoyment of easementary right by any documentary evidence and independent witness, whether the lower appellate Court has not erred in law in decreeing the suit?

3.When there is an alternate way to reach suit property as evident by the Commissioner's report Ex.A-7 and plan submitted by the defendants, whether the lower appellate Court has not erred in law in decreeing the suit?

4.When the plea of survient and dominant owner has not been pleaded and established, whether the lower appellate Court has not erred in law in decreeing the suit filed for declaration based on easementary right?

6.Heard, the learned counsel for the appellants and also the learned counsel for the respondents 5 and 6 and the learned counsel for the 7th respondent. Respondents 1 to 4 are the plaintiffs, and they, though served with notice, did not appear to contest this appeal.

7.After hearing their arguments and perusing the documents, this Court is prima facie satisfied that the plaintiffs' property in S.F.No:221, is not land-locked. However, since the

plaintiffs did not appear before this Court, it wanted to ascertain the said fact and therefore, directed the learned Government Advocate appearing for respondents 5 and 6 to make available a plan drawn to scale indicating the position of the plaintiffs property and also other details. This plan has been made available, it is now marked Ext.C.3.

8.The allegation of the plaintiffs has all along been that the property comprised in Sy.No.221 is land-locked and, but for the pathway available in Sy.No.418/1, they could not access the main road on the west. The Commissioner's plan as well as the plan now provided indicate that the plaintiffs' property is accessible from almost all the sides including the one on the west and it also indicates that, notwithstanding the construction of a building by the appellants there is still space available for the plaintiffs to access the main road on the west.

9.The learned counsel for the respondents 5 and 6 submitted that during the process of preparation of Ext.C.3, the Government has noted certain encroachments made by the plaintiffs too. This Court however, does not consider it to be germane to consider the same in this appeal.

10.Turning to the substantial questions of law No.1, the fact that neither Ext.A.1 nor A.2, two of the title documents under which plaintiffs claim right of way do not deal with the right of way specifically over S.F.No:418, does not ipso facto imply that they should be denied their right to claim an easmentary right of way, for an easmentary right can be founded neither in a contract nor in a grant, but in lost grant, prescription or necessity. Question Nos.1 and 2 are decided against the appellants. So far as the substantial question no.3 is concerned, this Court does not find the reasons of the Appellate Court reasonable enough, as it ignores the other points of accessibility to the plaintiffs' property. As is made known in the Commissioner's report marked Exts.C.1 and C.2, even on the western side, where the appellants were assigned some land and wherein it had put up construction measuring 20 feet x 40feet, there is still space available for the plaintiffs to access the main road. Even if the plaintiffs have any right of access, yet they do not have a right to a right of way in a straight line. This apart, the plaintiffs have access to the main road from all the three sides of their fields, and therefore, their claim of easmentary right, to a large extent is exaggerated. Therefore, this Court finds that the findings of the first Appellate Tribunal is not founded on reasonable appreciation of the material evidence available on record and hence, is not in agreement with the finding of the first Appellate Court on this point. The substantial question No.4 is

ancillary to this question and it is also so decided.

11. In view of the same, this appeal is allowed and the Judgment and Decree of the learned Principal District Judge, Thiruvananthapuram allowing the appeal made in A.S.No.40/2001, dated 28.2.2002 and reversing the Order of Dismissal passed by the District Munsif-cum-Chief Judicial Magistrate, Chengam, dated 10.4.2001 in O.S.No.150 of 2000 is hereby set aside. No costs. The plan marked Ext.C.3 is directed to be made a part of the decree passed by this Court.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

tsg

To:

1. The Principal District Court,
Thiruvananthapuram.
2. The District Munsif-cum-Chief Judicial Magistrate,
Chengam.

+1cc to Mr.S.K.Bose, Advocate, S.R.No.68228

+1cc to the Special Government Pleader, S.R.No.67716

S.A.No.643 of 2004

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