

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.03.2020

CORAM

THE HONOURABLE MR.JUSTICE N.SESHASAYEE

S.A.NO.1323 OF 2002

AND

C.M.P.NOS.23 AND 34 OF 2019

Kuppusamy
S/o.Sundara Konar

... Appellant/1st Defendant

versus

1. Kuppusamy
2. Murugan (Died)
3. Krishna Konar
4. Sindhamani Ammal
5. Chinnappa Ammal @ Yasodai
6. Jayalakshmi
7. Dhanalakshmi
8. Krishnammal
9. Kuppu
10. Annamalai
11. Govindaraj
12. Murugan
13. Venkatesan
14. Malliga
15. Parimala
16. Pandiyan

... Respondents/Plaintiffs 3 & 4 and
Respondents 3 to 13

(Respondents 14 to 16 brought on record as legal representatives of the deceased 2nd respondent viz., Murugan vide Order of Court dated 03.02.2020 made in C.M.P.No.23912, 23913 of 2019 in S.A.No.1323 of 2002).

Prayer:

Second Appeal is filed under Section 100 of code of Civil Procedure against the judgment and decree dated 16.10.2000 in A.S.No.47 of 2000 on the file of the learned Additional District Judge, Tiruvannamalai reversing the judgment and decree dated 28.01.2000 made in O.S.No.691/84 on the file of the Additional District Munsif No.1, Tiruvannamalai.

For Appellant : M/s.B.S.Gnanadesikan & Associates

For Respondents: Mr.T.R.Rajaraman [R1, R14 to R16]

R2 - Died

R3, R13 - Not ready in Notice

R5 to R12 - No Appearance

R4 : Died

JUDGMENT

The 1st defendant, who was successful in non-suiting the plaintiff in a suit for bare injunction in O.S.No.691 of 1984 before the trial Court, but having suffered a reversal in A.S.No.47 of 2000, has come before this Court with the present appeal. The parties would be referred to by their rank before the trial court.

2. The suit property in relation to which the relief of injunction was sought, is a pathway. This property is described pictorially in Ext.A-4, which is a plan appended to the plaint. The suit land is an east-west running lane. To the south of the lane is situated Sy.Nos.136 and 135, and Sy.No.136 is on the west of Sy.No.135. The plaintiffs have their house property in Sy.No.135, whereas the third defendant is the title holder of the property in S.No.136. On the north of the lane is situate the properties in Sy.Nos.137 and 138, of which Sy.No:137 lies to the west of Sy.No.138. Further to the south and east of S.Nos.135 and 138, lies the property in S.No.139/3. The title to the plaintiffs and the defendants properties are not in dispute.

3.1 The only issue in the context of the prayer is about the width of the lane/pathway that runs in a east-west direction separating Sy.Nos.137, 138 on the north and Sy.Nos.136 and 135 of the south. The plaintiffs' claim is that it has a width of 12 feet.

3.2 The defendants 1 and 2 contested the suit. They have filed a written statement and also an additional written statement. In paragraph No.6 of the written statement, the defendants 1 and 2 would contend that on the western extremity of the alleged lane, there existed a 6 feet tall wall which had been removed at certain places for the convenience of the defendants, and that ramnants of the old wall was still available at the very entrance of the lane. He would add that the plaintiffs have been reaching the house only through a common passage situate to the south of S.Nos.136 and 135, i.e., to the south of the properties of the 3rd defendant and the

plaintiffs. In other words, they have pleaded that the width of the pathway was only 6 feet, that immediately to its north lies their own property in Sy.No:137 and 138, and that they had laid a 6 feet wide pathway in the southern portion of S.Nos.137 and 138. The 6 feet wide pathway referred to earlier lies to south of this pathway in Sy.Nos.137 and 138 and the former mentioned pathway alone was used as a common pathway both by the owners of the properties on to its either side. This pathway provides access to the street on the west, and at the western entrance point there was a wall enclosing their property on the north of the lane. This is the common passage referred to in the settlement deed dated 04.11.1933, under which the plaintiffs claim title. In the additional written statement, the defendants essentially relies on certain exchange deeds that source their title, which is not seriously disputed.

4.1 The dispute went to trial, and before the trial Court both sides adduced oral and documentary evidence, of which the evidence of PW2 and PW3 are critical for deciding this case to which reference would be made later in this judgment. The trial Court dismissed the suit primarily on the following grounds:

a) That in Ext.A1 exchange deed under which plaintiffs' ancestors have obtained title, there is a reference to the 'vasal', or entrance, as the northern boundary of S.No.135 and that it also refers to a common pathway to the south of S.No.135. Therefore, the boundary description of a vasal on the north as stated in Ext.A1, cannot be treated as the common pathway as claimed by the plaintiff. This in essence pertains to the identity of the pathway in terms of Ext.A-1.

b) Secondly, both PW2 and PW3 would refer to a point of admission about a certain mud-wall in the property of the defendants and the same was not explained by them.

4.2. Aggrieved by the decree of the trial court, the plaintiff took the matter in appeal, and the First Appellate Court concluded that the defendants and their witnesses have spoken about the existence of a common pathway on the north of plaintiffs' house, and based on the same it decreed the suit.

5. The 1st defendant has preferred this appeal and the appeal was admitted on the following substantial questions of law:

1. Whether the Appellate Court is right in admitting the additional evidence at the appellate stage?

2. Whether the lower appellate Court is right in granting the relief of injunction without proving

the adverse possession or easementary right without a prayer for declaration?

6.1 The learned counsel for the appellant argued that even if the First Appellate Court's finding founded on what it considered as an admission of the defendant is accepted on its face value, still the dispute as to width of the pathway remains. There is a difference between the existence of a common pathway and its width. This has to be appreciated in the context of the case of the defendant where he denied the existence of a common pathway at all as available on to the north of the plaintiff's property. The trial Court has held that there existed a pathway, but it has not determined the width of the said pathway to which the plaintiff may have an interest.

6.2. Developing it further, it was argued that the burden is squarely on the plaintiffs to establish that the width of the common pathway is 12 feet. In this regard, as rightly found by the trial Court, in Ext.A1, under which the plaintiffs claim and assert right to their property in S.No.135, the northern boundary of his property is stated to be a 'vaasal', or entrance. There cannot be a 'vaasal' for 12 feet, and if at all it is so, that would have found a better reference in Ext.A1. The second probable reason why there could not have been a 12 feet pathway as claimed by the plaintiffs is that in their evidence PW2 and PW3 speak about the existence of a certain wall to the north of the 6 feet pathway abutting plaintiff's property in Sy.No.135(which these defendants concede as the common pathway) some time earlier, and that the remnants of the wall are still available. In this regard, when the 1st defendant was examined as DW1, and during his cross-examination, plaintiffs have suggested about this separation of the entire 12 feet width by a wall dividing it into a northern and souther halves, and DW1 admits to this separation. This suggestion by the plaintiff goes to fortify the contention of the appellant/first defendant. Arguing further, the learned counsel submitted that when once the defendants have denied the title to the alleged 6 feet on the northern half of the pathway, then the plaintiff ought to have gone for a suit for declaration of his right of way over the entire width 12 feet. While they have not only failed to seek a declaration, but they have also made available evidence only for a 6 feet wide pathway. This is an aspect which the first appellate court has omitted to focus pointedly.

7. Responding to the same, the learned counsel for the respondent/plaintiff would argue that the defendants who had disputed the very existence of a lane/passage to the north of their property in S.Nos.136 and also 135, has conceded to the same in his chief examination as D.W.1, and this stand further fortified by their own witnesses namely DW2 and DW3. Given the

fact that when the defendants have denied the very existence of this passage in their written statement, the moment they conceded it in their oral testimony, then it ought to be held that the passage had a width of 12 feet. Since this is a finding on fact by the first appellate court, in the absence of any perversity in entering the said finding, this Court may not interfere with the same in the second appeal.

8. On the face of it, this court senses that in the context of the substantial questions framed for consideration, the tone of the argument of the appellant's counsel seems indicate that the appellant opts to settle for a lesser remedy. The dispute is now about the northern half of the 12 feet which according to the plaintiffs is part of the common pathway. As to the southern width of 6 feet, there is no dispute now.

9.1 The issue now is now limited to the width of the lane, and not as to the very existence of the lane, and whether the finding of the first appellate court in this regard ignores the evidence on record. On this point this court enters an immediate finding that the judgement of first appellate court is silent. Right to property is a valuable right, more so in a country where the citizens own insignificant and fragmented holding. Therefore, the Court may not treat a right such as this as inconsequential merely because it might appear to it as involving an inconsequential extent.

9.2. On the point of width of the pathway, the plaintiff has done himself considerable dis-service when he opted not to take out a commission to note the physical features of the property, which would have been a huge advantage to this court. This Court has to decide this issue which reached the Court some 36 years ago when the suit was laid, and any further loss of time for appointing a Commissioner now may not be profitable. More so because in the course of the argument, the learned counsel for the appellant had submitted that after the dismissal of the suit and during the pendency of the first appeal, the defendants laid a cemented passage to their house in the disputed northern 6 feet.

10. Turning to evidence, DW1 in his cross-examination would state that there is a bamboo fence between the northern 6 feet and southern 6 feet in his evidence. Therefore, in the context of what PW2 and PW3 and DW1 has testified, this Court holds that the width of common passage as was originally existing could only be 6 feet and hence the plaintiff cannot seek anything beyond 6 feet on the northern side. And, the plaintiffs have not pleaded any implied dedication of northern 6 feet by the first defendant as to enlarge the width of the pathway to 12 feet. So far as the suit passage for a width of 6 feet abutting

property of the 3rd defendant and the plaintiff is concerned, DW1 even in his chief examination has stated that he has no interest in obstructing this common passage of six feet that lies to the south of their private pathway of 6 feet. When there is no threat or obstruction to this common passage, then there is hardly any need for suit for injunction.

11. In conclusion, this Second Appeal is partially allowed and the width of the common pathway is limited to 6 feet that abuts the property of the plaintiffs, and to this limited extent, the judgment and decree in A.S.No.47 of 2000, dated 16.10.2000 on the file of the learned Additional District Judge, Tiruvannamalai is modified. No costs.

12. The learned counsel for the Appellant/1st defendant would now remind the Court that in view of the finding arrived by this Court, the appellant is not pressing C.M.P.No.23 of 2019. It is recorded and C.M.P.No.34 of 2019 is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

ssn

To :

1. The Additional District Judge,
Tiruvannamalai.
2. The I Additional District Munsif,
Tiruvannamalai.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to M/s.B.S.Gnanadesikan, Advocate, S.R.No.22825

+1cc to Mr.T.R.Rajaraman, Advocate, S.R.No.23026

S.A.No.1323 of 2002
and C.M.P.Nos.23 and 34 of 2019

SAI (CO)
CS/26/04/2021