



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 18.02.2021

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THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

S.A(MD)Nos.234 and 235 of 2015

Salai Servai (Died)

Velayutham ...Appellant in both appeals:/6thAppellant/Defendant
in A.S.No.1 of 2007 and 6th Respondent in A.S.No. 6 of 2007

Vs.

1.Muthu Servai ...1st Respondent in both appeals/
Respondent/Plaintiff in
A.S.No. 1 of 2007 and Appellant in A.S.No.6/2007

2.Rakkammal

3.Mookammal

4.Baghyam

5.Rajeswari ...Respondents 2 to 5 in both appeals/Appellants 2
to 5 in A.S.No.1 of 2007/Respondents 2
to 5 in A.S.No.6 of 2007

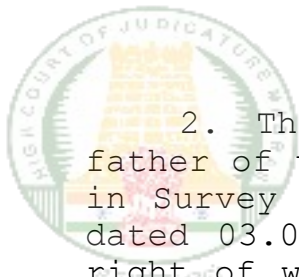
PRAYER in both appeals:- Second Appeals are filed under Section 100 of C.P.C against the judgment and decree dated 16.04.2014 passed in A.S.Nos.1 and 6 of 2007 on the file of the Subordinate Judge, Tirumangalam Camp Court setting aside the judgment and decree dated 23.11.2006 passed in O.S.No.209 of 1999 on the file of the District Munsif Court, Tirumangalam.

In both appeals:

For Appellant	:	Mr.S.Manohar
For Respondent No.1	:	Mr.P.Rajagopalan for Mr.R.Devaraj
For Respondents 2 to 4	:	No Appearance

C O M M O N J U D G M E N T

The defendant in O.S.No.209 of 1999 is the appellant. Challenge is to the judgment of the appellate court, which had granted a decree for declaration and mandatory injunction to the effect that the plaintiff is entitled to a 10 feet width pathway on the northern extremity of the defendant's property in Survey No.73/8B to reach his land in Survey No.73/8A situated on the western side from the cart track situated on east.



2. The suit was laid by the plaintiff contending that the father of the plaintiff had purchased the suit 'A' schedule property in Survey No.73/8B measuring about 2.5 cents under Ex.A1 sale deed dated 03.08.1959. He would further contend that he was provided a right of way over the property situated on the eastern side, which was purchased by the defendant from a common owner. Claiming that he is entitled to a 10 feet pathway and that the defendant had put up a construction obstructing the said pathway, the plaintiff sought for the relief of declaration and mandatory injunction.

3.The suit was resisted by the defendant contending that the plaintiff has no right of way over the defendant's property and if at all any right existed that has been lost by non-user. He would also contend that there is no pathway or cart track over his property.

4. At trial, the plaintiff was examined as P.W.1 and Exs.A1 to A.14 were marked. The son of the defendant was examined as D.W.1 and Exs.B.1 to B.25 were marked. A Commissioner was appointed pending suit and the reports, plan and FMB sketch filed by the Commissioner were marked as Ex.C.1 to C.4.

5. The trial court, upon consideration of the evidence on record, found that there was a reference to the existence of pathway on the northern extremity of the defendant's property in Exts.A.2 and A.3 sale deeds under which the defendant had purchased the property. Reliance was also placed on the recitals in Ex.A.1 sale deed under which the plaintiff had purchased the property. The trial court however found that since the plaintiff has been given only right of way and the description in the document is shown as 'Nadai Pathai', the plaintiff would be entitled to a 4 feet width footpath from the cart track on the eastern side to the plaintiff's property on the northern extremity of the defendant's property. On the said conclusion, the trial court granted a decree for declaration, permanent injunction as well as mandatory injunction directing the defendant to remove karuvella fence on the northern portion of 'B' schedule property.

6. Aggrieved by the rejection of the claim for 10 feet pathway, the plaintiff preferred an appeal in A.S.No.6 of 2007. Aggrieved by a grant of a decree for a pathway measuring 4 feet width, the defendant's legal representatives filed A.S.No.1 of 2007.

7. The appellate court, upon re-consideration of the evidence on record, concluded that the plaintiff has a right of way to the width of 10 feet as claimed in the plaint and while allowing an appeal filed by the plaintiff in A.S.No.6 of 2007, dismissed the appeal filed by the defendant's legal representatives in A.S.No.1 of 2007. Hence, these two Second Appeal have been filed by the legal representatives of the defendant.



8. The following questions of law have been framed by this Court at the time of admission:

i) Whether the courts below were right in decreeing the suit when the plaintiff has filed the suit for declaration and permanent injunction without identifying the property?

ii) Whether the plaintiff has right to maintain the suit when his legal right of easement has been lost and extinguished as per Section 27 of Limitation Act, 1963?

iii) Whether the plaintiff is entitled to maintain the suit when he did not have any title and right in respect of the suit property at the time institution of the suit and hence the courts below were right in non-suiting the plaintiff ?

iv) Whether the courts below were right in decreeing the suit against the true owner of the plaintiff 'B' Schedule property after finding the property belongs to the Defendant ?

v) Whether the courts below were right in granting the plaint relief when C-3 commissioner Report finding is that there is no trace of pathway?

vi) Whether the courts below were right in fixing the measurement of 'B' Schedule when the plaint does not specify the measurements and boundaries?

vii) Whether the 1st Appellate court was right in taking adverse inference under section 114(g) of Indian Evidence Act as Defendant an aged person did not enter the witness box?

viii) Whether the courts below were right in granting mandatory injunction for a time barred claim when the Defendant has put up constructions in his property and the suit has not been laid for possession and has admitted that constructions were put up in 1999?

ix) Whether the courts below were right in declaring the right of easement of pathway in a private property when the plaintiff has not pleaded 'common pathway' and has not established his right as per provisions of section 28 of Indian Easement Act, 1882?"

9. I have heard Mr.S.Manohar, learned counsel appearing for the appellant and Mr.P.Rajagopalan, learned counsel for Mr.R.Devaraj, learned counsel appearing for the first respondent. There is no representation for the respondents 2 and 4.

10. Mr.S.Manohar, learned counsel appearing for the appellant would vehemently contend that both the courts below erred in concluding that the plaintiff has established that he has got right of way over the defendant's property, in the northern extremity, to reach his property situated on the west. He would submit that the



Commissioner in his report has stated that there was no trace of pathway. Therefore, according to him, the courts below erred in granting a decree for non-existing pathway.

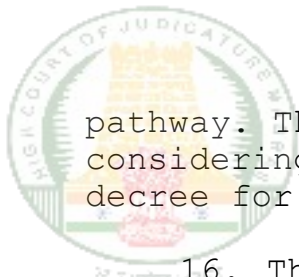
11. The learned counsel for the appellant would further submit that even considering that the plaintiff got a right, it is only a right to footpath and not a cart track. The appellate court is therefore not right in granting the plaintiff's right of cart track to the width of 10 feet. Drawing my attention to the recitals in Ex.A2 and A.7 Mr.Manohar, learned counsel would submit that if at all the plaintiff would be entitled to any right he is entitled to the right of footpath but not to cart track. Therefore, according to Mr.Manohar, the appellate court was not right in granting a decree for 10 feet width pathway.

12. Contending contra, Mr.P.Rajagopalan, learned counsel for the first respondent/plaintiff would submit that Exts.A1, A2 and A3 referred the right of way of the plaintiff over the defendant's property. Therefore, the plaintiff had clearly established that he has got undisputable right of way over the defendant's property to reach his land on the west.

13. As regards the width of the pathway, Mr.Rajagopalan, learned counsel for the first respondent, would submit that there is no positive evidence to show the exact width of the pathway and there is no reference to the width of the pathway in the documents. The plaintiff has deposed that he has been using a 10 feet wide pathway and the defendant has not got into the box to rebut the same and the defendant examined his son, who was not aware of the earlier transactions.

14. I have considered the rival submissions.

15. As rightly pointed out by Mr.P.Rajagopalan, learned counsel for the first respondent, the right of the plaintiff in a pathway over the property of the defendant cannot be denied in the light of the recitals in Exts.A1, A2 and A3. While Ex.A.1 specifically recognizes the right of the plaintiff over the defendant's property, Exts.A2 and A3 excluded the pathway from the property sold to the defendant. Therefore, the right of the plaintiff to a pathway cannot be denied. Despite his best efforts, Mr.Manoharan, learned counsel for the appellant is unable to point out any other material, which would justify a different conclusion. As regards the width of the pathway on the east, I find force in the submission of the learned counsel for the appellant. Ex.A1 states that the plaintiff would be entitled to a right of way on the eastern side. Exts.A2 and A3 specifically refer to a walk way and not a cart track. If the plaintiff is entitled to only walkway, then, the width of the walkway must be only that of a footpath not a cart track. Except the evidence of P.W.1, there is no other evidence on record to justify the conclusion that the plaintiff is entitled to a 10 feet wide



pathway. The lower appellate court in my considered opinion erred in considering the term 'Nadai pathai' as a cart track and granting a decree for a pathway of a width of 10 feet to the plaintiff.

16. The claim of the defendant that easementary right has been extinguished cannot be accepted inasmuch as the right claimed is based on necessity. It is fundamental principle of law that easement of necessity will not be extinguished unless there is merger of servient and dominant ownership. It is not the case of either party that there is merger of servient and dominant ownership. The Commissioner has filed a report stating that the plaintiff has no other way to reach his property except by passing through the defendant's land. In view of the same, the second question of law regarding extinguishment of right of easement is answered against the appellant. The third question of law also has to be answered against the appellant inasmuch as the plaintiff is not claiming any title over the defendant's property but he is only seeking his right of easement of way. Fourth question of law may not strictly arise since the plaintiff is not seeking any declaration of his right over the defendant's property but he is only seeking to establish his right of easement and easementary right can only be exercised on another's land and therefore, fourth question of law does not arise in the case on hand. I have already given my reasons to reject the contention of Mr.Manohar, based on the Commissioner's observations. It is the specific case of the plaintiff that the defendant had obliterated the pathway and put up construction. Therefore, mandatory injunction has been sought for. Hence, fifth question of law is also answered against the appellant. As regards the eighth question of law, I find that the suit is filed in 1999 when the construction was put up and the Commissioner has found that the construction over the pathway on the northern side of 'B' schedule property has been put up afresh by using old material. Therefore, the claim of mandatory injunction cannot be negated on the ground of delay.

17. In view of the answers to the questions of law as above, SA (MD)No.235 of 2015 will stand allowed and the judgment and decree of the first appellate court in A.S.No. 6 of 2007 is set aside and the judgment and decree of the trial court is restored. SA(MD)No.234 of 2015 will stand dismissed and the judgment of the decree of the first appellate court in A.S.No.1 of 2007 is confirmed. No costs. There shall be no order as to costs.

Sd/-

Assistant Registrar (CS II)

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/ /2021

Sub Assistant Registrar(CS)



- 1.The Subordinate Judge, Tirumangalam Camp Court.
2.The District Munsif Court, Tirumangalam.

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The Record Keeper
VR Section, Madurai Bench of Madras High Court,
Madurai.(2 Copies)

+2ccs to Mr.R.DEVARAJ, ADVOCATE, SR NO.6214,6215
+2ccs to Mr.S.MANO HAR, ADVOCATE, SR NO.6311,6312

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and M.P(MD)No.1 of 2015
18.02.2021

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