



S.A.No.559 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :	20.12.2023
PRONOUNCED ON :	31.01.2024

CORAM:

THE HON'BLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

S.A.No.559 of 2014

and

M.P.No.1 of 2014

1.N.Ramasamy
2.R.Madheswaran
3.R.Ravichandran

... Appellants

Vs.

1.Manimehan
2.R.Subramaniam
3.R.Jothimani
4.K.Arunachalam

.... Respondents

PRAYER: This Second Appeal is filed under Section 100 of Code of Civil Procedure, to set aside the order passed in A.S.No.14 of 2013 on the file of Subordinate Court at Rasipuram dated 21.10.2013 confirming the order passed in O.S.No.105 of 2010 on the file of District Munsif Court at Rasipuram.



S.A.No.559 of 2014

WEB COPY

For Appellants : Mr.S.C.Vishwanth
For Respondents : Mr.V.Ramana Reddy

JUDGMENT

This second appeal has been filed to set aside the order passed in A.S.No.14 of 2023 on the file of Subordinate Court at Rasipuram dated 21.10.2023 confirming the order passed in O.S.No.105 of 2010 on the file of District Munsif Court, Rasipuram.

2. The appellants are the defendants in O.S.No.105 of 2010 on the file of the District Munsif Court, Rasipuram. The respondents are the plaintiffs in the above suit. The respondents have filed the above suit for the following relief: 1) to declare the easementary right of the plaintiffs in the ABCDEF pathway shown in the plaint and for the consequential relief of permanent injunction.

3. The brief facts of the plaintiffs' case are as follows:-

(a) The property mentioned in the suit belonged to the plaintiffs



S.A.No.559 of 2014

and the pathway leading to the said properties are situated at Koonavelampatty village. The rough plan filed along with the plaint in which the properties of the plaintiffs are shown as "P, P1, P2" and the property of the defendants is shown as "D" and the suit pathway is shown as "ABCDEF". The survey numbers of P, P1 are 102/1 and 102/2 and the same belong to the plaintiffs 1 and 2 by virtue of an oral partition.

(b) According to the plaintiffs, the properties shown as P2 is situated in survey nos.101/2, 101/4 and 101/5 and the same belonged to the 3rd and 4th plaintiffs. The further contention of the plaintiffs is that the pathway to the width of 15 feet is running towards west from Koonavelampatty to Gurukkapuram north south thar road to the properties of the plaintiffs through the defendants property in S.No.102/3 on its northern side which is shown as "ABCDEF" in the rough plan. The said pathway is running up to Alavaimalai. The plaintiffs have access to their property only through the above said "ABCDEF" pathway. The said pathway is very old which connects Kolli hills and Sangagiri kottai. The said pathway is in existence for more than 100 years and the same is also mentioned in the revenue map. The plaintiffs and their ancestors and the



S.A.No.559 of 2014

predecessors in title have been using the said pathway for the past 74 years for taking their men, cattle, carts, etc. The plaintiffs have no other access except the suit pathway. The said pathway is running through the defendants land. Even before the purchase of the "D" property by the 1st defendant from the grandfather of the 3rd plaintiff namely Perumal Nadar, the father of the 1st plaintiff namely Kumaravel gounder, 2nd plaintiff and the said Perumal nadar entered into a pathway agreement on 17.07.1985 wherein it was agreed to give 10 feet land for pathway in their respective land and only after the said agreement, the first defendant purchased the property.

(c) The plaintiffs have perfected their right in the suit pathway by easement by prescription by their continuous, long and open enjoyment. As the plaintiffs have no other alternate pathway, the plaintiffs are having right by easement of necessity also. The defendants have no right to obstruct the plaintiffs from using the pathway. The plaintiffs have attempted to create several obstructions in the suit pathway on several occasions for which the plaintiffs have preferred a police complaint. On 07.05.2010 when the plaintiffs were using the pathway to reach their



S.A.No.559 of 2014

property, the defendants obstructed them which was successfully averted by the plaintiffs with the help of neighbours. Hence, the plaintiffs were constrained to file the above suit to declare the rights of the plaintiffs in the suit pathway by easement by prescription and necessity and for permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the suit pathway by the plaintiffs.

4. The defendants in their written statement denied the averments made in the plaint. According to the defendants "ABCD" portion of the plaint rough plan is situated within the survey no.102/3 which belonged to the defendants and not on the northern side of the defendants' property. Therefore, the pathway is not in existence as stated by the plaintiffs.

5. It is further submitted that only a 3 feet width pathway was in existence. But the plaintiffs have encroached to an extent of 6 feet and laid the pathway. The disputed portion is not a cart track but only a pathway. The defendants in their rough plan had shown the pathway from Koonavelampatty panchayat road leading to Alavaimalai as



S.A.No.559 of 2014

WEB COPY

"X,X1,X2". The property belonged to the defendants are shown as "A,A1,A2,A3". The 3 feet width pathway in the defendants property is shown as "A1,A2,A3,A4". The newly laid pathway portion by encroachment is shown as "A4,A3,A5,A6" and the alternative pathway available to the plaintiffs are shown as "X3,X4,X5,X6" and "X7,X8,X9".

6. The further contention of the defendants is that, the plaintiffs are having access to their property through a cart track from Rasipuram to Tiruchengode main road. Likewise, another pathway was laid by the parties adjacent to survey no.101/5 which starts north south on its western side of survey no.101/5 which runs east west on the northern side of survey no.101/5, 101/4 and 101/2. Thus, the plaintiffs have alternative pathways to reach their property.

7. Further, it is submitted that the suit pathway admittedly run from Kollimalai to Sangagiri kottai, but the same is only a pathway and not a cart track. Even, the parent documents of the plaintiffs also shows the existence of the pathway and not a cart track. The width of the said



S.A.No.559 of 2014

pathway was enlarged and diminished as per the own convenience of the respective land owners in their respective lands situated adjacent to the said pathway. Accordingly, only a pathway is in existence in the defendants land and only with the permission of the defendants the others can use the said pathway as a cart track and cannot claim as a matter of right.

8. The predecessors in title of the defendants land are not parties to the mortgage deed dated 09.01.1936 and as such the recitals of the said mortgage deed is not binding on the defendants. In the revenue records it is only shown as pathway. The defendants have purchased the property not from the grandfather of the 3rd plaintiff but only from his legal heirs including the 3rd plaintiff. The pathway agreement dated 17.07.1985 is prior to the purchase of the property by the defendants is an unregistered documents and created only for the purpose of this case by forging the signature of one Kumaravel gounder and Kandasamy. Since no reference about the pathway agreement mentioned in the sale deed dated 08.02.2005 through which the defendants have purchased the property



S.A.No.559 of 2014

would clearly prove that the said agreement is fabricated document. The defendants have fenced their property with metal wire and on 14.09.2009 the 1st plaintiff picked up quarrel with the defendants demanding pathway and the same was refused by the defendants.

9. Hence, the first plaintiff preferred a police complaint and the defendants were threatened by the Deputy Superintendent of Police, Namakkal that he would register a criminal case against the defendants if they failed to remove the fencing wire and therefore, the defendants were forced to remove the fencing wire.

10. Under these circumstances, on 14.02.2010 at about 5.00 p.m., without any prior intimation, the plaintiff and his family along with others encroached into the defendants property and attempted to lay a pathway in the defendant's property. When the defendant's prevented their act of laying the pathway they were assaulted by the plaintiffs in which the defendants 2 and 3 and the second defendant's wife sustained injuries and admitted in the Hospital. On the same day at about 10.00

8/24



S.A.No.559 of 2014

WEB COPY

p.m. the plaintiff and others encroached into the defendant's land and laid a cart track in stead of pathway. The second defendant preferred a petition to the Superintendent of Police, Namakkal on 15.02.2010 and FIR was also registered. The revenue and police authorities visited the properties of the parties and confirmed the existence of the pathway. Thereafter, the plaintiffs approached the Vacation Court and filed the above suit. The encroached portion of pathway is shown as "A4,A3,A5,A6" in the rough plan filed by the defendants and the said portion is the suit property for the counter claim of the defendants. Therefore, the defendants are seeking declaration of their title in respect of the above said portion and for permanent injunction restraining the plaintiffs from interfering or obstructing the possession and enjoyment of the said portion by the defendants and for mandatory injunction directing the plaintiffs to remove the pathway laid by encroachment to an extent of 6' x 100' and restore the same to the old position by way of counter claim. Hence, prayed for dismissal of the suit and for allowing the counter claim.



S.A.No.559 of 2014

WEB COPY

11. In the reply statement filed by the plaintiffs, it is stated that the portion shown as "X,X1,X2" pathway in the rough sketch filed by the defendants alone is the pathway leading to Alavaimalai from Koonavelampatty panchayat road.

12. The Advocate Commissioner's report clearly says about the existence of 10 feet width pathway. By suppressing the same, the defendants are claiming as if only 3 feet width pathway is in existence. The Advocate Commissioner had also referred in his report that the alternate pathway "X3,X4,X5,X6" is running in a third party's land and another pathway "X7,X8,X9" is able to accommodate only one person for walking. The pathway agreement dated 17.07.1985 is a true and genuine document and signed by the parties therein. Since the defendants attempted to obliterate the suit pathway which was in existence for more than several years by accumulating metal wire, blue metals and stones, the plaintiffs with no other option approached the Vacation Court. Therefore, the counter claim has to be dismissed and suit has to be

10/24



S.A.No.559 of 2014

decreed as prayed for.

WEB COPY

13. Based on the above pleadings, the Trial Court framed the following issues for consideration

- 1) Whether the plaintiff rough plan is correct?*
- 2) Whether the defendant's rough plan is correct?*
- 3) Whether there is a pathway in existence to the plaintiffs property in S.No.102/3 and 100/1 to an extent of 15 feet north-south width and 10 feet east-west width?*
- 4) Whether the plaintiffs have perfected their right over "ABCDEF" pathway by easement by prescription and easement by necessity?*
- 5) Whether it is true that the plaintiffs are entitled to use the northern side of the defendant's property only as a pathway and not a cart track?*
- 6) Whether the pathway agreement dated 17.07.1985 is true and genuine?*
- 7) Whether the plaintiffs have encroached into any portion of the*



S.A.No.559 of 2014

defendants land?

WEB COPY

8) Whether the plaintiffs are entitled to the reliefs as prayed by them?

9) Whether the defendants are entitled to the counter claim as prayed by them?

10) To what other reliefs the parties are entitled?

14. Before the Trial Court on the side of the plaintiffs P.W.1 and P.W.2 were examined and Ex.A1 to Ex.A11 were marked and on the side of the defendants two witnesses DW1 and DW2 were examined and Ex.B1 and Ex.B8 were marked. The Advocate Commissioner report and plan were marked as Ex.C1 and Ex.C2 and witness Ex.X1 and Ex.X2 were marked.

15. On consideration of the pleadings, oral and documentary evidence of both parties and after hearing the arguments of both sides, the learned trial judge has decreed the suit partly in respect of 7 1/2 feet

12/24



S.A.No.559 of 2014

pathway and also partly allowed the counter claim for declaration and permanent injunction in respect of the remaining land of the defendants situated on the southern side of 7 1/2 feet width pathway for which relief was granted to the plaintiffs and dismissed the counter claim for mandatory injunction without cost by his judgment and decree dated 29.11.2012.

16. Aggrieved by the said judgment and decree, the defendants have preferred an appeal in A.S.No.14 of 2013 before the Sub Court, Rasipuram.

17. The First Appellate Court framed the following points for consideration which is extracted as under: -

a) whether the decreeing in part of the suit of the plaintiffs as prayed for by the trial court is correct and;

b) whether the judgment of the trial court warrants any interference?



S.A.No.559 of 2014

WEB COPY

18. Considering the materials available on record, the judgment of the Trial Court and the argument of the counsel for the parties, the first Appellate Court confirmed the judgment and decree dated 29.11.2012 in O.S.No.105 of 2010 and dismissed the appeal in A.S.No.14 of 2013. As against the said judgment and decree of the first Appellate Court, the defendants have preferred the present Second Appeal.

19. At the time of admission, the following substantial questions of law are framed:

a) Whether the judgment and decree of the Courts below are contrary to law and evidence on record.

b) Whether the findings of the Courts below are perverse for non-consideration of the materials available on record.

20. The learned counsel appearing for the appellants would contend that the Courts below failed to see that the property situated in the survey no.102/3 belonged to the defendants which is not on the



S.A.No.559 of 2014

northern side of the defendant's property. He would submit that only 3 feet width pathway was alone in existence, but the plaintiffs have encroached further on both side of the 3 feet width pathway to an extent of further 6 feet and laid the pathway by including the 6 feet width.

21. He would further contend that the courts below failed to take note of the facts that the disputed portion is only a pathway not a cart track. His further contention is that, the parent documents of the plaintiffs and the revenue records would show the existence of the pathway and not a cart track. The Trial Court failed to see that while the plaintiffs are claiming right in the pathway by prescription and necessity, failed to frame issues on that basis and have not discussed about them and had given findings in this regard, which is unsustainable.

22. The Courts below failed to take note of the fact that recitals in Ex.A6 do not reveal any right of pathway for cattle or carts to the plaintiff. Even in Ex.A7, it is mentioned about widening of the existing pathway. Therefore, Ex.A6 and Ex.A7 cannot be looked into as they are



S.A.No.559 of 2014

inconsistency in their recitals. Moreover, the right of easement is a right transferable by granting only through registered document and the right of easement by prescription and easement by necessity can never go together.

23. The further contention of the learned counsel for the appellants is that as per Ex.C1 and C2, the cart track is located only to the south of Survey no.102/1 and 2 not in survey no.102/3. It would also establish the widening of the pathway prior to the suit. The physical features would also clearly indicate the widening of the pathway. Even from the evidence of the vendors of the plaintiff, it is clearly established that the existence of pathway is only to the south of Survey no.102/1 and 2. Moreover, the wicket gate in the suit pathway would clearly establish the existence of pathway and not a cart track.

24. The evidence of the Tahsildar would also shows that only a suit pathway is in existence. Therefore, the judgment and decree passed in A.S.No.14 of 2013 on the file of the Sub Court, Rasipuram dated

16/24



S.A.No.559 of 2014

21.10.2013 confirming the judgment and decree passed in O.S.No.105 of 2010 on the file of District Munsif Court, Rasipuram is liable to be set aside.

25. Heard the rival submissions on both sides and perused the materials available on record.

26. The substantial question of law raised in the grounds of appeal are as follows:

i. Whether the order passed by the lower Appellate Court and the trial Court is contrary to law.

ii. Whether the lower Appellate Court and the trial Court has gone through the witness and documents produced by the appellant herein.

iii. Whether the lower Appellate Court and the trial Court consider the Advocate Commissioner report in O.S.No.105 of 2010 on the file of the District Munsif Court, Rasipuram.



S.A.No.559 of 2014

WEB COPY

27. The plaintiffs have filed the above suit in O.S.No.105 of 2010 for declaring the right of the plaintiffs in the suit pathway by easement by prescription and necessity and for permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the suit pathway by the plaintiffs. On the other hand, the defendants by way of counter claim sought declaration of title in respect of the alleged encroached portion shown as "A4,A3,A5,A6" in the rough plan filed by the defendants and for permanent injunction restraining the plaintiffs in any manner interfering or obstructing the possession and enjoyment of the said encroached portion by the defendants and for mandatory injunction directing the plaintiffs to remove the pathway laid by encroachment to an extent of 6' x 100' and restore the same to the old position.

28. In this case, the plaintiffs are seeking declaration of their rights in the suit pathway on the ground of easement by prescription and easement by necessity. As discussed above, the existence of the pathway



S.A.No.559 of 2014

is admitted, but the dispute is only in respect of the width of the pathway.

WEB COPY

29. According to the plaintiffs, the suit pathway was in existence for 100 years and it was in usage and the enjoyment of the plaintiffs ancestors and predecessors in title for the past 74 years.

30. On the other hand, though the defendants admitted the existence of the pathway failed to establish any definite period from which the pathway is in existence neither in the written statement nor in the evidence. The plaintiffs establish the existence of pathway for several decades relying upon Ex.A6 mortgage deed dated 09.01.1936 through which the lands comprised in survey no.100/1,101/2 and 101/4 were mortgaged by the predecessor in title.

31. In Ex.A6 mortgage deed, the existence of 5 cubit pathway in the northern extreme of the survey no.102/3 is clearly mentioned. Therefore, through Ex.A6, the plaintiffs have established that their predecessors in title have enjoyed a pathway right in survey no.102/3 on



S.A.No.559 of 2014

its northern extremity to an extent of 5 cubit width which is equivalent to 7.5 feet width and that is the reason they have mentioned above the right of enjoyment of 5 cubit pathway in the said mortgage deed.

32. Now, it has to be considered whether the defense taken by the defendants only a foot path was in existence in survey no.102/3 and not a cart track. However, no document was produced on the side of the defendants to establish the same. Though the defendants have not objected the execution of the said mortgage deed, they have only raised their objection that they were not parties to the said document and therefore Ex.A6, mortgage deed is not binding on them. The plaintiffs have marked the above documents only to establish that the suit pathway was in existence, even, at the time of executing Ex.A6 mortgage deed which is in the year 1936.

33. The plaintiffs are not claiming any easement of grant through Ex.A6. They have marked Ex.A6 document only to prove the existence of the suit pathway for more than 70 years. Therefore, the contention of



S.A.No.559 of 2014

the defendants that since they are not parties to the said mortgage deed and the same is not binding on them is unsustainable. Therefore, the existence of 5 cubit pathway is clearly proved through Ex.A6. The first appellate Court has rightly concluded that unless the contrary is proved, it has to be presumed that the said pathway mentioned in Ex.A6 was in existence right from the year 1936.

34. Moreover, it is the definite case of the defendants that the plaintiffs have encroached and enlarged the existing pathway by adding six feet width. While so, the defendants have to prove their contention that the width of the pathway is only 3 feet. However, the defendants have failed to establish the same and also failed to establish that the plaintiffs have encroached 6 ft in the property of the defendant.

35. Furthermore, the defendants failed to establish that no such pathway was in existence to the extent of 5 cubit as mentioned in the Ex.A6 mortgage deed by way of oral and documentary evidence. Even as per the report of the Advocate Commissioner marked as Ex.C1, a



S.A.No.559 of 2014

pathway to a width of 9 feet was found to be in existence on the date of his inspection. However, the trial Court did not grant relief for the entire 9 feet width pathway but only granted relief for 7.5 feet width pathway relying on Ex.A6 mortgage deed. Therefore, in the absence of any materials on record to establish the case of the defendants that only 3 feet width pathway was in existence, the claim of the plaintiff ought to be accepted.

36. This Court finds no illegality or infirmity in the decision of the trial Court as well as the First Appellate Court in deciding the width of the pathway as 7.5 feet by relying upon Ex.A6 which was the only available registered document pertaining to the year 1936. Moreover, the defendants failed to examine any independent witness to prove their case that the plaintiffs have encroached into their land to the extent of 6 feet after removing the metal wire erected by them. Therefore, the findings arrived at by the Courts below, do not warrant interference, which are based upon factual and legal aspects. Therefore, I am of the considered opinion that no substantial question of law arises for consideration in this second appeal.

22/24



S.A.No.559 of 2014

WEB COPY

37.In view of the above discussed, the second appeal is dismissed.

The judgement and decree of the trial Court and the First Appellate Court are hereby confirmed. No cost. Consequently, connected Miscellaneous Petition is closed.

31.01.2024

Index : Yes / No

Internet : Yes / No

Speaking order /Non-speaking order
rjr/vsn

To

- 1) The Subordinate Court, Rasipuram.
- 2) The District Munsif Court, Rasipuram.



WEB COPY



S.A.No.559 of 2014

K.GOVINDARAJAN THILAKAVADI, J.

rjr/vsn

S.A.No.559 of 2014
and
M.P.No.1 of 2014

31.01.2024