

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23-12-2005

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

Second Appeal No.640 of 1995

1. Ponnann (alias) Palaniappan
2. Chellammal ... Appellants/Defendants

Vs.

1. Chinna Gounder (Died)
2. Nallammal
3. Rangasamy
4. Ponnayya ... Respondents/Plaintiff

(RR-2 to 4 are brought on record as the legal representatives of the deceased first respondent vide order dated 23.2.1996 in CMP No.14900/1995)

Second Appeal filed under Section 100 of Code of Civil Procedure, against the decree and judgment of the learned Subordinate Judge, Namakkal, in A.S.No.131 of 1993 dated 6.2.1995, confirming that of the learned Additional District Munsif, Namakkal in O.S.No.876 of 1989 dated 28.4.1993.

For Appellant : Mr.P.Mathivanan

For Respondents 2to4 : Mr.N.Manoharan

J U D G M E N T

The unsuccessful defendants, having lost before the Courts below, preferred this second appeal. The sole plaintiff died pending second appeal and his legal representatives were impleaded as respondents 2 to 4 as per the orders of this Court dated 23.2.1996.

2. The brief facts leading to filing of the original suit are that the deceased plaintiff purchased the suit property on 23.6.1965 for valid consideration from one Ramasamy Gounder's wife Veerammal and her sons Kuppusamy and Perumal, and eversince the date of purchase, he was in absolute possession and enjoyment

of the same. The adjacent land belongs to one Vellaiyan @ Karuppanna Gounder, elder brother of the first respondent. Next to that, lies the land of defendants, on the southern and eastern side of plaintiff's land. The specific case of the plaintiff is that he is the absolute owner of the suit property, enjoying the same by raising groundnut crops. Such being the case, the plaintiff alleged that on 15.10.1989 the defendants attempted to lay a pathway in the land of the plaintiff by destroying the crops stood therein. Hence the suit was filed for permanent injunction restraining the defendants from in any manner interfering with the peaceful possession and enjoyment of the suit property.

3. In the written statement filed by the defendants, all the allegations raised in the plaint are denied. The defendants purchased the entire land in S.No.310 and an extent of 2.93 acres in S.No.308 of Ramadevan Village from their previous owners in the year 1978 and 1979 respectively and are enjoying the same. According to the defendants, the said lands have access only through the suit pathway; that the defendants and their predecessors were using the suit pathway for the past 60 years; and that, there is no other pathway to reach their lands. Hence it is stated that the defendants have right over the pathway on the basis of easement by prescription as well as easement by necessity. The case of the defendants is that in view of the previous enmity between the plaintiff and the defendants and taking advantage of the enmity between the first defendant and his elder brother Karuppanna Gounder, the plaintiff encroached the pathway and obstructed the defendants from using the same. These facts, according to the defendants, have been clearly mentioned in the Commissioner's report. Defendants also contend that the suit is bad for non-joinder of Karuppanna Gounder as a necessary party to the suit.

4. On the basis of the plaint and written statement, the Trial Court framed two issues. The deceased plaintiff examined himself as PW-1 and two other witnesses were examined as Pws.2 and 3, besides marking Exs.A-1 to A-3. On behalf of the defendants, Dws.1 to 3 have been examined and five documents have been marked as Exs.B-1 to B-5. The Commissioner's report and plan were marked as Exs.C-1 and C-2 respectively.

5. The Trial Court found that the case of the defendants that they were using the suit pathway for the past sixty years is false and consequentially granted the relief of permanent injunction as prayed for by the plaintiff, against which, the defendants preferred appeal in A.S.No.131 of 1993 on the file of Sub Court, Namakkal.

6. The first appellate Court, after reassessing the oral and documentary evidence, could not come to a different conclusion and confirmed the decree and judgment of the Trial Court by dismissing the appeal. As against the said decree and judgment, the defendants have approached this Court by filing the present second appeal.

7. This Court, while admitting the second appeal, framed the following substantial question of law for consideration,

"Whether the Courts below are correct in not going into the question of prescriptive right, especially where evidence was let in to prove the same and also where the appellants have raised the plea of easementary right ?"

8. The learned counsel appearing for the appellants/defendants argued that even though the suit was filed for a bare injunction, declaratory relief was granted by the lower appellate Court, which is beyond the scope of the prayer in the suit and hence the same is unsustainable. The learned counsel further states that the Commissioner's report and the evidence of PW-1 were not taken into consideration by the Courts below. It is further submitted that the easement by prescription can be acquired only on the ground of easement of necessity, for which no alternative pathway shall be available.

9. In turn, the learned counsel appearing for the respondents submitted that the easement by prescription is not at all proved by the appellants and nothing is mentioned about the cart track in Ex.B-1 sale deed. But the learned counsel concedes that the declaration granted by the lower appellate Court is beyond the scope of the suit and the said portion of the judgment alone may be set aside.

10. I have considered the arguments of the learned counsels appearing for the appellants as well as the respondents. As contended by the learned counsel appearing for the appellants, the suit itself is for permanent injunction restraining the appellants herein/defendants from in any manner interfering with the peaceful possession and enjoyment of the suit property. The declaratory relief granted by the lower appellate Court is definitely not a relief sought for in the suit and no case is made out for declaration. Therefore the said portion of the judgment of the lower appellate Court is liable to be set aside.

11. As regard the contention of the learned counsel for the appellants/defendants that Ex.C-1 Commissioner's report dated

3.5.1990 was not at all considered by the Courts below, the same cannot be accepted in view of the specific statement found in Ex.C-1 that even though there was a cart track available, it is not being used in recent times and there is no iota of evidence to show that there was running of carts in the said track. It is also stated therein that in fact, the old cart track was ploughed 20 days ago and maize crops were raised therein. According to the said report, even in the adjacent lands, belonging to the third parties, there is no cart track, and that the old cart track has no continuity and in some portions there remains trace of the same was being used as pathway and the carts could not have been driven in the said route. From the above it is clear that only after considering the Commissioner's report, the Courts below arrived at the conclusion.

12. In fact, there is a factual finding that there is no cart track. In Exs.B-1 and B-2, nowhere the existence of pathway is mentioned. The lower appellate Court clearly found in paragraph 11 that the defendants failed to prove the existence of pathway. The said finding is a factual finding based on evidence and therefore the same cannot be treated as perverse finding. Since the appellants/defendants have failed to prove easementary right and easement by necessity as pleaded by them, and as there is an alternative pathway available for them. The claim of the appellants/defendants is not sustainable as Section 13 of the Indian Easements Act, 1882, contemplates the proof of necessity, without which the land cannot be enjoyed. The said section reads thus,

"Section 13 - Easements of necessity and quasi easements.- Where one person transfers or bequeaths immovable property to another -

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement;

or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or lessee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement. Where a partition is made of the joint property of several persons,--

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement; or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless the different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section clauses (a), (c) and (e) are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee."

Further according to section 15 of the Act, a person claiming the right must establish the same and prove that it is enjoyed peacefully, openly and without interruption for the prescribed period prior to two years of filing of the suit. The said aspects are not proved by the appellants/defendants as held by the Courts below. Therefore, there is no legal right for the appellants to sustain the Second Appeal.

13. At this juncture, it is relevant to refer to the following decisions cited by the learned counsel for the respondents.

(a) In the decision reported in (1999) 3 SCC 722 (Kondiba Dagadu Kadam v. Savitribai Sopan Gujar), cited by the learned counsel for the respondents, in paragraph 6, the Honourable Supreme Court held that the mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law, and that, where the first appellate Court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal.

(b) In the decision reported in 2000 (III) CTC 200 (Subba Reddiar V. Vasantha Ammal) this Court, in paragraph 7 held that the High Court under section 100 cannot entertain any arguments to be advanced outside the purview of the substantial question of law framed at the time of admission of the second appeal. That apart, both the courts below have concurrently held against the plaintiff in respect of the above issues based on evidence. It is well settled principle that this Court cannot interfere in the concurrent findings of facts however erroneous they are. The said principle has been laid down by the Apex Court in the decision reported 1999 (II) CTC 468 : AIR 1999 SC 2213 (Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and others).

14. The Courts below having given factual findings with regard to the non-availability of easementary right to the appellants/defendants, I could not see any error in the said findings and the same cannot be set aside. Hence the decree and judgment of the Courts below are confirmed, except the portion of the first appellate Court's judgment where declaratory relief is granted.

15. In the result, while deleting the relief of declaration granted by the lower appellate Court, the judgment and decree of the lower appellate Court is confirmed and the second appeal is dismissed. No costs.

vr

Sd/
Asst.Registrar

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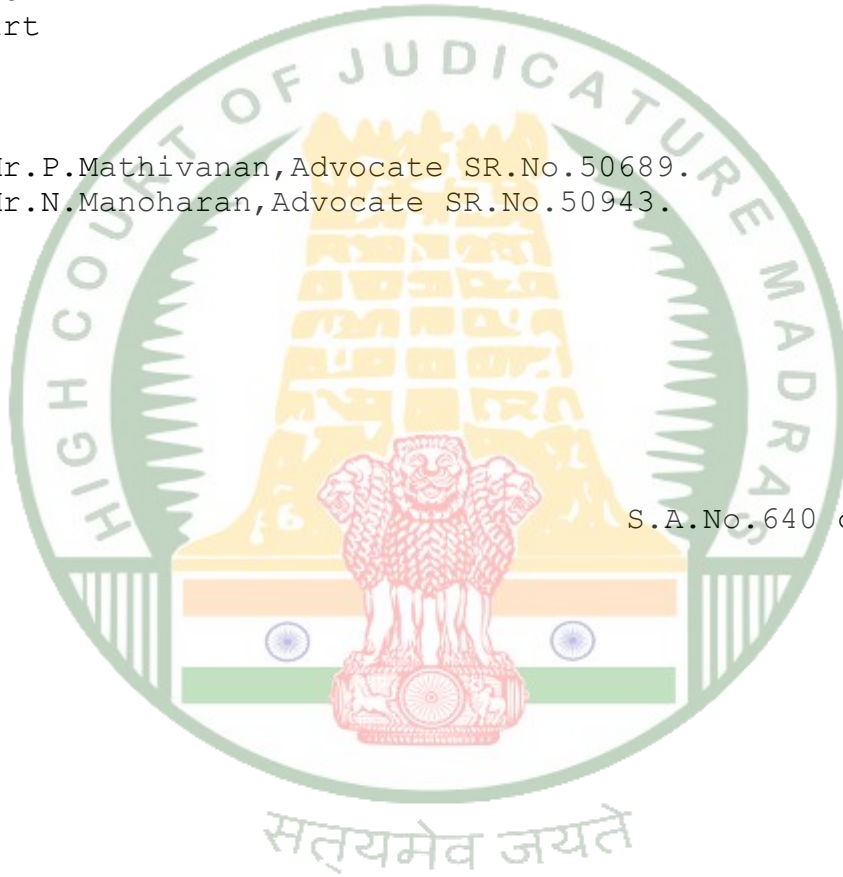
Sub Asst.Registrar

To

1. The Sub Judge
Namakkal
Salem District.
2. The Additional District Munsif
Namakkal
Salem District.
3. The Section Officer
VR Section
High Court
Madras.

+ One CC to Mr.P.Mathivanan, Advocate SR.No.50689.
+ One CC to Mr.N.Manoharan, Advocate SR.No.50943.

JE (CO)
RSM/6.1.2006



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