

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.07.2010

CORAM:

THE HONOURABLE MRS.JUSTICE ARUNA JAGADEESAN

SA.No.1000/2004

1.R.Chitra
2.C.Nilavu
3.V.Govindammal
4.P.J.Ponnappan
5.P.J.Cheramam

Appellants

Vs

V.A.Mavalirajan

Respondent

Prayer:- This Second Appeal is filed against the Judgement and Decree dated 5.12.2003 passed in AS.No.200/2003 by the learned 4th Additional Judge, City Civil Court, Chennai, reversing the Judgement and Decree dated 31.07.2002 passed in OS.No.3684/1999 by the learned 14th Assistant Judge, City Civil Court, Chennai.

For Appellant : Ms.Thenmozhi Sivaperumal

For Respondent : Mr.T.Arulraj

JUDGEMENT

This Second Appeal is filed the at the instance of the legal heirs of the Plaintiff in OS.No.3684/1999, who died after passing of the decree by the Trial Court and has been entertained on the following substantial questions of law:-

- (a) Whether the prayer in the suit for a declaration "that the Plaintiff has got the absolute right of access and use of the passage" will amount to claiming any title over the passage so as to defeat the right of easement claimed by the Plaintiff under Section 15 of the Indian Easements Act, 1882 read with Section 25 of the Limitation Act, 1963?
- (b) Has not the lower Appellate Court given a totally perverse judgement in reversing the judgement of the Trial Court on the basis of the oral and documentary evidence adduced regarding the easementary right claimed by the Plaintiff?

2. The above said suit was instituted by the

Plaintiff/mother of the Appellants herein for declaration that the Plaintiff has got the absolute right of access and use of the passage starting from Kalingarayan Street, Chennai-21 and going straight upto the building at Door No.9, Kalingarayan 1st lane, Chennai-21 marked as 'ABCD' in the plaint plan and for injunction restraining the Defendant from interfering with the Plaintiff's possession and enjoyment of the said passage.

3. The case of the Plaintiff as set out in the plaint is as follows:-

a. The Plaintiff is the absolute owner of the site and building bearing Old Door No.12 and present Door No.9, Kalingarayan First Lane (formerly Kalingarayan Mudali First lane) by virtue of a settlement deed executed in her favour by her father V.Ayyavu Nadar on 9.8.1965. In the said building, the sons of the Plaintiff namely P.J.Ponnappan and P.J.Cherman are running a business by name Dravida Nadu Drugs and Pharmaceuticals as partners. The said property is on the rear western side of the house bearing Door No.20, Kalingarayan Street belongs to the Defendant, who is the brother of the Plaintiff and the Defendant has got the said house and site under a will executed by his father. There is a passage marked as 'ABCD' in the plan on the northern side of the premises of the Defendant and it extends upto the premises at Door No.9, Kalingarayan 1st lane and it measures 5 feet in breadth and 56 feet in length and the said passage is the main entrance from Kalingarayan Street to the premises of the Plaintiff and it is the only way to reach the premises of the Plaintiff. Since Kalingarayan 1st lane was a very narrow lane, for the purpose of having the main entrance from the big street namely Kalingarayan Street, the settlor provided the said passage and it was meant exclusively only for the use of the owner of the property at Door NO.9, Kalingarayan 1st lane and it is being used by the Plaintiff exclusively.

b . There is a gate put up at the entrance point in Kalingarayan Street in the suit passage by the Plaintiff and it is in existence from 1940 till date. Water connection for the property of the Plaintiff is in existence and use ever since the settlement in 1965 through the passage. The Plaintiff has acquired by prescription the exclusive right to the passage marked as 'ABCD' in the plaint plan as per Section 15 of the Indian Easements Act, 1882. The Defendant has not raised any objection whatsoever right from 1940 till 1998 for the exclusive use of the passage by the Plaintiff. For the first time, on 14.12.98 the Defendant wrote a letter to the officers of the Tamil Nadu Electricity Board and to the said Company stating that he is the absolute owner of the property bearing Door No.20, Kalingarayan Street and that the Plaintiff has no right to use the suit passage in his property. The objection of the Defendant was that the said Company should not install a generator in the suit passage. However, by a reply dated 28.1.99, the Plaintiff informed the Defendant that generator was never sought to be installed in the suit passage and in fact, the

generator had been installed in a room which is on the western end of the building and the said factual position has been made clear in the Executive Engineer's reply dated 12.3.1999 sent to the counsel of the Plaintiff. Hence, the suit has been filed for declaration and injunction against the Defendant.

4. In the Written Statement filed by the Defendants, it is averred as follows:-

a. The suit passage on the northern side of the house of the Defendant was not intended to provide a passage to the house of the Plaintiff. The Plaintiff's house had access only from Kalingarayan 1st lane. The rough plan is misleading. It is not correct to say that Kalingarayan 1st lane is a narrow street. There are lot of houses, bigger than that of the Plaintiff and none of the houses have any access to the Kalingarayan Street. The suit passage is intended only for the Defendant and not to the Plaintiff. Since the Plaintiff was the sister of the Defendant, he had given oral permission to use the passage without conferring any legal right to the Plaintiff to claim it as her property. It is a part and parcel of the house of the Defendant. No predecessor of the Plaintiff ever enjoyed the passage previously. No question of acquiring of any easementary right nor any right of prescription arises as against the Defendant in law or on facts. The Plaintiff put up motors and other polluting chemicals in the passage and hence, the Defendant objected to it and the Plaintiff is not entitled to any relief and in such circumstances, the suit is liable to be dismissed.

5. Before the Trial Court, on the side of the Plaintiff, Ex.A1 to A15 were marked and the Plaintiff examined one P.J.Cherman as PW.1. On behalf of the Defendant, Ex.B1 to B5 were marked and the Defendant was examined as DW.1.

6. On consideration of the oral as well as the documentary evidence, the Trial Court decreed the suit and the appeal filed as against the same filed by the Defendant was allowed, setting aside the Judgement and Decree of the Trial Court, as against which, this Second Appeal has been filed.

7. This court heard the submissions of the learned counsel on either side and also perused the judgements of the courts below and the materials on record.

8. There is no dispute that one V.Ayyavu Nadar was the original owner of both the properties, namely, Door No.9, Kalingarayan 1st Lane and Door No.20, Kalingarayan Street, Old Washermen Pet. By virtue of a settlement deed dated 9.8.1965, the property bearing Door No.9, Kalingarayan 1st lane was settled in favour of the Plaintiff J.Kamalambal (since deceased) and her sons namely P.J.Ponnappan and P.J.Cherman are running a business under the name and style of Dravida Nadar Drugs and Pharmaceuticals

Limited, a partnership firm. Like wise, the Defendant had become the owner of the property bearing Door No.20, Kalingarayan Street under a Will Ex.B2 dated 7.6.1969 executed by V.Ayyavu Nadar. The Plaintiff's building bearing No.9 is on the rear side of the Defendant's house and there is a east west passage of 5 ft. in breadth and 56 ft. in length running from the Kalingarayan Street to the house of the Plaintiff. The house of the Defendant is facing the Kalingarayan Street and the suit passage is on the northern side of his house.

9. Admittedly, at the entrance of the said passage, there is a gate leading to the Plaintiff's house and there is no entrance to the passage from the Defendant's property, as there is a compound wall on the northern side of his property. Ex.A3 is the rough sketch appended to the plaint, wherein the suit passage is marked as 'ABCD'. The Plaintiff has claimed exclusive right to the suit passage and sued for declaration of right of access and use of the suit passage entering from Kalingarayan Street.

10. It is the case of the Plaintiff that she has been using this passage for ingress and egress from his property to Kalingarayan Street for a large number of years. Her predecessor in interest was using it since 1940 and after settlement of the property in her favour, she and her family members are using the said passage from 1965 onwards. The Defendant sought to prevent the officials of the Tamil Nadu Electricity Board from installing a generator in the suit passage, which was denied not only by the Officials, but also by the Plaintiff. After making a local inspection, the officials of the Tamil Nadu Electricity Board had asserted that the generator was not installed in the suit passage and it was installed in a room, which was on the western end of the Defendant's building at Door NO.9, Kalingarayan 1st lane. In view of the above action taken by the Defendant, the Plaintiff (since deceased) has filed the suit to declare her prescriptive right of easement over the suit passage.

11. The Defendant in his Written Statement has conceded that the suit passage is on the northern side of his house and runs upto the house of the Plaintiff, but contended that it is intended only for the use of the Defendant. It is his case that the Plaintiff being the sister of the Defendant was permitted to use the suit passage owing to her health condition. It is his assertion that the Plaintiff's access to her house is only through Kalingarayan 1st lane and she has no right over the suit passage.

12. The Trial Court decreed the suit holding that the Plaintiff has been peaceably and openly enjoying the suit property as of right without any interruption from 1965 onwards and thus acquired easementary right of way over the suit passage by prescription. The first appellate court reversed the said finding on two grounds, namely, (1) the Plaintiff having claimed ownership to the suit passage cannot seek right of easement on the basis that

such right was exercised over a statutory period and (2) the Plaintiff had access to his house through Kalingarayan 1st lane which the other house owners abutting the said lane are using and she cannot claim easement by necessity, which plea is not only inconsistent with the claim of ownership and easementary right by prescription, but such relief cannot be granted merely on the inconvenience to use the said lane as it is very narrow. Aggrieved over the said findings of the first appellate court, this Second Appeal has been filed.

13. Mrs. Thenmozhi Sivaperumal, the learned counsel for the Appellants contended that the prayer in the suit for declaration that the Plaintiff has got the absolute right of access and use of the passage will not amount to claiming any title over the passage so as to defeat the right of easement claimed by the Plaintiff under Section 5 of the Indian Easement Act, 1882 read with Section 25 of the Limitation Act. The learned counsel would urge that the first appellate court has committed a serious error in not considering the pleadings raised by the Appellant claiming easementary right by way of prescription for more than 30 years and based its finding merely on a statement made by PW.1 the son of the Plaintiff in his cross examination that they are the owner of the suit passage.

14. On the contrary, Mr. T. Arulraj the learned counsel for the Respondent supported the findings of the first appellate court and contended that the Plaintiff had claimed title to the suit passage and also easementary right which pleas are quite contradictory to each other and the Plaintiff having failed to establish the claim of title cannot seek for the relief on the basis of easement. The learned counsel relied on the decisions of this court rendered in the cases of E. Elumalaichetty Vs. Naina Mudali and others [AIR-1987-Mad-102] and Vedavilli Ammal Vs. Kathayi Ammal [2002-3-MLJ-804] in support of the aforesaid contention.

15. At the outset, it is to be noted that the Plaintiff has not claimed title or ownership to the suit passage, but only claimed exclusive right of pathway through the suit passage on the ground that it existed even from the year 1940 when both the properties were owned by her father V. Ayyavu Nadar and it has been used by her predecessor and by the Plaintiff for the past 40 years. The relevant passage at paragraph 9 of the plaint is extracted below:-

"The Plaintiff's predecessors in title were peaceably and openly enjoying the right of way from Kalingarayan Street to the property now owned by the Plaintiff from 1940. After the settlement in favour of the Plaintiff in the year 1965, the Plaintiff's right of way from Kalingarayan Street to the Plaintiff's building in Kalingarayan 1st lane has been peaceably and openly enjoyed by the Plaintiff and an easement and as of right without interruption right from 1965 that is for the

past about 35 years. Therefore, the Plaintiff has acquired by prescription the exclusive right to the passage marked ABCD in the plaint plan as per Section 15 of the Indian Easements act, 1882. Under Section 25 of the Limitation Act, 1963 also, the Plaintiff has acquired easement by prescription since the right of way in the passage ABCD has been peaceably and exclusively enjoyed by the Plaintiff alone without interruption for 35 years."

16. In fact, PW.1 has deposed that they were using the Defendant's pathway which would clearly indicate that the Plaintiffs were conscious that they are using the pathway of the Defendant. Hence, the assertion made by the Plaintiff in the plaint as well as evidence adduced through PW.1 would only go to show that they have claimed the easementary right by prescription as an absolute and indefeasible right. I can see nothing to suggest that the evidence on which the first appellate court relied was sufficient to come to a conclusion that the Plaintiff has claimed ownership to the suit pathway. I only desire to add that the Trial Court has tried the case on the footing that the Plaintiff's claims is by way of easement, the right of way over the suit pathway which according to the Defendant forms part of his land and the relevant issues had been raised only in that regard. Therefore, I am of the view that the mere fact that the PW.1 has remarked that they are the owners of the suit pathway in his evidence does not affect the question of easementary right claimed by the Plaintiff.

17. It is, of course, perfectly true that an easement can only be claimed in respect of somebody else's property and a man cannot claim an easement over his own property. But, in the instant case, it is clearly pleaded by the Plaintiff that for more than a statutory period, the Plaintiff has openly exercised right of pathway through the suit pathway, which is sufficient to show that during the whole of the prescription period they were consciously asserting a right of an easement.

18. The learned counsel for the Appellants contended that when the Plaintiff had established open and uninterrupted user, a presumption would arise that it was as of right and it necessarily followed that the user was an easement and that it was for the Defendant to show that the user was not as of right, but other wise.

19. Under Section 15 of the Indian Easement Act, 1882, the person claiming a right of way has not only to establish that he enjoyed the right for 20 years peaceably and openly, but also that the right was enjoyed "as of right". In the instant case, the strip of land, on which the Plaintiff was exercising his right of way, had been admittedly passage which is 5 ft. in width runs starting form the Kalingarayan Street to the house of the Plaintiff on the western end of the passage. There is a gate at the entrance

and the passage on the top has been covered by iron grills. Throughout the passage plants are planted as disclosed from the evidence adduced. The Defendant in their Written Statement conceded about the existence of the pathway and the use of the pathway by the Plaintiff, but their defence is that it is that of permissive user. From the evidence, it could not be inferred as to what is the nature of permission, whether it was for all time or for a specific period. There is no evidence on the part of the Defendant in support of the case that the Plaintiff was using the pathway only on permission.

20. The pathway admittedly is covered by the compound wall on either side i.e. on the southern and northern side. It is not known as to why the said pathway is set apart as a well defined pathway, when the Defendant had direct entrance from the Kalingarayan Street. Though the Defendant claimed that he has put up the gate, but there is clear a indication that the pathway leads only to the Defendant's house on the rear side and the gate should have been only fixed by the Plaintiff. The admission made by the Defendant as extracted below throws much light on this issue that the Plaintiff had been using it for a longer period:-

"மேற்படி தாவா பாதை வாதியின் வீட்டிற்கு பக்கவாட்டில் போய் சேருகிறது. தாவாபாதை வாதியின் வீட்டைதவிர வேறு யாரு வீட்டிற்கும் சென்று சேரவில்லை என்று சொன்னால் சரிதான். தாவா பாதையின் முகப்பில் திராவிடநாடு டிராக்ஸ் டி கெமிக்கல்ஸ் நிறுவனத்தின் போர்டு தற்போது உள்ளது. என்னிடம் காண்பிக்கப்படும் புகைப்படத்தில் போர்டு உள்ளது. அந்த புகைப்படம் வா.சா.ஆ.13 தாவாபாதையில் நான் போர்டு எதுவும் வைக்கவில்லை. தாவா பாதையில் மின் விளக்கு மூன்று, நான்கு எரிகிறதா இல்லையா என்பதை நான் பார்க்கவில்லை. தாவாபாதையில் எரியம் 3,4 விளக்குகளுக்கான ஸ்விட்ச் அந்த தாவாபாதையிலேயே உள்ளது என்றால் அதுபற்றி எனக்கு தெரியாது. அதற்காக மின் இணைப்ப, வாதியின் வீட்டிலிருந்து தான் வருகிறது என்றால் அதுபற்றி எனக்கு தெரியாது. தாவாபாதையில் மேலே இரும்பு, அடைப்பு, யார் போட்டது என்று எனக்கு தெரியாது. மேற்படி இரும்பு, அடைப்பை தாவாபாதையில் வாதிதான் போட்டு பராமரித்து வருகிறார் என்று சொன்னால் அதுபற்றி எனக்கு தெரியாது. வாதிதான் இரும்பு, அடைப்பை ரிப்பேர் செய்துள்ளார். அதற்கான புகைப்படம் வா.சா.ஆ.14 தாவாபாதைக்கு வடக்கே பக்கத்து வீட்டு சுவர் உள்ளது. தாவா பாதையின் தெற்கே என் வீட்டின் சுவர் உள்ளது. அதில் சன்னல் உள்ளது. உயில் மூலமாக எனக்கு வீடு கொடுக்கப்படும்போதே தாவா பாதை இருந்தது."

21. So, it is made clear that even on the date when his property was given to him by way of will dated 7.6.1969 the suit passage was in existence which probabalises the case of the Plaintiff that the said pathway was set apart for the owners of the property on the rear side to reach their house from Kalingarayan Street. It is not denied by the Defendant that the suit pathway is

used only by the Plaintiff to reach his house from the Kalingarayan Street. Ex.A8 is the registration certificate of the Plaintiff's firm by name Dravida Nadu Drugs and Pharmaceuticals Pvt Limited and its name board is placed on the entrance of the passage which is seen from the photographs Ex.A6. In Ex.A8, the address of the main place of business is given as No.44, Dewan Rama Street, Madras-84 and in the column 8, the other places of business is given as No.20, Kalingarayan Street, Madras-21 which refers to the door number given to the suit passage. Hence, all the above features and the oral evidence would clearly demonstrate that the pathway is used by the Plaintiff at least from the year 1965 onwards viz. from the date of settlement executed by the predecessor of the Plaintiff. It is seen that for several years, the Plaintiff has been peacefully enjoying the pathway and it is probably in view of the strained relationship between the parties that the Defendant had thought of raising protest against the user of the pathway.

22. The decision of the Honourable Supreme Court rendered in the case of Justiniano Antao and others Vs. Bernadette B.Pereira [AIR-2005-SC-236] will not apply to the facts of this case, inasmuch as the facts are distinguishable. In the above said case, the Plaintiff having not proved access to the house as of right through the property of the Defendant for more than 20 years, the claim as to right of access through prescription was held not tenable. But, in the instant case, the Plaintiff has proved that the suit pathway was used by them from the time of their predecessors, that is for more than 30 years and on the basis of the evidence and documents placed on record, I am of satisfied that the Trial Court has come to a right conclusion, but the first appellate court has reversed it which appears to be based on improper appreciation of facts and law and by ignoring material evidence. Accordingly, the substantial questions of law are answered in favour of the Appellants.

23. In the result, this Second Appeal is allowed. However, in the circumstances of the case, there will be no order as to costs.

Sd/
Asst.Registrar
/true copy/
Sub Asst.Registrar

Srcm

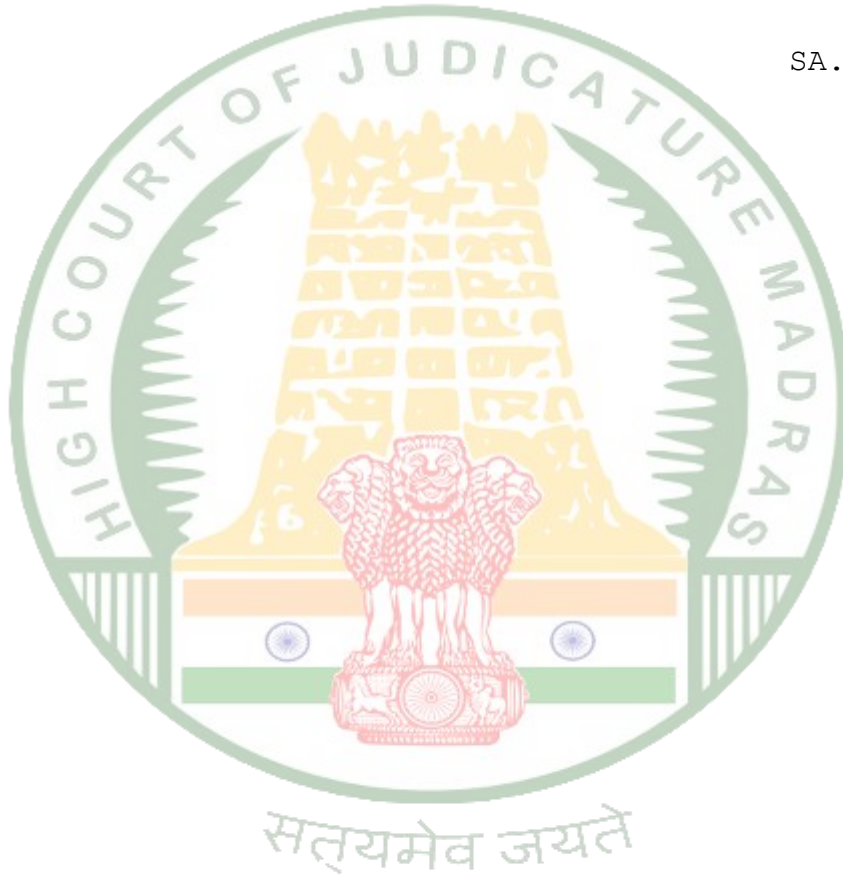
To:

- 1.The 4th Additional Judge, City Civil Court, Chennai
- 2.The 14th Assistant Judge, City Civil Court, Chennai.
- 3.The Record Keeper, VR Section, High Court, Madras

+lcc to Mr.T.Arulraj, Advocate Sr 55459

SJ(CO)
km/6.10.

SA.No.1000/2004



WEB COPY