
(2017) 06 MAD CK 0081
In the Madras High Court
Case No : 458 and 459 of 2011

Perumal

APPELLANT

Vs

Ganesan (deceased), & Ors.

RESPONDENT

Date of Decision : 02-06-2017

Acts Referred:

Citation : (2017) 06 MAD CK 0081

Hon'ble Judges : S.Vaidyanathan

Bench : SINGLE BENCH

Advocate : S.Vaidyanathan

Final Decision : Dismissed

Judgement

1. The appellant herein, who was successful before the Trial Court, is before this Court by way of this Second Appeal, aggrieved by the judgment of reversal passed by the First Appellate Court.
2. Since the issue involved in both the Appeals is one and the same, the Appeals are taken up for disposal by a common judgment.
3. The appellant herein is the plaintiff before the Trial Court. The case of the appellant/Perumal before the Trial Court is that the property in "A" schedule is his absolute property, purchased by him under a registered Sale Deed dated 25.05.1987 from one Kishta Pillai, S/o.Narayana Pillai for Rs.2,400/- and he is in possession and enjoyment of the same. The said property is situated on the eastern side of the respondent's house and the way to the property is described in "E" schedule. Kishta Pillai was in possession and enjoyment of "A" schedule property. According to the appellant/Perumal, he is in enjoyment of the right of way over "B" schedule property to reach his property in "A" schedule and he reaches his house in "A" schedule property from the western side only through the way described in "B" schedule. So also, the respondent/Ganesan has access to his house on the western side of the appellant's house in "A" schedule only through the way described in "B" schedule.

4. It is the further case of the appellant/Perumal that the respondent/Ganesan purchased the site on the western side of the house from one Ponnusami Gounder and Ramalingam and he did not have direct access from west street to his house, lying immediately on the east of west street and west of his house. According to him, he and the respondent and their predecessors in title have enjoyed the "B" schedule property as a way from time immemorial and that he has access only through the way described in "B" schedule and hence, the right of way is absolutely necessary and essential for the beneficial enjoyment of his house in "A" schedule.

5. Before the Trial Court, the appellant/Perumal has further stated that he constructed a house in S.No.200/1 in west street and is using "A" schedule property as a cattle shed and that the thatched house in "A" schedule property is assessed to property tax. Also, the appellant used to lead his cattle to and from the "A" schedule property only through the way in "B" schedule. Moreover, the respondent also used the said way to reach his house from west street and hence, he is estopped to deny the existence of the said way and also his right to use the same to reach his house in "A" schedule.

6. Thereafter, the Natham Survey authorities surveyed the house sites in the suit Village. The respondent's site and house have been resurveyed as S.No.200/13 and the appellant's house has been resurveyed as S.No.200/14. The "B" schedule property, i.e. the way has been resurveyed as 200/15. The appellant has been granted house site patta in respect of S.No.200/14 and the Patta Number is 75. The appellant as well as the respondent were served notices of Natham Survey. The Surveyor fixed boundaries for the properties of the appellant and the respondent and also the way described in "B" schedule. The respondent did not question fixation of boundaries of the same and so, the decision of the Surveyor has become final and conclusive. Thus, according to the appellant, the respondent is barred by resjudicata to dispute the appellant's right to use the way in S.No.200/15, morefully described in "B" schedule. Hence, the appellant/Perumal filed a suit in O.S.No.368 of 1999 seeking declaration of his right of way over "B" schedule property to reach his house in "A" schedule property from the west street and for permanent injunction restraining the respondent/Ganesan from interfering with his enjoyment of "B" schedule property as a way to reach his house in "A" schedule property from west street.

7. While so, the respondent/Ganesan filed a suit in O.S.No.348 of 1999 seeking permanent injunction restraining the appellant/Perumal from using his property described in Item Nos.1 and 2 of "A" schedule property as a pathway. According to the respondent, he purchased Item No.1 of "A" Schedule in O.S.No.348 of 1999 from one Pattu Gounder and others by a Sale Deed dated 13.06.1972 and Item No.2 of "A" Schedule by a Sale Deed dated 07.07.1980 from one Ramalinga Gounder and he is in possession and enjoyment of both the properties and that the appellant is trying to trespass into a portion of his property as described in "A" schedule of O.S.No.348 of 1999 claiming the portion to be poramboke land.

It is the case of the respondent that the "B" schedule property in O.S.No.368 of 1999 (corresponding to the southern portion of "A" schedule in O.S.No.348 of 1999) is the exclusive property of the respondent and that the appellant has no right of way over the same.

8. The Trial Court, on consideration of the oral and documentary evidence available on record, decreed both the suits in O.S.Nos.348 and 368 of 1999 by a common judgment dated 19.09.2005 in favour of the appellant/Perumal. Aggrieved by the said judgment, the respondent/Ganesan preferred two appeals in A.S.Nos.45 and 47 of 2006 against the two suits and the First Appellate Court, by a common judgment dated 29.03.2007, reversed the judgment of the Trial Court, in favour of the respondent/Ganesan. Challenging the judgment and decree of the First Appellate Court, the appellant/Perumal, who won his case before the Trial Court, is before this Court.

9. The substantial questions of law that arises for consideration in this appeal are:

(i) Whether the First Appellate Court is right in reversing the judgment and decree of the Trial Court, after resurveying the lane as S.No.200/15?

(ii) Whether the First Appellate Court is right in reversing the judgment of the Trial Court without considering the fact that the appellant herein was entitled to the right through the lane based on easement by necessity?

10. According to the learned counsel for the appellant, the lands in question have been re-surveyed and there is no re-classification of the same. It is his submission that the re-surveyed portion adjoining the Natham lands having found in the suit property is used only as a passage and it was not used as a house-site at any point of time and the same has not been in possession of the appellant or the respondents. It is his further case that pursuant to the resurvey, the property has been sub-divided as S.Nos.200/13, 200/14 and 200/15 and that S.No.200/15 is a poramboke lane in Natham "A" Register.

11. Learned counsel further submitted that the contention of the respondent that Grama Natham lands cannot be re-classified is correct and in the case on hand, there is no re-classification, but there is re-survey and the passage has been given S.No.200/15. He submitted that there is no alternative pathway and by way of easement by prescription and also by way of easement by necessity, the appellant would be entitled to the relief. It is also the case of the appellant that he enjoyed the pathway for more than 20 years and hence, he has got easementary rights by way of prescription. Even otherwise, there is no other pathway to the property of the appellant and he gets easementary right by necessity.

12. In support of his case, learned counsel for the appellant has relied on the following decisions of this Court : (i) R.Sengoda Gounder and others vs. Sengoda Gounder and others (1999 (1) L.W. 422)

"10. As regards the objection with reference to inconsistent pleas, learned

counsel for the appellant relies on a judgment of this Court reported in I.L.R. (1997) 3 Madras 1425 (Nanjammal vs. Marappa Gounder) Subramani, J. in dealing with the facts of the case in paragraph No.9 of the judgment has made a passing observation that the very claim by prescription and necessity was inconsistent. Such an observation cannot be quoted out of the context as if to mean that a party would be non-suited if either an alternate plea or even a concurrent plea is raised. It would depend upon the facts and circumstances of each case. For instance, if a party has acquired an easement of necessity in terms of Section 13 of the Easements Act and he has also continued to exercise it for more than 20 years as required under Section 15 of the Act, there is no reason why he should be deprived of claiming both the easementary rights. Both the rights are parallel and independently available to a party and there can be no question of any inconsistency in the pleadings. Even in the judgment relied upon by the learned counsel for the appellants, the learned Judge has not held that such a plea would by itself, result in non-suiting the plaintiff. In fact, the learned Judge had considered both the pleas of the plaintiffs on their merits and held against the plaintiffs. Moreover, in the present case, even though in the written statement, the claim of easement by prescription as well as of necessity has been raised, the defendants/respondents had restricted in their evidence only to the right of easement by prescription and both the Courts have also rendered their findings mainly on the basis of the claim of easement by prescription only. Therefore, I am unable to sustain the said objection."

(ii) S.Arulammal and another vs. P.Renjamony and another (2011 (2) MWN (Civil) 291)

"17. We have seen that the finding of the lower appellate court regarding the existence of an alternative passage to reach the plaint "A" schedule properties from the channel road through the north-south road running on the west of the properties of defendants, Sivaraman and Krishnakumar, appellants/defendants and in favour of the respondents/plaintiffs is neither defective nor infirm. In addition to the same, as pointed out supra, since the claim of easement over plaint "B" schedule property made by the respondents/plaintiffs is one of prescriptive easement even if it is assumed that there exists an alternative approach to the plaint "A" schedule properties, the same shall not be enough to defeat the claim of the respondents"/plaintiffs" prescriptive right of easement over the plaint "B" schedule properties. It is a small stretch of land on the eastern extremity of the defendants" property, having 4 1/2 feet width, running northsouth that connects the east-west channel road running on the south to the appellants"/defendants" properties and the properties of the respondents/plaintiffs described as items 1 and 2 of the suit "A" schedule properties. Electric poles have been planted in such area. There are also visible marks to show that the said area claimed to be the passage was left vacant by the defendants for the use of the plaintiffs as an access to the plaint "A" schedule properties.

(iii) Nachammal and others vs. S.Murugesan (2011 (1) MWN (Civil) 712)

"19. Therefore, for an Occupied Grama Natham, the occupier and his successor-in-title become the absolute owner. For an Unoccupied Grama Natham, which is otherwise known as Natham Poramboke, it was the practice of the Government to issue assignment for the individuals and on such assignment, that person becomes the owner of the house site. The Government, as the custodian, has the right to grant such assignment. The appellant cannot challenge the assignment, unless he proves better title."

(iv) Malaya Gounder (died) and others vs. Nachiappa Gounder and others (2012 (2) MWN (Civil) 591)

"14. The judgment of this Court reported in 2009 (2) LW 752 (C.Pazhamalai Pillai (died) v. Chinnadurai) the application of Section 15 of the Easement Act would lay down as follows:

31. Section 15 of Easements Act, the manner in which easement right by prescription could be acquired. One of the necessary ingredients for acquisition of rights by prescription is that it should have been enjoyed without interruption peaceably for 20 years as of right. It is more clear that Plaintiffs and other villagers have access to the suit pathway as of right for more than 20 years. On the basis of evidence, trial court rightly held that plaintiffs have established their right of easement by prescription."

15. Similarly, the judgment of the Honourable Apex Court reported in 2010 (1) CTC 455 (SC) (Sree Swayam Prakash Ashramam v. G.Anandavally Amma), it has been held as follows:

21. The High Court relied on a number of observations in Katiyar Law of easement and Licences (12th Edition) on law with respect to "implication of grant of an easement." It may arise upon severance of a tenement by its owner into parts. The acquisition of easement by prescription may be classified under the head of implied grant for all prescription presupposes a grant. All that is necessary to create the easement is a manifestation or an unequivocal intention on the part of the servient owner to that effect.

22. The High Court quoted with approval Katiyar's note to Section 8 of the easement act, which reads as follows:

"There are numerous cases in which an agreement to grant easement or some other rights has been inferred or more correctly has been imputed to the person who is in a position to make the grant, on account of some action or inaction on his part . These cases reason on the equitable Doctrine of acquiescence, but they may be referred to, for the purpose of classification, as imputed or constructive grants. The party acquiescing is subsequently estopped from denying the existence of easement. It is as if such person had made an actual grant of the easement...

... It is the intention of the grantor whether he can be presumed to have been intended to convey to the grantee a right of easement for the reasonable and

convenient enjoyment of the property which has to be ascertained in all the circumstances of the case to find out whether a grant can be implied. A description in a conveyance may connote an intention to create a right of easement. An easement may arise by implication, if the intention to grant can properly be inferred either from the terms of the grant or the circumstances."

16. Next, when we go through the easement of necessity as sought for by the plaintiffs, it has been shown in Ex.A7, field map that the cart track which is branching from Alampalayam to Koothapalayam Panchayat Road towards south goes up to S.No.165 and 178 and it did not branch towards east to join with another Panchayat Road found in S.Nos. 155, 179 and 182. However, the commissioner's report would go to show that there is a branching of cart track towards east to go to Itteri and thereafter to reach panchayat road. The said cart track should have been as told by the plaintiffs that it could not be used as a regular and pucca cart track since the commissioner himself has reported that there are various branches of roots of the trees which have been obstructing the thorough usage of the cart track. In the said circumstances, we cannot deem it as an alternate route to reach Alampalayam to Koothapalayam Panchayat Road. That cart way cannot be considered as an alternate cart way. The plaintiffs have produced the evidence for the usage of the cart track through the grant, by prescription and also through necessity. When the existence of the suit cart track itself is admitted and it has been shown to court that the plaintiffs have been using the said cart way for over 44 years through admission of D.W.1, the finding reached by the first appellate Court on facts cannot be assailed. In view of the discussions held above, the questions of law framed by this court are not decided in favour of the appellants/defendants."

(v) Periasamy Gounder and others vs. Arassapa Gounder (2017 (1) CTC 662)

"11. Only on account of the same, it could be seen that the defendants, unable to resist the case of the plaintiff, has chosen not to adduce any oral evidence in support of their defence other than marking Ex.B1. The defendants have not adduced any evidence to establish their defence. No doubt, it is for the plaintiff, to establish his case by acceptable and reliable evidence. When the plaintiff has established his case through oral and documentary evidence marked by him and also, when his case has been further sustained by Exs.C1 to C4, it could be seen that other than the suit Cart-Track, there is no other Cart-Track to enable the plaintiff to reach his house and lands adjoining thereof. As rightly argued by the plaintiff, no claim of any exclusive right over the suit Cart-Track is made by the plaintiff, other than the plaintiff's claim of Easement of necessity for using Cart-Track to have access to his property. Therefore, when the plaintiff has established his claim of Easement of necessity, merely because, the plaintiff has not established his case of usage of the suit Cart-Track by grant by itself would not disentitle the plaintiff to claim the relief sought for in the plaint."

13. On the other hand, it is the case of the respondents that easement by way of prescription and easement by necessity cannot go together is not correct.

Learned counsel for the respondents submitted that as per the Advocate Commissioner's Report and Plan, marked as Exs.C1 and C3, it is seen that the access to the appellant's property is through the passage in S.No.200/15, which is a poramboke land and even assuming that the property belongs to the respondents, the appellant having used the pathway for more than 20 years gets easementary right of prescription and also by necessity.

14. It is the further contention of the learned counsel for the respondent that the fact finding rendered by the Lower Appellate Court cannot be interfered as the scope of the Second Appeal interpreting the finding of fact under Section 100 is very limited. Once it is classified as Natham lands, the Government cannot convert the Natham lands into Natham poramboke lands. He further submitted that the pathway has been created in 1994 and when the Lower Appellate Court having rendered a finding that there is a separate pathway to enter into the land of the appellant, now the appellant cannot contend that he has a right of pathway in the Natham land belonging to the respondents.

15. To substantiate his stand, learned counsel for the respondents relied on the following:

(i) a decision of the Supreme Court in the case of Karbalai Begum vs. Mohd. Sayeed and another (AIR 1981 SC 77)

"9. This finding of the learned District Judge was a clear finding of fact and even if it was wrong (though in our opinion it is absolutely correct) it was not open to the High Court to interfere with this finding of fact in second appeal. Furthermore, the District Judge at another place found that there was no evidence on the record to prove that the plaintiff was not given any share out of the produce and, therefore, the conclusion that the plaintiff should be deemed to be ousted from possession, was not correct. In this connected, the learned Judge observed as follows:

"The argument advanced by the counsel for the respondents that there is no evidence on the record that the plaintiff was given any share out of the produce and, therefore, the plaintiff should be deemed to be ousted from possession, is fallacious."

10. This was also a finding of fact which was binding in second appeal. The High Court seems to have relied on the fact that there was no evidence to prove that the plaintiff was prevented from filing a petition under S.9 of the U.P. Consolidation of Holdings Act, 1953 or that the defendants assured the plaintiff that her name shall be entered in the record during the consolidation proceedings. Here also, the High Court committed an error of record because the clear evidence of P.W. Karbalai Begum, is to the effect that she was not at all informed about the consolidation proceedings and was assured by the defendants that they would take proper care of her share in any proceedings that may be instituted. This was accepted by the District Judge and should not have been interfered with by the High Court in second appeal."

(ii) yet another Supreme Court decision in the case of Md. Mohammad Ali (dead) by Lrs vs. Jagadish Kalita and others [(2004) 1 SCC 271]

"19. Long and continuous possession by itself, it is trite, would not constitute adverse possession. Even nonparticipation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription. A co-sharer, as is well settled, becomes a construction trustee of other co-sharer and the right of the appellant and/or his predecessors-in-interest would, thus, be deemed to be protected by the trustees. As noticed hereinbefore, the respondents in their written statement raised a plea of adverse possession only against the third set of the defendants. A plea of adverse possession set up by the respondents, as reproduced hereinbefore, does not meet the requirements of law also in proving ouster of a co-sharer. But in the event, if the heirs and legal representatives of Gayaram Kalita and Kashiram Kalita partitioned their properties by metes and bounds, they would cease to be co-sharers in which event a plea of adverse possession as contradistinguished from the plea of ouster could be raised. The courts in a given situation may on reading of the written statement in its entirety come to the conclusion that a proper plea of adverse possession has been raised if requisite allegations therefor exist. In the event the plaintiff proves his title, he need not prove that he was in possession within 12 years from the date of filing of suit. If he fails to prove his title, the suit fails."

(iii) a decision of this Court in the case of Periyanna Gounder (died) and another vs. Komarasami (2000 (1) MLJ 431)

"21. No doubt, it is true that in one paragraph of the plaint, it is averred claiming easementary right both by prescription and necessity. The very claim by prescription and necessity is itself inconsistent. An easement of necessity means an easement without which the property cannot be used at all. Mere convenience is not the test of an easement of necessity. A man cannot acquire a right of way as an easement of necessity, if he has got other means of access to his land, however, more inconvenient it may be than by passing over the land of neighbours.

22. An easement of necessity is not to be granted merely on the ground of convenience and advantage, but solely on the ground of absolute necessity. In other words, when there are other ways of ingress and egress, an easement of necessity cannot be claimed merely on the ground that such ways are inconvenient.

23. It is a well established rule that ordinarily a court should find a case and decree the suit only on the basis of the pleadings of the parties. In a case, where the claim is for an easement right, it is all the more necessary that the pleadings should be specific and precise. The right of easement is one which a person claims over a land which is not his own. The qualitative and quantitative requirement for the different kinds of easements are to a great extent mutually exclusive. That is the reason why the Courts have always insisted that whenever

a right of easement is claimed, the pleadings should be precise and clear and not vague."

(iv) a First Bench decision of this Court in the case of The Executive Officer, Kadathur Town Panchayat vs. V.Swaminathan and others (2004 (3) CTC 270)

"5. While dealing with the contentions urged by the learned counsel for the appellant, the matter has to be dealt with in the light of the nature and classification of the land which is under occupation of the petitioners. There is no dispute that the land under occupation of the petitioners is classified as "Natham" or otherwise called as "Grama Natham" land and the petitioners were granted pattas as early as in the year 1992 recognising their continued occupation. For the purpose of exercising right as against the petitioners to evict them from the land in question, it has to be decided as to whether the "Grama Natham" land actually vests either with the Government or the Town Panchayat. As regards the classification of the land as "Grama Natham", it is not the communal property in the sense in which thrashing floor or burning grounds or other property is communal viz., the property reserved for the use of the community. The "Grama Natham" land, if it is unoccupied, is assigned from time to time by the proprietor whether it is in zamindari area or in an inam village; and the said practice was referred to by the learned Judge WADSWORTH, J. In Chinnathambi Goundan vs. Venkatasubramania Ayyar (49 L.W. 326) as early as on 6.12.1938. The learned Judge while dealing with the vacant house sites, taken note of the recognised practice of the then Madras Presidency, excluding the areas with a special revenue law such as Malabar, the control of unoccupied village site vests in the proprietor whoever he may be. A further reference is also made therein to the effect that in Zamindari areas, that control is exercised by Zamindar and in a shrotriem village not falling under the Estates Land Act, the village site vests in the shrotriendar. Even in respect of lands covered under the Madras Estate Land Act, it is held that the Government can exercise its powers only to the limited extent to prevent the diversion of village site poramboke from the purpose for which it has been reserved and it was held therein that the village sites did not actually vest with the Government. The above view was approved subsequently in the decision rendered in Palani Ammal vs. L. Sethurama Aiyangar reported in 1949 (1) MLJ 290."

16. It is no doubt true that patta will not give a right of title, but, however, the respondents have produced documents with regard to the property showing the boundaries. It is also not in dispute that there was a re18 survey and the lands in question have been sub-divided and the disputed pathway is given S.No.200/15.

17. It is seen that the First Appellate Court, after framing the issues in paragraph 12 of its judgment, has clearly held that there is a separate pathway in order to enable the appellant enter his land and based on Ex.B13, S.No.200/15 has been erroneously shown as lane "cart track" and there is no evidence to show that the appellant /Perumal was using the said lane for over 20 years in order to claim

easement right by prescription. For better understanding, relevant portion of the judgment of the First Appellate Court is extracted hereunder: "VERNACULAR MATTER OMITTED"

18. Thus, on a reading of the above portion of the judgment of the First Appellate Court, it is clear that the appellant/Perumal has got alternative passage to his property. Hence, this Court is of the view that the appellant is not entitled to the relief of easement right by necessity.

19. Though I agree with the contention of the appellant/Perumal that a party is entitled to claim easement right both by way of prescription and also by way of necessity, his claim can be granted only if he is able to establish that he has been using it for over 20 years. To substantiate his stand, learned counsel for the appellant has placed much reliance on the Advocate Commissioner's Report. The First Appellate Court, taking note of the Report of the Advocate Commissioner and also in view of the entire oral and documentary evidence, has clearly held that the appellant/Perumal has got a separate passage other than the passage in question in S.No.200/15.

20. Further, the Apex Court in a recent judgment in the case of Syeda Rahimunnisa vs. Malan Bi (dead) represented by L.Rs. reported in (2016) 10 SCC 315, has held that unless a substantial question of law is involved, the Court cannot interfere with the said finding, more particularly when there is no perversity in the said finding. Accordingly, the substantial questions of law framed in this case are answered against the appellant/Perumal.

21. Accordingly, the judgment and decree of the First Appellate Court dated 29.03.2007 passed in A.S.Nos.45 and 47 of 2006 on the file of the Principal Subordinate Court, Tindivanam reversing the common judgment and decree of the Trial Court, is confirmed. In fine, the Second Appeals are dismissed. No costs. Consequently, connected M.P.No.1 of 2011 in both the Second Appeals are closed.