Chengalvaraya Pillai Vs Govinda Pillai and Ramachandran

Court: Madras High Court

Date of Decision: Nov. 16, 2009

Acts Referred: Easements Act, 1882 â€" Section 13

Hon'ble Judges: M. Jaichandren, J

Bench: Single Bench

Advocate: A. Seshan, for the Appellant; P. Veena, (R1), for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

M. Jaichandren, J.

1 .This second appeal has been filed against the judgment and decree, dated 16.12.1994, made in A.S. No. 6 of 1993, on the file of the

Subordinate Judge, Ranipet, confirming the judgment and decree, dated 21.12.1992, made in O.S. No. 442 of 1989, on the file of the District

Munsif Court, Ranipet.

2. The plaintiff in the suit, in O.S. No. 442 of 1989, is the appellant in the present second appeal. The defendants in the said suit are the

respondents herein. The suit had been filed by the plaintiff praying for the relief of declaration of title and for permanent injunction. The plaintiff had

stated that the suit property is his absolute property. He had got it under an oral partition between the plaintiff and the defendants and one Kannan,

who is the brother of both the plaintiff and the defendants, in or about the year, 1975. Thereafter, the plaintiff had constructed a tiled house in the

schedule property and he has been enjoying the remaining portion of the said property, as a vacant site. As such, the brothers of the plaintiff have

no right or title or interest over the schedule property.

3. The defendants had sold the adjacent vacant site, which they had got under the oral partition, to one Kalidoss, by a registered sale deed, dated

28.4.1980. They had repurchased the said property from Kalidoss and his minor sons, by a registered sale deed, dated 23.9.1981. Accordingly,

they have been in possession and enjoyment of the said property, which is a vacant site. While so, the defendants had been attempting to trespass

into the suit scheduled property, from 1.7.1989 onwards. They had also threatened to demolish the house constructed by the plaintiff in the said

property taking advantage of the fact that the plaintiff is very old and sick. In such circumstances, the plaintiff had filed the suit, in O.S. No. 442 of

1989, praying for the relief for declaration of his title, in respect of the suit property and for permanent injunction, restraining the defendants from

interfering with his peaceful possession and enjoyment of the suit property.

4. In the written statement filed on behalf of the defendants it has been stated that it is not correct on the part of the plaintiff to state that the suit

property belongs to him, absolutely. His claim that the suit property was allotted to him under an oral partition is incorrect. The suit property is an

ancestral property and since there is no specific allotment of the property to any one it forms a part of the common ancestral property belonging to

the plaintiff, as well as the defendants. The defendants had further stated that the schedule mentioned property had been used in common by all the

brothers, even though the plaintiff had constructed a house in a portion of the said property. The remaining vacant portion of the property has been

used as a passage both by the defendants, as well as the plaintiff, to reach their house. The defendants have no other way except through the

vacant portion of the suit schedule property. The vacant portion of the property has been used in common by the defendants, as a passage, for

several decades.

5. It has been further stated that due to the differences that had arisen between the plaintiff and the defendants, the plaintiff had started to dig for

the laying of a foundation to raise a wall over the passage in order to block it. The plaintiff has falsely stated that the defendants had threatened to

demolish the house that had been constructed by him in a portion of the suit property. Further, the defendants had not committed any trespass into

the plaintiff''s property, as alleged. The sale of the property belonging to the defendants to one Kalidoss and the subsequent purchase of the

property by the defendants has nothing to do with the suit schedule property. Since the defendants have been using the common passage for many

years they have easementary right over the said passage. In such circumstances, the suit filed by the plaintiff, praying for declaration of title and for

permanent injunction is not maintainable.

6. In view of the averments made on behalf of the plaintiff, as well as the defendants, the trial Court had framed the following points for

consideration:

1. Whether the plaintiff had been allotted the suit property, in accordance with the partition between the plaintiff and the defendants?

2. Whether the suit property is an undivided ancestral property?

3. Whether it is correct to state that the plaintiff and the defendants had been using the land adjacent to the suit property, as a common property?

4. Whether the defendants are entitled to the vacant possession in the suit property under easementary right?

5. Whether the plaintiff is entitled to the relief of declaration and permanent injunction, as prayed for in the plaint?

6. What other reliefs the parties to the suit are entitled to?

7. One witness had been examined on behalf of the plaintiff and seven documents had been marked as exhibits. On behalf of the defendants two

witnesses had been examined and no document has been marked.

8. Based on the evidence adduced on behalf of the parties to the suit the trial Court had come to the conclusion that there is a six feet wide path

way in a portion of the suit property said to have been allotted to the plaintiff, by way of an oral partition amongst the members of his family. The

trial Court had found that the plaintiff had stated in his evidence, that there is a passage in existence, which he has been using to reach his house.

The plaintiff had also admitted that the defendants are also using the same passage to have access to their houses. The plaintiff had also admitted

that the passage is being used by the defendants and they have also been taking their cattle through the said passage. It has also been admitted that

the defendants have no other way to reach their houses. The plaintiff had also not disputed the fact that the passage in question is six feet in width

and that it has been used as a common passage, both by the plaintiff and the defendants to reach their ancestral properties. The witnesses P.W.2,

D.W.1 and D.W.2 have also accepted, in their evidence, that the passage in question is a common passage, which is six feet in width and that it

has been used as such for nearly forty five years. They had also accepted that the defendants have been taking the cattle through the said passage

and that they have no other passage to reach their houses.

9. The trial Court had also found from the report and the sketch filed by the Commissioner, as Exs.C-1 and C-2, respectively, that the suit passage

is a common passage and that there is no other passage in existence to reach the properties of the defendants. In view of the evidence available on

record the trial Court had come to the conclusion that certain ancestral properties had been allotted to the plaintiff, as well as the defendants, by

way of an oral partition and that there is a common pathway, which is in the property belonging to the plaintiff, which has not been allotted to him

for his separate use. The pathway in the vacant portion of the property belonging to the plaintiff is a common passage used both by the plaintiff, as

well as the defendants, to reach their houses. Since the defendants have been using a common path way for a long time they have easementary

right over the said passage. Therefore, the trial Court had come to the conclusion that the plaintiff cannot claim for the relief of declaration and

permanent injunction in respect of the common passage. Accordingly, the trial Court had dismissed the suit filed by the plaintiff, by its judgment and

decree, dated 21.12.1992.

10. Aggrieved by the judgment and decree of the trial, dated 21.12.1992, the plaintiff had filed the first appeal, on the file of the Subordinate

Judge, Ranipet, in A.S. No. 6 of 1993. The first Appellate Court had framed the following point for consideration:

Whether the plaintiff/appellant is entitled to the relief of declaration and permanent injunction as prayed for by him?

11. Based on the evidence available on record and in view of the contentions raised on behalf of the appellant, as well as the respondents, the first

Appellate Court had found that the passage, which was in a portion of the suit property, was a common passage used by the plaintiff, as well as

the defendants, both for their use, as well as for taking the cattle. The passage has been used in common for nearly fifty years. In the Advocate

Commissioner''s sketch, marked as Ex.C-2, the portion marked as `LU'' was the common passage. The first defendant, who had been examined

as D.W.1, had deposed that both the plaintiff, as well as the defendants, were using the common path way to reach their houses. He had also

stated in his evidence that he has no other pathway that can be used by them to have access to the north-south lane leading to their properties. He

had also stated that the common passage has been used by them in common for about fifty years and that the same passage had also been used for

taking their cattle.

12. One Munusamy, who had been examined as D.W.2 had stated in his evidence that he has been living opposite to the defendants'' house, for

nearly 50 years. He had stated that the passage had been used both by the plaintiff, as well as the defendants, to reach their residence and to take

their cattle. From the report of the Advocate Commissioner, marked as Ex.C-1 and from his skech marked as Ex.C-2 the lower Appellate Court

had found that the passage, marked as `LU'' in the sketch, had been used for a long time both by the plaintiff and the defendants. However, the

first Appellate Court had found that the plaintiff''s had marked Exs.A-3 to A-6 said to be the house tax receipts and Ex.A-8, which is the voter''s

list, to show that the plaintiff has been residing in the property belonging to him. However, there has been no evidence to substantiate the claim of

the plaintiff that the passage marked as `LU'' in the Ex.C-2 sketch, filed by the Advocate Commissioner, belongs to him, exclusively. From the

Ex.C-2 sketch the first Appellate Court had found that the passage marked as `LU'' is a common passage and that there is no other passage for

the defendants to reach their house.

13. The contention of the plaintiff that even if the defendants had certain easementary rights in the passage in question they had lost the same after

they had sold the property to one Kalidoss, by way of a sale deed, dated 28.4.1980, marked as Ex.A-1. Thereafter, the defendants had

purchased the said property from Kalidoss, by way of a sale deed, dated 23.9.1981, marked as Ex.A-2. However, no such common passage had

been mentioned, either in the sale deed, dated 28.4.1980, or in the sale deed, dated 23.9.1981. In such circumstances, there is no evidence

regarding the existence of the common passage, as claimed by the defendants". Even if it could be accepted that such a passage had existed, the

defendants had lost their easementary rights in respect of the passage after they had sold their property, by way of a sale deed, dated 28.4.1980.

14. The first Appellate Court had not accepted the said contentions raised on behalf of the plaintiff. From the evidence available on record, the first

Appellate Court had come to the conclusion that the plaintiff cannot ask for the reliefs of declaration of title and for a permanent injunction, in

respect of the entire suit property, since he does not have any exclusive right over the six feet wide common passage, which has been used both by

the plaintiff, as well as the defendants, for a long time. Therefore, the first Appellate Court had decreed the suit in favour of the plaintiff, except for

the six feet wide common passage, marked as `LU" in the commissioner"s sketch, marked as Ex.C-2, by the judgment and decree, dated

16.12.1994. Accordingly, the first Appellate Court had decreed the suit, partially, by its judgment and decree, dated 16.12.1994, made in A.S.

No. 6 of 1993.

15. Aggrieved by the judgment and decree of the first Appellate Court, dated 16.12.1994, the plaintiff in the suit in O.S. No. 442 of 1989, had

filed the present second appeal, only in so far as it had rejected the claim of the plaintiff, in respect of the common passage, marked as `LU" in the

Ex.C-2 sketch filed by the Advocate Commissioner. This Court had admitted the second appeal on the following substantial questions of law:

1. When the plaintiff filed the suit for declaration of title over 39" x 28 Ã¯Â¿Â½", of land, whether the first Appellate Court was correct in granting a

decree in favour of the plaintiff for entire suit schedule mentioned property except 6" pathway in the suit land, especially, when there is no pleading

to that effect?

2. In the suit filed by the plaintiff, is it open to the lower Appellate Court to grant a decree for 6" common pathway in favour of the defendants,

which was not pleaded in the written statement?

16. The learned Counsel appearing on behalf of the appellant had submitted that the Courts below had failed to take into consideration the fact that

the respondents had sold their property to one Kalidoss under a sale deed, dated 28.4.1980, marked as Ex A-1. Thereafter they had repurchased

the same property by way of a sale deed, dated 23.9.1981, marked as Ex.A-2. Even if it could be accepted that the respondents had certain

easementary rights to use the passage in question, as a common passage, such rights had been terminated when they had sold their property to a

third person. Both in the sale deed, dated 28.4.1980, marked as Ex.A-1 and the sale deed, dated 23.9.1981, marked as Ex.A-2, there is no

recital, with regard to the existence of a common passage.

17. The Courts below had failed to note that the appellant had allowed the respondents to use the land which had fallen to his share in the oral

partition that had taken place after the death of Chinnaya Pillai, the father of the appellant, as well as the respondents. However, it would not

confer any right on the respondents, in respect of the suit property. Further, the respondents had not pleaded in their written statement that the

common passage was six feet wide. In the absence of such a pleading the Court below ought not to have held that the appellant is not entitled to

the reliefs sought for by him in his suit, in O.S. No. 442 of 1989.

18. The learned Counsel appearing for the appellant had relied on the decision of this Court reported in R. Louis @ R.P. Thambi Raja v. R.

Irudayamary Ammani 1999 (1) L.W. 557, wherein, it had been held that Section 13 of the Easements Act, will come into play only in case of

necessity. Where a common owner had been making use of an open space as a passage to reach the main door, after the severance of the two

houses, the respective owners will not have any such easementary right.

19. The learned Counsel had also relied on a decision of this Court reported in K.S. Vaidyanathan and Others Vs. Buhari and Sons (P.) Ltd. and

Another, wherein it had been held as follows:

An easement of necessity is one without which the property in question cannot be enjoyed at all and not one merely necessary for the reasonable

or convenient enjoyment of the property. Where a plaintiff can have access to his property by making necessary alterations in his own property,

there cannot be said to be any easement of necessity over a property belonging to another.

20. The learned Counsel appearing on behalf of the respondents had submitted that the passage in question is a common passage, used both by

the appellant, as well as the respondents, for nearly fifty years. The respondents had been using the common passage to reach their property and to

take their cattle. From the evidence of D.W.1 and D.W.2, it is clear that the passage has been used as a common passage, both by the appellant,

as well as the respondents, for a long time. Further, from the report and the sketch of the Advocate Commissioner, marked as Exs.C-1 and C-2,

respectively, the passage had been found to be a common passage and that there is no other pathway for the respondents to reach their property.

21. The plaintiff who is the appellant in the present second appeal had not produced sufficient evidence to show that the pathway in question was

being used by him, exclusively. The first Appellate Court, based on the evidence available on record, had found that the appellant was entitled for a

declaration and for permanent injunction only in respect of his property, excluding the six feet pathway, which was being used both by the

appellant, as well as the respondents.

22. In view of the submissions made by the learned Counsels appearing for the appellant, as well as the respondents and in view of the evidence

available on record, this Court is of the considered view that the appellant had not shown sufficient cause or reason for this Court to interfere with

the findings of the first Appellate Court, in its judgment and decree, dated 16.12.1994, made in A.S. No. 6 of 1993.

23. From the evidence of D.W.1 and D.W.2 it is clear that the passage in question had been used as a common passage, both by the appellant, as

well as the respondents, for nearly fifty years. Further, from the report of the Advocate Commissioner, marked as Ex.C-1 and the sketch marked

as Ex.C-2, it is clear that the passage marked as `LU" in the said sketch is a common passage, which was being used both by the appellant, as

well as the defendants. It could also be seen that there is no other passage for the respondents to reach their property. Even though the appellant

had claimed that the passage in question was forming a part of the property allotted to him by an oral partition amongst the members of his family,

he had not shown sufficient evidence that the passage was being used by him, exclusively.

24. On the other hand, the respondents had adduced sufficient evidence to show that the passage, shown as `LU" in the sketch filed by the

Advocate Commissioner, marked as Ex.C-2, was being used both by the appellant, as well as the respondents, for over nearly 50 years. Since

sufficient evidence was available to prove the claims of the respondents that they have been using the passage in common, the lower appellate

Court was right in coming to the conclusion that the appellant would be entitled for a declaration of his title and for permanent injunction, only in

respect of his properties, except the six feet wide path way, which was being used both by the appellant, as well as the respondents. In such

circumstances, the second appeal is dismissed, confirming the judgment and decree of the first Appellate Court, dated 16.12.1994, made in A.S.

No. 6 of 1993. No costs.