

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 25.02.2015

CORAM :

THE HON'BLE MS. JUSTICE K.B.K.VASUKI

Second Appeal No.732 of 1998

1.Vettaiah Gounder
2.Kaliayammal
3.Nachiannan

.. Appellants/Defendants1 to 3

Vs

1.Chinna Gounder
2.Rathinam
3.Palanisamy
4.Kandasamy

.. Respondents/Plaintiff/
Defendants 4 to 6.

Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 27.02.1998 made in A.S.No.43 of 1993 on the file of the Subordinate Court, Namakkal reversing the Judgment and Decree dated 30.08.1991 made in O.S.No.26 of 1986 on the file of the Additional District Munsif, Namakkal.

For Appellants : M/s.T.Dhanyakumar
For Respondents : M/s.Muthumani Duraisamy for R1.
R2 : Died
R3 and 4 : No Appearance

J U D G M E N T

Heard both sides.

2. The second appeal is admitted on the following substantial questions of law :

(i)Whether the plaintiff without establishing prejudice and loss, can prevent the defendants from using the suit pathway leading to the lands situated at point D2? and

(ii)Whether the defendants are entitled to go to D2 lands or any other lands after they reach D2 land?

3.The defendants 1 to 3 are the appellants herein. The parties are referred to as per their rank in the suit in OS.No.26 of 1986.

4.The suit is filed for declaration that the defendants have no right to use "X - Y" suit cart track lying in "P" marked plaintiff's property to go to "D2" marked defendants land and for permanent injunction restraining them from using "X - Y" cart track lying in "P" marked land to go to D2 marked land.

5.The facts that the plaintiff is the owner of "P" marked land abutting Pudupatti main road situated on the North of the lands shown as D to D2 belonging to the defendants. While D and D2 lands belong to the defendants 1 to 3, D1 in the middle of D and D2 belongs to the fifth defendant. "X - Y" portion is admittedly a cart track commencing from Pudupatti main road running north south on the western side of the plaintiff's land and the same enters the land belonging to the defendants i.e, "D" marked portion at the point "Y". The defendants have admittedly right to use the suit X-Y cart track to reach the "D" marked portion from Pudupatti main Road. The only objection raised on the side of the plaintiff is that the same cart track cannot be used to go to D2 marked land lying beyond D and D1 marked land.

6.The trial Court dismissed the suit mainly on the ground that the plaintiff has no right to prevent the defendants to go beyond D and D1 marked lands, through "X - Y" cart track. Whereas, the lower appellate court by relying on the judgment of the Division Bench of Patna High Court reported in AIR (34) 1947 - Patna 266 (Mahabir Bhagat and others V. Ram Chandra Bhagat and others) reversed the findings of the trial Court. It is held by the lower appellate court that if a dominant owner has only a limited right of using a way, he is not entitled to use it for going to the dominant tenement as well as to some other place beyond and if he is permitted to do so, it would amount to imposing a greater burden on the dominant tenant than was intended by the grantor of the easement. The lower appellate court, while doing so, was of the view that the judgment of the Hon'ble Apex Court reported in 1985-1-MLJ 36 : (1984) 4 SCC 376 - (Ayyaswami gounder and other V. Munnusamy Gounder and other) cited on the defendants side was not applicable to the facts of the present case.

7.In my considered view, the lower appellate court has on misconception of law and facts, failed to apply the principles laid down by the Apex Court to the facts of the present case and such failure has resulted in an erroneous judgment, thereby reversing the judgment of the trial court. In the case of 1985-1-MLJ 36 - Ayyaswami Gounder and others v. Munnuswamy Gounder and others decided by the Apex Court, the suit was filed by the plaintiffs for declaration of their right to take water from their exclusive well through a portion of a channel in the joint land of the parties and for consequential relief of permanent injunction restraining the defendants from interfering with the enjoyment of the plaintiffs' right to take water through the aforesaid channel. The defendants though admitted the plaintiffs' right to enjoy the common well, the common land and the

common channel, pleaded that the plaintiffs were not entitled to use the common property for taking water from their exclusive well. However, the defendants while contending so, did not plead or prove any damage, injury or hardship suffered by the defendants to show that they were in any way prejudiced by the plaintiffs forming a small channel in the common land to take water from their exclusive well to their family lands north of the suit property. The trial court found that the plaintiffs being co-owners of the common property, were entitled to use the property in the way most advantageous to them and the defendants having not pleaded or proved any damage or loss to the common property, cannot obstruct the plaintiffs from taking water to their lands from their exclusive well through the common channel. On appeal by the defendants, the first appellate court modified the decree of the trial court by fixing terms for the plaintiffs' use of the channel. Aggrieved by the same, the defendants preferred second appeal before the High court, who reversed the judgment and decree of the courts below and dismissed the suit, holding that the plaintiffs did not acquire any right either by grant or by prescription by way of easement. The High court further found that the plaintiffs by taking water from their exclusive well through the common channel, would be throwing additional burden on the common channel and common land, which was not and could not have been intended by the parties at the time of the partition, when they kept their well and the lands situated around it and the common channel for the common enjoyment of the parties. The judgment and decree of the High court was challenged by the plaintiffs/appellants before the Hon'ble Supreme Court. The Hon'ble Apex court, while negating the objection raised on the side of the defendants, observed that the right claimed by the plaintiffs was on the basis of admitted co-ownership rights, which includes unrestricted user and unlimited in point of disposition and the only restriction put by law on the common user of land by a co-owner was that it should not be so used as to prejudicially affect or put the other co-owner to a detriment. The Apex Court has also referred to the judgment of the High Court reported in AIR 1973 Mad 42 (Subbiah Goundan v. Ramaswamy Goundan and others) wherein the learned single judge under similar situation, observed that "unless the plaintiff proves that such use by the defendants in any way interferes with his rights or that the common channel is being or is likely to be damaged or injured or weakened he cannot prevent the defendants from making use of the channel during their turn of enjoyment of the common well by taking water from their exclusive well also, which is most advantageous and beneficial from their point of view".

8.As rightly argued by the learned counsel for the appellants/defendants, when the defendants enjoyed their common right to use the cart track to reach their land, no restriction can be imposed on them to go to any other land beyond D and D1 portions that too without any specific pleading and without establishing any prejudice or detriment to them through which the cart track is run. The lower appellate court has erred in finding that extra burden was

caused to the dominant tenement by allowing the defendants to use the common cart track to go to their lands immediately lying on the south of the common cart track and the plaintiff's property and thereafter to go to any other land from their lands. That being so, the adverse finding of the lower appellate court warrants interference by this Court and the substantial questions of law are hence answered in favour of the defendants.

9. In the result, the second appeal is allowed by setting aside the judgment and decree of the lower appellate court and by restoring the judgment and decree of the trial court. No costs.

tsh

-s/d-

Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

To

1. The Subordinate Court,
Namakkal.

2. The Addl. District Munsif,
Namakkal.

+ 1 cc to Mr. T. Dhanyakumar, Advocate SR 10483

+ 1 cc to Mr. Muthumani Doraisamy Advocate SR 10565

sr(co)
prk9/9

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