

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 17.11.2016

Judgment pronounced on :24.11.2016

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.490 of 2008

V.Paramasiva Gounder

... Appellant

Versus

1.R.Jayakrishnan
2.J.Dhanasekaran @ Dharuman
3.S.Venkatesan
4.S.Thamizharasi
5.T.Sellamuthu Mudaliar
6.R.Vijayakumar
7.R.Muthusamy
8.Vaiyapuri Gounder
9.V.Lakshmana Gounder
10.P.Thangavel
11.P.Shamugham
12.M.Chitra
13.V.Arumuga Gounder
14.V.Subramania Gounder
15.Pappayammal

... Respondents

Prayer: Petition filed under Section 100 of the Civil Procedure Code to set aside the judgment and decree as made in A.S.No.58 of 2005 dated 07.03.2006 on the file of the learned First Additional Subordinate Judge, Erode reversing the judgment and decree made in O.S.No.4 of 2001 dated 28.02.2005 on the file of the learned First Additional District Munsif, Erode.

For Appellant : Mr.A.K.Kumaraswamy

For Respondents : Mr.Naveen Kumar Murthi for R1 and R2
R3 and R4 Given up
R15 died

J U D G M E N T

Challenging the judgment of learned First Additional Subordinate Judge, Erode, passed in A.S.No.58 of 2005 dated 07.03.2006, the second appeal have been filed.

2. The plaintiff is the appellant before this Court. The suit filed by the plaintiff seeking declaration of his right to take vehicle of all types, cattle and men to the alleged pathway and perpetual injunction restraining defendants 2 and 3 and there means from interfering the plaintiff's right to use the said pathway was not found in favour of the plaintiff by the Courts below. Hence Second Appeal.

3. The contention of the appellant is that he purchased 0.12.5 acres of land in survey no.63/3A from one Mariammal and others vide sale deed dated 01.06.1972. According to the plaintiff the larger extent of land in the said survey no.63/3A was held by the common owners and they have divided into parts of 25 to 30 cents each with an express understanding, the purchase will have right of pathway on the extreme Southern and extreme East to

connect Water Works Road on the western side and Krishnampalayam Road on the Northern side. Such a pathway is absolutely necessary for ingress and egress of the plot owners by the plaintiff. The specific case of the plaintiff is that along with the plaintiff all the defendants are entitled for usage of the cart way. However, defendants 1 to 3 are trying to encroach upon the cart way.

4. The first defendant has filed his written statement stating that this is the second round of litigation. In the earlier suit filed by the plaintiff claiming the same extent of land in survey no.63/3A as shown in this suit was dismissed by the Court in the judgment and decree passed in O.S.No.666 of 1972. Therefore the present suit is barred by resjudicata. There is no cart track as alleged by the plaintiff running North South connecting Krishnampalayam Road. Even if plaintiff was conferred with any such right earlier the same is lost by non usage and got extinguished by lapse of time.

5. Based on the rival claim, the trial Court has framed the following issues:-

1. Whether the plaintiff is entitled for a declaration in respect of cart track?
2. Whether the plaintiff is entitled for permanent injunction?

3. What other relief?

The following additional issues were framed on 07.07.2004.

1. Whether the suit is barred by resjudicata u/s.11 Civil Procedure Code?
2. Whether the suit is barred under Order 2 rule 2 CPC?

6. On behalf of the plaintiff 3 exhibits were marked and on behalf of the defendants, 5 exhibits were marked. The plaintiff and the second defendant were examined as P.W.1 and D.W.1 respectively. The commissioner report and sketch were marked as Ex.C.1 and Ex.C.2. After analysing the evidence available, the trial Court has observed that the documents relied by the plaintiff does not disclose the cart track which runs East-West on the Southern end extent and towards North and run North South up to Krishnampalayam Road. From Ex.A.3 partition deed between the predecessor in title only the cart track running East-West is mentioned. Neither the documents relied by the plaintiff, nor the evidences let in by him in support of his case, nor the commissioner report supports the case of the plaintiff, that the cart track exists on the eastern side of the plaintiff plot. There is no trace of pathway or cart track could be seen from the report of the Advocate commissioner. Therefore, the trial Court dismissed the suit which was confirmed by the first Appellant Court.

7. The first appellate Court has observed that the plaintiff has initially claimed declaration over the alleged path way as a joint owner of the pathway along with the other plot owners who have purchased from the common vendor. However after loosing the case before the trial Court, he pleads easement of necessity to use the pathway. A person who claims right as a common owner cannot seek easement of necessity which is available only for a person who accepts the ownership with third party. Having claimed joint ownership in the pathway an alternative plea of right of easement of necessity cannot be pleaded. Having held so, the Appellate Court reiterated the findings of the trial Court that the plaintiff has failed to prove existence of pathway on the eastern side of his land.

8. Aggrieved by the concurrent findings, the present second appeal has been filed on the ground that the first Appellate Court has not framed proper points for consideration and the judgment is violated for following mandatory provisions of order 41 rule 31.

9. The learned counsel for the appellant submitted that, when the Court has accepted that the entire land originally belongs to one owner, failed to appreciate the fact that there arise an easement of necessity to have access to reach each part of the land as per Section 13 of the Indian Easement Act.

The findings of the first appellate Court that having claimed ownership over the suit cart track the alternative plea of easement right of necessity is precluded is perverse. The learned counsel for the appellant in the course of arguments, emphasised his submissions to the point that every person should have an access to his land, more particularly where the vendors of the disputing parties are common. When the dispute land is barrer, the Courts below ought not have come to a conclusion that there is no sign of cart track and therefore the plaintiff is not entitled for the declaration. When the specific case of the plaintiff ie., defendants 1 to 3 obliterated the existing cart track and trying to annex it with their land with a malafide intention, the Courts below ought to have come to a conclusion that the plaintiff are entitled for right of way through the said cart track.

10. Per contra the learned counsel appearing for the respondents submitted that the plaintiff has no where pleaded that he seeks right of way as a necessity. The case of the plaintiff is that the commercial value of the plot will be enhanced if he could access to his land through Krishnampalayam road. Easement of necessity could be granted only if the plaintiff plead and prove that there is no other access to the property. Plea that other mode of access is inconvenient and diminish the market value of the property cannot be a reason to grant relief of easement of way by necessity.

11. The law on easement of necessity and quasi easement is covered under Section 13 & 41 of the Easement Act 1882. It is by tride law of easement of necessity that

(a) a person claiming a right of way as an easement of necessity must prove that there is no other access to his property; (b) an easement of necessity is an easement without which the property cannot be used at all and not merely one for the reasonable enjoyment of the property and in considering questions of easements of necessity, convenience is not the test but absolute necessity. The necessity must be an absolute necessity and not a convenient mode of enjoyment of the property; and (c) necessity in the sense of being indispensable and without which the property could not be enjoyed at all must be established.

12. In the present case from Ex.B2 the commissioner report and sketch filed in earlier proceedings between the same parties in O.S.No.666 of 1975 we find the commissioner had inspected the field and had shown the cart track only on the southern part of the land running from east to west and the

cart track alleged by the plaintiff running north south on the eastern portion of the property is not been shown in the sketch. The physical feature of the property still remains as unaltered when the commissioner has inspected the property in the present suit even after more than 25 years. The Courts below has given due consideration of the admission made by the defendant that there is only a pathway and not a cart track of six cubic as claimed by the plaintiff and even the exact location of that pathway could not be ascertained from the evidence let in by the plaintiff. The trial Court has rejected the plea of the plaintiff on yet another ground that he has not based his claim on easement of necessity, but as a joint ownership of the alleged cart track. When his joint claim over the cart track found to be false, plaintiff is not entitled for easement right of way on the basis of necessity.

13. The answer for this question is well settled by our Hon'ble High Court as early as 1978 by Hon'ble Justice Suryamurthy in his judgment *K.Mohideen Vs. M.M.Abdullah reported in AIR 1978 Mad 97*. The following passages in the said judgment gives quietus to the entire issue.

"In Konda V. Ramaswami, ILR 38 Mad 1: (AIR 1916

Mad 718), Sundara Ayyar and Sadasiva Ayyar, JJ. held that:-

"there is no reason why a person who walks along a certain land without the permission of the true owner and in the

assertion of a right to walk should not create in favour of the enjoyer a prescriptive right of easement, simply because he mistakenly supposes that he is the owner of the land or asserts that his act of enjoyment is sufficient to give him the ownership by prescription".

Similarly in Venkata Varaha Dikshithar it was held that a false belief of owner acquisition of a right of easement". However, in Attorney General of Southern Nigeria V. John Holt and Co. Liverpool Ltd., 1915 AC 599, 618: (AIR 1915 PC 131) the Privy Council held that -

"An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other..."

Therefore, the learned Judges of the Bench of this Court, who heard an appeal in Subbarao V. Lakshmana Rao, AIR 1926 Mad 728 (FB) thought that the judgment of this Court referred to earlier may have to be modified in view of the decision of the Judicial Committee which was based not on the Indian Easements Act but on the English Law. Odgers J. who was one of the two Judges who made the reference was of the opinion "that the ruling in Konda V. Ramaswami, ILR 38 Mad 1: (AIR 1916 Mad 718), with great deference to the opinion of the

two eminent Judges who decided it, is wrong and that if a man exercises a right with the animus or consciousness that he is exercising a proprietary right in his own land and not a right over another's land he cannot acquire a right of easement by prescription". In answering the reference, the Full Bench held that-

"The learned Judges in Konda V.Ramaswami, ILR 38 Mad 1: (AIR 1916 Mad 718), seem to imply that the assertion of ownership during the period of user is not fatal to the success of a claim to an easement. To this proposition we cannot assent. Our opinion is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against the right of easement, yet the question quo animo agerit to what purported character are the acts of user to be ascribed is one which the court must answer, and if Konda V.Ramaswami, ILR 38 Mad 1: (AIR 1916 Mad 718) implied the contrary we think it is wrongly decided. We agree with the conclusion of Shearmen, J. in Lyall v.Lord Horthfield, 1914-3 KB 911, that acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. The question of animus in this case is one of fact....."

Therefore, a person cannot acquire an easement unless he acts with the knowledge that it is a case of dominant and servient tenement and he is exercising a right over property which does not belong to him. If he enjoys a right under the

supposition that he is the owner of the property does not acquire an easement.

14. This Court find no reasons to interfere the judgments of the Courts below, regarding the plaintiff claim in respect of cart track. Even if one got by the suit schedule property, it is absolutely clear that the plaintiff wants access to his land both from Water Works Road on the Western side and Krishnampalayam Road on the Northern side which appears to be luxury but not necessity. Seen from any angle the appellant herein has neither proved existence of cart track on the easter side of his land nor his joint ownership over the alleged portion of the land as pointed. Hence the second appeal is dismissed no order as to costs.

24.11.2016

Index :Yes/No.

Internet:Yes/No.

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Dr.G.Jayachandran,J.
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To

1. The First Additional Subordinate Judge,
Erode
2. The First Additional District Munsif,
Erode.

S.A.No.490 of 2008

24.11.2016

PRE-DELIVERY ORDER IN

S.A.No.490 of 2008

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
Respectfully Submitted.

dpq -P.A.