

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.02.2017

Pronounced on : 21.02.2017

CORAM

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN
S.A.No.551 of 1996

1. Rukmani
2. Prabhakaran
3. Bhaskaran ... Plaintiff 2 to 4/Appellants/Appellants

versus

1. Mohammed Yusuf (Deceased)
2. Arunachalam
3. Rajendran
4. Sukumar ... Defendants 2 to 5
5. Mohammed Sherif
6. Ahmed
7. Ameena Bi
8. Noorjahan
9. Mehrunnissa
10. Zalbunnissa
11. Fathima Bi
(1st Respondent died
vide order of the Court
dated 07.02.2017 in
SA 551 & 552/1996) ... Respondents 2 to 12/Respondents

Prayer :- Second Appeal filed under Section 100 of Civil Procedure Code 1908, against the judgement and decree, dated 24.11.1994, made in A.S.No.128 of 1993, on the file of the Principal District Judge, Salem, confirming the judgment and decree, dated 13.04.1993, made in O.S.No.536 of 1986, on the file of the District Munsif Court, Attur.

For Appellant : Mr.T.Murugamanickam

For Respondents : Mr.P.Jagadeesan for R6 to R9
For R2, R3 to R5, R10, R11 - No
appearance

JUDGEMENT

The plaintiffs are the appellants before this Court. The suit for declaration, permanent injunction and mandatory injunction was dismissed by both the Courts below. Hence, the present second appeal.

2. The appellants are wife and two sons of Krishnamoorthy, who filed suit. On his death, the appellants herein were arrayed as plaintiffs' LRs and they continue to contest the suit.

3. The dispute regarding right to enjoy the cart-track along with plaint "B" schedule property and for injunction restraining the respondent from obliterating the existing pathway in the said survey number and for a mandatory injunction directing the defendant to restore the pathway along survey No.330/2A, Gangavalli Village, which is owned by the first defendant.

4. The case of the plaintiff is that the entire stretch of the suit land were owned by his ancestors. Later, it was sub divided into different survey numbers. In the partition between the sons of Chinnasamy Moopar, the property was divided into three portions, the elder son Dharmalingam was allotted the northern portion whereas the plaintiffs' father was allotted the middle portion and Karuppannan was allotted the southern portion. The Swetha river is on the north of the portion allotted to Dharmalingam. The said Dharmalingam on 10.01.1968 sold his portion to one Abdul Rahman. The share allotted to the plaintiffs' family is known as Villai Kottai in S.No.330/1. Time immemorial there is a cart-track running north to south from Swetha river.

5. The case of the plaintiffs is that a cart-track of 10 feet width is running from river porambokku, S.Nos.301, 331/2 abutting the Swetha river and from there the cart-track runs through the land of first and second defendants to reach the land of the plaintiffs at S.No.330/2B. Though, the entire extent was held by his ancestors, earlier it was divided into three portions initially and further divided among the legal heirs of the respective sharers and some case the properties alienated to third parties. The cart-track was used by all the land owners in common till the dispute arose. The "A" schedule property and other properties were purchased by one Mohammed Yusuf and Abdul Salam. After division among the brothers, "A" schedule property was allotted to Mohammed Yusuf. The "B" schedule property was purchased by the wife of the first defendant from one Muthu varadarajan.

6. The plaintiffs' land is concerned, it has right of cart-track to reach the land from his Gangavalli Village, which is on the other side of the Swetha river. The case of the plaintiffs is that from the ancestors house they have to cross the Swetha river and pass through the river Porambokku land S.Nos.330 and 331 and enter into S.No.331/2. Thereafter, enter upon the S.No.330/2A of the land owned by the second defendant marked as F G in the plaint sketch and has to reach S.Nos.307, 327 and 328. While so, in the year 1986 during the month of March the second defendant Mohammed Yusuf obliterated the cart-track passing through his land bearing S.No.330/2A, which is morefully identified as F G in the suit plan. However, alleging as if the plaintiffs trespass into their land, the second defendant filed an injunction suit in O.S.No.139/1986 seeking injunction suppressing the fact of easementary right over the cart-track to reach the land in S.No.328. The plaintiffs have to necessarily pass through the cart-track existing on the field. For years together they are enjoying that right in the S.No.331/2 and 330/2A. Therefore, the suit for declaration over the easementary right of cart-track, injunction and mandatory injunction to restore the obliterated portion of the cart-track track marked as F and G mentioned in the suit plan.

7. The second defendant in the written statement has submitted that the plaintiffs have no right of cart-track over the suit property. Their title deed does not provide for easementary right of way to the alleged cart-track through the defendants land. Denying the alleged obliteration of existing cart-track, the defendant averred that it was the plaintiffs, who attempted to encroach upon the defendants land to put up cart-track. That attempt was resisted by the plaintiffs. The plaintiffs have alternate cart-track to reach their land, which they are using all along. However, after alienating a portion of their land bearing S.No.307/2A to one Kumara Gounder, without reserving right of cart-track to their land, now trying to put up a new cart-track encroaching upon the defendants property. Therefore, the suit for declaration and injunction is not maintainable.

8. The trial Court has framed five issues based on the pleadings.

After examining, two witnesses on behalf of the plaintiffs and 14 exhibits as Ex.A1 to A14, two witnesses on behalf of the defendants and 15 exhibits as B1 to B15, through them, dismissed the suit holding that no right of pathway have been prescribed to the plaintiffs through the defendants land. Further, the trial Court held that the plaintiffs failed to prove any easement of necessity. The first appellate Court, confirmed the trial Court judgment.

9. Aggrieved by that the plaintiffs have preferred the second appeal, wherein the Court has formulated the following questions of Law:

"When contiguous plots of land owned by one family with right of a user of a cart-track going through the entire stretch is later sold as several persons will not the subsequent purchasers become servient owners bound to allow passage of the cart-track to the lands of the dominant owners".

10. In support of his contention, the learned counsel for the appellant referred the judgement of this Court in Murugesu Moopanar vs. Sivagnana Mudaliar, reported in 1997 (1) CTC 348 , wherein paras 13 and 16 read as follows:-

"13. Section 13 of the Indian Easements Act deals with easement of necessity. An easement of necessity can arise only when there is a cessation of common ownership. It arises where both the servant and dominant tenement were in common ownership and by disposition, there was disintegration of the tenements. It is also well settled that easement of necessity arises only where by a transfer, bequest or partition, a single tenement is divided into two or more tenements and any of those is to be situated that it cannot be enjoyed at all without certain privilege on another such tenement. When there is an impossibility of enjoyment an implied grant or reservation will be presumed in favour of the person holding the former tenement. It is also settled law that the creation of easement of necessity is an outcome of the prior relationship between the tenements. The disposition which terminates the common ownership and gives rise to an easement by implication of law, may be of either tenement, or may be a simultaneous disposition of both tenements "Easement" is also defined as a right which the owner or occupier of certain land possesses, an such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to do thing being done, in or upon, or in respect of certain other land not his own. It is a curtailment on the enjoyment of the absolute owner and, therefore, unless it is priced by the appellants that they are entitled to curtail the rights of the plaintiff in the enjoyment of his land, they cannot claim a right of easement.

11. Learned counsel also relied on the judgement of this Court in Palaniswami Naicker vs. Chinnaswami Naicker, reported in 81 Law Weekly, wherein relevant portion reads as under

.....As the definition itself postulates, the interruption of the course of way should be significant. In the instant case, there is no acceptable evidence to show that there has been a telling interruption leading to a normal presumption as to extinguishment of the right of way originally created by the instrument of 1890. Can it be said that there has been a snap in the chain of continuity of the assessment by the non-mention of the same in Ex.B2 which is the sale deed in favour of the predecessor in title of plaintiff. A right of way enjoyed as an easement of another's land passes with the transfer of the dominant tenement, whether it be by alienation or succession. In my opinion, the omission to mention the obvious in a conveyance deed is immaterial. Of course, when such a recital is there, it may be considered as supporting evidence. An easement being an appurtenance to the dominant tenement, passes with the property and it cannot be destroyed or extinguished by a casual omission of a draftsman while drawing up a conveyance deed....."

12. The learned counsel for the appellants submitted that both the Courts below have failed to appreciate the case of the appellants and dismissed on the ground that in the title deed the course of cart-track not been given in detail by furnishing all the survey numbers through with the cart-track runs. So taking advantage of the omission to refer S.Nos.331/2 in the partition deed and other documents Court held against the plaintiffs since it is proved that to reach the land of the plaintiffs at S.No.330/2B necessarily the plaintiff has to pass through S.Nos.331/2 and 330/2A.

13. Whereas the counsel for the respondents submitted that the plaintiffs/appellants produced a rough sketch marked as Ex.A2 and the written statement filed in the suit for declaration, they were contradictory. After executing Ex.B2 partition deed between the predecessors in title as well the title deed of the respondents, the Courts below has rightly held that the S.No.331/2 has been consciously omitted because, to reach a suit land it is not necessary to pass through S.No.331/2. Therefore, the allegation that the defendants obliterated the existing pathway not proved. The Commission report also forfeit the case of the defendants. Therefore, there is no necessity to interfere the concurrent finding of the

Court below regarding the existence of cart-track in the suit property.

14. The rough sketch Ex.A2 filed in support of the plaint averment indicates that the Gangavalli Village is on the other side of the Swetha river and the suit properties are on south of the plaintiffs' house to reach the land. The plaintiffs ought to cross the river from the village and pass through the Atthu Porambokku at S.Nos.330 and 331. The properties purchased by Mohammed Yusuf and Abdul Salam from one Dharmalingam, s/o. Ramasamy Moopar was later divided under Ex.B1 partition deed between Abdul Salam and Mohammed Yusuf. The "A" schedule property wherein S.No.330/2A was allotted to the share of Mohoammed Yusuf. The "B" schedule property was purchased by Urija Bi from Muthu Varadhan vide Ex.A3 dated 11.02.1981. The partition deed, which is relied by the appellants to show that there is an existing right of easement to use the cart-track is marked as Ex.A1. A thorough scrutiny of this partition deed discloses the following facts.

a) On 15.07.1966, partition has been effected between Chinnasamy Moopar and his sons Arunachalam and Krishnamoorthy. The property has been divided into three schedules the first schedule property has been allotted to Chinnasamy Moopar, the 2nd schedule property is allotted to Arunachalam and the third schedule property is allotted to Krishnamoorthy. If one look at the three schedules of the properties, S.No.330/2B known as Villai Kottai the car track course is mentioned as river porambokku S.No.331/1,333 and 334, 330/2A, 330/2B and through 307/3 and 327 whereas for the second schedule property allotted to Arunachalam, who is vendor of the defendant, the course of the cart-track track is mentioned as S.Nos.331/1, 333/3, 333/4, 330/2A and 330/2B, 329/1A, 307/3, 327, 324/3 and 324/2. The Courts below after reconciling the document Ex.A1 found that through Ex.A1 partition deed and sale deed from one Muthurvaradaajan, the second defendant has purchased land at S.Nos.331/2 and 330/1. In none of this documents the right of cart-track to the plaintiffs' property as claimed in the plaint is shown in the conveyance. While so, the plaintiffs are claiming right of pathway, which is not in existence both on the field and exhibited document. Further, the Court has held that the plaintiffs had alienated and easy access to his land, thorough his own land, through S.Nos.333/3 and 333/4. Having sold a portion of the land to Kumara Gounder without reserving right of cart-track in that portion, the plaintiff cannot stake right of way through the defendants land.

15. As pointed out by the Courts below, the plaintiffs had never enjoyed right of way through the S.Nos.331/2 and 330/2A. There is no necessity for the plaintiff to pass through

S.No.331/2 to reach his land at S.No.330/2B. His access was always through the S.No.301, 331/1, 333/3 and 333/4. Having alienated the property at S.Nos.333/3 and 333/4 to Kumara Gounder without reserving right of pathway, the plaintiff cannot now make an alternate pathway through the land of the defendants 1 and 2. Therefore, this Court finds no error in the judgment of the Courts below. The plaintiffs have failed to establish that the cart-track was passing through the stretch of land as mentioned in the plaint and plan sketch. It is well found through evidence more particularly exhibit A1, which is the earliest document regarding right of pathway in so far as the continuous plot of land. It is well found that the S.Nos.330/2A, 330/1 and 330/2 are not falling within the stretch of cart-track for the plaintiffs' land as shown in the partition deed.

16. Therefore, the plaintiffs have failed to establish the course of cart-track lands runs through the land of the defendants. Having failed to establish right of easement the relief sought for cannot be granted. Accordingly the second appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Salem.

2. The District Munsif Court,
Attur.

3. Section Officer, VR Section.

+1cc to Mr.P.Jagadeesan, Advocate, S.R.No.11119

+1cc to Mr.T.Murugamanickam, Advocate, S.R.No.10024

S.A.No.551 of 1996

AP (CO)
CS/15/06/17