

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 22.10.2018

PRONOUNCED ON: 24.10.2018

CORAM

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.954 of 2000

1.Karuppaboyan

2.Manickam

3.Subramaniam

4.Thangamuthu @ Muthusamy

... Appellants/Plaintiff

Vs.

Komarasami Gounder

... Respondent/Defendant

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the Judgment and decree passed by the Subordinate Judge, Gobichettipalayam, made in A.S.No.47 of 1998 dated 14.12.1998 confirming the judgment and decree of the District Munsif court, Gobichettipalayam, made in O.S.No.301 of 1993 dated 19.09.1996.

For Appellants : Mr.A.Veerasamy
for Mr.N.Narayanasamy

For Respondent : Mr.Tranquebar Durai Vasu
for Mr.R.T.Doraisamy

J U D G M E N T

This Second Appeal has been filed against the judgment and decree passed by the Sub-Judge, Gobichettipalayam in A.S.No.47 of 1998 dated 14.12.1998, confirming the judgment and decree passed by the District Munsif, Gobichettipalayam in O.S.No.301 of 1993 dated 19.09.1996.

2.The appellants herein have filed a suit in O.S.No.301 of 1993 on the file of the District Munsif, Gobichettipalayam to declare the easementary right of path way as marked in plaint plan as 'அ, ஆ, இ, ஈ, உ, ஊ, எ, and to restrain the defendant from interfering with their right of taking men and cattle in the said path way. The learned District Munsif, Gobichettipalayam has dismissed the said suit by the judgment and decree dated 19.09.1996. Aggrieved by the same, the plaintiffs have filed an appeal in A.S.No.47 of 1998 on the file of the Subordinate Judge, Gobichettipalayam. The learned Subordinate Judge by the judgment and decree dated 14.12.1998 has dismissed the said appeal, confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the plaintiffs have filed the present Second Appeal. For the sake of convenience, the parties are referred to as described before the trial Court.

3.The averments made in the plaint are, in brief, as follows:

(a) The properties situated in Inam S.Nos.219 and 220 and other survey numbers of Siruvalur Village, originally belonged to three brothers viz., Subramania Gounder, Palanisamy Gounder and Nataraja Gounder. The aforesaid persons had divided their properties under a registered partition deed dated 12.05.1966. In the said partition, the said Subramania Gounder, Palanisamy Gounder and Nataraja Gounder were allotted A, B and C schedule properties respectively. The portion which is shown in red colour in the plaint plan allotted to Nataraja Gounder; the portion which is shown in yellow colour allotted to Subramania Gounder and the portion which is shown in blue colour allotted to Palanisamy Gounder. In the plaint plan, the common well is shown as 'அ 1'. In the aforesaid common well, all the brothers entitled to 1/3rd share each. On the west of the aforesaid common well, the plaintiffs house and cattle shed is situated. Likewise Palanisamy Gounder's house is also situated on the west of the aforesaid well and the same is shown in blue colour in the plaint plan. The first defendant's house is situated as shown in the plaint plan. On the east and south of the first defendant's house, the said Nataraja Gounder got two houses and the said Nataraja Gounder had sold those houses to one Rajan @ Rangasamy and Eswaran Chettiyar respectively.

(b) In the plaint plan a path way is shown as 'அ, ஆ, இ, ஈ, உ, ஊ, எ, ன்'. The width of the said path way is about 4 feet and the same is hereinafter referred to as suit path way. The said path way was in existence even before the partition took place between the aforesaid brothers. In the partition deed also, it is specifically mentioned that the owners of the 'A', 'B' and 'C' schedule properties are entitled to use the said path way. The plaintiffs' vendor namely Nataraja Gounder had used the suit path way openly and continuously for more than 25 years and thereby easement by prescription also acquired. So, the plaintiffs are entitled to use the suit pathway for taking men and cattle. Since the defendant has attempted to prevent plaintiffs from using the suit path way, the plaintiffs were constrained to file the above suit for aforesaid reliefs.

4.The averments made in the written statement filed by the defendant are, in brief, as follows:

The plaint plan is not correct. The plaintiffs are not entitled to the easementary right. The defendant had purchased his property under a registered sale deed dated 25.08.1966 and from that date onwards, he is in possession and enjoyment of his property. The defendant has put up a wooden gate in the point mentioned as 'v' in the plaint plan. At that time, neither the

plaintiffs' vendor nor his brothers raised any objection. The plaintiffs have stolen the said gate on 26.05.1993 and keeping them in their house. The common well is not in use for several years and the same is in a damaged condition. After partition, from the month of August 1966, the respective sharers have dug bore wells separately and they are taking water from the said bore wells. So, the plaintiffs are not having any easementary right. Even if there was any easementary right, it was extinguished for not using the same for several years. The plaintiffs' properties situated just adjacent to the main road and they can go to their land from the said main road directly and therefore, there is no necessity for them to use the suit path way. The plaintiffs have not come to the Court with clean hands and therefore, the defendant prayed to dismiss the above suit.

5. Based on the aforesaid pleadings, the learned District Munsif, Gobichettipalayam has framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the second plaintiff was examined as P.W.1 and one more witness was examined as P.W.2. The plaintiffs have marked Ex.A1 to Ex.A4 as exhibits. On the side of the defendant, the defendant examined himself as D.W.1 and he also examined one Palanisamy as D.W.2. He has marked Ex.B1 to Ex.B6 as exhibits. The report and plan filed by the Advocate Commissioner have been marked as Ex.C1 and Ex.C2 respectively.

6. The learned District Munsif, Gobichettipalayam after considering the materials placed before him, dismissed the suit with cost. Aggrieved by the same, the plaintiffs have filed an appeal in A.S.No.47 of 1998 on the file of the Sub-Judge, Gobichettipalayam. The learned Sub-Judge has dismissed the said appeal, confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the plaintiffs have preferred the present Second Appeal.

7. At the time of admitting the Second Appeal, this Court has formulated the following substantial question of law:-

" Whether the Courts below are correct in dismissing the suit when the respondent/defendant's case is against the recitals of the registered partition deed Ex.A1 and which defence is clearly hit by Section 92 of the Evidence Act?"

8. Heard Mr.A.Veerasingam for Mr.N.Narayanasingam, learned counsel for the appellants and Mr.Tranquebar Durai Vasu for Mr.R.T.Doraisamy, learned counsel appearing for the respondent.

9. Substantial Question of law:-

The learned counsel for the appellants / plaintiffs has

submitted that the Courts below erred in not taking into consideration the recitals in Ex.A1 partition deed which clearly proves the existence of the path way. He further submitted that the Courts below erred in not taking into consideration the Commissioner's Report and plan which clearly established the existence of 4 feet path way and was used by the plaintiffs for a long time. He further submitted that the Courts below erred in not holding that the defence is clearly hit by Section 92 of the Evidence Act. He further submitted that merely because the right to use the suit pathway has not been specifically mentioned in Ex.A2 and Ex.A3 sale deeds, it cannot be said that the plaintiffs are not entitled to use the suit pathway. He further submitted that the Courts below failed to consider that 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. In support of his contentions, he relied upon the decision of this Court in Palaniswami Naicker Vs. Chinnaswami Naicker, 1968 (1) MLJ 502, 1968 - 81 - LW 95.

10. Per contra, the learned counsel for the respondent has submitted that under Ex.A1, the plaintiffs vendor viz., Nataraja Gounder was allotted residential houses nearer to the defendant's vendor's house and hence, he has to take water from the common well to his houses and for that purpose, a right was given to him to go through the suit path way. But, the aforesaid houses were sold to some third parties and that the plaintiffs have purchased only agricultural land and there was no necessity for them to go through the suit path way and that was the reason for not mentioning the right to use the suit pathway in Ex.A2 and Ex.A3 sale deeds. He further submitted that the Courts below taking into consideration of the aforesaid facts have rightly rejected the plaintiffs claim and in the said concurrent factual findings, this Court cannot interfere and therefore, he prayed to dismiss the Second Appeal.

11. The undisputed facts are as follows:-

The lands which are situated in Inam S.Nos.219 and 220 and other survey numbers originally belonged to three brothers viz., Subramania Gounder, Palanisamy Gounder and Nataraja Gounder. The said three brothers have partitioned their properties under a registered partition deed dated 12.05.1966 (Ex.A1). In the said partition deed the aforesaid brothers were allotted A, B and C schedule properties respectively. The property which was allotted to Nataraja Gounder is shown in red colour in the plaint plan; the property which was allotted to Subramania Gounder is shown in yellow colour and the property which was allotted to Palanisamy Gounder is shown in blue colour. In the said partition deed, 1/3rd share was given in the common well for each of the brothers. Further one house was

allotted to Subramania Gounder and the same is shown in yellow colour in the plaint plan. One house was allotted to Palanisamy Gounder and the same is shown in blue colour and two houses were allotted to Nataraja Gounder and they are shown in the plaint plan adjacent to the defendant's house. The defendant had purchased the share of Subramania Gounder under a registered sale deed (Ex.B4) dated 25.08.1966 both the agricultural land and also house. The plaintiffs have purchased the agricultural land under Ex.A2 and Ex.A3 dated 05.05.1970, which was allotted to the said Nataraja Gounder under Ex.A1 partition deed.

12. In Ex.A1, it is stated that the owner of 'C' schedule can take water from the common well situated in Inam survey No.290 to his house by laying pipe line through 'A' schedule. It is also stated that for taking such water, the owners of 'B' and 'C' schedule can use the path way which is being used by the owner of the 'A' schedule. The aforesaid recitals clearly would show that only for the purpose of taking water from the common well to their residential houses they can use the suit path way. Admittedly, the plaintiffs have purchased only agricultural lands from the said Nataraja Gounder and after such purchase, the plaintiffs constructed their houses nearer to the common well and therefore, there is no necessity for them to use the suit path way. The plaintiffs have admitted in their plaint that their vendor namely Nataraja Gounder was allotted two houses nearer to the defendant's house and those houses were sold by the Nataraja Gounder to the third parties. If any right was given to the said purchasers of the houses for taking water from the common well, then they can claim easementary right for taking water through the suit path way. But the plaintiffs cannot claim easementary right over the suit path way because they have not purchased the aforesaid houses.

13. In Palaniswami Naicker Vs. Chinnaswami Naicker (supra), this Court has held as follows:-

'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.'

14. From the aforesaid decision, it is clear that a right of way enjoyed as an easement of another's land passes with the transfer of the dominant tenement. In this case as per Ex.A1, a

right of way was given for taking water from the common well to the houses of the plaintiffs' vendor namely Nataraja Gounder. Admittedly, the aforesaid houses were sold to the third parties. The plaintiffs have not purchased the said houses. So, the right of way of easement passes with the transfer of the houses of the said Nataraja Gounder. Therefore, the aforesaid decision will not help the plaintiffs.

15. The recital in Ex.A1 clearly shows that the said suit pathway was meant only for taking water from the common well to the houses of the plaintiffs' vendor. So, it cannot be said that the trial Courts have taken decision against the recital of the said document. This Court is of the view that the trial Court, after taking into consideration of the materials placed before it, has rightly found that the plaintiffs are not having easementary right over the suit pathway. The said findings have been confirmed by the first appellate Court. In the said factual concurrent findings, this Court cannot interfere. Accordingly, this substantial questions of law is answered.

16. In the result, the Second Appeal is dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

- 1.The Subordinate Judge,
Gobichettipalayam.
- 2.The District Munsif court,
Gobichettipalayam
3. The Section Officer,
V.R.Section,
High Court, Madras.

+lcc to Mr.N.Narayanasamy, Advocate sr.no.72797

S.A.No.954 of 2000

cnr(co)
nr 14/05/2019