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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :18.09.2018

PRONOUNCED ON:23.10.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.515 of 2015

and

M.P.No.1 of 2015

- 1.Vedavalli
- 2.S.Gunamani
- 3.S.Jayakumar
- 4.Malarvizhi

[Cause title accepted vide
order of Court dated 10.06.2015
made in M.P.No.1 of 2015
SA.SR.No.33962 of 2015]

...Appellants/Plaintiffs

Vs.

V.N.Swaminathan (deceased)

1.S.Saroja

2.Ramesh

3.Suresh

4.S.Prakash

[The 1st respondent died after
the judgment made in A.S.No.54
of 2012], hence the respondents
2 to 5 added in Memorandum of
Appeal.

5.S.Elangovan

... Respondents/Defendants

Prayer:Second Appeal filed under Section 100 of C.P.C., against
the judgment and Decree in A.S.No.54 of 2012 dated 08.10.2014 on
the file of the Sub-Court, Mannargudi, confirming the judgment
and decree in O.S.No.76 of 2008 dated 11.06.2012 on the file of
the District Munsif Court, Mannargudi.

For Appellants : Mr.S.Thiruvengkataswamy

For RR1 to R4 : Mr.S.Kasirajan



For RR5

: No appearance
Set exparte
vide order dated 18.09.2018

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J U D G M E N T

In this Second Appeal, challenge is made to the judgment and decree dated 08.10.2014 passed in A.S.No.54 of 2012 on the file of the Subordinate Court, Mannargudi, confirming the judgment and decree dated 11.06.2012 passed in O.S.No.76 of 2008 on the file of the District Munsif Court, Mannargudi.

2. Parties are referred to as per the rankings in the trial court.

3. The Second Appeal has been admitted on the following substantial questions of law.

(a) Whether the judgment and decree of the Courts below are sustainable in law when the Plaintiffs/Appellants have proved their right to use the 'B' Schedule mentioned property out of Easement of Necessity to reach the lands situated in 'A' Schedule mentioned properties purchased from the predecessor in title and joint owners with the 1st defendant ever as per the recitals made in Partition Deed Ex.A1?

(b) Whether the findings of the Courts below are vitiated and unsustainable in law on account of misreading the oral evidence of the D.W.1, who has clearly admitted the existence of the suit passage is the main access to reach the 'A' Schedule mentioned properties purchased under different sale deeds from the brothers of the 1st defendant/1st respondent?

(c) Whether the Lower Appellate Court is correct in holding that as per Ex.A4 and Ex.A5 the right given is relating to an immovable property which requires registration under Sec.17(1)(b) of the registration, when the family partition deed Ex.A1 clearly indicate that the other joint owners along with the 1st defendant can make use of the passage set a part to reach the lands allotted to them under the said partition?

4. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.



5. The suit has been laid by the plaintiffs seeking the relief of declaration that they and the second defendant are having the right of easement of necessity over the common way described in the plaint 'B' schedule for reaching their lands described in the plaint 'A' schedule and for the relief of permanent injunction restraining the first defendant and his men from interfering with their right to use the common pathway described in the plaint 'B' schedule.

6. The plaintiffs based their case mainly upon the sale deeds marked as Exs.A2 to A5. Materials placed on record go to show that the plaintiffs' vendor Ramachandran had acquired the properties comprised in Exs.A2 and A3 sale deeds from Selva Kumar and Raghunathan. The said Selvakumar and Raghunathan are the brothers of the first defendant. It is the case of the plaintiffs that they had acquired the properties described in items 1 to 3 of the plant 'A' schedule from Ramachandran by way of Ex.A4 sale deed. It is further case of the plaintiffs that they had acquired item 4 of the plaint 'A' schedule properties by way of a sale deed marked as Ex.A5 executed by V.K.Shanmugha. Thus it seen that the plaintiffs' claim right to the pathway described in the 'B' schedule property based on the abovesaid sale deeds.

7. It is not in dispute that the first defendant and his family members effected the partition of the properties belonging to them by way of a partition deed dated 25.06.1973 and the copy of the abovesaid deed has been marked as Ex.A1. On a perusal of Ex.A1, it is found that various schedule properties had been allotted to the first defendant and his family members as described therein and it is also mentioned in the abovesaid partition deed that the four sharers involved therein, they should enjoy the road running from Vadavarru channel [up to R.S.No.230-14(b) eastern boundary line] through R.S.Nos.227, 228, 229 and 230 in common. For a better understanding of the abovesaid right conferred upon the four sharers in respect of the abovesaid pathway/road, the extract as found in the abovesaid partition deed with reference to the same is reproduced below:

மன்னார்குடி தாலுக்கா 137 நீர் நெடுவாக்கோட்டை வட்டம் மேலநாகை கிராமத்தில் வடவாறு வாய்க்காலில் இருந்து சு.ஞ.குடி,227இ228இ229இ 230 வழியாக (சு.ஞ.குடி,230/14(௭) கீழ் அத்துவரை) செல்லும் ரோட்டை 4 நபர்களும் பொதுவாக அனுபவித்துக் கொள்ள வேண்டியது,

8. On a perusal of the abovesaid right conferred upon the four sharers by way of Ex.A1, it is seen that, the common pathway/road described thereunder had been allotted to all of them in common and to be enjoyed in common and in such view of the matter, when it is found that the four sharers involved in Ex.A1 have been granted common right over the abovesaid pathway/road to be enjoyed in common and furthermore, when as



seen from the recitals contained in the abovesaid partition deed, the abovesaid common pathway/road had not been created on account of the severance of single tenement into two or more tenements and on the other hand, it is found that the common pathway/road described therein had been in existence even prior to the partition effected under the above deed and in such view of the matter, as rightly determined by the Courts below, the four share holders had been given the right of joint ownership over the common pathway/road as described therein and therefore, there is no question of any easementary right conferred upon them with reference to the abovesaid comon pathway/road.

9. Resultantly, when it is found that the plaintiffs' predecessors in interest namely Selva Kumar and Raghunathan had been conveyed common/joint ownership/right over the abovesaid pathway/road as rightly determined by the Courts below, the plaintiffs having derived the right from them though their vendor Ramachandran, at the most, the plaintiffs would be entitled to claim only ownership/right over the common pathway/road described in the partition deed Ex.A1 and not easementary right, as such, in respect of the same. As abovenoted, the plaintiffs have laid the suit only for the declaration of their right of easement of necessity over the common way/road described in the plaint 'B' schedule. On the other hand, when the parent document namely Ex.A1 partition deed had conferred only common ownership/ right over the common pathway/road to all the shareholders described therein, it does not stand to reason as to how the plaintiffs, who seeks the right through the abovesaid shareholders namely Selva Kumar and Raghunathan are seeking the easementary right over the common pathway/road as described in the plaint 'B' schedule. Accordingly, it is seen that the plaintiffs' suit is found to be misconceived and the plaintiffs without knowing as to the nature of the right, they seek to assert over the common way/road described in the plaint 'B' schedule, is found to have instituted the suit to claim the easement of necessity in respect of the same.

10. As rightly determined by the Courts below, when the plaintiffs' predecessors in interest had acquired common right in respect of the common way/road described in the plaint 'B' schedule under Ex.A1 partition deed, there is no question in holding that they had derived any easmentary right over the same and in such view of the matter and when the question of easement would arise only when two tenements are involved namely the dominant to which the right belongs and the servient on which the obligation is imposed and when the right of easement could only be sought for in respect of the land belonging to a different owner, and when the right of easement and ownership would not co-exist as such, in such view of the matter, the



11. Furthermore, as could be seen from the materials placed on record, it is seen that under the sale deeds marked as Exs.A2, A4 and A5, there is no reference at all about the common way/road described in the plaint 'B' schedule property. Only in the sale deed marked as Exs.A3, there is a reference about the same whereunder the executant of the of the abovesaid sale deed had granted the right, he had in respect of the common way/road described in the plaint 'B' schedule to the purchaser and in such view of the matter, the plaintiffs' suit for declaration of their easementary right with reference to the same is found to be not maintainable.

13. As rightly determined by the Courts below, as could be seen from the recitals contained in Ex.A1 partition deed, the properties allotted to various shareholders had already been subdivided and in such view of the matter, the plaintiffs should have at the time of filing the suit, described the plaint 'B' schedule common way/road with clear particulars particularly, the boundaries within which the same runs or furnished the particulars of the lands lying on either side of the common way/road described in the plaint 'B' schedule. However, the plaintiffs have not given the particulars with reference to the same and thereby, it is seen that, merely on the basis of the description of the common way/road given in the plaint 'B' schedule, it cannot be held that such a common way/road exists on ground and is required for the plaintiffs to have access to their 'A' schedule properties.



14. In this matter, the Advocate Commissioner had inspected the subject matter with the help of the Revenue Officials and his report and plan had been marked as Exs.C1 and C2. On a perusal of Exs.C1 and C2, it is seen that, a cart track is running through the survey numbers 229/2D1, 2D2, 230/1A1, 1A2, 1B, 2,3,4, 5A1, 5A2, 14A1, 234A/8A1 and 234A/8B. Thus, it is found that as per the Commissioner's report and plan, the cart track as noted by him runs in the abovesaid survey numbers and not as described in the plaint 'B' schedule. As above pointed out, the 'B' schedule common way is shown to be running through the survey numbers 227, 228, 229 and 230. Per contra, as per the Commissioner's report and plan, there is no passage or cart track running in survey numbers 227 and 228 and on the other hand, the cart track is found to be running through several subdivision numbers of 229, 230 and 234. Admittedly, the plaintiffs have not filed any objection to the Commissioner's report and plan. Therefore, as rightly determined by the Courts below, on ground and in reality, the common way/road or cart track as the case may be does not exist as described in the plaint 'B' schedule and on the other hand, exists only as noted down by the Advocate Commissioner and pointed out in his report and plan. Despite the same, even after the filing of the Commissioner's report and plan, the plaintiffs have not endeavored to amend the plaint suitably for sustaining the reliefs sought for by them in the suit. With reference to the same, there is no proper explanation on the part of the plaintiffs. Furthermore, there is no proper explanation as to the non-existence of the common way/road or cart track, as the case may be, in survey numbers 227 and 228.

15. Furthermore, as determined by the Courts below, when the cart track on the ground runs through several survey numbers as detailed in the Commissioner's report and plan and when the first defendant is found to be not owning any land on either side of the cart track as described in Exs.C1 and C2 and on the other hand, various other persons are found to be owning lands on either side of the abovesaid cart track, in such view of the matter, if at all, the plaintiffs are entitled to seek any alleged easementary right over the abovesaid cart track, as rightly determined by the Courts below, the plaintiffs should have impleaded all the owners of the lands adjoining the abovesaid cart track for claiming the reliefs sought for and as above discussed, the plaintiffs having failed to implead the brothers of the first defendant namely the sharers involved in Ex.A1 partition deed as well as the adjacent owners of the properties situated on either side of the cart track, in such view of the matter, they also being the proper and necessary parties, if at all the plaintiffs are entitled to seek any easementary right as such with reference to the common way/road/cart track, in such view of the matter, the plaintiffs'



suit has been rightly held to be bad for non-joinder of the abovesaid proper and necessary parties.

16. When under Ex.A1 partition deed, the various sharers described therein had been granted common ownership over the road described therein and accordingly, when the sharers endeavor to convey the said right to others, as rightly determined by the first appellate court by way of the same, the right in and over the immovable property are transferred. Transfer of such right requires registration under section 17(1) (b) of the Registration Act and in such view of the matter, when the plaintiffs' title deeds barring Ex.A3 do not refer to or mention about the conveyance of any such right and accordingly, the first appellate court is found to be justified in holding that without the said right having been conveyed by way of a registered document, the plaintiffs are not entitled to seek the reliefs sought for in the plaint.

17. That apart, as far as Ex.A5 sale deed is concerned, executed by V.K.Shanmugha in favour of the first plaintiff admittedly, the property comprised therein is not shown to be forming part of the single tenement in respect of which Ex.A1 partition was executed. Therefore, when the property comprised in Ex.A5 sale deed does not form part of the single tenement or belonging to the first defendant's family as such and accordingly, the plaintiffs having sought the relief in respect of the 'B' schedule common way/road, on the basis of easement of necessity, accordingly, it is seen that the plaintiffs cannot seek the alleged easementary right for having access to the item 4 of the plaint 'A' schedule properties and the same had also been rightly considered by the Courts below.

18. In the light of the above discussions, when as could be seen from the materials placed on record, only common ownership/right had been granted to various sharers in respect of the common right running through R.S.Nos.227,228, 229 and 230 up to R.S.No.230-14(b) eastern boundary line and they having not been granted easementary right as such with reference to the same and the plaintiffs seeking right only through the two sharers involved in Ex.A1 partition deed accordingly, it is found that, if at all the plaintiffs would be entitled to any right over the common way/road described in Ex.A1 partition deed, the plaintiffs should have instituted the suit with reference to the same by seeking appropriate reliefs and on the other hand, the plaintiffs having laid the suit on a misconception that they have right of easement by way of necessity over the abovesaid common way/road and accordingly the plaintiffs having failed to implead the proper and necessary parties with reference to the same, in such view of the matter, in toto, it is seen that the frame of the suit laid by the plaintiffs is found to be misconceived, devoid of merits and



also as above discussed, the plaintiffs having failed to establish the existence of the common way/road on ground and on the other hand, the cart track as noted by the Advocate Commissioner is found to be running through the other survey numbers and when the plaintiffs had also failed to implead the adjacent land owners of the abovesaid cart track, accordingly, it is seen that no interference is called for in the judgments and decrees of the Courts below in non-suiting the plaintiffs. The substantial questions of law formulated in the Second Appeal are accordingly answered against the plaintiffs and in favour of the first defendant.

19. In support of his contentions, the plaintiffs' counsel placed reliance upon the decisions reported in

1. 2007 AIR (A.P.) 112 :2007 (4) ALT 683:2007 (1) Andh LD 4446 [Gurram Sanjappa Vs. Gurram Pedda Thippaiah and others]
2. 2010 (2) SCC 689 [Sree Swayam Prakash Ashramam and another Vs. G.Anandavally Amman and others]
3. 2017 (2) CTC 770 [Chinnusamy and another Vs. Sundaram]
4. 2017 (1) MWN (Civil) 30 [N.Periyasamy and others Vs. P.Arumugham and others]
5. 2017 (1) CTC 662 [Periasamy Gounder and others Vs. Arassapa Gounder]
6. AIR 2006 SC 2234 [Hero Vinoth (Minor) Vs. Seshammal]
7. High Court Madras Judgment in S.A.No.733 of 2011 dated 15.02.2017
8. High Court Madras judgment dated 06.07.2018 in S.A.No.1928 of 2004]

The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

20. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

s/d-
Assistant Registrar (CS V)

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Sub-Assistant Registrar

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To

1. The Subordinate Judge,
Sub-Court,
Mannargudi.



2.The District Munsif,
District Munsif Court,
Mannargudi.

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The Section Officer,
VR Section,
High Court,
Chennai.

+1 CC to Mr.S.Thiruvengataswamy, Advocate sr 71921.

+1 CC to Mr.S.Kasirajan, Advocate sr 71976.

S.A.No.515 of 2015
and
M.P.No.1 of 2015

EV(CO)
SP(20/11/2018)