

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[JUDGMENT RESERVED ON : 23.07.2019]

[JUDGMENT PRONOUNCED ON : 02.12.2019]

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.Nos.1288 and 1289 of 1998

and

C.M.P.No.12493 of 1998

P.Sadayan (Died)

1. S.Manikodi
2. S.Indirani
3. S.Maheswari
4. S.Jayalakshmi
5. S.Palanivelu

... Appellants in
S.A.No.1288/1998

P.Sadayan (Died)

1. S.Indirani
2. S.Manikodi
3. S.Maheswari
4. S.Jayalakshmi
5. S.Palanivelu

... Appellants in
S.A.No.1289/1998

... Vs ...

- 1.Arumugam
2. Saroja
3. Arumugam
4. Sundaram
5. Kalyanasundaram
6. Dhanam
7. Manickammal
8. Minor Sasi
9. Minor Baby

(Respondents 8 and 9 are represented by
their Court Guardian Mr.R.Suresh,
Advocate, Bar Association, Salem.)

... Respondents in S.A.No.1288/1998

1. Arumugam
2. K.C.Balasubramaniyam
3. Selvaraj

... Respondents in S.A.No.1289/1998

Prayer in S.A.No.1288 of 1998: Appeal is filed under Section
100 of the Civil Procedure Code against the judgment and

decree dated 21.03.1997, passed by the learned Principal Subordinate Judge, Salem, in A.S.No.42 of 1996, confirming the judgment and decree dated 12.01.1994 passed by the Principal District Munsif, Salem, in O.S.Nos.1140 of 1987.

Prayer in S.A.No.1289 of 1998: Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 21.03.1997 passed by the learned Principal Subordinate Judge, Salem, in A.S.No.6 of 1996, confirming the judgment and decree dated 12.01.1994 passed by the Principal District Munsif, Salem, in O.S.No.1011 of 1987.

In both S.As.
For Appellants : Mr.P.Mathivanan
For RR-1, 5 & 7 to 9 : Dismissed vide order
dated 04.12.2009
For R-2 :MS.G. Shabnam for
Mr.T.Ravindran
For RR-3, 4 & 6 : No Appearance in S.A.No.1288/98
For R1 and R3 :No appearance in S.A.No.1289/98

COMMON JUDGMENT

Heard both sides and perused the records.

2. These two second appeals arise out of the common judgment and decree passed by the learned Principal Subordinate Judge, Salem, in A.S.Nos.42 and 6 of 1996 respectively dated 21.03.1997, confirming the judgment and decree passed by the learned Principal District Munsif, Salem, in O.S.Nos.1140 and 1011 of 1987 respectively, dated 12.01.1994.

3. For the sake of convenience, the parties are referred to as per their ranking before the trial Court in O.S.No.1011 of 1987, since the said suit was filed prior in time and evidence and documents are marked in the said Original Suit.

4. The suit in O.S.No.1011 of 1987 was filed for permanent injunction. The plaint proceeds on the basis that the suit properties belong to the plaintiff and his brother. Originally, the suit properties were purchased by the mother of the plaintiff namely, Pavayammal by Sale Deeds dated 06.07.1942 and 09.03.1925. The third defendant is the close relative of the plaintiff. The defendants 1 and 2 seems to have obtained a Sale Deed in their favour from the third defendant and are attempting to seize the suit properties. The third defendant has no right, title, interest or possession over the suit properties. The plaintiff is enjoying the suit properties absolutely. The Sale Deed shall not bind the plaintiff and his brothers.

5. The gist of the written statement filed by the defendants 1 and 2 in O.S.No.1011 of 1987 are as follows:-

The first defendant and the second defendant along with his wife Maheswari have purchased the suit properties from the third defendant and the first defendant's wife Saroja and the second defendant purchased the properties from one Karumpillai @ Palaniammal for proper and valid consideration and they are in possession and enjoyment of the properties covered under the Sale Deeds. The suit properties described in the plaint schedule are all vague, misleading and incorrect.

6. It appears from the records that during the pendency of the appeal, additional written statement was filed whereby, it is stated that originally, the plaintiff is claiming the extent of $0.31 + 0.45 = 0.71$ cents in the trial Court and at the appeal stage, he is claiming the extent of $0.70 + 0.45 = 1.15$ cents by way of amendment. The plaintiff has no case and only to drag on the proceedings, he has resorted to file the amendment petition. The plaintiff is not entitled to either 0.71 cents nor 1.15 cents and he has not produced any supporting documents.

7. The suit in O.S.No.1011 of 1987 filed by one Sadayan is for the relief of permanent injunction in respect of two items measuring $0.70 + 0.45$ cents = 1.15 Acre cents situated in Jagirammalayam Village called Gurunathan Punjai. Originally, the suit was filed seeking the relief in respect of two items measuring 31 + 45 cents and admittedly, the extent purchased by the plaintiff's predecessor-in-title Pavayammal under the Sale Deeds dated 06.07.42 and 09.07.1930 marked as Exs.A.2 and A.4 are more than what is stated in the original plaint and at the appellate stage, the plaintiff was permitted to amend the description of the properties in accordance with the description given in the Sale Deeds marked as Exs.A.2 and A.4 and after the amendment, the total extent in respect of which the relief claimed is $0.70 + 0.45 = 1.15$ acres.

8. According to the plaintiff/Sadayan, the properties given in Item Nos.1 and 2 of the suit property are purchased by his mother Pavayammal and since the date of purchase, his predecessor-in-title and after her, the plaintiff as one of her L.Rs. are in possession and enjoyment on the same and the defendants without any legal right, title or interest are trying to interfere with the possession and enjoyment of the suit properties.

9. The suit in O.S.No.1140 of 1987, which was later in point of time, was filed by one Arumugham and Saroja against Sadayan and others for the relief of declaration and injunction. The property covered in the suit was shown as 'A' and 'B' Schedules. The declaratory relief sought for was on

the ground that the plaintiffs are the owners of the suit 'A' schedule property by way of purchase from one Selvaraj, who is the third defendant in O.S.No.1011 of 1987 and the suit 'B' schedule road is the only access to reach the 'A' schedule property and the same is being used by the predecessor-in-title and after them by the plaintiffs for more than the statutory period and as the 'B' schedule road is the only road and the right to use the same is given in the Sale Deeds executed in their favour, they are entitled to get the relief on the ground of easement of necessity, by way of grant and prescription and it is their further contention that the defendant Sadayan and others are trying to unlawfully prevent the user of the same and obliterate the road.

10. In the written statement filed by Sadayan in the suit in O.S.No.1011 of 1987, though the existence of the suit road as described in the suit 'B' schedule is admitted, the only plea raised was that it belongs to them absolutely as it forms part of their property and the plaintiffs have no manner of right, title or possession over the same.

11. During the pendency of the suit, an Advocate Commissioner was appointed, who filed his report and plan as Exs.C1 and C2. Along with the suit in O.S.No.1140/1987, a rough plan was filed, in which, the 'B' schedule suit road is described as ABCD portion and the combined scrutiny of these Exs.C1 and C2 and the rough plan, which was marked as Ex.B.35 would go to prove the actual location of the properties on ground, as shown in the plan Exs.B.35 and C.2. As seen from these two plans, the property of Sadayan is situated on the North-South of Thiruvagoundanoor Panchayat road, on the North of East-West Panchayat Road, on the South of the properties belonging to the defendants 1 and 2 in O.S.No.1011 of 1987 and the plaintiffs in O.S.No.1140/1987. Exs.C.2 and B.35 plan would further show that there is a suit road measuring 12 ft. in width shown in red colour in Ex.B.35 and yellow colour in Ex.C.2 report which is situated within the property of the plaintiff Sadayan and on the West of the same is situated the properties belonging to Chinnasamygounder and Chinnagounder and the entire suit road was shown as ABCD in Ex.B.15 and PQRS Ex.C2.

12. As seen from these two plans, the North South road situated on the South of East-West Panchayat Road leads to the property belonging the defendants in O.S.No.1011 of 1987 (and the plaintiffs in O.S.No.1140 of 1987) and as seen from Ex.C2, the total extent of the property belonging to Sadayan actually, available on ground excluding the road portion, as 61 cents in S.No.287/16 and 7 cents in S.No.287/15 within which the terraced house and the thatched house belonging to the plaintiff is physical features as mentioned in the Commissioner's report in Ex.C.1. Neither of parties have filed any objection to the Commissioner's Report.

13. The physical features as mentioned in Exs.C1 and C2 report and plan would show that the passage measuring four meter width marked as PQRS in the yellow colour in the plan in running North-South and it stops at point 'S' and 'P' and from there it runs towards East and the width of the passage towards East is 1/4 of the width on the North-South and there are two electric posts in the passage and the electric lines are crossing the North-South passage and there is a water tap at the end of the passage and there are stones on the passage and two wheelers, scooters and men are using the same passage and the entrance of the residential houses situated on the western side of the passage and on the southern side of the passage are facing the passage area.

14. P.W.1-Sadayan has admitted the existence of the suit pathway and nowhere in the written statement in O.S.No.1140/1987 or in his evidence as P.W.1, Sadayan has denied the width of the same as 12 ft and the course of the same as running from the East-West Panchayat Road on the Western part of his property up to the property belonging to the defendants in O.S.No.1011 of 1987 and the plaintiffs in O.S.No.1140 of 1987.

15. The evidence in the box would go to show that there is no dispute with regard to the existence North-South road of 12 ft. width on the western portion of his land. The main dispute involved in this case is with regard to the user of the suit road. Though originally the plaintiff Sadayan has claimed the relief of permanent injunction on the strength of his theory of possession in respect of 31 + 45 cents = 76 cents before the Appellate Court, the same was amended by giving more extent 70 = 45 = 1.15 acres.

16. Thus, this Court finds that originally, the property purchased by the predecessor-in-title of Sadayan and the predecessor-in-title of the defendants in O.S.No.1011 of 1987 and the plaintiffs in O.S.No.1140 of 1987 is one Ramasamy and from the common vendor Pavayammal purchased a portion of the property and one Karumpillai @ Palaniammal purchased another portion of the property known as Kurunathan Punjai.

17. The purchase in favour of Pavayammal is dated 09.07.1930 and 06.07.1942 under Exs.A2 and A4. Though on the side of the defendants in O.S.No.1011 of 1987 and (the plaintiffs in O.S.No.1140 of 1987), the Sale Deeds in their favour executed by Selvaraj and Palaniammal are marked as Exs.B.1 to B.4, the original Sale Deed in favour of Karumpillai @ Palaniammal is not produced on their side assumes significance, in the light of dispute.

18. As already stated, the original Sale Deed in favour of Karumpillai @ Palaniammal under whom the defendants claim title is not produced before this Court. As such, the

plaintiff Sadayan has come forward with an application in I.A.No.58 of 1996 to receive the copy of the said document as additional evidence. Since the right of the pathway is claimed only by way of grant on the strength of the Sale deed executed in their favour, the copy of the Sale Deed executed in favour of their predecessor-in-title is a vital document to prove as to what is the right given to her under her deed so as to divide the right given to them under the Sale Deed in their favour. Since no such right of pathway is given to Karumpillai @ Palaniammal in her Sale Deed, no better right can be claimed by the successor in title claiming under Karumpillai @ Palaniammal. As this Court finds that the document is more important one to decide the main dispute between the parties, the same is permitted to be received as additional evidence on the side of the plaintiff as Ex.A.5.

19. On a perusal of Ex.A.5, dated 12.12.1949, it is seen that the same was executed in favour of Karumpillai @ Palaniammal by Ramasamy Chettiar, who is the same person from whom the predecessor-in-title of Sadayan has purchased the other properties. The property covered under the Sale Deed is 1.45 acres in Gurunathan Punjai. On the East to the remaining property excluding the portion sold to Pavayammal and on the South of the lands belonging to Pavayammal. There is no specific mention anything about the suit road but mention is made about "mamool nada thadam". (மாழில் நடதம்).

20. Thus, this Court finds that for the reasons best known, the defendants have suppressed the Sale Deed dated 12.12.1949 executed by Ramasamy in favour of Palani Ammal, the predecessor-in-title of the defendants. Admittedly, Ramasamy is the common vendor, who had sold a portion of the land to the mother of the plaintiff and another portion to the said Palani Ammal, after changing hands, it has reached the defendants. In Ex.A.5, it is clearly stated that there is a "momool nada thadam." (மாழில் நடதம்).

21. It appears from Exs.B.2 and B.15 that the vendor of the defendants for the first time mentioned the 12 feet road in the year 1982. In the absence of anything to convey a right to the predecessor-in-title under Ex.A.5, it appears that only during the subsequent document viz., Exs.B.2 and B.15, the predecessor-in-title, who has never acquired any right under Ex.A.5, have chosen to convey a 12 feet road which they does not belong nor any document has been filed by the defendants to substantiate the same. It is to be stated that the width of the road as 12 feet is mentioned only in the document of the year 1982 not in the document of the year 1941 by which, there is a specific usage as pathway to and in favour of the predecessor-in-title of the defendants also

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available to reach their land also assumes significance. More so, when a person is not having any title, he cannot convey better right than what is given to him. In the absence of anything to mention about the width of the road and in the absence of non-examination of any person in the locality to speak about the width of the road, it appears that both the Courts below have got swayed by the recital in the earlier document. The recital of the document are to the effect of the existence of the road.

22. It remains to be stated that the first respondent herein has not entered into the witness box to depose about the width of the road as to the usage of the road nor any of the neighbours were examined to give the measurement of the width of the road. Furthermore, in the absence of any person, who is a party to the document being examined on behalf of the defendants viz., any one of the vendor of the defendants are predecessor-in-title of the defendants or any neighbour, who is in the said neighborhood to depose regarding width of the road, this Court finds it hard to accept that in view of the specific recital in Ex.A.5 "mamool nada thadam" the same cannot be increased as 12 feet as contended by the defendants. Furthermore, the plaintiffs are not party to the Sale Deeds Exs.B.2 and B.5 and it appears that those who sold the land in favour of the defendants does not own the same and hence, they cannot convey better right than what is given to them.

23. Exs.C.1 and C.2-Commissioner's Report on which much reliance seems to have been taken by the Courts below is the present status. In the absence of any substantial right to show that the road was enjoyed by the defendants over the statutory period of time before the filing of the suit, the same cannot convey any right or title in favour of the defendants.

24. Learned counsel for the second respondent, who is the second plaintiff in O.S.No.1140 of 1987 would contend that they are using the disputed pathway for more than the statutory period by way of grant, by way of easement of necessity and according to them, this is the only road to reach their property from the East-West panchayat main road. A suggestion is also put to P.W.1 during the course of cross examination that except the suit road, there is no other road to reach their property. Though the plaintiff has raised a plea that there are other roads, he has not chosen to point out the same to the Advocate Commissioner during his visit and it is not even deposed by him while in the box that there are other access available to reach the schedule property in O.S.No.1140 of 1987. It is further contended that as a matter of fact, as seen from Ex.C.2, there seems to be no other road for the use of the defendants in O.S.No.1011 of 1987 and the plaintiffs in O.S.No.1140 of 1987 to reach their lands on the South of the properties belonging to the plaintiff and on the failure of the plaintiff to adduce any such rebuttal evidence

with regard to the existence of the alternative road, the admitted facts and the oral and documentary evidence adduced would show that not only by way of grant but also by way of easement of necessity, the contesting parties are entitled to use the suit road.

25. This Court has given its anxious consideration for the above contentions of the counsel for the second respondent.

26. At this juncture, it is to be stated that a relief of easement by necessity can be claimed only in respect of land belonging to another and the plaintiff is not entitled to claim this relief if the dominant tenement as well as the servient tenement is not partitioned till filing of suit.

27. In the decision reported in 2012 (5) L.W. 649 [Natesa Gounder Vs. Raja Gounder & others], this Court has held as follows:-

"Easement Act (882), Sections 13 and 15 / Easement by grant, Easement by prescription, antithetical to each other, easement of necessity, scope of.

Private easement rights would not be found specified in the revenue maps. But curiously in the revenue map, it was got corrected as though S.No.18/3A is a pathway and that sub-division 3A also emerged in S.No.18. It is clear that the plaintiff is having the facility of ingress and egress to his property through the 'iteri' (pathway) situated to the north of his property. In such a case, his inclination or desire to use the suit property as his pathway from the southern side would not attract the concept of easement by necessity or easement of necessity by implied grant. Implied grant and the concept easement by prescription are quite antithetical to each other. If a person is having an implied grant in his favour, then the question of prescription would not arise. Easement by prescription would come into play, if at all the plaintiff had exercised his right of ingress and egress to his property over a continuous period of 20 years in another man's land, openly, uninterruptedly and peacefully. Plaintiff's right to have ingress and egress through the iteri (pathway) might be a difficult one, still he has to get himself satisfied with that. In the absence of defendants 1 and 2 or their ancestors, being parties to Exs.A.2 and A.3, the right of pathway contemplated therein would not be binding on D1 and D2. Easement of necessity by implied grant is not applicable." (emphasis supplied)

28. It is to be stated that easement of necessity gets extinguished when necessity comes to an end. Necessity should be absolute necessity and not convenient necessity. No easement of necessity can be claimed unless ingredients of Section are satisfied.

29. It is to be stated that creation of easement of necessity should be outcome of prior relationship between tenement. No additional relief can be claimed on existing easementary right. Mere convenience or inconvenience is not test of easement of necessity. Easement of necessity arises where normally both dominant and servient tenements are in common ownership so that creation of easement by implication of law may be said to be outcome of former jointness of two tenements.

30. Thus, this Court finds that both the Courts below have not properly analysed the documents Exs.C.1 and C.2- Advocate Commissioner's report which show the present status of the physical features of the land, since the defendants are claiming easement of necessity or easement of by grant they have to satisfy the usage of statutory period. Furthermore, as pointed out earlier, Ex.A.5 is the document executed by the common vendor Ramasamy in favour of Karumpillai @ Palani Ammal, predecessor-in-title of both the parties wherein a pathway was mentioned without any measurement. For the reasons best known, neither the first defendant nor the second defendant have entered into the witness box to depose about the breadth and width of the pathway only in the document of the year 1982 under Exs.B.2 and B.5. The vendor of the defendants appears to have mentioned it as a 12 feet road without any basis. To appreciate the said contention, no valid map or panchayat road map was filed before the Court and hence, in view of the document Ex.A.5, there exists "mamool nada thadam" and hence, the defendants cannot claim 12 feet width as claimed in their suit without any basis as the same has been inserted only by the subsequent document in the year 1982 while Ex.A.5 is of the year 1949 whereby the property was sold by the mother of the original plaintiff Sadayan and hence, the substantial question of law is affirmative in favour of the appellants.

31. In the result,

[i] Second Appeal No.1288 of 1998 is allowed.

[ii] The judgment and decree passed by the learned Principal Subordinate Judge, Salem, in A.S.No.42 of 1996, confirming the judgment and decree passed by the learned Principal District Munsif, Salem, in O.S.No.1140 of 1987, are set aside and O.S.No.1140 of 1987 is dismissed.

[iii] Second Appeal No.1289 of 1998 is allowed.

[iv] Judgment and decree passed by the learned Principal Subordinate Judge, Salem, in A.S.No.6 of 1996, confirming the judgment and decree passed by the learned Principal District Munsif, Salem, in O.S.No.1011 of 1987, are set aside and O.S.No.1011 of 1987 is decreed as prayed for.

[v] However, there shall be no order as to costs.

[vi] The connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

Jrl

To

1. The Principal Subordinate Judge, Salem.
2. The Principal District Munsif, Salem.

1 cc to Mr.K.P. Jotheeswaran, Advocate, Sr. 101219

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GP (CO)
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