

IN THE HIGH COURT OF JUDICATUE AT MADRAS

Judgment Reserved on : 11.01.2019

Judgment Pronounced on : 01.02.2019

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.Nos.200 and 201 of 2008

Koolan @ Munusamy

... Appellant/Plaintiff
in both appeals

Vs.

Chennammal

... Sole Respondent/Defendant
in S.A.No.200 of 2008
& 3rd respondent in S.A.No.201 of 2008

Jayalakshmi
2008

... 1st respondent in S.A.No.201 of

Mahalingam

... 2nd Respondent/Defendant
in S.A.No.201 of 2008

Common Prayer: Second Appeals filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 30.11.2007 made in A.S.No.71 of 2004 and A.S.No.50 of 2005 respectively on the file of the Subordinate Judge's Court at Dharmapuri reversing the Judgment and Decree dated 29.10.2004 made in O.S.No.282 of 1997 on the file of the District Munsif Court at Palacode.

In S.A.No.200 of 2008:

For Appellant : Mr.P.Valliappan
For Respondent : Mr.R.Selvakumar

In S.A.No.201 of 2008:

For Appellant : Mr.P.Valliappan
For Respondents 1 and 2 : Mr.R.Sudhakar
For 3rd Respondent : Mr.R.Selvakumar

COMMON JUDGMENT

These twin appeals arise out of two decrees passed in two separate appeals, both of which have arisen from O.S.No.282 of 1997. The suit is laid for declaration of plaintiff's right over a cart track in the suit property. Parties would be referred to by their rank before the trial Court.

1.2. The suit came to be decreed as against which the 1st

defendant has filed A.S.No.71 of 2004 and the defendants 2 and 3 had filed A.S.No.50 of 2005. Both these appeals came to be disposed of by a common judgment of the first Appellate Court, by which it allowed the appeals and non suited the plaintiff. Challenging the same, the plaintiff has come forward with these appeals.

2.1 There is a broader agreement on substantive facts, and the only dispute relates to the right of way. Hence the facts not in dispute are narrated as below:

- A certain Muniya Gounder held the properties in S.F.Nos:184, 185 and 186 as his ancestral properties. These properties lie in one block. Muniya Gounder had four sons and they are: (i) Rama Gounder (ii) Murugesan Gounder (iii) Koolan and (iv) Kannu alias Govindasamy. Subsequently, all the four brothers had orally partitioned the aforesaid properties.
- While so, under Ext.A1, dated 12.06.1967 Govindasamy Gounder (brother of the plaintiff/appellant) referred to above had sold 75 cents in S.No.185 and 2.45 acres in S.No.186 along with a fractional share in the well in S.No.186 that came to be allotted to him in the partition to one Ponnammal and Jayalakshmi. The purchaser namely Jayalakshmi is arrayed as 2nd defendant in the suit. The 3rd defendant is son of Jayalakshmi.
- From one of the co-purchaser under Ext.A1, namely Ponnammal, the plaintiff has purchased 1.50 acre in S.F.No.186 under Ext.A2 dated 10.06.1985. It may be stated here that the schedule of properties in Ext.A1 described the property conveyed therein to include a right over a cart track along northern extremity/boundary of S.No.184 for reaching S.Nos.185 and 186 on the south. This description finds a repetition in Ext.A-2 under which the plaintiff has purchased Ponnammal's share of the property.
- If the properties were to be described with the aid of the plan appended to the plaint, the plaintiff has his share of the property on the east and to the west of which lies the property covered under Ext.A-1 in favour of Jayalakshmi and Ponnammal. And, the property which Ponnammal had sold to the plaintiff under Ext.A-2 lies to the south of the remaining portion belonging to the second defendant.
- Be that as it may, Munusamy Gounder, one of the sons of Munia Gounder, another brother of the present plaintiff, had sold 1.03 acres in S.No.184 and 1.40 acre under

S.No.185 in favour of a certain Perumal under Ext.B4 sale deed dated 04.02.1972. Subsequently, the purchaser under Ext.B4 had sold the property he had purchased to Chennammal, the 1st defendant, under Ext.B2 dated 29.05.1979. These two sale deed do not refer to right of way.

- The main road is on the north and to the immediate south lies the property of the first defendant. To its further south is situate the property of the plaintiff that he had obtained in the family partition. To the south of the first defendant's property and the west of the plaintiff's property is the second defendant's share of the property that she had purchased under Ext.A-1. To the south of second defendant's plot lies the property that the plaintiff had purchased from Ponnammal. In other words, the plaintiff's property is situated in two blocks.

2.2 The Plaintiff's case:

- According to the plaintiff if he were to access the main road from the property allotted to him in the partition he needs to cut across the property of the first defendant, lest it will be land-locked. And, if he needs to have access to the property he had purchased from Ponnammal under Ext.A-2, he needs to cross the property of the second defendant and then the property of the first defendant, lest this will also be landlocked.
- The plaintiff would allege that he has a right over a cart-track in S.F.No:184 belonging to the first defendant. Here the cart-track runs along the eastern extremity of the first defendant's property reaches the northern boundary of plaintiff's property (the one he obtained in family partition), then takes a turn towards west and runs along the northern boundary of the plaintiff and then takes a turn towards south and crosses the second defendant's property before it reaches the plaintiff's property which he purchased from Ponnammal under Ext.A-2.

As the plaintiff faced some obstruction to his right of way, the suit is laid for declaring the same along with related ancillary reliefs.

2.3 The defendants' case:

- The defendants 1 to 3 though seems to have been represented by the same counsel before the trial court, have filed separate written statement, disputing and denying the plaintiff's right over the suit cart track. The 1st defendant has pleaded in her written statement that she had already laid O.S.No.59 of 1997 for injunction, that a

Commissioner came to be appointed in that suit, and there exists no cart track along the property of the 1st defendant in the manner described by the plaintiff, that the plaintiff had purchased certain property in S.Nos.188/3, 188/4 and 188/5 under the sale deed dated 01.06.1990 and this document shows that there exist a cart track to reach the plaintiff's property and hence there is no cause of action for the present suit.

- In the written statement laid by the 3rd defendant and adopted by the 2nd defendant, it is alleged that the right of pathway referred to in Ext.A1 sale deed (under which the 2nd defendant obtained half share) has not come into effect, that the plaintiff has purchased piece of property without any pathway and in order to create a right of pathway, he has laid the present suit.

3.1 The trial court has appointed a Commissioner and he has produced plan and report and the same was marked as Exts.C1 and C2. For the plaintiff, his two sons were examined as P.W.1 and P.W.2 and they have produced Exts.A1 and A2 referred to above. For the defendants, the 1st defendant was examined as D.W.1. Besides, they have also examined three other witnesses. They have produced Exts.B1 to B4, of which Ext.B4 and B2 have already been referred to above. Ext.B1 is a sale deed dated 01.06.1990 under which the plaintiff has purchased the a property in S.No.188.

3.2 Appreciating the evidences before it, the trial court in essence has relied on the cart track referred to under Exts.A-1 and A-2 and proceeded to decree the suit. It may be mentioned that there is hardly any reference to Exts.B-4 and B-2 in the said judgment. Challenging the same, the defendants, as already indicated, have preferred separate appeals. The First Appellate Court again kept the plaintiff's claim of right over the first defendants' property as a constant, and essentially addressed the dispute vis-a-vis the defendants 2 and 3. For this, it relied on the Commissioner's report wherein it is indicated that there exists a pathway along the eastern boundary of the 1st defendant and the plaintiff's properties, with a channel or a drain separating both and came to allow the appeals on the ground of existence of an alternate pathway. In short, it did not consider the right of way over the cart track in Exts.A1 and A2.

4. Hence, the plaintiff is now before this Court. These appeals were admitted on the following substantial questions of law:

- A) When the appellant had clearly established his easementary right over the suit cart tract by producing Exhibits A.1 and A.2 - Sale Deeds dated

12.6.1967 and 10.6.1985 respectively, whether the lower appellate Court is correct in law in holding that the appellant had not established his right over the suit cart track?

B) When there is absolutely no material on record to show that the appellant has an alternative cart track to reach his land in Survey No.186/3, whether the lower appellate Court is correct in law in simply concluding on the basis of citations referred before it, that the appellant does have an alternative access?

C) When Exhibits C.1 and C.2 - Advocate Commissioner's report and plan clearly show the existence of the suit cart track and the obstructions made by the respondents, whether the lower appellate Court is correct in law in eschewing the same, especially when the respondents have not filed any objections against the same?

D) When the trial Court, has categorically found that the appellant has got a easementary right over the suit cart track and that he does not have any alternative access, whether the lower appellate Court is correct in law in reversing the judgment of the trial Court without setting aside the said findings?''

5.1 Before proceeding to state the arguments advanced on behalf of rival parties, it may be stated at the outset, that the trial court has considered Ext.A-1 which relate to the property of the 2nd defendant but did not choose to consider the property of the first defendant and proceeded to grant a decree as against both. The first Appellate Court on the other hand has relied on the Commissioner's Report to find road or pathway to the west of S.No:188 to allow the appeals. It chose not to consider whether the property in S.F.No:188 lie contiguously with the properties of the parties involved in the suit.

5.2 The counsel for the appellant argued:

- The son of the plaintiff, and PW2 Munusamy, the brother of the plaintiff (vendor in Ext.B-4 sale deed) have explained the origin of the entire property as originally belonging to one Munia Gounder, the father of PW2, and how the property came to be divided among the four sons of Munia Gounder. This would imply the existence of a larger property which was held under a single title came to be disintegrated on partition among his four sons. This would necessarily imply that in the absence of any specific

understanding during partition, parties would be entitled easement of necessity to have a pathway, since no property can be landlocked and need to have an access. This right gets manifested in Ext.A1 sale deed that Govindasamy Gounder, one of the brothers of the plaintiff executed in favour of Ponnammal. This gets reiterated in the sale deed executed in favour of Ponnammal under Ext.A2. This would mean that the right of pathway as provided in Ext.A1 has come into existence by agreement between the parties to the oral partition referred to above in recognition of the easementary right of necessity for the convenient enjoyment of the respective plots allotted to the four sharers who partitioned the property in the said oral partition.

- When under Ext.A1 the 2nd defendant has purchased the property, she would now contend in the written statement that this right has not come into existence. If it is so, even the 2nd defendant would not have a right of access from the main road. Secondly, when Ponnammal had sold the property under Ext.A2, then whatever right that she had obtained as co-purchaser along with the 2nd defendant under Ext.A1 had also been transferred to the plaintiff.
- Now, the First Appellate Court has referred to certain pathway, which lies beyond the eastern boundary of the 1st defendant's property. The Commissioner's report shows that between eastern fence of the plaintiff's property and the road (shown in the Commissioner's plan on further east) runs a channel. And S.No:188 is to the further east of this road.
- The defendants have not pleaded the existence of any alternate way. The 1st defendant contended that while both the courts below are literally silent on her right, yet the evidence on records are adequate enough to consider her defense. This defendant had nowhere contended the existence of alternative pathway. Admittedly, the 1st defendant's property abuts the main road in north and the plaintiff's property lies to the immediate south of the 1st defendant's property. When the plaintiff's property bounded on the west by the 2nd defendant's property, on the east by third parties property and the water body, there cannot be any access to the plaintiff's property to the road on the north except through the cart track as indicated in the plaintiff plan.

10.1 The learned counsel for the 1st respondent submitted:

The entire plaint proceeds on the existence of an easement of necessity over the suit cart track. However, now in the body of

the plaint schedule of property to the plaint property, its dimension are not given. Even the Commissioner's report may not be of any assistance since he has not prepared a plan taking assistance from any qualified surveyor. Thirdly, turning to the existence of the alleged suit cart track, during his visit, he has seen full grown grass there.

10.2 The only document in which some reference to existence of cart track is mentioned as Exts.A1 and A2 and they indicated the existence of a cart track in S.No.184 and not in S.Nos.185 or 186. While the plaintiff has pleaded essentially the easement of necessity, the trial court has built a case for acquisition of easement by prescription based on the testimony of P.W.1. This has been correctly interfered with by the First Appellate Court which has not only taken into account the absence of any right of path way conveyed under Ext.B4 and in Ext.B2 as well as the existence of alternate path way that lies to the east of plaintiff's property as indicated in the report and plan. Taking the entirety of the facts, the findings of the Courts below is on facts and there is no perversity in the appreciation of evidence by the First Appellate Court.

11. Responding to the same, the learned counsel for the plaintiff/appellant has taken this Court through the cross-examination of D.W.1 to indicate that D.W.1 in essence has admitted the unity of title among the four sons of Munia Gounder and subsequent disintegration which brings the case one under easement of necessity within the meaning of Section 13 of the Easement Act.

12. On a careful consideration of rival submissions, this Court finds merit in the submissions of the counsel for the plaintiff. The reasons are:

- It goes as an undisputed fact that the entire property in S.F.No:184, 185 and 186 is held under one title and this faced disintegration in the subsequent partition. Necessarily, Sec.13 of the Easement Act providing for easement of necessity of right of way will invite itself to ensure that none of those who are parties to the partition is disadvantaged due to want of a right of access. The fact that it came to be recognised in Ext.A-1 and A-2 only goes to prove that at least one of brothers of the plaintiff other than himself had conceded this right. When this right finds expression in Exts.A-1, then the 2nd defendant cannot go against her own sale deed. It binds her, no matter if there exists an alternative access or not. The first appellate Court has gone miserably wrong here.
- Turning to the first defendant's property, first she has

not pleaded the existence of any alternate pathway and she is only harping on the fact that no restriction over her property indicating a right of way is seen in Ext.B-2 sale deed. But right of easement, does not depend on the concessions made by parties to a sale deed, but it exists independent of it. And, if this suit cart-track is not there there is no way to reach plaintiff's property.

- Turning to the theory of alternate pathway, this is an invention the first appellate court. True, during trial, some evidence were brought on record by the defendants to show that the plaintiff has purchased a piece of property in S.F.No:188. This property has come to the plaintiff by purchase and not under oral partition.

Necessarily all the substantial questions of law have to be decided in favour of the plaintiff/appellant.

13. In the result, these appeals are allowed and the judgment and decree dated 30.11.2007 made in A.S.No.71 of 2004 and A.S.No.50 of 2005 respectively on the file of the Subordinate Court, Dharmapuri reversing the judgment and decree dated 29.10.2004 made in O.S.No.282 of 1997 on the file of the District Munsif Court at Palacode, are set aside. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

ssn

To:

- 1.The Subordinate Court, Dharmapuri.
 - 2.The District Munsif Cout, Palacode.
 - 3.The Section Officer, VR Section, High Court, Madras.
- +2 cc's to Mr.P.Valliappan, Advocate, Sr.No. 9250
+1 cc to Mr.R.Selvakumar, Advocate, Sr.No. 9315

Judgment in
S.A.Nos.200 and 201 of 2008

CNR(CO)
CSL/09.05.2019