

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 23.01.2019

Pronounced on: 04.02.2019

Coram

The Honourable Dr.Justice G.Jayachandran

Second Appeal No.1512 of 2004
& C.M.P.No.11952 of 2004

1. K.Kalianna Gounder,
S/o.Kaithamali Gounder,
2. K.Muthusami,
S/o.Kalianna Gounder

Both are residing at
Anganan Thottam Anganna
Goundenpudur,
Malayadipudur Village,
Sathyamangalam Taluk,
Erode District.

..Appellants/Appellants/Plaintiff

/versus/

1. Sundararaj,
S/o.Petchimuthu,
F-64, 54/144, Teachers Colony,
Pothanur Post,
Coimbatore-641 009,
Coimbatore District.

2. Vijayakumar,
S/o.Nagappan,
Teachers Colony,
Pothanur Post,
Coimbatore-641 009.
Coimbatore District

..Respondents/Respondents/Defendants

PRAYER:- Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 23.03.2004 made in A.S.No.3 of 2004 on the file of Principal Subordinate Judge, Gobichettipalaym confirming the Judgment and Decree dated 31.12.2003 made in O.S.No.279 of 2000 on the file of District Munsif, Sathyamangalam.

For Appellant : Mr.R.T.Doraisamy
For R2 : Mr.V.Raghavachari
for Mr.MA.P.Thangavel
For R1 : No appearance

J U D G M E N T

The plaintiffs are the appellants herein. The suit was filed for permanent injunction restraining the defendants their men and agents from forcibly forming any cart track within the suit property.

2. The suit property is described as 46 cents of land meant for common purpose specified in the registered partition deed Ex.A.1 dated 02.04.1958 where, it is alleged that the defendants are forcibly forming a cart track.

3. Both the Courts below held against the plaintiffs holding that 46 cents of land earmarked under the partition deed Ex.A.1 includes cart track, to have access to the defendants land. The trial Court after considering the Ex.A.1 partition deed between the Kaithamalai Gounder grand-father of the plaintiffs and Sivanappa Goundar, held that the defendants have established their easementary right by necessity and also their right as a co-owner.

4. Aggrieved by the concurrent finding, the present appeal is filed. At the time of admission, this Court has formulated the following Substantial Questions of law.

(i). Whether the Courts below are correct in holding that the defendants have a right to form the cart track over the common land of 46 cents which was allotted for some other specific purposes as per Ex.A.1?

(ii). Whether the Courts below are correct in holding that the defendants can claim cart track right over the common land which was not available to their predecessor in title as per Ex.A.1?

(iii). Whether the Courts below are correct in holding that the defendants have right to have a new cart track over the common land of 46 cents by relying Ex.B.2 the later sale deed ignoring the earlier partition deed dated 02.04.1958 Ex.A.1?

(iv). The Courts below are correct in holding that the defendants can claim their easementary right when there is a existing cart track as per the report of the commissioner filed in Ex.C.1?

5. Before adverting to the specific facts of the case, it is essential to point out the legal position that claim of right of passage as a co-owner is diagonally opposite to the plea of right of passage as an easement. They are mutually exclusive to each other. Unfortunately in this case, the Courts below have held that the respondents right of passage and have a cart track in the common area earmarked for specific purpose as co-owner and also held that the passage right get enhanced by easement of necessity.

6. The right of enjoyment in the common property by the co-shares is subject to a restriction that such enjoyment should not prejudice or cause inconvenience or detrimental to the interest of the other co-owners. Whereas, the right of easement is not based on the title but accepting the title with the servient owner, the enjoyment of the easement has to be claimed by the dominant tenement.

7. In this case the plaintiffs have made mutually exclusively claim in respect of their the right of passage through a cart track in the common property. The Courts below have granted the relief recognising the plaintiff as co-owner of the property as well as owner of the dominant tenement and entitled for right of passage by easement of necessity.

8. The factual background of the case:-

Kaithamalai Gounder and Sivanappa Gounder are son of Marappan Gounder. On 02.04.1958 they entered into a partition deed in respect of properties jointly enjoyed by them so far. In the said partition deed while dividing the various agricultural land by metes and bounds, kept 46 cents of land in S.No.136 for common usage in which well, Kalam and garden sheds located. The cart track runs in S.No.136 East-West with 20 links width in 11 cents and continue in S.No.356 running East-West 7 cents and North-South 14 cents on the Eastern portion of the said survey number left for the use of passage, with restricted right of passage and not to graze or tether cattles. As per the partition deed Kaithamalai Gounder and Sivanappa Gounder were enjoying their respective properties peacefully and kept the cart track for passage and the 46 cents of land for common usage as mentioned in the partition deed. The dispute is in the respect of the use of the said 46 cents of land, for laying cart track which is reserved for specific common usage.

9. Accordingly to the plaintiffs, in the common area as per the Will of Kaithamalai Gounder his son Kallyanna Gounder is entitled for $\frac{1}{2}$ share. The remaining $\frac{1}{2}$ share is owned by the descendents of Sivanappa Gounder. 4 out of 5 legal heirs of Sivanappa Gounder had sold their respective shares to the 2nd plaintiff, except one sharer by name Revathy who holds $\frac{1}{10}$ th share in the entire common passage in the extent of 46 cents and right in the cart track specifically earmarked for common passage. The portion of the land allotted to Revathy was purchased by one S.R.Nachimuthu Gounder who in turn sold the property to the defendants on 04.09.2000. Thus, in the suit property extent of 46 cents earmarked for specific purpose to be enjoyed by the plaintiffs' predecessor in title and the defendants predecessor in title.

10. The defendants have $\frac{1}{10}$ th share in common and the 1st and 2nd plaintiffs together have $\frac{9}{10}$ th share in common. In the said 46 cents of land, except for the purpose specified in the partition deed namely Kalam (paddy drying field), Kalai and Well, the co-owners have no other right. While so, it is contended by the plaintiffs that contra to the terms of the partition deed, the defendants who have purchased $\frac{1}{10}$ th share from one of the descendents of Sivappan Gounder is trying to forcibly form a North-South cart track within the suit property to reach his land which is situated in S.No.171/1B and 172. The vari (space used for drawing water from well) in the suit property was partly obliterated by the defendants on 26.11.2000 to form North-South cart track within the suit property. Hence, the suit for permanent injunction restraining the defendants from forcibly forming any cart track within the suit property which has been morefully described in the plaint as 46 cents of land in new S.F.No.171/1B (old S.F.No.136) along with the common well, Kalam, vari, vaikkal and Kalai (garden sheds) and all other appurtenances therein.

11. In the written statement filed by the 2nd defendant the title over the property as claimed by the plaintiffs and the co-ownership of the plaintiff and the defendants over the suit properties is accepted. According to the 2nd defendant, the 46 cents earmarked for common usage for well, Kalam and garden shed also includes common usage of the land as pathway(cart track). In the partition deed entered between the legal heirs of Sivappan Gounder on 14.03.1983 the vendor of the plaintiff Indirani and the predecessor in the title of the defendants Revathy are parties. They have consciously mentioned the common area for use of pathway also. A larger extent of land in and around the suit property originally owned by a common owner and there is no other pathway to reach the shares of the defendants except through the suit property. Therefore, the defendants have a right of cart track through the suit property as right of

easement by necessity also. Further, it is contended in the written statement that the common East-West cart track which comes upto suit property, continues in the suit property and runs upto the defendants share on the North-East of the suit property. The defendants as a co-owner can use the common property for cart track which does not in any way detrimental to the interest of the other co-owner. They have right to use the cart track to reach their land in S.Nos.171/1B and 172. They have not forcibly formed any new cart track in the suit property running North-South. It is an existing cart track and the defendants have only carried out certain minor repair on it.

12. While, the plaintiffs have relied upon the partition deed Ex.A.1 dated 02.04.1985 between Kaithamalai Gounder and Sivanappa Gounder, Ex.A.2 the registered Will in favour of Kallyanna Gounder executed by Kaithamalai Gounder on 02.04.1993, Ex.B.3 sale deed in favour of the defendants executed by Nachimuthu Gounder on 04.03.2000 and the Ex.A.4 sale deed in favour of 2nd plaintiff executed by Indiran in favour of the 2nd plaintiff on 30.10.2000. The defendants have relied upon the partition deed between the legal heirs of Sivanappa Gounder and the sale deed executed by Revathy in favour of Nachimuthu Gounder which were marked as Ex.B.1 and Ex.B.2 respectively. The commissioner's report and plan were marked as Ex.C.1 and Ex.C.2. The trial Court has examined Selvi Joice Senthamarai as Court witness. Two witnesses each on behalf of the plaintiffs and the defendants were examined.

13. The trial Court has relied upon the judgment of this Court in The Licencee, Sri Lala Talkies Vadipatti, Madurai Taluk Vs. The District Collector, Madurai District, Madurai and others reported in 1991 1 MLJ page No. 526 wherein, this Court has held that a co-owner is entitled to make use of joint property in a way quite consistent with the continuance of joint ownership and possession, so long as he is not excluding the right of any co-owner". And, the judgment Subbaiah Gounder Vs. Ramasamy Gounder report in AIR 1973 Madras page No.42 wherein, this Court has observed when co-owners, at the time of partition set apart a portion of the common property to be used as common for the beneficial enjoyment of the respective shares, each of such co-owner of the common property is entitled to use the property in the way most advantageous and beneficial to him without, at the same time causing any injury or detriment to the other co-owners. So long as the use of the common property by one co-owner does not materially interfere with the use of the property by the other co-owners or affect their rights or in any way weaken, damage or injure the common property. Such co-owners are not entitled to prevent the other co-owner from using common property in the way most beneficial to him.

14. Referring the observation made in above two judgments the trial Court has negatived the plea of the plaintiffs that laying cart track in the common area will prejudice his intention to construct a house in the suit property. Also the trial Court has held that the defendants have satisfactorily proved that the cart track is necessary to reach his other lands and so, real detriment will cause to the defendants, if a cart track is not formed.

15. Referring the commissioner report and the deposition of the Commissioner examined as C.W.1. The trial Court has arrived at a conclusion that the plaintiffs have not shown any alternative pathway which could be used by the defendants to reach their land. When Ex.B.2 describes the suit property as a common property left for the well, Kalam and cart track, the defendants have established their easementary right by necessity and also as a co-sharer.

16. The judgments relied by the plaintiffs to substantiate their plea are negatived by the trial Court. On appeal, the Appellate Court has confirmed the judgment of the trial Court.

17. The learned counsel appearing for the appellants would submit that the Courts below have miserably failed to appreciate the evidence placed before it and the law governing the right of easement. When the property was divided between Kaithamalai Gounder and Sivanappa Gounder vide the partition deed marked as Ex.A.1, the parties have specifically divided their properties in such a way that area were earmarked with extend for specific purpose namely cart track and an exclusive clause has also been incorporated in the partition deed that the said cart track which runs North-South on the Eastern side of S.No.356 and turns towards West pass through S.No.136 East-West, shall not be put to use for any other purpose, except for cart track and passage. Specifically the document prohibiting the use of this passage for tethering cattles and grassing cattle. The suit property which is in the extent of 46 cents in S.No.136 is reserved for common usage of both the parties. The well, vari, Kalam and right to draw water through the well were reserved for common usage. In the said partition deed, there is no reference of cart track in the common land of 46 cents. While so, the defendants predecessor in title divided their property allotted to Sivanappa Gounder under partition deed Ex.B.1, they have included the word 'தடும்' (pathway) in addition to well, Kalam and the land appurtenant to the well.

18. The learned counsel pointing out the inclusion of the word 'தடும்' (pathway) in the partition deed entered between the legal heirs of Sivanappa Gounder. While describing the common area meant for specific purpose would submit that the right which was not given under the earlier partition deed cannot be included in the subsequent deeds entered by one of the parties to the deed with third parties in the land situated at S.No.136. Further, pointing out the recital of Ex.B.1 wherein, the parties have agreed to lay a cart track on the South of S.No.278/4 for the common usage of the parties to the partition deed Ex.B.1. So the defendants who purchased 1/10th share from Nachimuthu Gounder who had earlier purchased the property from Revathy cannot try to make a cart track in the common pathway. If at all he needs any cart track to reach the land which he has purchased under Ex.B.2, he can only insist upon his vendor and the other parties to the partition deed Ex.B.1 to form a cart-track in S.No.278/4.

19. The learned counsel appearing for the appellants would also submit that it has been specifically pleaded by the plaintiffs that the respondents is having land in S.No.171/1B and 172 which are abutting to the land purchased by the defendants under sale deed Ex.B.2. Pointing out the boundaries described in Ex.B.2 wherein, a common Vaikkal being shown on the East of the property purchased by the plaintiffs and the admission of the defendants in the written statement itself that they need the cart-track to reach their land in S.Nos.171/1B and 172, would contend that the findings of the Courts below that apart from proof of common ownership in the suit property of 46 cents to lay a cart-track, even on the doctrine of necessity the defendants are entitled to lay a cart-track, is contrary to the admission of the defendants.

20. According to the learned counsel for the appellants even before purchase of land from Nachimuthu the 1/10th share in the suit property, the defendants had property adjacent to the land they purchased and had access to the land. Therefore, the Question of easement of necessity does not arise. Furthermore, when as per the partition deed Ex.B.1 when the parties have aggrieved to have a separate cart-track of their own in S.No.278/4, the Courts below have failed to appreciate these documents and erroneously held that the defendants as co-owner as well as by easement of necessity, entitled to lay a cart-track and it cannot be prevented by the appellants.

21. Per contra, the learned Senior Counsel appearing for the respondents would submit that both the Courts have gone through the records and the pleadings scrupulously and has held that the plaintiffs who are now holding 9/10th share together in the common property of 46 cents cannot prevent the 1/10th

shareholder from utilising the common area for the beneficial use of his property. Further, referring the observation made by the Courts below, the learned counsel would contend that the plaintiffs interest is no way affected by the cart-track, which is in existence even at the time when the property was purchased by the defendants and it not a newly laid cart-track. Pointing out the commissioners report, the counsel would submitted that the commissioner report show that close to the well North-South cart-track is running to reach the land of the defendants. While so, there is no grounds to interfere the concurrent finding of the Courts below.

22. This Court, in the Second Appeal is bound to find out whether there is any error in application of law and cannot re-appreciate the facts settled by the Courts below. The case of the plaintiffs have been negatived by the Courts below for the following reasons'

(i). It is held by the Courts below that as a co-owner of the common area measuring 46 cents, the defendants are entitled to lay a cart-track and make use of it in the manner of beneficial to them, without detrimental to the interest of the plaintiffs.

ii) Based on the above principle, on facts, Courts below relying upon the Commissioner's report has held that the plaintiffs was not able to show any other alternate way to reach the defendants land, except the cart-track which runs through the suit property.

23. On reading the partition deed marked as Ex.A.1, 46 cents of land has been earmarked for a specific common purpose mentioned in the deed itself. There is no right reserved for passage in the common land. The sketch annexed to the Commissioners report indicates a pathway running South to North touching upon the land of the defendants. This pathway is very near to the well. As per partition deed Ex.A.1, the vari (வாரி) to draw water from the well and Thulai (துளை) are mentioned to be in the field. Therefore, when the partition deed took place in the year 1958 and the land of Sivanappa Gounder was one composite area. There was no necessity to have a cart-track in the common area of 46 cents. The need of a cart-track was only upto the common area and not through the common are. That is why under Ex.A.1 land specifically earmarked with intend and direction mentioned as cart track. The recital of Ex.A1 specifically say the cart track runs North-South on the eastern side of their land turns to the western side and ends upto the well. There was no further cart-track referred in the document in the 46 cents earmarked for the specific utility. Therefore, the finding of the Courts below that as a co-owner, the

defendants who has purchased 1/10th right in the common land can lay a pathway is erroneous. When this 46 cents was specifically earmarked and identified for a particular purpose, the Court below has miserably failed to appreciate the submission made by the appellants that in the partition deed Ex.B.1, the parties have agreed to have a separate cart-track in S.No.278/4 and also failed to consider the addition made in the recital of Ex.B.1 while describing the common area and the purpose for which the common area was reserved. The 46 cents which was reserved for utilising the well, Kalam, salai for Kaithamalai Gounder and Sivanappa Gounder, there is no reference about right of passage or a cart-track only when the legal heirs of Sivanappa Gounder divided their shares under the partition deed Ex.B.1 dated 14.03.1983 they have inserted the word தடம் (pathway). Even they have not mentioned the cart-track. The word cart-track has been deliberately introduced only in the description of the property under sale deed Ex.B.2. There is a vast difference between pathway (தடம்) and the cart-track (வண்டி தடம்). When the source document namely the partition deed Ex.A.1 does not whisper anything about (தடம்) pathway or cart-track (வண்டி தடம்) in the common area of 46 cents, the reference of pathway or a cart-track in the documents created subsequently by the descendants of one of the co-sharers will not bind the plaintiffs.

24. As far as the easement of necessity is concerned, it is an admitted fact by the defendants that they owe property adjacent to the land they purchased under Ex.B.2. It is also highlighted through witnesses that to reach that land, the defendants have separate pathway. While so, the doctrine of easement by necessity does not have any application to the facts of the present case. It is a well settled principle under the law of easement, the doctrine of necessity can be applied only if the dominant tenement establishes that except the subject pathway at servient tenement there is no other access to reach their land and if that right of passage is deprived, the property cannot be used at all.

25. The Courts below has ignored the admission of the defendants that they owe land in S.Nos.171/1B and 172 which is adjacent to the land they have purchased under Ex.B.2 and shown as boundaries of the land purchased, quoting the omission of the Advocate Commissioner to mention facts above availability of alternate pathway in his report has drawn a conclusion that the defendants have no other access to their land, except to lay a cart-track in the suit property. If the existing cart-track is extended by laying a new cart-track running North to South in the suit property, it may be a convenient passage for the defendants but it will not fall under the category of right of easement by necessity.

26. Unless right of passage is given under a grant either implied or explicit, the defendants cannot put cart-track afresh in the common area, which has been earmarked for specific purpose and more particularly not for cart-track. The necessity to have connectivity to the defendants land through the existing cart-track arose only after the division of the property among the legal heirs of Sivanappa Gounder in the year 1983 and sold a portion of it to others. While dividing their property, they have though fit to have a separate cart-track in S.No.278/4 for their common usage. Having purchased land with that right, the defendants herein can at the most claim right of passage based on the grant under Ex.B.2 and not claim right of passage in the common area meant for other purpose expressly specified.

27. In this regard, it is appropriate to extract Section 13 of the Indian Easement Act, 1882, which deals with the easements of necessity and quasi easements.

Section 13: Easements of necessity and quasi easements

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement. Where a partition is made of the joint property of several persons,-

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

28. Nowhere in the Ex.A.1 which is the partition deed of the year 1958, there is any reference of easementary right of passage either as pathway (தடம்) or by cart-track (வண்டி தடம்). Though it is the case of defendants that for enjoying their 1/10th share of land purchased, along with right of usage in the common area, it is necessary for him to have a cart-track in the suit schedule property, the plaintiff had proved that the defendants have their own right of passage and they were enjoying the adjacent lands in S.Nos.171/1B and 172, even prior to their purchase of 1/10 share under Ex.B.2. The existing pathway and the recital in Ex.B.1 referring formation of cart track in S.No.278/4 precludes the respondents from claiming right of passage through suit property, on the ground of easement by necessity.

29. No doubt, the respondents herein are co-owners in respect of the suit schedule property holding 1/10th share. It does not mean that they can exploit their share detrimental to the enjoyment of the other co-sharer. It has been specifically pleaded by the plaintiffs that the respondents by obliterating the vari (area used to draw water from the well) and the channels have attempted to make a cart-track. The Courts below had ignored the apprehension of the plaintiffs that if the defendants are allowed to put a cart-track in the common area, it will affect the enjoyment of the area allotted to his predecessor-in-title for putting up Salai (farm shed).

30. Therefore, for this reasons stated above this Court finds that the Courts below have miserably failed to apply the correct law while appreciating the fact of the case. Hence, it requires interference. Accordingly, the Second Appeal is Allowed. The judgment of the trial Court as well as the Appellate Court are set-aside. The suit for injunction is allowed as prayed for. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

bsm

To

1. The Principal Subordinate Judge, Gobichettipalaym
2. The District Munsif, Sathyamangalam.

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