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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 02.01.2019

Delivered on: 27.04.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.536 of 2018

&

C.M.P.No.13488 of 2018

1.K.Shanmugam
2.Kailasapathy

...Appellants/Plaintiffs

Vs

1.Boopathi
2.Balamani
3.Karthikeyan
4.Dharmalingam
5.Sundarammal
6.Janaki
7.Thulasimani

...Respondents/Defendants

PRAYER: First Appeal is filed under Order 41 Rule 1 read with Section 96 of the Code of Civil Procedure against the Judgement and Decree dated 08.02.2018 made in O.S.No.675 of 2011 on the file of the learned V Additional District Court, Coimbatore.

For Appellants	:	Mr.N.Manokaran
For Respondent 1 & 2	:	Mr.R.Nandha Kumar
For Respondent 3	:	Notice not sent
For Respondents 4 to 7	:	Mr.E.K.Kumaresan

J U D G E M E N T

The plaintiffs are the appellants before this Court. The suit O.S.No.675 of 2011 has been instituted by the plaintiffs on the file of the V Additional District Judge, Coimbatore, for a declaration of their absolute right for the usage and enjoyment of the 20 feet X 400 meter common cart track described in Item No.2 of the suit schedule as the absolute property of the plaintiffs binding over the defendants 1 to 7 and for a consequential injunction restraining the defendants 1 to 7 from interfering with the usage of Item No.2 of the suit property by the plaintiffs.



2.Item No.1 are the lands comprised in Survey No.373 of Arasur Village, Palladam Taluk. Item No.2 of the suit property is the pathway over which the suit has now been instituted. The parties are referred to in the same array as in the suit.

3.Plaintiff's Case:

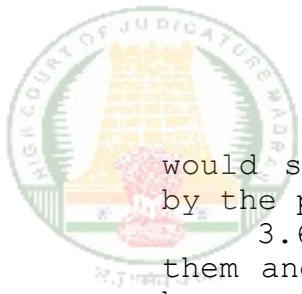
3.1.It is the case of the plaintiffs that the suit properties and other properties belonged to their grand father Marappa Gounder. Item No.2 of the suit property was a common cart track which was used by Marappa Gounder, prior to him by his predecessors in title and after Marappa Gounder the cart track was used by the plaintiffs for well over seventy years.

3.2.It is the further case of the plaintiffs that under a registered partition deed dated 07.04.1958, Marappa Gounder along with his wife, three daughters and the son of predeceased daughter had partitioned the suit properties and in the partition the following properties were allotted to the daughters. Palaniammal the plaintiffs' mother was allotted 2.90 Acres in S.F.No.373. Palanisamy the son of Chinammal, the predeceased daughter of Marappa Gounder was allotted 4.64 Acres in S.F.No.378 and 379/2. Pahammal was allotted 4.64 Acres in S.F.No.378 and 379/2 and Pongiammal was allotted 3.02 ½ Acres in S.F.No.373. Therefore Palaniammal and Pongiammal were allotted shares in S.F.No.373.

3.3.The partition deed very clearly described the cart track through which the allottees of share in S.No.373 was to proceed from the North-South Ittari (Sulur-Avinashi Road). The pathway was described in the deed as on proceeding from the road running East-West through Survey No.379/2, thereafter taking an easterly direction and turning North-South and from thereon running to the northern boundaries and from there proceeding upto the Water Tank in S.F.No.373. It is the case of the plaintiff that this cart track is in existence for over 70 years, measuring about 20 feet in breadth and 400 meters in length (This pathway has been described as Item No.2 in the suit schedule).

3.4.This usage of the cart track by Marrappa Gounder was handed over to the plaintiffs' mother Palaniammal and her siblings and nephew and thereafter she had executed a settlement deed dated 12.11.1986 in favour of the plaintiffs together with the right over the pathway. Therefore, it is the case of the plaintiffs that they have been in continuous and uninterrupted possession and enjoyment of Item No.2 of the property without any let or hindrance.

3.5.It is their case that their father had purchased 4 Acres in S.F.No.373 to the south of the Item No.1 of the suit property. It is their further case that except for cart track described in the partition deed there was no other access to their land and also to the lands of the 3rd defendant. They



would submit that cart track was jointly possessed and enjoyed by the plaintiffs and defendants 1 to 3.

3.6. The plaintiffs have developed the lands purchased by them and had put up a huge coconut grove and defendants 1 and 2 became jealous of this success and consequently developed animosity and they had therefore joined hands with defendants 4 to 7 to prevent the plaintiffs from using the pathway.

3.7. On 16.11.2011, the defendants had made their first attempt to block the usage of Item No.2 of the property, a complaint was lodged and Police Authorities had advised the defendants to desist from disturbing the plaintiff's enjoyment of the Item No.2 of the suit property. Despite this, on 22.11.2011, the second attempt was made and on this occasion fencing stones were placed in the pathway and the plaintiffs were compelled to invoke the jurisdiction of this Court.

4. Written statement of the Defendants 4 to 7:

4.1. These defendants, who have their lands north of Item No.2, would argue that the plaintiffs are not the only owner of the suit property and that there was another co-owner Kumarasamy who had died leaving behind him surviving his three daughters, Murugathal, Subathal, Sundara Ammal. Despite having knowledge about the same the plaintiffs have not added them as parties and it is also evident that the plaintiffs have not obtained any release from the said daughters of Kumarasamy, therefore the defendants would contend that the suit was bad for non-joinder of necessary parties.

4.2. They further contended that the plaintiffs had an alternative pathway to reach their lands and defendants 4 to 7 had a right of way in S.F.No.379/2A upto the common Well and in the revenue records S.F.No.379/2A has been subdivided as per the respective enjoyment. On 04.11.1992, defendants 4 to 7, Sagunthala and Angathal, the owners of S.F.No.379/1 had partitioned the properties and on 30.10.1998, 4th defendant had purchased the share of Angathal under a registered sale deed.

4.3. It is their further case that the common well and common place belongs to the defendants and the cart track runs only upto the common well. They would further contend that S.F.No.379/2A, is in the common possession and enjoyment of the owner of the lands in S.F.No.379/1, 379/2B to 379/2G and none else. It is their case that the plaintiffs had never enjoyed or possessed Item No.2.

4.4. Being a suit for declaration the plaintiffs ought to have impleaded all the land owners of the land situate in S.F.No.379/2B to 379/2G, particularly when the plaintiffs were trying to extend the cart track into the defendants field in S.F.No.379/1. It is their further case that three months prior to the institution of the suit they had put up fencing between S.F.No.379/1 and 379/2A within their own lands. The owners of the lands in S.F.No.379/2B to 379/2G had protested and it is the



case of the defendants 4 to 7 that it is them who had set up the plaintiffs to file the present suit.

4.5. Further case of the defendants is that the cart track provided under a partition deed dated 07.04.1958 (Ex.A.1), never came into existence and as per the deed the plaintiffs were entitled only to 13 links and not 20 feet and that too in S.F.No.379/2. It is the case of the defendants 4 to 7 that they ought to have filed a suit for mandatory injunction and not declaration in respect of the cart track, Item No.2 of the suit schedule property.

5. Written statement of the 1st defendant:

5.1. Under a partition, Pahammal was allotted S.F.No.378 and 379 which was later subdivided as 379/2C and 379/2D. It is the case of the 1st defendant that the land belong to Subramanian and Velusamy who are the legal heirs of Pahammal and they were entitled to the cart track. It is their further case that Annamalai the vendor of the Marrappa Gounder was entitled to the lands in S.F.No.379/F, after his demise his sons become entitled to the lands in S.F.No.379/F. Therefore they are also necessary parties to the suit.

5.2. They would further contend that Ex.A.1 partition deed has clearly described the pathway however the plaintiffs have not asked for a mandatory injunction to restore the pathway. They therefore sought for the dismissal of the suit.

6. Trial Court:

6.1. Pending the suit the Trial Court had appointed an Advocate Commissioner to visit the suit property and submit a detailed report with plan in I.A.No.2262 of 2011. The Advocate Commissioner visited the property and have given a detailed report together with plan and the plaintiffs had also filed an objections to the said report. The parties had gone to trial on the following issues:

"1. Whether the 2nd item is used for ingress and egress to the 1st item by the plaintiffs?

2. Whether alternative pathway is available to the plaintiffs?

3. Whether the description of second schedule is correct?

4. Whether the suit is bad for non-joinder of necessary parties?

5. Whether the plaintiff is entitled for the relief of declaration and permanent injunction as prayed?

6. To what other relief, is the plaintiff entitled to?"

6.2. The 2nd plaintiff had examined himself as P.W.1 and his



cousin Velusamy as P.W.2. The Assistant Engineer of the Tamil Nadu Electricity Board was examined as P.W.3 and one Eeswaramurthi was examined as P.W.4. Ex.A.1 to Ex.A.12 were marked and through P.W.3, Ex.X.1, Ex.X.2 and Ex.C.1 were marked. On the side of the defendants the 1st defendant had examined himself as D.W.1 and the 4th defendant as D.W.2. Ex.B.1 to Ex.B.18 were marked on the side of the defendants. Barring issue No.4 all the other issues were answered against the plaintiffs. Challenging the said Judgement and Decree the plaintiffs are before this Court.

7.Submissions:

7.1.Mr.N.Manokaran, learned counsel appearing on behalf of the appellants would contend that the right and enjoyment of the suit Item No.2, Cart track has been given to them under a partition deed dated 07.04.1958 (Ex.A.1). He would further argue that the right of enjoyment is both by way of grant as well as by way of prescription and further the plaintiffs have come to the Court at the earliest point of time.

7.2.He would further argue that the existence of the alternate pathway will in no way extinguish or disallow their right of enjoyment of Item No.2, since that right has been conferred by them under Ex.A.1, partition deed. He would submit that the plaintiffs' right of enjoyment of Item No.2 does not got extinguished with the existence of an alternate pathway since the right over Item No.2 has been conferred under the partition deed Ex.A.1 and is therefore an easement by grant.

7.3.He would invite the attention of this Court to the Judgement in Hero Vinoth (Minor) Vs. Seshammal reported in 2006 (4) CTC 79, wherein the Honourable Supreme Court has held that an easement by grant will not be extinguished under Section 41 of the Indian Easements Act, 1882, as the same does not relate to an easement of necessity.

7.4.The Honourable Supreme Court has held that in the case of an easement of necessity where an alternate access becomes available the legal necessity of burdening the servient owner ceases to exist and the easement of necessity is legally withdrawn or extinguished as recognised under Section 41 of the Act. Further such a legal extinction does not apply to an acquisition by grant and Section 41 is not applicable in such case. He would further argue that the pleadings in the plaint has to construed as a whole and construed liberally.

7.5.He would argue that the Court should not non-suit the plaintiffs on the ground of non-pleading of ouster when ouster is made out by a wholesome reading of the plaint. In support of this argument he would rely upon the Judgement in Des Raj and others Vs. Bhagat Ram (Dead) by Lrs. and others reported in (2007) 9 SCC 641.

7.6.He would also rely upon the Judgement of the Honourable Supreme Court in S.B.Noronah Vs. Prem Kumari Khanna reported in



(1980) 1 SCC 52, which once again advances the argument that the pleading has to be read as a whole and technical limitations should not be imposed upon the same, when the matter, if read as a whole, conveys the requisite ingredients.

7.7. He would also rely upon the written statement of the defendants wherein they have admitted the existence of the Cart track as stated in Ex.A.1, but would contend that by non usage the cart track is no longer in existence. He would also draw the attention of this Court to the evidence of D.W.1, the 1st defendant wherein he has clearly admitted that the fence has been put just six months prior to the filing of the suit and also to the existence of Stone Wall at the southern tip of the property of the defendants 4 to 7 and at the northern tip of the property of the defendants 1 to 3, which would indicate that it is in existence since 1958. He would also point out the admission of D.W.1, about the existence of the pathway as per Ex.A.1.

7.8. The learned counsel would also draw my attention to the evidence of D.W.2, the 4th defendant who would also acknowledge the existence of pathway and the fact that the fence had been put up only few months prior to the filing of the suit. Therefore the learned counsel would argue that the Court below was in error in dismissing the suit.

7.9. Per contra, Mr.E.K.Kumaresan, learned counsel appeared on behalf of the defendants 4 to 7 would argue that the plaintiffs have not come with a definite case as to whether the easement over Item No.2 is one of the grant or prescription. He would also argue that the plaintiffs have not come forward to describe the fence on either side of the suit pathway which came into existence even prior to the filing of the suit.

8.0. He would argue that a perusal of Ex.B.14, which is a FMB Sketch would clearly show the existence of an house abutting S.F.No.379/2G and the fact that the pathway does not proceed beyond the well therein. He would further argue that the plaintiffs are enjoying the alternate pathway which is the situate in survey No.372/4 which leads directly into their properties situate in survey No.373, namely the 1st Item of the suit property.

8.1. He would also invite the attention of the Court to Ex.B.16, the FMB sketch with reference to S.F.No.373 and would argue that there is no access provided from S.F.No.379 into the said property. He would further point out that the plaintiffs have come forward with a case that Item No.2 cart track measures 20 feet in breadth and 400 meters in length whereas even according to Ex.A.1 partition deed which is the basis of the plaintiffs claim, the breadth is only 13 links.

8.2. He would therefore contend that the plaintiffs have come to Court with a totally false case. He would also draw attention to the admissions of P.W.1, wherein he would admit that the name of the plaintiffs were not found in the revenue



records pertaining to S.F.No.372/2A and that the fence had been put up even prior to the filing of the suit and that the fence is situate within the boundary of defendants 4 to 7.

8.3.He would also draw attention of the Court to the admission of the P.W.1 that it is only through part of the 4th defendant's property and Item No.2, cart track, jointly when the vehicles can be taken. He would also argue that P.W.2 who is the cousin of the plaintiff and the son of Pahammal had admitted that the breadth of the pathway as found in Ex.A.1, partition deed is only 13 links and not 20 feet, as claimed.

8.4.His next contention is to the admission of P.W.1 that from S.F.No.379/2G the breadth of the cart track is reduced to just 2 feet and therefore there is no possibility of the vehicles being taken through the cart track. This fact is also reiterated by P.W.2, in his cross examination, therefore the counsel would argue that the cart track as pleaded is not in existence, therefore, there is no case made out to interfere with the Judgement and Decree of the learned V Additional District Judge, Coimbatore.

9.Points for Consideration:

From the pleadings, documents and submissions made the following points for consideration arise:

1.Whether the right of way through the Item No.2 of suit property as provided under Ex.A.1 gets extinguished in the light of Section 41 of the Indian Easements Act, 1882, in view of the existence of an alternate pathway?

2.Whether the plaintiffs are entitled to a declaration of the right over the suit 2nd item of property and consequently to injunct the defendants from interfering with the plaintiffs peaceful possession and enjoyment of Item No.2 of the suit schedule property?

10.Discussion:

10.1.The plaintiffs have come forward with a specific case that they were entitled to Item No.2, cart track which has been used by them and their predecessors in title and which had been given to the various sharers under Ex.A.1 partition deed dated 07.04.1958. A reading of Ex.A.1, particularly with reference to the pathway would clearly show that the pathway commences from northern side Ittari which is presently in Soolur-Avinashi road, which proceeds right upto S.F.No.373 allotted to the share of Palaniammal (Mother of the plaintiffs) and Pongiammal.

10.2.The recital clearly states that this pathway runs right



upto the common well. The fact that the cart track has been provided under Ex.A.1 has been acknowledged by all the defendants in their respective written statement. The only contention that has been put forward by the defendants is that the plaintiffs have an alternative cart track in Survey No.372/4 and therefore the easement of necessity to use the cart track provided in Ex.A.1 does not exist and also that the plaintiffs have not been using the said cart track.

10.3.The plaintiffs have come forward with specific pleading that they had been provided this cart track under the partition deed, Ex.A.1 and that they have been using the same for over seventy years. The claim is based on easement of grant and not easement of necessity and as rightly pointed out by the counsel for the plaintiffs, the easement of grant is not extinguished on account of the existence of an alternative pathway vide the Judgement in Hero Vinoth (Minor) Vs. Seshammal reported in 2006 (4) CTC 79.

10.4.A reading of the plaint clearly show the nature of the claim though the technical phrases have not been used by the plaintiffs with reference to their claim and as held by the Honourable Supreme Court in the Judgements in S.B.Noronah Vs. Prem Kumari Khanna reported in (1980) 1 SCC 52 and Des Raj and others Vs. Bhagat Ram (Dead) by Lrs. and others reported in (2007) 9 SCC 641, the pleadings have to be read as whole and a common sense approach should be taken without non suiting a person on technical defects.

10.5.Ex.A.1 which is the basis of the claim clearly describes the pathway and the Advocate Commissioner's report and plan (Ex.C.1) also indicates the existence of the pathway put up right upto the common well situate in point I-J in the Advocate Commissioner's plan. It is only at the point where the water and air tank is situate and the breadth of the pathway has been reduced to 2 feet. Ex.A.1 does not show the existence of this water and Air tank, which is a latter addition. It is no doubt true that the pathway described in Ex.A.1 measures only 13 links and not 20 feet, as claimed by the plaintiffs.

10.6.It appears that after the defendants had fenced the property on either side, the extent of enjoyment had got reduced. This fact is also admitted by P.W.1, who would say that the fence has been put up only within defendants lands and therefore it cannot be stated that the defendants have encroached into the pathway, it is only the water and Air tank which is situate on the pathway.

10.7.Therefore, though there exists an alternate pathway in S.F.No.372/4, however considering the fact that the right of the plaintiffs emanates from Ex.A.1, of the year 1958 and since the easement is one by grant which does not get extinguished by Section 41 of the Indian Easements Act, the first point for consideration is answered in favour of the plaintiffs.



10.8. In view of the above discussions this Court is of the opinion that the plaintiffs are entitled to a declaration. The plaintiffs' right to Item No.2 cart track is as indicated in the Advocate commissioner's plan from point AB to point IJ and there shall be an injunction with reference to this cart track. However, since the plaintiffs have not asked for any mandatory injunction this Court cannot direct the pathway to be restored to its original length and breadth. In view of the above observations the 2nd point is also answered in favour of the plaintiffs to the extent mentioned above.

Consequently, the First Appeal is allowed to the extent mentioned herein above and the Advocate Commissioner's plan (Ex.C.1) shall form a part of the decree and the Judgement and Decree of the V Additional District Court, Coimbatore in O.S.No.675 of 2011 is set aside. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is also closed.

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

To

The V Additional District Judge,
Coimbatore.

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A.S.No.536 of 2018 &
C.M.P.No.13488 of 2018

VD(CO)
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