

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 30.10.2019	Delivered on:12.11.2019
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CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.2227 of 2004

1.Koneeswari

2.Minor Gowtham

3.Minor Yogapriya ... Appellants/Plaintiffs
(Minors 2 and 3 represented
by guardian mother Koneeswari
the first appellant.)

Vs.

1.Ramasami Gounder

2.Govindasami Gounder

3.Duraisami

4.Rangasami

5.M/s.Terra Agro Technologies
represented by its Manager
Elayamuthoor Village
Udumalpet Taluk
Coimbatore District.

... Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree of the learned Subordinate Judge, Udumalpet dated 31.10.2003 in A.S.No.23 of 2003 confirming the judgment and decree of the learned District Munsif, Udumalpet dated 10.07.2003 in O.S.No.429 of 1999.

For Appellants : Mr. V.Nicholas

For Respondents: R1, R3 and R4 are dismissed
as abated vide order dated 17/10/2019

: R2 and R5 - Set exparte
vide order dated 30.10.2019

JUDGMENT

This Second Appeal has been filed by the plaintiffs against the judgment and decree passed by the Sub-Judge, Udumalpet, in A.S.No.23 of 2003 dated 31.10.2003, confirming the judgment and decree passed by the District Munsif, Udumalpet, in O.S.No. 429 of 1999 dated 10.07.2003.

2. The appellants herein had filed a suit in O.S.No.429 of 1999, on the file of the District Munsif, Udumalpet, to declare their easementary right over the suit 'B' Schedule property and consequently to restrain the defendants from interfering with their right of using the suit 'B' schedule property as pathway by means of permanent injunction. The learned District Munsif, Udumalpet, by the judgment dated 10.07.2003 had dismissed the said suit with costs.

3. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.23 of 2003 on the file of the Sub-Judge, Udumalpet. The learned Sub-Judge, Udumalpet, by the judgment dated 31.10.2003 had dismissed the said appeal without costs and thereby, confirmed the judgment and decree passed by the trial Court. Feeling further aggrieved, the plaintiffs have filed the present Second Appeal.

4. For the sake of convenience, the parties are referred to as described before the trial Court.

5. The averments made in the plaint are, in brief, as follows:-

(a) The suit 'A' Schedule property belongs to the plaintiffs ancestrally. The suit 'B' Schedule property is the pathway meant for taking bullock carts to the suit 'A' Schedule property. The suit properties and other properties originally belonged to one Thimanna Gounder. The said Thimanna Gounder had four sons viz., 1) Chinnathambi Gounder 2) Karuthimana Gounder 3) Anumantha Gounder 4) Ramakrishna Gounder. Chinnathambi Gounder died several years ago. The defendants 1 to 3 are the sons of the said Chinnathambi Gounder. The fourth defendant is the son of Anumantha Gounder. The legal heirs of the said Thimanna Gounder namely, Karuthimana Gounder, Anumantha Gounder, Ramakrishna Gounder and the defendants 1 to 3 (sons of Chinnathambi Gounder) had partitioned their family properties under a registered partition deed dated 02.02.1959. In the said partition, the defendants 1 to 3 were allotted lands on the western side; On

the east of their lands, the share of fourth defendant's father Anumantha Gounder was allotted; On further east the share of Karuthimana Gounder was allotted and on further east the share of Ramkrishna Gounder was allotted. As per the said partition, the aforesaid persons have been enjoying their respective shares. After the death of Anumantha Gounder his son fourth defendant had succeeded to his share. Karuthimana Gounder was allotted 'A' Schedule properties in the aforesaid partition deed. After the death of Karuthimana Gounder, his son Sivasubramaniam Gounder succeeded to his property. The said Sivasubramaniam Gounder died on 16.06.1996 leaving behind his wife (first plaintiff) and his daughters (plaintiffs 2 and 3) as his legal heirs. After the death of the said Sivasubramaniam Gounder, the plaintiffs succeeded to his properties.

(b) Initially, the lands which are situated on the west of the first defendant's lands were Mandhai Poramboke. Now, the said lands are in possession of the fifth defendant and on further west Kallapuram- Elayamuthoor Main Road runs in north-south direction. Prior to partition, there was no pathway to reach the lands of the sharers and hence, all the sharers had formed 10 feet breadth east-west pathway from Kallapuram-Elayamuthoor Main Road up to the share of Ramkrishna Gounder. Only through the said pathway all the sharers have taken their carts and cattle. Though the said pathway was not mentioned in the aforesaid partition deed, all the sharers being relatives have been enjoying the same without any discontentment. The said pathway is shown as 'ABCDEFGHI' in the plaint rough plan. The plaintiffs are entitled to use the said pathway for reaching their lands from the Main Road. They got the said right by way of easement by implied grant and also easement of necessity. Since the first plaintiff is a lady and plaintiffs 2 and 3 are minor children, with a view to grab their lands, the defendants 1 to 4 colluding with the fifth defendant and preventing the plaintiffs from using the aforesaid pathway. Hence, the plaintiffs were constrained to file the above suit for the relief of declaration and permanent injunction.

6. The averments made in the written statement filed by the third defendant are, in brief, as follows:-

It is false to state that the plaintiffs are entitled to use the suit 'B' Schedule pathway, for reaching their lands. The plaintiffs and others had partitioned their lands under a registered partition deed dated 30.10.1998, in which, they have not mentioned the suit 'B' Schedule property as boundary, but in the plaint schedule they have mentioned the 'B' Schedule property as boundary. At the time of partition deed dated 02.02.1959 no pathway was allotted in the suit 'B' Schedule

property. It is false to state that on the west of the first defendant's property Mandhai Poramboke lands were there. On the west of the first defendant's property the land belonging to one Govindaraj Gounder was there. The second defendant and his wife had purchased the said land under a registered sale deed dated 11.06.1990. All the sharers have to reach their lands only through the Odai (stream) which runs east-west on the northern side. After purchase of the property from Govindaraj and his wife which is situated adjacent to Kallapuram-Elayamuthoor Main Road by the second defendant, the defendants 1 to 4 have entered into an agreement with the second defendant on 09.01.1996 for laying a cart track on his land. Accordingly, they laid a cart track in the said property for reaching their lands. In the said pathway neither the plaintiffs nor Ramakrishna Gounder has any right. The plaintiffs and Ramakrishna Gounder are using the aforesaid east-west Odai for reaching their lands. The fifth defendant had purchased the property by admitting the aforesaid pathway right of the defendants 1 to 4. Hence, the plaintiffs are not entitled to claim any pathway right in the suit 'B' Schedule property and therefore, the third defendant prayed to dismiss the suit.

7. The averments made in the written statement filed by the fourth defendant and adopted by the defendants 1 and 2 are, in brief, as follows:-

The allegation that the suit 'B' Schedule property has been used by the plaintiffs for reaching their lands and they got right over the said pathway by way of easement implied grant and easement by necessity are all false. The allegation that on the west of the first defendant's property Mandhai Poramboke was there is also false. The land which is situated on the west of the first defendant's land belongs to one Govindaraj Gounder and the second defendant had purchased the said land from Govindaraj and his wife under a registered sale deed dated 11.09.1990 and thereafter, the defendants 1 to 4 had laid a pathway from the Kallapuram-Elayamuthoor Main Road to the land of the fourth defendant. Subsequently, the fifth defendant had purchased the aforesaid land admitting the pathway right of the defendants 1 to 4. The plaintiffs have been using the east-west Odai which runs on the northern side for reaching their lands. Therefore, the plaintiffs cannot claim any right over the suit 'B' Schedule pathway and therefore, the defendants 1, 2 and 4 prayed to dismiss the suit.

8. Based on the aforesaid pleadings, the learned District Munsif, Udumalpet, had framed necessary issues and tried the

suit. During trial, on the side of the plaintiffs, the first plaintiff examined herself as PW1 and also examined one more witness as PW2. They also marked Exs.A1 to A3 as exhibits. On the side of the defendants, the third defendant was examined as DW1 and one more witness was examined as DW2. The defendants had marked Exs.B1 to B6 as exhibits. The Advocate Commissioner's report and plan were marked as Exs.C1 and C2 respectively.

9.The learned District Munsif, Udumalpet, after considering the materials placed before him, found that the suit 'B' Schedule pathway was formed by the defendants 1 to 4 for their use, in which, the plaintiffs cannot claim any right. He further found that the plaintiffs are having pathway only through the Odai which runs east-west on the north of their lands. Accordingly, he dismissed the suit with costs. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.23 of 2003 on the file of the Sub-Judge, Udumalpet. The learned Sub-Judge, had dismissed the said appeal confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the plaintiffs have filed the present Second Appeal.

10. This Court, at the time of admitting the second appeal, has formulated the following substantial questions of law:-

"1.Whether the plaintiffs have established the easement of necessity?

2. Whether there can be a presumption that the plaintiffs were given the right of easement by implied grant in the partition deed entered into among the family members, and whether the Courts below were right in not granting the relief as prayed for by the plaintiffs?"

11. During pendency of this Second Appeal, it was reported that the respondents 1, 3 and 4 died. Even after expiry of the time for taking steps to implead the LRs, the appellants have not taken steps. Hence, this Court, by the order dated 17.10.2019, has dismissed the Second Appeal against the respondents 1, 3 and 4 as abated. Insofar as the respondents 2 and 5 are concerned, notices were served and their names have also been printed in the cause-list, but they have not appeared either in person or through counsel and hence, they were called absent and set exparte. Therefore, after hearing the arguments of the learned counsel for the appellants and perusing the records, judgment is being passed in this Second Appeal.

12. Substantial Questions of law 1 to 2 :

The learned counsel for the appellants/plaintiffs has submitted that the Courts below failed to consider that eventhough in the partition deed the existence of the pathway is not mentioned, the evidence on record would show the existence of the said pathway. He further submitted that the Advocate Commissioner's report and plan would show that the defendants had put up a fence after the first inspection made by him. He further submitted that the Courts below failed to consider that the Advocate Commissioner has not shown any alternative pathway for reaching the plaintiffs' land and hence, the plaintiffs are entitled to use the suit pathway by easement of implied grant and also easement of necessity. He further submitted that the Courts below failed to consider the oral and documentary evidence adduced by both the parties in a proper perspective and therefore, he prayed to allow the Second Appeal and set aside the judgments and decrees passed by the Courts below and decree the suit as prayed for.

13. According to the plaintiffs/appellants, they are entitled to use the suit 'B' Schedule property as pathway for reaching their lands from Kallapuram- Elayamuthoor Main Road. Their further case is that they have got right to use the said 'B' Schedule property by easement of implied grant and also easement of necessity. Their further case is that since their properties and the other properties of the defendants 1 to 4 originally belonged to the common ancestor Thimanna Gounder eventhough the suit 'B' Schedule property pathway has not been mentioned specifically in Ex.A1 partition deed, it has to be presumed that implied right to use the said pathway has been granted. Their further case is that since they are not having any other alternative pathway, by easement of necessity also they are entitled to use the suit 'B' Schedule property pathway.

14. The case of the defendants 1 to 4 is that originally, to the properties, both the parties did not have access directly from the Kallapuram-Elayamuthoor Main Road and used to go to their lands only through the Odai which runs east-west and west of their lands. It is their further case that the land which is situated in between the Kallapuram-Elayamuthoor Main Road and the land of the first defendant originally belonged to one Govindaraj Gounder and that the second defendant had purchased the said land from the said Govindaraj Gounder and his wife Devaki under Ex.B2 sale deed dated 11.06.1990 and thereafter, for forming a road through the land which was purchased by the second defendant under Ex.B2, they entered into an agreement and laid a pathway from

Kallapuram-Elayamuthoor Main Road up to the fourth defendant's land. Their further case is that since they formed the said pathway by purchasing a land for their convenience, the plaintiffs cannot claim any right in the said pathway.

15. The Advocate Commissioner's report and plan (Exs.C1 and C2) would show that the suit pathway starts from Kallapuram-Elayamuthoor Main Road and runs towards east and thereafter, it turns towards south and again towards east and reaches the land of the fourth defendant. At the place where the said pathway starts from the aforesaid Main Road, on either side, lands of the fifth defendant are situated and further east, lands of the defendants 1, 2, 3 and 4 are situated continuously and on further east, the plaintiffs' lands are situated. It is not stated in the commissioner's report and also in his plan about the said pathway reaching the plaintiffs' lands.

16. Further, in Ex.A1 partition deed, the existence of the aforesaid pathway is not mentioned. Further that, in Ex.A1 partition deed it is stated that on the west of the first defendant's land a Mandhai Poramboke land is situated. The plaintiffs have admitted in their plaint that the said land is now in possession of the fifth defendant. The plaintiffs have not stated in what capacity, the fifth defendant is in possession of the said land. According to the defendants, the land which is situated on the west of the first defendant originally belonged to one Govindaraj Gounder and from the said Govindaraj Gounder and his wife, the second defendant had purchased the land under Ex.B2 sale deed and thereafter the defendants 1 to 4 have entered into a registered agreement vide Ex.B3 for forming a pathway from Kallapuram-Elayamuthoor Main Road up to the land of the fourth defendant.

17. Ex.B2 would show that the second defendant had purchased the land which is situated between the aforesaid Main Road and the first defendant's land and thereafter, the defendants 1 to 4 entered into an agreement vide Ex.B3 and in pursuance of the said agreement they laid the suit 'B' Schedule pathway to reach their lands from the aforesaid Main Road. So, it is clear that the contention of the plaintiffs that the suit 'B' Schedule property pathway was formed even at the time of Ex.A1 partition deed is not correct. Only after purchase of the land by the second defendant from one Govindaraj Gounder and his wife under Ex.B2 dated 11.06.1990 and thereafter, entering into an agreement under Ex.B3 dated 09.01.1996 the aforesaid pathway would have been formed. Therefore, the plaintiffs cannot claim right of easement by implied grant.

18. The next question that arises for consideration is whether the plaintiffs are entitled to use the suit 'B' Schedule pathway by easement of necessity. Easement of necessity can be claimed only in the land which belongs to common ownership. In this case, as already pointed out, the second defendant had purchased the land which is situated between the Main Road and the first defendant's land and thereafter, in pursuance of the agreement between the defendants 1 to 4 for reaching, the aforesaid pathway has been formed. So, the plaintiffs cannot claim right over the said pathway on the ground of easement by necessity also.

19. It is seen from the Commissioner's plan (Ex.C2) that on the north of the lands of both the parties an Odai runs east-west touching the lands of both the parties. Further, the partition deed dated 23.07.1980 which was entered into between the defendants 1 to 3 would also show that they got pathway to their lands only from the aforesaid east-west Odai which runs on the north of their lands. Only thereafter, in the year 1990, the second defendant had purchased the land which is situated between the first defendant's land and the Kallapuram-Elayamuthoor Main Road and thereafter, by virtue of Ex.B3 agreement they formed the suit 'B' Schedule pathway. So, before forming the said pathway the defendants 1 to 4 used only the aforesaid east-west Odai which runs on the north of their lands. Likewise, the plaintiffs also would have used only the aforesaid Odai for reaching their lands. Therefore, the plaintiffs cannot claim any pathway by easement of necessity also.

20. It is also to be pointed out that admittedly, the suit 'B' Schedule pathway runs through the lands of the defendants 1 to 5 and the plaintiffs claimed only easementary right. In the present second appeal the defendants 1 to 5 were arrayed as respondents 1 to 5. During pendency of this Second Appeal the defendants 1, 3 and 4 died. Even after expiry of limitation, the appellants/plaintiffs have not taken any steps for impleading the LRs of the deceased respondents 1, 3 and 4. Hence, this Court by the order dated 17.10.2019 has dismissed the Second Appeal against the respondents 1, 3 and 4 as abated. The relief asked by the plaintiffs is a joint one and in the absence of the legal representatives of the defendants 1, 3 and 4 before the Court, the relief cannot be granted against the other defendants also. So, on this ground also, the appeal has to be dismissed.

21. The trial Court taking into consideration of the facts and evidence held that there is no implied grant for using the

suit 'B' Schedule property by the plaintiffs. It also held that since the said pathway runs in the property which belongs to the fifth defendant, the plaintiffs cannot claim easement by necessity also. The first Appellate Court also confirmed the said findings. In the said factual concurrent findings, this Court cannot interfere. Accordingly, the substantial questions of law are answered against the appellants/plaintiffs.

22. In the result, the Second Appeal is dismissed. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1.The Subordinate Judge,
Udumalpet.

2.The District Munsif Court,
Udumalpet.

+1 CC to Mr.V. Nicholas, Advocate sr 94238.

S.A.No.2227 of 2004

SJ(CO)
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