

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09 / 07 / 2018
DELIVERED ON : 16/ 03 / 2020

CORAM:

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

SECOND APPEAL NO.104 of 2008
&
M.P.No.1 of 2008

1.Radhabai
2.Sugunabai

...Appellants /Plaintiffs

Vs.

1.G.Bheeman @ Bheema
2.Raju
3.Chinthamani

...Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 30.10.2007 made in A.S.No.46 of 2007 passed by the learned Subordinate Judge, Udhagamandalam, The Nilgiris confirming the judgment and decree dated 10.01.2007, dismissing the suit in O.S.No.180 of 2005 passed by the District Munsif Judge, Udhagamandalam,, The Nilgiris.

For Appellants : Mr.G. Kumud Jhabakh
For Respondents: Mr.N.Damodaran

J U D G M E N T

The present Second Appeal has been preferred against the concurrent findings of Courts below on a suit for permanent injunction.

2. For the sake of convenience the parties are called as per their rankings in the suit.

3. Plaintiffs are the appellants.

4. According to the plaintiffs their father one V.Viswanathan purchased a land measuring an extent of 8 ½ cents in R.S.No.1788 and 1787 of Ootacamund town together with all rights of way and other easements, advantages and privileges appertaining thereto by registered sale deed No.218/1980 dated 04.02.1980. He gifted the said property in equal share measuring

0.02 8/16 cents each in favour of the plaintiffs by way of registered gift deed Nos.305 and 306/1981 dated 20.10.1981. Ever since the gift in favour of the plaintiffs in the year 1981 they were in peaceful possession and enjoyment of their respective shares along with the right of way (foot path) measuring a width of 5 feet being the only access to their property. The foot path made of stone stairs branching out from the Municipal office road(foot path) and reaching the plaintiffs property. The right of way was in enjoyment and usage by the plaintiffs and other adjoining owners from a very long period without any disturbance or hindrance. It is the only access to the plaintiffs properties and when the defendants demolished their old building and intended to put up a construction they attempted to remove the revetment/retaining wall of the foot path and thereby infringed the plaintiffs right over the property. The attempt of the defendants in removing the stones laid down in the foot path was objected and a survey was conducted on 22.07.2005 and it was declared as a common pathway and the defendants have no claim over the same. Taking this as a cause of action a suit for permanent injunction restraining the defendants from removing the stones from the retaining wall supporting the foot path and disturbing the peaceful enjoyment and right of way of the plaintiffs was filed.

5. The defendants denied the contents of the plaint. The claim that the vendor of the property to the plaintiffs father herself had only 7 1/2 cents Whereas the plaintiffs father has purchased 8 ½ cents. At the time of purchase, the eastern boundary of the plaintiffs was shown as Municipal office lane situated in R.S.No.1783/2. There exists a foot path between the properties of the plaintiffs and the defendants. The plaintiffs were never in possession and enjoyment of the right of way over defendants land as claimed by them. The disputed foot path was built up by the defendants after they purchased the same by way of registered sale deed. The alternative pathway as found from the sale deed of original vendor and plaintiffs father would clearly show that there is no necessity for the plaintiffs to use the foot steps exclusively belonging to the defendants. In fact the plaintiffs attempted to include their name as owners of the property in revenue records. Patta was transferred in favour of them and after appeal by the defendants it was deleted and restored to its original position in the year 1996 itself. The defendants never removed the stair case and there is no right of way available to the plaintiffs over the foot path belonging to the defendants. In fact they have access to their property through the Municipal lane which the eastern boundary of the properties of the plaintiffs.

6. The Trial Court framed appropriate issues. Plaintiff husband examined himself as P.W.1 and marked Exs.A1 and A2. Defendants 1 and 2 examined themselves as D.W.1 and D.W.2 and marked Exs.B1 to B14. Through Court the Advocate Commissioner and Surveyor were examined as C.W.1 and 2 and Exhibits C1 and C2 were marked.

7. The Trial Court after considering the oral and documentary evidence, came to a conclusion that plaintiff have not made out a case for easement by necessity and dismissed the suit.

8. Against which, the plaintiffs preferred the appeal and the Lower Appellate Court has held that the plaintiffs have failed to prove their right of way and found that they are not entitled to easementary right as there is an alternative passage available to the plaintiffs property and dismissed the appeal. Aggrieved over the same, the plaintiffs have preferred the above appeal.

9. On 17.08.2009, this Court admitted the Second Appeal on the following questions of law:

(1) Whether the Courts below are right in holding that the title to the property is a prerequisite to apply Section 15 of the Indian Easement Act?

(2) Whether the Courts below are right in holding that to apply the theory of easement of necessity the property upon severing into two parts any one of the share could not have a way alone can claim?

(3) Whether the Courts below are right in requiring for a document by ignoring the admission made by the defendant in evidence?"

10. Learned counsel for the appellants would contend that the defendants have categorically admitted that even before the purchase of the property by defendants, the plaintiffs were using the path way. The Court below had erroneously dismissed the suit holding that the plaintiffs did not have title to the passage. The gift deeds executed by their father vide Exs.A2, A3 in the year 1991 was not challenged and that they were in continuous possession and enjoyment of the right of way mentioned therein. Therefore, they should be granted easement right by necessity and dismissal of the suit on the ground that suit was not filed for declaration is bad. Once the defendants admit the usage of the pathway by plaintiffs, it is a conclusive proof and when it is substantiated by the revenue records that it is commonly used by both, the Courts below should have decreed the suit. Failure to do so is erroneous and as per

explanation 1 to Sec.15 of the Indian Easements Act, 1882, when the appellants were enjoying the right of way as found in the gift document in the year 1981 for more than 20 years without interruption till the date of filing of the appeal, the easementary right should have been granted in their favour. Therefore, he would contend that the judgments of the Courts below ought to be reversed.

11. Per contra, learned counsel appearing for the respondents/defendants would contend that the vendor of the property of the plaintiffs father herself only possessed 7 ½ cents. Where as the plaintiffs father has gifted more than what he has purchased with an ulterior motive to encroach the defendants property.

12. It is well proved by the documents marked as Exs. A2, A3, B6 and C1 that there exists an access through Municipal lane to the plaintiffs property. When an alternative path way is available they are not entitled to claim any easementary right by necessity. It is clearly proved that during cross examination of the witnesses, that there is a passage leading to the Municipal office is available between the disputed foot path belonging to the defendants and the properties of the appellants. When it is established, that there is a separate access to the plaintiffs property adjacent to the foot path belonging to the defendants and also the conveyance of excess extent of property by predecessor in title by itself prove that the plaintiffs are not entitled to any discretionary and equitable relief and Courts below have rightly dismissed the same.

13. I have considered the rival submissions.

14. Admittedly, the foot path measures 5ft X 61 ft is the subject matter of dispute. Plaintiffs father purchased a house plot measuring an extent of 8 ½ cents in the year 1980. He purchased the property from one Karthiyayini Ammal. The said Karthiyayini Ammal, vendor of the plaintiffs father had purchased the property from one Meenakshiammal. From perusal of Ex.B6 sale deed of the year 1961 reveals that only an extent of 7 ½ cents was conveyed in favour of Karthiyayini Ammal whereas the plaintiffs father had purchased an extent of 8 ½ cents together with right of way and other easements from Karthiyayini Ammal without any documentary proof or recitals in the indenture for having acquired the excess extent. When the vendor of the plaintiffs father herself had possessed only 7 ½ cents, it is not possible for her to sell more than she entitled to. On the other hand a perusal of the sale deed marked as Exs.B2,B3 and B4 in favour of the defendants clearly shows the suit property exclusively belong to them and they have clear and valid title

to the same. A perusal of Ex.B1 a photograph shows that a passage running by side of the disputed pathway. The Commissioner in his cross examination has categorically admitted that there exists a passage leading from plaintiffs property to the Municipal office lane. The exhibits marked on the side of plaintiffs vide Ex.A2 and A3 also shows Municipal office lane as Eastern boundary of the property. While it is established that there is another access to the plaintiffs property through the Municipal office lane, the claim of the appellants that they had right of easement through a gift deed of the year 1991 is not sustainable. The gift deed of the year 1991 was executed by the father in favour of the daughters is a self serving document. The defendants are not party to the documents. There is no mention about the footpath measuring 5ft by 61 ft in the sale deed executed by the original vendor of the plaintiffs father. The general statement that the plaintiffs father was entitled to right of way and easementary rights will not create a right over the properties purchased by the defendants for their exclusive use. The sketch exhibited as C2 also proves that a separate passage leading to the plaintiffs property is available on ground. Apart from this, the of revenue records vide exhibits A4 and A5 and Exs.B7 to B10 clearly shows that the plaintiffs have no right or interest over the usage of footpath, much less they do not have any easementary rights. For a person who claims easementary rights shall establish that there is no other passage to access his property other than the servient property over which he claims easementary rights and that he continue to enjoy the same peacefully and without interruption for more than 20 years. In the instant case, plaintiffs though pleaded that they and other owners of the properties were enjoying the same, absolutely failed to adduce any evidence and have failed to establish that they had enjoyed the foot path peacefully with the knowledge of the servient owner for more than 20 years. On the other hand the defendants disproved the case of the plaintiffs and proved that there is alternate access to the property of plaintiffs through oral and documentary evidence. Therefore, the question of law No.1 raised by the appellants is answered in negative.

15. In so far as question of law No.2 is concerned, the access to their property is the eastern boundary viz., Municipal office lane. By dividing the property, the access is not cut both the plaintiffs have access through the same lane and therefore by severing the property into two parts any one of the sharer could alone have access and the other cannot claim, will not arise in the instant case. The example given by the Trial Court is totally in a different context and that example will not apply to the plaintiffs case. Since both the properties have access through Municipal office lane. Second question of law is also not sustainable. A perusal of the entire evidence does not

show any admission on the part of the defendants. They had never admitted that plaintiffs had access through the stone stairs exclusively belonging to the defendants, on the contrary the evidence is otherwise. Hence, the question of law No.3 is also answered against the appellants.

16. In the result, the second appeal is dismissed. No costs. Connected miscellaneous petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1.The Subordinate Judge,
Udhagamandalam, The Nilgiris

2.The District Munsif , Udhagamandalam,
The Nilgiris.

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The Section officer
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+1 CC to Mr. N.Damodaran, Advocate sr 22887
+1 CC to Mr.G. Kumud Jhabakh, Advocate sr 22864.

सत्यमेव जयते SECOND APPEAL NO.104 of 2008

MG (CO)
SP (13/08/2020)

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