



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 09.11.2020	Pronounced on: 19.11.2020
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THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

S.A.No.309 of 2009
& M.P.No.1 of 2009

1. Muthusamy,
S/o.Karuppanna Goundar.

2. Saravanan,
S/o.Muthusamy.

3. Malliaga,
D/o.Muthusamy.

(All residing at Kattukottai,
Thirumalaigiri Village,
Namakkal Taluk and District) ...Appellants/Appellants/Defendants

/versus/

Rajendran,
S/o.Karuppanna Goundar,
Kattukottai,
Thirumalaigiri Village,
Namakkal Taluk and District. Respondent/RespondentPlaintiff

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, praying against the judgment and decree in A.S.No.40 of 2004, dated 11.06.2008, passed by the Learned Subordinate Judge, Namakkal, confirming the judgment and decree in O.S.No.469 of 2002, dated 25.03.2004, on the file of the Principal District Munsif Court, Namakkal.

For Appellants : Mr.C.Jagadish

For Respondent : Mr.M.S.Palaniswamy

JUDGMENT

(The case has been heard through video conference)

The Second Appeal is filed by the defendants in the suit for bare injunction having lost the respondent before the Courts below.

2.The brief facts of the case is that the plaintiff and the 1st defendant are brothers. The pathway mentioned as "ABCD" in the suit sketch is a common pathway of the plaintiff, the 1st defendant and their brother Subramanian. The 'well' marked as X, the second item of the suit schedule, is commonly enjoyed by the joint family members in turn. Based on 25.03.1985 partition entered between Karuppanna gounder his wife Muthaiammal and three sons Muthusamy (1st defendant), Subramaniam and Rajendran (plaintiff). Under the partition, the 'A' schedule property was allotted to the 1st defendant; the 'B' schedule property was allotted to Subramaniam and the 'C' schedule property was allotted to the plaintiff (Rajendran). For the enjoyment of their respective properties, the 'ABCD' common pathway to reach the north-south panchayat road on the west of their respective properties is used by the brothers. The common pathway from A to B runs into a straight line and turns to north in 'L' shape from B to C where the common well is located. Thereafter, from 'C' it turns to east the width of the common pathway mentions as '17' links in all the documents, but for convenience at the turning point 'B' and 'C' the width is little wide between 20 and 23 links. The said arrangement was made in the year 1984 by the parties and demarcated with stone boundaries. Later, due to misunderstanding between the brothers, the plaintiff was restricted from using the pathway to reach his land marked as Ex.X1 on the eastern extreme by the 1st defendant and his children, who are the 2nd defendant and 3rd defendant. They have also preventing him from using the common well to draw water and irrigate his land. They have planted trees along 'ABCD' common pathway preventing free access. Hence, suit for injunction restraining the defendants from preventing the plaintiff from enjoying the common pathway and the right of drawing water from the common well and also mandatory injunction to remove the obstructions caused by the tress and other plantations.

3.The defendants contested the suit admitting that under the partition deed dated 25.03.1985, the brothers have divided the properties under respective schedules. The "ABCD" pathway is earmarked as common pathway. However, the width of the pathway at 'B' and 'C' point is only 17 links. It was not expanded to '23' links at 'C' point and '20' links where the common well is located as alleged in the plaint. The width of the common pathway at all points always been 17 links. At no point it was extended. The defendants never prevented the plaintiff from using the common pathway or drawing water from the common well in turn.

4.The trial Court, based on the pleadings framed the following issues:

1. Whether the plaintiff is entitled for permanent injunction in respect of ABCD pathway?

2. Whether the plaintiff is entitled for permanent injunction in respect of common well?

3. Whether the plaintiff is entitled for mandatory injunction as prayed for ?

4. Whether the width of ABCD pathway is only 17 links as pleaded by the defendants?

5. Whether the plaintiff enjoyment of common well is not disturbed by the defendants?

6. What other relief the plaintiff is entitled to?

5. Before the trial Court, On behalf of the plaintiffs. the plaintiff and one Arumugam were examined as PW-1 and PW-2. 8 documents were marked. On behalf of the defendants, the 1st defendant and the 2nd defendant were examined as DW-1 and DW-2. 2 documents were marked. The Commissioner report and sketch were marked as Exs.C1 to C4.

6. The trial Court, on considering the evidence let in by the parties and the Commissioner Report, allowed the suit holding that at the turning point marked as 'BC' the width of the pathway is above 17 links and demarcation of boundary with stone indicates that the parties have expanded the pathway at the turning point 'BC'. The Commissioner Report and Sketch, which show the width of the pathway at 'BC' point is 28 links and 27 links, the trial Court held that, the parties on their own accord had expanded the pathway at the curve to have a smooth negotiation and it is for the convenience of all the sharers. Hence, the trial Court allowed the suit as prayed for. Regarding the use of the common well, the defendants themselves have stated that they never disturbed the plaintiff from enjoying the same as a co-owner. So, the trial Court also granted injunction regarding the well.

7. Aggrieved by the trial Court judgment and decree, the defendants preferred appeal before the Sub Court, Namakkal alleging that the trial Court has not properly appreciated the issue to arrive at a right conclusion. The width of the common pathway as noted by the Commissioner is not in accordance with the partition deed Ex.A1. 'ABCD' pathway has been assigned separate S.No.38/2C and subdivided with specific linear measurement. The Trial Court failed to take note of the said fact and erroneously accepted the deviation in the pathway as noted by the Advocate Commissioner was expanded by consent.

8.The lower appellate Court, after re-appreciating the evidence, relying upon the admission of the parties that expansion of the pathway at 'BC' point was done by them and the admission of fixing the boundaries with stone jointly along with other co-owners of the pathway, dismissed the appeal. It also took note of the fact that any alteration of the existing pathway will cause inconvenience to the users of the pathway including the defendants.

9.Aggrieved by the first appellate Court judgment confirming the judgment and decree of the trial Court the second appeal is filed.

10.In the second appeal, the learned counsel appearing for the appellants would submit that the Courts below have failed to properly appreciate the law relating to easement. The right of common pathway came into existence only under Ex.A1, which is a registered partition deed among the brothers entered on 25.03.1985, wherein the width of the pathway is mentioned as 17 links. When it is established by the defendants that as per the terms of partition, the width of pathway can only be 17 links and not more than that, the plaintiffs cannot claim right of easement for a larger width, which should be prescribed by peaceful and open enjoyment by more than 20 years. Whereas the common pathway came into existence only after the partition deed of the year 1985 which is obviously less than 20 years.

11.The learned counsel appearing for the appellants would also submit that the finding of the Courts below that the plaintiff have prescribed easementary right over the pathway over and above the width earmarked under the partition deed is perverse. The Courts below failed to properly appreciate the Commissioner Report in respect of measurements at each point. The Courts below erred by taking note of diagonal measurement at point 'B' and 'C', and had arrived at a wrong conclusion that at point 'B' and 'C', the width of the road has been expanded by consent for the convenience of the parties.

12.The learned counsel appearing for the respondent would submit that the Courts below on considering the evidence and on facts, had arrived at a concurrent finding that the plaintiff cannot be disturbed from using the common pathway marked as 'ABCD', The variation of width of the pathway on the curve of the pathway was for easy negotiation. The appellants attempt to narrow the pathway cannot be entertained.

13.Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondent. Perused records.

14. On perusal of the pleadings, the grievance of the plaintiff appears to be the intervention of the 1st defendant and his family members his using of the common pathway. The Commissioner report indicates that at the curve marked 'BC', the width of the common pathway is more than 17 links whereas as per the partition deed Ex.A1, the entire stretch of common pathway is only 17 links. The reason for expanded the width at 'BC' point has been clearly explained and justified by the plaintiff through the evidence and it has also been admitted by the parties that such expansion was done by consent of all the parties. The parties by consent have decided to have the common pathway in a particular manner for their usage and the minor expansion at the curve for easy negotiation cannot be found faulted. The defendants cannot prevent the plaintiff from using the common pathway under any pretext. Therefore, this Court finds no merit in the second appeal to interfere with the concurrent finding of the Courts below. Hence, this second appeal is liable to be dismissed.

15. In the result, the Second Appeal is dismissed. No order as to costs. Consequently, connected Miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-VIII)

//True copy//

Sub Assistant Registrar

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To:-

1. The Subordinate Judge,
Namakkal.
2. The Principal District Munsif Court,
Namakkal.
3. The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to Mr.C.Jagadish, Advocate SR.No.37227

+1cc to Ms.Palaniswamy, Advocate SR.No.37312

S.A.No.309 of 2009
& M.P.No.1 of 2009

GP (CO)
GMY (13/05/2021)