



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	24.09.2021
Pronounced on	29.10.2021

CORAM

THE HON'BLE Ms. JUSTICE R.N.MANJULA

S.A.No.1550 of 2008

1.Selvaraju (died) ... Appellant/Respondent/Defendant
2.Dhanam
3.Vijaya
4.Rajamani
5.Thenmozhi ... Appellants
[*Appellants 2 to 5 brought on record as LRs of the deceased sole appellant viz., Selvaraju vide Court Order dated 27.04.2021 made in MPs 1 and 2/2015 in SA 1550/2008]

Vs.

Balakrishnan ... Respondent/Appellant/Plaintiff

Prayer: This Second Appeal is filed under Section 100 of Code of Civil Procedure against the judgement and decree of the learned Additional District Judge, Fast Track Court, Ariyalur dated 13.06.2007 in A.S.No.93 of 2003, reversing the judgement and decree of the District Munsif Court at Jeyankondam dated 29.08.1997 in O.S.No.453 of 1995.

For Appellant : Mr.S.Mukunth
for M/s.Sarvabhauman Associates

For Respondent : No appearance

JUDGEMENT

(Heard through video conferencing)

This Second Appeal has been preferred against the judgement and decree dated 13.06.2007 of the learned Additional District Judge, Fast Track Court, Ariyalur in A.S.No.93 of 2003.

2. The deceased appellant was the sole defendant in the suit and the appellants 2 to 5 are his legal representatives.



3. The avernments of the parties in brief:-

The father of the defendant namely Rathina Mudaliyar is the son of one Arumuga Mudaliyar. Rathina Mudaliyar has got a brother by name Chockalinga Mudaliyar. The portions shown as G2 G1 G C D D1 B A1 A A2 in the suit plan are the portions of house and garden fell to the share of Rathina Mudaliyar. The portions shown as A2 AA1 BB1 M K2 K1 K is allotted to the share of Chockalinga Mudaliyar. After the demise of Chockalinga Mudaliyar, his son Thangavel Mudaliyar inherited his father's share and was in enjoyment of the same. He sold the garden portion to his paternal uncle Rathina Mudaliyar. After purchasing the above said portions, Rathina Mudaliyar was in enjoyment of the same along with his share.

3.1 There is a cow shed in the property enjoyed by Rathina Mudaliyar and it is shown in the plaint plan as G2 G1 A K1 K A2. Rathina Mudaliyar used to reach the cow shed by walking on the lane situated on the Northern side of his house. The deceased appellant and one Marimuthu are the two sons of Rathina Mudaliyar. The elder son Marimuthu got married and he died when his son Elavarasan was conceived by his wife. During his lifetime, Rathina Mudaliyar had executed a Will and bequeathed the suit property to his minor grandchild. After the demise of Rathina Mudaliyar, the Will came into force and the deceased first appellant and he was in enjoyment of garden portion shown as G2 G1 G C B A1 A A2, the backyard and the house portion shown as C D D1 B C. The said grandson of Rathina Mudaliyar namely Elavarasan got the portion shown as A2 A A1 B K2 K1 K and C D B1 B and was in enjoyment of the same through his mother and guardian Mangallamal. The said portion would include the half right in the half portion of the lane on the northern side. The said Mangallamal had sold the garden part shown as A2 A A1 B K2 K1 K in favour of the plaintiff for the welfare of minor Elavarasan. In the said sale deed itself it is mentioned that the plaintiff has got the right of pathway over the northern side of the lane in order to reach his cow shed. The said pathway is shown as A A1 B C B E K G H I in red colour.

3.2 The plaintiff was in enjoyment of the said lane; excepting the said pathway, the plaintiff has no other pathway. The plaintiff has got an easementary right over the pathway. But on 01.08.1995, the defendant with an intention of disturbing the plaintiff's easmentary right blocked the pathway at the points A A1 by putting bamboo fence at the points A and B. The plaintiff thwarted such attempt; however, the defendant continued to deny the plaintiff's easementary right and caused disturbance; so the plaintiff has filed the suit for declaring his easementary right



over the pathway and mandatory injunction for directing the defendant to remove the natural fence.

4. The Brief facts of the written statement are as follows:-

The plaintiff does not have any easementary right over A A1 B C D E F G H I as alleged by him; it is true that the plaintiff had purchased the garden and cow shed from Mangallamal on 01.03.1999. However, the plaintiff was having access to the cow shed by walking towards his old house and through his garden itself easily; the plaintiff was enjoying the old garden and his newly purchased garden as one unit; hence, there is no necessity to walk over the suit pathway; even if there was any easementary right by necessity, it will get extinguished after the purchase of the garden from Mangallamal; the deceased first appellant had raised a compound wall to separate his property from the plaintiff's property; at that point of time, the defendant did not make any objection; the said compound wall raised by the defendant got demolished in the recent cyclone; hence, the defendant has reconstructed his compound wall and only during that time the plaintiff raised objections with some ulterior motive.

4.1 The defendant's brother's son Elavarasan had executed a sale deed in favour of the respondent on 19.09.1988 and sold his house along with the land on the northern side; so, the plaintiff cannot claim any right over the pathway; the vendors of the plaintiff namely Elavarasan and Mangallamal are necessary parties to the suit; in the plaintiff's sale deed dated 01.03.1979, there is no mention about the suit pathway; the plaintiff's cow shed and his garden would run till the western side street; the pathway mentioned in the sale deed is only with reference to the said street; so the plaintiff has no cause of action and hence, the suit has to be dismissed.

5. Basing on the above pleadings made by the parties the learned trial Judge has framed the following issues:-

- 1) வழக்கிடைச் சொத்தில் வாதிக்கு புழங்குரிமை ஏற்பட்டுள்ளதா?
- 2) வாதி கோரும் விளம்புகை பரிகாரம் கிடைக்கத்தக்கதா?
- 3) வாதி கோரும் செயலுறுத்துக்கட்டளை கிடைக்கக்கூடியதா?
- 4) வாதிக்கு கிடைக்கும் பரிகாரம் என்ன?

6. During the course of the trial, on the side of the plaintiff, two witnesses were examined as P.W.1 and P.W.2 and 4 documents were marked as Exs.A1 to A4. On the side of the



defendant, two witnesses were examined as D.W.1 and D.W.2 and 3 documents were marked as Exs.B1 to B3. The Commissioners' report and plan were marked as Exs.C1 and C2.

7. At the conclusion of the trial and after hearing the arguments, the learned trial Judge has dismissed the suit. Aggrieved over that, the plaintiff has preferred the First Appeal before the Additional District Judge, Fast Track Court, Ariyalur in A.S.No.93 of 2003. After hearing the appeal, the learned First Appellate Judge has allowed the appeal by setting aside the judgement and decree of the trial Court. Aggrieved over the said judgement, the defendant has preferred the present Second Appeal and the Second Appeal has been admitted on the following substantial questions of law:-

1. Whether the Lower Appellate Court after holding that the respondent had failed to prove the easement by grant is correct in ultimately concluding that Exs.A2, B2 and B3 read cumulatively gives such a right?

2. Whether the Lower Appellate Court is correct in law in overlooking the contradictory pleas raised by the respondent wherein the respondent has pleaded an easement of grant, easement of prescription and easement of necessity?

8. Heard the arguments advanced by Mr.S.Mukunth, learned counsel for the appellants and perused the materials available on record.

9. The learned counsel for the appellants submitted that the respondent/plaintiff had raised inconsistent claims by claiming easement by prescription and easement of necessity; under Ex.B2 - Will, the vendor of the plaintiff has not been granted with any right over the suit pathway; the learned First Appellate Court has decreed the suit on assumption and presumption; even for the sake of arguments, it is admitted that the respondent's vendor used the pathway and the same got extinguished upon the subsequent purchase made by the respondent; the respondent can directly reach the cattle shed through his backyard itself and hence, there is no necessity for him to walk over the suit pathway; the Commissioner's report and plan would also show the same; but the learned First Appellate Judge has omitted to appreciate the same; the cattle shed and backyard of the plaintiff forms one integral unit and for which, the plaintiff has no necessity to walk through any third parties' property; the pathway mentioned in Ex.B2 - Will, would refer the way to reach the house and not the cow shed. Hence, the appeal



has to be allowed.

10. There is no dispute about the physical features and the antecedents of the properties belonging to respective parties. The suit property and other properties were originally belonged to the two sons of Arumuga Mudaliyar namely Rathina Mudaliyar and Chockalinga Mudaliyar. After the demise of Chockalinga Mudaliyar, his son Thangavel Mudaliyar has sold the portion of the property inherited from his father in favour of his paternal uncle Rathina Mudaliyar. The said portion is shown as A2 A A1 B B1 K2 K1. After purchasing the above said portion, the said Rathina Mudaliyar was enjoying the same as one lot along with his ancestral properties lying adjacent to it. He also had a cow shed on the western side of the field purchased by him from Thangavel. In the plaint plan, the said cow shed is shown as G2 G1 A A2 K1 K. It is alleged that the said Rathina Mudaliyar was using the land on the northern side of his house to reach the above shed.

11. Rathina Mudaliyar had a grandchild by name Elavarasan, who is the son of his predecessor son Marimuthu. The first appellant is the another son of the said Rathina Mudaliyar. It is not in dispute that Rathina Mudaliyar had executed a Will during his lifetime and bequeathed his properties in favour of his grandson Elavarasan and the first appellant. After his lifetime, the Will came into force. The first appellant became entitled to the portion shown as G2, G1, G, C, B, A1, A, A2 and C, F, F1 B C and also half of the house property. Elavarasan became entitled to the portion shown as A2 A A1 B K2 K1 K and the house property and enjoyed the same through his mother and guardian Mangallamal. As guardian of her minor son Elavarasan and for his welfare, Mangallamal sold the portion shown as A2 A A1 B K2 K1 K along with the cow shed in favour of the respondent/plaintiff Balakrishnan on 01.03.1979.

12. There is no dispute with regard to the sale transaction and other title deeds relating to the properties involved in this suit. The claim is only with regard to the alleged right of pathway conveyed in the said sale deed. It is alleged that only through that pathway A A1 B C D E F G H I, the vendor of the respondent/plaintiff and thereafter the respondent/plaintiff have been walking to reach the cow shed and the garden. It is alleged that he has the easement of necessity towards the pathway in order to reach his cow shed shown as A2 A K1 K. The first appellant's sale deed dated 01.03.1979 is shown as Ex.A2. The first appellant/defendant purchased the rest of



the portion of the house from Elavarasan on 19.09.1988 and the said sale deed is shown as Ex.B3. There is no dispute with regard to the said sale transaction also. But the contention of the first appellant is that the pathway shown in Ex.A2 - sale deed dated 01.03.1979 and Ex.B2 - Will dated 02.04.1971, refers only the street on the western side of the defendant's land and they do not refer the suit pathway. It is claimed by the first appellant that after the respondent/plaintiff's purchase in the year 1979 vide Ex.A2, he had constructed a wall between the points A1 and A and completely separated the properties of both the parties.

13. The present physical features of the properties would show that the respondent/plaintiff has got no necessity to walk into the suit pathway in order to reach his cow shed on the western side of his property. Because the respondent/plaintiff has got the convenience of walking into his own lands abutting the north-south street. The respondent/plaintiff claims that the suit pathway alone was referred in Ex.A2 - Sale Deed and it is a grant. Even if it prior to the plaintiff's sale, the whole property remained as an undivided joint family property. In such circumstances, it would have been necessitated to create an easementary right of pathway in order to reach the cow-shed conveniently. As on date, the pathway is not an indispensable necessity to reach the cow shed.

14. The learned counsel for the appellant relied on the decision of the Hon'ble Supreme Court reported in 2007-2-LW 945 [Hero Vinoth Vs. Seshammal]. In the said judgement, it is held that the easement of grant is a matter of contract between the parties and that has to be governed by the terms of contract and hence, even after the necessity got extinguished, the right over the said pathway will not get extinguished like an easement of necessity. The relevant portion of the above said judgement is extracted as below:-

.....
" 28. The question whether an easement is one acquired by grant (as contrasted from an easement of necessity) does not depend upon absolute necessity of it. It is the nature of the acquisition that is relevant. Many easements acquired by grant may be absolutely necessary for the enjoyment of the dominant tenement in the sense that it cannot be enjoyed at all without it. That may be the reason for the grant also. But easement of grant is a matter of contract between the parties. In the matter of grant the parties are



governed by the terms of the grant and not anything else....."

15. The facts of this case would show that no specific document had ever been executed between the parties with regard to the grant of pathway. The parties have not set out the terms and conditions with regard to the enjoyment of the pathway. It is a simple permission passed on with the title of the property for the purpose of reaching the cattle shed. In an easement of grant, there will be an understanding between the parties and the grant will be authenticated by virtue of specific recitals and the terms of contracts will also be set out therein.

16. The entire reading of the exhibits in Exs.A2, B2 and B3 would show that the reference about the pathway is only in the schedule of the properties. There is no such recital in the body of the sale deed and there is no mention about any agreement with regard to pathway. Hence, the understanding of the learned First Appellate Judge that the suit pathway should be considered as a subject matter of contract is wrong.

17. After the subsequent purchases made by respective parties, they could have enjoyed the same by keeping it as a single unit. In such case, enjoyment of every bit of the lands does not require any easementary right over anyone's property. When such is the ground reality, the learned First Appellate Judge ought to have invoked Section 41 of the Indian Easements Act. The learned trial Judge has rightly invoked the above provision and held that the easementary right over the suit pathway got extinguished due to the subsequent sale of the properties in his favour of the respondent/plaintiff. For the purpose of convenience, Section 41 of the Indian Easements Act is extracted hereunder:-

"41. Extinction on termination of necessity.—An easement of necessity is extinguished when the necessity comes to an end."

18. An easement which arose at some point of time was an easement of necessity and not as an easement of grant. Such kinds of easement cannot be considered as easement of grant and is a subject matter of contract. Hence, no perpetual right can be conferred on the respondent/plaintiff with regard to suit pathway, more particularly, after the necessity itself has ceased to exist due to the subsequent purchase of a property adjacent to the suit pathway. This is a clear case which mandates the application of Section 41 of the Indian Easements Act. Since the First Appellate Judge had misdirected himself by considering the easement as an easement of grant, the substantial questions of



law are answered in favour of the appellants.

In the result, this Second Appeal is allowed and the judgement and decree dated 13.06.2007 passed by the Additional District Judge, Fast Track Court, Ariyalur in A.S.No.93 of 2003 is set aside and the judgement and decree dated 29.08.1997 passed by the District Munsif Judge, Jeyankondam in O.S.No.453 of 1995 is upheld. No costs.

Sd/-

Assistant Registrar(CS-II)

// True Copy //

Sub Assistant Registrar

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To

1.The Additional District Judge,
Fast Track Court,
Ariyalur.

2.The District Munsif Court,
Jeyankondam.

Copy to:

The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to M/s.Sarvabhauman Associates, Advocate SR.No.56527

S.A.No.1550 of 2008

BS(CO)

CB(07/01/2022)