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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 07.01.2022
PRONOUNCED ON : 21.01.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.253 of 2010
and M.P.Nos.1 & 2 of 2010

Subramani ...Appellant/1st Plaintiff

Vs.

1. Marappa Gounder
2. Palanichamy
3. Ganesan
4. Chinnapayan @ Duraisami
Kaliappa Gounder (Died)
5. Palaniappan
6. Karuppusamy & Chinnasamy ... Respondents/... Defendants 1
to 4 and Plaintiffs 2 and 3

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 06.02.2009 made in A.S.No.21 of 2008 on the file of the learned II Additional Subordinate Judge, Gobichettipalayam, confirming the judgment and decree dated 22.10.2007 made in O.S.No.21 of 2004 on the file of the learned District Munsif, Sathyamangalam.

For Appellant : Mr.S.Parthasarathy,

For Respondents : Mr.Titus Enock [for R1 to R4]
for Mr.I.C.Vasudevan
RR5, 6 No Appearance

J U D G M E N T

The Second Appeal is focused as against the judgment and decree dated 06.02.2009 passed in A.S.No.21 of 2008 by the learned II Additional Subordinate Judge, Gobichettipalayam, confirming the judgment and decree dated 22.10.2007, made in O.S.No.21 of 2004 by the learned District Munsif, Sathyamangalam.



2. For the sake of convenience, hereinafter the parties are referred to, as per their litigative status before the trial Court.

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3. The laconic averments made in the plaint, are as follows:

(i) The 1st plaintiff is the absolute owner of the land comprised in Survey Nos.167/2, 8, 10, 166/5, 6, 9 and 174/3, 5 of Sunkarampalayam Village. Similarly, the 2nd and 3rd plaintiffs are having the lands in Survey Nos.166/2, 3, 4, 7, 8, 10, 11, 167/3, 4, 9 and in 174/4, 6, 7 of the same village. The 3rd plaintiff is having three brothers, among which, from one of the brother Arumugam, he purchased the land vide sale deed dated 15.02.1989. Further another brother Kaliappa Gounder, is also having a share in the suit property. Since the said Kaliappa Gounder had no intention to file a suit, he was added as the 5th respondent in the suit.

(ii) The fathers of the plaintiffs 1 to 3, are brothers and their father's name is one Karuppa Gounder. Plaintiffs are having the land on the Eastern side of the North-South of the cart track, which was shown in the rough sketch. From the date of purchase and also from the date of grant, the plaintiffs paid the necessary tax to the suit land, and they have been cultivating their lands.

(iii) The defendants are having the agricultural lands on the eastern side of the plaintiff's land. The defendants 2 to 4 are the sons of the first defendant. Before filing the suit, the defendants 1 to 4 asked the plaintiffs to allot some portion in the land owned by the plaintiffs, as a cart track. Since the plaintiffs have refused to the same, the defendants 1 to 4, damaged the live fence, which was marked as 'XY' in the rough plan. In the panchayat held, the defendants asked apology and thereafter, they made a proclamation that they would form a cart track in the plaintiff's land. Previous to the suit, the defendants reached their field by using the land, which was situated on the Eastern side of their lands. At no point of time, the suit land has been used as a cart track. Now, the defendants are attempting to form a cart track. Hence, the suit.

4. The averments found in the written statement filed by the 1st defendant, which were adopted by the defendants 2 to 4, are as follows:

(i) The averments made in the plaint with respect to the lands owned by the plaintiffs are true. However, the lands in Survey Nos.166/12 and 174/9 belongs to 1st defendant. After



putting up a hut, the defendants were cultivating the said land for the past 70 years. The defendants used to take cart through SF No.166, which belongs to the plaintiffs.

(ii) The existence of cart track was mentioned in the sale deed dated 08.05.1942. Excepting the suit track, no other cart track is found available to the defendants. In order to take vengeance, the plaintiffs damaged the suit cart track. Therefore, the defendants are entitled to the suit cart track through easment by grant and easment by necessity.

5. Apart from filing the written statement, the defendants 1 to 4 filed a counter claim application wherein they have stated as follows:

(i) In between the defendants' land and public itteri which runs North-South, on West lies the plaintiffs' land S.F.No.166 and to reach the defendants' land, there is an East-West cart track branching from North-South itteri. The pathway measuring about 8 feet, is in existence for more than 70 years. It runs on the northern most part of R.S.No.166, which belongs to the plaintiffs.

(ii) Vide sale deed dated 08.05.1942 one Rangappa Gounder, father of the 1st plaintiff purchased part of the suit land measuring an extent of 1.60.5 hectares from Chinnakaruppa Gounder. The defendants and their predecessors in title have been enjoying the cart track all along for more than 70 years openly, continuously and peacefully without interruption in assertion of their right over it. As such they have prescribed their rights of easment over it. Originally, the properties owned by the defendants and the plaintiffs, belonged to one and the same person.

(iii) In December 2003, plaintiff ploughed and raised horse gram and cholan on the pathway by including it along with their cultivable lands on the South and on the North and after made protest by the defendant, third person intervened and settled the dispute. Ultimately, the cart track has to be restored. For restoration, no work by way of levelling the land, removing and obstruction or any such things are needed. It is enough if the plaintiffs are restrained by way of injunction from obstructing the use of the cart track by the defendants to reach their land. Anyhow, by way of abandon caution, mandatory injunction is prayed. Hence, the counter claim.

6. The averments found in the reply statement filed by the plaintiffs, are as follows:



(i) The physical features narrated by the defendants are admitted. However, there was no existence of cart track in the width of 8 feet in S.F.No.166. There was no cart track running through SF No.166. It is admitted that in the sale deed dated 08.05.1942, there was a recital in the respect to the existence of cart track. The learned Advocate Commissioner in his report, had clearly mentioned the alternative pathway, which is having by the defendants. The plaintiffs never attempted to interfere with the possession of the cart track as alleged. The counter claim filed by the defendants is not having any merits and the same cannot be entertained. Hence, the said counter claim filed by the defendants is liable for dismissal.

7. Based on the above said averments, the trial Court framed necessary issues and tried the suit. On the side of the plaintiffs, the 1st plaintiff Subramani examined himself as PW1 and marked 12 documents as Ex.A1 to Ex.A12. On the side of the defendants, three witnesses have been examined as DW1 to DW3 and only one document was marked as Ex.B1. Apart from those documents, the report and plan submitted by the learned Advocate Commissioner were marked as Ex.C1 to Ex.C3.

8. Having considered the materials placed before her, the learned District Munsif, Sathyamangalam, came to the conclusion that the suit filed by the plaintiffs is not maintainable, on the other hand, the defendants have proved their counter claim. In the appeal filed by the 1st plaintiff, the learned II Additional Subordinate Judge, Gobichettipalayam, confirmed the findings arrived at by the trial Court and dismissed the appeal.

9. Feeling aggrieved over the findings arrived at by the Courts below, the 1st plaintiff alone has filed the present Second Appeal. When the second appeal is taken up for admission, this Court formulated the following substantial questions of law.

"1. Whether the respondents 1 to 4 are entitled to make a counter claim without cause of action, with reference to mandatory injunction?

2. Whether the respondents have easmentary rights over the suit property?"

10. Heard Mr.S.Parthasarathy, the learned counsel appearing on behalf of the appellant/1st plaintiff and Mr.Titus Enock, the learned counsel appearing on behalf of the respondents/defendants 1 to 4 and perused the materials available on record.



11. Admittedly the plaintiffs are having lands in re-survey Nos.166 & 167 of the Sunkuramapalayam Village. The corresponding old survey number to S.F.No.166 is 58A. Similarly, for the re-survey No.167, the corresponding old Survey Number is 59C. The rough plan filed by the plaintiffs along with the plaint and the rough sketch filed by the defendants dated 15.03.2004, establish the fact that there was a itteri in S.F.No.166. Further it shows that on the East of the said itteri, lands in S.F.Nos.166 and 167, which belongs to the plaintiffs are situated.

12.The defendants are having the lands on the Western side of the land owned by the plaintiffs in S.F.No.166. In respect to the title claimed by the plaintiff and defendants, there was no dispute on either side. In the said circumstances, the case of the plaintiffs is that in between S.F.No.166 and S.F.No.167, there was a cart track in East-West running from North-South itteri and reaches the defendants' land.

13. Ofcourse, in the report filed by the learned Advocate Commissioner in Ex.C1 and Ex.C2, he has not mentioned the existence of the said cart track. Though, he has stated in his report as there was a pathway, which runs to the land of the defendants from the eastern side, being the reason that the land owned by the defendants is an agricultural land, the same alone is not sufficient to hold that the defendants by using the said pathway took the cart for reaching their land.

14. In this connection, the learned counsel appearing for the appellant/1st plaintiff would vehemently contend that the defendants are not entitled to cart track as alleged in the rough plan by way of easment by prescription, easment of necessity or easment by grant, since, it is apparent that the plea taken by the defendants is mutually contradictory one

15. Considering the said submission, it is true the pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement.



16. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easmentary right claimed, the dominant tenement cannot be used.

17. Here it is a case, though it was contended on the side of the defendants that both the lands owned by the plaintiffs and the defendants are in the hands of the single tenement, in order to substantiate the same, the defendants have not produced any relevant documents. In fact in the document relied by the defendants, it was stated that the name of the vendor is Gowda, on the other hand, the plaintiffs and the defendants belong to Gounder community. Therefore, it cannot be said that previously both the lands were in the hands of a single tenement.

18. On the other hand, in respect to the easment by prescription also, except the oral evidence of the witnesses examined on the side of the defendants, nothing was produced to show that the alleged cart track was in existence for the past 70 years.

19. The next aspect which is to be decided in this appeal is that whether the defendants are claiming the right over the suit cart track based on the ownership also. In this regard, in the judgment rendered in the case of Arunachallam Pillai Vs. Sorimuthu Pillai, reported in (2004) 1 MLJ 474, this Court has held as follows:

"The plaintiff cannot be permitted to raise inconsistent pleas. To claim easement, the plaintiff must admit the title of the defendant over the property. If the plaintiff claims easementary right that must be proved by sufficient evidence by the plaintiff. When the plaintiff admits that he claimed ownership and not easement and if he fails to prove ownership, he cannot be allowed to prove easementary right. Ownership and easement are mutually exclusive. Both cannot be pleaded. Therefore, when the plaintiff claimed ownership, he gives up the plea of easementary right. Ultimately, when the plaintiff failed to prove ownership, he cannot revive the plea of easement. In such circumstances, the plaintiff is not entitled for any relief."



20. In the instant case, though the defendants claimed right over the suit cart track upon the plea of easment, here it is a case, the sale deed exhibited as Ex.B1, discloses the fact that the father of the 1st defendant on 08.05.1942 purchased the ½ share in Old S.F.No.58C measuring an extent of 2.96 acres, further, through the said sale deed, he purchased 1/4th share from an extent of 2.58 acres in Old S.F.No.57 [New Survey Number is 166]. In the said sale deed, the existence of alleged cart track is clearly mentioned. Further, the vendor of the said sale deed has clearly given the right to the purchaser to use the cart track situated in Northern side of S.F.No.166 to the width of 8 feet for ingress and egress of the defendants' land. In respect to the recital found in the said sale deed, in the reply statement filed by the plaintiffs, they have admitted the contents of the document. So, by way of grant / ownership, the defendants are having the right over the suit cart track.

21. Accordingly, after availing the right over the suit cart track, through the sale deed dated 08.05.1942, claiming the right over the cart track by way of easment is not necessary. The Courts below has traversed in the same lines and concluded that the suit filed by the plaintiffs has not been proved and on the other hand, the counter claim made by the defendants is proved. The findings rendered by the Courts below rejecting the claim of the plaintiffs cannot be found fault with and they do not warrant any interference. The substantial questions of law framed are answered as above.

22. In the result, the second appeal fails and the same is dismissed. No Costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CO)

// True Copy //

Sub Assistant Registrar

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To

1.The II Additional Subordinate Judge,
Gobichettipalayam.



2.The District Munsif,
Sathyamangalam.

Copy to: The Section officer,
VR Section, High Court,
Madras.

+1cc to Mr.S.Parthasarathy, Advocate SR.No.3862
+1cc to M/s.I.C.Vasudevan, Advocate SR.No.3586

S.A.No.253 of 2010

RP(CO)
CB(08/03/2022)