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IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 08.11.2021

JUDGMENT DELIVERED ON : 06.01.2022

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.507 of 2011

Parvathy ...Appellant/Respondent/Plaintiff

...Versus...

Ponnusamy ...Respondent/Appellant/Defendant

PRAYER:This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.31 of 2006 dated 22.01.2010 on the file of the Additional District Court, Namakkal, Fast Track Court, reversing the judgment and decree made in O.S.No.13 of 2001 dated 28.09.2004 on the file of the Principal District Munsif Court, Namakkal.

For Appellant :: Mr.T.Dhanyakumar

For Respondent :: Mr.Darshan
for Mr.N.Manokaran

J U D G M E N T

The plaintiff is the appellant herein.

2. The plaintiff has filed a suit in O.S.No.13/2001 seeking the relief of (i) a Permanent Injunction from obstructing the plaintiff installing an Oil Engine in the common well in S.No.127/2B of Ariyur Village amended as per order in I.A.No.62 of 2002 dated 22.01.2002 and pumping out water through the same in alternate days for irrigating her lands in S.Nos.126/1B and 127/2C in Ariyur Village and (ii) Interdicting the defendant and his men and family members by a pipeline underneath the common path in S.No.127/2B to a depth of three feet crossing East West Panchayat road for carrying water from her family exclusive well to irrigate the schedule lands.



3. The suit was decreed and the defendant has preferred A.S.No.31/2006 before the Sub-Court, Namakkal, wherein, the appeal was partly-allowed in respect of relief No.'A' and dismissed in respect of relief No.'B' and hence, with regard to the disallowed portion of rejection of 'B' relief in the appeal, the appellant/plaintiff has preferred this Second Appeal.

4. For the sake of convenience the parties are referred as per their ranking before the lower Court.

5. In the above Second Appeal, initially, notice of motion was ordered on 25.04.2011 and thereafter, the appeal was admitted on 25.09.2020 and the following Substantial Questions of Law were framed.

a) Whether Exs.A1 and A2 prove the common ownership of the plaintiff?

b) Whether the construction of Ex.A1 by the Lower Appellate Court is erroneous and contrary to the tenor of the documents?

6. The learned counsel for the appellant/plaintiff contended that both the Courts below have concurred and granted relief 'A' as sought for in the plaint, however, refused the relief 'B' and relied upon Ex.A1 that a common right of the plaintiff over the suit property in Survey No.127/2B and therefore, the constructions of the recitals of the document in Ex.A1 by the lower Appellate Court is erroneous and also the learned counsel would draw my attention to the word used in Ex.A1 "பொதுவாக" (in common).

7. Per contra, the learned counsel for the respondent/defendant contended that both the Courts below have concurrently granted the relief of 'A' to the plaintiff, however, specifically rejected the relief of 'B' stating that the defendant cannot be added with additional burden in respect of common pathway so as to enable the plaintiff to lay a pipeline 3 feet underneath the common pathway and made submissions in support of the judgment of the lower Appellate Court.

8. On a perusal of records, it appears that both the Courts below, on appreciation of the evidence of Exs.A1, Ex.A2 and Ex.B1, have granted the relief of 'A' as sought for by the plaintiff and rejected the second relief of 'B', as extracted supra viz., permanent injunction against the defendant from obstructing the plaintiff laying a pipeline underneath the



common pathway in S.No.127/2B at the depth of 3 feet crossing East to West Panchayat road to take water from her family exclusive well for irrigating the schedule lands. An Advocate Commissioner has also been appointed and his reports were marked as Exs.C1 and C2.

9. On perusal of Ex.A1 shows that the plaintiff has a common right over the suit property in No.127/2B. The plaintiff has given the right to her men, cattle and vehicle etc and such a right is to both the co-owners.

10. As pointed out, a word "common right" is given under Ex.A1 and it was mentioned as bghJthf (in common) and hence, taking into consideration the document Ex.A1, A2 and Ex.B1, both the Courts below have rightly come to the conclusion that the appellant/plaintiff had a common right over the suit property.

11. The learned counsel for the appellant contended that once the relief 'A' is granted, relief 'B' is an automatic in nature. The plaintiff is a common man and she can enjoy the suit property.

12. Now the point for determination is that, whether such a right in common for using the suit property as a pathway for her men, cattle and vehicle etc includes a right to lay a pipeline to a depth of 3feet below underneath the earth on the common pathway and Exs.C1 and C2 have been discussed by the trial Court.

13. In the earlier suit filed by the father of the plaintiff vendor and the father of the defendant herein in O.S.No.23/1972 right to take water from the common well has been given declaration. Before the trial Court, there was a specific issue as to the usage of the well and it was recorded that the well does not appear to have been in use for a long time and there is no sign of drawing of water from the well. As per Ex.B1, as extracted above, appears to be that the well in question is a dilapidated condition not used by the parties.

14. Whether the common right in S.No.127/2B to use the suit property (steep of the land) as a common pathway to take the servant, men, animal, cattle and traffic vehicle and thus include right to lay P.V.C pipeline underneath or not?

15. This Court in Basha Reddiar [died] and 4 others Vs.Janarthanam and 5 others in 1998 3 LW 197 has held that :



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...As a co-owner, he is entitled to make use of the land to the maximum benefit, subject to only one condition, i.e., his enjoyment should not affect the right of others. To take an underground drainage connection is a right of enjoyment by a co-owner and the other co-owners cannot injunct the plaintiff on the ground that he interferes with their co-ownership rights. If such a relief is granted, it will amount to negating the right of the co-owner to enjoy his co-ownership right. By laying the underground pipeline, there is no interference of the passage or their access to their buildings or their property, except for some minor inconvenience during the time of laying the pipeline. The defendants will not put to any hardship or injury to their co-ownership rights.

....When co-owners of lands divide the lands, sometimes they set apart a common pathway for the beneficial enjoyment of their respective shares. Each co-owner is entitled to use the common pathway in a way most beneficial to him. If he happens to acquire a new land adjacent to his share and if that land can be approached through the common pathway he cannot be prevented from using the common pathway provided his user of the common pathway does not interfere with the rights of the other co-owner in the common pathway".

16. In Mitra's Book on 'Joint property and Partition', the learned Author has considered the right of each co-owners over the common passage. The said paragraph reads thus:-

"It is permissible for a co-owner or co-sharer to change the mode of user of a common passage without the consent of the other co-sharers. As between the co-sharers of a common passage each has the right to lay underground drains. In such a case there is no question of common passage being a servient tenement in respect of any of the premises of the co-owners. Every co-owner has the right to make full use of the common passage. Even though a co-owner has the right to



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lay a new underground drains in the common passage but such laying of new drains should not interfere with the existing drains and with the right of other co-owners of the passage. A person's right to drain his own premises by laying underground pipes in his own land is an incident of legal ownership and is not an easement. It is a joint property and any co-owner has to use such property reasonably in the sense that his user does not amount to ouster of other co-owners. No co-owner can complain that the use of the common passage by the cause an unnecessary or additional burden upon the common passage. A co-owner carrying his carts, bullocks and ploughs through the joint property cannot be said to have caused unnecessary in convenience to the other co-owner".

I had an occasion to consider a similar question and the same is reported in (1997 I.M.L.J 309 (Krishnammal v.Periasamy) In view of the settled legal position, I do not think that the finding of the Courts below, that the plaintiff is not entitled to have the underground drainage over the common pathway could be accepted. As a co-owner, he is entitled to make use of the land to the maximum benefit, subject to only one condition, i.e. his enjoyment should not affect the right of others. To take an underground drainage connection is a right of enjoyment by a co-owner and the other co-owners cannot injunct the plaintiff on the ground that he interferes with their co-ownership rights. If such a relief is granted, it will amount to negating the right of the co-owner to enjoy his co-ownership right."

17. In K.Kolandaidsami Gounder (deceased) and another Vs.Manickam 2001 3 LW 832 this Court has held as follows:

"Easements Act, 1882, Section 4 and Easement -Meaning and scope of expression easement is a privilege by which owner of one tenement has right to enjoy over tenement of another - Easement of necessity is easement created by law under particular circumstances by virtue of doctrine of implied grant to meet necessity of particular case.



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Easements Act, 1882, Section 13- Easement of necessity -Creation of easement of necessity should be outcome of prior relationship between tenament - No additional relief can be claimed on existing easementary right - Mere convenience or inconvenience is not test of easement of necessity - Easement of necessity arises where normally both dominant and servient tenaments are in common ownership so that creation of easement by implication of law may be said to be outcome of former jointness of two tenaments.

Easements Act, 1882, Section 28 - Right of pathway - Specific right was given to use land as pathway of particular of width - Owner of lands cannot be burdened with more obligation by enlarging such right so as to claim right to use pathway of greater width and right of taking drainage over the pathway by laying under ground pipeline - Easementary right in respect of pathway cannot form basis of right to lay drainage through common path way - Additional burden cannot be imposed on the owner of servient tena-ment."

18. Keeping the above principles in mind, this Court finds that if the facts and circumstances under recital in the documents are to the effect that the parties are co-owners, then the decision in Basha Reddiar cited supra will occupy the domain and if the recitals in the material documents are to the effect that as that of enjoyment of the pathway alone, then the decision in Kolandaisami Gounder's case cited above will occupy the domain. Both these two decisions occupy the different domain and operate on different domain and hence the recital in the document is vital.

19. The trial Court has granted the relief in respect of 'B' schedule namely laying a pipeline below 3 feet on the common pathway but the lower appellate Court has negatived the same and hence, the Second Appeal.

20. The point that has to be considered is that whether the plaintiff is entitled to lay the pipeline underneath the pathway in Survey No.137/2B to a depth of 3 feet, crossing East West Panchayat road for carrying water from the family well for irrigating the scheduled land. As discussed supra, the recital in Ex.A1 has common right over the suit property in Survey No.177/2B.



21. Ex.A1 was pressed into service to the plaintiff to agitate the point that he has common right over the suit property in Survey No.127/2B. After perusing the recitals therein, a common right has been given under Ex.A1 and or used as [பொதுவாக (in common). Ex.A2 is the copy of the decree passed in O.S.No.2096/72, dated 25.04.1977 and Ex.B1 is the judgment copy in the very same suit. Exs.C1 and C2 are the commissioner's report and the sketch.

22. On a combined reading of Ex.A1 along with Ex.B1 Judgment copy, I find that the said suit in O.S.No.2096/72 was filed before the District Munsif Court, Namakkal by the father of the vendor of the plaintiff against father of the defendant. The recitals in Ex.A1 are to the effect that in respect of other portions, the right is described as common in right and when it comes to the Survey No.127/2B, it is specifically stated that for transportation of cattle and vehicle, pathways in other words, she has right to access for her men, cattle and vehicle only and none more.

23. On perusal of Ex.B1 judgment in O.S.No.296/72, the lis between the father of the defendant and the father of the vendor of the plaintiff goes to show that in respect of Survey No.127/2B, where the disputed pathway is situated and it gives only for access to the land of the plaintiff and it does not mentioned that it belong to him. It belongs to the plaintiff and there is no whisper with regard to the fact that it was belongs to her. What was recital therein is only with regard to taking of the access to the property which gives only right of access and vendor of the plaintiff has instituted the suit and which resulted in passing of a decree under Ex.B2 and judgment Ex.A2 and decree Ex.B1 decree B2 which clearly shows that the portion marked P, Q, R in the Advocate Commissioner's Report gives that it is only for 5 feet breadth to carry pathway and to have an access to the property and the defendant should not interfere with the access.

24. It remains to be stated that the declaration granted in the earlier suit is only with respect to use of the property which has access to the property of the plaintiff and there is no finding or declaration as to the title of the property of the plaintiff.

25. In the absence of any declaration declaring the joint owner or co-ownership of the vendor of the plaintiff, the plaintiff cannot claim a right as a co-owner and hence, I find



that in view of the recitals contained in Ex.A1 and the civil decree between the father of the defendant and the father of the vendor of the plaintiff under Ex.B2, the plaintiff is not a co-owner of the disputed property and she can claim only easementary right and not as that of the co-owner of the property and hence, I find that the decision reported in K.Kolondaisamy Gounder case is applicable to the facts and circumstances of this case, in view of the facts, as discussed supra.

26. Accordingly, following the decisions cited above viz., Kolondaisami Gounder's case, I find that the plaintiff is not entitled to the relief of injunction against the defendant and the similar finding arrived at by the lower appellate court does not warrant any interference and hence, I find that all the substantial questions of law framed above are answered in negation against the appellant and in favour of the defendant. The second appeal is devoid of merits and the same is liable to be dismissed.

27. In the result, this Second Appeal is dismissed, confirming the judgment and decree of the lower appellate Court. No costs.

Sd/-

Assistant Registrar

//True copy//

Sub Assistant Registrar

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To

- 1.The Additional District Judge, Namakkal, Fast Track Court,
- 2.The Principal District Munsif, Namakkal.

Copy to

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

+1 CC to Mr.T.Dhanyakumar, Advocate sr 1766

+1 CC to Mr.N.Manokaran, Advocate sr 1682.

S.A.No.507 of 2011

RSV(CO)

SP(15/02/2022)