



S.A.No.1140 of 2003

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.01.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.1140 of 2003
and C.M.P.No.9883 of 2003

1.Gopalakrishna Konar (Died)
2.Saroja
3.Annamalai
4.Srinivasan
5.Dhanam

... Appellants

Vs.

1.Narayana Gounder (Died)
2.Govindasamy Gounder @ Manika

... Respondents

[1st Appellant is died, Appellant A.2 to A.5 brought on record as LRs of the deceased 1st Appellant and Respondent 1 died, 2nd Respondent brought on record as LR of the deceased R1 vide Court order dated]

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgement and decree of the A.S.No.6 of 2001 on the file of the Additional District Judge, Thiruvannamalai made in OS.No.361



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of 1996 on the file of the Additional District Munsif Cum Judicial Magistrate, Chengam dated 14.11.2000.

For Appellant : Mr.S.Kanniah
For Respondents : M/s.G.Lavanya for M/s.T.Saikrishnan
[R.2]
: R.1 [Died]

JUDGMENT

The defendant in the suit O.S.No.361 of 1996 on the file of the Additional District Munsif Cum Judicial Magistrate, Chengam is the appellant before this Court challenging the judgement and decree in A.S.No.6 of 2001 of the Additional District Judge, Thiruvannamalai in and by which the learned Judge has reversed the judgement and decree of the Additional District Munsif Cum Judicial Magistrate, Chengam. The facts of the case are herein below narrated and the parties are referred to in the same ranking as before the Trial Court.

2. The plaintiff had filed the suit OS.No.361 of 1996 to declare that the plaintiff is entitled to reach the A schedule property through the B schedule pathway and that the plaintiff has an easementary right to use the said pathway and for a consequential injunction restraining the defendant,



his men and agents from interfering with the plaintiff's usage of this pathway. The plaintiff would contend that the lands comprised in Survey No.173/2 and 173/3 including the well in Survey No.173/2 originally belonged to joint family of Kuppusamy Gounder and his sons Govindasamy Gounder, Thanji Gounder and Kolandai Gounder. The brothers were jointly enjoying the said property.

3. Thereafter, Kuppusamy Gounder and his 3 sons had sold half of their interest in the said lands together with a 2/3rd share in the well to one Ponnusamy Reddiar. Thereafter, Survey Nos.173/2 and 173/3 were sub-divided and the lands purchased by Ponnusamy Reddiar was sub-divided as 173/2B and 173/3B. The land in which the well was situate was sub-divided as Survey No.173/2A and 173/3A. After alienating the property to Ponnusamy Reddiar, the said Kuppusamy Gounder and his sons were accessing their lands in Survey No.173/2C, 173/2D, 173/2E and 173/3C through this B schedule pathway. This pathway has been described as A B C D in the plaint plan. The plaintiff is taking the water from the well through the channel which is also shown in the plaint plan and Kuppusamy Gounder and his sons were irrigating their lands with this water. On the



South-Eastern side of the well, there is a water-bailing apparatus and on the North-Eastern corner a separate water-bailing apparatus had been set up and is operational through which the said Ponnusamy Reddiar irrigates the lands bearing Survey Nos.173/2B and 173/3B.

4. Kuppusamy Gounder had filed a suit for partition of his 1/4th share in the remaining property before the District Munsif Court, Tiruvannamalai against his three sons. In the said suit, Kuppusamy Gounder was allotted the land bearing Survey No.173/3C along with a share in the well in S.No.173/2A apart from other properties. The said Govindasamy was allotted the land bearing Survey No.173/2C measuring 97 cents along with a share in the well in Survey No.173/2A apart from other properties. The said Thanji Gounder on the other hand was allotted 52 cents in Survey No.173/2D along with a share in the well in Survey No.173/3A. Kulandai Gounder was allotted the land in Survey No.173/2E together with a share in the well situate in Survey No.173/2A amongst other properties. For irrigating the land in Survey No.173/3C, there is a separate channel running from the said well from west to east.



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5. It is the case of the plaintiff that the lands described supra i.e; 173/2C, 2D, 2E, 3B and 3C including the well situate in Survey Nos.173/2A and 173/3A originally belonged to Kulanthai Gounder and on his death devolved on his son Kuppusamy Gounder. To reach the lands bearing Survey Nos.173/2C, 2D and 2E from the Vedanakulam Battai, there is a pathway marked as ABCD in the plaint plan which is the only access. Except for this pathway there is no other access to reach the lands. It is the further case of the plaintiff that after alienating the lands in Survey No.173/2B and 3B, the said Kuppusamy Gounder and his sons had been continuously, openly, peacefully and uninterruptedly using the ABCD pathway to reach their lands.

6. Even after the partition between Kuppusamy Gounder and others the three sons of Kuppusamy Gounder had been reaching their respective lands and taking their cattle only through the suit pathway. The northern lands in Survey No.173/2C, 2D and 2E cannot be enjoyed without access through the 'B' schedule pathway. The plaintiff's eldest brother in his capacity as a Manager of the joint family had purchased the A schedule property from Govindasamy Gounder under a registered sale deed dated



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20.07.1967 for a sale consideration of Rs.3,400/- and from the date of the purchase the plaintiff and his brothers are enjoying the A schedule property and have access through the suit B schedule pathway. They had been drawing water from the suit well through the channel that is passing by alongside BCD pathway. The plaintiff is entitled to a 1/4th share in the A schedule properties.

7. The plaintiff's elder brother Thambu Gounder had died leaving behind him surviving his only son Perumal. The plaintiff thereafter purchased the remaining 3/4th share in the suit A schedule properties from his brothers and nephew and thereby became entitled to the entire extent of the A schedule properties together with a right of way only through B schedule pathway. Likewise, the purchaser from the other brother Thanji Gounder is also using the pathway to reach his land. Poonusamy Gounder who had purchased the other half died leaving behind him his son Venkatakrishna Reddiar to succeed to the lands bearing S.Nos.173/2B and 173/3B. From the said Venkatakrishna Reddiar, the defendant and his brother Kannan Kona jointly purchased the lands bearing Survey Nos.173/2B and 3B. The defendant and his brother exchanged their

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properties as a result Kannan had given up his interest in Survey No.173/2B and 3B in exchange for other properties to his brother, the defendant.

8. It is the further case of the plaintiff that as the common well was not having sufficient water to irrigate all the lands, the plaintiff had dug a separate well in his land in Survey No.173/2C nearly 4 years ago and has installed an oil engine in the said well. After the plaintiff has dug a separate well in his land, the defendant had demanded that the plaintiff should sell all his share in the common well situate in the Survey Nos.173/2A and 173/3A in favour of the defendant which was rejected by the plaintiff. The defendant thereafter filed OS.No.325/1985 on the file of the District Munsif Court, Tiruvannamalai against the present plaintiff and his son by making false allegations with reference to the channel and the common well. On 16.05.1988, the defendant attempted to obstruct the plaintiff from passing through and from taking his cattle through the B schedule pathway. The defendant is also attempting to put up a fence in the suit pathway. Therefore, the suit had been filed.



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9. The defendant had filed a written statement inter alia stating that B schedule pathway is not in existence and it is an imaginary one. The defendant had further submitted that the contention that the B schedule pathway is the only access to the lands of the plaintiff is absolutely false. The defendant would further deny the allegation that he and his sons had attempted to form a new channel in the lands of the present plaintiff. The defendant had taken out an application in the suit OS.No.325 of 1985 for an interim injunction in IA.No.571 of 1989 which was dismissed, against which CMA No.5 of 1986 was filed and the same was allowed and injunction had been granted, subject to the right of the present plaintiff to enjoy the common well. Therefore, it is the contention of the defendant that the plaintiff has a right to enjoy only the common well.

10. He would also contend that there is an alternate pathway to the north of the plaintiff's property and that apart the plea of having prescribed the right of easement was denied. The defendant therefore sought for a dismissal of the suit.



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11. The Trial court after considering the evidence on record both oral as well as documentary dismissed the suit against which the plaintiff had filed A.S.No.6 of 2001 on the file of the Additional District Judge, Thiruvannamalai. The learned Judge returned a finding that the plaintiff and his predecessors in title have been using only the north Odai Poramboke as an access and considering the fact that they had an alternate pathway proceeded to allow the appeal against which the defendant had preferred the above Second Appeal.

12. The above Second Appeal has been admitted on the following Substantial Questions of law:-

i) Whether the Decree and Judgment of Appellate Court is liable to be reversed for non-considering relevant evidence available on record?

ii) Whether the Appellate Court failed to consider and appreciate the documentary evidence of the Defendant in exhibit 'B' and wrongly came to the conclusion that the plaintiff is having easementary rights over the 'B' Schedule



property?

iii) *Whether it is open to the Courts below to accept any evidence contrary to documents the contents of the produced against the 61 of the Evidence Act of 1872?*

13. Heard both the counsels.

14. The Advocate Commissioner who has inspected the suit premises has observed as follows:-

“ Ex.C.1 that the Odai, running east to west direction is lying at a distance of 68 feet on the north of ‘A’ Schedule land, at a height of approximately 4 feet, that the said Odai is covered with the thorny bushes, that the depth of the Odai is 5.5 feet and that ‘nobody can have success through the said Odai to ‘A’ Schedule lands’. The same learned Advocate Commissioner has also indicated on unequivocal lines that there is a ‘continuous ridge, with a width of about 1.3 feet’, marked a ABCDEFGH in his rough Plan viz. Ex.C.2, in between the southern Vedankulam Pattai



and Appellant's northern 'A' Schedule lands, passing through dry Survey number 173/2B. According to the Appellant's side, the said ridge, pointed out by the learned Commissioner had been used by the Predecessors in title as a pathway and subsequently, being used by the Appellant to reach the Northern lands Vedankulam Pattai."

15. A mere reading of the above would clearly show that the alternate pathway which has been relied upon by the Trial Court cannot be effectively used by the plaintiff. The finding of the Appellate Court in this regard therefore has to be confirmed. Further both the defendant and the plaintiff are claiming a right to their respective properties from a common owner who had been accessing the well in Survey Nos.172/2A and 3A through this B schedule pathway and had also accessed the Vedankulam Pattai through this pathway which is the only pathway available to them. The plaintiff has clearly proved his easement of necessity to use the suit B schedule pathway. Further, Ex.A.2 to Ex.A.4 which are the sale deeds also make reference to this pathway. The Judgement relied upon by the counsel for the respondent reported in ***(1984) 4 SCC 376 - Ayyaswami Gounder and others Vs.***



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Munnuswamy Gounder and Others does not advance the case of the defendants since in that case the Hon'ble Supreme Court had observed that a common channel can be used to take the water from the exclusive Well of one of the co-owners to irrigate their lands. The learned Judges held that such a use of the channel cannot be considered an additional burden to the prejudice of the defendants thereon.

16. Therefore, the Substantial Question of laws are answered against the defendant. Consequently, the Second Appeal stands dismissed and the judgment and decree of the Courts below is confirmed. No. Costs. Consequently, the connected Miscellaneous Petition is closed.

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Index : Yes/No
Internet : Yes/No
Neutral Citation :Yes/No
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To
1.The Subordinate Judge, Tirupattur.
2.The District Munsif, Tirupattur.

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P.T. ASHA, J,

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