



S.A.No.877 of 1998

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 04.01.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.No.877 of 1998

V.Kandaswami

...Appellant

(Appellant is recorded as LR of the deceased first respondent vide order dated 24.07.2003 made in C.M.P.No.15847 of 2002)

-Vs-

1.Vemb Anna Gounder (died)

2.Muthuswami (died)

(Second respondent is recorded as LR of the deceased first respondent vide as per order of the Court dated 24.07.2003 made in C.M.P.No.15847 of 2002)

(Memo in USR 5908/2018 is recorded as per order dated 19.12.2018)

3.Chellammal (died)

(R3 brought on record as LR of the deceased R1 vide order dated 13.09.2011 made in C.M.P.No.15846 of 2002 in S.A.No.877 of 1998)

(Memo filed in USR No.1308, dated 08.03.2017 to the effect that R3 died and R2 & Sole appellant are recorded as LRs of the deceased R3 vide Court order dated 08.03.2017 made in S.A.No.877 of 1998)



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5.Ravichandran

... Respondents

(R4 & R5 are brought on record as LR's of the deceased second respondent as per the order dated 23.04.2019 in C.M.P.No.2437 to 2439 of 2019)

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 18.12.1996 of the Principal District Judge, Dindigul Anna District, in A.S.No.55 of 1995 confirming the judgment and decree dated 13.12.1994 of the learned District Munsif, Palani, in O.S.No.334 of 1983.

For Appellant	: Mr.G.Sridharan for Mr.T.M.Hariharan
For Respondents	: No appearance

JUDGMENT

The plaintiff in the suit is the appellant. The appellant filed a suit for declaration of his title to the suit property, injunction restraining the respondents from interfering with his possession and also sought for mandatory injunction directing the respondents to restore the cart track along with red marked portion in Survey No.750/1 in the plaint plan. He also sought for mandatory injunction directing the respondent to restore the channel course 'AB' along with western



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extremity of red marked cart track in Survey No.750/1. The suit was partly decreed by the Trial Court granting the relief of declaration and injunction. The Trial Court also declared that the appellant is entitled to use the water channel in Survey No.750/1 with the width of two feet together bunds with the width of one feet on either side. The trial Court also issued a mandatory injunction directing the respondents to restore the water channel and the bunds as declared by it. In respect of other prayers of the appellant/plaintiff, the suit was dismissed. Aggrieved by the same, the appellant filed first appeal in A.S.No.55 of 1995, on the file of Principal District Court, Dindigul and the same was dismissed. Challenging the said judgment and decree, the appellant is before this Court.

2. According to the appellant/plaintiff, the first respondent is his father and the second respondent is his brother. The suit property was originally belonged to the Hindu joint family consisting the appellant, first respondent and second respondent. There was a partition in the family on 07.12.1979 whereunder the properties of the family was partitioned among the family members. Under the said document, 'C' schedule was allotted to the share of the appellant. 'A' schedule was allotted to the first respondent and 'B' schedule was



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allotted to the second respondent. It was further pleaded by the appellant that the second respondent herein obliterated the water channel and the common cart track running from the common well situated in the portion of the property allotted to the first respondent leading to the property of the appellant, which lies on the southern side. It was specifically pleaded by the appellant that the cart track is the only way of access to his agricultural lands and in the absence of the cart track, he may not be in a position to take his agricultural implements to his lands on the southern side. The cart track, which was obliterated by the second respondent, was shown by red marked portion in the plaint plan. The appellant also pleaded that the respondents obliterated the water channel leading to his lands from the common well. Therefore, he also sought for mandatory injunction directing the respondents to restore the water channel.

3. The first respondent herein filed a written statement denying the very existence of the water channel and cart track as alleged by the appellant. It was further pleaded by the first respondent that there was a cart track lying on the eastern side of the appellant's property and he had been using the same as an access to his agricultural land. It was further pleaded that on the southern side



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also, there is a cart track along with the water channel. The existence of water channel from the common well to the property of the appellant was also denied by the first respondent. The second respondent also filed a written statement on the very same lines supporting the written statement of the first respondent.

4. Before the trial Court, the appellant was examined as P.W.1 and the paternal uncle of appellant and the brother of the first respondent, namely, Kuppanna Gounder was examined as P.W.2. On behalf of the appellant, five documents were examined as Ex.A.1 to Ex.A.5. On behalf of the respondents, the second respondent was examined as D.W.1 and the first respondent was examined as D.W.2. On behalf of the respondents, no documentary evidences were let in. The Advocate Commissioner's report and plan were marked as Ex.C.1 and Ex.C.2.

5. The trial Court, on appreciation of evidences available on record, came to the conclusion that as per the partition deed between the parties, which was marked as Ex.A.1, the appellant/plaintiff is entitled to a share in the common well, which is lying in the property allotted to the first respondent. Based on the



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said right, the trial Court came to the conclusion that the appellant is entitled to take the water from the common well to his agricultural lands on the southern side and for that purpose, there shall be a water channel. The trial Court also based on the admissions of D.W.1 came to the conclusion that the appellant is entitled to use the bunds of the channel as a pathway and consequently, granted a decree directing the respondents to restore the water channel with pathway with a width of one feet each on either side of the water channel. Aggrieved by the said judgment, the appellant had filed first appeal in A.S.No.55 of 1995 and the same was dismissed by the first appellate Court confirming the findings of the trial Court. Challenging the same, the appellant is before this Court.

6. At the time of admission, the following substantial questions of law were framed :

(i) Whether on the very finding that the appellant is entitled to a right of way, as an easement of necessity the Courts below are right in restricting it only to a footpath?

(ii) Whether the right of the appellant to the suit cart track as an easement of necessity that arises on the disruption of



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joint possession can be negated on the ground that Ex.A1 partition deed does not refer to the same when admittedly Ex.A.1 partition deed reserves the right of the appellant to use the east-west cart track to the north of the property of the first respondent which cannot be reached except through the suit cart track pleaded by the appellant?

7. Elaborating the substantial questions of law framed at the time of arguments, the learned counsel for the appellant submitted that there is a reference about the cart track even in the partition deed, Ex.A.1, entered between the parties. It is the submission of the learned counsel that when the suit cart track is referred to in Ex.A.1, the trial Court ought not to have restricted the width of the cart track to two feet. The learned counsel further submitted that there is a poramboke cart track on the northern side of the properties of the parties and in between the cart track on the northern side and the lands allotted to the appellant, the lands allotted to the first respondent is situated. Therefore, to reach the cart track on the northern side, the suit cart track is the only access for the appellant. The learned counsel had also taken this Court to the evidence of D.W. 2, wherein he admitted about the existence of the water channel and the right of



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the appellant to use the bunds of the water channel as a pathway to reach his lands.

8. Pending the second appeal, the first respondent passed away and his wife was brought on record as third respondent and the appellant and the second respondent, who are sons of the first respondent were also recorded as his legal representatives. Subsequently, the third respondent also died and hence, the appellant and the second respondent were recorded as legal representatives of the third respondent. Pending the second appeal, the second respondent also died subsequently and hence, the respondents 4 and 5, namely, his sons were brought on record as his legal representatives. Though the respondents 4 and 5 are served, there is no representation for them.

9. The trial Court, on appreciation of oral and documentary evidences available on record, came to the conclusion that the appellant is entitled to restoration of water channel to take water from the common well to his agricultural lands. As far as the right of way is concerned, the trial Court restricted the width of the pathway to two feet by holding that the appellant is



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entitled to use the bunds of the water channel on either side of the channel as an access to his agricultural lands. The paternal uncle of the appellant and the brother of the deceased first respondent was examined as P.W.2. He is also an attester to Ex.A.1- partition deed. In his evidence, he referred to easementary right of appellant to take water from the common well to the portion of the lands allotted to him under the partition. He also speaks about the existence of cart track leading to the lands allotted to the appellant. P.W.2 is the paternal uncle of the appellant and the second respondent and brother of the first respondent. He also referred to the east-west cart track on the northern side of the properties of the parties. D.W.2 also in his evidence admits about the right of the appellant to use the bunds of the water channel on either side to use as an access to the agricultural lands allotted to him.

10. P.W.2 is a common relative to the appellant as well as the respondents and absolutely there is nothing on his part to speak against the respondents. The evidence of P.W.2 that there was a cart track in the suit property prior to filing of the suit, cannot be ignored. Even the Courts below on assessing the evidences available on record came to the conclusion that there is no other



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access to the appellant's property and hence, he is entitled to use the bunds of the water channel as the pathway to reach his lands. Therefore, it is clear that there is no other cart track to reach the lands of the appellant, except the access which runs parallel to the water channel. In the absence of cart track, the appellant may not be in a position to take his agricultural implements to his lands. The properties of the parties belong to a common ancestor and it was enjoyed by them as a joint family property. Only under Ex.A.1 the properties were partitioned among the parties. Therefore, the cart track enjoyed by them before the partition should be made available to all the sharers. It is settled law splitting of tenements results in easementary right by necessity.

11. In view of the discussion made above, there is no justification for the Courts below to restrict the right of way available to the appellant to a width of two feet. Therefore, the judgments and decrees passed by the Courts below requires modification with a declaration that the appellant/plaintiff is entitled to a cart track with a width of six feet. With these modification, the second appeal stands allowed.



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12. In fine,

(i) the Second Appeal is allowed by modifying the judgments and decrees passed by the Courts below that the appellant is entitled to a cart track on the eastern side of water channel with a width of six feet parallel to the water channel running from the common well to the lands of the appellant; and

(ii) In the facts and circumstances, there will be no order as to costs.

04.01.2023

NCC : Yes/ No
Index : Yes / No
Internet : Yes / No
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To

- 1.The Principal District Judge,
Dindigul.
2. The District Munsif, Palani.
- 3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

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S.SOUNTHAR, J.

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