



S.A.(MD).No.74 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 30.07.2024

DELIVERED ON : 14.10.2024

CORAM

THE HON'BLE MR.JUSTICE G.ILANGO VAN

S.A.(MD).No.74 of 2021
and C.M.P.(MD).No.1001 of 2021

Durairaj

... Appellant/1st Respondent/
1st Defendant

Vs.

1.Sivaraj

2.Patturaj

3.Anantharaj

... Respondents 1 – 3 /Appellants/
Plaintiffs

4.Poongani

5.Ponmani

6.Ponrani

7.Jansirani

... Respondents 4 – 7/
Respondents 2 – 5/Defendants 2 - 5

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, to set aside the Judgment and Decree of the Lower Appellate Court dated 31.01.2020 passed in A.S.No.439 of 2017 on the file of the Subordinate Court, Tiruchendur, Reversing the Judgment and Decree of the Trial Court dated 01.09.2017 passed in O.S.No.32 of 2015 on the file of the District Munsif Court, Tiruchendur.

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For Appellants : Mr.V.Janakiramulu
For Respondent : Mr.C.Swamy for R1 to R5 & R7
For R6 – No Appearance

JUDGMENT

This appeal has been filed against the Judgment and Decree of the Lower Appellate Court dated 31.01.2020 passed in A.S.No.439 of 2017 on the file of the Subordinate Court, Tiruchendur, Reversing the Judgment and Decree of the Trial Court dated 01.09.2017 passed in O.S.No.32 of 2015 on the file of the District Munsif Court, Tiruchendur.

2.The averments of the plaint in brief:

The suit property mentioned as first and second items originally belongs to one Samy Nadar. On 09.02.1977, Samy Nadar and his sons sold the property to Thangalinga Nadar. Possession was also handed over. That was pertaining to the first item. After the death of Thangalinga Nadar, the first item devolved upon his legal heirs namely the plaintiffs and defendants 2 to 5. The second item was also sold by Samy Nadar to one Dharmalinga Nadar. Dharmalinga Nadar settled the property in favour of Saraswathi. Saraswathi sold the property to one Athimani. From Athimani the first defendant and his brothers purchased the



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property. In the partition took place between the first defendant and his brothers, second item was allotted to the first defendant and the first defendant is in possession. The plaintiff is enjoying the second item as a pathway to the property situated on the east and to the further north to the road. For enjoying the first item of the property except the second item no other pathway is available. But the first defendant on 10.11.2014, blocked the pathway. So the plaintiff was unable to reach the first item. So the plaintiff got easementary right to use the second item as easement of necessity. To remove the blockage or the block, the plaintiff issued notice on 07.01.2015 to the first defendant. There was no reply. For binding adjudication, the defendants 2 to 5 are added as parties. So suit is laid for declaration that the second item is the pathway for the first item and easement of necessity right and for removing the blockage by way of mandatory injunction as mentioned in the plaint and for cost.

3.The first defendant filed written statement stating that the second item was never enjoyed as easement of necessity for first item by the plaintiff. The plaintiff used the first item from east-west road through a Pallivasal and one Sundari Ammal's land. The description of property of



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the first item is also not correct. On the south of the suit property the plaintiff is having land in S.No.150. Suppressing the above said fact the suit is laid. It is denied that the first defendant blocked the pathway as mentioned in the plaint.

4.On the basis of the pleadings the trial Court framed the following issues.

1. Whether the first item of the suit property jointly belongs to the plaintiff and the defendant?
2. Whether the plaintiffs are having easement of necessity for the first item and the second item?
3. To what other relief?

5.Before the trial Court the plaintiff was examined as PW1 and on his side 7 documents were marked. On the side of the first defendant, he himself was examined as DW1 and no documents were marked. The commissioner was appointed and commissioner's plan and sketch was marked as Ex.C1 to Ex.C3.



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6.At the conclusion of the trial process the suit was dismissed.

Against which first appeal was preferred before the appellate Court namely Sub Judge, Tiruchendur in A.S.No.439 of 2017. Reversing the judgment and decree of the trial Court the suit was decreed as prayed for without cost.

7.Against which, the second appeal is preferred by the first defendant. At the time of admission the following substantial question of law were framed.

1. Whether the Appellate Court was right in granting a Decree, based on easement of necessity, when the plaintiff has failed to prove the absolute necessity?
2. Whether the Appellate Court was right in concluding that the plaintiff has no other pathway to reach the road, ignoring the specific admission of the plaintiff that the suit first scheduled property is bound on the southern side of his father's property and a road is in existence on the south of his father's property?
3. Whether the Appellate Court was right in ignoring the oral evidence of the plaintiff, wherein, he has specifically admitted that



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he is claiming a new right of way in the suit?

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8.The learned counsel for the appellant would submit that report of the commissioner does indicate that there is alternative pathway is available to the plaintiff. He want to set up a new pathway in the second item namely the second schedule of property. The appellate Court has committed error in making contradictory finding with regard to the availability of the alternative pathway.

9.The learned counsel for the respondent would submit that both the plaintiff's father and the first defendant's predecessor in title purchased the respective properties from the very same family members namely joint owners. At that time, it was a single survey number. Later it was subdivided. Mere laying of pipeline will not create any easement of pathway. That must be considered only as a licence. Moreover, the above said Jeya Anand was examined as witness. Since no other pathway is available to the first schedule, judgment passed by the appellate court requires no interference.



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10.Per contra, in reply to the above said arguments, it was submitted by the appellant that a new plea has been taken before this Court stating that the second item and the first item originally belongs to the common ancestors. In the plaint, the plaintiff has suppressed the availability of the property on the south as indicated in the substantial question of law. As mentioned above here there was no previous right existing in the second schedule and for the first time such a plea is raised. He mentioned the southern property in the written statement.

11.It is a claim of easement of necessity. Before we go into the evidence on record, we will see, whether both first and second item of the properties originally belongs to common owner. For that purpose, we will refer to the plaint averments. As mentioned above, it was mentioned in plaint para 3 itself that both the first and second items originally belongs to Samy Nadar. The first item was purchased by his father Thangalinga Nadar. The second item was purchased by Dharmalinga Nadar, who is the predecessor in title of the first defendant. So such plea is already available. It is further stated that originally the first and second schedule situated in one survey number. Later it was subdivided into



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two. But there is no plea in the plaint and we will see whether any plea during evidence. Nothing has been stated. During the course of cross examination, it was specifically put to PW1 that Samy Nadar is the son of Narayana Perumal Nadar, who entered into partition along with Dharmalinga Nadar on 27.02.1930 under Ex.A7. So we can take that both the first and second schedule of the property originally belong to the common owner.

12.At this point of time, the learned counsel for the respondent would submit that different persons purchased different portions from the very same owner, from which, one portion of the property cannot be enjoyed without using the other property.

13.He is referring to the judgment of the Co-ordinate bench of this court made in the case of ***Koolan @ Munusamy Vs. Chennammal and Others*** reported in ***(2019) 4 MLJ 284***, wherein Section 13 of the Indian Easements Act, 1882 has been referred. Section 13 is extracted hereunder.

*“13. Easements of necessity and quasi-easements.-
Where one person transfers or bequeaths immovable*



property to another,

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or

(c) if an easement in the subject of the transfer or bequest is necessary, for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement;

or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,



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(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (a), (c) and (e), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.”

14.By pointing out Section 13, the learned counsel for the respondent would submit that only to meet out such an eventuality Section 13 has provided, he is referring to para 12 of the judgment.

“The entire property is held under one title and this faced disintegration in the subsequent partition. Necessarily, Section 13 providing for easement of necessity of right of way will invite itself to ensure that none of those who are parties to the partition is disadvantaged due to want of a right of access.



Turning to the 1st defendant's property, first she has not pleaded the existence of any alternate pathway and she is only harping on the fact that no restriction over her property indicating a right of way is seen in Ext.B-2 Sale Deed. But right of easement, does not depend on the concessions made by parties to a sale deed, but it exists independent of it. And, if this suit cart-track is not there there is no way to reach Plaintiff's property."

15.Per contra, the learned counsel for the appellant would rely upon the following judgments for the purpose of argument that absolutely there is no evidence on record to say that both the properties originally belongs to the same owner.

1.The Judgment of the Honourable Supreme Court made in the case of ***Sree Swayam Prakash Ashramam and another vs. G.Anandavally Amma and Others*** reported in ***(2010) 2 SCC 689*** and

2.The Judgment of this Court made in the case of ***Murugesha Moopanar Vs. Sivagnana Mudaliar*** reported in ***1997 (1) CTC 348***.

16.Apart from that it is also submitted that there is no evidence on



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record to show that the second item of property was enjoyed by the plaintiff as an easement of necessity for several years. It is also further submitted that there is alternative pathway is available to the first item. On the very same proposition, he relied upon the judgment of the Honourable Supreme Court in the case of ***Murugesu Moopanar Vs. Sivagnana Mudaliar*** reported in ***1997 (1) CTC 348***.

17. Now we will go to the lie of the property, on the basis of the admission made by the appellant herein. On the east of the first item, he owns the property. On the west of the first item one Christopher and in north one Selvam and Jeya Anand. On the south one Dharmalinga Nadar is situated. Dharmalinga Nadar is the father of the second plaintiff. On the north of 'A' schedule road is situated. That is the alternative pathway mentioned by the appellant. According to him, it is situated on the north – east of first schedule, which is referring to the property belongs to the Jeya Anand on the north. It is admitted by the plaintiff that they have laid pipeline in the property belongs to the Jeya Anand. Now we will go to the commissioner's plan and the report. From the commissioner's sketch and plan, it is seen that on the north of first and second schedule a



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service pipeline was laid beneath the property belongs to one Selvan and Jeya Anand. Now according to the defendant that portion alone is used by them. But lie of the property clearly shows that the first item lies on the west of the second item. On the eastern of the second item plaintiffs are having the property. So for reaching the road, which situated on the north east except the second item the plaintiffs have no other alternative way. As mentioned above, section 13 and judgment of co-ordinate Bench of this court clearly shows that when a single tenement was divided into various tenements and sold to several persons and if the property cannot be enjoyed without the support of the other portions, then section 13 will come into operation.

18.Except on that proposition of law, the appellate Court has recorded no finding. Even otherwise, the lie of the property does not indicate the availability of any alternative pathway near the south of the second item of the first item. But they have to reach the north east road way. Except through this property they cannot reach the north east road. The contention that the plaintiff have laid pipeline in the property of Selvan and Jeya Anand's property that will not create any right in their



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favour, when section 13 of Indian Easements Act operates in favour of the plaintiff. So the plaintiff has established the fact that except the second item they have absolutely no alternate pathway. On that ground the judgment of the appellate Court is legal which requires no interference. So the substantial question of law framed are answered against the appellant. Second appeal fails.

19. Accordingly, this second appeal stands dismissed. The Judgment and decree passed by the appellate Court is hereby confirmed. But, however having considering the situation, no costs. Consequently, connected miscellaneous petition is closed.

14.10.2024

Index : Yes / No
Internet : Yes / No
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To

1. The Sub Judge, Tiruchendur.
2. The District Munsif, Tiruchendur.
3. The Section Officer,
E.R. Section/V.R. Section,
Madurai Bench of Madras High Court, Madurai.

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G.ILANGOVAN,J.

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