

Jeyabalan and ors. Vs. V. Bal Naicker (Died) and ors.

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Court : Chennai

Decided On : Mar-26-1998

Reported in : (1998)3MLJ412

Appellant : Jeyabalan and ors.

Respondent : V. Bal Naicker (Died) and ors.

Advocate for Def. : Mr. V. Venkatasamy

Judgement :

M. Karpagavinayagam, J.

1. The appellants are the unsuccessful defendants in O.S.No. 227 of 1978 on the file of the District Munsif Court filed by the plaintiff/respondent for declaration, mandatory injunction and consequential relief of permanent injunction. They have filed the Second Appeal after having lost in both the courts below.

2. The case of the plaintiff is this. The plaintiff has got a land bearing R.S.No. 412/1(a). The pathway marked as A, B, C runs in between the patta lands and terminates in the lands bearing R.S.Nos. 413 and 412/1(a). The pathway has been in existence from time immemorial and the plaintiff had the origin in last grant. The suit pathway has been recited in the sale deed by which the plaintiff purchased R.S.No. 412/1(a) and also in the partition deed by which the properties were allotted to the defendants. Due to enmity, the defendants high handedly caused

obstruction at point 'C' by putting up thorny fences. Hence, the plaintiff prayed in the suit for a declaration that the plaintiff is entitled to right of access to his field S.F.No. 412/1(a) through the pathway A, B, C, to direct the defendants by mandatory injunction to remove the obstruction at point 'C' and to restrain them by permanent injunction from interfering with the user of the pathway A, B, C by plaintiff for access to his field S.F.No. 412/1(a). The defendants resisted the suit by putting forward the case which is as follows: The pathway B, C is part and parcel of the land of the defendants 1 and 2. The plaintiff is not entitled to any pathway right in the lands of the defendants much less the alleged suit pathway. The plaintiff has not reserved or claimed any pathway right in S.F.Nos. 458, 449 and 411 to reach his land in R.S.No. 412/1(a). The plaintiff has purchased north south cart track from one Karuppanna Gounder under a registered sale deed dated 6.11.1971 to reach his land from the southern east-west poramboke pathway. As such, the suit is liable to be dismissed.

3. After trial, on consideration of the materials placed by both the parties, the lower court decreed the suit granting the reliefs sought for.

4. As against this judgment and decree, the defendants filed an appeal before the first appellate court in A.S.No. 163 of 1980 namely the court of Subordinate Judge, Karur. The lower appellate court has well considered the submissions and the records, concurred with the judgment and decree passed by the lower court and dismissed the appeal. Hence, this Second Appeal.

5. Mrs. P. Bagyalakshmi, the learned Counsel appearing for the appellants herein, while elaborating the substantial questions of law formulated at the time of admission of the appeal, contended that both the courts below committed a grave error in holding that the plaintiff is entitled to the reliefs sought for in the suit by omitting to advert to a vital piece of evidence relating to the availability of the alternative pathway for plaintiff to reach his land. It is also contended that when the defendants/appellants herein proved through Ex.B-2, the sale deed executed in favour of the plaintiff which would show the alternative pathway, both the courts below have not properly appreciated the evidence adduced by the defendants and have come to the hasty conclusion that the plaintiff has made out a case. In

support of her submission, she cited sufficient authorities with reference to the legal position relating to the easement of necessity.

6. On the other hand, in support and justification of the judgments and decrees passed by the courts below, Mr. V. Venkatasamy counsel for the respondent/ plaintiff would contend that the claim for the easementary right is only on the basis of grant, which was satisfactorily proved by the evidence of witnesses produced on behalf of the plaintiff through oral and documentary inclusive of Exs.A-1 and A-3 and that it was also held by both the courts below that there is no evidence for alternative pathway and as such the factual finding given on proper appreciation by the courts below may not be disrupted in the Second Appeal.

7. I have carefully considered the submissions made on either side. At the outset, I must mention that the suit for claiming easementary right is only on the basis of the grant. Ex.A-1, the sale deed dated 22.10.1954, Ex.A-3, the partition deed dated 30.11.1959 in which defendants are the parties, would disclose the existence of the suit pathway and the same has been used by the neighbouring landowners as a common pathway even prior to 1954. But, the case of the defendants through the evidence of D.W.1 is that the pathway was formed by his father in their lands in or about 1956. This evidence cannot be true as held by both the courts below, in view of the evidence adduced by the plaintiff through Ex.A-1. Though D.W.1 when he was examined, stated that there is no such pathway, the Commissioner who was subsequently appointed by the court went and inspected the property and submitted the report Ex.C-1 and plan Ex.C-2 which would show that there is a pathway enclosed with a fence on either side. It is also clear from the materials placed before the court that the lands conveyed to the plaintiff as well as the defendants originally belonged to two common owners and as such this pathway had been formed only for the convenient enjoyment of all the survey members and as such the suit pathway has been in existence even prior to 1954 as indicated in Ex.A-1.

8. It is the case of the defendants that the suit pathway forms part of the lands belong to the defendants. However, as correctly pointed out by the courts below, the defendants have failed to prove the same. On the contrary, the materials

produced by the plaintiff would make it obvious that the suit path way was being enjoyed by the plaintiff and others as a common pathway in between the lands belonging to the defendants and others and that the said pathway reaches and terminates at S.F.No. 412/1(a) which is admittedly the property of the plaintiff. In the light of the meticulous analysis and appraisal of the evidence adduced by both the parties, the courts below, in my view, have correctly concluded that the plaintiff established prima facie case to have the judgment and decree in his favour.

9. The main thrust of the arguments advanced by the counsel for the appellant is that once when there is an alternative pathway to reach his land, plaintiff loses his right to use the suit pathway. To substantiate this submission, the counsel cited *Murugesu Moopanar v. Sivagnana Mudaliar* : 1997(1)CTC348 . This judgment, in my view, would not be applicable to this case because the claim of that plaintiff in that case was only on the easement of absolute necessity and on the facts and circumstances of the case this Court held in the said decision that the appellant had got alternative pathway though it was a circuitous one. In the instant case, the plea of easement of necessity was never raised in the suit by the plaintiff. However, it is the case of the defendants that through Ex.B-2 the plaintiff subsequently purchased the land portion as a pathway to reach his land S.F.No. 412/1(a). Though the claim of the plaintiff as the user of the path way on the ground of the grant by using the pathway from time immemorial even prior to 1954, the plea of the defendants relating to the availability of alternative pathway in my view can be considered, provided there are materials to prove the same.

10. It is relevant in this context to note that the Commissioner appointed by the court on the application by the plaintiff went and inspected and submitted the report. In the said report he mentioned the alleged alternative pathway as recited in Ex.B-2 reached the property of third parties. It is also to be noted that the defendants by way of objection to the report of the Commissioner, again filed an application for re-issue of the warrant to the Commissioner for the inspection and for taking correct measurements. This petition after hearing both the parties, was allowed by the lower court. However, for the reasons best known to the appellants/ defendants they did not pursue the matter. Consequently the availability of alternative pathway was not established by defendants. Both, the courts below

took into consideration this aspect also and found against the defendants. Therefore, having failed to prove the case of the defendants in the lower court by adducing proper evidence, though opportunity was given, it is not open to them to submit that the suit ought to have been dismissed on the ground that there is no easement of necessity on the basis of availability of alternative pathway. As indicated earlier, through the evidence of Exs.A-1 and A-3 and the oral evidence of P.W.1, it has been clearly established that the plaintiff has been using the common pathway from time immemorial and had the origin in the last grant. Mr. V. Venkatsamy, the counsel, for the respondents would cite the authority reported in V.K. Ramasami Gounder and three Ors. v. P. Ramasami Gounder and two Ors. (1997)1 L. W. 495, wherein it is held as follows:

The right of easement acquired by grant cannot be said to have been extinguished on the ground stated in Section 41 of the Indian Easements Act and it is even held to be immaterial whether the easement by grant was by way of an express grant or a grant by necessary implication on a true construction of the deed (Vide: Sivanandan v. Rajammal : (1975)1MLJ251 : 'In this case, the plaintiffs have asserted their rights after they purchased their rights under Ex.A-2 in 1968 and the suit was filed in Sub Court, Salem as early as on 17.9.1968 and it cannot, therefore, be said computing the period from the document Ex.A-6, dated 7.2.1956 that the plaintiffs could be said to have lost their right on account of non enjoyment viewed in the context of the stipulations contained in Section 47 of the Indian Easements Act. The proviso to Section 47 of the Act and the principles enshrined in the main section will belie the claim of the defendants. As a matter of fact, the learned trial judge has adverted to the various factual position and assigned sufficient reasons to come to the conclusion that the defendants have not substantiated their claim of either destroying the rights of the plaintiffs by adverse possession and prescription by the defendants or the extinction of the plaintiffs' rights of the easement by grant on account of any proof of the continuous non user or non enjoyment of the right for the stipulated statutory period of time.

This authority, in my view, is clearly applicable to this case since even according to the defendants, they laid obstruction by putting thorny fences in the suit pathway only some days prior to the filing of the suit. Therefore, as held in Panchugopal

Barua and Ors. v. Umesh Chandra Goswami and Ors. (1997)2 L. W. 249, by Supreme Court of India in the absence of any substantial question of law, this Court cannot interfere in the factual findings arrived at by the courts below on appreciation of the evidence, in view of the change brought about under Section 100, C.P.C. by the Amendment Act of 1976, which has drastically restricted the scope of Second Appeal.

11. For the foregoing discussion, I do not find any infirmity in the judgments and decrees passed by the courts below, so as to warrant the interference. Hence, the Second Appeal is dismissed No order as to costs.

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