

(1996) 02 MAD CK 0024
In the Madras High Court

Margaret Ammal		APPELLANT
	Vs	
Susai Mari		RESPONDENT

Date of Decision : 29-02-1996

Acts Referred:

Easements Act, 1882 — Section 13

Citation : (1996) 2 LW 27 : (1996) 2 MLJ 363

Hon'ble Judges : S.S. Subramani, J

Bench : Division Bench

Judgement

S.S. Subramani, J.—Defendant in O.S. No. 420 of 1984, on the file of the First Additional District Munsif's Court, Coimbatore, is the appellant herein.

2. Suit filed by the plaintiff was for a mandatory injunction to direct the appellant herein to remove the wooden planks placed on the point MN by

granting a mandatory injunction and for a permanent injunction restraining the defendant, her men and agents from in any way interfering with the

plaintiff's peaceful enjoyment and user of CDEF drainage and dhoni GH, and also to direct the defendant to remove the structures put up in the

passage viz., EFTNM as described in the rough plan and the wall put up at the doorway situated on the eastern side wall of the kitchen room and

to remove the blockage in the drainage running north south from the kitchen and the blockage in the "dhoni" by way of mandatory injunction on or

before a date fixed by court, and for other consequential reliefs.

3. Even though three reliefs have been claimed, all these are only for an injunction on the claim that the plaintiff is entitled to get an easement to

drain water through the property of the defendant.

4. At the time of argument of the second appeal, learned Counsel for the respondent submitted that he is confining his argument only on the easement of necessity, and that he is not claiming any other easement. I asked him whether the said submission can be recorded. He said that I can do so, and that his client needs only an easement of necessity. In paragraph 14 of the plaint also, the case put forward is only on the basis of absolute necessity.

5. The admitted facts are as follows:

The properties belonging to both the plaintiff and the defendant originally belonged to one Chinnappan alias Ponnusamy. He executed a sale deed in favour of his wife on 7.2.1922, as evidenced by Ex.B-1. A portion of the same is claimed by plaintiff by various assignments under Ex.A-1 dated 20.6.1981. Defendant is claiming another portion on the basis of Ex. A-2 settlement deed dated 30.6.1950. The facts mentioned above alone are sufficient, for, the claim is only as an easement of necessity. That is, the property which belonged to the same person, and by various documents, it has now come to plaintiff and defendant. So, one of the conditions required u/s 13 of the Easements Act is satisfied. The other question to be considered in this second appeal is, whether there was necessity and whether that necessity is absolute necessity.

6. Before going to the facts of the case, I will first deal with the law, what is meant by "necessity" and how it is extinguished u/s 41 of the Indian Easements Act.

7. In (Saripella) Venkatapathiraju and Others Vs. (Saripella) Subbaraju and Another, learned Judge said thus:

An easement of necessity is an easement without which a property cannot be used at all and not one merely necessary to the reasonable enjoyment of the property.

The learned Judge said that it is, therefore, necessary to bear in mind that while considering the question of easement of necessity, it has to be seen whether there is an absolute necessity.

8. In K.S. Vaidyanathan and Others Vs. Buhari and Sons (P.) Ltd. and Another, this Court agreed with the decision reported in (Saripella) Venkatapathiraju and Others Vs. (Saripella) Subbaraju and Another, .

9. In *Karunakaran and Ors. v. Janaki Amma and Ors.* (1987) 2 K.L.T. 1010 it was held thus:

Easement of necessity arises on the severance of tenements by transfer inter vivos bequest or partition as envisaged in Clauses (a), (c) and (e) of

Section 13. Transferor, transferee, testator, legatee, or sharer of a portion of an undivided estate in any of the above cases is entitled to such an

easement provided it is necessary for enjoying the subject of transfer, bequest or partition and in the case of a testator for enjoyment of what

remains with him. For that purpose no express provision in the document making grant is necessary because the rationale or the legal basis of it is

not any express grant but an implied grant as of necessity for enjoyment. Lands could be conveniently enjoyed in many cases only if the owner is

able to have access to it and therefore the doctrine of implied grant is to meet the necessity of a particular case to avoid landlock. Law prescribes

an easement by implied grant in such cases only to the extent of absolute necessity and not for convenient or reasonable enjoyment. The right is

only in cases where without it the tenement cannot be used at all. It is the outcome of the former jointness which was severed resulting in necessity

of fresh access. When property is conveyed which is so situate relatively to that from which it has been severed that it cannot be enjoyed without a

particular privilege in or over the land of the grantor, the grant of it is implied and passes over without any express words. The word "necessary"

will have to be construed in its ordinary sense. When there is another means by which there is access the question of such an easement will not

arise at all because "necessity" implies that it is not a rule of convenience. Mere common ownership and subsequent severance will not create an

implied grant. Easement of necessity must terminate when the necessity ceases. This principle has been given statutory recognition u/s 41 of the Act

which provides that an easement of necessity is extinguished when the necessity comes to an end.

10. Regarding the extinguishment of easement of necessity, in (1969) 1 S. C. W.R. 97 (at page 99 of the Reports), it was held thus:

...As passage through the land was absolutely necessary for enjoying the plaintiff's house, the plaintiff had a right of way of necessity through it.

This right continued during the subsistence of the necessity. It is not now necessary for the plaintiff to pass through the disputed land. The public

lane now provides an equally convenient and efficacious passage for his men and cattle. As the necessity came to an end by the opening of the public lane the easement of necessity was extinguished u/s 41 of the Easement Act, 1882....

[Italics supplied]

11. Now, coming to the facts and circumstances of the case, I have already said that both the plaintiff and the defendant are part-owners of the

property covered by Ex.B-1. The plaintiff has filed a rough plan along with the plaint. It is seen that the defendant's property is situated on the

northern portion of the plaintiff's property. On the eastern side of the defendant's property, there is a passage. On the eastern end of the passage

which is having a width of 4 1/2 feet there is a "dhoni" situated on the north south direction and the same leads also to the further east to a passage.

The plaintiff's property has also access to the passage situated on the eastern side of the defendant's property and there is a gate. It is that gate

that is closed by the defendant by wooden planks. This pathway is used only to drain the rain water. On the south-eastern corner of the plaintiff's

property, they have a bathroom and immediately south of it, i.e., on the eastern side of the plaintiff's property, she has also a kitchen. The building

of the plaintiff is facing west. It is the case of the plaintiff that she has been using it as of necessity this drain and "dhoni" for the very flow of drain

and rain water, and she has no other way to drain the same.

12. It is further averred that the defendant has recently obstructed the same, and after the institution of the suit, she has further put up constructions

over the passages, thus, causing complete blockage of the "dhoni". It is to remove those obstructions, the suit was filed.

13. In the written statement filed by the defendant, she contended that there cannot be any question of necessity in this case, for, the plaintiff has

other ways and means to drain the rain water and also the drain water through under ground drainage. It is said that necessary connection has been

provided by the Local Authority and even in front of the plaintiff's house, necessary provision has been made for the said purpose, and in fact,

plaintiff is also using the same. The sum and substance of the defendant's case is that even if there had been any necessity earlier to drain the gutter

and rain water, that necessity has ceased in view of subsequent developments.

Accordingly, the defendant pray for the dismissal of the suit.

14. The trial court as well as the lower appellate court did not consider the subsequent developments, but held that since the plaintiff has satisfied

the condition of Section 13 of the Easements Act, the plaintiff is entitled to have the drain and rain water pass through the "dhoni" situated on the

eastern side of the defendant's building. Therefore, the courts below held that the obstruction caused by the defendant is unauthorised and illegal

and is liable to be removed. The construction made on the passage was also directed to be removed by the Courts below. It is against the

concurrent decisions, the second defendant has preferred this second appeal.

15. The following substantial questions of law have been raised in the memorandum of appeal:

(1) Whether the court below is correct in law in countenancing the plea of easement of necessity especially when an alternative drainage has been

found by the Advocate-Commissioner in Exs.C-3 and C-4 and also admitted by P.W.2 in her evidence?

(2) Whether the suit based on easement of necessity is maintainable without there being plea with reference to severance in tenement giving rise to

such an easement?

(3) Whether on the facts and circumstances of the case, the courts below are correct in granting a decree with reference to a property which is not

the subject matter of the suit?

(4) Whether on law the plaintiff is entitled to maintain a suit claiming easement of necessity to commit a nuisance over the property of the appellant?

and

(5) Whether the courts below are correct in law in decreeing the suit for permanent injunction and mandatory injunction filed by the respondent

both on the basis of title and easement of necessity?

16. Learned Counsel for the appellant mainly submitted that in this case there is no pleading to show that the plaintiff has satisfied the requirements

u/s 13 of the Easement Act. It is true that the pleadings are vague. Except the statement that the plaintiff is the southern property owner and the

defendant is the northern property owner, there is no pleading anywhere in the plaint that the property owned by them belonged to their common

predecessor, and it is due to various sale deeds, they happened to be owners of different tenements of the same property. But that contention may not hold good at present since the defendant had no case at the initial stage or before the lower appellate court that she was prejudiced or that she could not put forward her defence properly in view of the lack of pleadings. That apart, both the plaintiff and the defendant are also relations and they are aware as to how they became owners of the same property. So, that contention of the defendant cannot hold good. I may also state that even the antecedent title was filed by the appellant herself as Ex.B-1. It is too much at this point of time to urge a case of lack of pleadings. I repel the said contention.

17. After Ex.B-1, another document was executed by the predecessor under Ex.B-2 dated 6.1.1944. That is in favour of the predecessor of the defendant. It is an unregistered document. But there is a reference in Ex.A-3 that the plaintiff's predecessor had got right to drain the gutter and rain water through the passage. It is on the basis of this statement, in Ex.A-3, the courts below came to the conclusion that the plaintiff has got that right, even though the same had not been made mention of in the subsequent documents in favour of the plaintiff. If there is an easement, that right also will be conveyed when ownership of the property is conveyed. Merely because the right was not specifically mentioned at all in Ex.A-3 settlement, plaintiff cannot lose that right, if it is found that she has got a right.

18. At the time when Ex.A-3 was executed, that was necessary, for, at that time, there was no drainage system available. On that date, such a provision was absolutely necessary for the proper enjoyment of the plaintiff's predecessor's property. In view of the documentary evidence in this case, I have to hold that originally there was an absolute necessity to provide for the free flow of drain and rain water through the "dhoni" situate on the eastern side of the passage of the defendant's building. But, how far that right remained on the date of suit is a matter to be decided, and whether the obstruction caused by the defendant is liable to be removed, or whether the plaintiff has got a cause of action on the date of suit.

19. Along with the plaint, plaintiff applied for the issue of a Commission. The Commissioner visited the property on 6.8.1984. At that time, the defendant was not given notice, and the Commissioner noted all those matters

which were pointed out by the plaintiff. As per the said report, the Commissioner found that there was obstruction caused to the free flow of water, and the gutter water could not be drained through the "dhoni". He also found wooden planks fixed in front of the gate which gives access to the plaintiff's buildings on the backyard. He also filed a rough plan along with the Report.

20. On the application of the defendant, the very same Commissioner was deputed again and he filed a Report on 6.12.1990 along with the plaint.

From that report, it is clear that the Municipal Corporation has provided undergoing drainage for all these buildings and even the plaintiff's building is connected with it. In the Report, it is stated thus:

The plaintiff's house is ABCD in the plan, shaded in blue colour and the defendant's house BEFC shaded in red colour. There is Corporation ditch, running on the western side of the houses, along the north south road.

Further down, it is said thus:

On the south-western corner of the ABCD house there is a small room and from the said room a water outlet hold is seen., through which the water would let into the Corporation ditch. On the north-east corner of the plaintiff's ABCE house, there is a pallam (anganam) on the floor, measuring 3" x 3", which is used for washing purposes."" In paragraph 8, he further said that on the southern side of the suit property, of the wall, there is a water ditch from the point B inside third party's property and it runs towards west through the Corporation ditch on the road. He further says: ""I have also noted ditches including Corporation ditch in and around the suit property which is shaded in green colour.

21. From the above Report, it is clear that the plaintiff wants to drain any water that she makes use of through the ditch provided by the

Corporation. Plaintiff has no case that the same cannot be used. In fact, connection has been provided by the Corporation and water could be

taken through the drainage. Necessary outlet has only to be provided by the plaintiff for the said purpose. If by necessary adjustment in plaintiff's

house, water could be taken through Corporation ditch, the necessity also will cease. As has been held in K.S. Vaidyanathan and Others Vs.

Buhari and Sons (P.) Ltd. and Another, where plaintiff can have access provided in his own property by making necessary alterations, there

cannot be an easement of over a property belonging to another. Even though that is a right of way, the same principle applies, for here also, plaintiff seeks only, easement of necessity for free flow of water.

22. Trial court as well as Lower Appellate Court did not consider the 2nd Report filed by Commissioner, though the same was available. In fact, both the courts were carried away by Ex.A-3 and also by the First Report wherein the Commissioner has stated that there is blockage of drain water.

23. When the defendant has put forward the defence in the written statement, there is a duty on the part of the courts below to consider whether the necessity alleged by the plaintiff existed on the date of suit.

24. The evidence of P.W.2 also to a certain extent supports the case of the appellant. This fact was also not considered by the courts below. Even the findings of the courts below are concurrent, I am constrained to interfere since the courts below have not considered the material evidence before it. If only the courts below had considered the alternative drainage connection available to the plaintiff, the result would have been different.

25. For the above reasons, the substantial questions of law raised in this second appeal are found in favour of the appellant. Even though there was easement of necessity earlier, that ceased to exist in view of the alternative drainage arrangement available to the plaintiff. Exs.C-3 and C-4 support the claim of the appellant in this regard. The other question of law raised in the memorandum of appeal does not arise for consideration in view of my finding that the easement of necessity is not existing as on date.

26. In the result, the second appeal is allowed by setting aside the judgments of the courts below. The suit is dismissed. However, there will be no order as to costs.