

(1996) 09 MAD CK 0093
In the Madras High Court

V.K. Ramasami Gounder and Others

APPELLANT

Vs

P. Ramasami Gounder and Others

RESPONDENT

Date of Decision : 09-09-1996

Acts Referred:

Easements Act, 1882 — Section 13, 41

Citation : (1997) 1 LW 495 : (1997) 2 MLJ 223

Hon'ble Judges : Raju, J

Bench : Division Bench

Judgement

Raju, J.—The plaintiffs in O.S. No. 1934 of 1970, on the file of the Court of Additional District Munsif, Namakkal, are the appellants in the above second appeal. They filed the suit for declaration of the plaintiff's title to A and B schedule properties, or in the alternative, to declare that the plaintiffs are entitled to the right of cart track, for their men, cart and cattle through the "CDE" portion of the suit "A" schedule property, and to declare the title of the plaintiffs to the suit "B" schedule property and for permanent injunction, restraining the defendant from interfering with the plaintiffs' peaceful possession and enjoyment of the suit "A" and "B" schedule properties.

2. The case of the plaintiffs before the trial court, as disclosed in the plaint, which had undergone an amendment, after remand in S.A. No. 578 of 1977, by this Court was that the plaintiffs 1 to 4 are the sons of the 5th plaintiff, that the defendants 1 to 3 are brothers, that the plaintiffs 1 to 4 purchased lands in Survey Nos. 25/9 and 24/4 along with portions of S. No. 55/12 of Vennandur village, under a registered sale deed dated 1.6.1968, from one Palanisamy Chettiar and others and filed Nos. 24/4 and 55/12 were said to be originally owned by one Vennandur Ramaswamy Chettiar, and the defendants were said to have purchased portions of field No. 55/12, from the heirs of Vennandur Ramaswamy Chetty, excepting "CDE" portion, shown in the plaint plan to be read as part of the plaint. The said Ramaswamy Chetty, during his life time was said to have sold a portion of the field No. 55/12 to one Minnakkal Ramaswamy

Chetty, who in turn sold to one Ramaya Gounder, the vendor of the present defendants and the other portions of field No. 55/12 had been purchased by the defendants under a sale deed dated 8.5.1941. The further case of the plaintiffs was that the vendor under both the sale deeds has reserved the "CDE" portion shown in blue colour in the plaint plan to themselves and that "EFGH" marked portion in "B" schedule also had been reserved by the vendors at the time of those sale deeds. The claim is sought to be projected on the basis that there are specific recitals about the reservation of the portion set apart for taking carts, cattle and men. Further, S. Nos. 55/1 to 11 of Vennandur village, are said to be the ancestral properties of the plaintiffs, and that a panchayat road, runs in S. Nos. 57, 58, 64 and 65, and from the Panchayat Road fields No. 24/4 has to be reached only along with "ABCDE" pathway, of width of about 9 feet, as shown in the plaint plan, that in field No. 55/12, there is a stone revetment on the eastern side, which runs north to south, that in "CD" portion, there is well-built stone revetment on one side and the owners of field Nos. 24/4 and 55/12 have been using the "ABCDE" pathway to reach the field No. 24/4. The vendors of those lands and their predecessors in title were said to have been using "ABCDE" portion as a cart track peacefully, openly, continuously without let or hindrance as of rights for period of more than eighty years, and on "AB" portion, the plaintiffs' right to use the suit cart track was not interfered with by the owners of S. Nos. 59 and 56. Field Nos. 55/12 and 24/4 were said to have been originally owned by one owner and the plaintiffs are entitled to "CDE" portion as an easement of necessity. The plaintiffs assert their claim for such right by prescription also, in the light of the use claimed by them as also by their predecessor in title for more than 20 year's and 2 years prior to the filing of the suit. The claim is sought to be also justified as an easement of grant, in so far as it relates to the cart track "CDE" by virtue of the purchase under the sale deed in their favour. On the allegation that the defendants are attempting to interfere with the use of the cart track by the plaintiffs, the suit came to be filed for the reliefs referred to supra. An alternative plea has also been raised, that if the court concluded that the plaintiffs are entitled only to a right of easement for taking their men, cattle and cart over "A" Schedule property, and not for the relief of declaration that the plaintiffs are entitled to take their men, cart cattle over the suit "A" Schedule properties, and the plaintiffs have got absolute title over the "B" Schedule properties.

3. The first defendant filed a written statement adopted by the remaining defendants, contending that the relationship of parties, as stated in the plaint are true and correct, that the plaint plan is not correct, that the sale deed dated 1.6.1968, in favour of the plaintiffs contained false, fictitious and imaginary recitals and rights, that the defendants came to know of the sale deed only recently and they have caused a notice to be issued to them through their counsel, informing them that they were not entitled to any right of pathway in S. No. 55/12 and the purchase of a portion of S. No. 55/12, excluding the "CDE" portion from the heirs of Ramaswamy Chetty was also denied as false. The

defendants" father was said to have purchased a common undivided half share in S. No. 55/12 under a sale deed dated 9.6.1941, that CDE portion was not demarcated at the time of sale, that the brother of the defendants" father Ramaya Gounder purchased another half share in 55/12, and in turn sold the same to the defendants, that the heirs of Vennandur Ramaswamy Chetty, had at no time enjoyed any portion in S. No. 55/12, and only "DE" portion was reserved under the sale deed, and even that portion was never enjoyed by the original vendor though reserved by them, and ever since 1941 the entire S. No. 55/12 including the reserved portion, upto the southern extremity was enjoyed by them without any let or hindrance, openly and adversely to the knowledge of every one, and in the "DE" portion, small trees have been planted for getting green manure and the reservation of the portion as a cart tract was abandoned by the plaintiffs" predecessor in title by non-user from 1941 onwards. The plaintiffs" predecessor in title had leased out S. Nos. 24/4 and 25/9 to third parties, who used the cart track on the south coming from Nachipatti as shown in the commissioner"s second plan, and the rights, if any, of plaintiffs have been lost and got extinguished by non-user and abandonment. The access to S. No. 24/4 from point "A" claimed along "ABCDE" pathway was also denied as false, as also, the claim that the width of the pathway was 9 feet. The existence of "AB" "Iteri" for taking cart, men and cattle was admitted by the defendants as true, and the "BCD" cart track on ground was admitted as being used by defendants and others, and the plaintiffs were using it as a cart track, only upto "BC" portion to reach their land in S. Nos. 55/1 to 11, from Savuripalayam road. The claim of use of the pathway by the owners of S. Nos. 25/4 and 55/12 were denied as false, and untenable. The fact that the claim asserted by the defendants, that the plaintiffs" vendor never exercised any right over the alleged cart track, and that the plaintiffs are not entitled to "CDE" portion as an easement of necessity was asserted repeated by and it was also claimed by the defendants that the plaintiffs have their own way from the road to reach their lands in S. No. 22/8 which is north of S. No. 24/4 and the Raja Vaikal was being used to reach the land in S. No. 24/4 through S. No. 22/8. The easement of necessity claimed by the plaintiffs also was said to have come to an end by the plaintiffs owning the adjacent land and having access therefrom, and the plaintiffs were said to have not acquired any such easement by prescription. Plaint "B" schedule property was said to be enjoyed by the defendants in their own right by putting up temporary cattle shed and by way of easement by prescription, the plaintiffs have not acquired the right ever since 1941, and the plaintiffs and their predecessors, in title never exercised any right of ownership over the same. The plaintiffs and their predecessors in title were never said to be in possession of "B" Schedule properties for 12 years, prior to suit, and therefore they were said to have no cause of action for the suit reliefs or claims.

4. By an additional written statement filed by the 1st defendant, adopted by the other defendants, it was also contended that the vendors of the plaintiffs never reserved the "CDE" portion for themselves and were granting easement right to

purchasers over "CDE" portion and after the plaintiffs purchased the properties, they were given absolute rights over that, and that the plaintiffs claim that they were entitled to "AB" schedule properties were denied as false. The vendors of the plaintiffs were said to have parted with "A" schedule property, and therefore, the plaintiffs were not entitled to the alternative prayer.

5. On the above claims and counter claims the suit came to be tried, and both oral and documentary evidence was let in on by the plaintiff and the defendant let in only oral evidence. The learned trial Judge, in the first instance, has granted reliefs to the plaintiffs as-prayed for. The same was challenged by the defendants before the Sub Court in A.S. No. 113 of 1975, and the first appellate judge, sustained only the claim with reference to the "B" Schedule properties, and denied the other reliefs in respect of the "A" schedule. The said decision was challenged before this Court, on an earlier occasion in S.A. No. 578 of 1977 and this Court has remitted the matter to the first appellate court, for fresh disposal on merits, making it clear, at the same time, that the plaintiffs are entitled to argue on the alternative relief of right of easement by grant or prescription or necessity as also clarified subsequent by the order dated 21.1.1983. The first appellate court, thereupon restored the appeal as A.S. No. 88 of 1980, and proceeded to consider the claims of parties, in the light of the directions of this Court. Ultimately, the learned first appellate Judge, by his Judgment and decree dated 23.7.1983, partly set aside the judgment and decree of the trial court, and while declaring the rights and granting consequential relief of injunction in respect of "B" schedule property, in so far as "A" schedule property K.N.M.L. is concerned, the first appellate court held that the plaintiffs are not entitled to any right of way or cart track, and to that extent, the suit has been dismissed. The plan Ex. A-16, has been ordered to be annexed to the judgment and decree of the first appellate court. Aggrieved over the same, the above second appeal has been filed.

6. Mr. Sethuratnam, learned senior counsel, appearing for the appellants, while elaborating the substantial questions formulated at the time of admission of the appeal, contended that the lower appellate court committed a grave error, in omitting to advert to a vital piece of evidence marked as Ex. A. 20, more-so, when the trial court has specifically relied upon the same for granting the reliefs, and sustaining the claim of suit pathway, on the ground of easement of necessity. The learned senior counsel also contended that the first appellate court was not right in holding that the appellants were entitled to use the alternative pathway "OPQR" when there is not indication that they had any such right, under the partition deed Ex. A-20 and the omission on the part of the first appellate court to advert to Exs. A-1 to A-6, A-11 and A-12 to substantiate the claim of the plaintiffs in respect of the suit cart track by way of grant also vitiated the decision of the first appellate court. The learned senior counsel invited my attention to the judgment of the learned trial judge, and the reasons for the same as also the findings recorded by the first appellate court, which according to the learned senior counsel for the appellants suffered from serious infirmities,

as referred to above.

7. Per contra, Mr. K. Duraisamy, learned senior Counsel for the respondents contended that the judgment and decree of the first appellate court are supported by sufficient and valid reasons, which are unassailable in law and that it is not only, not given to the plaintiffs to make a claim of the nature, which according to the learned senior counsel for the respondents was contradictory and self destroying, but that for such claims there was no basis on facts. It was also contended further by the learned senior counsel for the respondents, that the reasons assigned by the first appellate court, based on the availability of the alternative access disentitles the plaintiffs, for the relief claimed in respect of "A" Schedule Property KNML.

8. The learned Counsel also invited my attention to some of the decisions, to which reference may be made herein after. In R. Sivanandan and Others Vs. Rajammal and Another, , a learned single Judge of this Court, was dealing with the question of easementary right claimed in the context of Sections 13 and 41 of the Indian Easements Act, 1882. The learned judge, after an elaborate consideration of the case law, on the subject, held that a grant of easement need not necessarily be in express terms, but it is enough, if it can be gathered as a matter of necessary implication from the recitals in the document, construed if necessary, in the light of the circumstances then existing, that an easement acquired by grant cannot be extinguished on the grounds stated in Section 41 of the Easements Act. It was also observed therein, that there is no difference in this respect between an express grant and a grant by necessary implication on a true construction of the deed and where an easement is acquired by grant, either expressly or by necessary implication, it will not amount to an easement of necessity u/s 13 of the Act for the purpose of being liable to be extinguished u/s 41 of the Act, and that there was no justification to hold that an easement of express grant or by necessary implication cannot be taken to have been extinguished, even when the necessity ceases, as enacted in Section 41 of the Act.

9. In P.V. Krishnaiar and Another Vs. Perumal Nadar through his power Agent S. Pandian, , another learned single judge of this Court, held while dealing with a claim for declaration of title to a lane and also at the same time, a claim for injunction against the defendants, on the basis that the claimant had acquired an easement by prescription in relation to the same lane, that the reliefs claimed were two different claims and not alternative claims. It was also observed that the question of animus plays an important part in the acquisition of an easement. Even at the time of trial if the plaintiff was proceeding on the basis that he was the owner of the lane, he could not be said to have had the requisite animus of enjoying an easement in the other party's lane, as he had always been conscious of his ownership over the lane.

10. In E. Elumalaichetty Vs. Naina Mudali and Others, , a learned single Judge of this Court, held that the claim of title and easementary right are distinct and

contradictory pleas and the plaintiff failing to establish claim of title to a strip of land specifically pleaded by him cannot turn round and ask for reliefs on the basis of easement. The learned Judge, has chosen to follow the earlier decision in P.V. Krishnaiar and Another Vs. Perumal Nadar through his power Agent S. Pandian, and also placed reliance upon the decision in (Pannala) Subba Rao Vs. (Parupudi) Lakshmana Rao and Another, , A.S. Pakkir Mahamud Rowthen and Another Vs. Pichai Thevan and Others, , Chapsibhai Dhanjibhai Danad Vs. Purushottam, and an unreported decision in Palaniappa Gounder v. Lakshmayee Ammal S.A. No. 1235 of 1974, dated 22.1.1977.

11. I have carefully considered the submissions of the learned senior counsel appearing on either side. The controversies raised on the principles of law apart, the issue before me would turn mainly on the peculiar facts and circumstances of this case. No doubt, the plaintiffs have claimed title to "A" and "B" schedule properties and in the alternative sought to claim a right of easement in respect of "A" schedule property on the basis of an easement by grant, an easement by way of necessity and an easement by way of prescription by continuous use and assertion of the right of the cart tack described in "A" schedule. The learned trial judge has rejected the claim based on title so far as "A" schedule is concerned. He has chosen to decree the claim on the ground of the plaintiff's right of way as an easement of necessity. On appeal the appellate court on the first occasion reversed the judgment and decree of the learned trial judge in respect of "A" schedule on all aspects and thereupon in S.A. No. 578 of 1977 when this Court remanded the matter back to the first appellate court for consideration afresh, once again the claim made by the plaintiffs based on title has been rejected on the ground that the earlier rejection of the claim on the basis of title has become final and it is not given to the parties to re-agitate the same.

12. The learned first appellate Judge thereupon, pursuant to the order of remand, made by this Court, considered the claim of easement projected by grant, by prescription and by necessity and has chosen to once again reject the claim in respect of "A" schedule cart track even as a right of easement on any of the three grounds. The learned senior counsel for the respondents vehemently contended that with the claim of the right by way of title and the rejection of the same, the plaintiffs will be estopped from projecting a claim on the basis of easement also and such claims are not only contradiction in terms, but are mutually self destructive. To support such a plea, the learned senior counsel has relied upon some of the decisions referred to supra. It could be seen from the above case law that the claim, which was under consideration in those judgments was a claim of title on the one hand and a right of easement by prescription on the other. The first appellate court also in the Judgment under now challenge in the second appeal has chosen to rely upon some of the decisions to come to the conclusion that the plaintiffs have disentitled themselves to project a claim of easement also along side with the said claim based on title to the rights forming part of the "A" Schedule property. The learned First Appellate Judge has chosen to come to the conclusion that the plaintiffs' predecessors-in-title have been

always enjoying the lands through lessees and that they were found to be using the cart track mentioned as "OPPQR" and the claim by way of necessity or prescription therefore cannot be sustained. Whatever may be said about the correctness of the said approach or findings recorded by the first appellate court so far as the right of easement claimed based upon necessity and acquisition by prescription, in my view, the learned first appellate Judge has chosen to reject the claim of right of easement by grant under a through misapprehension and misconstruction of the relevant and vital facts as also the law applicable and governing the same.

13. The learned trial judge has held that Ex. A-6 dated 7.2.1956 and the other documents categorically reserve the right of pathway along the southern side of the land in S. No. 55/12 to reach the lands in S. Nos. 24/4 and 25/9. The learned First Appellate Judge also does not demolish the said finding by coming to any conclusion to the contrary. While dealing with the issue concerning this right of easement by grant and as to whether the plaintiffs have lost the said right on account of non-user; the learned first appellate Judge has got confused the said issue with the principles relevant and applicable to the right of easement by prescription and/or necessity and the manner of consideration undertaken by the first appellate court in paragraphs 7 and 8 would go to show that the relevant principles vital for considering the right of easement by grant and whether such grant has been lost on account of non-user in this case have not been properly borne into consideration. The mere fact that the Commissioner did not in his report described in "A" Schedule is no ground to totally disbelieve the user. The cart track in question cannot be said to be a public cart track. The same being only available to the owners for the time being of the properties in questions viz., the plaintiffs and the defendants, the limited use by parties may be the cause for the absence of a beaten or well marked wheel tracks. The question that has to be really and properly considered before coming to the conclusion that the right of easement by grant had been lost in a matter like this is to consider the same in the light of the principles contained in Section 47 of the Indian Easements Act, 1882. As noticed earlier, even the document in favour of the defendants, marked as Ex. A-6 discloses, apart from the other documents referred to by the learned trial judge that the parties, viz., the original common owner and predecessor-in-interest of the defendants as also plaintiffs have at all points of time reserved this cart track for use to have access to Survey Numbers 24/4 and 25/9. If even as late as February, 1956 this was the position and there was such stipulation by earmarking and reservation of such right in Ex. A-6, unless the defendants were able to show that the right of easement was proved to have been ceased to be enjoyed for an unbroken period of 20 years, there is hardly any scope for claiming extinction by non enjoyment alone.

14. The manner in which the period of non enjoyment has to be computed is also set out meticulously in the section itself. 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 : R. Sivanandan and Others Vs. Rajammal and Another, . In this case, the plaintiffs have asserted their rights after they purchased 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. These relevant and essential aspects have not been, in my view, properly and also in their correct legal perspective even dealt with or considered or determined by the learned First Appellate Judge, who has chosen to mix the different categories and nature of rights claimed by applying certain common principles unmindful of the inherent and vitally distinguishing features of the same. On the other hand, as noticed earlier, the consideration by the learned first appellate Judge in paragraphs 7 and 8 of the judgment under challenge would go to show that he has confused the various and different nature of easements claimed as though a common consideration is applicable to all such categories unjustifiably ignoring the essential differences involved in the claim of easement by prescription on the one hand and easement by necessity on the other as also an easement by grant, which vastly differ in the manner of their acquisition and method of extinction. On this ground along, in my view the judgment and decree of the learned first appellate Judge in respect of "A" Schedule property are liable to and are hereby set aside. The judgment and decree of the learned trial judge in respect of "A" Schedule also are restored. The parties have not raised any dispute with reference to the "B" Schedule property. There is no cross-objections also in respect of the "B" Schedule property and therefore, the findings of the courts below in respect of "B" schedule property calls for no interference in this appeal. The second appeal is allowed on the above terms in respect of "A" schedule property on the ground that the plaintiffs have substantiated their claim of right to "A" Schedule cart track as an easement of grant. No costs.