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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 08.11.2016

C O R A M

THE HONOURABLE MR. JUSTICE S.S.SUNDAR

Second Appeal (MD) No.594 of 2016

AND

C.M.P (MD) No.8753 of 2016

M.Satheeshkumar : Appellant/Appellant/Defendant

Vs.

S.Sekar : Respondent/Respondent/Plaintiff

Prayer: - Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908, to set aside the judgment and decree in A.S.No.90 of 2010 dated 30.01.2013 passed by the learned Additional Sub-Judge, Dindigul, confirming the judgment and decree made in O.S.No.106 of 2007 dated 16.07.2010 passed by the learned Principal District Munsif, Dindigul.

For Appellant : Mr.J.Lawrance
For Respondent : Mr.N.Dilip Kumar

J U D G M E N T

The Defendant in the suit who suffered a decree before the Courts below, is the appellant before this Court.

2. The respondent/plaintiff filed a suit in O.S.No.106 of 2007 on the file of the Principal District Munsif Court, Dindigul, for permanent injunction restraining the appellant in any way obstructing or interfering with the usage and enjoyment of the suit property of the plaintiff.

3. The suit property has been described as "Cart Track" having a width of 15 feet and length of 225 feet running South East to North West in the suit Survey No.130/6 in Manalur Village, Dindigul District.

4. The case of the plaintiff, as culled out from the plaint, is as follows:-

4.1. The property in Survey No.130/6 measuring to an extent of 2 Acres 94 Cents originally belonged to one Sangammal. After the death of the said Sangammal, her four sons including the plaintiff divided their family properties by metes and bounds and the plaintiff and his two brothers.



4.2. The suit property starts from the main Vellarikanai road is left by the three brothers as a "Cart Track" for the free ingress and egress of the plaintiff and his two brothers. Though the "Cart Track" was referred to in the partition dated 20.08.2004, entered into among the plaintiff and his brother it was not specifically mentioned about the width of "Cart Track". An unregistered agreement dated 20.08.2004 written in a stamp paper was entered into by the brothers, specifying the width of the suit "Cart Track" as 15 feet.

4.3. Since the usage of "Cart Track" by the plaintiff is apparent by plying all types of vehicles and he is enjoying the suit "Cart Track" for a period of more than 20 years, the plaintiff is entitled to easementary right by prescription. The suit "Cart Track" is also absolutely necessary to enable the plaintiff to enjoy his property. Without the said "Cart Track", the plaintiff's property cannot be reached from the main road. In other words, there is no other alternative way to have access to the plaintiff's land from the main road.

4.4. The plaintiff's brother one Jawaharlal sold the eastern most 97 cents that was allotted to him in the partition among the brothers in favour of the defendant by a Registered Sale Deed dated 25.08.2004. Since the defendant is only claiming under the plaintiff's brother, he has no right to abstract the enjoyment of the plaintiff over the suit "Cart Track".

5. The suit was contested by the defendant by stating that the suit "Cart Track" was never in existence and that there is only a pathway of a width of 4 feet which was used for walking. According to the defendant, there is no possibility for a "Cart Track" as it is not even possible to ply lorry, truck or any jeep through the existing pathway.

6. The trial Court decreed the suit after considering the documents filed by both sides apart from the Commissioner's report and plan.

7. Aggrieved by the Judgment and Decree of the trial Court, the defendant preferred an appeal in A.S.No.90 of 2007 on the file of the learned Additional Sub-Judge, Dindigul and the lower appellate Court also fell in line with the trial Court and dismissed the appeal.

8. Aggrieved by the concurrent findings of the judgment and decree of the Courts below, the present second appeal has been filed.

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9. The learned Counsel for the appellant raise the following questions of law in the grounds of appeal and reiterated the same



during his arguments:-

" a) Whether the Judgment and Decree of the courts below are vitiated for non consideration of the oral and documentary evidence in proper perspective?

b) Whether the Courts below are right in casting the burden of proof on the Appellant/Defendant particularly when the suit schedule property was claimed as "Cart Track" by the respondent/plaintiff?

c) Whether the Courts below are right in declaring the suit schedule property as "Cart Track" by relying upon Ex.A1 and Ex.A4 when there is nothing mentioned in any of the above said documents about the existence of "Cart Track" in suit schedule property?"

10. The existence of pathway is not in dispute. However, the learned Counsel for the appellant would submit that there was no "Cart Track" as contended by the plaintiff. As a matter of fact, the documents relied upon by the plaintiff would clearly demonstrate that the suit property is in existence as a "Cart Track" and not as a pathway.

11. The learned Counsel for the appellant submitted that the plaintiff's brother who executed a sale deed in favour of the defendant under Ex.A4 has joined hands with the plaintiff and his other brothers while executing a document under Ex.B1 dated 14.02.2002. However, the Courts below have considered all the documents apart from the oral evidence and came to the conclusion that the case of the plaintiff is true. The trial Court as well as the appellate Court relied upon the Commissioner's report and Plan which clearly demonstrates the existence of a "Cart Track" of 12 feet width. Since the Commissioner's report clearly indicates the existence of "Cart Track" with the Width of 12 feet the suit came to be decreed however without considering the actual width of "Cart Track" which is in existence as per the Commissioner's report.

12. The learned Counsel for the respondent, though relied upon the documents and the submitted that the width of "Cart Track" as per the documents is 15 feet, conceded that the defendant has no serious objection for using the cart track with the width of 12 feet.

13. Considering the rival submissions of both sides and considering the evidence both oral and documentary, I am of the considered view that the existence of "Cart Track" having a width of 12 feet has been categorically found by the Commissioner. However, the trial Court as well as the lower appellate Court has granted decree for injunction as prayed for without adverting to



the actual width of "Cart Track" as reflected in the Commissioner's report.

14. The learned Counsel for the appellant, vehemently contended that the documents under Ex.A1 and other documents relied upon by the plaintiff cannot be construed to confer him any right over the "Cart Track" as pleaded by the plaintiff. According to the learned Counsel, no reliance can be placed on the documents relied upon by the plaintiff in view of the fact that he purchased the property way-back in the year 2004 without referent to any "Cart Track". The Courts below have arrived at a concurrent finding as to the existence of suit "Cart Track" as well as (Plaintiff's) as the right title and interest of plaintiff's family over the entire land as well as the right of plaintiff to use the suit "Cart Track". The findings of the Courts below are supported by reasons and based on materials on record. In such circumstances, this Court cannot re-appreciate the evidence to interfere with the findings of the Courts below.

15. I have also gone through the materials placed before this Court and the documents which confer the right of the plaintiff in respect of the suit cart.

16. However, I find that the plaintiff has not established the fact that the suit "Cart Track" exists with the width of 15 feet. The Commissioner himself has found that the width of "Cart Track" is only 12 feet. As against the report of the Commissioner, the plaintiff has only relied upon the agreement which is an unregistered one. The said agreement is executed on the same date on which Ex.A1 was entered into. As per the unregistered agreement under Ex.A6, the suit Cart has been described as "Cart Track" having a width of 15 feet. The document under Ex.A6 was disputed by the learned Counsel for the appellant on various grounds. No explanation is offered as to why a parallel agreement is extended into.

17. First of all, the Courts below have not discussed about the genuineness of the unregistered agreement Ex.A6. Though this document is styled as an agreement, then in declaration of right in this document. Since the defendant's vendor had executed the sale deed without reference to this document Ex.A6, the genuineness of transaction under Ex.A6 is doubtful. However, the learned Counsel for the respondent fairly conceded to the position that the plaintiff is prepared to accept 12 feet "Cart Track" instead of claiming more interest so as to give a quietus to the issue.

18. Considering these circumstances, the Second Appeal is allowed by modifying the decree of the Courts below that the plaintiff is entitled to "Cart Track" as decreed by the Courts below subject to the modification in the width of "Cart Track"



restricted to 12 feet and in all other respects, the judgment and decree of the Courts below are confirmed. No costs. Consequently, connected Miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-II)

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Sub Assistant Registrar(CS)

To

- 1.The Additional Subordinate Judge, Dindigul.
- 2.The Principal District Munsif, Dindigul.

Copy to : The Section Officer/Record Keeper, VR Section,
Madurai Bench of Madras High Court, Madurai.

+1cc to Mr.J.Lawrance, Advocate in SR.67263

+1cc to Mr.N.Dilipkumar, Advocate in SR.66732

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