

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.02.2017

PRONOUNCED ON : 15.02.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.733 of 2011

and

M.P.No.1 of 2011

1. Chinnusamy

2. Rajeswari

...

Appellants

Vs.

Sundaram

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 24.02.2010 made in A.S.No.35 of 2009 on the file of the Subordinate Judge's Court, Tiruchengode, reversing the judgment and decree dated 28.02.2007 made in O.S.No.27 of 1994 on the file of the District Munsif Court, Tiruchengode.

For Appellants

: Mr.P.T.Asha

for M/s.Sarvabhauman Associates

For Respondent

: Mr.P.Valliappan

JUDGMENT

In this second appeal, the defendants 1 & 2 have impugned the judgment and decree dated 24.02.2010 made in A.S.No.35 of 2009 on the file of the Sub Court, Tiruchengode, reversing the judgment and decree dated 28.02.2007 made in O.S.No.27 of 1994 on the file of the District Munsif Court, Tiruchengode.

2. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal:-

" Whether in the absence of a document to prove title, the lower appellate court was correct in law in decreeing the suit on the ground that the respondent herein had an easement by grant over the pathway?"

3. The suit has been laid by the plaintiff for permanent injunction.

4. The Cart Track is the suit property. The plaintiff claims easementary right over the suit property by way of grant under the sale deed dated 10.08.1945 marked as Ex.A1 and also, the plaintiff, in

support of his case, for claiming the above said right, placed reliance upon the sale deed dated 07.08.1945 marked as Ex.A6. The defendants, in their written statement, have all together not disputed the existence of the Cart track as described in the plaint. Even in the grounds of appeal, it has been accepted that under Ex.A1 only one cart track has been referred to as described in the plaint schedule and the other cart track mentioned in Ex.A1 is only customary cart track i.e. already available. This is pointed out in ground No.5. From the evidence adduced by the respective parties, as rightly found by the first appellate Court, it is seen that the plaintiff and the defendants are "Pangalis" and their ancestors had been in possession and enjoyment of the properties situated in the concerned area without effecting partition in common. As regards the above position, there is no dispute. The same has been admitted by Dw1, the second defendant. That apart, it is also found that the common ancestors of the parties, without going in for partition, had proceeded to effect sale deeds, while dividing the properties amongst themselves and accordingly, it is found that the sale transactions have been effected viz., Exs.A6, A1 and B1 and the same has also been admitted by DW1. Now, according to the plaintiff, he has been granted the easementary right over the suit property i.e. cart track under the sale deeds relied upon by him. A

perusal of the sale deeds marked as Exs.A6 & 1 cumulatively would go to show that the cart track described as the suit property had been in existence and in the usage of all the parties concerned and accordingly, while effecting the sale transactions, the right of usage over the cart track had accordingly been conveyed in the manner and language known to them. Accordingly, it could be seen that specific reference of the cart track has been made under Ex.A6 and under Ex.A1, as rightly found by the first appellate Court, reference has also been made about the suit cart track, though at one place, it is mentioned as customary cart track i.e. which has been reiterated in ground No.5 of the second appeal.

5. The case of the defendants that the suit cart track as described in the plaint does not exist, as such, cannot be accepted in the face of the recitals, with reference to the same found in Exs.A6 & 1. That apart, it is found that in this case, an advocate commissioner was appointed to locate the existence of the suit cart track and accordingly, it is found that the commissioner, on his inspection of the suit property on 26.01.1994, found the existence of the said cart track as per the case of the plaintiff and accordingly, submitted his report and plan marked as Exs.C1 & 2. To Exs.C1 & 2, no objection seem to

have been placed by the defendants. Therefore, it could be seen that on the date of the inspection of the suit property by the advocate commissioner, the suit cart track was found to be in existence. Accordingly, it could be seen that as rightly put forth by the counsel for the plaintiff, while effecting the sale transactions of the common property amongst the ancestors of the plaintiff and the defendants under Exs.A6, A1 & B1, they had chosen to note down the existence of the suit cart track and also the right of the parties to have access through the same for reaching their respective properties. In such view of the matter, it is found that the plea taken out by the defendants in the written statement that the suit cart track is not in existence, as such, cannot be countenanced. The above plea of the defendants in the written statement is found to be a false one considering the admission of DW1. During the course of cross examination, DW1 has admitted that the suit cart track was in existence earlier and after they had purchased all the three shares in Narikal punjai in the year 1986, the suit cart track had ceased to exist. Therefore, even according to DW1, prior to 1986, the suit cart track was in existence. Thereafter, it has to ceased exist after their purchase of three shares in Narikal punjai in the year 1986. However, on ground, the advocate commissioner has noted the existence of the suit

cart track as described in the plaint, when he inspected the suit property on 26.01.1994. In such view of the matter, the first appellate Court has rightly held that no safe reliance could be attached to the evidence of DW1 or for the matter, the defence of the defendants that the plaintiff has not been granted any cart track right over the suit property, as such, under the deeds relied upon by them. It is also found that the plaintiff's case is buttressed by the settlement register copy marked as Ex.A8 and the FMB plan marked as Ex.A9, wherein, the existence of the cart track had been affirmed. Therefore, the first appellate Court has based upon the evidence adduced on the part of the plaintiff through Ex.A1, A6, A8 & A9 and also Ex.C1 & C2 found the existence of the suit cart track. That apart, it is also noted that the existence of the suit cart track has also been referred to in Ex.A7 mortgage deed also.

6. The main contention of the defendants' counsel is that under Ex.A1 the title deed of the plaintiff, there is no specific right conferred, as regards the two cart tracks as found in the plaint and therefore, the plaintiff's case should not be accepted. However, it is contended by the plaintiff's counsel that easementary right by way of grant can be either express or by implication. In this connection, he placed reliance

upon the authorities reported in **2006 (4) CTC 79 (Hero Vinoth (Minor) V. Seshammal), 2010 (1) CTC 455 (Sree Swayam Prakash Ashramam and another V. G.Anandavally Amma and others), and 2006 (5) CTC 573 (Ponnan and others V. Peraman and another).**

7. From the above said authorities, it could be seen that easementary right by way of grant can be either express or by implication and the right by way of implication could be gathered from the attending circumstances and viewed in that angle, it is found that considering the recitals found in Ex.A6, A1 and B1 cumuatively and also, when the existence of the said cart track had been affirmed as adverted to earlier and when even the defendants have admitted the existence of the said cart track during the year 1986 and their case that thereafter, the same had ceased to exist, not having been substantiated and on the other hand, when their case, with reference to the same, is belied by the report of the commissioner marked as Exs.C1 & 2, it is evident that the plaintiff's right of the suit property i.e. Cart track as has been upheld by the first appellate Court does not call for any inference.

8. The plaintiff's counsel, in addition to the above mentioned authorities, also placed reliance upon the authorities reported in **1998 – 2 – L.W.660 (Jeyabalan and 2 others V. V.Bal Naicker (died) and 3 others), 2011 (3) MWN (Civil) 374 (Koshe V.A.Natarajan) 2011 (2) MWN (Civil) 291 (S.Arulammal and another V. P.Renjamony and another), 2017 (1) MWN (Civil) 30 (N.periyasamy and two others V. P.Arumugham and two others) and 2017 (1) CTC 662 (Periasamy Gounder and two others V.Arassapa Gounder)**. The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the present case.

9. As seen from the authorities relied upon by the plaintiff's counsel, it could be seen that the easementary right by way of grant is a matter of contract between the terms of the grant and it can be either express or by necessary implication. That apart, it is also found that the easement right by way of grant cannot be extinguished at any point of time, even if it is found that the party has other access to his property, therefore, distinguishing the easement by grant and easement of necessity. It has been held that easement by way of grant will not be extinguished, even if, another access has been made

possible for enabling the party concerned to reach the properties. In so far as this case is concerned, it is found that the plaintiff has established that the right over the suit cart track has been granted to under the sale deeds he relied upon and further, he has also established the existence of the suit property, as such, from the various documents and the evidence placed by him and as adverted to earlier. Therefore, it could be seen that the plaintiff has been granted the easementary right by way of grant and the same could be inferred from the express recitals found in the document and also by necessary implication as adverted to earlier. Therefore, the contentions of the defendants' counsel that the recitals as found in Ex.A6 having not been specifically incorporated in Ex.A1 and therefore, the plaintiff cannot claim easementary right over by way of grant, as such, cannot be accepted. When it is found that easementary right by way of grant can be acquired even by necessary implication on the basis of the attending circumstances under which, the right had been conferred, a perusal of the recitals found in Ex.A1 cumulatively would only go to show that as rightly pleaded by the plaintiff, he had been granted the right of easement over the suit cart track under Ex.A1 and the same would not get extinguished, even it has been pointed out or held that the plaintiff could have access to his properties through other ways.

10. In the light of the above discussions, the substantial question of law formulated for consideration in this second appeal is answered against the defendants and in favour of the plaintiff.

In conclusion, the second appeal fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Index : Yes/No
Internet: Yes/No
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15.02.2017

To

1. The Sub Court, Tiruchengode.
2. The District Munsif Court, Tiruchengode.

T.RAVINDRAN,J.

sms

Pre-delivery Judgment in
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