

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 12.06.2018

PRONOUNCED ON : 16.07.2018

CORAM

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.432 of 1999

1.D.Muthusamy
2.M.Kandasamy
3.D.Shanmugam
4.Minor Sangeetha rep. by
mother & next friend
Mallikadevi.
5.C.Muthusamy @ Mani
6.P.Chinnappa Gounder ...Appellants/Respondents
1 to 3 & 5 to 7/Defendants
1 to 3 & 5 to 7

Vs.

1.M.Songappan (Deceased)
2.Sasikala
3.N.Chinnappa Gounder
4.Pavathal
5.Subramaniam
6.Vasanthi

(Respondents 4 to 6 brought on record
as LR's of the deceased R1 vide order
of Court dated 18.01.2018 made in
C.M.P.8881 to 8883 of 2016
in S.A.No.432 of 1999.) सत्यमेव जयते

(No relief required against
Respondents 2 & 3)

...Respondents/Plaintiffs/
Respondents 4 & 8/
Defendants 4 & 8

PRAYER: Second Appeal filed under Section 100 of C.P.C,
against the judgment and decree of the learned sub-judge,
Erode dated 27.04.1998 in A.S.No.107 of 1997 reversing the
judgment and decree of the learned Principal District Munsif
of Erode dated 05.09.1994 in O.S.No.76 of 1984.

For Appellants : Ms.J.Prithivi
for Mr.S.Kaithamalai Kumaran

For Respondents : Mr.N.Manoharan
for Mr.M.Guruprasad
for R4 to R6.

JUDGMENT

This Second Appeal has been filed by the defendants 1 to 3 and 5 to 7 against the judgment and decree passed by the Principal Sub-Judge, Erode, in A.S.No.107 of 1997 dated 27.04.1998 reversing the judgment and decree passed by the Principal District Munsif, Erode, in O.S.No.76 of 1984 dated 05.09.1994.

2. The first respondent herein has filed a suit in O.S.No.76 of 1984 on the file of the Principal District Munsif, Erode to declare that he is absolutely entitled to take carts, cattle, men and manure to his land situated in R.S.No.194/2 through the suit cart track situated in R.S.No.181/1 from the Panchayat road and consequently restrain the defendants their men, agent etc., from interfering with his enjoyment of the said right by means of permanent injunction. The learned District Munsif has dismissed the said suit by the judgment and decree dated 13.03.1988. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.71 of 1988 on the file of the Additional District Judge, Erode. The learned Additional District Judge, Erode by his judgment and decree dated 20.07.1999 allowed the said appeal and set-aside the judgment and decree passed by the learned District Munsif and remanded the matter to the trial Court for fresh disposal. Accordingly, the learned Principal District Munsif has restored the suit on file and after impleading the 8th defendant as party, again dismissed the suit by the judgment dated 05.09.1994. As against the same, the plaintiff has filed an appeal in A.S.No.107 of 1997 on the file of the Principal Sub-Judge, Erode. The learned Principal Sub-Judge, by the judgment dated 27.04.1998, has allowed the appeal and set-aside the judgment and decree passed by the trial Court and decreed the suit as prayed for. Feeling aggrieved, the defendants 1 to 3 and 5 to 7 have preferred the present Second Appeal. For the sake of convenience, the parties are referred to as described before the trial Court.

3.The averments made in the plaint are, in brief, as follows:

a) One Sengoda Gounder was originally owning 6.09 acres in old S.F.No.108; 10.21 acres in old S.F.No.104 and 4.65 acres in old S.F.No.103 of Vadivullamangalam Village, Erode Taluk. The said Sengoda Gounder had four sons viz., 1) Athianna Gounder, 2)Nallappa Gounder, 3)Palanimalai Gounder and 4)Muthusamy Gounder. Athianna Gounder sold his undivided 1/4th share in the aforesaid land to one Sellappa Gounder. The said Sellappa Gounder in turn sold the said property to the second son of Sengoda Gounder viz., Nallappa Gounder under a registered sale deed dated 26.05.1920. Muthusamy Gounder (4th

son of Sengoda Gounder) died leaving behind his widow Kaliammal, from whom, the aforesaid Nallappa Gounder purchased 1/4th share in the aforesaid lands under a registered sale deed dated 08.09.1937. Thus the said Nallappa Gounder became absolute owner of 3/4th share including his 1/4th share. The said Nallappa Gounder had two sons viz., Muthusamy Gounder (father of the plaintiff) and Chinnappa Gounder (8th defendant). Thus Muthusamy Gounder and his brother Chinnappa Gounder (8th defendant) entitled to 3/4th share of the aforesaid lands. The remaining 1/4th share belonging to Palanimalai Gounder (3rd son of Sengoda Gounder) who died leaving behind his son Chinnappa Gounder (7th defendant). 6th defendant is the son of the 7th defendant.

b) In the oral partition took place between Nallappa Gounder and Palanimalai Gounder, 5 acres out of 20.95 acres allotted to Palanimalai Gounder and the remaining extent was allotted to Nallappa Gounder. Of the three survey fields, S.F.No.103 alone is abutting North-South panchayat road. Hence, Palanimalai Gounder and Nallappa Gounder provided a cart track at North-Western corner of S.F.No.103 branching off from the panchayat road proceeding in North-Eastern direction at the Northern extremity of S.F.No.103, to have ingress and egress from panchayat road to S.F.Nos.104 and 108. The aforesaid cart track is in existence for more than 50 years and the same is shown in the plaint plan in red colour.

c) Nallappa Gounder's sons viz., Muthusamy Gounder and Chinnappa Gounder divided their lands allotted to their father in S.F.Nos.103, 104 and 108 under a registered partition deed in the year 1960, under which, the whole of S.F.No.108 was allotted to Chinnappa Gounder elder brother of Muthusamy Gounder. Muthusamy Gounder was allotted portions of land in S.F.Nos.103 and 104. In the re-survey proceedings, the red colour marked cart track has been assigned a separate re-survey Number as R.S.No.181/1, R.S.No.195 was allotted for old S.F.No.108. Muthusamy Gounder's portion in S.F.No.103 and Chinnappa Gounder's portion in S.F.No.104 are respectively given re-survey numbers as R.S.No.180/1 and 180/2. Muthusamy Gounder's portion of land allotted to him in the partition in S.F.No.104 was given a separate re-survey No.194/2. Chinnappa Gounder's share in S.F.No.104 was given a separate re-survey No.181/2. The common well belonging to Muthusamy Gounder and Chinnappa Gounder situated in old S.F.No.103 was assigned a separate re-survey number as R.S.No.191/1. Nallappa Gounder's elder son Chinnappa Gounder (8th defendant), subsequent to the partition had really not used the suit cart. He had another cart track for reaching his lands. As a result thereof, the 8th defendant orally relinquished all his rights over the suit cart track in favour of the plaintiff and his father. Thus the plaintiff became exclusively entitled to use the suit cart track for the purpose of taking carts, men, manure etc., to his lands situated in R.S.No.194/2.

d) The defendants 1 to 5 are the owners of S.F.No.109 corresponding to new R.S.No.196 and they have no manner of right and title and interest in the suit cart track. They have provided a separate cart track in S.F.No.109 (new R.S.No.196) branching from the panchayat road. The defendants 1 to 5 are making haste attempts to obliterate their own cart track in R.S.No.196 and are attempting slowly and steadily to annex the suit cart track which is running in R.S.No.181/1 with their land. In their attempt to annex the suit cart track, the defendants 1 to 5 have already filed a suit for permanent injunction in respect of under-ground pipeline that across the suit cart track in O.S.No.12 of 1984 on the file of the Additional District Munsif, Erode. In the family partition between the plaintiff and his father, the plaintiff became absolute owner of R.S.No.194/2 and share in the common well in S.F.No.194/1 and S.F.No.180/1. Hence, the plaintiff alone has become interested in safe-guarding his interest in the cart track in S.F.No.181/1. The plaintiff has based his right to the suit cart track on the basis of quasi-easement; on the basis of prescriptive right of easement and implied grant. The defendants 1 to 5 are causing hindrance to the free passage of carts, men and cattle through the suit cart track. Since the defendants 6 and 7 are owners of the land in R.S.No.181/2 which is situated south of the suit cart track and they are colluding with the defendants 1 to 5, the plaintiff has impleaded them as necessary parties in the suit. Since the defendants 1 to 5 are causing hindrance to the plaintiff from enjoying the suit cart track, the plaintiff has filed the above suit for the aforesaid reliefs.

4.The averments made in the written statement filed by the first defendant and adopted by the defendants 2 to 7 are, in brief, as follows:

The rough plan attached to the plaint is incorrect on material particulars. The sub division R.S.No.194/2 is not fully shown in the plan and it looks as though as 181/1 and 194/2 are single units. On the other hand, R.S.No.194/1 is specifically demarcated and it's western boundary is R.S.No.196, southern boundary is R.S.Nos.181/1 and 181/2 and it's eastern boundary is R.No.194/2. The attempt to show R.S.Nos.181/1, 194/1 and 194/2 as a composite unit is fraudulent. The plaintiff has no right in R.S.No.181/1. The sub-division has been made long ago in 1967 more than 17 years ago and the present attempt to set up a false right is sheer abuse of process of law. In R.S.No.182, there is a cart track, which comes and ends in south east corner of R.S.194 and that being so, why the plaintiff should claim a cart track right on the western side is not understandable. The suit cart track not mentioned in the family partition deed that took place between the plaintiff and his father. The defendants 1 to 5 have filed the suit for safeguarding their rights and as a counter blast, the present suit has been filed by the plaintiff on fraudulent basis. R.S.No.181/1 forms part of old S.F.No.109 and should have been annexed to R.S.No.196. Even

though a separate new S.F.No. has been given in the name of the 6th defendant, the defendants 1 to 6 are enjoying the same by mutual consent. The allegations that the defendants 1 to 5 have provided a separate cart track in old S.F.No.109 (New R.S.No.196) is not correct. R.S.No.181/2 belongs to the 6th defendant alone in which the 7th defendant has no right. As such he is an unnecessary party to the suit. The plaintiff is having cart track on the south of old S.F.No.103 (New R.S.No.180). Therefore, the defendants 1 to 7 prayed to dismiss the above suit.

5.The averments made in the written statement filed by the 8th defendant are, in brief, as follows:

It is true that subsequent to the partition in the year 1960 between the 8th defendant and Muthusamy Gounder, the father of the plaintiff, it became apparent that the 8th defendant had no use for the suit cart track in as much as the 8th defendant had easier access to his lands through a different cart track. Accordingly, soon after the partition in the year 1960, the 8th defendant orally relinquished all the right, title and interest in and over the suit cart track in favour of the plaintiff and his father. As a result of family partition between the plaintiff and his father Muthusamy Gounder, the plaintiff became exclusively entitled to the suit cart track and hence, he has no objection for decreeing the suit in favour of the plaintiff.

6.The averments made in the Additional written statement filed by the first defendant and adopted by the defendants 2 to 7 are, in brief, as follows:

The allegations that the 8th defendant had no use for the suit cart track and he orally relinquished all his right, title and interest in and over the suit cart track in favour of the plaintiff and his father is denied as false. The alleged oral relinquishment is not valid under law. The averments that the plaintiff has become exclusively entitled to use the suit cart track for the purpose of taking carts, men, manner etc., to his land situated in R.S.No.194/2 is denied as follows. Therefore the defendants 1 to 7 prayed to dismiss the suit.

7. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as P.W.1 and he has also examined four more witnesses as P.W.2 to P.W.5. He has marked Ex.A1 to Ex.A5 as exhibits. On the side of the defendants, the first defendant examined himself as D.W.1 and also examined one more witness as D.W.2. They have marked Ex.B1 to Ex.B13 as exhibits. The Advocate Commissioner's report and plan have been marked as Ex.C1 and Ex.C2 respectively.

8. The learned District Munsif, after considering the materials placed before him, dismissed the suit by the

judgment and decree dated 13.03.1988. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.71 of 1988 on the file of the Additional District Judge, Erode. The learned Additional District Judge, Erode by his judgment dated 20.07.1989 has allowed the said appeal and set-aside the judgment and decree passed by the trial Court and remanded the matter for fresh disposal. Accordingly, the learned District Munsif has restored the suit on file and after hearing both sides and perusing the materials placed before him, he again dismissed the said suit by the judgment and decree dated 05.09.1994. As against the same, the plaintiff has filed an appeal in A.S.No.107 of 1997 on the file of the Principal Sub-Judge, Erode. The learned Principal Sub-Judge by the judgment dated 27.04.1998 has allowed the said appeal and set-aside the judgment and decree passed by the trial Court and decreed the suit as prayed for. Feeling aggrieved, the defendants 1 to 3 and 5 to 7 have filed the present Second Appeal.

9. At the time of admitting this Second Appeal, this Court has formulated the following substantial questions of law:-

"a) Is the Lower Appellate Court in holding that the Respondent / Plaintiff is entitled to the suit cart track to reach his lands in R.S.Nos.194/2 and 191/1 on the ground of long enjoyment for 50 years?

b) Has not the Lower Appellate Court committed an error of law in granting the easementary right or prescription as against the absolute entitlement to the cart track as owner?"

10. Heard Ms.J.Prithivi for Mr.S.Kaithamalai Kumaran, learned counsel for the appellants and Mr.N.Manoharan for Mr.M.Guruprasad, learned counsel appearing for the respondents R1 and R4 to R6.

11. Questions (a) and (b):

The learned counsel for the appellant has submitted that the first Appellate Court has erred in holding that R.S.No.181/1 is not the part of old S.F.No.196 or S.F.No.109, but it is a part of old S.F.No.103. She further submitted that the first Appellate Court has erred in holding that the plaintiff is entitled to the cart track in R.S.No.181/1 belonging to the appellants. She further submitted that the first Appellate Court has erred in holding that the appellants are not using cart track because their lands are abutting the main road. She further submitted that the first Appellate Court failed to consider that the plaintiff is having alternative pathway to reach his lands and as such, he is not entitled to claim easement of necessity. She further submitted that the first Appellate Court erred in holding that the plaintiff is entitled to have absolute right over the suit

cart track, while he himself claimed only easementary right. She further submitted that the first Appellate Court failed to consider that in the suit for declaration of title, the plaintiff has to prove his case and cannot rely upon the weakness of the case set up by the defendants and therefore, she prayed to allow the Second Appeal and set-aside the judgment and decree passed by the first Appellate Court and restore the judgment and decree passed by the trial Court and dismiss the suit.

12. In support of her contentions, she placed reliance upon the following decisions:

1. Natesa Gounder Vs. Raja Gounder and Others [2012] 7 MLJ 813.

2. Union of India (UOI) and Others Vs. Vasavi Co-op.Housing Society Ltd. and Others, AR [2014] SC 937.

13. The learned counsel for the respondents / plaintiffs has submitted that the defendants 1 to 5 are in no way connected with the suit cart track which is running in R.S.No.181/1. He further submitted that as per the patta issued by the Revenue Department, R.S.No.181/1 stands in the name of the defendants 6 and 7, but they have not filed a separate written statement denying the rights of the plaintiff. On the contrary, they have simply adopted the written statement filed by the first defendant. He further submitted that the defendants 6 and 7 have not come forward to give evidence against the plaintiff and that itself shows that they are not having any objection for using the suit cart track by the plaintiff. He further submitted that the Commissioner's Report would show clearly that the plaintiff's lands are situated in different levels ranging from 3 to 4 feet in 9 fields and it is very difficult to take carts through the pathway which is running on the eastern side of the R.S.No.181/2 and hence, the first Appellate Court has rightly rejected the contentions of the defendants. He further submitted that the Commissioner's Report would also show that the defendants 1 to 5 are having lands adjacent to the Panchayat road and as such, they need not take carts through the suit cart track. He further submitted that the defendants 6 and 7 also having separate cart track for reaching their land and hence they are also not entitled to use the suit cart track and therefore, he prayed to dismiss the Second Appeal.

14. In support of his contentions, he placed reliance upon the following decisions:

1. Vidhyadhar Vs. Mankikrao and another, AIR 1999 Supreme Court 1441

2. Sree Swayam Prakash Ashramam and another Vs. G.Anandavally Anna and Others (2010) 2 SCC 689.

15. The undisputed facts are as follows:

One Sengoda Gounder was originally owning 6.09 acres in old S.F.No.108; 10.21 acres in old S.F.No.104 and 4.65 acres in old S.F.No.103 of Vadivulamangalam Village, Erode Taluk. The said Sengoda Gounder had four sons viz., Athianna Gounder, Nallappa Gounder, Palanimalai Gounder and Muthusamy Gounder. Athianna Gounder sold his undivided 1/4th share to one Sellappa Gounder and the said Sellappa Gounder in turn sold the said 1/4th share to the second son of Sellappa Gounder viz., Nallappa Gounder. The 4th son viz., Muthusamy Gounder died leaving behind his widow Kaliammal, from whom the said Nallappa Gounder had purchased 1/4th share and thus the said Nallappa Gounder became the absolute owner of 3/4th share. The remaining 1/4th share belonging to the 3rd son viz., Palanimalai Gounder. The plaintiff Songappan and the 8th defendant are the sons of the said Nallappa Gounder. The 7th defendant is the son of the 3rd son Palanimalai Gounder. The 6th defendant is the son of the 7th defendant. In the oral partition which took place between Nallappa Gounder and Palanimalai Gounder, 5 acres were allotted to Palanimalai Gounder and the remaining extent of 15.95 acres were allotted to Nallappa Gounder. Of the three survey fields, viz., S.F.Nos.103, 104 and 108, S.F.No.103 alone is abutting North-South Panchayat Road. The land belonging to the defendants 1 to 5 is situated in old S.F.No.109 (R.S.No.196).

16. According to the plaintiff, since S.F.No.103 alone is abutting North-South panchayat road, his father Nallappa Gounder and his brother Palanimalai Gounder provided a cart track at North-Western corner of S.F.No.103 branching off from the panchayat road proceeding in North Eastern direction to have ingress and egress from panchayat road to S.F.Nos.104 and 108 and the said cart track is shown in the plaint plan in red colour. His further case is that in the re-survey, the said red marked cart track has been assigned a separate re-survey Number as R.S.No.181/1.

17. The case of the defendants 1 to 7 is that there is no such cart track in R.S.No.181/1 as alleged by the plaintiff. Their further case is that in the Eastern side of the plaintiff's land, a cart track is running and the plaintiff is using only the said cart track and therefore, the plaintiff cannot claim pathway right in R.S.No.181/1.

18. In Ex.B2 (Adangal Extract), it is stated that R.S.No.181/1 is Nilaviyal Wari. So it appears that it is meant for taking seepage water. In the Advocate Commissioner's report (Ex.C1) also it is stated that on the northern extremity of the suit property there is a trench starting from the plaintiff's land and proceeds towards west upto the Panchayat Union road for taking seepage water. In Ex.C2 (Commissioner's Plan) also the said pathway has been shown. In the written statement in paragraph 6, the defendants 1 to 7 have stated that the other dividing line between the R.S.No.196 and R.S.No.181/2 is S.F.No.181/1 which

belongs to both and which has been treated as a common pathway which was no doubt part of R.S.No.196 and by mutual understanding, it has been agreed that the owners of R.S.No.196 and 181/2 that R.S.No.181/1 can be used as common cart track. So it is clear that even according to the defendants 1 to 7, the Nilaviyalwari which is situated in R.S.181/1 has been treated as a common pathway and they are using it as a common cart track.

19. The defendants 1 to 5 claimed that R.S.No.181/1 forms part of old S.F.No.109 and should have been annexed to R.S.No.196. To substantiate the said claim, the defendants 1 to 5 relied upon Ex.B4. Ex.B4 is the proceedings of the Revenue Divisional Officer, Erode, dated 21.01.1987. So, it is clear that the said document came into existence during pendency of the suit. Therefore, no reliance can be placed upon Ex.B4. Further even in the said document, it is not stated that R.S.No.181/1 was originally in old S.F.No.109 only. On the contrary, it is stated that R.S.No.181/1 forms part of old S.F.No.103 and 109. Admittedly, the land situated in old S.F.No.109 (R.S.No.196) alone belongs to the defendants 1 to 5, but the land situated in old S.F.No.103 belongs to the defendants 6 and 7. So, the defendants 1 to 5 cannot claim exclusive right over R.S.No.181/1.

20. It is also to be pointed out that Ex.B1 (Chitta Extract) shows that patta for R.S.No.181/1 stands in the name of the 6th defendant. In Ex.B2 (Adangal Extract) and Ex.B3 (Extract of the Village land Revenue Register), it is mentioned that, the 7th defendant is the owner of the land situated in R.S.No.181/1. Therefore, it is clear that the defendants 6 and 7 are owners of the land situated in R.S.No.181/1. Admittedly, the land situated in R.S.No.181/1 has been used as a cart track. So, if at all any objection for using the said cart track by the plaintiff that could be made by the defendants 6 and 7. In this case, the defendants 6 and 7 have not filed any written statement denying the rights of the plaintiff. The main written statement was filed by the first defendant and the same has been adopted by the defendants 2 to 7. Of course, legally there is no bar for the co-defendants for adopting the written statement filed by other defendants. But, when the Revenue Records show that the defendants 6 and 7 alone are owners of the land under dispute, either the 6th defendant or 7th defendant should have come forward to give evidence denying the right of the plaintiff.

21. In this case in paragraph 13 of the plaint, the plaintiff has pleaded that he based his right to the suit cart track on the basis of quasi-easement; on the basis of prescriptive right of easement and implied grant. When the plaintiff has claimed easementary right of pathway over the land situated in R.S.No.181/1, the defendants 6 and 7, who are being the owners of the said land should have entered into the witness box and adduce evidence denying the plaintiffs'

claim. But in this case, neither the defendant No.6 nor the defendant No.7 has come forward to give evidence denying the plaintiffs claim.

22. In Vidhyadhar Vs. Mankikrao and another (supra), the Hon'ble Supreme Court has held in paragraph No.16 as follows:

'16. where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbaksha Singh v. Gurdial Singh, AIR 1927 PC 230. This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh, AIR 1930 Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh, AIR 1931 Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat, AIR 1970 Madh Pra 225, also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (AIR 1927 PC 230) (supra). The Allahabad High Court in Arjun Singh v. Virender Nath, AIR 1971 Allahabad 29 held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab and Haryana High Court in Bhagwan Dass v. Bhishan Chand, AIR 1974 Punj and Har 7, drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.'

23. As already pointed out that in this case, the owners of the land situated in R.S.No.181/1 viz., the defendants 6 and 7 did not come forward to adduce evidence denying the rights of the plaintiff and they have not subjected themselves for cross examination. In view of the aforesaid decision of the Hon'ble Supreme Court an adverse inference has to be drawn against the defendant Nos. 6 and 7.

24. In Natesa Gounder Vs. Raja Gounder and Others (supra), this Court has held that any amount of discomfiture or difficulty in using the alternate pathway would not enure to the benefit of the plaintiff in seeking right of ingress and egress through another man's property. There is no quarrel with the above position of law. Once alternate pathway is available, plea of easement by necessity goes. In this case as per the Commissioner's report and plan (Ex.C1 and C2) there is a cart tack on the eastern side of the plaintiff

's lands. But in this case, the plaintiff claimed implied grant also. Admittedly, the lands of the plaintiff and the defendants 6 and 7 were originally owned by their grandfather Sengoda Gounder. The Commissioner's report and plan (Ex.C1 and C2) would show that the suit land has been used as a cart track which branches from a panchayat road and reaches the plaintiff's land. As already pointed out that though in revenue records the suit land (R.S.No.181/1) has been classified as Nilaviyal Vari, the parties are using the same as cart track.

25. In *Sree Swayam Prakash Ashramam and another Vs. G.Anandavally Anna and Others* (supra), the Hon'ble Supreme Court in paragraph No.17 has observed as follows:

"17. The very fact that the plaintiff was continuing to use the said pathway for access to A schedule property was an indication that there was implied grant of B schedule pathway of the plaintiff for access to the A schedule property even while A schedule property was separately allotted to him under settlement deed. Such implied grant is inferable also on account of the acquiescence of the defendants in the original plaintiff (since deceased) using B schedule as pathway till it was for the first time objected to on 21-7-1982 as alleged by the original plaintiff (since deceased).'" 26. In this case also, the plaintiff is continuously using the said pathway for access to his land from Panchayat road. So it was an indication that there was implied grant of suit pathway for access to the plaintiff's land. Such implied grant is inferable also on account of the acquiescence of the defendants in the plaintiff's using the suit land as pathway. Therefore, in view of the aforesaid decision of the Hon'ble Supreme Court it can be treated as implied grant.

27. In *Union of India (UOI) and Others Vs. Vasavi Co-op.Housing Society Ltd. and Others* (supra), the Hon'ble Supreme Court has held that it is trite law that in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff. There is no quarrel with the above position of law. In this case, the Commissioner's report and plan (Ex.C1 & C2) would show the existence of the suit pathway. In Ex.A1 itself it is stated as mamool pathway. PW1 has deposed that he has been using the suit pathway for more than 50 years. His evidence is corroborated by the evidence of Pws 2 to 5. Though DW1 has denied the existence of suit pathway, as already stated that in the written statement it is clearly admitted that the suit land is being used for pathway. Admission is the best evidence. Further, Ex.B1 & B2 would show the suit land now stands in the name of the sixth defendant. The said fact has been admitted by the DW1 also. But the 6th defendant did not come forward to adduce evidence

denying the easementary rights of the plaintiff. Hence this Court is of the view that the plaintiff has proved his right to use the said land as cart track.

28. As already pointed out that the plaintiff in paragraph No.13 of the plaint claimed easementary right of cart track over the land situated in R.S.No.181/1. But subsequently, he has amended the plaint and incorporated the paragraph No.7a wherein he claimed that he is exclusively entitled to use the said cart track. Further, he has stated that the defendants 1 to 5 are having separate cart track in the land situated in old S.F.No.109 (R.S.No.196). As per the evidence available on record, the defendants 6 and 7 are owners of the land situated in R.S.No.181/1. The plaintiff is claiming only an easementary right of pathway over the said land. In such a case, he cannot raise any objection for using the said cart track by the defendants 1 to 5 or the defendants 6 and 7. It is for the owners of the said land viz., defendants 6 and 7 to raise objection or not to raise objection for using the said cart track by the defendants 1 to 5.

29. For the aforesaid reasons, this Court is of the view that the plaintiff is entitled for declaration that he can use the suit cart track and also entitled for permanent injunction restraining the defendants from interfering with the use of the said cart track. At the same time, the plaintiff is not entitled to object the defendants 1 to 7 from using the said cart track. Accordingly, these substantial questions of law are answered.

30. In the result, the Second Appeal is dismissed confirming the judgment and decree passed by the first Appellate Court. However, it is made clear that while using the suit property as cart track, the plaintiff should not prevent the defendants 1 to 7 from using the said cart track. Considering the facts of the case, the parties are directed to bear their own costs.

vsa/g

Sd/-
Assistant Registrar (CS IV)

//True Copy//

Sub Assistant Registrar

To

- 1.The Sub-Judge, Erode
- 2.The Principal District Munsif, Erode

+1cc to Mr.S.Kaithamalai Kumaran, Advocate SR.NO.46777
+1cc to Mr.M.Guruprasad, Advocate SR.NO.47693

GJ(CO)
sm:31.10.2018

S.A.No.432 of 1999



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